

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

Federal Complaint 2001:530

El Paso County SD 11

Decision

INTRODUCTION

This Complaint letter was dated October 10, 2001, and received by the Federal Complaints Officer on October 15, 2001. The school's response was dated November 5, 2001, and received by the Federal Complaints Officer, by fax, on the same date, and by FedEx on November 6, 2001. The complainant's response to the school's response to the Complaint was dated November 19, 2001, and received by the Federal Complaints Officer on the same date. The Federal Complaints Officer then closed the record.

On November 28, 2001, the complainant made an additional submission by fax, the original of which was received by regular mail on November 30, 2001. The school subsequently made an additional submission in response, by fax, on November 30, 2001, the original of which was received by regular mail on December 3, 2001. These submissions were made after the record was closed and without the permission of the Federal Complaints Officer. Therefore, these submissions were inappropriate. However, the Federal Complaints Officer finds that neither party has been prejudiced by these submissions and includes them as a part of the record in this Complaint.

COMPLAINANT'S ALLEGATIONS

The complainant alleged the following violations:

- 34 CFR 300.342(b)(3)(ii) of the Individuals with Disabilities in Education Act (IDEA) regulations (cited in the Complaint as 34 CFR 300.342(ii)), which references – "The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP." Id.

- 34 CFR 300.350(a)(1) of the IDEA regulations (cited in the Complaint as 34 CFR 350(1)), which requires that a school – “Provide special education and related services to a child with a disability in accordance with the child’s IEP...” Id.
- 34 CFR 300.13 of the IDEA regulations, which defines free appropriate public education (FAPE) to include special education and related services that are “...provided in conformity with an individualized education program (IEP) that meets the requirements of (sections) 300.340-300.350.” Id. at 34 CFR 300.13(d). Parenthetical added.

SCHOOL’S RESPONSE

The school denied all allegations.

FINDINGS AND DISCUSSION

A. COMPLAINANT’S ARGUMENT

In support of its allegations, the complainant cites the following language from the student’s February 26, 1999 IEP:

“Given the opportuni(ty) (sic) (student) will participate in all curriculums.” Annual goal number two. Parentheticals added.

“With adaptations (student) will sustain his attention at the computer for 10-15 minutes (daily).” Short- term instructional objective b, under annual goal number two. Parentheticals added.

“Classroom toys and computer adapted so that they are accessible to (student).” Educational needs. Parenthetical added.

“Consultation for augmentative communication” – Special Education and Related Services Plan. The February 26, 1999 IEP states that this service was to be provided for ninety (90) minutes per quarter. The complainant also claims that augmentative communication consultation is an assistive technology service and cites portions of 34 CFR 300.6 as support for this claim.

“Consultation and support for motor activities and for accessing the environment ... (and) 1 to 1 support for positioning.” Special Education and Related Services Plan. Parenthetical added.

As the Federal Complaints Officer understands the complainant’s argument, the student was not able, during his kindergarten year, to “participate in all curriculums”, because: IEP required computer adaptations (including positioning) were not made in order to provide the student with accessibility to the computer, so that he could appropriately use the computer for the 10-15 minutes per day specified as a short- term instructional objective in his IEP; and, because appropriate positioning for the student was not otherwise provided, due to the school’s failure to appropriately provide “consultation for augmentative communication” and “consultation and support for motor activities and for accessing the environment; and, due to the school’s failure to provide “1 to 1 support for positioning.” The complainant makes factual allegations in support of its argument at pages two (2) and three (3) of its Complaint letter:

“Although the augmentative communication service was clearly stated in the 2/26/99 IEP, and those services are explicitly defined in 34 C.F.R. § 300.6 (1999), (student) did not receive this service until 3/7/00, when he was first evaluated for computer adaptations. This was more than a year after the IEP was written. Initial adaptations did little for (student’s) access to the computer as he was still positioned on the floor and the computer was on a table. Furthermore, the computer switch suggested by the District augmentative communication specialist on 3/7/00 was obviously too tall for (student), requiring him to hold his head at an angle preventing view of the monitor. (Student) did not receive a functional evaluation in his customary environment as required by 34 C.F.R. § 300.6(1999) until his mother accessed an independent AT evaluation on 4/17/00 (Exhibit B). Despite the goals and services written in the 2/26/99 IEP, (student) had no access to the computer during his entire Kindergarten year. It should be noted that due to (student’s) disability, which does not allow for use of his hands, feet or mouth to hold a writing utensil, the computer is his only way of expressing what he is learning on paper.” Id. at page two (2) of complainant’s Complaint letter. Student’s name deleted. (The contention that the student cannot write with a mouth utensil is disputed by the school. See school’s response at page three (3), footnote (1). The complainant subsequently modified this contention – “The use of a mouth tool is awkward and tedious.” Complainant’s response to the school’s response at page six (6).)

The complainant claims that the student’s mother “verbally requested reevaluation of his positioning almost continually upon his entering Kindergarten”. Page two (2) of the complainant’s Complaint letter. The complainant alleges that the school did not reevaluate the student as requested by the mother, and that this violated 34 CFR 300.536, which states: “Each public agency shall ensure - (a) That the IEP of each child with a disability is reviewed in accordance with §§ 300.340-350; and (b) That a reevaluation of each child, in accordance with §§ 300.532-300.535, is conducted if conditions warrant a reevaluation, or if the child’s parent or teacher requests a reevaluation, but at least once every three years.” Id.

The complainant further alleged:

“On March 7, 2000, (student’s mother) addressed his teacher and principal in-person and with a letter outlining her concerns (Exhibit C). At no time throughout (student’s) Kindergarten year, did the Occupational Therapist (OT) or the Physical Therapist (PT) complete written positioning evaluations, nor did the school provide a positioning device to raise (student) to a level where he could adequately interact with his peers and safely view his classroom. Again, not until the mother sought an independent evaluation on 4/17/00 (Exhibit B) were adequate positioning solutions found for (student). The District did not provide those recommended positioning devices until September 2000, when (student) entered first grade. (Student) spent his Kindergarten year unable to visually interact with his classmates or view classroom activities because he did not receive timely OT/PT evaluations and the District did not implement independent OT/PT recommendations until he started first grade.” Complainant’s Complaint letter at page three (3). Personally identifiable information deleted.

As a result of these alleged violations, the complainant requests the following remedies: “ 1. 58.5 hours of one-to-one computer training with a skilled tutor familiar with (student’s) educational program and adaptive equipment. 2. 37.9 hours of direct therapeutic physical therapy, which includes range of motion activities. 3. Purchase of a computer and adaptive software (Tracker 2000) for (student’s) permanent home ownership.” Complainant’s Complaint letter at page four (4). Student’s name deleted.

B. SCHOOL'S ARGUMENT IN RESPONSE

The school begins its argument in response by claiming that "consultation for augmentative communication" of ninety (90) minutes per quarter was provided. "The District maintains that it provided (student) with consultation for augmentative communication for 90 minutes a quarter beginning on February 26, 1999. The District's assertion is confirmed by its augmentative communication specialist ..., who is willing to sign an affidavit to that effect if necessary." School's response at page two (2). The school indicates that this consultation included: "observations of the student on-site; determining the student's ongoing needs regarding technology; in person and phone communication with school staff; in person and phone communication with other District staff; in person and phone communication with vendors; and research and experimentation with a variety of assistive devices." Id. at school's response pages two (2) and three (3). Student's name deleted. The school disagrees with the complainant's claim that "augmentative communication consultation" is an assistive technology service as defined by 34 CFR 300.6. Id. at page three (3).

The school further responds, as excerpted by the Federal Complaints Officer, to the IEP violations alleged by the complainant, and the factual allegations in support of those violations, as follows:

"This complaint invents greater entitlement and access to a computer than is contemplated in the 2/26/99 IEP by linking all references to computers and augmentative communication together. The first of those is the annual goal that, '(Student) will be given the opportunity to participate in all curriculums', and one of its objectives, 'With adaptations (student) will sustain his attention at the computer for 10-15 minutes daily.' The reference to a computer in this context does not confer entitlement to a specific piece of equipment. It does establish a working goal and objective, which may or may not be met, of being able to focus a kindergartner's attention on a computer for 10-15 minutes per day, a reasonable outcome for any child turning five just 44 days earlier. Next, the complaint references the statement in the EDUCATIONAL NEEDS section of the 2/26/99 IEP stating, 'Classroom toys and computer adapted so they are accessible to (student).' Entitlement to a particular toy or computer is not conferred by such a statement in this section of the IEP. What is conferred is that to the extent those items are part of the educational program, they be adapted for (student). The final reference is to, 'Consultation for augmentative communication,' in the SPECIAL EDUCATION AND RELATED SERVICE PLAN. This language confers entitlement to specific services, however invisible they may be to all but those engaged in a two party conversation, not to any particular hardware or software. This is not to say that the District does not believe that use of technology is, and will be, of benefit to (student) throughout his life. To the contrary, the District has made, and will continue to make, efforts to help ensure that (student) is able to effectively use technology in his every day life." School's response at page two (2). In addition, the school included with its response a document it labeled an IEP planning document, with cover letter, identified as school's Document A, as evidence that the student met the student's February 26, 1999 IEP short-term instructional objective of sustaining "his attention at the computer for 10-15 minutes daily." See school's response at page three (3), citing Document A.

The school argues, as summarized by the Federal Complaints Officer, that the student received educational benefit from his special education program and achieved his IEP goals and objectives. See pages three (3), four (4), and five (5) of the school's response. The school details in several different ways determinations made by school staff that the student's goals and objectives were met during his kindergarten and 1st grade years. Thus, the school states – "Since (student) successfully achieved the annual goals and short-term instructional objectives on his kindergarten IEP and continued to achieve his annual goals and short-term instructional objectives on his first grade IEP, then his special education, related services, supplemental aids and services conferred educational benefit to him." School's response at page five (5). Student's name deleted. The school therefore argues, as summarized by the Federal Complaints Officer, that this student was not denied FAPE, and therefore no compensatory education is warranted. In any case, the school argues, the requests by the complainant for computer training and physical therapy were not services required by the student's IEP, nor did the student's IEP team determine that the student needed a computer in his home in order to receive FAPE. Moreover, if the IEP team had determined that home computer use was appropriate, the student would have been entitled to a computer for home use, but would not have been entitled to ownership of the computer. The school cites the answer to Question 36, Appendix A, of the IDEA regulations, as support for the school's claim that home ownership of the computer would not have been appropriate. See pages four (4), five (5), six (6), and seven (7) of the school's response.

C. FEDERAL COMPLAINTS OFFICER'S DETERMINATION

The Federal Complaints Officer is limiting his Decision to the student's kindergarten year (1999-2000). Despite the typographical error in the complainant's Complaint letter, the Federal Complaints Officer finds from the rest of the record in this Complaint that the complainant intended its Complaint to cover the entirety of the student's kindergarten year (1999-2000). The Federal Complaints Officer also finds that the complainant has not made out a sufficient Complaint of allegations for any current violations, or any violations that allegedly may have occurred during the student's first grade year. Nor, therefore, are any arguments or information supplied by the school for these time periods relevant to the resolution of allegations of violations for the student's kindergarten year, at least in so far as they are offered to support the school's view that no violations occurred during the kindergarten year. The complainant's allegations of violations during the student's kindergarten year are within the regulatory statute of limitations period, since the complainant is requesting compensatory education. See 34 CFR 300.662(c).

The Federal Complaints Officer finds that the school violated 34 CFR 300.342(b)(3)(ii) , 34 CFR 300.350(a)(1), 34 CFR 300.536, and 34 CFR 300.6(a), with regard to this student for his kindergarten year (1999-2000), and that these violations were sufficient to deny this student FAPE, including as FAPE is defined by 34 CFR 300.13.

This Complaint put the Federal Complaints Officer in the difficult position of having to make substantial judgments about the quality of IEP services that the school was able to provide , in order to determine whether FAPE requirements for this student had been met. Thus, it was not a matter of whether IEP services had been provided at all, but whether these services had been provided in a way sufficient to meet IEP requirements for FAPE. For this student's kindergarten year, the Federal Complaints Officer finds that this was not the case.

The Federal Complaints Officer does not disagree with the school that “consultation for augmentative communication” can take many forms. The Federal Complaints Officer also does not challenge the school’s claim that its augmentative communication specialist provided ninety (90) minutes per quarter of services – the amount of time specified by the student’s February 26, 1999 IEP. Nor does the Federal Complaints Officer find that this student did not make some progress at “sustain(ing) his attention at the computer for 10-15 minutes (daily)”, or that the student had some degree of accessibility to “classroom toys and computer”, as designated by his February 26, 1999 IEP. Also, the Federal Complaints Officer does not find that this student did not receive some “consultation and support for motor activities and for accessing the environment...” and some “1 to 1 support for positioning”, as designated by his February 26, 1999 IEP. Thus, to some extent, this student was able to “participate in all curriculums”, as designated by his February 26, 1999 IEP, and the student did receive some educational benefit from the school during his kindergarten year. However, the Federal Complaints Officer also finds that the educational benefit received was not sufficient to constitute FAPE. To the best of the Federal Complaints Officer’s knowledge, there can be no such thing as a partial FAPE, or a partial failure to provide a FAPE.

The Federal Complaints Officer bases his finding that the school failed to provide FAPE to this student during his kindergarten year (1999-2000), on the finding that adaptations, positioning, and augmentative communication devices for this student during his kindergarten year, were inadequate to allow the student to benefit from the other services that the school provided, sufficient to constitute FAPE. Nowhere in the school’s response to this Complaint does the school dispute the complainant’s claim that positioning was eventually determined to have been inadequate for this student during his kindergarten year (1999-2000) – a conclusion supported by the Independent Educational Evaluation (IEE) of April 17, 2000, obtained by the student’s parent. Nowhere in the school’s response to this Complaint does the school otherwise dispute this IEE, which made recommendations for this student which, as the Federal Complaints Officer interprets them, indicated substantial changes from the adaptations, positioning practices, and augmentative communication devices that had been provided by the school. For a student as severely physically disabled as this student, the Federal Complaints Officer finds that such provisions are critical. Whether or not the parent did everything she could have done, or should have done, to request an evaluation for her son from the school, during her son’s kindergarten year (1999-2000), the school was under an independent obligation under 34 CFR 300.536 to conduct an evaluation if “conditions warrant(ed)” – which, in this student’s case, should have included the functional evaluation in 34 CFR 300.6(a). *Id.* In light of the results of the IEE obtained by the parent on April 17, 2000, undisputed by the school, the Federal Complaints Officer finds the IEP services previously being provided to this student were not sufficient to meet the requirements of FAPE.

REMEDY

According to the understanding of the Federal Complaints Officer, this student has a diagnosis of arthrogryposis, which the complainant described in the first page of its Complaint letter as “a condition that results in most of his joints being fused, he is not ambulatory, and cannot use his hands.” *Id.* The Federal Complaints Officer has no reason to doubt that this student has a great need for special education services, notwithstanding the information submitted by the school that this student is now being home-schooled. Moreover, notwithstanding the complainant’s

specific allegation that appropriate computer software was still needed for this student at the time of the filing of this Complaint, and at the time of the complainant's response to the school's response to the Complaint, this Complaint otherwise contained information specifically directed entirely at the student's kindergarten year, and September of his 1st grade year. The following statements by the school in its response, describing the student's 1st grade year, were unchallenged by the complainant:

"Document B, a conference note dated 12/14/00 signed by both (student) and his mother states, 'Student is making excellent progress on his goals & objectives. He has met his academic objectives. *(Student) is using the computer proficiently.*' (emphasis added) Document C, another conference note dated 2/1/01, signed by (student's) mother, with an indication that (student) was also in attendance, states, '*(Student) has met his goals & objectives. We will move (student) to List 3 & 4 of Dolch & continue to monitor progress. Review will be done in April after the classroom QRI is given.*' (emphasis added) These conference notes serve as interim reviews of (student's) performance and indicate: **1) (Student) continues to make progress on his goals and objectives; 2) (Student) continues to use his computer proficiently, and; 3) (Student's) teachers are anticipating his participation in the QRI, a test administered district wide to measure reading achievement of all first graders.**

...

"(Student's) IEP report card dated 04/06/01, District's Document E, documents progress on the two short-term instructional objectives supporting annual goal 6 (*(Student) will demonstrate independent use of assistive technology*). This IEP report card, sent to (parent), contains a progress notation for each of the six annual goals and the supporting short-term instructional objectives. For annual goal six (*(Student) will demonstrate independent use of assistive technology*) **the short-term instructional objectives are rated either 4 (Exceeding rate of projected progress), or (Other; Objective met).** ..." School's response at page four (4). Italics and bold in original. Personally identifiable information deleted.

The school's own characterization of the student's success during his first grade year, and the fact that this characterization is undisputed by the complainant, in addition to supporting the conclusion that this student received FAPE during his first grade year, is supportive of the conclusion that the IEE obtained in the spring of the student's kindergarten year was instrumental in directing appropriate educational changes for this student that were implemented during his first grade year.

The complainant asks for 58.5 hours of one-to-one computer training, 37.9 hours of direct therapeutic physical therapy, and the purchase of a computer and adaptive software (Tracker 2000), for the student's permanent home ownership. The Federal Complaints Officer fails to see how the provision of extra hours of computer training and physical therapy are going to provide educational compensation for this student, now of second grade age, for educational loss he suffered while in kindergarten. Whatever this student's current needs are for computer training and physical therapy should be met through a current IEP, for so long as he is enrolled as a public school student. If, as an enrolled public school student, the parent thinks that these needs are not being adequately met, she has a right to raise her concerns in the IEP process, or due process hearing, in order to get computer training and physical therapy services in her son's IEP. This student either needs these services now or he doesn't. If he does need them now, as a student enrolled in public school, he needs them to the extent the IEP team deems appropriate. If he does not need them now, then it would be nonsensical to order any

compensatory education services that the student does not need. The computer services and physical therapy services are not services, as defined by the complainant, that were specifically provided for in the February 26, 1999 IEP. Even if they had been, to try to provide them one (1) to two (2) years after the fact, in addition to providing the student with what he currently needs to be receiving, would only constitute compensatory education if the student could sufficiently benefit from these additional services – a proposition which seems dubious, if the student is provided with an appropriate current IEP, as an enrolled public school student, which is being appropriately implemented. As for the request for home ownership of a computer and software, the Federal Complaints Officer agrees with the school – a student may be entitled to use of such equipment at home, if determined appropriate by his IEP team, but s/he is not entitled to ownership of the equipment. It is up to the student's current IEP team – if he is enrolled as a public school student – to determine whether home use of computer equipment is appropriate for this student. If the parent disagrees with this determination, she is entitled to a due process hearing to challenge this determination. The complainant's reliance on Federal Complaint Decision 2000:533 is misplaced. See ALJ Decision ED 2001-08.

Compensatory education is not meant to be a fine or damages used to punish a school for denying a student FAPE. It can only be awarded if it is determined that the student has suffered an educational loss, which can be compensated by more education. The exception is a circumstance where a parent has obtained educational services at their own expense and there is a determination that this expense was incurred because the school was not providing FAPE. The Federal Complaints Officer finds that there are no instructional educational services which could now be provided to this student, beyond those services to which the student should already be entitled to receive through a current IEP, which would remedy the educational loss this student experienced in kindergarten. However, the Federal Complaints Officer also finds that if the parent incurred the expense for the IEE – meaning it was not paid for with public or private insurance or any other third party payer to which the parent owes, or owed, no debt for such payment – the parent is entitled to be reimbursed by the school for the expense of that evaluation, upon providing proper proof to the school. The Federal Complaints Officer has found that the school violated 34 CFR 300.536 and 34 CFR 300.6(a), and the IEE is an educational service for which the parent is normally entitled to be reimbursed according to the provisions of 34 CFR 300.502, absent a showing by the school to a hearing officer that its evaluation was appropriate. Having found that the IEE was an appropriate evaluation, which, if it had been timely purchased by the school, or if the school had timely conducted its own appropriate evaluation, could have avoided the consequence of this student's not receiving FAPE during his kindergarten year, the Federal Complaints Officer finds that the IEE is an educational service which the parent should not have had to purchase in order to insure her son's receipt of FAPE, and therefore she is entitled to reimbursement for the purchase of this service, assuming she incurred the expense for its purchase.

The parent shall have thirty (30) days from the date of the complainant's receipt of this Decision to present the school with a request for reimbursement for the IEE, with sufficient proof to meet the requirement to show she incurred the expense for the IEE. If the parent does not present the school with such a request, with sufficient proof, within this time period, the school shall be under no further obligation, under this Decision, to reimburse the parent for the IEE. The school shall have thirty (30) days from receipt of such request and presentation of proof to make the reimbursement, unless another time period is agreed to by the parent.

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 _____, 2001.

Charles M. Masner, Esq.
Federal Complaints Officer