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

Federal Complaint 2001:504

DENVER PUBLIC SCHOOLS

Decision

INTRODUCTION

This Complaint letter was dated February 2, 2001, and received by the Federal Complaints Officer on February 5, 2001. The school's response was dated and received February 22, 2001. The complainant's response to the school's response was dated March 1, 2001, and received by the Federal Complaints Officer on March 5, 2001. The Federal Complaints Officer then closed the record.

COMPLAINANT'S ALLEGATIONS

- The complainant alleges that the student was suspended for a total of twenty (20) days, and that the school did not provide the student with an interim alternative educational placement (IAEP) for thirteen (13) days, after the first ten (10) days of suspension, and that this was a violation of 34 CFR 300.121(d) and 34 CFR 300.520(a)(1)(ii) (misidentified as (a)(ii) in the complainant's Complaint letter), of the Individuals with Disabilities in Education Act (IDEA) regulations.
- The complainant alleges that the manifestation determination review done by the IEP team concluded that the behavior for which the student was disciplined was a manifestation of his disability, but that the school nevertheless required the student to attend an expulsion hearing, and that this violated 34 CFR 300.523(d) and 34 CFR 300.522(a)(b)(1)(2) (misidentified as (a)(1)(2) in the complainant's Complaint letter), of the IDEA regulations.
- The complainant further alleges that the referral of the student to an expulsion hearing was a violation of 34 CFR 300.552(a)(1)(2)(b)(2) (misidentified as (a)(1)(b)(2) in the complainant's Complaint letter), of the IDEA regulations.

SCHOOL'S RESPONSES

- The Federal Complaints Officer treats the school's response as an admission that it violated 34 CFR 300.121(d) and 34 CFR 300.520 (a) (1) (ii), but only for a period of five (5) school days, not thirteen (13) as alleged by the complainant.
- The Federal Complaints Officer treats the school's response as a denial that it violated 34 CFR 300.523(d) and/or 34 CFR 300.522(a)(1)(2)(b)(2).
- The Federal Complaints Officer treats the school's response as a denial that it violated 34 CFR 300.552 (a)(1)(2)(b)(2).

FINDINGS AND DISCUSSION

- The Federal Complaints Officer finds that the school violated 34 CFR 300.121(d) and 34 CFR 300.520(a)(1)(ii) of the IDEA. The complainant, in his response to the school's response to his Complaint, did not dispute the school's claim that this violation occurred for a period of five (5) school days, rather than the thirteen (13) days as originally claimed in the complainant's Complaint letter. Absent any such argument, the Federal Complaints officer finds that these violations occurred for a period of five (5) school days.
- The Federal Complaints Officer finds that the school violated 34 CFR 300.523(d), 34 CFR 300.522(a)(b)(1)(2), and 34 CFR 300.552(a)(1)(2)(b)(2), of the IDEA. The IDEA prohibits students, who have been determined, as a result of a manifestation determination review conducted by the student's IEP team, to have manifested behavior resulting from a disability, for which the student has received a disciplinary removal, from receiving further disciplinary removal, including suspension or expulsion, for that type of behavior. The maximum number of days, within a school year, that such a student can receive a disciplinary removal, according to the IDEA regulations, is ten (10) consecutive school days, or ten (10) cumulative school days that constitute a pattern - See 34 CFR 300.519 – unless 34 CFR 300.520 or 34 CFR 300.521 is applicable. The IDEA gives authority to the IEP team to determine what the placement and services for such a student shall be. The latter provisions – 34 CFR 300.520 and 34 CFR 300.521 - apply to weapons and drug violations, or to circumstances where an IDEA due process hearing officer, or a court of competent jurisdiction, has determined that there is a substantial likelihood that the student may injure himself or others. These latter provisions, based upon the information submitted to the Federal Complaints Officer, are not applicable to this Complaint, and in any case, these provisions also give placement and services decision-making authority to the IEP team. Nothing in the information supplied to the Federal Complaints Officer indicates that this student was charged with a crime, the allegation of which is within the authority of the school to make, as is made clear by 34 CFR 300.529.

  On December 13, 2000, a manifestation determination review was held. According to the school document recording this IEP meeting (School's Attachment F), the school found that the behavior for which this student was disciplined was a manifestation of his

disability. According to this same document, the school recommended homebound instruction for this student. However, the School's Attachment G, the school document that the student's mother signed, on that same date, December 13, 2000, authorizing homebound instruction, asks, at question number two (2) of the document – "For how long will homebound teaching be needed? " The answer given is – "now until a decision is made at the Expulsion Hearing." Question number seven (7) of the same school document asks – "Has there been a hearing officer's recommendation for homebound instruction?" The answer box for this question is – "No." The Federal Complaints Officer interprets this document to contemplate that a hearing officer, at an expulsion hearing held for this student, was to have the authority to determine this student's placement and appropriate services. Such a hearing officer has no such authority under IDEA. Only the student's IEP team has this authority. The Federal Complaints Officer therefore finds that the school's actions violated the IDEA's provisions vesting legal authority in this student's IEP team to make educational decisions for this student. It does not matter that the expulsion-hearing officer, evidently, ratified a continued temporary placement made by the IEP team. The expulsion-hearing officer had no authority to make such ratification. Indeed, since the intervention of the expulsion hearing subverted the authority of the IEP team, it cannot be certain that the IEP team might not have reached a placement determination for long term placement, different than the temporary and short term placement determination which it did make.

The school states in its response that, according to the school principal, the "…school neither intended nor expected (the student) to be expelled, but rather the school appreciated the opportunity to meet with this neutral member of staff (the expulsion hearing officer) to brainstorm a variety of educational opportunities available to (the student) and/or any DPS student." Parentheses added. The Federal Complaints Officer does not find this argument persuasive. If the school wants an expulsion hearing officer, or any other "neutral member of staff", to attend an IEP meeting, to "brainstorm a variety of educational opportunities", the school is entitled to have such persons attend IEP meetings. The IEP meeting, not an expulsion hearing, is the appropriate forum for receiving such input. Moreover, to re-emphasize, if an expulsion-hearing officer does attend an IEP meeting, it is the IEP team, not the expulsion-hearing officer, or any other individual, that has the authority to make placement and appropriate services decisions for special education students. If the IEP team, after considered deliberation, cannot reach consensus, the school then must propose what it intends to provide as a free appropriate public education (FAPE), and the parent(s) can agree or disagree and exercise their dispute resolution rights if they choose to do so.

The school's procedures for Discipline Of Students With Disabilities, a part of the School's Attachment I, states at page three (3), item four (4), that – "If the team (IEP) determines that the student's behavior was a manifestation of the student's disability, the student shall be disciplined in accordance with the student's IEP, any behavioral intervention plan, and this policy. The student may not be expelled and shall remain in his/her current placement unless: a. The student's parent/guardian consents to a change in placement; or b. The school District obtains a change of placement as provided by law." Parenthesis added. In light of relevant IDEA law, and the school's recognition of such in its own procedures for disciplining students with disabilities, it is difficult to see what legitimate justification there can be for the school having a policy of allowing a procedural option of sending a student whose behavior has been determined to be a manifestation of his/or her disability, to an expulsion hearing. It is an option that could

never be legally exercised, the existence and/or exercise of which not only violates the IDEA, but may also subject the school to a successful allegation of violation of Section 504 of the Rehabilitation Act of 1973.

REMEDIES

1) The complainant has asked for compensatory educational services, but has not provided the Federal Complaints Officer with any guidance as to what the complainant believes those services should be. The Federal Complaints Officer believes, in this case, that, if any compensatory educational services are appropriate, the IEP team should determine what such services should be. Therefore, at the request of the student's parents, the IEP team shall meet to make this determination. In no case shall this IEP meeting, absent the mutual agreement of the parties, take place later than the end of the spring semester school year, 2001. If the parents do not request such an IEP meeting, within thirty (30) days of the date of this Decision, the school shall not be required to hold an IEP meeting for this purpose.
2) The Director of Special Education shall submit to the Federal Complaints Officer, within thirty (30) days of the date of this Decision, unless extension is granted by the Federal Complaints Officer, a Statement of Assurance sufficient to demonstrate that the school will no longer have a procedural policy option of referring students with disabilities, whose behavior has been determined to be a manifestation of their disability, to suspension or expulsion hearings, and that such referrals will no longer take place. The Federal Complaints Officer reserves the right to determine the sufficiency of this Statement of Assurance, and to recommend further corrective action, if necessary. If the Director of Special Education needs any clarification as to what the Federal Complaints Officer is expecting in ordering this Remedy, she should contact the Federal Complaints Officer for clarification.

CONCLUSION

This Decision shall become final as dated by the signature of the Federal Complaints Officer. A copy of the appeal procedure is attached to this Decision.

Dated today, March _____, 2001.

_____
Charles M. Masner, Esq.
Federal Complaints Officer