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

Federal Complaint 2004:510

Jefferson County School District R-1

Decision

I. INTRODUCTION

This Complaint was dated June 18, 2004, and received by the Federal Complaints Officer on June 23, 2004. It was filed by the Legal Center for People with Disabilities and Older People, on behalf of the student and his mother. The school district's response to the Complaint was dated July 13, 2004, and received by fax the same date, with an additional copy received by regular mail on July 16, 2004. The complainant's response to the school district's response was dated July 23, 2004, and was received by the Federal Complaints Officer the same date. The Federal Complaints Officer then closed the record.

II. COMPLAINANT'S ALLEGATIONS

The gravamen of the complainant's Complaint is that this student was denied a free appropriate public education (FAPE), for a portion of the academic year 2003-04, and, as result, he is entitled to compensatory education in the amount of 82.5 hours. The 82.5 hours is an amount calculated by the complainant based upon the complainant's allegation that this student was denied a FAPE for nineteen (19) school days.

The complainant alleges alternative grounds for the alleged denial of a FAPE:

1) The complainant alleges that the student's mother, at a meeting with the student's teacher, the school counselor, and the school principal, sometime in late August, 2003, requested that her son be evaluated in order to determine whether he was eligible for special education services. The complainant alleges that the school district failed to appropriately respond to this request, as required by the Individuals with Disabilities Education Act (IDEA) regulations at 34 CFR 300.343(b)(1)-(2), and Colorado Exceptional Children's Educational Act (ECEA) Rule 4.01(2)(c). This alleged failure, alleges the complainant, delayed the eligibility determination of the student as a student covered by the IDEA. Because of this delay, further alleges the complainant, the student experienced multiple disciplinary removals, totally twenty nine (29)

school days, nineteen (19) school days beyond a permissible number of ten (10) school days during which school districts are not required to provide a FAPE to students covered by the IDEA.

The complainant further alleges that all disciplinary removals for this student after the first ten (10) days constituted a change of placement according to IDEA 34 CFR 300.519. Therefore, according to the complainant, this student was entitled, according to IDEA 34 CFR 300.523, to a manifestation determination review no later than ten (10) school days from the date this change of placement took place. The complainant alleges that no manifestation determination review was held. Further, alleges the complainant, the student was entitled, according to IDEA 34 CFR 300.520, to a functional behavioral assessment (FBA), no later than ten (10) business days from the date this change in placement took place, which meant, according to the complainant's calculation, no later than November 6, 2003. The complainant alleges that this FBA never took place, at least not by the November 6, 2003 deadline. Further, alleges the complainant, the student was entitled, according to IDEA 34 CFR 300.520, to a behavioral intervention plan (BIP), which was not completed until December 8, 2003. Further, alleges the complainant, after this BIP was developed, neither it, nor the student's individualized education program (IEP) was appropriately considered, implemented, or modified by the program staff who had the responsibility to do so, during April and May of 2004, a period of time, during which, alleges the complainant, the student experienced seven (7) of the twenty nine (29) days of the disciplinary removals he experienced during the 2003-04 academic year. This combination of violations of law, alleges the complainant, resulted in this student being denied a FAPE, as required by IDEA 34 CFR 300.121, for nineteen (19) school days, or 82.5 hours, as calculated by the complainant.

2) Concurrently, the complainant also alleges that the school district violated IDEA 34 CFR 300.527, which affords protections for certain students not yet eligible for special education services. The complainant alleges that this student, because of his behavioral difficulties, and because of his mother's notice to the school district of such behavioral difficulties in August of 2003, was a student entitled to the protections of this regulatory provision. The most fundamental of these protections being that if a student is a student covered by this regulatory provision, then the student has all the protections of a student who has been determined to be eligible under the IDEA. If this was the case, then all of the allegations of violations that flow from the allegation of the school district's failure to timely respond to the parent referral for evaluation in late August of 2003, also flow from the school district's alleged failure to recognize and treat this student as a student with a disability beginning in late August of 2003. In either case, as the Federal Complaints Officer interprets the complainant's arguments, this student was denied a FAPE – because of the school district's failure to timely and appropriately respond to the mother's request for an eligibility determination, and because this failure also constituted a failure to recognize and treat this student as a student with a disability, unless and until an appropriate evaluation determined otherwise. Also, alleges the complainant, given the parent's pending request for an evaluation of late August, 2003, the school district was obligated to provide this student with an expedited evaluation. Since the evaluation was not completed until December 8, 2003, it was not an expedited evaluation, alleges the complainant.

III. SCHOOL DISTRICT'S RESPONSE

The school district denies any denial of FAPE for this student, as calculated by the complainant. However, the school district also responds that this student is entitled to eleven (11) hours of compensatory education.

1) The school district specifically denies that the mother of the student made a request for a special education evaluation for her son in late August of 2003. "The District disputes that Complainant requested a special education evaluation for [this student] in late August of 2003. [The student's] teachers, counselor and principal have all indicated that they have no recollection or documentation of such a request." School district's response at p. 2. The school district does state however that, in response to a letter from the student's mother to the students teacher, dated September 4, 2003, the school district implemented "regular education interventions". School district's response at p. 2. Subsequently, according to the school district, a student study team (SST) was convened and, as a result of that process, a building level referral for special education for this student was made on October 14, 2003. On October 16, 2003, the student's mother signed a consent form for evaluation, and an IEP was completed by December 8, 2003, within the required forty-five (45) school days. The school district, like the complainant, cites the Federal Complaints Officer to regulatory provisions in Colorado ECEA Rule 4.01. The regulatory provisions in ECEA Rule 4.01 allow for the triggering of a special education referral – within forty-five (45) school days – either by request of the student's building level staff, or by the parent. In either case, the parent must give written permission for assessment before an evaluation process can begin. The school district contends that these referral initiation events were not completed until October 16, 2003.

2) Concurrently, the school district denies that this student was entitled, as of late August, 2003, to the IDEA protections at 34 CFR 300.527, for students not yet eligible for special education services. The school district's position is that this entitlement did not begin until October 14, 2003. As stated by the school district:

> In this case, the District received a written statement of specific concerns from Complainant on September 4, 2003. However, Complainant did not suggest that [her son] was in need of special education and related services. In fact, the letter makes several suggestions for interventions to be tried in regular education, which were implemented. Only after the SST was convened upon the District's initiative and subsequently made a special education referral on October 14, 2003, can the District be deemed to have knowledge that [the student] may be a student

> with a disability according to the regulation. Therefore, from that date, [the student] was entitled to the protections of the IDEA. He was entitled to a functional behavioral assessment no later than ten business days after his tenth day of disciplinary removal. In addition he was entitled to a manifestation determination once his disciplinary removals constituted a change of placement. School district's response at p. 4.

As for the complainant's allegations of shortcomings by the school district in conducting a manifestation determination review and an FBA, the school district stated:

> After October 14, 2003, [the student] was removed from school for eleven days after an initial ten days of suspension. When further disciplinary removal was proposed on December 5, 2003, it constituted a pattern of exclusion and [the student] was entitled to a manifestation determination to determine whether his behavior was a manifestation of his disability in accordance with 34 C.F.R. § 300.523. Because of a miscommunication between IEP teams when [the student] was placed at the [new placement for the student] on November 10, 2003, a manifestation determination was not made prior to further disciplinary removal. In addition, on November 19, 2003, [the student] was entitled to a functional behavioral assessment. A functional behavioral assessment was performed by the school counselor and a resulting behavior intervention plan was developed. School district's response at p. 4.

The school district argues that the failure to provide a manifestation determination review for this student did not constitute a denial of a FAPE, because the student's mother agreed to the new placement. "…[The student's] educational placement was changed with the agreement of Complainant to the [new program], where behavior planning began immediately and where his behavior intervention plan was implemented after December 8, 2003." School district's response at p. 4.

IV. FINDINGS AND DISCUSSION

The key to deciding this Complaint is first determining when this student was entitled to appropriate services under the IDEA and the ECEA.

1) The Federal Complaints Officer does not find that a parent referral for special education services was initiated in late August of 2003, or at any other time preceding the filing of this Complaint. A special education referral commenced by a parent requires that the request from the parent be in writing, and that the parent give appropriate written permission to assess. This is the Federal Complaints Officer's determination of the requirements of Colorado ECEA Rule 4.01(2)(c), and 4.01(2)(c)(ii). The Federal Complaints Officer finds that this parent never made

a written request for a special education referral. Her written permission to assess was obtained on October 16, 2003, after a building level referral.

The complainant and the school district allege competing versions of the facts of the meeting in late August, 2003. The complainant alleges that the student's mother made an oral request for a special education referral. The school district denies this allegation. The Federal Complaint process, while it sometimes does, in the Federal Complaint's Officer's view, require that the Federal Complaints Officer make credibility determinations, is a forum in which such determinations should be severely circumscribed. The Federal Complaint process, unlike a due process hearing, provides for no sworn testimony under direct and cross examination. If, given such testimony, it could be demonstrated to a hearing officer's satisfaction that the school district had abrogated the parent's right to initiate a special education referral, then the parent might have a case for claiming that the normal requirements of submitting her request in writing should be similarly abrogated. However, the Federal Complaint process is not the appropriate forum for making this kind of credibility determination, at least, as is the case in this Complaint, where there is no other documentation to adequately judge what transpired between the parent and school district staff members at a meeting in late August of 2003.

Nor does the Federal Complaints Officer find that the student's mother's letter to the student's teachers, dated September 4, 2003, submitted by the school district as their Exhibit A, per se constituted a written special education referral by the mother for her son. It is in keeping with the least restrictive environment (LRE) principle in the IDEA, and generally accepted good educational practice, that interventions be attempted in the student's general education curriculum before, and as a part of, determining whether special education services might be necessary. Therefore, it was not necessarily required that the school district initiate a special education referral based upon the parent's letter dated September 4, 2003.

The complainant argues, however - in the response to the school district's response to the Complaint - that the meeting in late August of 2003, and a subsequent communication that same month between the student's literacy teacher and the student's mother, and, presumably, the mother's letter to the student's teachers dated September 4, triggered an obligation upon the school district to inform the mother of her rights under the IDEA. Most specifically, the right to make a referral for special education services, and how to do so. The complainant cites the Federal Complaints Officer to a case out of Alabama for authority. The complainant does not cite the Federal Complaints Officer to any authority bound to be recognized by a Federal Complaints Officer in Colorado. The school district was not given an opportunity to respond to this argument. However, even if the school district had been given an opportunity to respond, the credibility dilemma for a decision maker would have been the same. That's because the complainant is not arguing that the complainant did not know she had a right to refer her son for special education services. The complainant could not credibly argue this view, and at the same time argue that the student's mother requested a special education evaluation as early as late August of 2003. What the complainant is arguing is that the school district did not properly act on the parent's request.

If a parent is aware of the availability of special education services, and this parent, according to the argument of the complainant, was aware of such services, and requests that the school district

try regular class room interventions first, there is nothing in law or educational practice which prevents this from occurring – indeed it is encouraged. This is at least one possible interpretation of the communications that occurred between the school district and the complainant. Nothing in controlling authority, of which the Federal Complaints Officer has knowledge, requires, per se, the school district to inform a prospective special education parent of the particulars of IDEA rights when the parent chooses regular education interventions. If, however, the parent requests that it be determined whether their son or daughter is eligible for special education, as the complainant alleges occurred in this case, then a failure of the school district to appropriately respond to that request, including failing to provide an adequate explanation of the parent's rights, including referral rights, might very well be determined to be a violation of the IDEA, and relevant provisions of state law. The same would be true, in the view of the Federal Complaints Officer, if the parent requested, or obviously needed, information about her IDEA rights as a part of her considerations about whether to make such a referral. Again, however, this requires a credibility determination which the Federal Complaints Officer has determined it would not be appropriate for him to make, based upon the information available to him, and absent an evidentiary hearing.

2) A school district cannot, however, avoid a subsequent finding of denial of a FAPE for a student, based upon a violation of a student's right to be treated as a student with a disability under 34 CFR 300.527(a), by arguing that a parent failed to perfect a special education referral. The Federal Complaints Officer does not need to make a credibility determination of who said what to whom and when, in order to find that at least by the date of the parent's September 4, 2003 letter to her son's teachers, the school district had sufficient information to bring this student under the umbrella of the protection of 34 CFR 300.527. In addition to the letter of September 4, 2003, there is no dispute that on at least two prior occasions the parent had conversations with school district staff regarding educational concerns about her son. Whether or not the parent made a special education referral, the school district admits in its response that, at least in the student's mother's meetings with her son's literacy teacher "… special education [was] one of many possible interventions …" discussed. School district's response at page 2. IDEA 34 CFR 300.527(b) indicates that a school district may be deemed to have knowledge that a child is a child with disability under any of four circumstances. IDEA 34 CFR 300.527(b)(2) is the relevant circumstance in this Complaint. This regulatory provision indicates that a student not yet determined eligible for special education services, should nonetheless be entitled to the protections of those entitled special education services if his "… behavior or performance … demonstrates the need for these services." Id.

The fact that a school district fails to timely determine that a student is a student entitled to FAPE under the IDEA, should not allow the school district to impose the consequences of that failure on the student who is subsequently determined to be IDEA eligible. The school district in this Complaint, in consultation with the parent, beginning in late August of 2003, and documented by the mother's letter to the student's teachers dated September 4, 2003 knew that this was a student who potentially could be IDEA eligible. Regular classroom interventions were tried. These interventions weren't sufficiently successful, and a special education referral, by the school district, was commenced on October 14, 2003, with the parent's written permission obtained on October 16, and with the eligibility determination and evaluation completed within forty-five

(45) school days, resulting in the creation of an IEP on December 8, 2003. In the meantime, the student had been suspended for twenty-two (22) school days, the last of these twenty-two days ending on December 9, 2003, a day after the IEP's completion. The school district argues that the ten (10) day allowable disciplinary removal clock started to run on October 14, 2003 – the date the school district argues that the student became entitled to the relevant protection provisions of 34 CFR 300.527, since this was the date, argues the school district, that it can first be deemed to have knowledge of the student's disability, based upon the building level special education referral.

Regular classroom interventions, prior to a subsequent determination of special education eligibility, need not always result in a determination that the student was denied a FAPE, based upon a determination of a violation of IDEA 34 CFR 300.527. However, on the facts of this Complaint, the school district knew, at least as of the date of the mother's September 4, 2003 letter, that the nature of this student's problems included his behavior. In paragraph three (3) of that letter the mother wrote:

> [My son] is being treated by Drs. [We] haven't quite put our finger on the problem even after months of treatment and even a 4 day hospital evaluation. He has a good heart under it all and wants to do the right thing but easily goes off course. He is very lazy with his responsibility and that includes school work. We defiantly know he has ADHD and right now isn't on medication for it. School district's Exhibit A.

In its response to this Complaint, the school district indicates how it responded to the mother's letter of September 4, 2003:

> [A]s a result of [the mother's] expressed concerns about [her son's] behavior issues, the District implemented regular education interventions to help [her son]. An individual learning plan ("ILP") was developed to address his reading difficulty. [The student] was assigned a counselor and [the mother] was made aware that the counselor was available to meet with [the student] to address behavior and academic concerns. [The student's] literacy teacher offered to work with him on a one-to-one basis during lunch hour and after school to improve his skills in reading and to give him individualized attention. Behavioral issues were also addressed through meetings with [the student] and [his mother], during which the principal detailed the behavior expectations, consequences and positive alternatives to some of the behavior [the student] was exhibiting. In addition, a Student Study Team (SST) was convened to recommend interventions for [the student] on October 14, 2003. As a result of the SST process, a building level referral to special education was made. On October 16, 2003, [the mother] signed the consent form for the District to evaluate [the student] at the District's request. Evaluations were completed and an IEP was developed on December 8, 2003.

All during this time period, between September 4, 2003 and October 16, 2003, the student continued to be suspended – for a total of eight (8) days according to both the complainant and the school district's calculations. He continued to receive suspensions, totaling fourteen (14) more days, through the eligibility determination process, and subsequent to that process, after December 9, 2003, he received a total of seven (7) more days of suspension – for a combined total of twenty-nine (29) school days. The complainant and the school district are in agreement on these totals.

Had this student not been a student with what was subsequently determined to include a behavioral disability under the IDEA, or, if he had not experienced disciplinary removals subsequent to the mother's letter to her son's teachers dated September 4, 2003, and subsequent to the school district's regular curriculum interventions, there might have been no denial of a FAPE. However, it is the determination of the Federal Complaints Officer, that at least as early as September 4, 2003, the school district had sufficient information to initiate its own building level referral for special education. It did not do so, but nonetheless continued to suspend the student. Now, after initiating such a referral on October 14, the school district wants to claim the eight (8) school days of disciplinary removals between September 4, 2003 and October 14, 2003, as days they were entitled to suspend this student, notwithstanding that had they made the referral by September 4, 2003, for a student who turned out to be IDEA eligible, those eight (8) days most certainly would have counted against the total of ten (10) days that the school district could disciplinarily remove the student from school without denying him a FAPE. The Federal Complaints Officer does not believe that it is an appropriate interpretation of the intent of the IDEA to allow a school district to deny a student a FAPE, on facts such as exist in this Complaint, because of failed regular classroom interventions.

With a triggering date of September 4, 2003, for counting disciplinary removals against the ten (10) day no FAPE required clock, a manifestation determination review and a FBA should have been conducted, and a BIP implemented, earlier than required by a triggering date of October 16, 2003. A manifestation determination review was never conducted. The school district claims that an FBA was conducted, which the complainant questions. In any case, the complainant challenges the effectiveness of the BIP that was eventually implemented.

The school district violated its obligation to timely conduct a manifestation determination review, and a FBA, and subsequently to timely implement a BIP. If the school district had taken these actions sooner, perhaps the student would not have committed behaviors that would have otherwise subjected the student to disciplinary removals. The Federal Complaints Officer says "otherwise subjected" because, beginning October 24, 2003, as determined by the Federal Complaints Officer, the school district could not have subjected the student to further punitive disciplinary removals, due to behavior related to his disability. And, even if a manifestation determination review had been timely held, and had determined that the student's behavior was not related to his disability (which in retrospect should not have been the case), the school district still would have been required to provide the student with a FAPE during periods of punitive disciplinary removals, assuming that he was IDEA eligible independent of his behavioral difficulties.

The school district concedes it did not conduct a manifestation determination review prior to a change of placement for the student on November 10, 2003, but, in essence, argues that this was harmless error, given that the student's mother agreed to the subsequent placement. The school district claims that it did, subsequent to November 10, 2003, do an FBA, although it states that there was a "short delay" in getting this done, and that this FBA was the foundation for the creation of a BIP, which was implemented beginning with the December 8, 2003 IEP. The complainant argues, in essence, that the failure to conduct a manifestation determination review (at this time or earlier) was not harmless error, and questions whether an FBA was completed and whether the BIP has been appropriately implemented. However, the complainant does not, either in the original complaint filing, or in its response to the school district, provide evidence or argument in support of any claim that the student's BIP at the time of this Complaint filing was inappropriate, beyond the allegations of inappropriate implementation evidenced by continued suspensions. If the complainant wants to further pursue, in an appropriate dispute resolution forum, allegations of a failed BIP, flowing from no manifestation determination review, and an FBA that was allegedly not done, or not appropriately done, that resulted in a denial of a FAPE beyond the alleged inappropriate disciplinary removals, the complainant can do so. The Federal Complaints Officer makes no findings on any such allegations as a part of this Complaint.

An expedited evaluation is to be done by a school district, either upon referral of a student for special education, or other appropriate application of 34 CFR 300.527 (students potentially IDEA eligible), if the student is experiencing disciplinary removal(s) that might be related to the student's disability. The IDEA does not define "expedited". The Federal Complaints Officer finds that this evaluation should have been more timely done, with the expedited period beginning after the first disciplinary removal after September 4, 2003. This would also have been a time to inform the complainant, if she was not already so informed, of her IDEA rights according to 34 CFR 300.504. However, the most fundamental problem in this Complaint was not the timeliness of the completion of the student's evaluation, but that the school district continued to suspend the student during the evaluation period. Even if the school district's date of October 14, 2003 is used as the triggering date, the student was nonetheless suspended fourteen (14) days without a FAPE between this date and December 9, 2003. December 9, 2003 being one day after the IEP meeting date of December 8, 2003. The school district applied these suspensions to this student, notwithstanding that it made the referral of October 14, 2003, and notwithstanding that the student had already experienced eight (8) days of no FAPE suspension as of that date. The Federal Complaints Officer has found that September 4, 2003 was the date for triggering the school district's 34 CFR 300.527 obligations. Between that date and through October 23, 2003, the student received ten (10) days of no FAPE suspensions. After October 23, 2004, the school district was not entitled to apply further no FAPE disciplinary removals to this student pending completion of an evaluation, no matter how many days short of forty-five (45) school days meet the qualification of expedited.

The Federal Complaints Officer is finding that day ten (10) of the ten (10) days of disciplinary removals that were allowable without providing this student with a FAPE was October 23, 2004. The nineteen (19) days of disciplinary removals that subsequently occurred constituted a change of placement that was a denial of a FAPE for this student. They occurred because of the student's disability. The school district is not really claiming that these subsequent nineteen (19) disciplinary removals were not a result of the student's disability. What the school district is

claiming, contrary to the complainant, is that eight (8) of these nineteen (19) days, should be included as a part of the no FAPE ten (10), therefore reducing the denial of FAPE number to eleven (11). The school district reaches this result by ignoring the eight (8) disciplinary removals prior to October 14, 2003, based upon arguments of no referral or knowledge of disability before October 14, 2003. The Federal Complaints Officer has already discussed these arguments, and has rejected them to the extent that they have been offered as a basis for reducing the student's entitlement to a FAPE. The school district is also claiming that only one (1) hour per day of denial of a FAPE should be counted for each of these eleven (11) days, arguing that these are all the IEP FAPE services to which this student was entitled. The Federal Complaints Officer rejects this argument. A student covered by the IDEA is entitled, like his or her non-disabled peers, to the entire educational curriculum, not just part of it. Therefore, the Federal Complaints Officer finds that this student was denied a FAPE for nineteen (19) school days, or 82.5 hours as computed by the complainant.

V. REMEDIES

1) The student is entitled to 82.5 hours of compensatory education, to the extent he can benefit from it. The Federal Complaints Officer refers this back to the student's IEP team for this determination. If the IEP team cannot reach agreement, then the Federal Complaints Officer will decide - based upon information supplied by the parties to the IEP team - how much, and what kind, of compensatory education is to be provided – unless the parent of this student decides to present any unresolved resolution of the issue of compensatory education to a hearing officer.

2) The Director of Special Education for the school district shall submit to the Federal Complaints Officer a statement of assurance that policies and implementing procedures are in place to avoid further findings of like violations by the Federal Complaints Officer.

The Remedies shall be completed within thirty (30) days of the date of this Decision, unless the parent agrees to an IEP determination beyond this time period.

VI. CONCLUSION

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

Dated today, August 11, 2004.

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Charles M. Masner, Esq.
Federal Complaints Officer