

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

Federal Complaint 2004:512

Jefferson County School District R-1

Decision

I. INTRODUCTION

This Complaint was dated September 13, 2004, and was received on September 15, 2004. The school district's response was dated October 6, 2004, and was received on October 6, 2004. The complainant's response to the school district's response to the Complaint was dated October 20, 2004, and was received October 21, 2004. The Federal Complaints Officer then closed the record.

II. COMPLAINANT'S ALLEGATIONS

- 1) The complainant alleges that the student who is the subject of this Complaint has not received appropriate paraeducational services, as required by the student's most current individualized education program (IEP), since the beginning of the 2004-2005 academic year.
- 2) The complainant alleges that the student who is the subject of this Complaint has not received appropriate deaf/hard of hearing services, as required by the student's most current IEP, since the beginning of the 2004-2005 academic year.
- 3) The complainant alleges that the student who is the subject of this Complaint has not received appropriate occupational therapy (OT) services, as required by the student's most current IEP, since the beginning of the 2004-2005 academic year.

III. SCHOOL DISTRICT'S RESPONSES

- 1) The school district concedes that it was unable to provide this student with a paraeducator, because it was unable to hire such a person, until September 14, 2004. However, the school district argues that IEP required services, that would have been provided by a paraeducator, were nonetheless adequately, and hence appropriately, provided by a certified special education teacher or a licensed tutor/interpreter. The school district argues that: "[G]iven

the education and skill level of the teacher and tutor/interpreter, [the student] actually received services from more highly trained service providers than what was called for on his IEP and for a longer period of time.” School district’s response at page 2.

- 2) The school district concedes that the deaf/hard of hearing classroom services for this student did not begin until September 9, 2004, because of the terms of the grant which the school district received which funds these services, which first required an individual assessment for all participating students. However, the school district also argues that prior to September 9, 2004, this student was receiving deaf/hard of hearing services in the general education classroom sufficient to provide him with the appropriate educational services required by his IEP.
- 3) The school district concedes that the occupational therapist assigned to this student’s attendance center is on leave until January of 2005. However, the school district argues that it has assigned other occupational therapists to work with this student. Nonetheless, the school district also concedes that this student is entitled to additional IEP required OT services – specifically, three one-half hour sessions.

IV. FINDINGS AND DISCUSSION

The Federal Complaints Officer finds that this student did not receive all of the IEP required services necessary to provide him with a FAPE, from the beginning of the 2004-2005 academic year through, and including, the date of September 13, 2004. Specifically, as argued by the complainant, the student did not receive appropriate IEP required paraeducator services, or deaf/hard of hearing services, or OT services. The school district is bound to provide services as stated in a student’s IEP. If a school district wants to vary from the IEP requirements as stated, it needs to reconvene an IEP meeting, and, if agreement is not reached with the parents to change the IEP, give written notice to the parents of the proposed change, including informing the parents of their due process rights. This is to be done a reasonable amount of time before the proposed change is to take place. If the parents request a due process hearing, stay put is invoked, and the IEP remains the same pending agreement between the parents and the school district, or order of the hearing officer. If the parents do not request a hearing to object to the school district’s proposed IEP changes, then the IEP can be changed without the parents’ consent.

The Federal Complaints Officer is aware of the practical difficulties that sometimes may occur in trying to proceed as the law requires, especially if one of the difficulties is in hiring appropriate staff. However, in this case the school district had from March of 2004 until the beginning of the 2004-2005 academic year to meet with the parents and to seek agreement from them to put contingencies in this student’s IEP, based upon potential programmatic difficulties of which the school district was aware. Indeed, if the school district anticipated staffing difficulties, contingencies could have been provided for in the student’s IEP created in March of 2004, absent parental disagreement that resulted in the request for a due process hearing. The Federal Complaints Officer does not find that any meetings or other communications between the parent(s) and the school district, subsequent to the creation of the student’s IEP in March of 2004, and continuing through the date of this Complaint, relieved the school district of its

obligation to meet the requirements of the student's March of 2004 IEP. The school district is bound to provide what an IEP requires. It is not relieved from doing so because of any hiring or staffing difficulties it may encounter because it cannot obtain IEP required services at a cost it has determined to pay. Nor is it relieved from doing so because of any grant requirements that are imposed for the receipt of funds to help pay for IEP required services.

Nor can a school district be assured of being relieved from providing IEP required services by arguing, after the fact, to a Federal Complaints Officer, that, even though the services weren't provided as stated on an IEP, a student nonetheless received a FAPE through alternative means. The IEP determines the FAPE that a school district is required to provide. The Federal Complaints process provides for no hearing and thus for no sworn testimony from expert witnesses, including cross-examination of those witnesses. The parents of this student do not believe that their son received a FAPE. The school district staff, the Federal Complaints Officer presumes, based upon the arguments in the school district's response, believes the student was provided with a FAPE, notwithstanding that it was accomplished by alternative means from those stated in the IEP. However, a Federal Complaints Officer should be circumspect in addressing issues that a due process hearing is best designed to resolve. Not to do so allows parents and school districts to avoid the forum of a due process hearing, to the disservice of making appropriate factual determinations about a FAPE for a student in a way that most appropriately does justice to those determinations – if those determinations cannot otherwise be made by agreement between parents and school districts.

On the facts of this Complaint, where there is no record of the parents being appropriately informed of the school district's proposed actions; nor of the parents' agreement to those proposals; nor of the parents being appropriately informed of their due process rights to challenge the school district's proposals; and where this student's IEP is clear about how the FAPE for this student was to be provided, the Federal Complaints Officer has determined that the IEP requirements necessary to provide a FAPE for this student were not met, for the time period beginning with the academic year 2004-05, and extending through September 13, 2004. This determination has been made notwithstanding any alternative services that the school district did provide.

V. REMEDY

This student is entitled to compensatory education to the extent that it is determined that he can benefit from compensatory education. However, compensatory education is not a form of punitive damages to be imposed upon school districts as a result of a finding that a student has been denied a FAPE. While the Federal Complaints Officer does not agree with the school district that "[c]ompensatory education is [only to be] awarded when an IEP is so inappropriate that no educational benefit is accruing to the student", he does agree that "[c]ompensatory education as a remedy does not necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed." School district's response at page five (5), citations omitted. While the Federal Complaints Officer has found that what the school district provided to this student was not sufficient to meet what it was obligated to provide

this student, based upon the FAPE requirements of the student's IEP, he has not found that what the school district provided to the student was of no benefit. Nor did the complainant argue that what the school district provided was of no benefit to the student, although the complainant did argue that the school district's failure to provide IEP required services for this student created additional problems for the student.

The Federal Complaints Officer has agreed with the complainant that what the school district provided was not sufficient to provide this student with a FAPE. What needs to happen now is to determine whether this student can benefit from compensatory education, taking into account what services the school district has provided, and thus, if so, what that compensatory education should be. Ideally, this determination should be made by the student's IEP team, and therefore the Federal Complaints Officer is ordering the school district, upon the request of the student's parent(s), to convene an IEP meeting to see if agreement between the school district and the parent(s) can be reached on the issue of compensatory education. If not, and if the parent(s) do not take this issue into a due process hearing, the Federal Complaints Officer will decide, based upon information submitted to him by the parties, what compensatory education should be provided to this student. If the parties wish for a mediator to be assigned to facilitate the IEP meeting, and/or to help the parties develop a protocol for communications (as the complainant requested and as the school district agreed to consider), the Federal Complaints Officer will assign a mediator for either or both of these purposes, at the expense of the state of Colorado Department of Education (CDE).

The IEP meeting ordered to be offered to the parent(s) upon their request is to take place within thirty (30) days of the parent(s) request for such a meeting, unless the parent(s) agree to an extension of this time period. If the parent(s) do not request such an IEP meeting within thirty (30) days of the date of this Decision, the school district shall not be required, for the purpose of complying with this Complaint Decision, to convene such an IEP meeting. The Director of Special Education for the school district shall provide the Federal Complaints Officer with a written statement of assurance that the school district has complied with the Remedy as ordered by the Federal Complaints Officer.

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.

Dated today, November 3, 2004.

Charles M. Masner, Esq.
Federal Complaints Officer