

**FEDERAL COMPLAINT NUMBER 98.525
FINDINGS AND RECOMMENDATIONS**

I. PRELIMINARY MATTERS

- A. This complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (“CDE”), on July 13, 1998, but was received within CDE on July 1, 1998.
- B. The complaint was filled by Ms. Susan M. Weiner representing Mr. [parent] and Ms. [parent] on behalf of their son, [student], against the Boulder Valley School District, Mr. Tom Seigel, Superintendent, and Ms. Kathleen Anker, Director of Special Education (“the District”).
- C. The timeline within which to investigate and resolve this expires on August 31, 1998.
- D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Act 20 U.S.C. 1401 et seq., (“the Act”), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.
- E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receive federal funds for the purpose of providing a free appropriate public education (“FAPE”) to eligible students with disabilities under the Act.
- F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegation contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.
- G. [student] is a student with disabilities eligible for services from the District under the Act.
- H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act, by failing to provide [student] with a free appropriate public education (“FAPE”) beginning with the 1992-93 school year to present, as indicated by:

- Failing to evaluate goals and objectives according the objective criteria and evaluation procedures and schedules listed,
- Failing to consider the need for extended school year services (“ESY”),
- Failing to develop behavior management plans,
- Making programming decisions prior to the completion of an IEP,
- Failing to have the required participants at IEP meetings, specifically, someone qualified to provide, or supervise the provision of special education.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18), (19), (20); and 1412 (2) (B), (4), (6) and 1414, as amended by 20 U.S.C. 602, 612 and 614 and its implementing regulations (as amended by statute), including but not limited to 34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.344, 300.350, 300.532, and 300.533, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District, in part, based on the assurances contained within the application.
3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.
4. [Student] was identified as a student with disabilities on an initial IEP dated 5/27/92. Subsequently, IEPs were amended and/or developed 48 times during the next 72 months (6 years) as indicated by documentation on the following dates:

10/7/92	12/15/94	10/28/96
3/16/93	1/3/95	11/26/96
6/8/93	1/6/95	1/7/97
8/27/93	2/27/95	4/16/97
10/15/93	3/9/95	10/9/97
11/19/93	5/18/95	10/20/97
12/3/93	8/28/95	10/28/97
12/10/93	9/27/95	2/5/98
1/7/94	10/25/95	2/19/98
2/23/94	11/14/95	3/9/98
3/11/94	2/21/96	4/21/98
5/18/94	3/6/96	5/19/98
7/13/94	3/21/96	6/4/98
8/23/94	6/6/96	
9/7/94	8/27/96	
9/19/94	9/16/96	
10/3/94	9/25/96	
11/14/94		

5. The following are alleged by the complainants at the following specific times. Note that there are no specific times when failure to consider ESY is alleged; but rather this is a general allegation relative to 1992-93, 1993-94, and 1994-95.

Failure to evaluate previous goals and objectives	Failure to develop measurable goals or objectives with objective criteria and evaluation procedures	Failure to determine evaluation schedules	Failure to consider Extended School Year ("ESY")	Failure to develop behavior goals or behavior management plans	Failure to have someone qualified to provide, or supervise the provision of special education at the IEP meeting	Determination of placement prior to development of IEP
5/27/92 and 10/7/92	5/27/92 and 10/7/92	5/27/92 and 10/7/92		5/27/92 and 10/7/92		
6/8/93 and 8/27/93	6/8/93 and 8/27/93	6/8/93 and 8/27/93		6/8/93 and 8/27/93		
	10/15/93 no modifications			10/15/93		
	11/19/93 no modifications			11/19/93		
				12/3/93		
9/7/94, 9/19/94 and 10/3/94	9/7/94, 9/19/94 and 10/3/94	9/7/94, 9/19/94 and 10/3/94		9/7/94, 9/19/94 and 10/3/94		
11/14/94	11/14/94	11/14/94		11/14/94		
				2/27/95		
	11/14/95	11/14/95				
11/26/96				5/19/97		
2/5/98	2/5/98			2/5/98	2/5/98	2/5/98

6. In its response to the complaint, the District states the following relative to each of the allegations. Next to the District's response, is a review of documentation. Following that is an analysis of the information relative to the requirements of the law.

Allegation	District's Response	Documentation
Failure to evaluate previous goals and objectives	<p><u>92-93</u> was [student]'s first year in special education, therefore there were no prior year's goals and objectives to evaluate</p> <p><u>93-94</u> was done on page 4 of 8/27/93 IEP</p> <p><u>94-95</u> was done on pages 3 and 4 of 11/14/94 IEP</p> <p><u>95-96</u> was done on pages 3 and 4 of 11/14/95 IEP</p> <p><u>96-97</u> appears on the 11/26/96 IEP</p> <p><u>97-98</u> goals and objectives are still current and therefore have not yet been evaluated</p>	<p>8/27/93 goals evaluated following year</p> <p>11/14/94 goals evaluated following year</p> <p>11/14/95 goals evaluated following year</p> <p>11/26/96 goals evaluated following year</p>

Discussion: The law is clear in that IEPs must contain a statement of annual goals, including short-term instructional objectives, appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

With the initial IEP having been developed on 5/27/92 and 10/7/92, goals and objectives should have been evaluated at least once in each of the following school years. That was not formally recorded in the following year, but was for the next for years. With IEP reviews occurring every 6 or 8 weeks, there was extensive general review of [student]'s progress.

<p>Failure to develop measurable goals or objectives with objective criteria and evaluation procedures</p>	<p>Baseline data is absent from the 10/7/93 IEP. This was an initial IEP and it is probable that such data was not known. However, the District agrees that baseline data should have been included. The District agrees that the 1993-94 IEP should, but does not, show baseline data. The 95-96 and 96-97 IEPs clearly include baseline data. The goals and objectives in the 1997-98 IEP are clearly measurable.</p>	<p>5/27/92: 2 goals, 10 objs., Ex.: "will improve extension muscle tone 8 seconds" 10/7/92: 1 goal, 6 objs., Ex: "will isolate eye from head movements" 8/27/93: 8 goals and objs. 3/11/94: 4 goals and objs. 9/19/94: 8 goals and objs. 11/14/94: 8 goals and very specific meas'able objectives 11/14/95: 8 goals and very specific meas'able objectives 11/26/96: : 8 goals and very specific meas'able objectives 2/5/98: : 8 goals and very specific meas'able objectives</p> <p>Files include numerous behavioral charts including success rate measurements, tally sheets, observation forms, point sheets, schedules with notes, time-out logs and medication charts.</p>
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Discussion: The law is clear in that IEPs must contain a statement of annual goals, including short-term instructional objectives, with appropriate objective criteria. The law does not include specific language relative to baseline data.

Extensive goals and objectives were written for [student] and, even where the District admits they could have been more specific, they were written to include objective criteria such as, "8 seconds" and "will isolate head from eye movements".

Failure to determine evaluation schedules	Target dates were not required in IEPs in 1992-93. In general, the target date was the date of the next annual review. Beginning 1996-97, target dates were entered.	1992-1996 yearly only 11/26/96 schedule 2/5/98 schedule
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Discussion: The law is clear in that it requires evaluation procedures to be scheduled at least on an annual basis. The evaluation procedures and schedules need not be included as a separate item in the IEP, but they must be presented in a recognizable form and be clearly linked to the short term instructional objectives. In many instances, these components are incorporated directly into the objective.

The District did write yearly goals and objectives and evaluated them on a yearly basis, the date often being presumed to be the same as the next annual review.

Failure to consider Extended School Year ("ESY")	<u>92-93</u> No records <u>93-94</u> Documentation on 10/15/93 IEP <u>94-95</u> Documentation on 11/21/94 <u>95-96</u> Parents declined ESY services for the summer of 1996, choosing instead to send [student] to science camp <u>96-97</u> Extensive Documentation <u>97-98</u> Documentation on 5/19/98	5/18/94 ESY considered 7/13/94 ESY considered 11/14/94 ESY considered 11/14/95 ESY considered 3/97 ESY considered 4/97 ESY considered 5/19/98 ESY considered
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Discussion: The amount of services to be provided and the anticipated duration of services must be stated in the IEP. This would include any need for extended school year ("ESY") services.

Extended school year services were considered in the last five school years.

Failure to develop behavior goals or behavior management plans	<u>92-93</u> Behavior goals and objectives on pages 3 and 4 of 10/7/92 IEP <u>93-94</u> Behavior goals and objectives on page 3 of the 8/27/93 IEP <u>94-95</u> Behavior management in goals A,B,D, and F of 11/14/94 IEP <u>95-96</u> Behavior management plan developed Fall of 95 <u>96-97</u> Plan developed <u>97-98</u> Plan developed 5/10/97	5/27/92 1 behavioral goal 10/7/92 add 1 behav. Goal 8/27/93 3 behavioral goals 3/11/94 7 behavioral goals 9/19/94 7 behavioral goals 11/14/94 5 behavioral goals 11/14/95 5 behavioral goals Behavior plan on file 11/26/96 4 behavioral goals Behavior plan on file
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Discussion: The law has not, until recently, spoken to the need for behavior goals or behavior plans specifically, but rather speaks to the need for a direct relationship between the present levels of performance and the other components of the IEP.

Clearly, behavior goals and objectives have been and integral part of [student]'s IEPs from the beginning.

Failure to have someone qualified to provide or supervise the provision of special education at the IEP meeting	IEP meetings were always attended by persons qualified to provide and supervise the provision of special education. This is clearly evidenced by the signature pages for each annual or triennial review. A traumatic brain injury specialist, C.C.C., participated in the 1993, 1994 and 1995 staffings, but not in 1996 and 1997. It was believed that sufficient expertise existed among the other participants, and there was no contemporaneous objection or request by the Complainants. Further, they did not indicate any substantive problems with the IEPs resulting from the absence of Ms. C.	A random review of 15 of the 48 IEPs and/or addendum indicated the following number of professional persons at the meeting, many of whom (at each meeting) were qualified to supervise the provision of special education: 8,9,8,9,6,5,6,5,6,7,5,10,9,8.
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Discussion: The law requires the following participants at an IEP meeting: a representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of special education, the child's teacher, and other individuals at the discretion of the parent or agency. For the child who has been evaluated for the first time, participants

must include a member of the evaluation team and a representative of the public agency who is knowledgeable about the evaluation procedures and is familiar with the results of the evaluation. "Qualified" generally means someone who holds state certification or licensure relative to his or her position.

Clearly, IEP meetings were held every 6-8 weeks with an average of 7 "qualified" persons in attendance from the District or brought in as consultants.

<p>Determination of placement prior to development of IEP</p>	<p>We are unable to determine what this point refers to in this and all subsequent years. Neither the Complainant nor the notice of complaint provides sufficient specificity to respond. We note, however, that the documentation supports the conclusion that all programming decisions were made at appropriately convened staffing meetings.</p>	<p>A review of IEPs indicated many placement options were considered at each. Also, the total unduplicated hours of special education and placement always changed, based on new information. The following succession was noted: 6-7 hrs. spec. ed; 16½ hrs. spec.ed; 27½ - 30 hrs. spec. ed., 3-5 hrs. homebound and day treatment; 16 ½ hrs. intensive program; 15-20 hrs intensive program; 15-20 hrs intensive programming with full time aide; 10 hrs. day treatment; 15 hrs. learning center; 20 hrs. intensive programming.</p> <p>The 2/5/98 triennial review was held while [student] was receiving services at Odyssey, the day treatment program. 18 of the 19 objectives written refer to being "in a classroom"; one of the 19 refers to [student] getting "to level 4 on the Odyssey level system". Characteristics of service do not mention place, but rather list: "spec. ed. teacher/para, psych, S.W., O.T., nurse. Placement options were the District Intensive Program and Odyssey. Odyssey was selected, with the explanation that the "SIED intensive alone is not sufficient to meet need."</p>
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Discussion: Placement decisions must be made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. The placement decision must be made in conformity with the IEP team and must be in the least restrictive environment (“LRE”).

Documentation shows that placement decisions were changed often, sometimes every 6 weeks, after reconvening the IEP team to discuss progress and needs. There is no documentation of the District’s making placement decisions prior to the IEP teams’ meeting. The documentation for 2/5/98, although it refers to an Odyssey level system, clearly shows options were considered and decisions made by the team.

7. The District, in its response to this complaint states the following conclusion: “The documentation and other history establish that [student] has received a free appropriate public education in the least restrictive environment in accordance with all of his rights throughout his schooling. There may be isolated instances of technical flaws in the District’s documentation, but there is absolutely no indication that either [student]’s rights or his parents’ rights have been adversely affected. On the contrary, the record clearly evidences a very significant effort by District personnel, well beyond the minimum standards of law to evaluate and meet [student]’s educational needs. By contrast, much of the Complaint is demonstrably erroneous and groundless, and none of the issues warrant any relief to the Complainants or sanctions against the School District.”
8. The complainant, after having received the District’s response, expressed ongoing problems with placement decisions not being made with qualified personnel nor by the IEP team. She states, “...at the last IEP meeting we specifically brought up the issue of placement but were told pointedly by [District counsel] that placement would not be discussed in that meeting since the District had already decided the issue.” In addition, “The District has the positive requirement to provide someone at the IEP that has some expertise in head injuries.”

III. CONCLUSIONS

The District did not violate the provisions of the Act, by failing to provide [student] with a free appropriate public education (“FAPE”) beginning with the 1992-93 school year to present. The District did not fail to evaluate goals and objectives according the objective criteria and evaluation procedures and schedules listed, fail to consider the need for extended school year services (“ESY”), fail to develop behavior goals and objectives/ behavior management plans, make programming decisions prior to the completion of an IEP, and did not fail to have the required participants at IEP meetings, specifically, someone qualified to provide, or supervise the provisions of special education.

Rather, the District is meeting and even exceeding that which is required by law. Normally IEPs are reviewed once a year. In this case it was every 6-8 weeks, due to the concerns about [student]’s progress. When the District admits its concern about a student’s progress, that is not an indication of lack of FAPE, but rather an indication of the need to re-group and discuss reasons and alternatives. That certainly appears to be one of the reasons for so many IEP reviews. Extensive behavioral objectives were written for [student], however, it cannot be expected that these be evaluated formally at every IEP review when such reviews are every 6-8 weeks. Clearly [student]’s progress has been reviewed, often. Programming decisions were made by the team and were often changed due to his needs changing. The District does not

have an obligation to re-open all IEP decisions every 6-8 weeks; so a statement that this had already been decided [at a previous meeting] is not out of line. In addition, the assumption that the District is required to provide someone with expertise in head injuries, is false. The District must gather information relative to [student]'s particular condition and must include in its meetings someone who can provide or supervise special education; but it need not have a particular "head-injury programming specialist" at every IEP meeting.

If the complainants disagree with the decision of the IEP team relative to placement, they can exercise their right to appeal that decision.

[Student] appears to be a student with very significant needs. It is recommended that the complainants and District personnel work together, rather than as adversaries, in finding ways to meet those needs. Both may want to consider the use of mediation to resolve further conflicts.

Dated this 31st day of August, 1998

Carol Amon, Federal Complaints Investigator