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

Federal Complaint 2002:509

Aurora Public Schools

Decision

INTRODUCTION

The complainant sent a letter, dated January 28, 2002, to Dr. Robert Pasternack, Assistant Secretary, Office of Special Education and Rehabilitation Services (OSERS). The record does not indicate when this letter of the complainant's was received by Dr. Pasternack. A subsequent letter, undated, from Mr. Anthony White, Customer Service Specialist, Office of Special Education Programs (OSEP), to Dr. Lorrie Harkness, Colorado State Director of Special Education, forwarded a copy of the complainant's letter of January 28, 2002, with instruction to resolve the Complaint. This correspondence was received in the Colorado Department of Education (CDE) Special Education Services Unit (SESU), on April 23, 2002.

By certified mail dated April 25, 2002, the Federal Complaints Officer sent the Director of Special Education for the Aurora Public Schools (APS), a copy of the complainant's Complaint. This certified mailing was received on April 30, 2002. According to Colorado Federal Complaint procedure, the school district had fifteen (15) calendar days to respond to this certified mailing. At the request of the Director of Special Education, the Federal Complaints Officer extended this response time until May 20, 2002. On May 21, 2002, the Federal Complaints Officer received the school district's response to the complainant's Complaint, submitted by the school district's attorney. This response, inclusive of supporting documents, was one hundred and forty-seven (147) pages.

By certified mailing dated May 21, 2002, the Federal Complaints Officer sent the complainant a copy of the school district's response to her Complaint, and offered her ten (10) calendar days in which to submit a written response to the school district's response to her Complaint. This certified mailing was received by the complainant on May 24, 2002. At the request of the complainant, the Federal Complaints Officer extended the complainant's response time until June 4, 2002. On June 4, 2002, the Federal Complaints Officer received the complainant's response to the school district's response to her Complaint. This response, inclusive of

supporting documents, was forty-three (43) pages. The Federal Complaints Officer then sent the school district a copy of the complainant's response to the school district's response to her Complaint, with cover letter copied to the complainant, and closed the record.

EXCEPTIONAL CIRCUMSTANCES

Whether or not this Complaint is decided within the sixty (60) days specified in 34 CFR 300.661(a) of the Individuals with Disabilities Education Act (IDEA) regulations, the Federal Complaints Officer finds exceptional circumstances exist as provided for in 34 CFR 300.661(b)(2)), which permit time extension. The exceptional circumstances are the additional time needed for the school district and complainant to submit written responses, the volume of information in the Complaint record, and the complexity of the factual and legal issues.

COMPLAINTANT'S ALLEGATIONS

The Federal Complaints Officer is presenting the entire body of the letter of the complainant to Dr. Pasternack, dated January 28, 2002. Only personally identifiable information has been deleted.

> Thank you for speaking at the PEAK Inclusion Conference, Denver, Colorado, January 18th. Your speech gives parents hope, but our children need more than hope. We need funding to reach the classrooms. Lack of funding for the school district's special education department and the absence of good communication between the school and the special education department seem to be at the heart of the problem we are having trying to get our 5 year old son, (proper name) who has a diagnoses of Down Syndrome, to attend school with his older brother and sister at the only charter school in Aurora Public Schools.
>
> The first week of school we had an ugly surprise when our son, (proper name), was pulled from his kindergarten classroom and sent to the principal's office to wait for his mom because (son/proper name) had a dirty diaper. I was told that since special education did not provide an aide for (son/proper name) he would not be allowed into the classroom until I either found – and paid for – a full-time aide or I had to volunteer to be in the class the entire time (son/proper name) was in class. Surely any regulations that require an aide are designed to force an aide in the class, not to force the child out.
>
> The special education director has refused to provide an aide for our son even after he was "lost" in the school on 4 separate occasions! And only one of those times did the staff look for him. The district refused to acknowledge or write necessary supports into the IEP, although (son's/proper name) IEP has been re-written several times since the initial IEP was drafted in August. We were told that to receive more services our son must enroll in one of the district's developmental kindergartens where ½ of the students have special needs. We were also told that the charter school is a school of choice, so the district does not have to provide a full array of services to charter school students, because the services are available at another site. This does not allow for (son/proper name) to attend

school with his brother and sister and friends from pre-school. If (son/proper name) did not have a disability, (son/proper name) would attend the charter school Aurora Academy.

We had four IEP meetings and five informal meetings since the start of school in August. Key staff have been absent from these meetings and no safety plan was in place despite loosing (sic) (son/proper name) four times. After the 3d IEP review in December, we decided to withdraw him from the school, until we can find a public school that would be (sic) appropriately meet his needs for the second half of the school year. (Son/proper name) is currently enrolled in private kindergarten where he is fully included and has never been lost.

Mr. Pasternak, do you have a plan to help (son/proper name) and support the teachers he will have next year? On February 14 I will be driving to Colorado Springs to the Colorado Department of Education's Special Education Directors Forum. I have already made an appeal to the Colorado Special Education Advisory Committee. What else can I do to make next year better?

More children are being saved today as a result of advances in modern medicine. These children are enrolling in schools, expecting an education that will prepare them to work and contribute to our economy and community. Please help our teachers prepare for these exceptional children who have already overcome so much just to get to the classroom.

Id. Personally identifiable information deleted by the Federal Complaints Officer.

SCHOOL DISTRICT'S RESPONSE

The Federal Complaints Officer is presenting the entire body of the school district's response, dated May 20, 2002, received May 21, 2002, absent supporting documents. Only personally identifiable information has been deleted.

Introduction

As an initial procedural matter, we take the position that the essential issues which seem to be raised by the complaint are not appropriate for resolution in a federal complaint. Specifically, whether the IEP provided FAPE (including whether the alleged failure to provide a full time aide to the student was a denial of FAPE), and whether the placement at the Aurora Academy was appropriate, are not proper issues for a federal complaint. Rather, a due process hearing under the IDEA is the appropriate forum for addressing such issues. Without waiving this objection, and because in addition to these fundamental issues there may also be questions about whether the IEP was implemented as written, we submit the following substantive reply.

At the outset, the District wishes to note that the child is now being successfully served as a kindergarten student at Dartmouth Elementary School within our school district. At the time (complainant) wrote her letter to Mr. Pasternack on January 28, 2002, she had withdrawn her son from our district. As is explained in more detail below, during January

and February of this year the District made persistent efforts, which were eventually successful, to convince (complainant) to again enroll her child, (proper name), in the School District.

Chronology

May 2001 – District begins planning for initial IEP meeting to be held in May or June 2001. (See enclosed e-mail dated May 1, 2001.)

May 25, 2001 – The (complainant and her husband) request that the June meeting be postponed to August, so the staffing can include the teachers from the charter school who will be serving their child. (See enclosed letter dated May 25, 2001.)

August 23, 2001 – Transition IEP meeting to transition from private preschool to kindergarten (parents selected Aurora Academy; District made other choices available which it believed would have offered FAPE). (Note: consistent with most public school districts in Colorado, the APS kindergarten program for all students (including non-disabled students) is one-half day. It is our understanding during most or all of the 2001-02 school year, (student/proper name) was enrolled in a private kindergarten program even when he was attending kindergarten in APS.)

September 12, 2001 – IEP Meeting – Reviewed goals and reviewed assessment information. Included kindergarten teacher from the Aurora Academy Charter School. Occupational Therapy and Physical Therapy services were increased at this meeting from one hour a month to one-half hour weekly each.

Toileting program was developed by special education staff (proper names – all employees of the School District's special education office.)

September 18, 2001 – Meeting with (complainant) to review toileting program (in attendance, APS Special Education Department members (proper names); also attending was the APS special education teacher assigned to the Aurora Academy, (proper name).)

October 2, 2001 – Meeting with (complainant), (APS special education staff member/proper name) and Assistant Principal to address safety issues.

October 2001 – Parents unilaterally change child's days of attendance from five mornings weekly to some full days.

November 30, 2001 – Parents send e-mail to Aurora Academy Principal (proper name), saying they are withdrawing their child.

November 29-30, 2001 – (Complainant) and (proper name) (APS Director of Special Education) visit Jewell Elementary School and Dartmouth Developmental Kindergarten class (both traditional elementary schools in the School District) to explore possible options for future placement.

December 4, 2001 – (Complainant and husband) notified Special Education Office of the intent to withdraw (son/student) from Aurora Academy.

December 5, 2001 – IEP meeting to determine placement. Two programs discussed as potentially appropriate placements – Jewell and Dartmouth. At parent request, the IEP was not completed, in order to give them the opportunity to review and visit the schools again. Three advocates were in attendance on behalf of the (complainant/husband) and took conflicting positions. Representing ARC was (proper name); she felt Dartmouth was appropriate. Dr. (proper name) from the University of Northern Colorado advocated full inclusion and stated that the numbers of special education students should be in natural proportion to those in general population. Finally, a parent who had her child in the GEMS program said that program was appropriate – this is a program serving only students with disabilities.

December 10, 2001 – (Complainant) requested more choices in elementary school programs. The administrators from the District's Special Education Department reviewed 12 elementary school programs in the two quadrants closest to the (complainant and family's) home. On the basis of that review, the administration believed that two programs merited further discussion by the staffing team. These were:

The neighborhood school, Jewell Elementary School. (Complainant) was concerned about the door from the kindergarten room to the playground and the teacher-student ratio of 1-23. The District said that it would consider putting a buzzer on the door and taking other steps.

Dartmouth Elementary School – Developmental Kindergarten Program ("DK"). This program, which serves both disabled and non-disabled kindergarten students, has two teachers, one a general education teacher and one a special education teacher. Also available to assist the class as a whole is a paraprofessional. Roughly speaking, during the current school year, in the morning session of DK there have been about nine disabled students and nine or ten non-disabled students. In the afternoon session, there have been about sixteen or seventeen regular education students and three special education students. Responding to an expressed desire by the (complainant and husband) to have (son/student) in a more "inclusive" setting, it was suggested that (son/student) attend in the afternoon. However, (complainant) then noted her concern about (son/student) attending the afternoon session because of his inability to stay awake for afternoon kindergarten. The District indicated a willingness to provide services in either the morning or afternoon.

December 17, 2001 – (Complainant) requested additional visits to Jewell and Dartmouth. These were arranged during this week.

December 20, 2001 – A call was placed to the (complainant and husband) to discuss their feelings about placement. Left message on the answering machine.

January 7, 2002 – (Complainant and husband) sent fax requesting placement of (son/student) in a school for students with disabilities.

January 9, 2002 – (Director of Special Education/proper name) writes (complainant and husband) and tells them the District can offer an appropriate program and urges that the IEP meeting begun on December 5 be completed.

January 16, 2002 – IEP team reconvenes to work on IEP. Three-hour meeting at the Charter School.

January 31, 2002 – IEP meeting continued with Aurora Academy and Dartmouth staff to write goals and safety plan (this meeting was tentatively set and then canceled three times by the (complainant and husband) before it was held.)

February 7, 2002 – Follow up meeting with (complainant and husband) and three advocates to discuss placement and starting date (Dartmouth Elementary School Principal (proper name), (APS Special Education Staff Member/proper name), (APS Special Education Staff Member/proper name), (Director of Special Education/proper name))

Services

Speech Language Services – began Sept 5th - .5 weekly

- Reviewed the IEP with teachers and accommodations
- Developed literacy work baskets for in-class use (Alphabet, Colors, Numbers, Shapes)
- Developed picture label system for the classroom (this took some time because the parent initially did not want (son/student) to do anything different from what was being done by others in the classroom)
- Consultation with (complainant) one to two times per week
- Provided pull-out speech language services

Physical Therapy Services – began October 8th - .5 week

- Services were provided on Mondays. Despite agreement about which days (son/student) would be coming to school, (complainant) changed the schedule without notifying the school or the District and (son/student) did not come to school on Mondays. Services were then changed to Fridays.

Occupational Therapy – began September 4th - .5 a week (starting September 12th)

- Services were provided in class

Adaptive PE – Assessment was recommended at the September 12th IEP Meeting

- Assessment was completed October 15, 2001

Special Education Services

- Under the charter school contract between the District and Aurora Academy, the School District is responsible for providing necessary special education services at the charter school. The District had hired a full time special education teacher to work at the Aurora Academy.

- Provided in-class and pull-out services.
- Daily consultation with the teacher on accommodations.
- Assisted in scheduling and toileting.

Response to specific issues in (complainant's) letter of January 28, 2002

Lack of funding for the School District's Special Education Department

Aurora Public Schools receives local, state and federal funding through a variety of sources including the Colorado School Finance Act and the Individuals with Disabilities Education Act. Aurora Public Schools' funding, programming and services are generally equivalent to other school districts in the Denver metropolitan area.

Absence of good communication between the school (charter) and the Special Education Department

Early and frequent communication took place between district special education administrators and the staff of the charter school. For example, the enclosed e-mail correspondence between (proper name) and (proper name), dated September 6, 2001, discusses whether services have begun. Similarly, the enclosed message between the undersigned and (proper name) (the Assistant Director of the APS Special Education Department) indicated that the District was making sincere efforts to inform the Aurora Academy principal that it had the right under the charter contract to control matters involving special education for students at the charter.

Some problems did result when the special education teacher the District had hired and who was assigned to the Aurora Academy did not show up for work the first day. (This even after signing a contract and while giving no notice whatever that she would not be appearing; the first day of school came and the teacher simply did not appear.) Until a new special education teacher could be hired (this occurred around September 25, 2001), the School District provided services with substitute teachers. The District had, from the first day of school, assigned one of the Consultants from its central Special Education Department, (proper name), to act as liaison with the charter school. She was in regular contact with the charter soon after school began in late August.

(Complainant and husband) experienced problems getting their child to attend the charter school

(Student) attended the Aurora Academy Charter School beginning with the start of the school year. The School district believed, at the time the initial IEP was written, that the IEP would provide FAPE at the Aurora Academy. It is important to note, however, that FAPE was also offered at other district sites. The decision to place (student) at the charter school was essentially a parental choice. (Complainant), who was one of those who worked initially to get the Aurora Academy off the ground and believes very much in the school, was especially insistent that (son/student) attend the charter school. After a period of time, concerns began to grow among APS staff that the Aurora Academy was not an

appropriate placement for (student), and efforts were then made to begin exploring other options. Especially because of (complainant's) strong belief in the Aurora Academy, it was necessary to try the Aurora Academy placement for a reasonable time before the issue of whether the placement was working could be brought to the staffing team.

When that reasonable time had passed, the District then began to try to lay the groundwork for exploring other possibilities. This resulted in the visits to Jewell and Dartmouth in which (Director of Special Education) accompanied (complainant). We would note that having the head of the entire special education function in the District personally accompany (complainant) on these visits demonstrates an unusual level of interest and commitment by the District to see that her son is appropriately served. After a good deal of discussion with (complainant), and even after the (complainant and her husband) had withdrawn their son from the School District (and thus the District could have simply let the matter drop), the District continued to pursue the options and staffing team eventually concluded that the Dartmouth Developmental Kindergarten program was the appropriate placement for (student).

1st week of school – (student) was pulled from his class and taken to principal's office to wait for Mom because he had a dirty diaper

The School District is unable to respond with certainty to the statement about what the principal may have done. This is because (proper name), the person who was then the Aurora Academy Principal, resigned as principal in April and a new principal has been hired to complete the school year.

However, as to the issue of diapering generally, the issue of diapering for (student) was discussed at the September 12, 2001 IEP meeting (see 'ANNUAL GOALS', *Life/Career 5 – Personal Choices* "follow a toileting sequence moving from full physical prompt – visual cues with 90% acc."). And a follow-up meeting was held on September 18, 2001 to discuss the toileting issue. At that meeting a toileting schedule, a copy of which is enclosed, was discussed. (This document bears the heading "Instructions for Toilet Training" and includes a chart for each day of the week showing the party responsible for assisting (student).) It is our understanding that prior to September 18, (complainant) was providing diapering services.

The Aurora Academy ordinarily holds its classes for kindergarten students half days on Monday, and full days on Tuesday and Thursday. However, as an accommodation to (student), it had agreed that he would attend school mornings, Monday through Friday. The (complainant and her husband) changed this agreed upon schedule without notifying the Aurora Academy or the District. (See enclosed e-mail dated October 28, 2001 in which (complainant) acknowledges and apologizes for this.) As is true of most Down's Syndrome children, consistency is critical for (student). The unilateral change of schedule eliminated this consistency and obviously made it very difficult to plan the delivery of services to (student), including his toileting. (See enclosed e-mail from Principal (proper name) dated October 26, 2001 indicating his frustration with the schedule change – he says the schedule changes "are causing havoc for the special education team that is trying to toilet train him.") The District had arranged for diapering services for (student) on the assumption that he would be attending Aurora Academy in the morning only. Consistent with general practice for a child in need of diapering, (complainant) was also

asked to change (son/student) just before he came to school, or if she preferred, to change him at school just before coming into class.

The change in schedule without notice was indicative of the kinds of difficulties which were experienced in working with (complainant) to provide (student) with consistency and a regular schedule. Also contributing to the difficulties in providing diapering services to (student) were his frequent absences and tardies.

I was told that since special education didn't provide an aide he wouldn't be allowed into the classroom until I either found – and paid for – a full-time aide or I had to volunteer to be in the class the entire time (student) was in class.

This appears to be a comment attributed to (charter school building principal). As noted, we are unable to say what he may have said because he is no longer employed at the charter school. Obviously, if this were said, it is not a position we would support. If an aide were determined by the staffing team to be necessary to the provision of FAPE for (student), then the School District would have to provide an aide. However, one must recall that the staffing team had not decided that an aide was necessary. Our understanding is that the discussion of the aide centered around toileting and safety issues, as opposed to issues of delivering the curriculum.

Special Education Director refused to provide an aide even after he was lost four times

It is true that (student) left the classroom on three occasions. One other time, when he was under his mother's control, he left her. "Lost" is probably too strong a term to refer to what had happened, since it implies (student) was out of the class for a considerably longer period of time than was actually the case. To our knowledge each of these incidents lasted less than five minutes and he was returned to class each time. On one of the four occasions, (complainant) had brought (student) to school in the afternoon, which was not a time of day during which he was scheduled to attend classes.

We are able to offer the following specifics about these incidents:

According to a note written by (proper name) (Special Education Coordinator in the District's Special Education Office) of a phone conversation with (proper name) of The ARC on September 26, 2001, (student) had been 'lost' on the preceding Thursday and Tuesday. According to (Special Education Coordinator in the District's Special Education Office) note of her conversation with (charter school building principal), he was momentarily out of the classroom and was found once in his brother's classroom, and once in the gymnasium.

According to the enclosed e-mail of November 9, 2001 from (complainant), (student) left the art class while she was there. He was missing for about two minutes according to (complainant).

(Student) also left the P.E. class once and was found shortly thereafter.

Finally, (student) once left the school library when under his mother's supervision. On this occasion, he was there in the afternoon even though the school had him scheduled to attend in the morning. The school cannot be held accountable for this instance.

Obviously, the School District understands that its schools are responsible for taking whatever measures are necessary to supervise students attending its schools. When the IEP was written, it was believed that adequate steps had been taken. Frankly, the principal of the school (proper name) was not taking the issue of (student's) personal safety as seriously as the School District believed was appropriate. Calls were made to (charter school building principal) reminding him of his responsibility for student safety, the need to talk with the teacher about the issue, and even reminding him of the potential for personal liability should harm come to the child.

However, the School District came to suspect that (student's) wandering off from class was symptomatic of a larger issue – his lack of intellectual engagement in the program. The September IEP indicates that even then there was some concern about whether the academics at the Aurora Academy would be appropriate for (student): *"Justification for Service Outside General Classroom:* (Student's) needs and abilities require some instruction outside the classroom so as to not disrupt the learning of others and to have more focused instruction." P.4. In addition, (proper name), the speech language teacher who was working with (student), notes that he had a very short attention span, and needed to be redirected every two to three minutes. She observed this in the charter school classroom.

This lack of intellectual engagement was a primary reason that concrete discussions with (complainant) began about the possibility of (student) attending another school. Soon after (Director of Special Education) and (complainant) visited Dartmouth and Jewell Elementary Schools, the IEP team reconvened on December 5, 2001 to consider a different placement for (student). (Again, this was even after the (complainant and her husband) had said they were withdrawing (student) and so the School District was not obligated to hold such a meeting. We submit that this is a convincing indication of the School District's continuing interest in seeing that (student) be appropriately served.) The School District members of the team were advocating sending (student) to a school other than the charter, in large part because of their belief that even with modifications, the Aurora Academy's Core Knowledge curriculum would not be appropriate for (student). (Complainant) said she needed more time to consider options. As already noted, (complainant) then notified the District that she was enrolling her child in a private program and asked the District to pay for the program. The School District responded in early January that it could provide FAPE to (student) in the School District and urged that the IEP meeting which had begun on December 5, 2001 be continued so that a final decision could be reached. As shown by the enclosed *"Parent Contact Record"* which indicates contact history during January and February 2002, the School District made numerous contacts attempting to schedule a date to continue the meeting, and the parents repeatedly cancelled. The meeting was finally held in February and a placement to the Dartmouth DK program was made.

An elaborate safety plan was put in place at Dartmouth, because of the experience at the Aurora Academy. But especially telling in terms of the appropriateness of the Dartmouth program (and by contrast, the inappropriateness of the Aurora Academy's program) is the fact that (student) has not attempted to leave the classroom once. This is because he is engaged in the curriculum which is being offered at Dartmouth. In the District's view, the program at Dartmouth is unquestionably appropriate for (student), and that available at the charter school is not appropriate.

(Complainant) is of the opinion that the District should have supplied an aide at the charter. However, because the District believed that even with an aide, the curriculum would be inappropriate for (student) and problems would continue, it wisely chose to address the root of the problem – the curriculum itself.

Only one of the four times did staff even look for him

On the three occasions when (student) left the class to which he was assigned, he was promptly looked for and found. On the one occasion when he left his mother in the school library in the afternoon, he was scheduled to attend class only in the morning, and so the school staff understandably did not consider (student) their responsibility.

District refused to acknowledge and write necessary supports into the IEP for him

As already noted, the District believed that the IEP of September 2001 would provide FAPE. When it had doubts about that, it took the necessary steps to reconvene the staffing team to reconsider the issue. (See discussion above.)

We were told that to receive more supports we must enroll in DK

The District denies making this statement. The District did say, once it was concluded that even with added supports (student) would not receive FAPE at Aurora Academy, that he would receive more appropriate supports in the Dartmouth Developmental Kindergarten program.

We were told that the charter school is a school of choice so the District does not have to provide a full array of services to charter school students; this means he can't go to school with siblings; if he were not disabled, he would attend the charter

See discussion immediately above.

In addition, we take the position that just as a school district is not required to provide the full range of special education services in all its traditional schools, (*Murray v Montrose County School District,* 54 F. 3d 921, 928-30(10th Cir. 1995), (sic) a school district is not required to offer all services in its charter schools. This is especially so when the charter determines the nature of the curriculum to be offered. While we would agree that a charter may be required in a given case to make certain accommodations to a student, we do not believe that it must fundamentally alter the curriculum. *Urban v. Jefferson County School District* __F.3d___ (10th Cir. 1996) (sic) . In short, there is no absolute entitlement to attend the neighborhood school (or by extension the charter school) where the child cannot be appropriately served there. Thus, there may be times when a disabled student will be unable to attend school with his siblings, just as there may be times when he is unable to attend school with the children in his neighborhood.

Key staff absent from meetings – and no safety plan despite his being lost

We have enclosed the IEP's from this school year. They reflect that those persons legally required to attend were at all IEP meetings.

(Complainant) may refer to a meeting held on October 2, 2001 at which safety issues were discussed. It is true that several staff members who had been scheduled to attend did not attend. This was because of illness and other reasons. Nonetheless, (proper name) of the District's Special Education Department, the Assistant Principal of the Aurora Academy, and (complainant), did discuss safety issues on October 2, 2001. The Assistant Principal said that the decisions made at that meeting would be shared with the appropriate members of the Aurora Academy staff, and to our knowledge they were.

(Student) is currently enrolled in private school where he is fully included

As noted, (student) is now enrolled at the Dartmouth DK program where he is quite successful. We assume that what is referred to here is enrollment during the half-day when (student) is not attending the Dartmouth Program.

Conclusion

The School District assigned both a liaison and a special education teacher to work with the Aurora Academy. The staffing team developed an IEP which was designed to offer FAPE. Whenever problems arose in (student's) program at the charter school, the School District took prompt steps to address them. The District expended extraordinary amounts of staff time and energy on trying to address (student's) needs. Our special education teacher (proper name), along with O.T., speech language and P.T. service providers, provided services consistent with the IEP, (APS Special Education Staff Person/proper name) visited the charter regularly; our special education administrators (including just mentioned APS Special Education Staff Person/proper name), were in frequent contact with the (complainant and her husband) and followed up promptly on their concerns. As noted, the Director of Special Education for the District even personally took (complainant) to look at potential schools. All of this indicates an extremely high level of service and a sincere desire to serve (student). Moreover, it is through the District's persistent efforts, even after the (complainant and her husband) withdrew him from the School District, that (student) has been appropriately placed and is reported by his teachers to be very successful in the Dartmouth DK placement.

If any shortcomings existed in the delivery of (student's) IEP, they did not deny (student) FAPE. If you need further information, please contact me.

Id. Personally identifiable information deleted by the Federal Complaints Officer. The correct cite for Murray is 51 F.3d 921, 928-30 (10th Cir. 1995). The correct cite for Urban is 89 F.3d 720 (10th Cir. 1996).

COMPLAINANT'S RESPONSE

The Federal Complaints Officer is presenting the entire body of the response of the complainant, to the school district's response to her Complaint, dated June 3, 2002, received June 4, 2002, absent supporting documents. Only personally identifiable information has been deleted.

Thank you for taking the time to process this complaint. Based on your queries, it has been enlightening to see a coordinated single response to the multitude of issues surrounding our son (proper name's) first year in Aurora Public Schools. It was, is, and continues to be our goal to have all our children at the same school. Specific responses to issues will be listed later, but it would be useful to summarize several common themes at the outset.

1) Several issues are attributed to the former principal, (proper name) and seem to be dismissed as he is no longer employed within APS. The issues were real and while known by APS staff, were not over-ridden. In many respects, these issues forced us to choose between "lesser evils" rather than what we felt was appropriate for (son/student).
2) In several cases, the responses indicated we withdrew (son/student) from APS and had therefore absolved them of any immediate responsibility for educating him. As can be seen in the email dated November 25th when we withdrew (son/student), we did so for immediate safety concerns and strongly stated our firm intent to re-enroll (son/student) as soon as there was a safe place for him. We also stated we were actively working with (Director of Special Education) to find a new school as soon as possible.
3) In several cases, the reason for (son/student) leaving the classroom was attributed to the curriculum. We find no evidence to support this claim and will cite specifics later in this response.
4) Lack of communication and coordination was a huge issue – to the point where we were taking active steps to try to resolve these issues ourselves – including giving IEP copies to the principal and classroom teacher as they never received copies. It is interesting to note that our listed concern was communication between the Special Ed staff and Aurora Academy staff, and the one letter cited in their response is between two people within the Special Ed staff.
5) Many issues revolved around toilet training. To us this was (and still is) a peripheral issue. There was considerable debate about if (son/student) was even developmentally ready for training. The Special Ed team first omitted the issue on the first IEP (responsibility fell to parent), then made it a central part of his second IEP, but still failed to fully staff the IEP requirement, resulting in the parent still doing the work.
6) (Student) did end the year enrolled in a Developmental Kindergarten at Dartmouth. The program fails two important criterion. First, it contains unnatural proportions of students with disabilities (about half). Second, after DK most students are placed in separate "life-skills" classes, which are segregated from the rest of the student body.

With the general comments taken care of, here are responses to specific comments:

We agree with the timeline of events as presented. In a few cases our records are off by a day or so, but this is not substantive. Some additional important dates should also be included.

September 18: We have no record of this meeting.

September 20: (Son/student) lost during lunch break. Found 15 minutes later in brother's classroom

September 21: Meeting at Centertech Special Ed Office to set up toileting program (in Attendance (APS School District Staff person/proper name), (APS School District Staff Person/proper name), and (APS School District Staff Person /proper name).

September 25: (Son/Student) lost during PE class, found 15 minutes later locked in the Gym closet.

November 8: (Son/Student) lost during art class, found 2-3 minutes later in music class.

October 25: (Son/student) left Library outside time assigned to school.

Lack of funding for the school district's special education department

While not normally part of this type of complaint, funding was a source of considerable debate during the second and subsequent IEP meetings. The debate was between (proper name) (principal) and (proper name) (district rep) as to who was financially responsible for which services. Arguments over budget in our opinion were a major reason to get (son/student) enrolled in Dartmouth as it required no extra support staff above what was already in place.

Absence of good communication between the school (charter) and the Special Education Department

As stated in the summary, we note that the one example cited in their response is between two people who are the Special Ed staff. Of note, the classroom teacher had received no information at all regarding (son/student) before the first day of school from district staff. (Complainant) provided this information (Child Find evaluations, private therapy evaluations, and the article "Which Way did She Go?" from the Mile High Down Syndrome newsletter about planning for a child that wanders). Schedules of when Special Ed staff were to provide services for (son/student) were photo copied and hand delivered to the classroom teacher by (complainant). The teacher and principal also never received a copy of the August 23rd IEP until a meeting on September 12th. The copies they got then were provided by (complainant). On Dec 5th IEP meeting, teacher stated to all that every IEP she received was from (complainant). See supporting Documents 1 and 2.

(Complainant and husband) experienced problems getting their child to attend the charter school. 1st week of school – (Student) was pulled from his class and taken to principal's office to wait for Mom because he had a dirty diaper

The concern here was not that he enrolled in the charter school. It was that there were insufficient supports in place to give the enrollment a decent chance of success.

(Son/Student) was pulled out of the classroom twice at the principal's direction due to messy diapers with no offer of resolution except for (complainant) to be a full-time aide. If she failed to do this, she was told (son/student) would not be allowed to attend classes.

We believe this was a core violation of (son's/student's) rights to access a FAPE. The school district was aware of this, but did nothing until the 2nd IEP as this issue was completely omitted from the first IEP. (Student's) enrollment was contingent on (complainant's) presence from August 23rd through September 22nd (start of 2nd IEP implementation). Even with the new schedule, (complainant) was required to provide 7 of the 20 diaper checks. In reality she performed more than double this due to district staff not meeting their commitments. See Supporting Documents Toileting Spread Sheet.

As stated, we did not realize the level of confusion created by keeping (son/student) in class later in the day on days where he remained awake. We strongly disagree with the implications to diapering schedules as (complainant) assumed the hourly checks during these extra hours and therefore could not have affected anyone else's schedule or (son's/student's). There were no assigned people to affect. (Complainant) did verbally inform (proper name) (classroom teacher), (proper name) (Speech therapist) and (proper name) (Sp. Ed teacher) she was doing this on Oct 19th. (Complainant) also documented the first time (son/student) stayed awake all day at school in his communication notebook. Once we were told this was not acceptable by the principal and the district cited this as a violation of the IEP, we immediately stopped.

The frequent absences and tardies that were listed were a result of (complainant's) having doctor appointments and not being able to leave (son/student) at school without her present. She had no choice but to take (son/student) with her to these doctor appointments or pay the preschool across the hall to keep (son/student)!

I was told that since special education didn't provide an aide he wouldn't be allowed into the classroom until either I found – and paid for – a full-time aide or I had to volunteer to be in the class the entire time (son/student) was in class.

The above statement is true, and can be verified by fact that (complainant) was required by the district to be in the class until the 2nd IEP was implemented. Even with the 2nd IEP she was still required to be present for the toilet schedule. This can be verified by asking any of the following people still working for APS: (proper name), (proper name), and (proper name). This requirement is also clearly documented in the districts toileting schedule. The phrase was "fill in" was used, but it was clear that without (complainant) there, (son/student) was not welcome, as the schedule would not have worked otherwise.

The response indicated that the staffing team had not decided an aide was necessary. While this decision was still being debated, the issue was what to do until that decision was made. For that time, (complainant) was required to be at the school.

On September 9th email from the Occupational Therapist, (proper name) (in District's supporting documents), she stated (son/student)did "quite well with 1-to-1 supervision." On an Aug 30th meeting with (proper name) and Dr. (proper name), (proper name) emphatically stated (son/student) needed a full-time aide and Dr. (proper name) suggested (complainant) go find one. (Complainant) initiated this work assuming it would be district-funded, actually found three people, but when she found out that we were to pay for this person, clearly stopped the search. This issue is one of the core violations.

By requiring (complainant) to be in the classroom for (son/student) to attend classes, this clearly showed that without an aide provided by (complainant) (either herself or paying for

one), (son/student) could not access his FAPE. This is one of the core violations. See attached Meeting Notes and emails to support this assertion.

Special Education Director refused to provide an aide even after he was lost four times Only one of the four times did the staff even look for him

Much emphasis is on the fourth time (son/student) was lost where the district claims no responsibility. This does not address the other three times. After the fourth time, the school made it clear when they were responsible and when they were not. We apologized and strictly followed their proposed hours. Full accounts of four incidents are included in the supporting documentation.

We strongly disagree with the assessment that (son/student) was wandering from the classroom due to "lack of intellectual engagement". It was due to the fact that there was only one adult in the classroom with 24 other children. There was no additional support staff available to the classroom teacher except for (complainant). With appropriate adaptations and modifications, either curriculum could be successful. These accommodations were only made available at Dartmouth, never at Aurora Academy. Without any additional support at Aurora Academy, its program was essentially set up for failure.

Not documented were several discussions during the first and second IEPs where the approach to teaching children differed considerably between the charter school staff and APS Special Ed staff. We feel the argument of "intellectual engagement" stems from this difference of opinion over teaching practices and philosophy. It was this philosophical difference, I recall, sight words verses (sic) phonics that caused the delay in developing a picture label system for the classroom, not because of parent objections as listed in (proper name) Services-Speech Language paragraph. We believe in a print rich environment for all children.

Our agreement to remove (son/student) was purely for safety reasons (and documented as such) and enrollment in Dartmouth DK was the only alternative to full time private school, something we cannot afford. It was not a decision we took lightly and it did take several weeks to decide. Of the two meetings that were re-scheduled, only one was documented in advance by the district. The first was set up without confirming with us first and we could not schedule advocates to accommodate that time. For the second meeting, (complainant's husband) had an unexpected business trip that could not be avoided and advocates could not attend. Our eagerness to meet with the district and school staff is noted at the bottom of the first two IEP documents as parents waived 10 day notice and parent present at scheduling.

We agree that Dartmouth is a safer place for (son/student), but this has nothing to do with the curriculum. This has to do with safety plans and extra staff that were never made available at Aurora Academy. If similar supports were put in place at Aurora Academy, it would be just as appropriate and safe. These additional supports were never offered at Aurora Academy.

Note that on the issue of who was looking for (son/student), the district just says that (son/student) was found. (Complainant) was the only one doing the looking on all occasions but him getting locked in the Gym closet. The reason there were no other

people looking for (son/student) was there were no staff available to do so, there was only one teacher assigned to the class and that teacher could not leave the other students to look for (son/student). This was a staffing issue. Our notes show that (son/student) was lost for about 15 minutes on two occasions. Full details are in our supporting documentation below.

District refused to acknowledge and write necessary supports into the IEP for him.

I assume there is no contest on the first IEP being inadequate. "In the interests of time" during the second IEP, several items were omitted such as life goal and modifications. It was because of these omissions that we chose not to sign the IEP at the end of the meeting. Other issues we felt were omitted were a follow up review and safety plan. These comments were later written in the bottom of the IEP. See meeting notes

We were told to receive more supports, we must enroll in a DK.

We find their denial of this statement in contradiction to the rest of the response. In all other cases, they made it clear that the supports available at Aurora Academy would be inferior to those available at any other DK. These had purely to do with the inconvenience of scheduling staff to be available at Aurora Academy. We agree that (son/student) was not receiving a FAPE at Aurora Academy, but this was a self-fulfilling prophecy due to the lack of support provided compared to that of Dartmouth. At both the first and second IEP meetings the full APS Special Education staff made it clear that the only way they would support (son's/student's) attendance at Aurora Academy was if (complainant) remained as an in-classroom aide.

We were told that the charter is a school of choice so the District does not have to provide a full array of services to charter school students; this means that he can't go to a school with his siblings; if were not disabled, he would attend the charter.

We reviewed the cited Murray vs. Montrose and Urban vs. Jefferson County school district cases. The review we located (http://www.modrall.com/articles/articles 55.html) addresses these cases plus several more. As we are not legal council (sic) this non-legalese description made the most sense. The cited cases do not seem applicable to (son's/student's) situation. They deal with issues where the student has severe behavior disorders or significant medical needs. Neither of these applies to (son/student) for whom we are simply requesting an inclusive environment. Some quotes from this summary are listed below. Bold text is our emphasis.

> "Section 300.552. Placements. In determining the educational placement of a child with a disability, including a pre-school child with a disability, each public agency shall ensure that…(c) unless the IEP of a child with a disability requires some other arrangement, the child is education (sic) in the school that he or she would attend if non-disabled; (d) in selecting the LRE, consideration is given to any potential harmful

effect on the child or in the quality of services that he or she needs; and (e) **a child with a disability is not removed from education in age-appropriate regular education classrooms solely because of needed modifications to (sic) the general curriculum."**

"A general education classroom may be inappropriate if the student's service needs so dominate the teacher's attention and time that it substantially interferes with the learning of other students. Greer v Rome City School Dist., 950 F.2d 688 (11th Cir. 1991). **Before opting for a more restrictive placement, however, the school must consider other options, ie the additional (sic) of an educational aide."**

"Importantly, in making a decision to place a child in a school other than the neighborhood school, the IEP team should consider all relevant factors. IEPs are to be driven by the needs of the individual student, not the program offerings of the school."

In addition, Aurora Academy is contractually obliged to pay the district for special education services. As such, it is our understanding that these issues belong to the special education staff and not Aurora Academy.

Key staff absent from meetings – and no safety plan despite his being lost.

The meeting mentioned did happen with the number of people listed. According to (school district's attorney's) letter, the district made calls to (charter school building principal) "reminding him of his responsibility for student safety, and the need to talk with the teacher about the issue, and even reminding him of the potential for personal liability should harm come to the child." I question if the district's previously had experience with other children with a tendency to wander away and were there safety plans or strategies we could have tried to prevent repeatedly loosing (sic) (son/student). When we had a safety meeting only the classroom teacher, assistant principal Dr. (proper name), and district representative (proper name) were able to meet with (son's/student's) parents. This meeting was scheduled for 7:15 a.m. October 1. The special education teacher (proper name) showed up for the last 15 minutes due to a personal emergency. If (son's/student's) safety is a concern for the staff and (son/student) had been missing from several settings not just the kindergarten classroom why was there no brainstorming safety strategy meeting held with the teachers who also teach kindergarten subjects such as art and PE.? We made ourselves available when the staff wanted to meet with us concerning (son/student). We could not locate an advocate to attend this meeting, so we went without one. We were expecting this meeting to be attended by more staff, but it was not. See Meeting Notes October 1, 2001.

At the December 5, 2001 our advocate asked why no functional behavior assessment had been done regarding (son's/student's) not staying with the class. District staff told us that functional behavior assessments were for students who were dangerous. We pointed out that it was dangerous for (son/student) to be locked in a closet, or wandering the school alone. We were told that since his behavior did not endanger other students there would be no functional behavior assessment.

Conclusion

From the outset, the intent of the district was to place (son/student) in an existing special education program. It is our opinion that our son's rights to FAPE were violated repeatedly as we tried, unsuccessfully, to work out a solution at the Aurora Academy charter school. Supports and accommodations requested by us and the schools' staff were ignored, dismissed as unnecessary, or deemed not available at this particular site. We look forward to your response and decision in this matter.

Id. Personally identifiable information deleted by the Federal Complaints Officer. Emphases by complainant.

FINDINGS AND DISCUSSION

The Federal Complaints Officer summarizes what he finds to be the essence of the complainant's Complaint, subject to the jurisdiction of the Federal Complaint process, to be that, during the period from the beginning of the fall semester 2001-2002 school year, until November 23, 2001 - when the complainant and her husband dated an email, subsequently sent to the charter school's building principal by email on November 25, 2001, withdrawing their son from the charter school – the Aurora Public School system (APS) failed to provide their son a free appropriate public education (FAPE). (November 23, 2001 was a Friday. November 25, 2001 was a Sunday. It is indicated that a copy of this email, contained in the school district's supporting documents, was sent to eight (8) other school staff persons, including the school district's Director of Special Education.) The reasons for this alleged denial of FAPE, again as summarized by the Federal Complaints Officer, based upon the complainant's Complaint letter of January 28, 2002, were: poor communications between the charter school and the school district's special education department, the failure of the school district to provide an aide for their son, the failure of the school district to write necessary supports into their son's Individualized Education Program (IEP), the failure of the school district to provide a full array of services at the charter school, and the failure of the school district to have a necessary safety plan in place for their son. (Whether these alleged violations, if true, were a result of inadequate funding, as also alleged by the complainant, is irrelevant to this Complaint Decision. The IDEA requires the provision of FAPE, regardless of cost.) Presumably, the complainant and her husband would also argue that the school district did not meet its obligation to provide their son with FAPE from November 23, 2001 until – according to a letter from the complainant and her husband to the Director of Special Education, dated February 25, 2002, contained in the school district's supporting documents – their son subsequently began attending public school again as an APS student on February 25, 2002. The Federal Complaints Officer finds this view to be represented by the complainant in the complainant's response, item two (2), page one (1), dated June 3, 2002. The Federal Complaints Officer is deciding this Complaint based upon the finding that this view is the position of the complainant.

Item nine (9) of the complainant's June 3, 2002 response, raises new allegations regarding this student's present public school placement - as of the time of the Federal Complaints Officer's receipt of this Complaint - at Dartmouth Developmental Kindergarten. The Federal Complaints Officer makes no determination as to whether these allegations are within the jurisdiction of the

Federal Complaint process. The Federal Complaints Officer is not going to address these new allegations in this Complaint, because it is not necessary to do so in order to resolve the essential allegations raised by the complainant, as identified by the Federal Complaints Officer, and the school district has not been given the opportunity to respond to these new allegations, and to make time for such an opportunity would, it is the finding of the Federal Complaints Officer, inappropriately delay a resolution of this Complaint. The Federal Complaints Officer does recognize that this student had not begun attending Dartmouth at the time of the January 28, 2002 Complaint letter. If the complainant wishes to file further separate Complaint about her allegations regarding the Dartmouth placement, she is entitled to do so, contingent, as always, upon a finding by the Federal Complaints Officer as to whether the substance of any Complaint is subject to the jurisdiction of the Federal Complaint process.

In the first paragraph to its introduction to its response to this Complaint, the school district states:

> As an initial procedural matter, we take the position that the essential issues which seem to be raised by the complaint are not appropriate for resolution in a federal complaint. Specifically, whether the IEP provided FAPE (including whether the alleged failure to provide a full time aide to the student was a denial of FAPE), and whether the placement at the Aurora Academy was appropriate, are not proper issues for a federal complaint. Rather, a due process hearing under the IDEA is the appropriate forum for addressing such issues. Without waiving this objection, and because in addition to these fundamental issues there may also be questions about whether the IEP was implemented as written, we submit the following substantive reply. Id.

Question number seven (7), with Answer, of Office of Special Education Programs (OSEP) Memorandum 00-20, dated July 17, 2000, states as follows:

> **Question 7:** Does a dispute in an IEP meeting regarding the appropriateness of FAPE determinations made by a public agency amount to an allegation of a Part B violation which an SEA must resolve if a complaint is filed?
>
> **Answer:** Yes. Under the IDEA, the SEA is responsible for ensuring that FAPE has been made available to children with disabilities. If a parent believes that what is offered during an IEP meeting to his or her child with a disability does not constitute FAPE and files a complaint, the State must resolve the complaint.
>
> An SEA resolves a complaint challenging the appropriateness of a public agency's determination regarding a child's educational program or placement by determining not only whether the public agency has followed the required procedures to reach that determination, but also whether the public agency has reached a decision that is consistent with Part B requirements in light of the individual child's abilities and needs. Thus, the SEA would need to review the evaluation data in the student's record or any additional data provided by the parties to the complaint and the explanation included in the public agency's notice to parents as to why the agency made the challenged determination regarding the child's educational program or placement (and/or refused to make an alternative determination). If necessary, the SEA may need to interview appropriate individuals, to determine (1) whether the agency followed procedures and applied standards that are consistent with State standards, including the requirements of Part B, and (2) whether the determination made by the public agency is consistent with

those standards and supported by the data. The SEA may likely find that the public agency has complied with Part B requirements if the agency has followed required procedures, applied required standards, and reached a determination that is reasonably supported by the student-specific data.

ALTHOUGH DECISIONS OF THE IEP TEAM CANNOT BE OVERTURNED BY THE SEA, THE SEA CAN, ON A CASE-BY-CASE BASIS, IF IT CONCLUDES THAT WHAT HAS BEEN OFFERED DOES NOT MEET THE DEFINITION OF FAPE, ORDER THE IEP TEAM TO MEET TO DETERMINE FAPE FOR THE CHILD. IN ADDITION, PARENTS ALWAYS HAVE THE RIGHT TO CHALLENGE THE IEP TEAM'S DECISION BY FILING FOR A DUE PROCESS HEARING AND MAY SEEK TO RESOLVE THEIR DISPUTES THROUGH MEDIATION.

Id. Emphasis added by the Federal Complaints Officer.

Whether or not this is correct or wise policy, or even internally consistent on its own terms, is beyond the authority of the Federal Complaints Officer to determine in this Complaint. The state of Colorado, for the purpose of receiving federal funding, is bound to follow OSEP's guidance, unless and until that guidance is changed, or there are more authoritative legislative or judicial pronouncements that the Federal Complaints Officer would be bound to follow. The Federal Complaints Officer is therefore deciding this Complaint consistent with his interpretation of OSEP Memorandum 00-20.

The Federal Complaint process provides for no evidentiary hearing, and no mechanism for taking sworn testimony, other than by affidavit, and therefore, obviously, no appropriate mechanism for cross-examining sworn testimony. The Federal Complaints Officer acts as an investigator and judge. As such, s/he must not only maintain impartiality, s/he must also maintain the appearance of impartiality. This, the Federal Complaints Officer finds, is consistent with accepted ethical standards for persons performing investigative and judicial functions. In any case, the Federal Complaints Officer has not found it necessary to question individuals to develop information beyond the written information submitted by the parties to this Complaint, in order to resolve this Complaint. To try to question individuals about the competing factual versions submitted to the Federal Complaints Officer as a part of this Complaint would, it is the finding of the Federal Complaints Officer, inappropriately delay an appropriate resolution of the Complaint, and would not, it is the finding of the Federal Complaints Officer, provide any information likely to aid the Federal Complaints Officer in resolving factual allegations necessary to resolving this Complaint.

When the complainant makes the allegation that there was an "absence of good communication between the school and the special education department" (complainant's Complaint letter dated January 28, 2002) , the Federal Complaints Officer presumes the complainant means an absence of good communication conducive to providing FAPE for her son – a presumption reinforced by complainant's allegation item four (4) in her response, dated June 3, 2002, in which she states that the building principal and classroom teachers were not getting copies of her son's IEPs. The school district was not provided with an opportunity to respond to this allegation. However, independent of the accuracy of this allegation, the school district, in its response dated May 20, 2002, in the section addressing the complainant's allegation of an absence of good communication, references an email message between the school district's Assistant Director of Special Education and the school district's attorney, regarding the school district's efforts to inform the charter school building principal of the school district's dominant

authority regarding special education issues. A copy of this email message was a part of the documentation submitted by the school district. The Federal Complaints Officer infers from the school district's response that there was some problem in obtaining appropriate cooperation, in the school district's view, from the charter school building principal. However strenuous the efforts made by the special education department staff to communicate with necessary persons at the charter school, if the charter school building principal was not just as strenuously listening, in a way acceptable to the school district, or, similarly, not sufficiently heeding, in the school district's view, what was being communicated, then it seems to the Federal Complaints Officer more likely than not that this student's ability to receive FAPE would have been prejudiced. The Federal Complaints Officer finds that this was the case.

The Federal Complaints Officer finds no denial of FAPE, per se, because of the school district's decision, through the IEP process, not to provide this student with an aide consistent with the wishes of the complainant. This is an IEP team decision to make. If the IEP team cannot reach consensus, and if negotiation or mediation (if attempted) fails to produce an agreement on what should be provided in an IEP, the parent's relief is a due process hearing. The Federal Complaints Officer finds no sufficient basis in any of the factual allegations made by the complainant – including allegations made by the complainant that her son was "lost"– for finding that the issue of an aide was not adequately addressed and determined by the IEP team, in such a way to support a finding that the lack of a one (1) to one (1) full time aide for this student necessarily resulted, per se, in a denial of FAPE.

Likewise, the Federal Complaints Officer finds no denial of FAPE, per se, due to any lack of necessary supports, services, or safety plan being provided for by means of this student's IEP. The Federal Complaints Officer identifies the issue of "supports" as overlapping with the complainant's position that her son could not, and presumably, in the complainant's view, cannot, receive FAPE unless he has adequate assistance from an aide. The Federal Complaints Officer finds no fault in the IEP process, including the IEP team's determinations, relative to making decisions about an aide, supports, services, or a safety plan, sufficient to warrant a finding that this student has been denied FAPE. Nor does the Federal Complaints Officer find any denial of FAPE due to any lack of attendees at IEP meetings.

The Federal Complaints Officer does find, however, that the implementation of the placement of this student at Aurora Academy Charter School resulted in a denial of FAPE for this student, until the parents removed him by email notice dated November 23, 2001. In her Complaint letter dated January 28, 2002, second (2nd) paragraph, second (2nd) sentence, the complainant states that she was told, after an incident in which her son was sent to the charter school building principal's office because her son had a dirty diaper, that "…since special education did not provide an aide for (son/student) he would not be allowed into the classroom until I either found – and paid for – a full-time aide or I had to volunteer to be in the class the entire time (son/student) was in class." Id. Personally identifiable information deleted by the Federal Complaints Officer. In its response to the Complaint, as excerpted by the Federal Complaints Officer, the school district stated as follows, beginning with a reference to the complainant's allegation about what she was told about an aide:

> This appears to be a comment attributed to (charter school building principal). As noted, we are unable to say what he may have said because he is no longer employed at the charter school. Obviously, if this were said, it is not a position we would support. If an aide were determined by the staffing team to be necessary to the provision of FAPE for

(student), then the School District would have to provide an aide. However, one must recall that the staffing team had not decided an aide was necessary. Our understanding is that the discussion of the aide centered around toileting and safety issues, as opposed to issues of delivering the curriculum.

……...

Obviously, the School District understands that its schools are responsible for taking whatever measures are necessary to supervise students attending its schools. When the IEP was written, it was believed that adequate steps had been taken. Frankly, the principal of the school (proper name) was not taking the issue of (student's) personal safety as seriously as the School D istrict believed was appropriate. Calls were made to (charter school building principal) reminding him of his responsibility for student safety, the need to talk with the teacher about the issue, and even reminding him of the potential for personal liability should harm come to the child.

……...

IN THE DISTRICT'S VIEW, THE PROGRAM AT DARTMOUTH IS UNQUESTIONABLY APPROPRIATE FOR (STUDENT), AND THAT AVAILABLE AT THE CHARTER SCHOOL IS NOT APPROPRIATE.

Id. Personally identifiable information deleted by the Federal Complaints Officer. Emphasis added by the Federal Complaints Officer.

The complainant stated, in paragraph number three (3), sentences four (4) and five (5), of her Complaint letter dated January 22, 2002, as follows: "We were told that to receive more services our son must enroll in one of the district's developmental kindergartens where ½ of the students have special needs. We were also told that the charter school is a school of choice, so the district does not have to provide a full array of services to charter school students, because the services are available at another site." Id.

In its response to the Complaint, the school district further stated, as excerpted by the Federal Complaints Officer, beginning with a reference to this allegation by the complainant, as follows:

The District denies making this statement. The District did say, once it was concluded that even with added supports (student) would not receive FAPE at Aurora Academy, that he would receive more appropriate supports in the Dartmouth Developmental Kindergarten program.

……...

In addition, we take the position that just as a school district is not required to provide the full range of special education services in all its traditional schools, (*Murray v. Montrose County School District,* 54 F. 3d 921, 928-30 (10th Cir. 1995), (sic) a school district is not required to offer all services in its charter schools. This is especially so when the charter determines the nature of the curriculum to be offered. While we would agree that a charter may be required in a given case to make certain accommodations to a student, we

do not believe that it must fundamentally alter the curriculum. *Urban v. Jefferson County School District* ___*F.3d* ___ (10th Cir. 1996) (sic). In short, there is no absolute entitlement to attend the neighborhood school (or by extension the charter school) where the child cannot be appropriately served there. Thus, there may be times when a disabled student will be unable to attend school with his siblings, just as there may be times when he is unable to attend school with the children in his neighborhood.

Id. Personally identifiable information deleted by the Federal Complaints Officer. The correct cite for Murray is 51 F.3d 921, 928-30 (10th Cir. 1995). The correct cite for Urban is 89 F.3d 720 (10th Cir. 1996).

The Federal Complaints Officer does not disagree with the school district's statement that "…a school district is not required to offer all services in its charter schools" – for the purpose of meeting the legal requirements of the IDEA. However, once a student is placed, according to an IEP, whatever the service delivery system, and whatever the attendance center, the school district is legally bound to see to it that the student's IEP is appropriately implemented in order that FAPE be provided. The fact that parent(s) agree to, and, in this case evidently, affirmatively seek, a placement option that turns out to be inappropriate, for whatever reason(s), does not relieve a school district of its obligation to provide FAPE to a student. The promise, and entitlement, to FAPE, belongs to the student, not the parent(s). In so stating, the Federal Complaints Officer in no way wishes to discourage parents and school districts from reaching agreements about IEP services, service delivery systems, and placement locations for service delivery. However, when parents and school districts reach agreements about IEP services, delivery systems, and placement locations, and these agreements do not result in the provision of FAPE, the school district bears the responsibility to do its best to set things right. In this case the school district did so, in part, by offering alternative attendance centers. However, this did not directly address the denial of FAPE that the Federal Complaints Officer finds occurred for this student from the beginning of the 2001-2002 school year until November 23, 2001.

Even within the school district's definition of the jurisdiction of the Federal Complaint process (see page three (3) of this Decision), it is recognized that the Federal Complaints Officer has authority to determine whether IEPs are implemented so as to provide FAPE. Regardless of the resolution of all other factual disagreements between the complainant and the school district, it is the finding of the Federal Complaints Officer that the school district concedes in its response to this Complaint that the school district determined, in retrospect, that the placement of this student at Aurora Academy Charter School was not appropriate – albeit for different reasons than the complainant. See page five (5), unnumbered, of the school district's response to the Complaint, where the school district states:

(Student) attended the Aurora Academy Charter School beginning with the start of the school year. The School district believed, at the time the initial IEP was written, that the IEP would provide FAPE at the Aurora Academy. It is important to note, however, that FAPE was also offered at other district sites. The decision to place (student) at the charter school was essentially a parental choice. (Mother), who was one of those who worked initially to get the Aurora Academy off the ground and believes very much in the school, was especially insistent that (student) attend the charter school. **AFTER A PERIOD OF TIME, CONCERNS BEGAN TO GROW AMONG APS STAFF THAT THE**

AURORA ACADEMY WAS NOT AN APPROPRIATE PLACEMENT FOR (STUDENT), AND EFFORTS WERE THEN MADE TO BEGIN EXPLORING OTHER OPTIONS.

Id. Personally identifiable information deleted by the Federal Complaints Officer. Emphasis added by the Federal Complaints Officer. See also page twenty-three (23) of this Decision, emphasized portion of school district's Complaint response quoted by the Federal Complaints Officer.

The Federal Complaints Officer also finds, however, that there is insufficient evidence to conclude, as is implied, in the view of the Federal Complaints Officer, in the complainant's Complaint letter of January 22, 2002, that if this student had attended another school district attendance center, other than Aurora Academy Charter School, that he would have been denied FAPE in the least restrictive environment (LRE), or that he is presently so denied. Absent a determination that the receipt of services in a given attendance center is insufficient to provide FAPE in the LRE, the IDEA has no authority to determine attendance centers for students. The school district's citations to Murray and Urban as controlling authority for this conclusion are accurate. It is the finding of the Federal Complaints Officer that there is insufficient evidence to warrant a finding that this student could not now, or at any time during his previous attendance within APS, receive FAPE in the LRE somewhere other than Aurora Academy Charter School. It is true that Colorado has a School Choice Law – C.R.S. 22-36-101 - 106 – and individual school districts may have attendance center enrollment policies. However, nothing, per se, about the Colorado School Choice Law, or, so far as is known to the Federal Complaints Officer, any attendance center enrollment policies of APS, requires that parents be allowed to choose particular attendance centers in order for the school district to be compliant with the IDEA. So long as FAPE and LRE requirements are met, the IDEA is satisfied, whatever the attendance center may be. Whether the exclusion of a student with a disability from a particular attendance center, including a charter school, because of a student's disability, might unlawfully abrogate a disabled student's right to school of choice under Colorado's School of Choice Law, or in a way that is unlawfully discriminatory under other constitutional or statutory provisions – for example Section 504 of the Rehabilitation Act of 1973 – is a determination not being made by the Federal Complaints Officer.[1] It is not within his authority to do so. Allegations of violations of Section 504 are within the authority of the Office for Civil Rights (OCR) to investigate and determine.

The complainant argues that the placement at Aurora Academy Charter School would have worked if there had been better communication between APS and the charter school, if her son had been provided with an aide, if her son had received necessary supports and services, and if her son had been provided with an adequate safety plan. The school district argues that the problem was that the curriculum at the charter school was not appropriate for this student and concedes, to some extent, that there may have been some problem with safety, but that any such problem was the fault of the charter school building principal. The Federal Complaints Officer has found that communication was not adequate to be conducive to providing FAPE for this student. He has also found that, per se, there was no fault in the process or determination

[1] The Federal Complaints Officer raises this as a potentially open question notwithstanding the court's statement in Urban that "…(We) conclude that if a disabled child is not entitled to a neighborhood placement under the IDEA, he is not entitled to such a placement under section 504." Id. at 728. There is no indication in Urban or Murray, also cited by the school district, that the parents' claims included any allegation of unlawful discrimination based upon Colorado's School of Choice Law, either as written, or as applied.

of the IEP team with regard to whether this student needed an aide, the supports and services this student needed, and what provisions should be for this student's safety. However, the Federal Complaints Officer also finds that for the toileting and wandering problems this student experienced at Aurora Academy Charter School to be sufficiently addressed, either the existent charter school staff would have had to have done a better job, or additional resources, in some form, would have had to have been provided by APS. In either case, it was APS's responsibility to see to it that these problems were sufficiently addressed. A better resolution of these problems, however, would not necessarily have meant that Aurora Academy Charter School was an appropriate placement for this student, and, in any case, the school district was not legally required, under IDEA, to provide this student with a placement at Aurora Academy Charter School because, as Murray and Urban indicate, a student is not entitled to a specific attendance center in order to receive FAPE. This student's IEP team has subsequently determined that Aurora Academy Charter School was not an appropriate placement and that FAPE is being provided at Dartmouth Developmental Kindergarten. The Federal Complaints Officer finds no fault, as a part of this Complaint, in the process for making this determination, or in the resulting determination. If the complainant/parent wishes to seek a due process hearing to argue for a different finding, she is entitled to do so. She is also entitled to file further Complaint, subject to the jurisdiction of the Federal Complaint process, in accordance with OSEP Memorandum 00-20, with the potential for further relief of an IEP meeting for re-determination of FAPE.

It is the finding of the Federal Complaints Officer that what happened in this case is that this student did not receive FAPE at Aurora Academy Charter School from the beginning of the fall 2001 school semester until November 23, 2001. However, the Federal Complaints Officer is not finding that the school district failed to meet its obligation to provide this student with FAPE for any period of time subsequent to November 23, 2001, when the parents withdrew him from Aurora Academy Charter School. The Federal Complaints Officer finds no evidence to conclude that were not other attendance centers available within APS that would have met the FAPE requirements for this student in the LRE, sufficient to meet IDEA requirements, including meeting the safety concerns of the parents. Once the parent(s) withdrew their son from school on November 23, 2001, the school district no longer had the opportunity to provide their son with FAPE in the LRE at any attendance center within APS, until such time as the parents were willing to return their son to APS. The Federal Complaints Officer does not find that the school district was responsible for any delay between November 23, 2001, and February 25, 2002, when this student once again began attending APS, sufficient to find that the school district was not able, ready, and willing to provide FAPE for this student during this time period.

REMEDY

As soon as possible, and in no case later than thirty (30) days after the first day of the student's 2002-2003 school year, the student's IEP team shall meet to determine what compensatory education, if any, is to be provided to this student for being denied FAPE from the first day of the 2001-2002 school year, until November 23, 2001. It is unclear to the Federal Complaints Officer whether, and, if so, how, this student can benefit from compensatory education. The Federal Complaints Officer finds that the student's IEP team will be in the best position to make these determinations. If the parent(s) do not agree with the determination(s) made, they shall be entitled to a due process hearing to challenge the IEP team decision(s). They may also be entitled, according to OSEP Memorandum 00-20, to file further Complaint. However, the relief allowed by further Complaint, even assuming a Decision in favor of the complainant(s), is limited

to ordering further IEP meeting(s), again according to OSEP Memorandum 00-20. Moreover, the Federal Complaints Officer does not interpret successful complainants to be entitled to the relief of an unlimited number of IEP meetings.

CONCLUSION

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, June _____, 2002.

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Charles M. Masner, Esq.
Federal Complaints Officer