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

Federal Complaint 99:538

(Pikes Peak BOCS)

Decision

INTRODUCTION

This Complaint was dated November 1, 1999, and received by the Federal Complaints Officer on November 5, 1999. On November 9, 1999 a copy of the Complaint letter was sent to Pikes Peak BOCS Director, Dr. Brian Printz, with copies to the complainants and Ms. Linda Williams-Blackwell. The copy of the Complaint letter was accompanied with a cover letter from the Federal Complaints Officer stating, in relevant part, that "…if substantiated, the facts as stated by (the complainants) could be a violation of relevant special education law." The cover letter asked for a response from the school within fifteen (15) days of the school's receipt of the Complaint, unless an extension of time was granted by the Federal Complaints Officer. The Federal Complaints Officer received proof of receipt of this correspondence, by Dr. Printz, dated November 10, 1999. In a letter dated November 17, 1999, and received by the Federal Complaints Officer on November 19, 1999, the school filed a response to this Complaint, and seven (7) other individual Complaints filed by other complainants, as well as a group Complaint filed by all the complainants. The letter dated November 17, and received by the Federal Complaints Officer on November 19, was less than one and one half pages long and was the school's response to Complaints concerning eight (8) students.

In a telephone conversation of November 29, the Federal Complaints Officer spoke with the school's attorneys', Mr. Robert I. Cohn and Mr. Bruce Anderson. Federal Complaint procedure was discussed and the Federal Complaints Officer told Mr. Cohn and Mr. Anderson that he did not believe the school's response to the Complaints was sufficient because it did not address each Complaint individually with enough specificity to the allegations that had been made. Mr. Cohn and Mr. Anderson told the Federal Complaints Officer that they would get back to him that week with an answer about whether and when the school would be filing further responses. In a letter to the Federal Complaints Officer dated December 3, 1999, and received by the Federal Complaints Officer on December 6, 1999, from Mr. Cohn, the Federal Complaints Officer was told in writing what had already been conveyed to him orally by Mr. Cohn – that Mr. Cohn's firm was representing the school and all communications with the school from the Federal Complaints Officer, regarding the Complaints, should be through Mr. Cohn's law firm. The Federal Complaints Officer has not spoken to anyone at the school regarding the Complaints, with the exception of the on-site, since he received, on December 6, 1999 the letter of notification from Mr. Cohn dated December 3, 1999.

In correspondence to the complainants, dated December 6, 1999, the Federal Complaints Officer sent the complainants a copy of the school's response, dated November 17, 1999, and received by the Federal Complaints Officer on November 19, 1999. The Federal Complaints

Officer received proof of receipt of certified mailing, for this Compalint and the group Complaint, 99:538 and 99:537, respectively, dated December 16, 1999. In his correspondence dated December 6, 1999, the Federal Complaints Officer told the complainants that the school had estimated that additional responses would be forthcoming to their Complaints within ten (10) days. It is the recollection of the Federal Complaints Officer that this was the time period agreed on with Mr. Anderson. The Federal Complaints Officer told the complainants that he would send them copies of any individual responses received from the school. He also told the complainants that they could file a response to the school's initial response now, or wait and respond after they had received any additional responses the school provided. In a letter from the school's attorneys, dated December 17, 1999, and received by the Federal Complaints Officer on December 17, 1999, the school submitted a response to the individual Complaint. The Federal Complaints Officer mailed a copy of this additional school response to the complainants in correspondence dated December 21, 1999, and received by the complainants on December 23, 1999, according to proof of receipt of certified mailing. The Federal Complaints Officer failed to notify the complainants of their opportunity to respond to this additional response from the school. Upon discovering his mistake, the Federal Complaints Officer did notify the complainants of their opportunity to respond, in correspondence dated January 21, 2000.

On December 14, 1999, the complainants filed an addendum to their Complaint. In correspondence dated December 16, 1999, the Federal Complaints Officer mailed this addendum to the school and provided an opportunity for the school to respond. The school responded in correspondence dated January 5, 2000, and received by the Federal Complaints Officer on January 10, 2000.

On December 20, 1999 the Federal Complaints Officer called Mr. Cohn and left a voice mail asking whether there was going to be any further response forthcoming to the complainants group Complaint, and asking for a list of staff and student schedules for the purpose of doing an on-site at the school as a part of the investigation. The Federal Complaints Officer had previously requested this information from Ms. Linda Williams-Blackwell, prior to Mr. Cohn's law firm representing the school, and in correspondence to Mr. Cohn dated December 16, 1999, and subsequently received by Mr. Cohn's firm, by certified mail, on December 17, 2000, the Federal Complaints Officer had also requested this information. On December 20, that same day, the Federal Complaints Officer received a voice mail back from Mr. Cohn. The voice mail did not answer the question of whether there was going to be a further response to the group Complaint. The voice mail did say that Mr. Anderson, Mr. Cohn's colleague, had mailed the Federal Complaints Officer a list of staff and schedules on Friday. In correspondence to Mr. Anderson, Mr. Cohn's colleague, dated December 21, the Federal Complaints Officer again asked whether a further response to the group Complaint would be forthcoming, and again asked for a list of staff members and schedules. In faxed correspondence from Mr. Anderson, to the Federal Complaints Officer, dated and received December 27, 1999, Mr. Anderson, stated that they would provide a "more specific response to the group complaint" and also faxed the Federal Complaints Officer staff and scheduling information. Mr. Anderson explained that he had been out of the office on December 21, 22, and 23.

In correspondence dated January 5, 2000, and received by the Federal Complaints Officer on January 10, 2000, the school provided an additional response to the group Complaint. In correspondence dated January 13, 2000, the Federal Complaints Officer sent, by certified mail, a copy of this additional response to the group Complaint, to the complainants, and gave them fifteen days to respond if they wished. On that same day, January 13, 2000, the Federal

Complaints Officer received, in a letter signed by all of the complainants, dated January 11, 2000, a response to the school's initial response to the Complaint, dated and received November 17, and 19, respectively. In correspondence dated January 18, 2000, the Federal Complaints Officer sent the school a copy of this response from the complainants.

As a part of the investigation of this Federal Complaint, as requested by the complainants and the school, the Federal Complaints Officer conducted an on-site at Lewis Palmer Middle School. This was done on February 1 and 2, 2000. The Federal Complaints Officer met with persons that the complainants and the school had identified as the persons with whom they wanted the Federal Complaints Officer to meet.

COMPLAINANTS' ALLEGATIONS

In their Complaint letter, dated November 1, 1999, and received by the Federal Complaints on November 5, 1999, the complainants' alleged:

- Assistive technologies (specifically computers) were not being made sufficiently available to their son;
- There son was not being educated in the least restrictive environment;
- There was not an IEP in place for their son;
- Their were no regular education teachers as a part of their son's IEP team;
- During the first eight (8) weeks of the school year, fall 1999, modifications to their son's curriculum were made without their approval;
- Their son was not included in vision and hearing assessments;
- Their son's educational environment was inappropriately disrupted due to a room change;
- State inspectors did not investigate Lewis Palmer Middle School;
- Special education was not sufficiently funded by the school;
- The school discriminated against their son.

SCHOOL'S RESPONSE

The school's response, dated and received by the Federal Complaints Officer on December 17, 1999 was as follows:

- Special education students had the same access to computers as regular education students;
- The complainants' son was being educated in the least restrictive environment;
- The complainants' son did have a current IEP, dated October 27, 1998;
- A regular education teacher was present at the October 27, 1998 IEP meeting, and one would be available at the December 16, 1999 IEP meeting;
- "LPSD acknowledges that (complainants' son's) schedule was changed during the first weeks of the school year. If the changes were made without parental input or approval, they were done in violation of LPSD policy. LPSD made personnel changes to eliminate these types of concerns. (The new teacher) has and will continue to communicate with Complainants regarding (complainants' son's) education and classroom schedule."

- "All special education students receive a vision and hearing screening in conjunction with their annual review staffing. (Complainants' son's) IEP further provides "vision and hearing screenings are required in pre-school and kindergarten, and in grades 1, 2, 3, 5, 7 and 9."
- "Complainants' concerns regarding program changes to the SMN Program do not constitute violations of IDEA. LPSD made personnel changes and room changes which it believed were necessary to improve the quality of the SMN Program."
- "Complainants' allegations regarding a state board of education inspection do not constitute violations of the IDEA or (complainants'son's) IEP."
- "Complainants' unsubstantiated opinions regarding the funding of the special education program do not constitute violations of the IDEA or (complainant's son's) IEP."
- "None of the allegations regarding alleged discrimination constitute violations of the IDEA or (complainants' son's) IEP."

FINDINGS

- There is insufficient evidence in the record to demonstrate that the school has failed to provide complainants' son with any assistive technologies, including computers, that would constitute a violation of IDEA.
- The Federal Complaints Officer does not believe he has adequate information to make judgments about what services delivery system was, or is, best suited to meet complainants' son's special education needs in the least restrictive environment. Complainants can either get more specifics into the IEP, so there is no misunderstanding about what is required, or, if they cannot agree with the school about what these specifics should be, they can request a due process hearing. The due process hearing is a more appropriate forum, in the view of the Federal Complaints Officer, for considering what would be competing evidence about what "least restrictive environment" should mean, that is – what the IEP should contain, than is the Federal Complaint process, which is designed to investigate complaints about whether what the IEP does contain is, in fact, being provided. However, having said that, it is also true that, whatever "least restrictive environment" means, it is a part of a "free appropriate public education". If a "free appropriate public education" has not been sufficiently provided, then the "least restrictive environment" requirement cannot be said to have been met, whatever that was intended to be. That's what happened here, and, therefore, the Federal Complaints Officer finds that complainants' son was not provided an education in the "least restrictive environment". This was a violation of IDEA. See 34 CFR 300.550 – 300.556, and 34 CFR 300.13.
- School for the fall semester 1999 started on August 17, 1999. According to the response of the school, dated and received December 17, 1999, - "Shortly after the commencement of classes, (the principal) observed that (the teacher) was not meeting the required performance standards." Therefore, "(the teacher) was placed on administrative leave on September 15, 1999, less than 30 days after school began." A full time substitute was hired until a new permanent teacher was hired on October 25, 1999. According to the school, the anniversary date of complainants' son's IEP was October 28, three days after a new teacher was hired to replace a teacher the school acknowledges was incompetent, who was then replaced by a long term substitute until the new permanent teacher was hired. Under these circumstances, the Federal Complaints Officer finds that it is more likely than not that the complainants' son was not fully receiving a free appropriate public education, during this time period. Moreover, from October 28, 1999 until December 16, 1999, the complainants' son received special education services without a current IEP. The school says that – "Complainants signed a delay of staffing form." Its hard to see what choice they had under

the circumstances. Presumably, the school was not prepared to give the complainants' an adequate review on October 28, 1999, three days after the new teacher started, who replaced an incompetent teacher and a substitute. Under these circumstances, the Federal Complaints Officer finds that it is more likely than not that the complainants' son was not fully receiving a free appropriate public education for the remainder of the fall semester 1999. This was a violation of IDEA. See 34 CFR 300.13 and 300.340 – 300.350.

- According to the signatures on the complainants' son's December 16, 1999 IEP, a general education teacher was a part of complainants' son's IEP team. This meets a requirement of IDEA, and the Federal Complaints Officer finds no violation of this requirement.
- The changes in complainants' son's schedule during the first part of the fall semester 1999, without appropriate consultation with the complainants, was a violation of the IEP process, and a violation of IDEA. It is a part of the denial of free appropriate public education finding by the Federal Complaints Officer. See 34 CFR 300.13 and 300.340 – 300.350.
- The Federal Complaints Officer finds no violation of IDEA based upon complainants' allegation about vision and hearing screening for their son.
- Complainants are entitled to be informed about program changes which affect the delivery of special education services as required by the IEP. It is inconsistent with a regulatory scheme that requires parent participation to conclude otherwise. To be clear: the Federal Complaints Officer is not in any way stating that complainants have any authority, under IDEA, to participate in personnel decisions by the school. However, when those personnel decisions also result in program changes which affect the delivery of required IEP services, parents are entitled to be appropriately consulted so that, at a minimum, they can adequately prepare their sons and daughters for those changes. Ultimately, if parents and school cannot agree on program changes, the parents means of addressing their concerns is the due process hearing. The school's failure to keep the complainants adequately informed was a violation of IDEA. See generally 34 CFR 300.340 – 300.350. See also 34 CFR 300.503 and 34 CFR 300.507.
- Complainants' allegation about the way a state monitoring visit was conducted, is not an allegation subject to the jurisdiction of the Federal Complaint process.
- Complainants' allegation about special education funding is not an allegation subject to the jurisdiction of the Federal Complaint process.
- Complainants' allegations about discrimination are not allegations subject to the jurisdiction of the Federal Complaint process.

In additional information, dated and received from the complainants by the Federal Complaints Officer on January 7, 2000, the complainants raise new issues. Because these were not before the Federal Complaints Officer at the time complainants filed their Complaint, he will not consider them as a part of this Complaint. To proceed otherwise would allow for a Federal Complaint process without adequate closure, which would not be in the best interests of resolving the disagreements between the complainants' and the school. However, the Federal Complaint process places no limit on the number of Complaints a complainant can file. If the complainants wish to file further Complaints on issues that have arisen, are arising, or will arise, since the filing of their initial Complaint, which are subject to the jurisdiction of the Federal Complaint process, they have a right to do so.

DISCUSSION: FINDING OF DENIAL OF FAPE AND NEED FOR COMPENSATORY EDUCATION

In its response to the Federal Complaint, dated and received December 17, the school states that the "magnitude of the deprivation is a critical factor in determining whether equitable relief should be granted." The school then cites the Federal Complaints Officer to Bean v. Conway School District, 18 IDELR 65, 69 (D.N.H. 1991). A Federal Complaints Officer in Colorado, considering a Complaint arising out of the state of Colorado, is not bound by a U.S. District Court decision settling a dispute that arose in the state of New Hampshire. However, even if he was, and even if the school has correctly interpreted the court, it is clear that the magnitude of the deprivations suffered by the complainants' son in this case warrant relief. The complainants' son has not fully received a free appropriate public education during the fall semester, 1999. The school's own response, dated and received December 17, 1999, is at least a partial admission of such, since the school states the historical facts as follows: school began on August 17, 1999; shortly after the commencement of classes, (the principal) "observed that (the teacher) was not meeting the required performance standards"; (the teacher) was placed on administrative leave beginning on September 15, 1999; a full time substitute took over until another teacher was hired on October 25. At this point, half the semester was gone. The school has since agreed to employ two (2) full time teachers to meet the needs of the group of students of which the complainants' son is a part. In addition, the school initially considered compensatory education.

In its response to the Federal Complaint, dated and received December 17, the school states that the "courts have recognized that a school district may not be able to act immediately to correct a problem as some time may be necessary to respond to a complex problem." The school then cites the Federal Complaints Officer to M.C. & G.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996). Citing the same case, the school states – "A child is not entitled to the remedy of compensatory education unless a school district fails to rectify the problem within a reasonable period of time." Even if the school has correctly interpreted the third federal circuit, a Federal Complaints Officer in Colorado, considering a Complaint arising out of the state of Colorado, is not bound by a decision of the third federal circuit. The fact that injuries resulting from a deprivation of special education services, which occur because the school failed to provide those services, may require more complex solutions that take more time to resolve, does not change the fact that a student has suffered an injury that s/he should be entitled to have the school compensate – even if it were to be determined that the school was doing its best to correct the problems. The school, in this case, at least initially, agreed with this view. "Compensatory education will be addressed with each parent." So said the school in its initial response to this Complaint, dated November 17, 1999, and received by the Federal Complaints Officer on November 19, 1999. The Federal Complaints Officer presumes that the school would not have been considering compensatory educational services for complainants' son, if the school had believed that complainants' son had fully received a free appropriate public education during the fall semester, 1999. See 34 CFR 300.13.

REMEDIES

The school will submit to the Federal Complaints Officer, no later than thirty (30) days from the date this Decision becomes final, a written statement of assurances, signed by Dr. Brian Printz and Ms. Linda Williams-Blackwell, explaining how the school is remedying, or has remedied, every violation that the Federal Complaints Officer has determined has occurred. The Federal

Complaints Officer will determine whether this statement is sufficient. The Federal Complaints Officer will maintain continuing jurisdiction over this Complaint until compliance with this order is obtained. The Federal Complaints Officer reserves the right to impose and recommend other remedies, if he determines that the school is not making every reasonable effort to expeditiously come into compliance.

The school will provide compensatory educational services to the complainants' son. The complainants have fifteen (15) days from the date of this decision, to submit to the Federal Complaints Officer their proposal for compensatory educational services. The school will then have fifteen (15) days to respond. If the parties can agree, the Federal Complaints Officer will consider that agreement. If they cannot agree, the Federal Complaints Officer will order the compensatory educational services which are to be provided.

APPEAL RIGHTS

This decision will not become final until the Federal Complaints Officer has received the requested information about compensatory educational services, and has ordered what those services will be. At that time the decision will become final, and the appeal time will begin to run. A copy of the appeal procedure is attached to this decision.

CONCLUSION

Throughout the investigation and resolution of this Complaint, the Federal Complaints Officer has offered mediation to the parties. The Federal Complaints Officer renews that offer. The complainants need to understand that, while the school is obligated to provide qualified staff, no one can order anyone to take a job. That includes, of course, ordering someone to take on the job of providing compensatory educational services. If the complainants cannot find a way to work with the school to provide the kind of environment in which people want to work, for an amount of money which the school is obligated to pay, then it is not unreasonable to assume that the problems at Lewis Palmer Middle School will continue.

Dated today, March _____, 2000.

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Charles M. Masner, Esq.
Federal Complaints

Federal Complaint 99:538

Decision

COMPENSATORY EDUCATION

INTRODUCTION

The Federal Complaints Officer regrets that the complainants and the school could not reach agreement about the compensatory educational services to be provided. In the conclusion to his Decision, the Federal Complaints Officer renewed his offer of mediation. No one accepted. It is now the job of the Federal Complaints Officer to resolve the issue of compensatory educational services.

DISCUSSION

To the best of the Federal Complaints Officer's knowledge, compensatory education is not defined in relevant statutory or regulatory law. If there is definition in case law, that would provide the Federal Complaints Officer with sufficient guidance to resolve the issue in this case, the parties have not provided the Federal Complaints Officer with that definition. The Federal Complaints Officer therefore is proceeding to resolve the issue of compensatory educational services using his own judgement, based, obviously, on his own education and experience, as applied to the facts of this case.

Absent express guidance in the law, the Federal Complaints Officer believes that his determination about compensatory educational services should be narrowly defined. The Federal Complaints Officer holds no elective or appointed public political office. He has not been given that kind of authoritative legitimacy. If those who have such legitimacy want to institutionalize a more expansive definition of compensatory education for consideration by Federal Complaints Officers, it is up to them to do so.

The Federal Complaints Officer's definition of compensatory education, in this context, is educational services designed to compensate a student for harm that he or she has suffered because of an inadequate provision of educational services to which the student was entitled. First, there must be a determination that harm has occurred, and second there must be a determination that it is possible to compensate the student for that harm, through the provision of educational services. Using this definition of compensation, there may be some harm that it will not be appropriate to try and compensate, because the harm either cannot be compensated by educational services, or the harm will have been compensated either wholly or in part by intervening events. Also, the harm may have been so slight that no long term loss was suffered

by the student. If the harm is compensated by intervening actions not provided by the school, it may also be true that the student and his parents have incurred burdens they might not have incurred if the harm had never occurred to the student. However, if the student and his or her parents wish to seek reimbursement for the costs of these burdens, the appropriate forum for seeking such reimbursement, absent some new express authority to the contrary, is not, in the view of the Federal Complaints Officer, the Federal Complaint process. Moreover, if the intervening actions occurred after removal of the student from school by a complainant, the appropriate forum for seeking reimbursement for any costs is, in the view of the Federal Complaints Officer, the due process hearing. Otherwise, a parent complainant could remove their son or daughter from school for allegations about inappropriate services, provide or purchase services themselves, and then file a Complaint seeking reimbursement. This would inappropriately circumvent, in the view of the Federal Complaints Officer, the due process hearing as the appropriate forum for resolving certain types of disagreements about appropriate services or placement. That does not mean, of course, that if the school proposes compensation anyway, in the form of educational services or otherwise, in circumstances where parents have provided or purchased services themselves, with or without removing their son or daughter from school, that the proposal should necessarily be rejected, where such a proposal will satisfactorily resolve a disagreement between a complainant and a school.

In his Decision, the Federal Complaints Officer did determine that some harm had occurred which could be remedied by the provision of some compensatory educational services by the school. The Federal Complaints Officer found that the complainants' son, did not fully receive a free appropriate public education during the fall semester 1999. The Federal Complaints Officer views the fall semester 1999 at Lewis Palmer Middle School as a time period which went from legally insufficient to legally sufficient, by the end of the fall semester 1999. Legally sufficient in this instance meaning sufficient to meet the basic requirement of “appropriate” in Free Appropriate Public Education (FAPE). The Decision of the Federal Complaints Officer did not address circumstances beginning with the spring semester, 2000.

FINDINGS

The complainants' request for compensatory education goes beyond compensatory education as defined by the Federal Complaints Officer. Moreover, even to the extent that the complainants' request is compatible with the definition of the Federal Complaints Officer, the complainants give insufficient supporting rationale for their request. They state what they believe should be provided with definitions of harm that are insufficiently compatible with the Decision of the Federal Complaints Officer, and they provide insufficient analysis of how what they propose compensates for the harm they perceive has occurred.

The school offers a compilation of the hours of special education services denied, and then divides that by educational school day hours, in order to arrive at a number of hours for which one on one (1:1) tutoring should be provided to compensate complainants' son. The school’s rationale being that one on one (1:1) tutoring is more intensive than classroom hours in which the student is a member of the class group, and therefore the necessary compensatory educational services can be provided in less hours than the total number of classroom hours lost. The school states that this is the same way it determines how many hours of home based services to provide a student who, for whatever reason, cannot attend classes as a part of a class group, as is normally the case for the students enrolled at the school.

The Federal Complaints Officer accepts the school's computation of the special education services hours missed by complainants' son. That computation was supplied by Ms. Linda Williams Blackwell, who can qualify as an expert in special education. The Federal Complaints Officer also accepts that compensatory educational services should be provided through one on one (1:1) tutoring. However, the Federal Complaints Officer believes that because these are special needs students, and because the denial of FAPE occurred not only in a denial of hours of special education classroom programming, but also in qualitative aspects of the student's educational programming in and out of the special education classroom, the one on one (1:1) tutoring should be for the total number of hours of special education services denied. Special education students generally receive instruction with a lower pupil:teacher/aide ratio than the non-special education student population. Some of that instruction is one on one (1:1). Therefore, the number of hours of compensatory education to be provided shall be 173.9 hours. The tutor(s) shall be paid at a reasonable hourly rate necessary to hire the appropriate person(s) to do the job. This could be more or less than the twenty dollars per hour proposed by the school. These services shall include any necessary related services. If the complainants and the school cannot agree on an appropriate rate, or on other necessary terms for the delivery of these services, they shall submit their disagreement to the Federal Complaints Officer and he will decide the issue.

IT IS SO ORDERED.

CONCLUSION

This Order makes final the Decision of the Complaints Officer, as dated by his signature on this Order, and the appeal time begins to run accordingly. A copy of the appeal procedure is attached to this Order.

Dated today, May _____, 2000.

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Charles M. Masner, Esq.
Federal Complaints Officer

Federal Complaint 99:538

CLARIFICATION OF COMPENSATORY EDUCATION ORDER

The Federal Complaints Officer has determined that he was mistaken and that the Federal Complaint process does give him the authority to order monetary reimbursement in the appropriate case. The Federal Complaints Officer has also determined that it is not appropriate to do so in this case.

Dated today, May _____, 2000.

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Charles M. Masner, Esq.
Federal Complaints Officer