

**FEDERAL COMPLAINT NUMBER 98.527  
FINDINGS AND RECOMMENDATIONS**

I. PRELIMINARY MATTERS

- A. A complaint was received by the Federal complaints Coordinator, Colorado Department of Education (“CDE”), on July 6, 1998.
- B. The complaint was filled by Ms. J.B., an advocate with the ARC of Denver, on behalf of [student], son of [parent] and [parent], against the Denver Public Schools, Dr. Irv Moskowitz, Superintendent, and Ms. Patrice Hall, Director of Special Education (“the district”).
- C. The timeline within which to investigate and resolve this complaint expires on September 4, 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.
- H. 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.
- I. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.
- J. [student] is a student with disabilities residing within the District’s attendance boundaries and is eligible for special education services from the District.
- K. 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 complaints; 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 a **free** appropriate public education to [student] as it relates to his tuition, fees, transportation and books while taking two courses at the Community College of Denver, commensurate with his individualized education program (“IEP”).

## B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18) (19) and (20), 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, 300.350, 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] is 20 year old 12<sup>th</sup> grade student with emotional disabilities as identified on an IEP/transition plan dated 11/25/97. That IEP lists the following services to be provided:

Homebound instruction, 4 hours per week from 11/25/97 -1/23/98  
ACE/WES coordinator, 10 hours per week from 1/26/97-11/25/98  
Special educator, 1 hour per week average from 11/25/97–11/25/98  
General education, 3 and 1/3 hour per week

The following short term instructional objectives were some of those listed on the IEP:

[student] will schedule his own transportation to a from CCD.....  
[student] will identify 4 different locations to study on the CCD campus....  
[student] will investigate at least 3 clubs...on the CCD campus...  
[student] will communicate with... regarding his progress and concerns at CCD  
[student] will take the required screening assessment at CCD  
[student] will participate in the orientation and registration procedure at CCD  
[student] will remain in contact with the personnel in the CCD Disabilities office...

On the Statement of Interagency Services, it states:

Personnel Responsible: DPS and CRS

5. This was changed by a subsequent IEP dated 5/27/98 which lists the following services to be provided:

ACE/WES coordinator, 3 and ¾ hours per week from 5/27/98-5/27/99  
 Special educator consult, averaging 30 minutes per week from 5/27/98-5/27/99  
 General education 6 hours weekly from 9/1/98 to 5/27/99

These services were to be provided in community college classes with transition services provided.

The following short-term instructional objectives were some of those listed on the IEP:

- [student] will complete his French class at CCD...
- [student] will register, complete 2 classes at CCD each semester
- [student] will remain in contact with CCD personnel...
- [student] will explore...available at CCD...
- [student] will...meet...regarding progress at CCD...

On the Statement of Interagency Services it states:

Specific Services: classes at CCD paid by DPS in accordance with the Post Secondary Options Course

Fiscal Responsibility: Tutor, if requested, paid by CCD Disability Services  
 : DPS

Personnel Responsible: ACE/WES coordinator

Placement: CCD classes – Fall '98; Spring '99;

: tutoring to begin when and if [student] requests it

6. The complainants allege the District is not providing a free appropriate public education (1) requiring the parents to pay student fees (including RTD Bus Pass) and books during the 1997-98 school year, and (2) requiring the parents to pay tuition, fees (including RTD Bus Pass) and books during the 1998-99 school year. The complainants are willing to pay for books but are requesting reimbursement for the fees and tuition.

Specifically those costs are:

Fall: 1998		Fall: 1999	
Registration Fee	9.00	Registration Tuition	495.00
Student Activity Fee	36.00	Registration Fee	9.00
Student Center Fee	47.25	Student Activity Fee	36.00
RTD Bus Pass	<u>16.00</u>	Student Center Fee	47.25
Total	108.95	RDT Bus Pass	<u>16.70</u>
		Total	603.94

The 108.95 was paid by the Ms. [parent] last year. The 603.95 was paid by Ms. [parent] via MC/VISA on 8/21/98.

7. The District, in its response to this complaint, states that [student]'s enrollment at CCD is a choice he has made in accordance with the Postsecondary Enrollment Options Act, Title 22, Article 35 and in accordance with the District's guidelines relative to this Act. It is the position of the District that the IEP was developed in accordance with the provisions of law, that the determination of services at CCD was done in accordance with the Post-

Secondary Enrollment Options Act and that this was agreed to by the parents as reflected by their participation in the meeting and their signatures on the IEP.

8. The Postsecondary Enrollment Options Act states the following:

If the pupil so enrolled is receiving high school credit for such course, the pupil shall be included in the pupil enrollment of the school district...the school district shall forward to the institution of higher education the amount of tuition to which the institution of higher education would be entitled...for the first two courses. It also states that the school district...shall not be required to provide or to pay for transportation for such pupil.

9. District guidelines state that “such expenses as purchase of books, required fees, and transportation costs that may be associated with participation in the Postsecondary Enrollment Options Program are the responsibility of the pupil.”

10. The Act states that students with disabilities must have available to them a free appropriate public education (“FAPE”). The term “FAPE” means (1) special education and related services that are provided at public expense, under public supervision and direction, and without charge, (2) include preschool, elementary school or secondary school education in the State, and (3) are provided in conformity with an IEP.

11. Case law had addressed the issue of “free” and “at no cost” as indicated in the following:

Charging “maintenance fees” is permissible if they are (1) incidental fees normally charged to parents of nonhandicapped children as part of regular education programs, and (2) not a precondition or in any way related to the receipt of special education or related services. *Letter to McClintock*, 211:456

Public agencies may use federal, state, or local funds, as well as private sources of funds, to support special education and related services...so long as all necessary services for the provision of FAPE are provided at no cost to parents. *Letter to Porter*, 18 IDELR 596

Public agencies responsible for providing FAPE to children with disabilities are financially accountable for all costs associated with the provision of all education or related services as documented in each child’s IEP; however, these public agencies are not financially responsible for any costs associated with recommendations which are not adopted as part of an IEP. Moreover, if a multidisciplinary team formally recommends [something], then the public agency responsible for providing FAPE to the child must implement the recommendation. On the other hand, if individual members of the multidisciplinary team, but not the team as a whole, recommend [something], then the public agency is not financially obligated to implement the recommendation. *Letter to Greer*, 19 IDELR 348

In order to qualify as “free”, special education and related services must be provided at no cost to parents. However, a public agency is not precluded from charging certain “incidental” fees to the parents of students with

disabilities for items such as art, chemistry, or lab supplies, provided that similar fees are also charged to the parents of nondisabled students as part of the regular education program. The regulations define the term “at no cost” to mean that all specially designed instruction is provided without charge, but does not preclude charging incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program. *Letter to Anonymous, 20 IDELR 1155*

12. It appears helpful, then to answer the following questions:

a. *Was the tuition charged to the parents in the fall of 1998 an incidental fee normally charged to parents of nondisabled students as part of regular education?* Clearly this answer is “no” as tuition for two classes is normally paid by the District.

b. *Were the fees charged to the parents an incidental fee normally charged to parents of nondisabled students as part of regular education?* Clearly this answer is “yes” as the District’s guidelines state that such expenses as books, fees and transportation are the responsibility of the pupil.

c. *Was attendance at CCD documented in [student]’s IEP indicating the recommendation was made by the entire team, or was attendance at CCD recommended by an individual member of the team and not the team as a whole?* While the District asserts that this was simply a choice made by [student] and his parents and not a recommendation of the IEP team, the IEP clearly refers to CCD in numerous goals and objectives. In addition, the 5/27/98 IEP states that the least restrictive environment is “community college classes with transition services provided”. One of the transition outcomes listed for [student] on his IEP is “to complete college level classes in order to become a foreign language interpreter”.

d. *Were the classes at CCD specially designed instruction?* While these are regular community college classes, specific adaptations for [student] were discussed at a 12/4/97 meeting held at CCD and numerous adaptations were listed, suggesting that this is specially designed instruction.

e. *Did the IEP’s specifically state the financial obligations of the parents relative to tuition and fees and did the parents understand that obligation?* The 11/25/97 IEP simply states that the recommended placement in LRE is community college classes. It does not reference the Postsecondary Options Program, nor does it indicate that the parents are to have any financial responsibility. The 5/27/98 IEP does state that “classes at CCD will be paid by DPS in accordance with the Post Secondary Options Course”. Fiscal responsibility listed under various outcomes includes CCD Disability Services, Colo Div of Voc Rehab, DPS and CRS; nowhere does it specify parents.

According to Ms. J.B., the parents’ advocate, the parents (as well as the advocate) had no idea that the Postsecondary Options Program would require them to pay fees last year, and had no idea the District was not going to pay tuition this year.

## II. DISCUSSION

1. It is clear the tuition for [student] paid in the fall of 1998, should have been paid by the District. The District's guidelines state that tuition will be paid for two classes, and [student]'s IEP indicates classes at CCD will be paid by DPS in accordance with the Postsecondary Options Program.
2. Whether or not fees in both years is the responsibility of the District or the parents is not as clear. While classes at CCD may be considered regular education, they are an integral part of [student]'s IEP and transition plan. As a result, a strong case can be made for their need to be at no cost to the parent. In addition, when the parent agreed to these IEPs, it was not clear to her (nor to her advocate) that services as listed on the IEP would require financial contribution by the parents in the form of fees.
3. Clearly, [student] did attend classes at CCD last year and has enrolled in classes this year. The supportive special education and related services listed on the IEPs appear to have been provided by the District. The only issue here is reimbursement to parents for the payment of fees and tuition.
4. CDE has long held to a policy that it does not have authority to order Districts to reimburse parents for services. Rather, CDE's position has been to order compensatory services when there has been a failure to provide FAPE. In this matter, [student] did receive a FAPE and is receiving FAPE, but not at no cost to the parents.

## IV. RECOMMENDATIONS

It is strongly recommended that the District reimburse [student]'s parents for the fees and tuition they have paid to date relative to this matter. Henceforth, the parents will be aware of potential costs relative to IEP decisions and the Postsecondary Options Act and District guidelines; and they can make informed decisions relative to future IEP decisions and services.

Should the District choose not to do so, the parents may want to pursue other legal options for the recovery of those costs.

Dated this 3<sup>rd</sup> day of September, 1998

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Carol Amon, Federal Complaints Investigator