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

Federal Complaint 2001:523

MONTROSE COUNTY SD RE-1J

Decision

INTRODUCTION

This Complaint letter was post marked May 19, 2001, and received by the Federal Complaints Officer on May 21, 2001. The school's response was dated June 15, 2001, and received by the Federal Complaints Officer on the same date. The complainant's response to the school's response to the Complaint was dated June 27, 2001, and received by the Federal Complaints Officer on June 28, 2001. The Federal Complaints Officer then closed the record.

COMPLAINANT'S ALLEGATION

The complainant alleges that the student did not receive a free appropriate public education (FAPE) from the beginning of the 2000-2001 school year until an Individualized education program (IEP) of February 2001 was created and implemented for the student.

SCHOOL'S RESPONSE

The school denies the allegation.

FINDINGS AND DISCUSSION

The student is in the legal custody of the Department of Human Services (DHS) in the state of Colorado. He was placed in foster care, with foster parents residing within the school district, prior to the beginning of the fall 2000 school semester. The parental rights of the student's parents have been terminated.

The foster parents attempted to enroll the student in school prior to the beginning of the fall 2000 semester. Enrollment was denied. On October 16, 2000, the student began receiving

homebound services from the school two (2) times per week for one and one half (1and1/2) hour sessions. This increased to three (3) times per week on October 18, 2000. Between November 3, 2000 and December 12, 2000, these services were increased to four (4) times per week. On January 9, 2001, the services were decreased to three (3) times per week.

34 CFR 300.342 – of the Individuals with Disabilities Education Act (IDEA) regulations - When IEPs must be in effect – states, in relevant part:

(a) *General.* At the beginning of each school year, each public agency shall have an IEP in effect for each child with a disability within its jurisdiction.
(b) *Implementation of IEPs.* Each public agency shall ensure that –
    (1) An IEP-
    (i) Is in effect before special education and related services are provided to an eligible child under this part; and
    (ii) Is implemented as soon as possible following the meetings described under §300.343;
    (2) The child's IEP is accessible to each regular education teacher, related service provider, and other service provider who is responsible for its implementation; and
    (3) Each teacher and provider described in paragraph (b)(2) of the section is informed of –
    (i) His or her specific responsibilities related to implementing the child's IEP; and
    (ii) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

1 CCR 301- 8- 2220 – R- 4.03 – of the Colorado Rules for Administration of the Exceptional Children's Educational Act (ECEA) - Procedures for Transfer Students – states:

If a child moves into an administrative unit and is known to have been receiving special education services, the director of special education or designee, shall pursue one of the following options:

4.03(1) Provide services immediately in accordance with the child's IEP. All requirements for reviews shall be followed and a copy of the IEP shall be on file.

4.03(2) Provide the child with interim special education and related services agreed to by the parent(s) and the director of special education or designee, while waiting for the record of the IEP. Such interim services shall be documented in the student's record and provided for no more than 15 school days. Should the record of the IEP not be received within that time, the administrative unit must refer the child for complete assessment and planning in accordance with these Rules.

4.03(3) Refer the child for a complete assessment and planning in accordance with these Rules in the meantime providing services as indicated on the last agreed upon IEP or providing special education and related services as agreed to by the parents and the director of special education and documented in the student's record. Such assessment and planning shall be completed within 30 school days.

4.03(4) Services to a child moving into an administrative unit and known to have been receiving special education services, utilizing one of the above three options, shall commence according to the following:

4.03(4)(a) immediately, if the services/program are available,

4.03(4)(b) within 3 school days of requested enrollment if the services/program need to be developed, or

4.03(4)(c) other options agreed to in writing by the parent(s).

The Federal Complaints Officer finds that the school violated these federal and state regulatory provisions for this student. The school failed to meet the requirements of any of the transfer IEP options open to it under Colorado law and therefore no valid IEP was implemented by the school for this student at the beginning of the 2000-2001 school year, which was a violation of 34 CFR 300.342. The Federal Complaints Officer therefore finds that the school violated this student's right to FAPE. See specifically 34 CFR 300.13, especially section (d), which references the IEP provisions in 34 CFR 300.340 – 300.350.

The school argues, in essence, that its actions with regard to this student were appropriate because: (1) DHS violated the Interagency Agreement with the Colorado Department of Education (CDE) and (2) "Even if it could be argued that the District did not comply with (the student's) IEP, the fact that his very substantial academic progress can be demonstrated by his homebound teacher is indicative that he received FAPE." Quoting from the school's response to the Complaint at page eight (8). Parenthetical supplied.

Whatever the validity of the school's allegations as to violations of the Interagency Agreement, and Colo. Rev. Stat. sect. 22-20-108(7)(b) – of the Colorado ECEA - regarding agency involvement in the provision of educational and residential services, by DHS and its employee(s), including the complainant – and the Federal Complaints Officer makes no findings as to the validity of those allegations – the school was not entitled to ignore the IEP and FAPE requirements of federal and state law because of those alleged violations. The appropriate relief for addressing such allegations is the court(s), the legislature(s), an appropriate rule making body, or the relief provision in the Interagency Agreement, which states:

"In the event that a disagreement exists between the administrative unit of jurisdiction and the county department of Social Services regarding placement, manner of placement or any costs accruing to either a county department of Social Services or an administrative unit, the Commissioner of Education and the Executive Director of the Department of Social Services or their designees shall review all such disagreements and make a final written determination. Such disagreements shall not interfere with the provision of appropriate educational and educationally related services prior to the disagreement being settled." Interagency Agreement at page three (3). To the best of the Federal Complaints Officer's knowledge, this relief provision in the Interagency Agreement is still available to the school, should the school determine it to be in its interests to seek that relief.

In the school's Exhibit E, which the school identifies as a meeting summary of an IEP review meeting for this student which took place on September 7, 2000, the school states, in the final paragraph of that summary - "Meeting Conclusion: The Montrose County school district cannot

provide for the needs of this student as identified in his current IEP and through the Discharge Summary from (residential facility). All team members were in agreement. Thus (student's) placement agency was encouraged to work with his caseworker at (DHS agency) in order to obtain an appropriate therapeutic and educational placement for him." Id. at page two (2). Parentheticals supplied. In the school's Exhibit K, a Psychoeducational Report by the school's School Psychologist, at page two (2), it is also stated with regard to this meeting, that "… the IEP team determined that they were unable to provide the level of Special Education instruction (the student) required as indicated on his current IEP and through the discharge summary evaluation of his current level of functioning. " Id. Parenthetical supplied. A similar characterization of this determination made at this meeting is found on page three (3) of the school's response. Schools, and the IEP teams which are constituted under school leadership, cannot legally decide not to meet IEP identified needs and/or requirements. The school either had to implement the IEP it received or develop a new one, in accordance with the requirements of 34 CFR 300.342 and 1 CCR 301- 8- 2220-R - 4.03. On the one hand, the school argues that it could not provide for the self contained and/or residential placement which the incoming IEP recommended, and which the school agreed the student needed, and on the other hand the school argues that homebound instruction for a few hours a week between October of 2000 and February of 2001 evidenced "very substantial academic progress", to the extent that the student received FAPE. Quoting school's response at page eight (8). If the school believed that such homebound instruction was FAPE for this student, it should have followed the procedures in 34 CFR 300.342 and 1 CCR 301-8-2220-R-4.03 and created a new IEP for this student at the beginning of the fall 2000-2001 semester, providing evidence that such instruction was sufficient to provide this student with FAPE.

Whatever placement the appropriate IEP dictated should have been implemented by the school, notwithstanding any disagreement with DHS, which the school may have otherwise been entitled to address. "Such disagreements shall not interfere with the provision of appropriate educational and educationally related services prior to the disagreement being settled." Interagency Agreement at page three (3). It is the IEP that determines what the student needs, and what the student is legally entitled to receive. Whether or not this student has made "very substantial academic progress" does not retroactively justify the school's failure to appropriately develop and/or implement an IEP designed to meet the student's special education needs. The school argues that: "Because of (the student's) non-educational therapeutic needs, he required a residential treatment facility with a strong and particularized therapeutic component. His educational services were to be implemented in a self-contained day treatment setting. Pursuant to the terms of the Interagency Agreement, this type of therapeutic setting may only be accessed in Colorado through cooperation with the Department of Human Services." School's response at page five (5). Parenthetical supplied. And, referring to the transfer IEP from the residential facility where the student had previously been receiving services – "It was an IEP that was not implemented because of the failure of the …Department of Human Services, (student's) legal custodian, to place him in a therapeutic residential placement as determined by his IEP team at (residential facility) and agreed to by his IEP Team in Montrose." School's response at page seven (7). Parenthetical supplied. However, to the best of the Federal Complaints Officer's knowledge, nothing prevented the school from seeking such a placement – in order to appropriately provide educational services, after following appropriate IEP procedures - outside of the state if necessary, notwithstanding any failure of DHS to do so. The Federal Complaints Officer does recognize that had the school made such a placement unilaterally, it would have born the expense for acting unilaterally, at least initially, pending the outcome of any appropriate legal action(s) that the school may have been entitled to bring against DHS. The Federal Complaints Officer also does recognize that the costs of such

placement are not to be taken lightly. However, financial expense is not a sufficient argument for the denial of FAPE. To the extent there is an interagency disagreement about bearing the expense of placement, the law does not authorize that disagreement to be resolved at the educational expense of the student. Moreover, independent of the issue of residential placement, and the school's ability to seek such placement independently, there was no self-contained placement – which the school also could have provided, notwithstanding any failure of DHS - and the school has not otherwise sufficiently demonstrated that it adequately used the transfer IEP as a guide for the educational services that it did provide. In addition, the number of hours of homebound instruction provided per school day was significantly less than a full school day, a circumstance not provided for in the transfer IEP, which clearly states that this student was entitled to thirty (30) hours of special education services per week.

The school states that "…procedural noncompliance with the IDEA is not sufficient to render an IEP inappropriate if it does not result in substantial deprivation to the child." School's response at page seven (7). In support, the school cites Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720 (10th Cir. 1996) (quoting Doe v. Defendant 1, 898 F.2d 1186, 1190 (6th Cir. 1990), stating, "To hold otherwise would 'exalt form over substance.' " Id. However, the procedural noncompliance referenced in Urban was a failure to include a statement of transition services on an IEP, in circumstances where such services were actually provided. Id. at p. 726. In the case of this Complaint, it is the finding of the Federal Complaints Officer that the school neither appropriately adopted nor implemented the transfer IEP, nor created its own – until February of 2001. This is not a case where the school simply failed to list some services on an IEP, which it did, in fact, provide. For the time period from the beginning of the 2000 – 2001 school year until February of 2001, the school did not meet the most fundamental procedural, and substantive, requirement for providing FAPE – it did not appropriately adopt, create, or implement an IEP. The school argues that – "The law is clear that even in situations when a school district does not make available all of the services required on an IEP, that fact, in and of itself, does not mean that a student has been denied a free appropriate public education ('FAPE') and that a remedy is warranted. Bend-Lapine School District v. D.W., 28 IDELR 734 (9th Cir. 1998). If the failure does not result in the loss of a student's educational opportunity or denial of a parent's right to participate in the IEP process, it does not rise to the level of a denial of FAPE. O'Toole v. Olathe District Schools, 144 F.2d (sic) 692 (10th Cir. 1998) (quoting Roland M. v. Concord School Committee, 910 F.2d 983, 994 (1st Cir. 1990)." School's response at page six (6). The correct cite to O'Toole is F.3d, not F.2d. The quote from Roland , referenced by the school, states: "Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." Id. But the issue in this Complaint is not about setting aside an IEP; it is about getting an appropriate IEP appropriately adopted and implemented, which was not timely done, and which, it is the finding of the Federal Complaints Officer, resulted in a denial of services to which this student was legally entitled – a denial sufficient to constitute a denial of FAPE.

REMEDIES

1) Within ten (10) days of the date of her receipt of this Decision, the complainant shall provide a written proposal for compensatory education for this student to the school, by certified mailing, with a copy provided to the Federal Complaints Officer. The school shall then have ten (10) days after its receipt of the complainant's proposal, to respond in writing to the complainant's proposal, by certified mailing, with a copy provided to the Federal Complaints Officer. Once the complainant has received the school's response, the parties shall have ten (10) days to reach an agreement regarding compensatory education. If the parties both request it, the Federal Complaints Officer will assign a mediator to facilitate this effort. If a mediator is assigned, the time period for reaching an agreement about compensatory education may be extended, if the Federal Complaints Officer determines it is necessary to do so. If the parties do not reach an agreement within the allotted time, and no extension is granted by the Federal Complaints Officer, the Federal Complaints Officer will decide the issue of compensatory education.

2) To the best of the Federal Complaints Officer's knowledge, the law makes no explicit provision for the removal of an Educational Surrogate Parent (ESP). The school has stated: " It would be inappropriate for the Federal Complaints Officer to second guess the surrogate parent and the District and tell them they could not agree to a particular placement or program configuration for (the student) under the circumstances set forth above. Any school district must be allowed to rely on the consent and agreement of a parent or surrogate parent regarding the provision of FAPE to a child." School's response at page nine (9). Parenthetical supplied. However, the Federal Complaints Officer finds that the removal of an ESP may be appropriate as a corrective action under the Federal Complaint provisions in 34 CFR 300.660(b)(1). The ESP for this student was selected by the school and appointed by CDE. However, given that the Federal Complaints Officer has found that the school has violated this student's right to FAPE, and given that the ESP in her Affidavit dated June 13, 2001, submitted by the school as its Exhibit I, states support for the actions taken by the school which resulted in a denial of FAPE – the Federal Complaints Officer finds that an appropriate remedy for this student should include, at a minimum, a consideration of either the appointment of a new ESP, or the appointment of the foster parents to act as educational spokesperson representatives for the student. Therefore, the complainant, within ten (10) days of the date of her receipt of this Decision, shall submit to the school, in writing, by certified mailing, with a copy to the Federal Complaints Officer, her proposal for a representative for this student. This proposal may be the current ESP, another ESP, or the foster parents. It may not be an employee of DHS, or any other person(s) not legally entitled to perform this function. The school shall supply the complainant with a list of available ESPs, upon her request. The complainant's proposal shall include a rationale in support of her proposal. The school shall have ten (10) days from its receipt of the complainant's proposal, to respond, by certified mailing, to the complainant's proposal, with a copy provided to the Federal Complaints Officer. If the parties do not agree on educational representation for this student, the Federal Complaints Officer will decide the issue.

CONCLUSION

This Decision shall not become final until the Federal Complaints Officer enters orders determining compensatory education, and educational representation, for this student. The appeal rights of the parties will then be available to them, as explained in the Colorado Federal Complaint Procedure. A copy of the appeal procedure is attached to this Decision.

Dated today, July _____, 2001.

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Charles M. Masner, Esq.
Federal Complaints Officer