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

Federal Complaint 2003:514

Decision

Jefferson County Public Schools

I. INTRODUCTION

This Complaint letter was undated, but was received, by fax, on June 9, 2003. The school district's response to the Complaint was dated June 18, 2003, and received on June 26, 2003. The complainant's response to the school district's response to her Complaint was dated, and received, by fax, on June 30, 2003. The Federal Complaints Officer then closed the record.

II. COMPLAINANT'S ALLEGATIONS

The Federal Complaints Officer is stating the complainant's allegations as stated by the complainant, except as where edited by brackets by the Federal Complaints Officer.

1. Jefferson County School District did not give proper notice for an IEP meeting on May 27, 2003 as to who would be attending the IEP meeting. Staffs from other schools I may want to send my daughter to were there. The IEP was not ready for them to review. The district violated 34 CFR 300.345 (b)(2)(i), 300.345 (a)(i).
2. Jefferson County School District did not have a general education teacher present at the May 15 nor May 27 Triennial IEP where a change of placement was to be discussed. The District violated 34 CFR 300.344(a)(2).
3. The District violated my daughter's right to FAPE by not discussing extended school year and just marking it as NO on the IEP form. There was no discussion at either IEP meetings in May. The District violated 34 CFR 300.502(b).
4. I sent the District a letter that I disagreed with the reevaluations the school did in April and May of this year and that I wanted independent evaluations done for my daughter. The District has not responded. The District violated 34 CFR 300.502(b).
5. I was given a behavior plan for my daughter without a Functional behavior analysis done. For a child with a SIED it is essential that there be some understand[ing] of what the purpose of the behaviors [are] and how to positively motivate her.
6. My daughter will turn 16 before the school year starts on Sept. 15. There was no attempt to plan on needed transition services [for] my daughter as she enters the 10th grade. The draft IEP fails to meet these needs or services. The District violated 34 CFR 300.347(b)(1) and CFR 300.347(b)(2).

III. SCHOOL DISTRICT'S RESPONSES

The Federal Complaints Officer is stating the school district's responses as stated by the school district, except where edited with brackets by the Federal Complaints Officer.

1. Written notice was not tendered for May 27th. The IEP team had convened on May 15th. At that time, the complainant requested additional assessments. The District agreed and it was mutually decided to reconvene on May 20th to discuss those findings. A member of the IEP team subsequently became ill which necessitated rescheduling that meeting time. The May 27th date was actually chosen by the complainant. Her attendance and active participation led our team to conclude that the procedural aspects of the notice requirement had been reasonably met.

In a good faith effort to expedite completion of the IEP, including an active discussion of future or potential service and placement options for [student], representatives of the following schools were invited. Please note that the two "alternative" school representatives were present at the direct request of the complainant.

[The school district listed the Jefferson County Open School as an alternative/choice school with the Principal of the school invited. The school district listed the Compass Montessori School as a charter school, with the Principal of the school invited. The school district listed the Arvada Senior High School as the home school, with the social worker of the school invited. The school district listed Sobesky Academy as the current school.]

2. [Student] currently attends a special school that does not offer a general education component. In accordance with Section 300.344(a)(2), a general education teacher would have been included if said student had been participating in a regular education environment.

3. The IEP team has not completed the IEP process despite the fact that there have been multiple meetings. At each scheduled meeting, the complainant introduces new concerns or demands. Specifically, the complainant disagreed with the District's choice of cognitive instrument. She asked that the DAS Naglieri be administered in addition to the standard DAS. Our school psychologist and her own advocate attempted to explain that this was unwarranted and unlikely to provide any genuine insight particularly since the DAS findings were believed to be reliable and a valid measure of [student's] cognitive abilities. The ESY issue is a team decision and would have been discussed had we been permitted the opportunity to do so. Upon review of [student's] file, there is no current evidence that would indicate that [student] meets the criteria for eligibility for ESY services.

4. See June 4th memo. The District was patiently awaiting a response from the complainant to clarify her latest objections to the completed assessments or her expectations for further testing. The District was not attempting to cause an

unreasonable delay. The District was led to believe that clarification was forthcoming and was disappointed by the complainant's alternative response.

5. The BIP specifically addressed [student's] relatively poor attendance and tardiness at school. A functional behavioral assessment has been performed. The school maintains and has immediate access to that documentation. Additionally, the school team possessed substantial analytical data pertaining to effective and proven motivational strategies for [student]. There was simply no logical or reasonable need for further data or analysis.

6. Again, the District was hopeful of discussing and addressing this issue but was prevented from doing so by the team[']s inability to reach agreement from or with [complainant] on even the basic question of special education eligibility.

IV. FINDINGS AND DISCUSSION

1. There were two IEP meetings, or sessions of the same meeting, precedent to this Complaint. One was on May 15, 2003. The other was on May 27, 2003. The complainant attended both meetings, as evidenced by her signatures on the respective signature pages of the IEPs for May 15 and May 27, 2003.

The complainant only alleged a failure of notice for the May 27, 2003 meeting – specifically, violations of the Individuals with Disabilities Education Act (IDEA) regulations 34 CFR 300.345(a)(1) and 34 CFR 300.345(b)(2)(i). These regulatory provisions require, respectively, "…[n]otifying parents of the meeting early enough to ensure that they will have an opportunity to attend…" and , for a student with a disability beginning at age 14, or younger, if appropriate "…[i]ndicat[ing] that a purpose of the meeting will be the development of a statement of the transition services needs of the student required in § 300.347(b)(1)…." Id. The Federal Complaints Officer finds no violation by the school district of 34 CFR 300.345(a)(1), since the May 27, 2003 IEP meeting was a continuation of the May 15, 2003 IEP meeting, for which the complainant did not allege she had notice insufficient to allow her to attend, and since the complainant did not allege that she had notice insufficient to allow her to attend the May 27, 2003 IEP meeting. As for 34 CFR 300.345(b)(2)(i), the Federal Complaints Officer also finds no violation by the school district. On the one hand, the complainant argues that the meetings of May 15 and May 27, 2003 should have addressed, and did not, transition services for the complainant's daughter, and on the other hand the complainant objects to persons being at these meetings whose purpose was to help in addressing transition services, and that she was not informed that these persons were going to be in attendance. These claims are, at least in part, contradictory. Despite any contradiction, however, though not cited by the complainant, the Federal Complaints officer does find that the school district violated the notice provision of 34 CFR 300.345(b)(i), regarding "…who will be in attendance…" at IEP meetings. Id. The Federal Complaints officer finds insufficient documentation in the record to evidence that this notice provision was met by the school district. The Federal Complaints Officer also finds insufficient evidence in the record to find that the complainant, on behalf of her daughter, suffered any harm from this procedural error.

2. Unless the school district had already determined prior to the transition triennial IEP meetings of May 15 and May 27, 2003 that this student was not going to participate in the future in regular education – a determination the school district would not have been entitled to make without the parent's participation (and the Federal Complaints Officer finds that there was no such parent participation) – then a potentially prospective representative regular education teacher should have been at these meetings. One purpose of regular education teacher participation in IEP meetings is to help decide whether, and if so, to what extent, a student covered by the IDEA should participate in regular education. Thus, 34 CFR 300.344(a)(2) states, in relevant part, that an IEP team shall include "…[a]t least one regular education teacher of the child (if the child is, *or may be*, participating in the regular education environment) …" Id. Parentheses in original. Italics added by the Federal Complaints Officer. The Federal Complaints Officer finds that the school district violated 34 CFR 300.344(a)(2) by not having a representative regular education teacher participate in the IEP meetings of May 15 and May 27, 2003. See also Questions 22, 23, 24, 25, and 26, of Appendix A of the IDEA regulations.

3. On the one hand the school district states that the "…IEP team [had] not completed the IEP process" with regard to extended school year services (ESY), and yet the "no" box is checked on both the May 15 and May 27, 2003 IEPs, indicating that this student did not qualify for ESY services. The complainant parent alleges that ESY was not discussed at these IEP meetings. The Federal Complaints Officer understands the school district's argument to be that ESY was not discussed due to faults of the complainant. If ESY was not adequately discussed, then the "no" box should not have been checked. The Federal Complaints Officer finds that the "no" box should not have been checked and that ESY services were not adequately discussed and therefore that 34 CFR 300.309 was violated by the school district due to the failure of this discussion to take place. The Federal Complaints Officer makes no finding as to whether this student was entitled to ESY services, and no finding as to whether ESY services were necessary in order for this student to obtain a free appropriate public education (FAPE).

4. The Federal Complaints Officer finds that the school district violated the complainant's right to an independent educational evaluation (IEE), as required by 34 CFR 300.502(b). What the school district is entitled to do is to "… ask for the parent's reason why he or she objects to the public evaluation." 34 CFR 300.502(b)(4). "However, *the explanation by the parent may not be required* and the public agency may not *unreasonably delay* either providing the independent educational evaluation at public expense or initiating a due process hearing to *defend* the public evaluation." Id. Italics added by the Federal Complaints Officer. This regulatory provision states that it is the school district's obligation to "defend" its evaluation, not the parent's responsibility to defend his or her request for an IEE. The complainant parent made a written request for an IEE dated May 28, 2003, in which she asked that the school district please provide her with "… information on how to obtain Independent Educational Evaluations for my daughter." The school district, by letter of the Principal of the day treatment program of the student, dated June 4, 2003, responded to the parent's request for an IEE as follows: "As to your request for information related to the independent evaluation, you will need to specify which parts of the educational assessment you disagree with, the errors you believe exist and the reasons you believe an independent evaluation is warranted." Id.

The law allows the school district to ask for reasons, but the Federal Complaints Officer finds that asking the parent to "specify which parts" of the school district's evaluation a parent disagrees with, and "the errors [the] [parent] believe[s] exist[s]" in the school district's evaluation, while not unreasonable information for the school district to want to know, goes beyond what a parent is required to provide in order to exercise his or her right to obtain an IEE, and requesting such information has, in this case, unreasonably delayed providing the complainant parent with an IEE, or providing for the forum of a due process hearing for the school district to defend its evaluation. As 34 CFR 300.502(b)(4) states "…[an] explanation by the parent may not be required." Id. The school district is required, according to 34 CFR 300.502(2) to "…provide to parents, upon request for an independent evaluation, information about where an independent evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section." Id. Paragraph (e) provides that – "If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation." Id.

If a school district meets the requirement of 34 CFR 300.502(2), which the school district did not do in this case, it can help insure that a parent does not seek an inappropriate evaluation. If the parent seeks an evaluation which the school district does not believe meets necessary criteria, and if the school district believes that it has already done an appropriate evaluation, the school district is entitled to convene a due process hearing to "defend" the appropriateness of its evaluation and demonstrate that the parent's requested evaluation does not meet appropriate school district criteria. The school district is still entitled to convene such a hearing. However, unless the school district convenes such a hearing within thirty (30) days of the date of its receipt of this Decision, or unless the school district has already paid for an IEE for this student as of the date of this Decision, then the complainant shall be entitled to an IEE of her choosing to be paid for by the school district within thirty (30) days of the school district's receipt of a bill from the evaluator(s) – so long as the complainant obtains the IEE no later than the last day of the fall 2003 school semester.

5. The school district stated in its response to this Complaint that – "A functional behavioral assessment has been performed. The school district maintains and has immediate access to that documentation." If so, then the school district should have "access[ed] that documentation" and provided it to the Federal Complaints Officer. The school district has not done so. The "Behavior Plan" for this student, submitted by the school district, directs that a "Functional Behavior Analysis Worksheet" be completed. The school district submitted, as a part of its response to this Complaint, a document for this student labeled "Eligibility Determination Worksheet: Significant Identifiable Emotional Disability". The Federal Complaints Officer does not view this document as documenting the type of functional behavioral analysis contemplated by the IDEA. That said, however, the Federal Complaints Officer does not find, for the purpose of deciding this Complaint, that the school district has violated any portion of the IDEA relevant to effective diagnosis and intervention for behavioral difficulties for this student – except to the extent that the obtaining of an IEE is relevant to such diagnosis and intervention. It is not clear to the Federal Complaints Officer whether or not further assessment of this student's behavior is

necessary at this time. This is an IEP team decision, or a due process hearing officer decision if agreement cannot be reached. If the complainant parent believes that her daughter's behavioral needs are not being adequately met, her ultimate relief, under the IDEA, is the due process hearing.

6. The complainant states in her Complaint that – "The draft IEP fails to meet [transition] needs or services." This is an IEP team decision. If the IEP team cannot reach consensus, the parent's ultimate relief, under the IDEA, is the due process hearing – not the Federal Complaint process. The Federal Complaints Officer, for the purpose of deciding this Complaint, finds no violation by the school district of 34 CFR 300.347(b)(1) or 34 CFR 300.347(b)(2).

REMEDIES

1. Within thirty (30) days of receipt of this Decision, the Executive Director of Intervention Services shall submit to the Federal Complaints Officer a written statement of assurance that all procedural violations found by the Federal Complaints Officer have been addressed to promote the avoidance of their future occurrence.

2. Within thirty (30) days of receipt of this Decision, the Executive Director of Intervention services, if she has not already done so, shall appropriately inform the complainant of where she can obtain an independent educational evaluation (IEE), and shall either grant the complainant's request for such an evaluation at the school district's expense (assuming the complainant still wants an IEE) , or shall convene a due process hearing to defend the school district's evaluation – consistent with the specifics of the Federal Complaints Officer's Finding number four (4).

3. If the complainant requests an IEP meeting, within thirty (30) days of the date of this Decision, or within thirty (30) days of the completion of any IEE obtained by the complainant, if such IEE has not already been obtained as of the date of the complainant's receipt of this Decision, the school district shall grant such request for an IEP meeting. Any such IEP meeting requested shall be held within thirty (30) days of the complainant's request, unless otherwise agreed to by the parties. Any such IEP meeting(s) held shall include enough sessions for the parties either to reach consensus, or for the school district to communicate to the complainant parent, including written communication, what the school district is offering to provide as a free appropriate public education (FAPE) and the complainant parent's right to a due process hearing if she disagrees with what the school district is offering to provide. Any such IEP meeting(s) held shall be recorded. It shall be determined by the school district whether the recording is by audio, sound video, or by court reporter. In any case, the recording shall be intelligible and shall identify by name and title all speakers when they speak. The record, whether audio, sound video, or by court reporter, shall be made into a verbatim written transcription. A complete and verbatim copy of this written transcription, and an unedited copy of any audio or sound video recording made, shall be provided to the complainant parent. All expenses for recording, transcription, and complainant's copy, shall be paid by the school district.

4. In its response to this Complaint the school district requested – "That the Colorado Department of Education assign an 'intermediary' to assist this [IEP] team to reach consensus on existing and future IEP issues and in addressing the student's legitimate educational interests." Id. The school district indicated it made this request because :

> Over the years, the District has made numerous attempts to arrange advocacy assistance for the complainant and while that service is initially welcomed, there appears to be little long term benefit. Over the past two years there has not been a period of time in which [the complainant] has not had an active mediation, due process, Federal Complaint process and/or OCR complaint process in effect against the District. While the District has made countless good faith attempts to cooperate and act in a reasonable and fair minded manner [the complainant] has not reciprocated. [The complainant's] actions are emblematic of those that could best be described as an abuse of the basic [tenets] of the due process protections as guaranteed by IDEA. Id.

The Federal Complaints Officer asked the complainant to respond to the specific request by the school district for an "intermediary". The complainant did so in her written response to the school district's response to her Complaint, by stating – "I am open to an 'intermediary' that is a neutral person. My idea of a good 'intermediary' is a person who is skilled in special education and special education law." Id.

In his letter to the school district dated June 30, 2003, closing the record in this Complaint, with a copy sent to the complainant, the Federal Complaints Officer stated:

> With regard to the issue of an "intermediary", the parties are entitled, to the best of the Federal Complaints Officer's knowledge, to choose a person to serve in this capacity. If the parties mean by such a person, a mediator, as authorized by IDEA, then this Federal Complaints Officer, in his capacity as the person who has oversight over the mediators, will assign a mediator and the Colorado Department of Education will pay that mediator's fees and expenses. Such persons have authority to mediate, meaning trying to help the parent and the school district reach a voluntary agreement. The school district's request was for a person to "…assist this [IEP] team to reach consensus on existing and future IEP issues and in addressing the student's legitimate educational interests." It is the Federal Complaints Officer's view that something other than mediation may now be required. As the school district indicated in its response to this Complaint, and has not been disputed by the complainant, and has been independently verified by the Federal Complaints Officer, the parties have already been through mediation, as well as the Complaint and due process hearing processes – yet disagreements continue to arise.
>
> The Federal Complaints Officer will do his best in his Decision to explain his view about what may be appropriate in the way of dispute resolution between the parties. However, while that Decision will be available within the sixty (60) days allotted for

> such a Decision, the Federal Complaints Officer does not want to preclude the parties from proceeding sooner to try and resolve their differences, if they wish to do so. Therefore, the parties are informed that they may request traditional mediation prior to the written Decision of the Federal Complaints Officer, and they may also contact him for his views on what other "intermediary" solution may be available to them prior to that Decision. The Federal Complaints Officer will be out of the office for annual leave from July 1 until July 10, but he will be checking his voice mail during this period, if either or both of the parties wish for him to contact them regarding a mediator or an intermediary. The Federal Complaints Officer will not, however, otherwise engage the parties about resolution of the issues raised in the Complaint, unless he, not the parties, decides that it is necessary to do so.

The Federal Complaints Officer has not heard from either the school district or the complainant since the date of his June 30, 2003 letter, as of the date of this Decision.

The Federal Complaints Officer has determined that "impartial arbitrator" is a better descriptor than "intermediary" for the function the parties need performed. For the purpose of complying with this Complaint Decision, the Federal Complaints Officer will waive the imposition of Remedy number three (3), in its entirety, if the parties can agree on an impartial arbitrator to resolve their ongoing disagreements. Any fees or expenses for any such impartial arbitrator shall be paid by the school district. The selection, length of tenure, and scope of authority of any such impartial arbitrator shall be determined by the parties. If this remedy is selected by the parties they must do so, for the purpose of complying with this Complaint Decision, within thirty (30) days of the date of this Decision – including retaining the person who is to serve as the impartial arbitrator. For the purpose of complying with this Federal Complaint Decision, if this thirty (30) day time limit is not met, Remedy number three (3) shall not be waived, unless waived by the complainant.

CONCLUSION

In her response to the school district's response to her Complaint, the complainant, after stating her response to the school district's request for an intermediary, went on to state:

> My daughter has been in special education with Jefferson School District since the 3rd grade. She has made no progress as measured by Jeffco tests in the area of math. Her scores were higher before she received services. In her current placement her IQ has gone down dramatically. I am tired of trivial IEP's that give her little to no educational benefit. The current draft IEP is a continuation of no educational benefit. Id.

The complainant's daughter was a ninth grader during the 2002-2003 school year.

The Federal Complaints Officer is confident that both parties will agree that nothing in this Federal Complaint Decision is going to change these perceptions of the complainant, whatever

the school district may think of the validity of these perceptions, and whatever either party may think of the validity of the Federal Complaints Officer's findings and remedies. For so long as the complainant's daughter is entitled to services from the Jefferson County Colorado school district the complainant and the school district will have a relationship, and complainant's daughter will be a third party beneficiary of the quality of that relationship. For the benefit of the student, the Federal Complaints Officer encourages the parties to get more creative about improving the quality of that relationship.

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

Dated today, July 28, 2003.

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Charles M. Masner, Esq.
Federal Complaints Officer