

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

Federal Complaint 2001:516

EL PASO COUNTY SD 11

Decision

INTRODUCTION

The complainants' Complaint letter was dated March 12, 2001, and was received by the Federal Complaints Officer on March 22, 2001. The school's response was dated April 11, 2001, and received by the Federal Complaints Officer on April 13, 2001. The complainants' response to the school's response to their Complaint was dated April 21, 2001, and was received by the Federal Complaints Officer on April 27, 2001. The Federal Complaints Officer then closed the record.

COMPLAINANTS' ALLEGATIONS

The complainants' alleged the following violations of their son's Individualized Education Program (IEP):

- Their son was not receiving appropriate music instruction – specifically, how to play the recorder.
- Their son did not receive appropriate math services from September of 2000, until January 22 or 29 of 2001.
- Math services, which began on January 22, or 29, 2001 were not appropriate because their son received no small group instruction, and instructional materials were not adapted.
- Math services beginning at the end of February (2001), were for sixty (60) minutes per week, when what was required was seventy (70) minutes per week.
- Physical education services were not being appropriately provided.
- Their son was inappropriately excluded from art class on September 27, 2000, because "...it was stated he was a liability without his aide."
- Their son did not have screen enlargement or voice output for his computer.
- Their son received Braille instruction for 2-3 years from a teacher who did not complete the Certification of Braille Competency.
- Acceptable room accommodations for their son to take Colorado Student Assessment Program (CSAP) testing were not provided.

- Most playground equipment was not accessible to their son, and had not been so since 1996.
- Social instruction services were not begun for their son until October 25, 2000. No social instruction services were provided on January 10, 17, and 24 (2001).

SCHOOL'S RESPONSES

The school denied any violations of complainants' son's IEP.

FINDINGS AND DISCUSSION

In deciding this Complaint, the Federal Complaints Officer has reviewed all information in the record, including the following IEP document exhibits submitted by the school: December 6, 2000 IEP (Exhibit B); May 9, 2000 IEP (Exhibit C); March 21, 2000 IEP (Exhibit D), November 18, 1999 IEP (Exhibit E); March 17, 1999 IEP (Exhibit F).

Music Instruction (Instrumental)

None of the complainants' son's IEP documents reviewed by the Federal Complaints Officer contains music instruction as a requirement – per se. However, the March 17, 1999 IEP for complainants' son lists music as one of his vocational/transitional/interest(s). So does the November 18, 1999 IEP. So does the March 21, 2000 IEP. The complainants' son's May 9, 2000 IEP lists one of his vocational/transitional/interest(s) as – "Wants to be a DJ." The Federal Complaints Officer is presuming that "DJ" means Disc Jockey – the disc(s) being musical recordings. The complainants' son's December 6, 2000 IEP also lists as one of his vocational/transitional/interest(s) – "Wants to be a DJ."

There is no disagreement between the complainants and the school that complainants' son has been receiving instrumental music instruction from the school – notwithstanding that there is disagreement between the complainants and the school about the quality of that instruction. 34 CFR 300.305 – Program Options – of the Individuals with Disabilities Education Act (IDEA) regulations, states – "Each public agency shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education." Id.

The Federal Complaints Officer finds that music instruction, including instrumental music instruction, is a part of the special education IEP program that the school is legally obligated to provide for complainants' son. To find otherwise would be to find that the school ignored the finding of complainants' son's IEP team that music was a vocational/transitional/interest of complainants' son, by failing to encourage this interest of complainants' son. Clearly, this has not been the case, since complainants' son has been enrolled in music instruction, and the school claims that it has been doing a good job of providing this instruction, despite, the school claims, the complainants' son's lack of interest in learning how to play the recorder.

The complainants and the school, at least by implication, do not appear to be in disagreement that complainants' son likes vocal music, and gets along well with the vocal music teacher, in vocal music – who is the same teacher for instrumental music. The sole disagreement between complainants and the school appears to be whether complainants' son is receiving adequate instruction in how to play the recorder. The complainants claim their son is very interested in learning to play the recorder, but that the teacher isn't teaching him. They claim s/he hasn't been giving him a recorder to play; that s/he's been inappropriately requiring the paraprofessional to do the teaching; that s/he has not done necessary modification or adaptation of learning materials; and that s/he has not allowed their son's peers to appropriately help him. The school, to the contrary, says the teacher has been providing complainants' son with direct instruction. The school says that the teacher has adapted learning materials. The school says that the teacher encourages peer assistance. The school also says that the complainants' son does not practice the recorder at home (the complainants have claimed that their son is not allowed to take a recorder home); that he does not pay attention in class; that he makes no effort to play the recorder in class, or he "false plays" it. The school denies that the teacher ever announced to the class that it was the aide's job to teach complainants' son – as complainants alleged. The school does say that on one instance the teacher told a student who was helping complainants' son to sit down, because she and complainants' son were talking instead of paying attention to the teacher's lesson. The complainants' counter that their son is blind, and therefore must have peers talk to him in order to help him. The complainants' further claim that to the extent their son is not paying attention, it is because the teacher is not giving him sufficient instruction. They further say that their son can't be fake playing, since he hasn't been given a recorder to use in class.

In the first sentence, of the second paragraph, of the first page of the school's response to this Complaint, the school states – "As the (complainants) have not relied on sworn statements to support the violations alleged in their Complaint, it is the District's understanding that it is not required to do so unless both parties are ordered otherwise by the Federal Complaints Officer." Id. It is not the general practice of the Federal Complaints Officer – although he reserves the right to do so should he determine that it is appropriate – to request sworn statements of complainants, school staff persons, or any other individual from whom such a statement might be requested. It is not his general practice because he presumes that such sworn statements would only confirm the arguments of the respective party providing the sworn statement. Moreover, in a circumstance where the Complaint and/or the school's response is submitted by an attorney representing the respective party, the attorney has a professional ethical obligation not to knowingly present false information to the decision maker – which presumes that the attorney has done sufficient investigation to satisfy himself or herself that any legal or factual information presented to the decision maker would be sworn to as such by the person making that claim.

Neither a sworn statement, nor a written argument, can be subjected to cross-examination under oath. Only a human witness can be cross-examined under oath. Even if the Federal Complainants Officer interviewed the music teacher, the aide, and all of complainants' son's music class peers (assuming that such interviewing of peers would be appropriate – an assumption the Federal Complaints Officer does not make at this time), there is, in the view of the Federal Complaints Officer, insufficient reason to believe that he would be in any better position than he is now to substantially resolve the different versions of what the complainants and the school claim to be the truth. The Federal Complaints Officer is an impartial investigator and decision maker. The law does not provide him with authority to put witnesses under an

oath to tell the truth, and then cross-examine them in a partial way as an advocate would in order to test the witness's version of the truth. This can only be done in a hearing, and the Federal Complaint process does not provide for a hearing. The complainants have a right to bring their disagreement with the school to such a hearing, should they choose to do so.

The Federal Complaints Officer has found that the school has been, and is, under the IEP documents governing the 2000-2001 school year, obligated to provide music instruction to complainants' son. The Federal Complaints Officer has also found that this instruction, of some quality, is being provided by the school. The Federal Complainants Officer does not find that this instruction is insufficient to meet the requirement of complainants' son's IEP and to deny complainants' son a free appropriate public education (FAPE). If the complainants wish to further contest this service provision by the school, they are entitled to do so in a due process hearing.

Math Services – inappropriate services from September of 2000 until January 22 or 29 of 2001

Math Services - no small group instruction/adaptation of instructional materials – for services beginning on January 22 or 29, 2001

Math Services – only sixty, not seventy, minutes per week since the end of February 2001

Complainants' son's November 18, 1999 IEP, March 21, 1999 IEP, and May 9, 2000 IEP, all indicate that math services for complainants' son were to be provided by – "Individual/Small Group Instruction." The Federal Complaints Officer interprets this to mean that the instruction could either be provided individually to complainants' son, or to a small group of students of which complainants' son would be a member. The November 18 and March 21, 1999 IEPs indicate this instruction was to be for up to forty (40) minutes per week. The May 9, 2000 IEP indicates this instruction was to be for twenty (20) to forty (40) minutes per week. All of these IEPs indicate "Reg Ed/Spec.Ed./Para" as potential service providers, which the Federal Complaints Officer interprets to mean that these services could be provided by either regular or special education staff, including a paraprofessional. The December 6, 2000 IEP is different in that it specifies special education staff only as services providers, only specifies small group instruction, and indicates service provision is to be for seventy (70) minutes per week.

The complainants did not dispute, in their response to the school's response to their Complaint, the school's claim that, at least subsequent to the May 9, 2000 IEP, complainants son got at least fifteen (15) minutes per day of individualized math instruction from a paraprofessional. Such instruction alone is sufficient to meet the service time requirement stated on the IEP. Subsequent to the December 6, 2000 IEP, the school claims that complainants' son's math instruction was delivered in small groups ranging from 5:1 to 7.5:1. The complainants did not dispute this in their response to the school's response to their Complaint, although they did state that, at some point, their son was receiving math instruction in groups of students as large as fourteen. The Federal Complaints Officer does not need to make a factual finding as to whether or not this was the case, because the number of students that constitutes a "small group" is not defined in any of complainants' son's IEPs, and the Federal Complaints Officer does not believe that fourteen (14) is so large as to be outside such a definition. The Federal Complaints Officer does not find that the complainants' further complaint about the "quality" of math instruction has

sufficient basis to violate complainants' son's IEP or his right to FAPE. The complainants are entitled to a due process hearing if they wish to further pursue their disagreement with the school over the quality of their son's math instruction.

With regard to adaptation of instructional materials for math, the school stated in its response to the Complaint – “(Complainants' son) has been provided several adapted or specialized learning materials in math, including, but not limited to, a Braille math textbook, an abacus, a talking calculator, a portable ‘white’ board for use in solving math problems using felt tip markers, math manipulatives (fraction cut outs and Cuisenaire rods), and a Braille clock.” School's response at page nine (9), paragraph two (2). The complainants do not dispute this in their response to the school's response to their Complaint.

The Federal Complaints Officer finds that the school did not violate complainants' son's IEP with regard to small group or individual instruction in math. The Federal Complaints officer also finds that the school did not violate the complainants' son's IEP with regard to adaptation of instructional materials for delivery of math services. The Federal Complaints Officer does find that the school has been violating complainants' son's IEP, since March 1, 2001, by providing only sixty (60), not seventy (70), minutes of math instruction per week. This constitutes a violation of 34 CFR 300.13(d).

The December 6, 2000 IEP does state that complainants' son was supposed to begin getting seventy (70) minutes per week of math instruction. According to the complainants, this was reduced to sixty (60) minutes per week “at the end of February” (2001). The school claims the reduction began “on or about March 7, 2001”. The school claims that this reduction took place as a result of an agreement reached with the complainants. The complainants do not dispute this in their response to the school's response to their Complaint. However, the complainants' son's December 6, 2000 IEP does state seventy (70) minutes per week, and unless and until the complainants' son's IEP is appropriately changed, that is what the school shall be obligated to provide.

Physical Education

The complainants' son's March 17, 1999 IEP indicates “Instruction in & modifications in specifically designed PE class”. Service providers were to be “Reg Ed, Para, SPED, Vision”. This was to be for ninety (90) minute per week. The November 18, 1999, March 21, 2000, May 9, 2000, and December 6, 2000 IEPs repeat these requirements, with the exceptions that the weekly service time is not specified on the November 18, 1999 and March 21, 2000 IEPs, and the May 9, 2000 IEP specifies sixty (60) to ninety (90) minutes per week with OT (occupational therapy) and PT (physical therapy) service providers, a component of which service provision was to also be for motor skills in an academic setting, and the December 6, 2000 IEP indicates thirty (30) minutes per P.E. unit of consultation, and thirty (30) to sixty (60) minutes per P.E. unit of instruction.

At pages eleven (11) and twelve (12) of the school's response to the complainants' Complaint, the school describes modifications made for complainants' son's participation in P.E. class. The complainants do not dispute these descriptions by the school in their response to the school's response to their Complaint. The Federal Complaints Officer finds that the sole issue before him is whether the school is providing thirty (30) minutes per P.E. unit of consultation, and thirty

(30) to sixty (60) minutes per P.E. unit of instruction for complainants' son, as required by his December 6, 2000 IEP. The school says it has provided these services. The complainants state under item C. of their Arguments in response to the school's response to their Complaint, in relevant part, that – "As stated in the District's response and on (complainants' son's) IEP, adaptive PE Teacher is to provide 30 minutes consultation and 30-60 minutes instruction per unit. This is not happening. The adaptive PE teacher may have provided minimal consultation, but has not provided instruction to (complainants' son) every PE unit as required by his IEP." Id.

The Federal Complaints Officer references his previous discussion in this Decision under Music Instruction (Instrumental), with regard to the capability of the Federal Complaint process versus the due process hearing. The same discussion applies here. Moreover, "minimal consultation" is not necessarily inconsistent with thirty (30) minutes consultation per PE unit, and not providing instruction for "every" PE unit is not per se a violation of complainants' son's IEP or a denial of FAPE, on the facts of this Complaint. Moreover, the complainants have not alleged how much time was missed so that, even if the Federal Complaints Officer were to find in their favor, he would not know how much service provision might need to now be provided. The Federal Complaints Officer does not find that the school has failed to meet its IEP obligation to provide the complainants' son with thirty (30) minutes per PE unit of consultation and thirty (30) to sixty (60) minutes per PE unit of instruction. If the complainants wish to further contest the school's PE service provision for their son, they may do so in a due process hearing.

Art Class

The Federal Complaints Officer finds two references to art in complainants' son's IEPs. In the May 9, 2000 IEP, under Annual Goal #5, which indicates that complainants' son will improve his fine motor skills, it states – "(Complainants' son) will participate (progressing toward independence) in art and science activities with modifications 75% of the time." In the December 6, 2000 IEP, it states "...(Complainants' son) will gather and return his own materials in art class as necessary in order to complete a given project."

The complainants allege that their son was excluded from art class on one occasion because "... it was stated that he was a liability without his aide." The school admits that complainants' son was excluded from art class on one occasion because "... his aide was unavailable that day...". On the facts of this Complaint, the Federal Complaints Officer does not find that the missing of one art class by complainants' son constitutes any violation of his IEP or a denial of FAPE.

Computer (Screen enlargement and voice output)

The Federal Complaints Officer finds the following references to the computer on complainants' son's IEPs:

Present level of functioning

"Is writing short sentences on the computer." March 17, 1999 IEP

Educational Needs

"(W)ork w/computer (including new programs)." November 18, 1999 IEP

"Screen enlargement program (with audio) for a computer." December 6, 2000 IEP

Annual Goal and Instructional Objective

"(Complainants' son) will build independent computer skills." (Goal) May 9, 2000 IEP

"(Complainants' son) will use the computer independently." (Instructional objective) May 9, 2000 IEP

"(Complainants' son) will build independent computer skills." (Goal) December 6, 2000 IEP

"(Complainants' son) will learn the correct finger placement for the home row with 100% accuracy." (Instructional objective) December 6, 2000 IEP

There is apparently no disagreement between the complainants and the school that some screen enlargement and voice output computer modifications have been provided. The disagreement appears to be whether the modifications are appropriate and sufficient to meet complainants' son's needs when using his own computer. The complainants' son's IEPs do not provide specifics that dictate service provision other than what is being provided by the school. If the complainants want services provided which are not being provided by the school, they will need to get such service provision included in their son's IEP, or seek relief in a due process hearing if the school does not agree to any specifics which they request.

Braille Instruction

There is no dispute between the complainants and the school that complainants' son's IEPs have required that he be instructed in Braille. "Over the years, (complainants' son's) IEPs have required that (complainants' son) be provided instruction in Braille." School's response at page fifteen. There is also no dispute that since 1994 Colorado has had a law requiring teachers of learners with visual impairments to demonstrate competency in reading and writing Braille. There is also no dispute that the teacher who provided complainants' son with Braille instruction during his kindergarten, 2nd, and 3rd grade school years, had not demonstrated competency in Braille instruction according to the requirements of Colorado law. Complainants' son is now a fourth grader. All of complainants' son's public schooling in Colorado, to the best of the Federal Complainants Officer's knowledge, has been subsequent to the 1994 Colorado law. There is apparently no disagreement between the complainants and the school that complainants' son is now receiving Braille instruction from a person who has satisfactorily met the Colorado legal requirement for demonstrating Braille competency.

34 CFR 300.13 – Free Appropriate Public Education (FAPE), defines FAPE, in relevant part, as special education and related services that – "meet the standards of the SEA (State Education Agency/Colorado Department of Education)". Id. at 34 CFR 300.13(b). Parenthetical supplied. Were the issue of whether the complainants' son had been denied FAPE appropriately before

the Federal Complaints Officer, because of his teacher's failure to meet the legal requirements for demonstrating Braille competency, it is the view of the Federal Complaints Officer that this regulatory provision would be applicable to any analysis of whether or not FAPE had been provided. However, the Federal Complaint process limits the Federal Complaints Officer to investigating allegations of violations of law that occurred not more than one year before the date a Complaint is received, unless "... a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received..." 34 CFR 300.662(c). The complainants have not alleged a continuing violation, and therefore the Federal Complaints Officer does not need to make a finding on any such allegation. Nor have the complainants requested compensatory services. Therefore, the Federal Complaints Officer makes no finding as to whether compensatory services would be appropriate. The complainants are entitled to file further Complaint, or request a due process hearing, in order to make such allegations, should they determine it is appropriate to do so.

CSAP

All of complainants' son's IEPs include as a part of the accommodations that are to be made for his participation in state and district wide assessments that he be provided with a "...non-stimulating environment with limited distractions." There is no disagreement between the complainants and the school that this is an IEP requirement. The disagreement is whether this requirement was met for the 2000-2001 CSAP testing. The complainants say no, the school says yes. The complainants say their son got "...moved to different rooms each day to take the test" and ..."people were in and out of the rooms doing different things." The complainants argue that this "...environment was stimulating with distractions which is in violation of his IEP." Complainants' response to the school's response to their Complaint – Argument G. The school stated in its response to the Complaint that – "Although the District was unable to provide (complainants' son) with the same room for each day of the testing, it did provide him with three quiet and accessible rooms at (elementary school) – one for each day." School's response at page 16, paragraph one. The school argued that these settings each constituted a non-stimulating environment with limited distractions.

The complainants' son's IEP does not specify which room or rooms which must be used for assessment – only that the environment be "non-stimulating ...with limited distractions." Even if the Federal Complaints Officer visited each of the rooms designated for complainants' son to take the CSAP tests, it would not provide him with sufficient information to decide whether they provided non-stimulating environments with limited distractions. This is because the Federal Complaints Officer cannot now visit the rooms as they were on the days of CSAP testing. The Federal Complaints Officer references his previous discussion in this Decision under Music Instruction (Instrumental), with regard to the capability of the Federal Complaint process versus the due process hearing. The Federal Complaints Officer does not find, on the facts ascertainable through the Federal Complaint process, that the school has failed to meet its obligation to provide the complainants' son with a "...non-stimulating environment, with limited distractions" for CSAP testing. If the complainants wish to further contest the school's provision of such a test setting for their son, they may do so in a due process hearing.

Playground Equipment

The complainants' son's March 17, 1999, November 18, 1999, and March 21, 2000 IEPs all include language in the Educational Needs portion of the IEP that state complainants' son needs "access to playground equipment". The May 9, 2000 IEP does not repeat this language, but does say that complainants' son has a need for "safety equipment during physical activities." This language is repeated on complainants' son's December 6, 2000 IEP. Also on the December 6, 2000 IEP, under short-term instructional objectives for Annual Goal #6, it states, in relevant part – "(Complainants' son) will actively participate socially within his classroom 'cooperative group' within his classroom or on the playground."

The complainants argue that access to "playground equipment is in (their son's) IEP as a need and short-term objective." Complainants' response to the school's response to their Complaint – Argument H. The school argues, alternatively, that this is an issue for the Office for Civil Rights (OCR), and, in any case, the school's playground equipment is accessible to complainants' son.

The Federal Complaints Officer agrees with the school that OCR has the necessary legal authority, and expertise, for determining whether the school's playground equipment is accessible to complainants' son. However, accessibility to such equipment might be a legitimate IEP requirement for complainants' son. See also 34 CFR 300.306 – Nonacademic Services. The Federal Complaints Officer makes no finding on this issue. Should the complainants seek an OCR determination on this issue, and should such determination be that the school's playground equipment is not accessible to their son, the complainants would be entitled to file further Complaint and/or seek a due process hearing on the issue of whether the OCR's finding of inaccessibility constituted a violation of their son's IEP and a denial of FAPE.

Social Instruction Services

The only IEPs relevant to deciding this issue are the May 9, 2000 IEP and the December 6, 2000 IEP, both of which state, in relevant part, that – "Instruction in social skills development" from a "Psych./Social Wkr." Was to be for "30-45 min." per week, beginning May 31, 2000, and ending May 31, 2001. This had to mean, of course, that this instruction was to begin no later than the beginning of the school year 2000-2001. The complainants say this instruction did not begin until October 25, 2000. The school says that group instruction did not begin until October 25, 2000, but individual instruction from the social worker, at a variety of times, in a variety of school settings, was provided to complainants' son from the beginning of the school year 2000-2001, and that the cumulative time for these instructions met the 30-45 minutes weekly requirement. Evidently, group services did start on October 25, 2000, and the complainants' son was a member of the group that began receiving instruction at that time. As to the three missed sessions on January 10, 2001, January 17, 2001, and January 24, 2001 – the school states that the social worker was, on January 10, out sick, was, on January 17, at school, but concerned about contact with students making the students sick, and that on January 24 the students were engaged in another activity. The school goes on to say that all of the missed times were made up through later additional individual meeting with complainants' son. The complainants did not dispute this latter statement of facts regarding the three missed sessions.

The Federal Complaints Officer finds that the 30-45 minutes per week were to begin with the beginning of the school year 2000-2001, and that, based upon the school's own discussion in its response at pages 18 and 19, the original intent was that this instruction be delivered in a group. Whatever the intervening events that prevented this group instruction from beginning until October 25, 2000, and whatever other instruction the school may have provided in the interim, the Federal Complaints Officer finds that from the beginning of the school year 2000-2001 until October 25, 2000, the school did not provide complainants' son with IEP required social skills instruction. This constituted a violation of 34 CFR 300.13(d). As for the three missed sessions that the complainants have not disputed the school made up with individual sessions with the complainants' son – the Federal Complaints Officer finds no violation by the school.

REMEDIES

- At the complainants' request, the school shall provide complainants' son with additional math instruction sufficient to compensate him for the ten (10) minutes per week, short of the seventy (70) minutes total which complainants' son has not been receiving since March 1, 2001.
- At the complainants' request, the school shall provide complainants' son with additional social skills instruction, individually, or otherwise agreed to with the complainants, sufficient to compensate him for the 30-45 minutes per week of group instruction which he was not provided from the beginning of the 2000-2001 school year until October 25, 2000.

If the complainants have not made written request to the school, within thirty (30) days of the date of this Decision, for implementation of these Remedies, the school shall not be required to provide them under this Decision. If the complainants do make timely written request for these Remedies, the school shall provide them no later than the end of the fall 2001-2002 school year semester.

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, May _____, 2001.

Charles M. Masner, Esq.
Federal Complaints Officer