Colorado Department of Education
Decision of the Federal Complaints Officer
Under the Individuals with Disabilities Education Act (IDEA)

Federal Complaint 2003:501

Adams County School District No. 50

Decision

I. INTRODUCTION

This Complaint was dated 12/30/02 and filed on 01/03/03. The response of the Adams County School District No. 50 ("District") was dated 01/24/03 and received on that same date. The Complainant's response to the District's response to the Complaint was dated 02/05/03 and received on 02/07/03. On 02/25/03 and on 02/28/03, the Federal Complaints Officer contacted the District's attorney by phone for additional information. On 02/27/03, the Federal Complaints Officer contacted the Complainant by phone for additional information. The Federal Complaints Officer also contacted the student's court-appointed special advocate by telephone on 03/03/03 for additional information. The Federal Complaints Officer then closed the record on 03/03/03.

The Complainant is the Director of Advocacy with the Learning Disabilities Association of Colorado. The Complaint has been filed on behalf of a child who is in the twelfth grade and who has been identified as having a significant identifiable emotional disability (SIED). The Complaint has also been filed on behalf of an individual who had been acting as the student's educational surrogate parent and who was removed from that role by the District on 10/10/02. That individual will be referred to hereafter as L.W.

II. COMPLAINANT'S ALLEGATIONS

1) The District failed to timely complete the student's reevaluation in violation of 34 C.F.R. 303.332(e).[1]

2) The District improperly removed L.W. as the student's educational surrogate parent on 10/10/02, in violation of § 300.515(c).

3) The District violated §§ 300.340 through 300.344 when it completed the student's 04/10/02 IEP without using the entire team's input or obtaining team consensus on the IEP.

4) The District failed to provide L.W. with prior written notice when the District failed to incorporate L.W.'s input into the student's 4/10/02 IEP, in violation of § 1415(3)(c) of the Individuals with Disabilities Education Act (IDEA).

[1] Hereafter the IDEA regulations will be referred to by section number only, i.e., § 300.340.

5) The parents rights document given by the District to L.W. did not contain a statement informing her of the prior written notice procedural safeguard, presumably in violation of § 300.504.

III. THE DISTRICT'S RESPONSE

The District denies that it has violated § 303.332(e), which applies to evaluations done as part of early intervention programs for infants and toddlers. The District concedes that there were delays in completing some assessments for the student but contends that all required assessments have now been completed. The District also concedes that the goals and objectives for the student's 04/10/02 IEP were developed by school personnel after the 04/10/02 IEP team meeting, and that the 04/10/02 IEP was subsequently finalized without reconvening the IEP team or resolving discrepancies in the IEP drafts submitted by L.W. and the District. The District generally denies the remaining allegations. The District's specific responses are noted below.

IV. FINDINGS OF FACT AND CONCLUSIONS

Allegation 1. The District failed to timely complete the student's reevaluation.

The Complainant requests the Federal Complaints Officer to order the District to immediately complete the assessments in question.[2] The Complaint does not allege that the District's failure to timely conduct the assessments in question has deprived the student of a free appropriate public education (FAPE).

The Complaint cites § 303.332(e) as the regulatory authority supporting this allegation. In its response, the District correctly points out that § 303.332(e) is not germane to the Complaint as that regulation pertains to evaluations done as a part of early intervention programs for infants and toddlers.

The relevant IDEA regulation is § 300.536(b). That regulation requires each public agency to ensure that a child with a disability is reevaluated at least every three years. The purpose of a reevaluation is to determine (1) whether the child continues to have a disability, and (2) whether the child continues to need special education and related services. *See*, § 300.533 and Rule 4.01(4)(a)(ii) of the Exceptional Children's Educational Act (ECEA). Neither the IDEA regulations nor the ECEA rules establish a timeline for when a reevaluation must be completed once parental consent for the reevaluation has been obtained by the school district. However,

[2] Among the assessments of concern to the Complainant are career interest inventories and/or surveys, which are not disability/eligibility assessments but rather transition services. The student's 05/2001 IEP contained a transition career/employment goal -- "[Student] will develop a vocational exploration plan in order to choose a post-school career." The benchmarks for that goal included the completion of the COPS Inventory (an interest inventory) and a Skills Assessment Module. As of the 04/10/02 triennial review meeting, the student had not completed those benchmarks because the District no longer used those testing instruments. Whether the District failed to make good faith efforts to assist the student in achieving her transition career/employment goal is not an issue that was raised in the original Complaint letter but rather a new allegation to which the District has not had an opportunity to respond. Therefore, the Federal Complaints Officer will not consider this allegation. See Section V. The Federal Complaints Officer does note that the District has submitted adequate documentation showing that the student has now completed 3 career inventories/surveys—the Choices, the Bridges and the Self Directed Search.

implicit in both the IDEA regulation and the ECEA rule is the requirement that the reevaluation will be completed in time for the triennial eligibility determination meeting.

The District concedes that not all of the student's reevaluation assessments were completed as of 04/10/02, the date of the student's triennial eligibility determination meeting and annual IEP review meeting. The District has submitted documentation showing that, as of 01/09/03, all required assessments have been completed.

The Federal Complaints Officer finds that District failed to ensure that the student was reevaluated at least every 3 years. The Federal Complaints Officer concludes that, with regard to Allegation 1, the District violated §300.536(b).

The Federal Complaints Officer also finds that, as of 01/09/03, the District has completed the reevaluation for the student.

Allegation 2. The District improperly removed L.W. as the student's educational surrogate parent on 10/10/02, in violation of § 300.515(c).

§ 300.515 requires each public agency to ensure that the rights of children with disabilities are protected. Under this regulation, each public agency has a duty to assign an individual to act as a surrogate for the parents. § 300.515 (b). The regulation also establishes the criteria for selection of an educational surrogate parent.

The IDEA does not address whether an educational surrogate parent may be removed by the selecting public agency. In developing IDEA's implementing regulations, the Office of Special Education and Rehabilitative Services expressly refused to add regulatory procedures for the termination of surrogate parents:

> Several commenters suggested that the regulation include clear procedures for terminating surrogate parents who do not appropriately fulfill their responsibilities and include in those procedures the consideration of the student's opinion. Relatedly, some commenters recommended that the regulation state that LEAs cannot impose sanctions or threaten sanctions if surrogate parents make decisions the LEA opposes…There is insufficient evidence of a wide-spread problem of irresponsible surrogate parents which would require regulatory procedures for termination. Therefore, the issue of the need for procedures for termination of surrogates is left to the discretion of States. There is also insufficient evidence of public agency retaliation against surrogate parents. Since there are other civil rights statutes and regulations that prohibit discrimination, including retaliation, against individuals who exercise their rights under Federal law, including the right of individuals to assist individuals with disabilities without retaliation or coercion, there is no need to address this issue in this regulation.

Attachment 1—Analysis of Comments and Changes, at p. 12616, Federal Register: March 12, 1999 (Volume 64, Number 48)

In this case, although L.W. had been acting for some time as an educational surrogate parent for the student, she had never been selected by any school district nor appointed by the Colorado Department of Education (CDE) as the student's educational surrogate parent. L.W. mistakenly believed that she had been selected the student's educational surrogate parent by

the St. Vrain Valley School District and then apparently represented herself as the student's educational surrogate parent when the student enrolled in the District.

On the facts of this Complaint, the Federal Complaints Officer concludes that she does not have jurisdiction over Allegation 2. As was stated in the regulatory comment cited above, other laws may afford a remedy to L.W.

Allegation 3. The District violated §§ 300.340 through 300.344 when it completed the student's 04/10/02 IEP without using the entire team's input or obtaining the team's consensus on the IEP.

The Complainant alleges as follows: On 04/10/02, the IEP team did not complete the student's IEP, particularly with regard to decisions regarding educational needs, service time and delivery, the development of accommodations and the development of goals and objectives. L.W., while waiting for the District to schedule a follow-up meeting, sent the District her input on the draft IEP that had been provided to her at the 04/10/02 IEP team meeting. The District did not schedule another IEP team meeting, nor did it send to L.W. a marked-up draft of the proposed final IEP. At the end of the 2001-2002 school year, L.W. called the school but was told that school was out of session and that the student's case manager was gone for the summer. L.W. then left phone messages for the student's case manager and the District's representative requesting comments on the input that she had provided. The District did not return L.W.'s phone calls. In fall 2002, L.W. received a copy of the student's final IEP. The final IEP did not incorporate L.W.'s input. The school "failed to complete [Student's] triennial IEP because they failed to use [Student's] staffing team input and approval. [Student's] Case Manager wrote an IEP and imposed it upon [Student] without team consensus." In August 2002, L.W. "signed a Permission for Initial Placement, but that did not mean that she had accepted the IEP as a finalized version, she only agreed that the student should remain in special education." The Complaint does not allege that the final IEP is inappropriate.

The District concedes that the goals and objectives were drafted outside the 04/10/02 IEP team meeting. However, the District contends that "the team presented and discussed necessary information at the IEP meeting…, including the subject areas of the goals and objectives and service plan." The District further contends that the team, including L.W., agreed to a process whereby the goals and objectives would be drafted outside the 04/10/02 IEP team meeting based on the information that was discussed during that meeting. "The express understanding was that the draft would reflect what had been discussed at the meeting. This was done. The District advises that the ESP then sent a revised IEP with added items that had *not* been discussed at the meeting. The school year came to an end without a resolution of discrepancies in the two drafts. Then the ESP sent a letter to the District on August 28th stating that she had signed the consent for placement and asking the District to distribute the goals and objectives to teachers as written. The ESP had signed the consent for placement on August 23, 2002. The District proceeded accordingly."

An IEP is a written statement for a child with a disability that is developed, reviewed and revised in a meeting. § 300.340(a). The school district is responsible for initiating and conducting meetings for the purpose of developing, reviewing and revising the IEP. § 300.343 (a). "The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE… If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals regarding the child's educational placement and the

parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing." See, Question 9 of Appendix A, at pp.12473-12474, Federal Register: March 12, 1999 (Volume 64, Number 48).

The Federal Complaints Officer finds as follows: On 04/10/02, the student's IEP team did not complete the process of revising the student's IEP. The IEP team, including L.W., agreed that (1) school personnel and the student would draft goals and objectives outside the IEP team meeting, and (2) the other team members, including L.W., would be given the opportunity to review the draft goals and objectives. At the end of the 04/10/02 meeting, the special education coordinator also stated that "if we need to meet again that's fine." L.W. sent the District her comments and input, which was received by the District. L.W.'s input was discrepant with the District's proposed IEP. The District did not convene a follow-up IEP team meeting to resolve the discrepancies between the draft IEPs, nor did the District achieve consensus on the final IEP. The District sent L.W. the final IEP in August 2002, along with a "Parental Consent for Initial Placement" form. On 08/23/02, L.W. signed that consent form, indicating that she had been informed of and understood her special education rights and procedural safeguards and that she consented to the placement of the student in a program providing special education and related services. L.W. also sent a letter dated 08/28/02 to the student's case manager. That letter states that L.W. had received the final IEP and expressly requests the case manager to distribute the final goals and objectives to each of the student's teachers, to the school counselor and to "the person who is responsible for [Student's] college counseling…as [the goals and objectives] are an integral part of this IEP. If I do not hear from you in writing in five calendar days, I will assume the there are no problems with this request." The Federal Complaints Officer finds that, by signing the consent form and by expressly requesting in writing that that school personnel distribute the final IEP's goals and objectives to the student's teachers and other service providers, L.W. agreed to the final IEP. L.W. did not express any disagreement with the final IEP until she was notified that the District was removing her as the student's educational surrogate parent.

Certainly, IEP team members, including the parent, may agree to a process for preparing proposals for all or part of the IEP or for finalizing an IEP outside of the IEP team meeting. *See*, §300.501(b)(2). However, if a disagreement arises in the course of the agreed-to process, then it is incumbent on the District to reconvene the IEP team to resolve the disagreement. This the District did not do. Having failed to achieve consensus on the draft IEP, the District was required to provide L.W. with prior written notice regarding its proposed IEP. This the District also did not do. The Federal Complaints Officer therefore concludes that, with regard to Allegation 3, the District violated §§ 300.343 (a), 300.346 (a)(1), 300.503(a) and § 1415(b)(3) of the IDEA.

Allegation 4. The District failed to provide L.W. with prior written notice when the District failed to incorporate L.W.'s input into the student's 4/10/02 IEP, in violation of § 1415(c)(3) of the IDEA.

The Complaint does not allege that the District's failure to provide L.W. with prior written notice deprived the student of a free appropriate public education.

§ 1415(b)(3) of the IDEA requires school districts to provide to the parents of a child with a disability written prior notice whenever the school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. § 1415(c) of the IDEA specifies the content of the

written prior notice. Subsection 3 of that section requires school districts to include in the prior written notice a description of other options considered and the reasons such options were not selected.

After reviewing the Complaint and the Complainant's response to the District's response to the Complaint, the Federal Complaints Officer believes that the Complainant is generally alleging that the District failed to provide L.W. with prior written notice pursuant to § 1415(b)(3). The District's response to this allegation also assumes this to be the general issue.

The Federal Complaints Officer has previously concluded that the District violated § 1415(b)(3) of the IDEA by failing to provide L.W. with prior written notice when it finalized the 04/10/02 IEP without convening the IEP team in an attempt to reach consensus on the IEP. See Allegation 3.

Allegation 5. The Parents Rights document given by the District to L.W. did not contain a statement informing her of the prior written notice procedural safeguard, presumably in violation of § 300.504(b)(2).

Prior written notice is among the procedural safeguards afforded to parents of children with disabilities. The procedural safeguards notice must contain a full explanation of all special education procedural safeguards, including prior written notice. § 300.504(b)(2).

Neither the Complainant nor the District attached a copy of the procedural safeguards notice that each claims was given by the District to L.W. The Federal Complaints Officer contacted both the Complainant and the District's attorney by phone and asked each to submit a copy of the procedural safeguards notice that was given to L.W. Both parties submitted a procedural safeguards notice document. The procedural safeguards notice documents provided by the parties are versions of *Educational Rights of Parents*, a Colorado Department of Education (CDE) publication. The Federal Complaints Officer has carefully examined both documents and finds that both contain adequate statements of the prior written notice procedural safeguard. The Federal Complaints Officer concludes that the District did not violate § 300.504(b)(2).

While responding to the Federal Complaints Officer's request for a copy of the procedural safeguards notice provided by the District to L.W., the Complainant changed her allegation to state that L.W. received an adequate procedural safeguards notice on 10/10/00 but received no procedural safeguards notice at the 04/10/02 IEP team meeting.

This is a new allegation which was not contained in the Complaint letter. However, the District, in providing its copy of the procedural safeguards notice, states that the student's case manager presented *Educational Rights of Parents* to L.W. at the 04/10/02 IEP meeting. Because the District has addressed this new allegation, the Federal Complaints Officer will consider it.

§ 300.504(a) requires school districts to make available to parents a copy of the procedural safeguards notice at certain critical junctures, including upon each notification of an IEP meeting and upon reevaluation. § 300.504(a) does not require the District to provide the procedural safeguards notice to the parent at the IEP team meeting.

The Federal Complaints Officer has carefully examined all information submitted by the parties. The written meeting notice for the 04/10/02 IEP meeting, submitted by the District, states that "[a] parent's rights documents which explains your educational rights is enclosed with this letter.

Please read it carefully and, if you have any questions, please contact [Special Education Teacher]."

The Federal Complaints Officer finds that the District has submitted credible evidence that it included *Educational Rights of Parents* with the written notice to L.W. of the 04/10/02 IEP team meeting. The Federal Complaints Officer concludes that the District did not violate § 300.504(a).

V. NEW CLAIMS NOT RAISED IN THE ORIGINAL COMPLAINT LETTER

In response to the District's response to the Complaint, the Complainant has raised several other new claims:

- The student's 04/10/02 IEP has not been implemented with regard to the short-term objectives addressing the completion of college and financial aid applications (short-term objectives Nos. 1 and 2 of the Transition Plan Career/Employment annual goal).

- The 04/10/02 IEP lacks appropriate transition services (i.e., "the student still has no transitional services addressing community access skills connecting her with appropriate agencies or vocational training in helping her know how to find an apartment, manage money, pay bills, or to help her discover a career that would move her to independent life as a productive member of society.")

- The District did not assist the student in completing short-term objectives Nos. 1 and 2 of the Transition Plan Career/Employment annual goal contained in the student's 05/2001 IEP.

- Transition goals for independent living should have been developed for the student in year 2000.

Although expressing important concerns, these claims were not made in the original Complaint letter to which the District was asked to respond. Therefore, the Federal Complaints Officer will not consider these claims because the District has not had the opportunity to respond to them.

The Complainant is not limited to the number of federal complaints that she can file, although, depending on the circumstances, she may be limited to a one (1) year regulatory statute of limitations. If the Complainant wishes to file an additional Complaint within the applicable time limits, giving the District the opportunity to respond, she may do so.

VI. DENIAL OF FAPE

The District contends that, to the extent that any procedural errors may have existed, such errors have not resulted in a loss of educational opportunity for the student. The District has submitted evidence showing that the student has achieved 4 out of 5 benchmarks for her annual career/employment goal. The student is in the process of completing the remaining benchmark of that goal (the completion of financial aid applications). The documentation submitted by the District shows that the student has achieved most of the other goals and objectives specified by the 04/10/02 IEP.

The student's court-appointed special advocate (CASA) states that the student has earned enough credit to graduate from high school, provided that the student completes her coursework for the remaining school year.[3]

In response, the Complainant contends that the District's failure to timely administer the Woodcock-Johnson III Tests of Achievement (WCJ III ACH), which was not completed until 11/25/02, has resulted in a loss of educational benefit to the student. The results of the WCJ III ACH show that the student's scores on timed fluency tests in math and reading were slightly below grade level and her scores in all other areas were at or above grade level. "This information should have resulted in an IEP accommodation allowing the student extended time on standardized testing including the CSAPS. If extended time had been an IEP accommodation, this information could have been used to request extended time on college entrance exams, and the absence of time constraints could have raised her scores significantly which might help in a request for a college scholarship or financial aid."

§ 300.300 requires each State receiving assistance under Part B of the IDEA to ensure that FAPE is available to all children with disabilities, aged 3 through 21.

The Federal Complaints Officer has found that the District violated the following provisions of the IDEA and/or its implementing regulations:

- § 300.536(b) – failure to complete the student's reevaluation by 04/10/02.
- § 300.343(a) – failure to conduct a follow-up meeting to complete the review and revision of the IEP.
- § 1415 (b)(3) and § 300.503(a) – failure to provide written prior notice to L.W. when team consensus on the student's 04/10/02 IEP was not reached.

It is well established in the Tenth Circuit that mere technical deviations from the IDEA do not render an IEP entirely invalid. "To hold otherwise would exalt form over substance." Urban v. Jefferson County School District R-1, 89 F.3d. 924 (10th Cir. 1995).

The Federal Complaints Officer finds that, although the District violated a number of the IDEA's procedural requirements, those violations were technical in nature. Despite those procedural violations, [Student] has continued to receive all of the services that she was entitled to receive under the 04/10/02 IEP, which was agreed to by L.W. The student has achieved nearly all of the goals and objectives specified by the 04/10/02 IEP and, assuming that the student completes her coursework for the remaining school year, she will have enough credits to graduate from high school. The Federal Complaints Officer finds all of the above to be credible evidence that the student is receiving meaningful educational benefit.

There is insufficient evidence to find that, had the WCJ III ACH been administered prior to the 04/10/02 triennial review meeting, the IEP team would have determined that the student needed an extended time accommodation on state and district assessments. The Federal Complaints Officer further finds that the loss of educational benefit claimed by the Complainant (i.e., potentially higher scores on college entrance exams, college admission and scholarships) is

[3] The CASA is concerned that the District has not provided the student with vocational training. Although expressing an important concern, this is not an issue raised in the Complaint letter. See Section V.

speculative. The Federal Complaints Officer concludes that, based on the facts of this Complaint, the District has not deprived the student of a FAPE.

VII. REMEDY

The Complainant, as a remedy, has asked the Federal Complaints Officer to order the District to complete the student's reevaluation. The Federal Complaints Officer has already found that, as of 01/09/03, the District has completed the student's reevaluation. Therefore, the Federal Complaints Officer makes the following order:

> Within thirty (30) days of the date of the District's certified receipt of this Decision, the District's special education director shall submit to the Federal Complaints Officer a written statement that the District recognizes and accepts as valid every violation found by the Federal Complaints Officer. This statement shall include a statement of assurance explaining how each violation found will be addressed to prevent their recurrence not only as to this student but as to all children with disabilities enrolled in the District.

VIII. CONCLUSION

This Decision shall become final as dated by the signature of the Federal Complaints Officer. A copy of the appeal procedure is attached.

Dated this 4th day of March, 2003.

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Laura L. Freppel
Federal Complaints Officer