

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

Federal Complaint 2003:522

Aspen School District 1/Mountain BOCES

DECISION

INTRODUCTION

This Complaint was dated 10/16/03 and filed on 10/21/03. The response of the Aspen School District 1 and the Mountain BOCES (hereafter referred to as the "District") to the Complaint was dated and postmarked on 11/07/03 and received on 11/13/03. The Complainants' response to the District's response was dated 12/03/03 and received on 12/04/03. On 12/11/03 and again on 12/16/03, the Federal Complaints Officer spoke by phone with the District's special education director for additional and/or clarifying information. On 12/17/03 and again on 12/18/03, the Federal Complaints Officer spoke by phone with the student's mother for additional and/or clarifying information. The Federal Complaints Officer closed the record on 12/18/03.

The Complainants are the parents of a child with a significant identifiable emotional disability (SIED). The parents have requested "supplemental education to bring him up to where he was before he entered the Aspen School District."

COMPLAINANTS' ALLEGATIONS

The Complainants' allegations are set forth verbatim:

1. No one representing special services administration attended the IEP meetings.
2. We were not given our parents (sic) rights.
3. Our son wasn't serviced under an IEP during the last quarter of his 6th grade year.
4. Refused services
 - No outside counseling
 - No gifted and talented
5. Disparate treatment towards [Student] – He would receive worse punishment than others.

6. Refusing to give [Student] a property (sic) education – His Science/Math teacher told us that [Student] was one of the brightest students in Science and Math that he had ever seen, and couldn't teach him so he did everything he could to fail [Student].
7. Removal from proper educational setting.
8. Denied our son outdoor education until an attorney got involved.
9. Removed [Student] from the Jason Project. IEP team agreed this would be good for [Student]. His Math/Science teacher removed him from the project without notifying anyone.
10. The school did not give us access to all of his records.
11. The school did not provide to us a list of everyone who had any records.
12. The school did not provide a list of (sic) types and location of educational records collected, maintained, and used by the school upon request.
13. School did not keep (sic) record of access to student files.
14. [Student] was removed from classes more than 10 times.
15. The school limited the amount of time that we could have an IEP meeting. The school even had it written on a chalkboard at least 2 times, our meeting started at 7:30 a.m. and had to be over by 8:00 a.m.

THE DISTRICT'S RESPONSE

The District's specific responses are set forth below.

FINDINGS OF FACT AND CONCLUSIONS

1. No one representing special services administration attended the IEP meetings.

The District denies this allegation.

34 C.F.R. §300.344¹ establishes who must be a participant of a child's IEP team. One of the required participants is a representative of the public agency. §300.344 (a) (4). The party (the parents or the public agency) who invited the individual to the IEP meeting determines whether the individual member has the required knowledge or expertise. §300.344 (c). The public agency may designate another public agency member to serve as the agency representative. §300.344 (d).

¹ The regulations implementing the Individuals with Disabilities Education Act (IDEA) are located at 34 C.F.R. Part 300. Hereafter, the IDEA regulations are cited by section number only (e.g., §300.344).

The Federal Complaints Officer has carefully examined the documentation submitted by the parties. During telephone interviews on 12/11/03 and 12/16/03, Ms. Lisa Whitmore, who is the District's special education director, stated that Ms. Lisa Greer (school psychologist) and Ms. Beth Cashdan (special education coordinator) were at all relevant times her designees whenever she was unable to attend an IEP meeting in the Aspen School District.

The Federal Complaints Officer finds that [Student's] IEP team met on 09/04/02, 10/02/02, 12/13/02,² 01/29/03, 04/14/03 and 05/27/03. Each meeting was attended by Ms. Whitmore, Ms. Greer and/or Ms. Cashdan. The Federal Complaints Officer concludes that, with regard to this allegation, the District did not violate § 300.344.

2. We were not given our parents (sic) rights.

The Complainants state that the BOCES provided them with a parents' rights notice on only two occasions – with a meeting notice dated 03/12/03 (for a meeting to be held on 04/08/03) and at an IEP team meeting held on 05/27/03. During a telephone conversation on 12/16/03, Ms Whitmore stated that the school staff did not always include a copy of the parents' procedural safeguards notice with its IEP meeting notices to the Complainants.

Also in its response, the BOCES attached a document dated 09/04/02 entitled "Consideration/Permission for Reevaluation." That consent form bears [the father's] signature. The consent form also bears two dates³, including the date of 10/02/02, which was placed above [the father's] signature, and also above a box checked "yes" with the language: "I have been informed of (in my primary language) and understand my rights as a parent." The Complainants state that [the father] signed and dated the consent form on 10/02/02 but no copy of the procedural safeguards notice accompanied the consent form.

§ 300.504 requires the public agency to give parents a copy of the procedural safeguards notice at certain critical junctures, including upon reevaluation and upon each notification of an IEP meeting.

The Federal Complaints Officer finds that the District failed to include a copy of the procedural safeguards notice with IEP meeting notices dated 08/27/02, 09/20/02, 01/20/03 and 04/03/03. The Federal Complaints Officer concludes that, with regard to this violation, the District violated §300.504.

The parties do not agree that a copy of the procedural safeguards notice was provided to the parents with the reevaluation consent form. When facts are in dispute, the usual process in most legal settings for resolving the factual dispute is through an evidentiary hearing in which individuals testify under oath, and the testimony is then subject to cross-examination. It is

² The District's special education director states that the 12/13/02 meeting was a progress meeting, and not an IEP planning meeting. The Federal Complaints Officer considers this meeting to be an IEP meeting because additional services were added to the student's IEP on that date. See, District's 11/07/03 written response to Allegation No. 4.

³ The Complainants state that the first date (09/04/02) on the consent form had already been written on the form when the Complainants' received it.

through this process that the fact finder determines the credibility of the individuals, and by extension, which version of the facts is the more credible. The federal complaints process, unlike the due process hearing, makes no provision for an evidentiary hearing. Special education factual disputes are more properly resolved in a due process hearing.

Another way of resolving a factual dispute is to examine the documentation submitted by the parties and the surrounding circumstances to see whether they provide a definite answer. The Federal Complaints Officer has carefully examined the documentation and other information provided by the parties. The Federal Complaints Officer finds that the documentation and other information do not provide a definite answer to the question of whether a copy of the procedural safeguards notice accompanied the reevaluation consent form. Therefore, the Federal Complaints Officer finds that there is insufficient evidence to conclude that that the District violated §300.504.

The Federal Complaints Officer further finds that there is ample evidence in the documentation submitted by the parties demonstrating not only that the parents were familiar with and understood their rights⁴ under the IDEA but also that they frequently exercised their rights and have been strong, consistent and effective advocates for [Student]. The Federal Complaints Officer therefore concludes that the District's violation of § 300.504 was technical in nature and did not deprive [Student] of a free appropriate public education (FAPE).

3. Our son wasn't serviced under an IEP during the last quarter of his 6th grade year.

The parties agree that (a) [Student] transferred from an Oklahoma public school to Aspen Middle School in April 2002; (b) at the time of his enrollment at Aspen Middle School, the parents notified the school that [Student] was a special education student, and (3) [Student] did not receive any special education services between the dates of his enrollment and 09/04/02, when the IEP transfer meeting occurred.

§300.350 (a) (1) requires the District to provide a child with the special education services specified by the child's IEP. The IDEA regulations do not specifically address the question of when and how special education services must begin for a child with a disability transferring from a school in one state to a school in another state. However, Rule 4.03 (2) of the state rules⁵ implementing Colorado's Exceptional Children's Educational Act (ECEA) does. Pursuant to that rule, when a student is known to have been receiving special education services, the administrative unit's special education director or designee must pursue one of the following options:

- Provide services immediately in accordance with the child's current IEP;

⁴ See, for example, the document entitled "Consideration/Permission for Reevaluation" dated 10/02/02 ((signed by [the father] with a box checked "Yes" to the statement "I have been informed of (in my primary language) and understand my rights as a parent.")); and 03/12/03 Notes of [the father] documenting telephone conversation with S. Taliaferro ("I told her I was fairly familiar with our rights.").

⁵ Rules (for the) Administration of the Exceptional Children's Educational Act (ECEA), Rules 1 CCR 301-8, Rules 2220-R-100, *et seq.* Hereafter, the ECEA rules will be cited by rule number (e.g., ECEA Rule 4.03).

- Provide the child with interim special education and related services agreed to by the parents and the special education director or designee while awaiting for the IEP record from the sending school; or
- Refer the child for a complete assessment and IEP planning.

The parties agree that the parents notified school personnel that [Student] was a special education student when he was first enrolled at the school and that [Student] did not begin receiving special education services until after the 09/04/02 IEP transfer meeting. The Federal Complaints Officer concludes that the District violated §300.350 (a) (1).

The Federal Complaints Officer makes the following additional findings:

A.) Between the date of his enrollment in April 2002 and the 09/04/02 IEP transfer meeting, [Student] performed well academically in school without any special education services, and his behavior in school was appropriate.⁶

B) The student’s first behavior referral occurred on 09/21/02, well after the 09/04/02 IEP transfer staffing date and also after he began receiving the special education services consented to by his parents.

The Federal Complaints Officer therefore concludes that the District’s failure to provide [Student] with special education services between April 2002 and 09/04/02 was technical in nature and did not deprive [Student] of a FAPE.

4. Refused services

(a) No outside counseling

The Complainants state that the district refused to provide for outside counseling for [Student]. The District responds that, as of 04/16/03, the District began paying for outside counseling services for [Student].

As was state previously, § 300.350 (a) (1) requires a school district to provide services in accordance with the child’s IEP.

The Federal Complaints Officer finds that between 09/04/02 and 04/16/03, [Student’s] IEP first specified indirect/consultative counseling services (09/04/02 and 10/02/02 IEP services pages) and later direct counseling services (12/13/02 IEP services page addendum). All counseling services (direct and indirect) were to be provided to [Student] by the school psychologist. During the 01/29/03 IEP meeting, the parents requested outside counseling and the IEP team

⁶ [Student’s] 6th grade 2nd semester report card reflects that he earned a B in Language Arts; an A- in Science; a B in Reading; a B in Social Studies; a C+ in Math; and an A in Spelling. The 09/04/02 IEP transfer meeting notes state that “[r]ight now in math [Student] is doing ok. Competitive in his academics, interested in science. A little frustrated when he doesn’t have all the right answers. Buys into sarcastic comments very quickly. Stays focused in Eng & Soc Studies. Seems very responsible & very focused.”

refused that request. During the 04/14/03 IEP meeting the IEP team decided to provide outside counseling services. Beginning 04/16/03, the District paid for outside counseling services. The Federal Complaints Officer therefore concludes that the District did not violate § 300.351 (a) (1).

If, between the dates of 12/13/02 and 4/14/03, the parents disagreed with the IEP team's decision to provide counseling services by the school psychologist instead of by an outside provider,⁷ the parents were entitled to request a due process hearing to resolve that dispute.

(b) No gifted and talented

Neither the IDEA nor its implementing regulations require a school district to provide gifted and talented services to a child with a disability. The Federal Complaints Officer finds that, during the relevant time period, [Student's] IEP did not specify such services. With respect to this allegation, the Federal Complaints Officer finds no violation of the §300.350 (a) (1) which requires the public agency to provide the services specified by the child's IEP.

5. Disparate treatment towards [Student] – He would receive worse punishment than others.

This allegation states a claim of discrimination pursuant to Section 504 of the Rehabilitation Act of 1973 and/or Title II of the Americans with Disabilities Act. As set forth in a letter dated 12/04/03 addressed to Ms. Lisa Whitmore (a copy of which was sent to the Complainants and which is also attached to this Decision), the Federal Complaints Officer does not have jurisdiction over this allegation. The Complainants may file a complaint with the District or with the Office for Civil Rights, U.S. Department of Education.

6. Refusing to give [Student] a property (sic) education – His Science/Math teacher told us that [Student] was one of the brightest students in Science and Math that he has ever seen, and couldn't teach him so he did everything he could to fail [Student].

The Federal Complaints Officer finds that, during the relevant time period, [Student's] IEP contained no accommodations, curricular modifications or other specialized instruction that the regular education science/math teacher was required to provide. The Federal Complaints Officer therefore concludes that, with regard to this allegation, the District has not violated the §300.350 (a) (1) of the IDEA, which requires the District to provide the services specified by the child's IEP.

To the extent that this allegation alleges discrimination based on disability pursuant to Section 504 of the Rehabilitation Act of 1973 and/or Title II of the Americans with Disabilities Act, the Federal Complaints Officer has no jurisdiction over such a claim. The parents may file a complaint with the District or with the Office for Civil Rights, U.S. Department of Education.

⁷ The record does reflect this disagreement, including the father's 03/10/03 written directive to the school psychologist to cease meeting with the student.

7. Removal from proper educational setting.

For the reasons set forth in a letter dated 12/04/03 to Lisa Whitmore (a copy of which was sent to the Complainants and which is also attached to this Decision), this allegation has been dismissed and now forms a basis for Federal Complaint 2003:525.

8. Denied our son outdoor education until an attorney got involved.

The Federal Complaints Officer finds that, during the relevant time period, [Student's] IEP did not specify that [Student] was to participate in the school's outdoor education program. The Federal Complaints Officer concludes that, with respect to this allegation, the District has not violated the IDEA.

To the extent that this allegation alleges discrimination based on [Student's] disability pursuant to Section 504 of the Rehabilitation Act of 1973 and/or Title II of the Americans with Disabilities Act, the Federal Complaints Office has no jurisdiction over such a claim. The parents may file a complaint with the District or with the Office for Civil Rights, U.S. Department of Education.

9. Removed [Student] from the Jason Project. The IEP team agreed this would be good for [Student]. His Math/Science teacher removed him from the project without notifying anyone.

The Federal Complaints Officer finds that, during the relevant time period, [Student's] IEP did not specify that [Student] was to participate in the Jason Project. The Federal Complaints Officer concludes that, with respect to this allegation, the District has not violated the IDEA.

To the extent that this allegation alleges a claim of discrimination based on [Student's] disability pursuant to Section 504 of the Rehabilitation Act of 1973 and/or Title II of the Americans with Disabilities Act, the Federal Complaints Office has no jurisdiction over such a claim. The parents may file a complaint with the District and/or with the Office for Civil Rights, U.S. Department of Education.

10. The school did not give us access to all of his records.

The parents allege that the school did not provide them access to all of their son's records, including personal notes maintained by school staff as well as documents that appeared to have been removed from [Student's] education files. The District states that the parents were given [Student's] special education file which the parents copied behind closed doors using their own copy machine. The Federal Complaints Officer interprets the District's statement as being a denial of this allegation.

§300.562 (a) requires the school district to allow parents to inspect and review any education records relating to their child that are collected, maintained or used by the District under Part B of the IDEA, i.e., special education records.

The parties dispute whether the District allowed the parents access to all of [Student's] special education records. As was stated earlier, the federal complaints process is not well-suited for resolving factual disputes. The Federal Complaints Officer has carefully examined the documentation and other information provided by the parties. The Federal Complaints Officer finds that the documents and other information do not provide a definite answer to the question of whether the school failed to provide all of [Student's] special education records. The Federal Complaints Officer therefore finds that there is insufficient evidence in the record to conclude that the District violated § 300.562 (a).

To the extent that the Complainants are alleging that the District failed to provide them access to education records *other than* special education records, the Federal Complaints Officer does not have jurisdiction over claims made pursuant to the Family Educational Rights and Privacy Act. The Complainants may file a claim with the District and/or with the Family Policy Compliance Office, U.S. Department of Education.

11. The school did not provide to us a list of everyone who had any records.

The IDEA regulations governing access to special education records do not expressly require the school to provide the parents with a list of every person who has a special education record of the student. However, the Federal Complaints Officer interprets this as an allegation that the school failed to provide the Complainants with a list of the types and locations of [Student's] special education records. See Allegation No. 12, below.

12. The school did not provide a list of the types and location of educational records collected, maintained, and used by the school upon request.

The District responds that it does not know whether the school provided the list in question. The Federal Complaints Officer interprets the District's response as a denial of this allegation.

§300.565 requires each participating agency to provide parents with a list of the types and locations of special education records collected, maintained, or used by the agency when the parents request such a list.

The Federal Complaints Officer finds that the parents did request "a list of all people that have records on [Student] and what these records are...." See, 04/15/03 letter from the [parents] to P. Taylor. The request was made pursuant to the Family Educational Rights and Privacy Act.

The Federal Complaints Officer has carefully reviewed the documentation and other information provided by the parties. The Federal Complaints Officer finds that there is sufficient information in the record to conclude that school personnel did not provide the Complainants with the list requested by the Complainants. If the list had been prepared, a copy of it should have been submitted by the District. The Federal Complaints Officer concludes that the District violated §300.365.

The Federal Complaints Officer further finds that the District's violation of §300.565 was technical in nature and did not deprive [Student] of a FAPE because the violation did not impact the services that the student was entitled to receive under his then current IEP.

13. School did not keep (sic) record of access to student files.

The District denies this allegation and has submitted a document entitled "Record of Access" associated with [Student's] special education records. The Complainants respond that the document submitted is an incomplete/inaccurate record "because everyone clearly discussed the information contained in his records." The Complainants have not identified what special education information contained in [Student's] special education records was discussed or by whom the information was discussed.

§300.563 requires the District to keep a record of those persons who obtain access to the education records collected, maintained, or used under Part B of the IDEA, including the name of each person accessing the file, the date access was given, and the purpose for which the person is authorized to use the records. This regulation does not apply to parents and other authorized employees of the District.

The parties dispute whether the "Record of Access" submitted by the District is accurate. As has been stated before, the federal complaints process is not well-suited for resolving factual disputes. The Federal Complaints Officer has carefully reviewed the documentation and other information provided by the parties. The Federal Complaints Officer finds that the District did maintain a record of access in connection with [Student's] file. The Federal Complaints Officer finds that the documents and other information submitted by the parties do not provide a definite answer to the question of whether the record of access submitted by the District is accurate. For that reason, the Federal Complaints Officer finds that there is insufficient evidence to conclude that the District violated §300.563.

The Federal Complaints Officer notes that, based on the documentation submitted by the parties, [Student's] regular education teachers attended many of [Student's] IEP team meetings and, for that reason, it would be expected that his teachers would have personal knowledge of information gained from those meetings that is also contained in some of [Student's] special education records (i.e., IEPs developed during IEP meetings, etc.). Additionally, information not contained in education records but obtained through personal observation is not protected by the IDEA's confidentiality provisions.

14. [Student] was removed from classes more than 10 times.

For the reasons set forth in a letter dated 12/04/03 to Lisa Whitmore (a copy of which was sent to the Complainants and which is also attached to this Decision), this allegation has been dismissed and now forms a basis for Federal Complaint 2003:525.

15. The school limited the amount of time that we could have an IEP meeting. The school even had it written on a chalkboard at least 2 times, our meeting started at 7:30 a.m. and had to be over by 8:00 a.m.

The District does not deny that the school limited the IEP meetings when the meetings had to be scheduled prior to the start of the school day in order to accommodate the parents' work schedules. The District further states that the IEP meetings held were long enough to cover the concerns and issues to be discussed and determined. The parents disagree.

Neither the IDEA nor its implementing regulations prescribe the length of time for an IEP meeting. Certainly, the IEP meeting should be long enough to cover the matters to be discussed and/or determined. If not, then the meeting should be continued to another timely and mutually agreed-upon date.

The parties dispute whether sufficient time was provided for the IEP meetings. The Federal Complaints Office was not present at the meetings. No meeting transcripts, if any exist, were submitted by the parties. Nor do the documents and other information provided by the parties resolve this factual dispute. Therefore, the Federal Complaints Officer finds that there is insufficient evidence to conclude that, with regard to this allegation, the District has violated the IDEA.

NO DENIAL OF A FREE APPROPRIATE PUBLIC EDUCATION

Part B the IDEA requires each local educational agency, along with the State, to ensure that a free appropriate public education (FAPE) is available to all children with disabilities, aged 3 through 21. The Federal Complaints Officer has determined that the District violated §§ 300.350 (a) (1), 300.504 and 300.565. The Federal Complaints Officer has also found that none of those violations deprived the student of a FAPE.

REMEDY

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 the violations found will be addressed to prevent their recurrence.⁸

⁸ The Complainants requested additional remedies -- (1) Termination of the involved staff members, (2) a written and public apology to the student, and (3) supplemental (i.e., compensatory) education. The District, alone, has the authority to terminate employees. The Federal Complaints Officer does not have the jurisdiction to compel the District to apologize to the student. Compensatory education/services may be awarded only upon a finding that the District's violations have deprived the student of a FAPE. The Federal Complaints Officer has specifically found that there was no such deprivation under the IDEA.

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 today, December 18th, 2003

Laura L. Freppel
Federal Complaints Officer