

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

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**Federal Complaint 2004:503**

Morgan County School District RE-3

**Decision**

**I. INTRODUCTION**

This Complaint was dated April 12, 2004, and was received by the Federal Complaints Officer on April 13, 2004. The school district's response to the Complaint was dated April 27, 2004, and was received by the Federal Complaints Officer on April 28, 2004. The complainant's response to the school district's response to her Complaint was dated May 16, 2004, and was received by the Federal Complaints Officer on May 19, 2004. The Federal Complaints Officer then closed the record.

**II. COMPLAINANT'S ALLEGATIONS**

The complainant's allegations are stated as follows:

On February 25, 2004 I questioned ESY qualification and requested that [my son] be evaluated before and after spring break since it had not been done before and after winter break. That evaluation was not done. Complaint letter, page 1.

On February 25, 2004 I requested an in-depth Functional Behavioral Analysis be done to consider the necessity of a Behavior Support Plan for [my son]. A Functional Behavioral Analysis by an independent behavior specialist, also familiar with behaviors common and expected in students with Down Syndrome, was not done. On April 7, 2004 school staff drafted a Behavior Support Plan for [my son] without the benefit of that analysis. Complaint letter, page 1.

**III. SCHOOL DISTRICT'S RESPONSE**

The school district denies that it has committed any violations of law.

#### IV. FINDINGS AND DISCUSSION

##### ESY

As he indicated in his letter opening this Complaint, the Federal Complaints Officer is not deciding the issue of whether this student should have been determined to be eligible for extended school year (ESY) services. This is an IEP team decision, and, if parents and school districts are unable to agree, as a part of a valid IEP process, then the parent is entitled to a due process hearing to resolve the issue. However, it is within the jurisdiction of the Federal Complaints Officer to determine whether a valid IEP process took place. The Federal Complaints Officer finds that it did not.

In the school district's response, it states that – “In order to qualify for the ESY program an evaluation must be done to demonstrate that the student suffers from a lack of retention of information over a period of a school break.” School district's response at page 1. This is an incomplete statement of the law in Colorado. Colorado is a member state of the Tenth Circuit, and the Tenth Circuit Court of Appeals, in the case of *Johnson v. Independent School District No. 4*, 921 F.2d 1022 (10<sup>th</sup> Cir.1990), 17 *EHLR* 170 (1991), identified that other considerations for determining whether a student needs ESY services may include: the degree of impairment, the ability of parents to provide educational structure in the home, the child's rate of progress, the child's behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-handicapped peers, the child's vocational needs, whether the program is extraordinary as opposed to necessary, and areas of the curriculum in which the child needs continuous attention. 17 *EHLR* at 173. In a footnote the Court stated that – “This list is not intended to be exhaustive, nor is it intended that each element would impact planning for each child's IEP.” *Id.* at 176, FN 9. In addition, the Court stated, in using a regression/recoupment analysis, schools “should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also include predictive data, based on the opinion of professionals in consultation with the child's parents”. *Id.* at 173. The Federal Complaints Officer finds that the school district did not sufficiently follow the *Johnson* decision in making an ESY determination for this student.

The school district also states in its response that:

An interesting point is that while asking for ESY, at the February 25, 2004, staffing the parent stated that she did not want the child placed in the summer special education program. She wanted him in a regular, mainstream summer program. She was told that if the child qualified for ESY, placement would be the special education ESY program. School district's response at page 2.

Again, the Federal Complaints Officer passes no judgment on whether this student was, or is, entitled to ESY services, and no judgment on what those services, assuming entitlement, should have been, or should be. However, the appropriate educational services for a student covered by the Individuals with Disabilities Education Act (IDEA), and the appropriate delivery system for those services, are to be determined by a validly constituted IEP team, based upon the needs of the student – not upon a one size fits all package of services and delivery system. Therefore, as

described by the school district, the Federal Complaints Officer finds that the services and delivery system options made available to this IDEA covered student were not sufficient to meet the IDEA's requirement that IEP team decision making about such options be based upon the individual needs of the student, including that services be delivered in the least restrictive environment.

### Independent Educational Evaluation

The Federal Complaints Officer counts four (4) separate instances in its response, where the school district states, in italics, that the complainant parent did not request an independent evaluator or evaluation (IEE), despite having several opportunities to do so. Also relevant, the school district states in its response that:

At meetings with the parent on September 9, 2003 and February 11, 2004, she was given a copy of an Educational Rights Brochure, which explains the right to request an independent evaluation. An Oral Review of Rights was offered. On February 18, 2004 and February 25, 2004 she was again offered an Educational Rights Brochure and an Oral Review of Rights. ... School district's response at page 5.

School districts are, obviously, not required to be attorneys for parents of students, including students covered by the IDEA. However, what the school district could have done here, in order to resolve any ambiguity about what the parent wanted, would have been to ask whether the parent wanted an independent educational evaluation. Even after the filing of this Complaint, the school district's position was, and presumably still is, that the complainant parent has not, and is not, requesting an IEE – "Please note that we do not consider the complaint to your office to be a request for the Independent Evaluator to conduct a Functional Behavior Analysis." School district's response at page 5. As he stated in his letter opening this Complaint, the Federal Complaints Officer does treat the parent's Complaint as a request for an IEE, at least as of the date of this Complaint filing. He is therefore finding that the school district has violated its obligation to provide the parent with an IEE, or to convene a hearing in order to establish to the satisfaction of a hearing officer that an IEE is not necessary.

## **V. REMEDIES**

If the complainant parent requests, within thirty (30) days of the date of this Decision, an IEP meeting, in order to appropriately address, as indicated by the Federal Complaints Officer in this Decision, the issue of ESY, the school district shall convene such an IEP meeting. Any such IEP meeting requested shall be convened within thirty (30) days of the parent complainant's request for such a meeting, unless otherwise agreed to by the parent. If it is determined that ESY services are appropriate, and they can still be appropriately provided this summer, then, obviously, this should be done. If it is determined that ESY services, while appropriate, have not been timely provided, then the IEP team shall consider whether compensatory education, including reimbursement to the parent for educational services she has provided at her expense,

should be provided. If the determination remains that ESY services are not appropriate for this student, or there is disagreement over what those ESY services should be, or disagreement over compensatory education, then the parent shall be appropriately informed of her right to a due process hearing in order to further contest the issue of ESY services.

If the complainant parent renews her request, within thirty (30) days of the date of this Decision, for an IEE, then the school district shall either grant that request, or convene a due process hearing in order to establish that an IEE is not necessary. The school district shall respond to any such parent request for an IEE in accordance with the regulatory directives provided at 34 CFR 300.502 of the IDEA.

Within thirty (30) days of the date of this Decision, the Director of Special Education shall submit to the Federal Complaints Officer a statement of assurance that the remedies ordered by the Federal Complaints Officer have been, or will be, implemented as ordered by the Federal Complaints Officer.

## **VI. 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, June 7, 2004.

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Charles M. Masner, Esq.  
Federal Complaints Officer