

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

Federal Complaint 2005:511

Denver Public Schools

Decision

I. INTRODUCTION

This Complaint was dated May 16, 2005, and received May 19, 2005. The complainants are the mother and stepfather of the student. The school district's response was dated June 6, 2005, and received June 7, 2005. The complainants' response to the school district's response to their Complaint was dated June 23, 2005, and received June 27, 2005. The Federal Complaints Officer then closed the record.

The complainants were sent a copy of the school district's response, by certified mailing, on June 7, 2005. The post office attempted to deliver that mailing on June 9, 2005, and left a notice for the complainants on the same date. The Federal Complaints Officer attempted to reach the complainants' by phone on June 14, 2005. He did not reach the complainants' in person, and, to the best of his knowledge, none of the telephone numbers made available to him by the complainants, all of which he called, were working telephone numbers of the complainants, including one telephone number where he left a message in response to an unidentified voice prompt. On June 15, the Federal Complaints Officer sent the complainants a letter by regular mail notifying them of the certified mailing and of his attempts to reach them by telephone. In this same correspondence he notified them that he would dismiss their Complaint if they did not contact him within seven (7) days of the date of his letter. The complainants did not contact him, but they did obtain the certified mailing with the school district's response on June 17, 2005, as the Federal Complaints Officer confirmed online on June 21, and by return receipt of certified mailing.

II. COMPLAINANTS' ALLEGATIONS

The complainants stated their allegations as follows:

- 1) [Our son] has not received his rights to a free appropriate education in a timely fashion while he was hospitalized (twice) at The Denver Health Medical Center during the second semester in 2005.
- 2) The School District did IEP testing only twice during his 2 year enrollment while attending [attendance center].

- 3) The Denver Public School District failed to notify the parents of [our son] as to why he was not given an IEP test during his 8th grade school year while attending [attendance center].
- 4) [Our son's] "Math" teacher [proper name], openly admitted, during a meeting requested by his doctors, that he was passing with a "C", knowing that [our son] has "no" or "very poor" concepts of 8th grade math. [Proper name of math teacher] admitted at said meeting that [our son's] grades are actually below failing.

[Our son's] "special education teacher" [proper name of teacher], openly admitted, during a meeting request by [our son's] doctor's; that [our son] was doing exceptionally well academically and was not missing any assignments. [Our son's] "progress report" actually confirmed that [our son] was missing a few assignments. (progress report dated: on or about 5/11/05).

- 5) Special Education Teacher(s) at [attendance center] failed to revise a plan with general education teachers to adequately find methods to encourage the [continuing] educational needs under FAPE.

Punctuation as in original. However, the allegation that the Federal Complaints Officer has numbered (4) was numbered (5) in the complainants' Complaint letter. The Federal Complaints Officer has produced in entirety the contents of the enumerated list of the complainants' allegations, minus personally identifiable information.

The complainants concluded their Complaint letter by stating:

In closing, The Denver Public School District has violated the rights of our son, who has been determined to be a child who qualifies for IEP services. His education has been compromised during his hospital stays and teachers have been passing him when he doesn't understand certain concepts. It is in our prayers that the appropriate agencies find in our favor that the school district has an [obligation] and violated that obligation to require the means necessary to educate our son no matter what his needs may be.

III. SCHOOL DISTRICT'S RESPONSE

With regard to allegation number (1) of the complainants, the school district states:

Attendance records indicate that the student was absent 20 cumulative days for medical reasons (**ATTACHMENT D**). Medical records indicate that [the student] was in Denver Health Medical Center from February 3, through February 15, 2005 (9 school days); the parents kept him home 3 additional days.

Medical records indicate that [the student] was in Denver Health Medical Center from March 3, through March 8, 2005 (5 school days). School staff was aware the student had been hospitalized and forwarded a reading schedule to the parents.

Saturday, March 5th the parents emailed the special education teacher and reported that Denver Medical Center did have a school teacher and they had encouraged “[The student] to get any school assignments possible.” The parents went on to say “I, personally, would like to see [our son] focus directly on his recovery.” Staff made numerous attempts to contact the parents in order to forward work for the student to complete under the supervision of the hospital teacher, but the parents did not respond (**ATTACHMENT E**). School district’s response at page 4.

Although not specifically stated by the school district, the Federal Complaints Officer is treating the school district’s response with regard to allegation number (3) of the complainants, as also being a response in regard to allegation number (2) of the complainants:

The parents report that the “School District did IEP testing only once during his 2 year enrollment while attending [attendance center].” Initial evaluations were completed and the IEP was developed following appropriate timeline. The IEP Team (of which the parents are members) determined that sufficient and appropriate assessments were completed, documented and considered to determine the student’s current level of functioning, achievement, performance and educational needs. The parents never indicated they disagreed with the evaluations that were conducted by the District or requested an independent educational evaluation; nor did the parents ever request that the school conduct additional testing. The District did not propose or refuse to evaluate the student during the 2004-2005 school year, therefore the District would not be required to provide the parents with prior written notice regarding assessment. School district’s response at page 5.

With regard to allegation number (4) of the complainants, the school district, while not responding to the factual allegations of the complainants about statements made by teachers, states:

[The student’s] “doctors” contacted the school on May 3, 2005 and requested an opportunity to meet with the school staff. Specifically hospital personnel asked to meet with each of [the student’s] teachers to discuss their observations and the discrepancies between the behaviors reported by the school and hospital versus home. On May 12, 2005, school staff met with the medical staff for Denver Health Center. School district’s response at page 4.

With regard to allegation number (5) of the complainants, the school district states:

[The student] enrolled as a 7th grade student into [attendance center] August 2003. There was no history of the student having been identified as disabled.

Shortly after enrollment, the parents expressed concern in relation to the student’s behavior and progress in the curriculum. Although teachers generally described [the student] as bright, engaged and motivated when a subject or assignment

[related] to an area of interest; teachers did agree that [the student] was sometimes inattentive, lacked focus and did not always complete classroom work.

The District has [a] well defined Special Education Referral Process (**ATTACHMENT A**). [The attendance center] followed the exact process outlined in Attachment A. That is, the parent did not initiate a referral for ... special education or specifically request a special education evaluation. Therefore the school staff followed procedures that allowed the school to exhaust interventions prior to referring the student for multidisciplinary evaluation. The first step allowed [the student's] teachers to try a number of interventions which were reported as generally successful. The parent continued to express concern and staff sought additional strategies from the Community/School Assessment Team for Students. On September 24, 2003, [the mother of the student] and school staff with knowledge of the student's performance met [with] the Community/School Assessment Team for Students to discuss pertinent information and to identify additional strategies for meeting the student's needs in the general education setting. Interventions were implemented from September 25th through November 12, 2003. On November 12, 2003, the Community/School Assessment Team for Students reconvened and identified additional interventions to address the behaviors identified by the parents and staff.

Problems persisted in relation to the student's ability to focus and complete school work. The Community/School Assessment Team for Students initiated a referral for a special education evaluation. On February 24, 2004, the school secured permission from [the student's mother] for an Initial Evaluation. At that time the parent disclosed that the student had previously been diagnosed and had taken medication for Attention Deficit Hyperactivity Disorder (ADHD). The parent asked for information in relation to mental health services in the Denver area; the school provided the parent with general information including the contact numbers for mental health services.

The school conducted evaluations in all domains/areas of development. The parent provided medical records from the Denver Health Medical Center that confirmed the diagnosis of ADHD. Shortly before the eligibility meeting the parent reported [the student] had started taking the medications Adderall and Risperdal.

[The student] was identified as disabled at an Individualized Education Program (IEP) meeting on April 21, 2004. [The student's] primary disability was identified as physical disability (ADHD). The IEP called for 20 minutes per week of indirect (consultation) special education services; all other instruction was provided in a general education setting (**ATTACHMENT B**). The parents did not disagree with the evaluations conducted by the school or the decisions of the IEP team, and/or request that additional evaluations be conducted.

On the same day as the IEP meeting, [the student] was suspended from school for two days. School staff report the [student] was running down the hall and in the process unintentionally hit a teacher in the head with his hand. While [the student] was disciplined for this incident, staff did not perceive or respond to this incident as though this was an act of assault. While staff was stern with [the student], they tried to help the parents understand that this was a case of “horseplay” that got out of hand. The parents pursued a private medical/mental health evaluation at The Children’s Hospital. According to medical records the parents reported that [the student] had a history of assaulting teachers and peers. The student was hospitalized April 21 through April 27, 2004. Upon his release from the hospital the parents provided the school with a report from The Children’s Hospital indicating that the medical diagnosis of ADHD was modified to include Bipolar and Mood Disorder. The attending physician recommended that the student be assigned to a “self-contained classroom”.

Initially the parents did not want [their son] to return to school; they requested that [their son] either be assigned to a center program for students with emotional disabilities or receive in-home instruction for the remainder of the school year. The IEP team considered the physician’s recommendation and the parents concern for their child, but did not feel that a self-contained setting or homebound instruction was appropriate as the least restrictive environment. That is, the student had been only found eligible for special education on April 21st, the student was hospitalized that very same day. Prior to the disciplinary removal, teachers had observed that [the student] was better able to focus and complete his work. [The student] expressed his desire to return to the school setting. But most importantly, the school had not yet been provided an opportunity to provide supplementary aids and services in the general education setting. The IEP team (including the parents) developed a safety plan to be implemented upon the student’s return to school and agreed that services would remain constant for the remainder of the 2003-2004 school year. In addition, the team agreed to reconvene in the fall to determine the least restrictive environment in which the student would be educated. Again, the parents did not disagree with the decision of the team and/or request additional testing/evaluations.

An additional IEP (Annual Review) meeting was held on October 20, 2004 (**ATTACHMENT C**). The purpose of the meeting was to discuss the frequency and amount of special education services. General education teachers described [the student] as a hard worker, as having positive relationships with his peers and further reported that he is able to monitor his behavior and appropriately advocate for himself. Although [the father of the student] expressed concern regarding [his son’s] behavior at home, he agreed with the team decision to continue providing supplementary aids and services to facilitate the student’s participation in the general education curriculum in the typical classroom setting. The IEP called for 20 minutes per week of indirect (consultation) special education services; all other instruction was provided in a general education setting. Again,

the parents neither disagreed with the October 20, 2004, decisions of the team nor [requested] additional testing/evaluations.

Individual staff met with the parents on a regular basis to listen to their concerns regarding [their son's] behavior at home. The parents reported [their son] as assaultive, having hallucinations and suicidal/homicidal thoughts. Furthermore, the parents indicated that they kept the student in diapers at home because he urinated and defecated in different areas of the home. In contrast to the parents' observations, teachers described [the student] as a nice, bright, ... hard worker, rarely was there concern expressed in relation the student's behavior.

...

An Annual Review IEP meeting was held on April 20, 2005 (**ATTACHMENT F**). In anticipation of the student's transition to high school, the team identified a different level of support for the high school setting. The IEP called for 20 minutes per week of indirect (consultation) special education services for the remainder of the 2004-2005 school year and 50 minutes per day of direct services outside the general classroom beginning August 15, 2005; all other instruction will be provided in a general education setting. Again, the parents neither disagreed with the decisions of the team nor requested additional testing/evaluations. School district's response at pages 2, 3, and 4.

IV. FINDINGS AND DISCUSSION

Allegation No. 1

In response to the school district's response to the complainants' allegation that the student was denied a FAPE during hospitalizations, the complainants' state:

[D]uring his hospitalization from April 21st, 2004 to April 27th, 2004, the school district offered no accommodations for [our son] to continue his school work. When parents spoke to [proper name of the school counselor], she replied, "oh, don't worry about it". The parents then spoke to the assistant principal [proper name], who replied, "I'll check into it". However, [our son] never received any school work. The school district had ample time to gather school work. (The school was the [one] who initially made us aware of the disciplinary action against [our son].)

...

[Our son] has been hospitalized 3 to 4 times while being enrolled at [attendance center]. Not once did any [attendance center] school official contribute to [our son] attaining or maintaining his school work. In February, 2005, [our son] was hospitalized at Denver Health Medical Center. The staff at the hospital tried, numerous, to contact the school to get assignments for [our son]. (See

attachment-A). It failed. No one replied from the school. [Proper name], [our son's] special ed teacher, even said she'd e-mail all [of our son's] teachers to get them to put together school assignments for [our son] and would place them in the teacher's "box" in the main office. The parents agreed to pick up the assignments from [attendance center] 2 to 3 days later. When the parents arrived at the school, there were no assignments. The parents could not reach [proper name of the special education teacher] that day. The parents questioned hospital staff on how to get the school to send assignments to the hospital.

[Proper name of special education teacher] did indeed forward a reading calendar to the parents to send to [our son]. However, a reading calendar is somewhat a weak attempt to make up for several days being in a hospital, especially when missing major assignments from classes such as: science, social studies and math. Being absent for 9 days is quite a bit of time for a student who's grades are below average. Complainants' response at page 2.

In their initial Complaint letter, the complainants did not raise the allegation of a denial of a free appropriate public education (FAPE) for the time period April 21st, 2004 through April 27th, 2004. The school district did state in its response that the first two days of this time period were for a suspension, and the remainder of the time period was for a hospitalization that resulted in a finding "... indicating that the medical diagnosis of ADHD was modified to include Bipolar and Mood Disorder." School district's response at page 3. The complainants did not dispute these factual statements of the school district.

The Federal Complaints Officer finds no denial of FAPE for the time period April 21st, 2004 through April 27th 2004. Under the IDEA school districts are entitled to administer disciplinary removals to a student for up to ten (10) days without violating the student's right to a FAPE. While there might be circumstances, notwithstanding this provision in the law, that would warrant a finding of a denial of FAPE for a non provision of services lasting less than ten (10) days, the Federal Complaints Officer finds that such a circumstance did not exist for this time period on the facts of this Complaint.

For the same reason, the Federal Complaints Officer finds no denial of FAPE for the additional nine (9) days alleged by the complainants. In addition, for this nine (9) day period it is undisputed that the student, through his parents, was offered a reading calendar by his special education teacher. On the facts of this Complaint, there is nothing to indicate that this level of service offering was not appropriate for a hospitalized student, for this time period, regardless of whether he was otherwise provided with assignments. The stepfather of the student did state, in an email to the student's special education teacher dated March 5, 2005, that – "I, personally, would like to see [my stepson] focus directly on his recovery." School district's Attachment E.

Allegation Nos. 2 and 3

The Federal Complaints Officer finds no violation of the IDEA due to any failure of the school district to adequately evaluate the complainants' son, as alleged in the complainants' Complaint. The Federal Complaints Officer finds that required assessments were conducted, as explained by the school district on page 5 of its response.

Allegation No. 4

The Federal Complaints Officer finds no violation of the IDEA by the school district based upon allegations by the complainants of statements made by teachers of their son, at a meeting with doctors for their son. According to the complainants, the math teacher indicated their son was failing math, even though the teacher was giving him a grade of "C"; and, according to the complainants, their son was missing a few school assignments, even though the special education teacher said this was not the case. The Federal Complaints process provides for no hearing during which persons can be questioned under oath, and therefore there is no mechanism, other than the logic of the context of the circumstances, for a Federal Complaints Officer to judge who is more credible about what was said. In addition, even assuming that the complainants' version of the facts is accurate, the Federal Complaints Officer does not find a violation of the IDEA subject to the jurisdiction of the Federal Complaint process. Missing a "few assignments" does not amount to a denial of FAPE. As for failing math, while alleging the giving of a grade of "C" to a failing student, if the allegation proved to be true, might be a basis for a finding of a denial of FAPE, depending upon information that might be developed in a due process hearing, it is not possible to appropriately develop this information in the Federal Complaint process.

Allegation No. 5

The Federal Complaints Officer, on the facts of this Complaint, finds no violation by the school district of its obligation to provide a FAPE for this student. The parents participated in the IEP process. They were informed of their rights. They did not exercise their right to a due process hearing to challenge the decision making of the IEP team. The parents now say – "The parents did disagree with certain aspects of the IEP. (See attachment-B-,1,2). But ...the family liaison curbed our efforts." Complainants' response at page 2. Even if the family liaison did "[curb] [the] efforts" of the complainants, there is nothing in the record to indicate that the complainants are legally incompetent and incapable of deciding whether or not to be persuaded by the views of others. The Federal Complaint process is not an appropriate forum for the rewriting of an IEP. If the parent complainants (including the stepfather if he has custodial authority to do so) want to challenge the legal sufficiency of the IEP created for their son to provide their son with FAPE, they are entitled to a due process hearing to do so. From the first creation of their son's IEP on April 21, 2004 they have been entitled to do so.

V. CONCLUSION

In the complainants' response to the school district they state:

The parents of [the student] made the school district aware of his disability when he was enrolled at [elementary school attendance center] in April, 2003. At that time, administrators' never suggested any special need programs even though he was taking medications.

Upon [our son's] enrollment at [middle school attendance center – where he was enrolled at the time of the filing of this Complaint]; the school nurse was indeed aware of [our son] being a child with special needs due to the fact that the school nurse at [middle school attendance center] was administering his medications once daily. This is contrary to the school district claiming [our son] had no history of being disabled. School nurses are qualified people who are capable of recognizing why a child is taking such narcotics, such as the ones [our son] was taking upon his enrollment.

It was only until [our son] got into trouble, at [the middle school attendance center], did school officials seek strategies from the school/assessment team. [The student's mother] never asked for information concerning mental health services for [our son] as he had been seeing doctors prior to entering [the middle school]. The school district failed to acknowledge to the parents that [the student] needed special services offered by the school district, even as they administered his meds to him.

...

Doctor's recommended that [our son] be placed in "self-contained classes". Teachers could not say [our son] was "focused and able to complete his work" because his behavior was uncontrollable. Furthermore, if the school district was appropriate in allowing homebound instruction, what "least restrictive environment" would possibly be better than homebound instruction? The IEP team had no rights to over ride a doctor's recommendation to not place [our son] in a self-contained environment. This discussion took place with [proper name, family liaison] who visited our home during the summer of 2004. The parents didn't speak up [because the family liaison] assured [the parents] that it would not work out and that the school district was without financial means due to budget cuts. Parents' response at page 1. Quotation marks in original. Bold added by the Federal Complaints Officer.

The parents believe the school district should have acted sooner, and that it should have placed their son in a more restrictive environment. The parents did not, however, act to initiate a formal referral for determination of eligibility under the IDEA, during this period of time that the

parents are now alleging that the school district should have acted sooner and with greater service delivery restrictions. The school district's position, as understood by the Federal Complaints Officer, is that it first tried to meet the student's educational needs in the general education curriculum, before proceeding with a special education referral, and, subsequent to that referral, the school district has attempted to maintain service delivery in the least restrictive environment. Having a disability alone does not qualify a student for special education under the IDEA. The student must also , because of a covered disability, need special education and related services.

A homebound service delivery system, or a self contained classroom, can still be appropriate service delivery systems for students covered by the IDEA. However, as the least restrictive environment is defined by the IDEA, a homebound placement and a self contained classroom are restrictive placements that are not normally going to meet the IDEA's legal mandate for the least restrictive placement. Certainly, such service delivery systems are not normally going to meet this mandate until less restrictive placements are attempted. Moreover, while IEP teams are required to consider the expert opinions of doctors and others when making educational decisions for special needs students, the opinions of doctors and other experts do not override the determinations of IEP teams. If the parents in this Complaint believe that the service delivery system being offered their son through the IEP process is not adequate to provide him with a FAPE, then they are entitled to a due process hearing to make this argument. School districts are not entitled to deny students FAPE because of budget cuts, or any other cost concerns. However, a Federal Complaints Officer, unlike a due process hearing officer, cannot substitute his judgment for that of the IEP team.

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, July 18, 2005.

Charles M. Masner, Esq.
Federal Complaints Officer