

FEDERAL COMPLAINT NUMBER 98.513

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

- A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on April 6, 1998.
- B. The complaint was filed by Mr. [parent] and Mrs. [parent] on behalf of their daughter [student], against the San Juan Board of Cooperative Services (the BOCS), Ms. Marietta Sears, Director of Special Education and Excelsior Youth Services (Excelsior), Mr. Rus DeWitt, Principal.
- C. The timeline within which to investigate and resolve this complaint expired on June 5, 1998, but was extended by six weeks, upon approval of the complainant, to allow for additional investigation and analysis, the involvement of a consultant with specific expertise in out-of-district placements, and the involvement of a complaints investigational assistant, who is learning the process.
- D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education 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 BOCS as recipients of federal funds under the Act. It is undisputed that the BOCS is a program participant and receives federal funds for the purpose of providing a free appropriate public education (FAPE) to eligible students with disabilities under the Act. The complaint was also brought against Excelsior, a facility which is approved by the State Board of Education to run an on-grounds school and receive public education funds. It is also undisputed that Excelsior, as an approved facility, is held to the same standards as a school district in that they are required to maintain and follow policies and procedures which meet all federal and state regulations.
- F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegation contained in the complaint pertaining to a violation of federal law and rules in a federally funded program administered by CDE.
- G. [Student] is an eighteen year old student with disabilities, whose parents reside within San Juan BOCS, and is eligible for special education services. This student was placed by the Department of Social Services into Excelsior Youth Center on 10/3/95. She left the EYC in April, 1998, and her whereabouts are currently unknown.
- 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, interagency agreements and federal agency opinion letters.

I. ISSUES

A. STATEMENT OF THE ISSUE:

Whether or not the BOCS and/or Excelsior violated the provisions of the Act by:

- failing to conduct IEP meetings on 3/28/96 and 3/10/97, to which the parents are afforded the opportunity to participate, for the purpose of IEP development, but rather unilaterally writing the IEP,
- failing to develop IEPs which included the necessary transition goals and services, and
- failing to provide transition services from 3/28/96 until present.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (19), and (20)

20 U.S.C. 1412(2)(B), (4), and (6)

20 U.S.C. 1414, as amended by 20 U.S.C. 602, 612, and 614

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, and 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Individuals with Disabilities Education Act

C. FINDINGS

1. At all times relevant to the complaint, the BOCS was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the BOCS, in part, based on the assurances contained within the application.
3. One of the assurances made by the BOCS is that in accordance with the Act, it provide a free appropriate public education to each student with a disability according to the individualized education program (IEP).
4. Under current State Rules (Rules for the Administration of the Exceptional Children's Educational Act) 3.02(6)(c), Excelsior, as an approved facility, is required to maintain a comprehensive plan which includes, "policies and procedures to be followed to meet all appropriate federal and state statutes and regulations."
5. One of the assurances made by Excelsior within their comprehensive plan, in accordance with the Act, is to provide a free appropriate public education to each student with a disability placed there, according to his/her IEP.
6. At all times relevant to the complaint, Excelsior was receiving Excess Cost and PPOR funding, for their students with IEPs, from the districts of residence for those students. [Student] was one of those students, whose District of Residence was within the San Juan BOCS.

7. [Student] is a student with disabilities as identified on an IEP dated 3/28/96 and a subsequent IEP dated 3/10/97.
8. The first issue regarding **the failure to conduct IEP meetings on 3/28/96 and 3/10/97, to which the parents are afforded the opportunity to participate, for the purpose of IEP development, but rather unilaterally writing the IEP**, can be addressed in examining the following questions:
 - a. Were the IEP meetings of 3/28/96 and 3/10/97 conducted?

Documentation shows that an IEP meeting was held on 3/25/96. However, there is an issue of the actual date of the '97 IEP (3/6/97 or 3/10/97). Complainants allege that the IEP was already filed in with the wrong date (3/10/97) at the time of the meeting that occurred on 3/6/97. The BOCS in its response to this complaint, stated there was no record of this IEP occurring on 3/10/97; however their records show that it actually occurred on 3/6/97. The response from Excelsior states that the meeting occurred on 3/10/97 with no mention of a 3/6/97 date.

It is apparent that these two IEP meetings (3/28/96 and 3/97) were held. The actual date of the second meeting is not clear.

- b. Was the correct notification provided to the parents and the transition-aged student?

3/28/96 IEP:

Documentation shows that the permission for assessment/notification of rights was signed by the Department of Social Services Case Worker. It also shows that a memo "To Whom It May Concern" was sent notifying them of this IEP meeting.

The law is clear in that, if the parental rights have not been terminated, it is inappropriate for the case worker to sign where a parent signature is required, with regard to educational decisions. In fact, even if parental rights have been terminated it would still be inappropriate for a case worker to sign for a parent because, by law, that child would be entitled to an educational surrogate parent.

There is no documentation of prior written notice having been provided to the parents and the student, specifically; however, the parents' signatures of attendance are of record on the IEP dated 3/28/96, therefore a possible lack of notification is not of issue.

3/10/97 or 3/6/97 IEP:

Documentation shows the presence of notification letters, but they do not indicate to whom these letters were directed. Rather, they stated, "To whom it may concern".

The letter of notification does not contain all the elements of parent notification as required by the Act. Elements that were not evidenced were: scheduling the meeting at a mutually agreed on time and place, who will be in attendance at the meeting, or their right to bring other participants to the meeting. Given this student was 16 or above, there also was no evidence that the student was

invited separately from the parents, and parental notification did not include notice that the meeting will focus on transition.

The IEP does not contain a signature page which would give evidence of attendance at the meeting. However, the complainants state that this meeting was held on 3/6/97 at their request and that the Director of Special Education from [student]'s district of residence (Marietta Sears) was also in attendance at the meeting, as well as Rus DeWitt, the Director of Special Education at Excelsior, [student]'s primary therapist, and [student]'s Case Worker from the D.O.S.S. Therefore, a possible lack of notification is not relative to this issue.

Although prior written notice may not have been given, it is obvious that the parent(s) were in attendance.

- c. Were the required participants at the IEP meetings?

Documentation, as stated above, does not indicate that all participants, as required by the Act, were at the meetings held on 3/28/96 and 3/6/97 (or 3/10/97). There was no evidence that the student's Special Education teacher was present at either meeting. There is also no evidence that any representative of any agency that is likely to be responsible for providing or paying for transition services was present.

Although the meeting may not have included all the required participants, the meeting did occur.

- d. Was the 3/6/97 (or 3/10/97) IEP prewritten?

Complainants allege that the IEP was "totally filled out with the wrong meeting date at the top of the page," "no strengths or concerns listed even though the IEP had been prepared prior to the meeting," and that "Excelsior had already written goals and objectives that were neither appropriate nor measurable."

Excelsior's response states that "during the IEP meetings, all parties are provided a draft copy of information at the beginning of each meeting. This information is provided to offer visual as well as auditory information for all parties at the meeting. Goals are never written prior to this meeting and all information is subject to revision, removal or addition."

The BOCS's response was that "the meeting [of 3/6/97] was quite lengthy and Dr. DeWitt suggested that the goals and objectives should be developed later in communication with the parents."

Documentation shows that a draft set of goals and objectives was sent to Marietta Sears at the BOCS on 3/11/97, who subsequently sent them to the complainants for their input. Records indicate the complainants did make several changes to these goals and objectives and they were faxed back to Rus DeWitt on 3/31/97.

9. The second issue of **failing to develop IEPs which included the necessary transition goals and services** can be addressed by looking at all of the elements of transition as required by the Act.

- a. Did each of the IEPs contain a coordinated set of activities designed with an outcome oriented process which promotes movement from school to post school activities?

The complainants state that no transition was addressed on the '96 IEP, that the '96 IEP failed to list any transition skill needs, and that [student] needed appropriate supports in the transition stage.

Excelsior's response to this issue is that "in the IEP of 3/28/96 you can see goal 3 addresses some transition needs. During the spring of 1996, [student] participated in the cosmetology program. During the summer of 1996 she worked to develop job skills in the Summer JTPA work program. In the fall of 1996 [student] enrolled in and completed the class called 'Travel and Tourism as a Career.'"

The BOCS's response to this issue, but only in regard to the '97 IEP, states that "the parents and I [M. Sears] consulted on submitting appropriate transition goals to be included in the IEP of March 6, 1997."

- b. Were transition goals written based on [student]'s needs, preferences, and interests?

There is no indication of [student]'s preferences or interests other than in the vocational area, i.e. cosmetology.

The 3/28/96 IEP addresses career options and education, but does not address independent daily living or transition into the community.

The 3/6/97 IEP does address career options, public transportation, education, leisure activities, and transition into the community.

- c. Were transition activities and services identified with each agency's responsibilities and linkages?

Neither the 3/28/96 IEP nor the 3/6/97 IEP listed any specific transition activities or services. Rather, the only service listed was "Excelsior Teacher 32.5 hours per week". There was no job coaching, community service, or any other definitive transition activity listed relative to instruction to be given, community experiences, development of employment or acquisition of daily living skills. Specific to the goals, for example, there is no indication as to how [student] would be taught to write a resume, secure a job, use public transportation, complete applications, develop social skills, develop job skills, etc.

- d. Was there any indication of progress made toward those transition goals and objectives that were written?

The 3/28/96 IEP contains no information relative to whether the goals in the previous IEP were achieved.

There is no indication on the 3/28/96 IEP or the 3/6/97 IEP as to actual dates objectives were achieved, whether they need to be carried over, modified or were no longer appropriate. There is no record of "teacher observation" when that was

the evaluation procedure. There is no record of “monthly progress reports” when that was the evaluation procedure. There are no records of “self-reports” as indicated by the evaluation procedure.

10. The third issue, **failing to provide transition services from 3/28/96 until present**, was addressed by the respondents with the following comments.

The complainants allege little or no transition services were provided.

Excelsior states [student] was afforded numerous experiences to prepare her for transition into the community. These services include:

- Participation in Korean cultural and language classes from May 1996-March 1997
- Participation in Excelsior’s cosmetology program in the spring of 1996
- Job training and employment with Excelsior’s cafeteria from June 1996-Aug. 1996
- Job training and employment with Excelsior’s maintenance department from Aug. 1996-Jan.1997
- Participation in Excelsior’s “Travel and Tourism as a Career” class in the fall of 1996
- Enrollment in Food Services Vocational Class from Jan. 1997-March 1997
- Home visits with Mr. and Mrs. [foster parents], a potential foster family
- Home visits with adoptive family
- Numerous off-campus activities with cottage and campus peers and staff including: camping trips, theater performances, sports related events, and community service activities
- “Since [student] was to be placed with a therapeutic foster family after completing the program at Excelsior, the main focus for her was to learn transitional skills which would enhance her placement with this family. These included participating in off campus passes and home visits with the foster family, and taking part in the family’s activities. Additionally, [student] benefited from numerous transitional services including class work and job training.”

The BOC’s response to the issue is as follows:

“The needs and services as indicated on the IEP of March 28, 1996 until the March 6, 1997 IEP appear to be in conflict between what is outlined as IEP team goals and objectives and what is carried out as a treatment plan within the therapeutic component of Excelsior.

“Until the March 6, 1997 IEP meeting I was not aware of the extent to which the treatment behavior plan conflicted with any transition services which [student] could have been receiving. These issues have been discussed at length with Dr. DeWitt.

“As I assessed the lack of delivery of transition services at the March 6, 1997 IEP meeting, it was apparent that the consequences from the therapeutic component of service conflicted with the student being able to be off campus to explore any job related possibilities in line with the IEP.

“For example: If the student demonstrated a particular behavior the consequence was being restricted to cottage with no off-campus privileges for any reason, including what was on the IEP for transition. The end result is

that the IEP could not be fully implemented (See Transition Life Skill Concerns, IEP March 6, 1997). Safeguards as indicated in the needs section of the March 6, 1997 IEP were not completely followed.

"I addressed transition issues with personnel at the RCCF while [student] was in Excelsior. Subsequent to the issues being addressed with Excelsior regarding transition services, [student] came back to the Durango area and never returned to school."

III. DISCUSSION

1. The law is clear in that "it is not permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the parents of (1) the child's need for special education and related services, and (2) what services the agency will provide to the child." However, the agency may come prepared with recommendations regarding goals and objectives and the kind of services to be provide as long as it is clear to the parents that they are only recommendations to be reviewed and discussed at the meeting. Agencies must make it clear to the parents that these are only recommendations for review and discussion. Parents must be given the opportunity to be active participants on all major decisions.
 - a. The 3/6/97 IEP developed at a meeting, at which the parents were in attendance, is identical (except for goals and objectives) to the draft prepared by Excelsior, dated 3/10/97.
 - b. Excelsior did send the draft goals and objectives to the BOCS, but not to the parents/complainants. Upon receiving the draft from the BOCS, the parents made suggested changes. In reviewing the circumstances that occurred for the '97 IEP in which it was decided that goals and objectives would be written outside of the IEP meeting, in effect the team has violated the rights of [student]. According to the IDEA Regulations, in order for an IEP to "be in effect" means that "the IEP (1) has been developed properly (i.e., at a meeting(s) involving all of the participants specified in the Act...); (2) is regarded by both the parents and agency as appropriate in terms of the child's needs, specified goals and objectives, and the services to be provided; and (3) will be implemented as written. Since the goals and objectives were not developed at a meeting involving all the participants, and therefore the IEP, as written at the meeting, could not be implemented, then the IEP was not complete nor developed properly.
2. The law is clear in that transition goals, objectives, services and activities must be delineated on each of [student]'s IEPs, along with each agency's responsibility. Although some goals and objectives were written, no transition services were delineated, and no goals or objectives were measured to determine if they were achieved.
3. The law is clear in that transition services must be provided in the areas of instruction, community experiences, employment, and daily living.

Although Excelsior lists numerous experiences provided to [student], these do not appear to be the result of individual educational planning, do not directly relate to goals and objectives, and results were not measured to determine achievement.

The BOCS suggests a conflict between treatment and education/transition services. Although it is not within the jurisdiction of the complaint process to address this relationship, the law does require that transition services be provided.

In looking at the nature of the existence of Excelsior Youth Center, in that they serve emotionally and behaviorally disturbed girls, there must be a coordinated effort between the education and implementation of the IEP and the treatment services. The IEP is a legal document and must be followed. If, however, due to behavior consequences the IEP could not be fully implemented, as pointed out by the BOCS, then the IEP team could have determined, at a subsequent meeting, more appropriate transition services with reachable goals.

The parents/complainants allege that [student] is now "out on the streets" with no preparation for adult living. Records indicate that, indeed, there is no documentation of any achievement of transition goals or skills.

III. CONCLUSION

The BOCS and Excelsior did not violate the provisions of the Act by failing to conduct IEP meetings to which the parents were afforded the opportunity to participate. They did conduct meetings which the parents attended. The degree of "opportunity to participate" is questionable, however, given the lack of any changes to the draft IEP.

The BOCS and Excelsior did violate the provisions of the Act by failing to develop IEPs which included the necessary transition goals, objectives, evaluation criteria and schedules and documentation of evaluation and attainment of those goals and objectives.

The BOCS and Excelsior did violate the provisions of the Act by failing to provide transition services from 3/28/96 until present. Although many "transition activities" were provided, they were not based on individualized goals and objectives, nor were they based on evaluation of past goals and objectives and indication of attainment. In addition, there may have been times when transition services were withheld as a part of the treatment plan relative to consequences.

IV. REMEDIAL ACTION

It appears that [student] is no longer residing at Excelsior or within the BOCS and that she has not yet earned a diploma. Should she choose to return, she must be afforded the opportunity for a free appropriate public education which includes transition goals, objectives and services. Upon her return, should that occur, the BOCS must immediately hold an IEP meeting which focuses on transition planning. The parents and [student] must be afforded the opportunity to be active participants in that planning.

On or before September 15, 1998, Excelsior must hold a meeting of staff to clarify the relationship between treatment and education, stating firmly that if educational services are not provided due to treatment consequences, they must be compensated for. Those services listed on IEPs must be provided.

In addition, Excelsior must clarify to staff the need for individual planning relative to transition services.

On or before September 30, 1998, Excelsior must communicate to this office that each of these was done and the manner in which they were done.

Dated this 17th day of July, 1998

Carol Amon, Federal Complaints Investigator

Jennifer Woods, Complaints Investigation Assistant