Federal Complaint 2002:501

Mountain BOCS

Decision

INTRODUCTION

This Complaint letter was dated January 9, 2002, and received by the Federal Complaints Officer, by fax, on the same date. The school's response was dated January 22, 2002, and received by the Federal Complaints Officer, by fax, on January 24, 2002, and by regular mail on January 28, 2002. The complainant's response to the school's response to her Complaint was dated February 3, 2002, and received by the Federal Complaints Officer on the same date. The Federal Complaints Officer then closed the record.

COMPLAINANT'S ALLEGATIONS

- The complainant alleged the last IEP meeting for her son, at the time of her filing of this Complaint, was held on 11/15/2000. 34 CFR 300.343(c)(1) of the Individuals with Disabilities Education Act (IDEA) regulations, requires that a student's IEP be reviewed at least annually. In addition, IEPs are to be reviewed periodically, as necessary, to determine whether annual goals are being achieved.
- The complainant alleged that her son began high school in a regular classroom setting with "no contact" from the school to her prior to this happening. 34 CFR 300.342 of the IDEA regulations requires IEPs to be in effect at the beginning of each school year.
- The Complainant alleged that a meeting was held on October 8, 2001, after her son was re-admitted to school following a three-day suspension. The school was asked to respond as to whether, if held, this was an IEP meeting and, if so, whether and how, it was held according to the requirements of 34 CFR 300.340-350 of the IDEA regulations. If the school's position was that this meeting was not an IEP meeting, the school was asked to supply information explaining the purpose of the meeting. The school was also asked to explain, if such was the school's position, why the "Remedial Discipline Plan" signed by the student and his mother son October 8, 2001, was valid.
- The complainant alleged that a meeting took place on January 3, 2002, at which she, and at least the school principal and the school superintendent were present. The complainant alleged that she was given a choice of home schooling her son or sending him to an alternative school in Buena Vista. The complainant alleged that she was told that her son could not be on school premises. The school was asked to respond as to whether, if held, the meeting of January 3, 2002 was an IEP meeting and, if so, whether,

and how, it was held according to the requirements of 34 CFR 300.340-350 of the IDEA regulations. If the school's position was that this was not an IEP meeting, the school was asked to provide information explaining the purpose of the meeting. The school was also asked to explain, if such was the school's position, why, if as the complainant alleged, she was offered the choice of home schooling or the Buena Vista Alternative school for her son – how such alternatives were arrived at consistent with the requirements of 34 CFR 300.340-350 of the IDEA regulations.

- The school was also asked to explain, as applicable, how the requirements of 34 CFR 300.13, 34 CFR 300.121, 34 CFR 300.503, 34 CFR 300.504, 34 CFR 300.523, 34 CFR 300.524, 34 CFR 300.525, 34 CFR 300.526, 34 CFR 300.550, 34 CFR 300.551, 34 CFR 300.552, and 34 CFR 300.553 of the IDEA regulations were met for this student.
- The school was also asked to document, if it was the school's position that this student was not a special education student, that the provisions of 34 CFR 300.527 of the IDEA regulations had been met.

SCHOOL'S RESPONSES

- The school claimed that an IEP meeting was held on April 9, 2001, sufficient to meet the requirements of 34 CFR 300.343(c)(1) of the IDEA regulations.
- As interpreted by the Federal Complaints Officer, the school claimed that this student began the 2001-2002 school year with an IEP sufficient to meet the requirements of 34 CFR 300.342, and all other relevant legal requirements.
- It is unclear to the Federal Complaints Officer from the school's response, whether or not it is claiming the meeting of October 8, 2001 was, or was not, an IEP meeting. Other than to refer to the "Remedial Discipline Plan" as "Lake County School District policy", the Federal Complaints Officer finds no other information in the school's response in support of its validity.
- The Federal Complaints Officer interprets the school's response to be that the meeting of January 3, 2002 was an IEP meeting, which met all relevant legal requirements, including the requirements of 34 CFR 300.340-350. According to the school, one of the placement alternatives discussed was "homebound" instruction, not "home schooling" as referenced by the complainant.
- The Federal Complaints Officer interprets the school's response to be that it met all legal requirements referenced by the Federal Complaints Officer, and all other relevant legal requirements, and that this student was, and is, a special education student.

FINDINGS AND DISCUSSION

- The meeting held on April 9, 2001 was an IEP meeting, timely held sufficient to meet the time requirements for annual meetings specified in 34 CFR 300.343(c)(1). It is unclear to the Federal Complaints Officer when the previous annual review meeting was held, but, even assuming, as alleged by the complainant, that the IEP meeting of April 9, 2001, should have taken place on March 9, 2001, the Federal Complaints Officer does not find this delay sufficient, on the facts of this Complaint, to warrant a finding that the date for annual review requirements of 34 CFR 300.343(c)(1) were violated.
- This student did have an IEP when he began the 2001-2002 school year, and therefore the timeliness requirements of 34 CFR 300.342(a) were not violated. However, the

student's IEP dated April 9, 2001, which was the IEP in effect for this student when he began the 2001-2002 school year, states, in the Service Delivery space on page seven (7) of that IEP that – "(Student) will attend school ½ day and receive core content at school, 1 period at home." Id. Student's name deleted. The provision for one-half (1/2) day services is also included on the student's Behavior Support Plan (BSP), Item 3, dated April 9, 2001, a copy of which was submitted by the complainant in her response to the school's response to her Complaint.

It is true that the staffing notes of April 9, 2001, submitted by the school, under Recommendations, item (1)(B), do state that "Full day will be decided by the doctor by April 19th." Id. The school also states, in its item two (2), page one (1) of its response that – "(Student's) teacher … discussed with him at the end of the school year that it would be really hard to go half time at the high school, and they designed a full schedule for him and sent it to the high school. No one ever received a report from the doctor regarding this issue. I understood (complainant) to say in the meeting held 1/3/02 that (teacher) told her that (student) would be going to the high school full time in the fall, and that this was her desire." Id. Personally identifiable information deleted.

It is the service delivery language on the April 9, 2001 IEP that specified one-half (1/2) day scheduling, which is controlling. The obvious purpose of any report from the student's doctor was to determine whether increased schooling was going to be appropriate. Under such circumstance, the school should not have begun this student on a full time schedule without first obtaining and considering the doctor's report and, after proper written notice to the parent, convening an IEP meeting. At least, such a meeting should have been convened if the parent and/or others members of the IEP team thought it necessary to do so. A change in the amount of service delivery a student receives is a change in placement. See 1 CCR 301-8 – 5.04(1)(b), (c). The school violated this state regulatory requirement, designed as a part of IDEA implementation in Colorado. Moreover, the school has provided no evidence that the notice requirements of 34 CFR 300.503 and 504 of the IDEA regulations were met, and the Federal Complaints Officer finds that they were not met.

- If the meeting of October 8, 2001 was not considered to be an IEP meeting by the school, it should have been, given the subject matter of the meeting and the actions taken. In any case, the relevant IEP requirements of 34 CFR 300.340-350 of the IDEA regulations were not met for this student, given that for this student, with a Significant Identifiable Emotional Disability (SIED), and being the age of fifteen (15), an appropriate Behavioral Intervention Plan (BIP) and an appropriate Transition Plan were necessary to an appropriate IEP, and the Federal Complaints Officer finds that these were not in place. Thus, more specifically, the school did not meet the requirements of 34 CFR 300.520(b)(1)(ii) and 34 CFR 300.347(b) of the IDEA regulations.

The Federal Complaints Officer does not know whether an appropriate Functional Behavior Assessment (FBA) has ever been done for this student. While it is true that such an assessment is not usually legally required to be done until a change in placement or disciplinary removals exceeding ten (10) days have occurred, the school can proceed without waiting for a change in placement or waiting ten (10) days, and should so proceed if the student's needs indicate this to be appropriate. If the school does proceed, it is obligated to meet all relevant legal requirements. The school did not do so here.

In its response the school characterizes the meeting of October 8, 2001 as a school "re-entering" meeting, pursuant to school district policy, subsequent to a student's suspension form school. Item four (4) of the school's response at page two (2). However, at this meeting a BSP was completed, and the complainant and the student were asked to sign a "Remedial Discipline Plan", which they did sign, and which was also signed by the building principal. Clearly, the participants at this meeting were engaged in the process of attempting to address this student's behavior. This is the function of the IEP team for special needs students, and this student is a special needs student, and the Federal Complaints Officer therefore finds that the meeting of October 8, 2001 was an IEP meeting – the type of IEP meeting contemplated by 34 CFR 300.520(b)(1)(ii). Such a meeting is designed to review and revise a BIP – or BSP – as the state standard form used by the school is labeled, and its implementation, assuming an FBA has been properly conducted, as required by 34 CFR 300.520(b)(1)(i). It is the finding of the Federal Complaints Officer that, even if an FBA was conducted, it was either not properly conducted, or, even if properly conducted, not properly applied to the purpose of developing a BIP/BSP for this student, since the Federal Complaints Officer correspondingly finds that the BIP/BSP for this student dated October 8, 2001 was inadequate.

Whether the behavioral plan is called an intervention plan or a support plan, the intent is to change the student's behavior for the better. It is the finding of the Federal Complaints Officer that the BSP of October 8, 2001 is not legally sufficient to be adequate to this task. Behaviors are not specifically enough identified. Ways of changing inappropriate behaviors are not specifically enough stated. Replacement behaviors are not specifically enough identified. Ways of determining – measuring – success in the changing of behaviors are not specifically enough stated.

The "Remedial Discipline Plan", signed by the principal, and the parent, and the student, on October 8, 2001, violates the authority of the IEP team under IDEA. It is the IEP team, as prescribed by the relevant portions of 34 CFR 300.519-529, and 34 CFR 300.340-350, of the IDEA regulations, that creates a BIP/BSP, based upon a FBA, for a special needs student, as necessary. And, even if the "Remedial Discipline Plan", dated and signed on October 8, 2001, refers to the BSP, dated and signed on the same date, it is still invalid, because it subverts the manifestation determination review requirements of 34 CFR 300.523, and, just as fundamentally, it attempts a one size fits all blanket policy to be imposed on IEP team decision making for special needs students. The "Remedial Discipline Plan", as written, and as applied to this student and all similarly situated students, violates IDEA.

- If the IEP team determined a placement other than the high school building, then there is no educational need for this student to be in the high school building. However, 34 CFR 300.550-556 of the IDEA regulations provide for all special needs students to be educated in the Least Restrictive Environment (LRE). This student has been in a self-contained program, and now the school is offering some homebound services, pending potential placement in another school entirely separate from the student's home school and in another community. These placement decisions were made without the completion and/or implementation of a valid FBA and BSP/BIP, or Transition Plan. Therefore, it is the finding of the Federal Complaints Officer that this student's right to a Free Appropriate Public Education (FAPE), according to the requirements of 34 CFR 300.13 and 34 CFR 300.121 of the IDEA regulations, in the LRE, have been denied. The Federal Complaints Officer recognizes that, to the extent the parent has knowingly

agreed to past and present placement and services decisions, she may have participated in the denial of FAPE/LRE for her son. However, the school, independent of the parent, has a responsibility to inform the parent of what the school believes is necessary to provide the student with FAPE/LRE, and to also inform the parent of the parent's right to contest that determination in a hearing. If adequate BSP/BIP and Transition Plans have not been created or implemented due to the school's failure to do so, and the parent mistakenly relies on the school, and that reliance was to the detriment of the student, then the parent's consent may not relieve the school of its failure. Even if it could be otherwise argued regarding past actions by the school, the parent, by virtue of filing this Complaint, put these provisions in question. Moreover, the school has not demonstrated that the parent was adequately informed of her rights, pursuant to the requirements of 34 CFR 300.503 and 34 CFR 300.504.

REMEDIES

1) Within thirty (30) days of the date of the school's certified receipt of this Decision, the Director of Special Education shall submit to the Federal Complaints Officer a statement of assurance sufficient to demonstrate that the school understands the following legal requirements, and that the school will follow them in the future: 1 CCR 301-8-5.04(1)(b), (c); 34 CFR 300.503; 34 CFR 300.504; 34 CFR 300.340-350; 34 CFR 300.520(b)(1)(i); 34 CFR 300.520(b)(1)(ii); 34 CFR 300.347(b); 34 CFR 300.519-529; 34 CFR 300.523; 34 CFR 300.550-556 ; and, 34 CFR 300.13 and 34 CFR 300.121.
2) Within thirty (30) days of the date of the school' certified receipt of this Decision, the Director of Special Education shall submit documentation to the Federal Complaints Officer sufficient to demonstrate that the school has in place procedures sufficient to meet the requirements of 34 CFR 300.503 and 34 CFR 300.504. Upon request of the Director of Special Education, this time may be extended as necessary in order for the school to meet this remedy requirement.
3) Within thirty (30) days of the school's certified receipt of this Decision, the Director of Special Education shall submit a statement of assurance to the Federal Complaints Officer that the school's "Remedial Discipline Plan" will no longer be used for the special education student in this Complaint, or any other special education student.
4) Within thirty (30) days of the date of the school's certified receipt of this Decision, the Director of Special Education shall submit to the Federal Complaints Officer a statement of assurance that the school will accept the guidance of the relevant consultant(s) from the Colorado Department of Education, for the purpose of insuring that the school understands how to develop and implement appropriate transition planning for this student, and all other age appropriate special education students.
5) Within thirty (30) days of the date of the school's certified receipt of this Decision, the Director of Special Education shall submit a statement of assurance that the school will accept the guidance of the relevant consultant(s) from the Colorado Department of Education, for the purpose of insuring that the school understands how to conduct an appropriate FBA, and how to develop and implement an appropriate BIP, for this student, and all other appropriate special education students.

With regard to remedies four (4) and five (5), the Federal Complaints Officer will accept these remedies as having been met, as soon as he receives written statements from the relevant Colorado Department of Education consultant(s) that this is the case. The Federal Complaints

Officer reserves the right to seek further remedies if he should determine that any of the remedies otherwise provided in this Decision have not been met.

Even though the Federal Complaints Officer has found that this student has been denied FAPE, he is not specifying what, if any, compensatory education would be appropriate. However, it is a part of the remedies ordered by the Federal Complaints Officer in this Decision, that the complainant parent shall be entitled to an IEP meeting for the purpose of determining what, if any, compensatory education might be appropriate for this student. An IEP meeting for this purpose must be requested by the complainant parent no later that thirty (30) days prior to the end of the 2002 spring school semester, and held, if so requested, prior to this student's sixteenth birthday – unless other time frames are otherwise agreed to by the parties. If such an IEP meeting is not requested by the complainant parent, within the stated time period, then the school shall not be required to convene such an IEP meeting for the purpose of compliance with this Decision – unless otherwise agreed to by the parties. Should the parent be dissatisfied with the outcome of such an IEP meeting, she would be entitled to request a due process hearing to contest the IEP team's decision.

CONCLUSION

In the final sentence of page three (3) of the school's response to this Complaint, the school states that the complainant "…did not exhaust administrative remedies according to IDEA process." Id. The complainant violated no exhaustion of remedies requirement. There is no exhaustion of remedies requirement prior to filing a Federal Complaint, although, the Federal Complaints Officer certainly agrees with the school that seeking to resolve concerns without filing a Federal complaint is generally the preferred course of action.

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

Dated today, March _____, 2002.

_____
Charles M. Masner, Esq.
Federal Complaints Officer