

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

Federal Complaint 2001:521

AURORA PUBLIC SCHOOLS

Decision

INTRODUCTION

This Complaint letter was dated May 11, 2001, and received by fax on the same date. The original was received by regular mail on May 14, 2001. Additional information was subsequently faxed from the complainant to the Federal Complaints Officer. On May 24, 2001, the Federal Complaints Officer faxed a copy of this additional information to the school. The school's response was dated June 8, 2001, and received, by fax, on June 12, 2001. The original of this response was subsequently received by the Federal Complaints Officer. The complainant's response to the school's response to the Complaint was dated June 13, 2001, and received by fax on June 14, 2001. The Federal Complaint's Officer then closed the record.

COMPLAINANT'S ALLEGATION

In the words of the complainant, with personally identifiable information deleted: "(My son) has an IEP that states he will receive specific services for a prescribed amount of time. (My son) has been denied these services on a continual basis over the last four months – contributing to his increase in anxiety and absences from school." Complainant's Complaint letter, dated May 11, 2001.

SCHOOL'S RESPONSE

As excerpted, and enumerated, by the Federal Complaints Officer, with personally identifiable information deleted, the school responded as follows:

- 1) In February 2001, the CSAP was administered to all fourth graders. (Complainant's son) was excluded from the testing, at (complainant's) request. (Complainant) was concerned about the special education time missed and the total of three (3) hours for special education assistance was made up by the special education teacher extending (complainant's son's) time scheduled on five (5) occasions. Refer to Exhibit 2.

- 2) The speech/language pathologist assigned to (attendance center) changed residences and resigned her position with the Aurora Public Schools, in March, 2001, just prior to the District's spring break. The Exceptional Student Services department contracted with Alliance of Therapy Specialists, Inc. and such services were immediately provided upon return from spring break. This service is still being purchased.
- 3) One of the mental health providers took a leave of absence, due to shoulder surgery in May, 2001. The following week, this department scheduled with another mental health provider to continue with the service. No lapse in service took place. Refer to Exhibit 3, medicaid logs for time seen.
- 4) (Complainant's son) is scheduled with two special education teachers. (Teacher X) sees (complainant's son) for math and (Teacher Y) works on literacy and written language skills. (Teacher X) has made up any time she has missed in the area of math by extending his lessons. (Teacher Y) works at two different locations within the Aurora Public Schools. Her morning time is scheduled at (attendance center). Exhibit 4 lists the data collected on the four (4) objectives she works on with (complainant's son). "TA" refers to teacher absences and (Teacher Y) has been absent for a total of five (5) days since the week of November 27, 2000. All absences by (Teacher Y) equated to a total of 2.5 hours (each session is ½ hour in length). "A" refers to the amount of time (complainant's son) has missed school and you will notice that the days he was absent did not correlate with the allegation of anxiety due to (Teacher Y's) absences. Such time equated to 12 days or six (6) hours of special education time between November 27, 2000 and May 11, 2001. Between September 13, 2000 and May 11, 2001 (complainant's son) was absent from school for a total of 29.5 days (exhibit #5). School's response dated June 8, 2001. Bold in original.

In summary, as excerpted by the Federal Complaints Officer, the school stated: "Based on amount of hours missed by teacher absences, a free appropriate public education (FAPE) has been provided." Id.

FINDINGS AND DISCUSSION

- 1) In the response to the school's response to the Complaint, the complainant stated: "I agree that three hours was made up (and have provided documentation as such) ; however, 6.5 hours have been missed." Complainant's response to the school's response to the Complaint, dated June 13, 2001. The Federal Complaints Officer treats the school's response to the Complaint as an admission that complainant's son was denied three (3) hours of IEP required services, which were subsequently made up. The Federal Complaints Officer also treats the school's response as a denial that any more than three (3) hours of IEP required services were denied due to CSAP administration. The Federal Complaints Officer does not find that any more than three (3) hours of IEP required services were denied for reasons of CSAP administration. The Federal Complaints Officer also finds that these three (3) hours of services were made up by the school.
- 2) In the response to the school's response to the Complaint, the complainant stated, with personally identifiable information deleted: "This statement does not address the fact that **(complainant's son) missed 5 hours of services** for varying reasons (please refer to my letter to the school dated March 1st expressing my concerns about extensive amounts of service time being denied) and no effort was made to restore said services."

Complainant's response to the school's response to the Complaint, dated June 13, 2001. Bold in original. The Federal Complaints Officer does not find the complainant's letter of March 1, 2001, sufficient to establish complainant's claim that her son was denied five (5) hours of these services. The complainant also indicated, in a document she labeled Exhibit #5, submitted with her response to the school's response to her Complaint, dated June 13, 2001, that speech services were missed on five (5) days, between Friday December 22, 2000, and March 22, 2001. (The IEP requires speech services of one (1) hour per week.) The school did not have an opportunity to respond to this document, since the complainant did not submit it with her initial Complaint letter. The Federal Complaints Officer does not find this document sufficient to establish complainant's claim that her son was denied five (5) hours of these services. The Federal Complaints Officer does not find, on the facts of this Complaint, that the school denied complainant's son five (5) hours of IEP required speech/language pathology services, or other services, "for varying reasons" as alleged by the complainant.

- 3) Complainant's son's IEP, dated November 9, and 15, 2000, requires mental health services of one (1) hour per week. In the response to the school's response to the Complaint, dated June 13, 2001, the complainant stated, as excerpted by the Federal Complaints Officer, with personally identifiable information deleted: "According to their own records, (my son) has been denied in excess of ten sessions of psych/social work support since November." Id. Bold in original deleted. The complainant also submitted a document entitled "Instructional Plan for (Complainant's Son)", in support of her Complaint. By "their own records", the Federal Complaints Officer presumes the complainant to mean Exhibit #3 in the school's response to the Complaint. The Federal Complaints Officer does not find that sufficient documentation has been provided by the school to demonstrate that necessary IEP required services have been provided. While a failure to document by itself will not necessarily result in a finding against the school, here the school has presented, with its Exhibit #3, what it claims is documentation for the complainant's son's amount of "time seen" by mental health providers. Having relied upon this documentation, the Federal Complaints Officer finds it insufficient to adequately document for the school the provision of all the IEP required mental health service provider time designated in complainant's son's IEP. Therefore, the Federal Complaints Officer gives the complainant the benefit of the doubt and finds that complainant's son was denied 3.5 hours of IEP required mental health provider services.
- 4) In the complainant's response to the school's response to the Complaint, dated June 13, 2001, the complainant stated, as excerpted by the Federal Complaints Officer, with personally identifiable information deleted: "(My son's) daily back and forth sheet **does not reflect any extended lessons for the months of January through June 13th**. This has no factual basis and is, in fact, not supported by the documentation the district has sent you." Id. Bold in original. The complainant had also previously submitted a document entitled "Data Collection Goals for 2000-2001." In this instance, the school did not submit any documentation to the Federal Complaints Officer to support the school's claim. However, even assuming that the complainant is correct, and that the daily back and forth sheets do not reflect extended lessons, the Federal Complaints Officer does not find that the lack of such documentation, or the data collection document submitted by the complainant, outweighs the word of school service providers that services were provided. Failure of a school staff person to document that they did something, does not automatically mean that s/he didn't do it. If the complainant wants to make the daily back and forth sheet determinative of whether services were provided, then this needs to be expressly stated as such in the IEP for complainant's son.

In the complainant's response to the school's response to the Complaint, dated June 13, 2001, the complainant stated, as excerpted by the Federal Complaints Officer, with personally identifiable information deleted: **("My son's) sessions are and always have been 45 minutes in length** (please refer to attached copies of (my son's) back and forth sheet with documentation of times) in order to fulfill the contracted time on the IEP." Id. Bold in original. The complainant's son's IEP does not specify the amount of time per session that this particular special education teacher was supposed to spend with complainant's son. Documents submitted by the complainant do appear to indicate forty-five (45) minute sessions. The Federal Complaints Officer gives the complainant the benefit of the doubt and finds that these particular sessions for her son, with this service provider, were supposed to be forty-five (45) minutes in length. The school stated this staff person was absent five (5) school days, for a total of 2.5 hours of missed services by complainant's son, figured at ½ hour per session. Assuming forty-five (45) minutes per session times five (5) school days, this total rises to 3.75 hours. The Federal Complaints Officer gives the complainant the benefit of the doubt and finds that 3.75 hours of these IEP required services were not provided for complainant's son.

In the school's response to the Complaint the school stated that between September 13, 2000 and May 11, 2001, the complainant's son missed 29.5 days of school. The complainant did not challenge this statement. She indicated agreement with the school that her son has missed too much school. However, she also stated that she had shown that **"... many (though not all) of these days are a direct result of the continual denial of IEP services at the school."** Complainant's response to the school's response to the Complaint, dated June 13, 2001, at page three (3). Bold in original. The Federal Complaint process is not an appropriate forum for determining whether such a cause and effect relationship exists between complainant's son's missed services at school and his 29.5 days of absence. However, the Federal Complaints Officer is in agreement with both the complainant and the school that this is too much school to be missed. He also finds that such extensive absences, whatever their cause – and he makes no finding on causation –, coupled with the Federal Complaints Officer's specific findings of missed services, on the facts of this Complaint, have denied the complainant's son FAPE in violation of 34 CFR 300.13, most specifically 34 CFR 300.13(d), which references the IEP provisions in 34 CFR 300.340 through 300.350.

REMEDY

At complainant's written request, the school shall convene an IEP meeting prior to the beginning of the 2000-2001 fall semester at complainant's son's attendance center, for the purpose of determining whether complainant's son can benefit from compensatory education and, if so, what that compensatory education will be and how it will be provided. Compensatory education is not a fine or damages. It can only be provided if an educational harm has occurred which can be compensated. The Federal Complaints Officer has determined that complainant's son has been denied FAPE. On the facts of this Complaint, it is also the determination of the Federal Complaints Officer that the IEP team is in the best position to determine whether the complainant's son has experienced a harm that can be remedied by compensatory education, and, if so, how. Once a

determination has been made by the IEP team, the school shall provide the complainant with notice sufficient to meet the requirements of 34 CFR 300.503 and 300.504. In order for the complainant to exercise her right to this Remedy, she must present her written request to the school within thirty (30) days of the date of this Decision. If she does not do so, the school shall not be obligated to convene an IEP meeting for the purpose of determining whether, and if so how, compensatory education is to be provided – and therefore the school shall not be required, in order to comply with this Decision, to further consider providing compensatory education to complainant's son.

While it is not within the authority of the Federal Complaints Officer to determine, the Federal Complaints Officer believes the school has a duty under other law to seek complainant's son's attendance for receipt of educational services, and the complainant has a duty to see to it that her son is made available for receipt of such services. The Federal Complaints Officer recognizes that this is already a matter of contention between the complainant and the school. However, the determination of why complainant's son is absent so often from school needs to be made so that complainant's son can be provided services in whatever placement is determined appropriate, for the purpose of receiving FAPE. Ultimately, truancy law, child welfare law, and special education law as determined by a due process hearing officer, are the means for making these determinations, if the complainant and the school cannot reach agreement.

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 _____, 2001.

Charles M. Masner, Esq.
Federal Complaints Officer