

## FEDERAL COMPLAINT NUMBER 98.517

### FINDINGS AND RECOMMENDATIONS

#### I. PRELIMINARY MATTERS

- A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (“CDE”), on May 8, 1998.
- B. The complaint was filed by Ms. [parent] on behalf of her son, [student], against the Cherry Creek School District, Dr. Robert Tschirki, Superintendent and Dr. Richard Reed, Director of Special Education (“the District”).
- C. The timeline within which to investigate and resolve this complaint expired on July 7, 1998, but was extended by three weeks to allow for analysis of numerous allegations, considerable additional information presented by the complainant, and a need to bring the parties together (twice) to understand the greatly disparate perceptions as to what took place. Ms. [parent] originally agreed to this timeline extension and participation in a joint information gathering meeting. As indicated on page 23 of the Findings Analysis, Ms. [parent] later requested documentation of the fact that it was the (three week) delay which caused her to feel confused, anxious and intimidated resulting in her getting off track, forgetting some points and forgetting to ask questions.
- D. The process for receipt, investigation and resolution of the complaints is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et.seq., (“the Act”), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.
- E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education (“FAPE”) to eligible students with disabilities under the Act.
- F. The complaint was accepted for investigation based upon determination that CDE had jurisdiction over the allegation contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.
- G. [Student] is currently a student with disabilities eligible for services from the District under the Act.
- H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; consideration of relevant case law and federal agency opinion letters and analysis of issues and responses based on a joint meeting of the parties.

#### II. ISSUE

##### A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- 1.) failing to identify, locate and evaluate [student] as a student with disabilities during his kindergarten, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> grade years in school (at Willow

- Creek) even though teachers observed and discussed his attention and hyperactivity problems with his family and noted his underachieving,
- 2.) a District psychologist unilaterally determining [student]'s non-eligibility for special education, based on an ADHD screening evaluation in the 4<sup>th</sup> grade,
  - 3.) refusing to evaluate [student] for determination of eligibility for special education upon parental request, during his 5<sup>th</sup> grade year, and unilaterally determining non-eligibility due to his not being "2 grade levels behind", and not providing procedural safeguards (specifically the right to appeal the District's refusal),
  - 4.) a special education teams' unilaterally determining that [student] was not eligible for special education during his 5<sup>th</sup> grade year due to his "working at grade level and [being] very smart – he just needs to stay on task and work harder" and not providing procedural safeguards (specifically the right to appeal the District's refusal),
  - 5.) failing to provide medical services, as a related service, to determine [student]'s medically related disability,
  - 6.) failing to conduct evaluation and determination of eligibility in a timely manner upon special education referral from the building level (child study) team on 1/29/96 (meeting to determine eligibility held on April 8, 1996),
  - 7.) failing to have a teacher as a participant in the April 8, 1996 IEP meeting,
  - 8.) failing to document eligibility for significant identifiable emotional disability on April 8, 1996, but later unilaterally documenting disability on 4/29/96,
  - 9.) unilaterally completing an IEP in April, 1996, after IEP meeting was cut short; and not providing the parent with opportunity to participate,
  - 10.) failing to provide special education and related services and modifications commensurate with [student]'s IEP from 4/8/96 through the first quarter of the 6<sup>th</sup> grade year at Campus Middle School,
  - 11.) failing to provide medication as a related service at Campus Middle School 21 out of 46 days,
  - 12.) failing to allow parent to inspect or to have a copy of the complete set of special education records,
  - 13.) failing to provide special education and related services commensurate with [student]'s 3/6/97 IEP from March 9 to March 16, 1997,
  - 14.) failing to provide 3.25 hours of special education services per week at West Middle School from March 16 to April 30, 1997,
  - 15.) failing to complete IEP begun on 10/17/97,
  - 16.) failing to evaluate goals and objectives from previous IEP, when developing new goals and objectives on 10/17/97, and
  - 17.) failing to provide any special education services commensurate with [student]'s 3/6/97 IEP or the 10/17/97 unfinished IEP during the 1997-98 school year.

#### B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18) (19) and (20), and 1412 (2)(B), (4), (6) and 1414 as amended by 20 U.S.C. 602, 612 and 614 and its implementing regulations (as amended by statute),

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.128, 300.130, 300.131, 300.180, 300.220, 300.235, 300.237, 300.300, 300.340, 300.343, 300.344, 300.345, 300.350, 300.532 and 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaints, the receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District, in part, based on the assurances contained within its application.
3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.
4. [Student] was a student enrolled in the District from kindergarten through the first part of 6<sup>th</sup> grade, but was withdrawn on 10/25/96. He subsequently re-enrolled on 3/10/98 for the remainder of 7<sup>th</sup> grade.
5. The following is the list of allegations as modified by the complainant, the District's responses to those allegations and any documentation reviewed by the complaint's investigator. Following each allegation or set of allegations, is information from discussions with the parties, a statement of the applicable law and analysis of the issue.

## Federal Complaint Concerning [Student] No 98.517 Analysis

The analysis of each of the allegations is followed by a report of the discussion held at meeting requested by the complaints investigator to further clarify the issues. Present at that meeting were: the complaint investigator; Dr. Bill Porter, coordinator of special education for the District; Mandy Hesterman, Legal Resource for the District, Ms. [parent] parent of [student] and complainant, and (at the second meeting only) Ms. Cg. LaScala, advocate for Ms. [parent] from the ARC of Arapahoe and Douglas Counties.

Complaint Issue	District's Response	Records/Documentation
<p>1. failing to identify, locate and evaluate [student] as a student with disabilities during his kindergarten, 1st, 2nd, 3rd, and 4th grade years in school (at Willow Creek) even though teachers observed and discussed his attention and hyperactivity problems with his family and noted his underachieving. Ms. [parent], on 7/16/98, clarified this by telephone message, stating that the way this allegation was framed was in error. Rather than failure to evaluate for <u>disabilities</u>, it should have been stated, failure to evaluate for <u>ADHD</u>.</p>	<p>The early primary report cards for [student] indicate grades that were marked satisfactory and/or outstanding, with positive teacher remarks regarding creativity and ability. There is no reference of any significant academic or behavioral issues suggesting a need for special education referral.</p> <p>Parents and teachers had concerns about behaviors in 3<sup>rd</sup> grade, thus placed [student] into a social group to work on these issues; not especially helpful</p>	<p>Kdg. progress report states “[student] continues to talk” and “sometimes tests the limits” relative to self control. Kdg. notes state, “[student] is making a nice adjustment... positive attitude about learning... continues to do well in school.”</p> <p>3<sup>rd</sup> grade progress report lists 11 items relative to Habits of Mind, which were introduced to [student], but he was not able to demonstrate.</p>

### Discussion During Meeting:

Ms. [parent] very strongly believes teachers should have initiated a child study team meeting based on their observations of [[student]’s continuing to talk, testing the limits, etc. The District indicates that such behaviors are common among students in the first three grades and such behaviors would not cause an automatic referral to the child study team or an automatic referral to special education.

Ms. [parent] further clarified this allegation, stating her belief that the District should have evaluated [student] for ADHD at that time, not for a disability.

### The Law:

The law is clear in that Districts must ensure that all children who have disabilities and who are in need of special education and related services, are identified, located, and evaluated. Colorado’s Rules for the Administration of the Exceptional Children’s Education Act (“ECEA”) lists 10 disability areas; ADHD is not one of them. The Act lists 13 disability areas, ADHD is not one of them. The law does not require identification of ADHD; it does require identification of students with disabilities.

ADHD is not a disability, but rather a condition which may or may not result in a disability. The Diagnostic and Statistical Manual of Mental Disorders (“DSM”) definitions of ADD or ADHD do not specify who is responsible for determining whether a student has ADD or ADHD. It cannot be assumed that schools have responsibility or the identification of ADHD. They do have responsibility for identification of a disability.

ADHD “may have a relatively mild impact on a student’s learning. When this occurs, a general education response is most appropriate. Relatively minor adjustments in instruction and classroom management are often all that is necessary to ensure the student’s success. Classroom teachers have primary responsibility for these accommodations.: Attention Deficit Disorders, A Handbook for Colorado Educators, published by the Colorado Department of Education].

According to educational specialists at CDE, the behaviors exhibited by [student] during grades K-3 would not have indicated an automatic referral to child study or to special education.

<p>2. a District psychologist unilaterally determining [student]’s non-eligibility for special education, based on an ADHD screening evaluation in the 4<sup>th</sup> grade, <i>Parent asked teacher if she though [student]’s problems might be ADD, teacher indicated she would talk to school psychologist. After trying focusing strategies for 3 weeks, the school psychologist did some tests for ADD. [Student]’s physician prescribed Ritalin, which was helpful.</i></p>	<p>Psychologies administered an ADHD screening test at parent’s request, results non conclusive.</p> <p>Regular education intervention including classroom organizational structures, appropriate seating, repetition of instructions, and other monitoring devices were utilized and believed to be working. There was constant communication and support exchanged between the school and the family.</p> <p>[Student]’s grades and tests results did not demonstrate that he was having significant discrepancies related to achievement, nor were there any significant behavioral issues exhibited in the school setting to warrant any further testing at that time. It was the collective body of information and staff input that led to a determination that [student] would not be eligible for further special education consideration, and that informal interventions and accommodations in place were meeting his needs.</p>	<p>4<sup>th</sup> grade progress report indicates deficiencies in work/study habits, habits of mind and thinking.</p> <p>ADHD screening report, dated 12/94 states, “it is not clear at this time whether [student] does indeed have ADHD; it would be helpful to obtain more information regarding [student]’s emotional functioning. In addition, a test of visual-motor integration will be conducted to examine possible causes of poor quality written work; his current school performance is at grade level in all areas and does not suggest a specific learning disability; contact will be made with parents after the additional work is completed in order to further explore these recommendations.”</p>
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Discussion During Meeting:

Ms. [parent] strongly believes the psychologist conducting the ADHD screening administered the wrong tests for the diagnosis of ADHD, that his test results do not support the psychologist's summary indicating, "it is not clear at this time whether [student] does indeed have ADHD"; and she believes the psychologist should have found [student] to have ADHD.

The District indicated that many student are in social skills class, who are not in special education; and that [student]'s being in that class did not automatically qualify him for special education.

The Law:

The law does not require schools or psychologists to screen for ADHD. Should they decide to do so, the evaluations instruments utilized are based on their professional judgment. The complaint investigation process does not allow for questioning the psychologist's decision. The licensed psychologist then summarizes his or her findings, based on results of evaluation and professional clinical judgment. The complaint investigation process doe not allow for questioning the psychologist's summary of results.

<p>3. refusing to evaluate [student] for determination of eligibility for special education upon parental request, during his 5<sup>th</sup> grade year, and unilaterally determining non-eligibility due to his not being "2 grade levels behind", and not providing procedural safeguards (specifically the right to appeal the District's refusal), <i>5<sup>th</sup> grade teacher said she would talk to the special education team about [student]. Two weeks later, she told parents that [student] would not be tested because he wasn't 2 grade levels behind. (No information was given relative to due process rights.) So parents paid for academic testing with Dr. Larry Allen.</i></p>	<p>When [student] was in the 5<sup>th</sup> grade...his parents requested special education testing for the diagnosis of potential learning disabilities. Although parents may seek the school's assistance in requesting tests of this nature, <u>practice does not involve the more extensive testing for learning disabilities unless a student shows a significant discrepancy (of a 1.5 standard deviation below the norm) as evidenced by academic performance.</u> [Student]'s 4<sup>th</sup> grade IOWA test scores...indicated grade level and above performance in all areas...Testing done by an independent psychologist, also did not indicate a particular learning disability.</p>	
<p>4. a special education teams' unilaterally determining that [student] was not eligible for special education during his 5<sup>th</sup> grade year due to his "working at grade level and [being] very smart – he just needs to stay on task and work harder" and not providing procedural safeguards (specifically the right to appeal the District's refusal),</p>	<p>Although [student] had experienced some difficulties in quality of work and motivation, no evidence as indicated by report card grades or achievement test documentation supported testing for learning disabilities. As such, the special education staff determined that further testing would not be appropriate. Procedural safeguards were not discussed because the school was accommodating [student] in the regular classroom.</p>	

The Law:

The law is clear in that before any action is taken with respect to the initial determination of eligibility for special education, a full and individual evaluation of the child's education needs must be conducted in accordance with the Act's evaluation procedures. Such evaluation must be made by a multidisciplinary team or group of persons. In interpreting evaluation data and in make eligibility decisions, the District must draw upon information from a variety of sources.

The law is also clear that if the District refuses to initiate or change the identification, evaluation or educational placement of the child, the District must give written notice to the parents. Such notice must include all of the procedural safeguards available to them, a description of the action refused, an explanation of why it was refused, and a description of any options the District considered and the reasons why those options were rejected.

Discussion During Meeting:

The District and Ms. [parent] agreed that the District refused to make a special education referral for [student] without giving the parents written notice of the refusal and providing them with information relative to procedural safeguards.

<del>5. failing to provide medical services, as a related service, to determine [student]'s medically related disability</del>		
6. failing to conduct evaluation and determination of eligibility in a timely manner upon special education referral from the building level (child study) team on 1/29/96 (meeting to determine eligibility held on April 8, 1996),	During the time period from 1/29/96 until 4/8/96, school was not in session for 6 days, due to the President's Day holiday and the district spring break. The meeting was held on 4/8/96, the 45 <sup>th</sup> school day from 1/29, in compliance with legal guidelines.	Special Education Referral made on 1/29/96 as a result of a child study meeting, signed by learning specialist, psychologist, ED consultant, nurse and private psychologist.  Parent permission to assess signed on 1/29/96  Initial IEP and determination of eligibility held on 4/8/96.

The Law:

According to ECEA, if a child is determined to have a disability, an IEP must be developed within 45 school days of the date of the special education referral. If separate meetings are held for the determination of disability and the development of an IEP, the meeting to develop the IEP must be held within 30 calendar days of the determination that the child had a disability and is in need of special education services. This, however, must fall within the 45 school day timeline.

Discussion During Meeting:

The District was within the 45 school day timeline.

<p>7. failing to have a teacher as a participant in the April 8, 1996 IEP meeting, <i>[student]'s teacher played "hooky" that day, as he was seen at the Rockies Game.</i></p>	<p>[Student]'s fifth grade teacher was absent from the building... the student teacher who had been working in the classroom all semester was there to provide input from the regular classroom. In addition, while not present, the teacher had given input to the special education team and the parents regarding [student]'s needs and progress in the classroom. People sometimes are absent or have scheduling conflicts which can impact their ability to be physically present at a meeting. The student teacher could provide additional input, as well as relay information to the teacher when he returned. The teacher was available on a daily basis to the parents as a monitor and communicator of [student]'s progress and accommodations in the regular classroom.</p>	<p>Signatures indicate a regular education teacher was not present, but rather a student teacher was.</p>
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The Law:

The District must ensure that each meeting held for the development of an IEP includes certain participants including the child's teacher.

Discussion During Meeting:

Ms. [parent] was very disappointed the [student]'s teacher was not present at this meeting. She believed he was a key person to this discussion and that substituting a student teacher was not adequate.



<p>8.) failing to document eligibility for significant identifiable emotional disability on April 8, 1996, but later unilaterally documenting disability on 4/29/96,</p>	<p>The 4/8 meeting was concluded because time ran out, and was to be continued later. Seven days later, [student] was hospitalized due to out of control and unsafe behaviors...he was discharged on 5/7/96. During that time, a transition meeting was held on 4/29. At that meeting, with the knowledge of [student]'s continued hospitalization and with input from the private psychological evaluation and parents, SIED determination was finalized. There is no evidence on any of the documentation that there was disagreement about the handicapping conditions. The psychologist's report makes a finding of oppositional defiance disorder as well as the ADHD diagnosis, and included statements that [student] demonstrated anger, impatience and resistance. That report recommended counseling and social skills groups. At the meeting, the incident of hospitalization, parent concerns about behaviors in the home setting and teacher observations about behavior in the school setting were documented. The information provided by all parties present at the meeting collectively verified the documentation of SIED as a handicapping condition.</p>	<p>Initial IEP and determination of eligibility held on 4/8/96. It states: "there is a significant discrepancy between [student]'s ability and his achievement in the area of written language." Eligible with SIED as primary disability and Other Physical Disability (ADHD) as secondary.</p> <p>Eligibility checklists dated 4/29/96.</p>
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<p>9. unilaterally completing an IEP in April, 1996, after IEP meeting was cut short; and not providing the parent with opportunity to participate <i>[in meaningful determination of eligibility; viewing of SIED eligibility forms, appropriate objective and goal planning with advocate, Dr. Lawrence Allen, in attendance]</i>,</p>	<p>The private psychologist's report was given full consideration, even though he was not present. The parent was present at this meeting and authorized that special education services should begin for her son. There is no documentation evidencing any parental disagreement with the determination of SIED as a handicapping condition or the mental health services to be provided.</p>	<p>All pages of the April, 1996 IEP are dated 4/8/96 (including goals and objectives), except for the checklist for eligibility which was dated 4/29/96.</p> <p>4/29/96 Transition meeting held to establish schedule and IEP placement for next school year. Parents presented additional ideas for IEP, dated 4/11/96, however there is no indication IEP was changed.</p>
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Discussion During Meeting:

Both the District and Ms. [parent] agreed that eligibility was determined at the 4/8/96 meeting, and it was recorded as physical disability as a result of ADHD. That meeting was not concluded because time ran out. An additional meeting was held on 4/29/98, and (although it was not planned to re-open the discussion of disability), as a result of [student]'s then current hospitalization due to mental health concerns, the team changed the disability to SIED (primary) and Physical Disability (secondary).

Ms. [parent] claims she was given no notice of that meeting (although she did attend), that she did not know it was a continuation of the IEP meeting, that her disagreement with the SIED disability was not recorded, that she was told to sign the IEP as is to initiate services, and that she had never received a copy of the District's procedural safeguards because the copy provided to her was difficult to read due to poor copying. The parent believes the District to be in error for not reviewing the "Determination of Disability" form with her.

The District provided a copy of the written notice of the IEP meeting dated 4/8/96, notifying of the meeting on 4/29/96. The District stated that the form was checked appropriately by the recorder, as a result of the discussion.

The Law:

The law is clear in that, when determining eligibility, the team must consider the presence of one of 10-13 specific disabilities, as listed in ECEA and/or the Act, and determine if that disability prevents the child from receiving reasonable educational benefit from general education. When so doing, specific criteria must be considered.

<p>10.) failing to provide [several] special education and related services and modifications commensurate with [student]’s IEP from 4/8/96 through the first quarter of the 6<sup>th</sup> grade year at Campus Middle School, <i>Parents withdrew [student] on 10/25/96. Transferred to Renaissance Charter School in Douglas County.</i></p>	<p>The parents requested that [student] not participate in the direct service of the affective behavior class; instead, they asked that he be placed in the study skills class which they felt would more specifically address his difficulties with task completion and organization skills. The school agreed to this and placed him in the study skills class which met daily for approximately 45 minutes, and was taught by another special education staff member. In addition, the teacher met with [student] on a consult basis, and spoke weekly or bi-weekly with his core team teachers. She provided weekly feedback to parents.</p>	<p>Services listed on the 4/8/96 IEP were: 15 minutes of indirect consultation and 30 minutes of direct consultation per week.</p> <p>A meeting with the 6<sup>th</sup> grade teachers was held on 8/26/96 and the parents submitted a written information packet to them which included additional ideas for the IEP (dated 4/11/96). However, there is no indication the IEP was changed.</p> <p>Teacher’s phone log indicates 5 calls to Ms. [parent].</p>
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Discussion During Meeting:

Ms. [parent] agreed that she requested [student] be placed into a study skills class, rather than the affective behavior class and that he did receive those services. Ms. [parent], when asked what services she believes he did not receive, replied that she only got a weekly report from the teachers half of the time (approximately 4 weeks out of 8), he did not always get his medication, and that none of the characteristics of service as on the IEP were provided. (This included monitoring medication, assistance with long term projects, structure, monitoring social skills, limited copying a notes).

The District indicated that these needs and characteristics were translated into goals, but no specific adjustments/modifications/accommodations were written into the IEP. During that time, according to the District, many adjustments were made for [student], his grades were good, his behaviors were no worse than any others in the classroom, and he loved school while at Campus Middle School. Ms. [parent] responded to this by saying she did not believe the grades given to him reflected what he was doing (she believed he was not doing the work), his behaviors were worse than the school reported, the school was not monitoring him properly, and therefore, she withdrew him from the District. The District responded that he wanted to remain at Campus Middle School, was happy there and did not want to be withdrawn. Ms. [parent] agreed with that, but felt she had to withdraw him to seek a better education.

The Law:

The law is clear in that those services listed on the IEP must be provided. Needs and characteristics of services listed on an IEP are to be considered when finalizing goals and adjustments/modifications/accommodations.

Those services listed on the IEP were provided to [student]. The issues appears to be that Ms. [parent] did not trust the quality of those services and was extremely concerned that she did not

receive weekly reports on his progress (for 4 out of 8 weeks) which she was told would be given. Such weekly reporting was not listed as a service on the IEP, however.

<p>11.) failing to provide medication as a related service at Campus Middle School 21 out of 46 days,</p>	<p>The parents discussed with CMS special education staff that [student] was not to be singled out or made to look different in the receiving of any medication.</p> <p>Specifically, the parents did not want [student] to be sent for, or escorted to the clinic, even though reports indicated that [student] had been somewhat resistant to taking the medication. The school agreed to comply with the parents' request and set up a procedure whereby [student] would come to the clinic on a daily basis, of his own volition, to receive his medication.</p> <p>[Student] would accept the pass, created by the nurse, leave the classroom, but no show up at the clinic.</p> <p>After 4 days of not showing, the clinic utilized a CMS security guard to escort [student] to the clinic. Parents were informed, then told the school to discontinue this provision as of 10/17/96.</p> <p>The total missed days equals 9 days, four days of which show that specific passes were issued to come and get the medication and [student] refused to comply with the request.</p>	<p>A Health Care Plan dated 4/10/96 indicates school is to observe for signs of reaction to medication and administer medication for brace pain.</p> <p>The IEP does not list the provision of medication as a related service. One of the needs listed is "monitor medication needs".</p> <p>School nurse medication logs indicate:</p> <table border="0"> <tr><td>8/22</td><td>No</td></tr> <tr><td>8/23</td><td>Yes</td></tr> <tr><td>8/26</td><td>Absent</td></tr> <tr><td>9/4</td><td>No</td></tr> <tr><td>9/24</td><td>No</td></tr> <tr><td>9/25</td><td>No</td></tr> <tr><td>9/26</td><td>No</td></tr> <tr><td>9/30</td><td>No show</td></tr> <tr><td>10/1</td><td>No show</td></tr> <tr><td>10/2</td><td>No show</td></tr> <tr><td>10/3</td><td>No show</td></tr> </table>	8/22	No	8/23	Yes	8/26	Absent	9/4	No	9/24	No	9/25	No	9/26	No	9/30	No show	10/1	No show	10/2	No show	10/3	No show
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Discussion During Meeting:

Ms. [parent] states that the District's response (as stated above) is falsified. She stated, specifically, that at no time did she suggest she did not want [student] to be sent for or escorted to the clinic. She also believes the number of times medications were missed far exceeds the five times listed on records. Further complicating this was the perception by Ms. [parent] that it was

during the missed medication days, that [student] entered into misconduct and was unfairly disciplined.

The Law:

Should the provision and monitoring of medication be listed on the IEP as a related service, it must be provided. It was not. In fact, it was not even listed on the Health Plan.

<p>12.) failing to allow parent to inspect or to have a copy of the complete set of special education records.</p>	<p>When [student] was withdrawn, his cumulative records were forwarded to the counseling office at CMS for organization and check-out, and then sent to the district admissions office for final processing. What was not included in the record was the nurse's medication log, which was not part of the health file, but kept by the nurse as her own record documenting the medication distribution. During the 1996-97 school year, it was district practice for nurses to purge those records at the end of the year. In this instance, old medication logs had been transferred to a box in a storage area for purging. Initial requests by the parents to have the school administration produce the medication logs were not effective because administrators were unaware of the process, and were unaware that the logs had been transferred to a box in a storage area for purging. The administration was told by the nursing staff that the records no longer existed because of the practice of destroying the rosters. As such, the assistant principal relayed the message to the parents that the records were no longer available. At a later date, one of the nurses, discovered the box of medical logs and found [student]'s record. At that point she made a copy of the record and sent it to Ms. [parent].</p> <p>The district has since rectified this procedure by requiring the nursing staff to keep individual medication logs on each student, rather than a roster approach, and that those documents are returned to the student's health file as part of the educational record.</p>	
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Discussion During Meeting:

Ms. [parent]'s issue relates to discipline files, specifically the documentation of two incidents and one student statement. She indicates she received documentation of one of the two incidents, but not the other and not the student statement. She believes the District was purposefully misleading her when they indicated that such records were not normally part of the file transferred to another school and when told that discipline files were purged at the end of the year.

The Law:

The law is clear in the parents have a right to a complete set of special education records. Unless, specifically related to goals and objectives in an IEP, discipline records would not normally be a part of that record.

Ultimately, in this case, these two records were found and provided.

<p><i>Parents withdrew [student] on 10/25/96. Transferred to Renaissance Charter School in Douglas County</i></p>		<p>4/18/96 IEP amended on 12/3/96 at Renaissance Charter School. Services were changed to include: 30 minutes per week from EH teacher, 5 hours per week from EH PARA and 15 minutes per week from mental health person.</p> <p>Annual review held on 3/6/97: Disability changed to Physical (ADD) only; SIED eliminated. Services include: 15 minutes of indirect and 15 minutes of direct instruction from an EH teacher per week, 2 and ½ hours of direct assistance from and EH PARA per week and 15 minutes of consultation from a mental health person. In addition, five adaptations/accommodations/modifications were listed.</p>
<p><i>Parents withdrew from Renaissance at end of 6<sup>th</sup> grade year and applied to West Middle School in the District in the summer of 1997; application was denied; application to Thunderidge was denied; subsequently enrolled [student] in a private school, Center for Creative Learning. Terminated at CCL in December, 1997 and homeschooled with CCL consult.</i></p>		

<p>15. failing to complete IEP begun on 10/17/97,</p>	<p>The IEP was not completed because the parents did not come back to the school with the input they were requested to produce, and chose not to re-enroll their son. An IEP review meeting was held on 10/14/97 to address the possibility of re-enrollment. At the conclusion of the meeting, the parents were asked to review the SIED qualifiers and to address any additional concerns regarding finalization of the draft IEP.</p> <p>The parents did not return to complete the IEP process, but in effect, ended any further communication and did not re-enroll [student]. When questioned as to why, they indicated frustration with staff, the process and the IEP, expressing that any additional meetings would be unproductive.</p>	<p>Parents requested review to consider services within District. Review held on 10/14/97. Letter from Jane Fox, teacher, to parents, stating the in-process IEP was enclosed for their review; placement would be decided at follow-up meeting.</p> <p>Letter from parents' attorney to Bill Porter, dated 10/23/97 stating parents believe [student] needs more intensive services, asking for follow-up meeting to be rescheduled.</p> <p>Letter from parents attorney to Bill Porter, indicates they were in receipt of IEP developed by District and forwarded to them on 12/21/97; that parents disagreed for 8 reasons, that further meetings with the school district at this time will not advance the situation.</p> <p>1/12/98 letter from Bill Porter to parents' attorney, acknowledges letter, and suggests additional assessment.</p> <p>2/9/98 parents respond to Bill Porter, not agreeing with District's intent and asking for reimbursement for private school funding.</p>
<p>16. failing to evaluate goals and objectives from previous IEP, when developing new goals and objectives on 10/17/97,</p>	<p>The district indicates it reviews all needs, characteristics of service and goals.</p>	<p>No documentation exists of evaluation according to objective criteria and evaluation procedures.</p>

### Discussion During Meeting:

It was agreed that the 10/17/97 IEP meeting lasted three hours and was terminated, with the understanding the parents would take time to review and digest that which was decided by the team. During this time, [student] was in a private school, but Ms. [parent] was considering re-entry into the public school and, in fact, a re-entry time had been scheduled for [student]. Ms. [parent], upon reviewing the IEP, enlisted the services of counsel who responded to the IEP, but suggested great frustration and, subsequently, requested that this IEP process should not be continued.

### The Law:

The law is clear, in that an IEP for each child with a disability within the jurisdiction of the District must be developed and completed by a team.

In this case, [student] was not enrolled in the District; and the parent – through her attorney – requested that the IEP process be terminated. It was.



<p>13. failing to provide special education and related services commensurate with [student]’s 3/6/97 [from Renaissance] IEP from March 9 to March 16, 19978.</p>	<p>[Student] was not enrolled in school until the afternoon of 3/10; the school was not in session 3/12 and 3/13, and as of 3/11, an interim IEP had been drafted that dictated the services [student] would be receiving as of 3/16. At the 3/11 meeting, parents and teacher agreed that the 3/11/98 IEP would service as an interim service tool. Parents and teacher agreed to an additional meeting to be held on 4/30/98 to formalize the interim IEP. All agreed services would begin 4/16 and all agree that the least restrictive placement would be the general education classroom with special education consult. As in the past, the parent requested that [student] not be singled out or made to look different, and that he should be treated like any other student. She felt that would best be accommodated by the indirect services and contact.</p>	<p>In March, 1998, the District allowed [student] to begin at West Middle school, as documented in letter from Bill Porter. Private school tuition was denied.</p> <p>A meeting was held on 3/11/98 at West Middle school to discuss curriculum and scheduling needs. The interim included 12 Needs. (<i>The District perceived this to be an amendment to the IEP begun on 10/14/97 but never completed.</i> ) These needs include: staying for intramurals, monitoring use of assignment book, limiting copying from board, providing notes that are on overhead and alternative forms of testing if necessary.</p>
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Discussion During Meeting:

Ms. [parent] believes that the response by the District to this allegation is falsified. She perceives that she never agreed to an interim IEP, she wanted [student] in a more restrictive setting, and she did not have an issue with his being singled out; she wanted services commensurate with the out-of-district 3/6/97 IEP.

The Law:

The law is clear in that, when a student transfers from one District to another, there are basically two or three choices: to serve the student commensurate with the current IEP, to develop an interim IEP to which both the District and parents must agree or to develop a new IEP. In this case, when [student] transferred into the District, his “current IEP”, dated 3/6/97, was more than a year old. The District had no choice but to create an interim IEP until that time in which a full IEP annual review could be held. That full annual review was held on 4/30/98.

The District and the parent disagreed as to whether or not an interim IEP was agreed to; however, the most that [student] missed during this brief period, even if no interim IEP was in effect, was 3 days of specific services.

<p>14. failing to provide 3.25 hours of special education services per week at West Middle School from March 16 to April 30, 1997-8 - date of complaint and throughout the school year,</p>	<p>The services originally offered at the 4/11/98 meeting with the parent included 30 minutes of direct contact time with [student] five days a week by the case manager. In addition to the direct contact time, [student] was to participate in the after school intramurals class which assisted with homework and organizational skills. Further, he was to have additional time with the case manager on an "as needed" basis. The parent did not want [student] to have the direct contact with the case manager because she did not want [student] to be single out or treated differently. As such, the interim IEP was drafted on 3/11 to reflect that request. It was agreed that these services, as listed in the 3/11 draft would continue until the 4/30 IEP meeting was held.</p>	<p>The "current IEP", completed by Douglas County Schools, was dated 3/6/97, which had expired. Services listed on that IEP included: 15 minutes of indirect and 15 minutes of direct instruction from an EH teacher per week, 2 and ½ hours of direct assistance from and EH PARA per week and 15 minutes of consultation from a mental health person. In addition, five adaptations/accommodations/modifications were listed.</p>
<p>17. failing to provide any special education services commensurate with [student]'s 3/6/97 IEP or the 10/17/97 unfinished IEP during the 1997-98 school year. <i>[including ignoring "service paper" [needs statements developed on 3/11/98], not using an assignment notebook, no teachers checking on this]</i></p>	<p>Those services as listed on the 3/11/98 IEP and modified on the 4/30/98 IEP and again on 5/2/98 were provided. The district has been and continues to be willing to expend the time necessary for resolve of these matters, and has demonstrated this good faith effort by continuing to provide the required services, and to meet and discuss the needs of [student] with the parents on an ongoing basis.</p>	<p>A partial IEP, completed by the District and dated 10/14/97, was on file. This was not completed due to parental choice at that time.</p> <p>A 3/11/98 interim IEP which was a modification to the 10/14/97 IEP listed these needs: staying for intramurals, monitoring use of assignment book, limiting copying from board, providing notes that are on overhead and alternative forms of testing if necessary.</p> <p>A new IEP was begun on 4/30/98 and continued on 6/2/98.</p>

Discussion During Meeting:

Ms. [parent] expressed frustration that [student]'s teacher never acknowledged the existence of the outdated 3/6/97 IEP. Rather she focused on the 10/14/97 unfinished IEP and the interim (uncompleted IEP) dated 3/11/98. Ms [parent] strongly believes the District has falsified information in its response relative to her stating she did not want [student] to have direct contact with the case manager, to be singled out or treated differently.

Lengthy discussion during this meeting revealed that there was much confusion about which IEP was in effect, the meaning of those IEPs, whether or not parents have a right to change an IEP after it has been developed by a team, and how specific adjustments need to be included, etc. It was also evident that IEP meetings relative to [student] are very lengthy in time, far more than the ordinary.

The Law:

The law is clear in the IEPs must be reviewed annually, they must be developed and completed by a team, no one can unilaterally change them later, they must be specific in terms of amount of service, and services written on IEPs must be provided. Should parents disagree with those decision made by an IEP team, they may exercise their right to appeal by requesting a due process hearing.

<p><i>18. failing to conduct the annual review within a year of 3/6/97... rather, holding it on 4/30/98</i></p> <p><i>19. failing to write goals and objectives at meeting; delaying finalization until 6/2/98.</i></p>		<p>An annual review was scheduled for 4/30/98, 20 days after [student] re-enrolled in the District. It was held but continued to 6/2/98.</p>
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Discussion During Meeting:

The District acknowledged that the 4/30/98 IEP was continued on 6/2/98, and is not yet completed.

The Law:

The law is clear in that annual reviews must be held within the year.

In this case, however, [student] was not enrolled in the District until 4/10/98; an interim IEP was developed (although not agreed to) and an annual review was scheduled within 20 days. It was held on 4/20/98 and continued on 6/2/98 and still not completed.

<p><i>20. refusing to consider help in written language, due to non-qualification for services based on test score, rather than allowing team to determine services.</i></p>		
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Discussion During Meeting:

There appeared to be a difference relative to whether or not [student] did not “qualify” for services, based on test scores, or whether the team believed he did not need such services based partially on test scores.

The Law:

The law is clear in that, once a student is deemed eligible for special education, he has a right to any special education service the IEP team deems necessary. Should the parents disagree with that decision, they may exercise their right to appeal.

### Complainant's Desire:

Ms. [parent] was asked what she wanted for [student]. She indicated that she wanted him to be in a regular education class of 10-14 students with a teacher who constantly monitors his progress, who prompts him when necessary and who communicates regularly with parents. When it was explained to [parent] that regular classroom sizes of 10-14 students are not available within the public school district, she stated that she might possibly want him in a full time special education classroom. Mostly, she believes he needs constant monitoring of his performance, that is someone who would check on him 10 minutes in the morning and 10 minutes at the end of the day. Should he get a "D" or "F" grade on a paper or project, the parents should be notified and they, together, should decide on "what's going on here" and "what do we need to do". If [student] "blows" a test, he should be given alternative testing. Specifically she wants the IEP to state who is responsible for what – how many times a week, and how will progress be documented.

### Complainant's Additional Documentation:

In a letter to the complaint's investigator, dated 7/21/98, Ms. [parent] indicated that, whereas she was happy to be able to attend this meeting as requested, she found it to be more anxious and intimidating than imagined. She felt confused and anxious that the district brought their lawyer, even after she expressed her reservations about that. She also indicated that her "getting off track, forgetting that some points had already been discussed and forgetting to ask certain questions" was due to this meeting having been scheduled outside the 60 day timeline within which this complaint was to have been resolved.

6. On July 27, 1998, the complaints investigator was contacted by a physician at Children's Hospital who indicated she was calling at Ms. [parents]'s request. Reportedly, Ms. [student] had asked her to clarify why [student] was admitted to Children's. Although the report states that he was admitted due to "unsafe" and "out-of-control" behavior, he was really admitted due to his being severely "oppositional" that morning. The physician indicated he was in control, but looked severely depressed and ADHD. He was only evaluated for emotional concerns while there, not for learning concerns. Reportedly, Ms. [parent] had asked that this be noted.

## II. CONCLUSIONS

1. The District did **not** violate the provisions of the Act by failing to identify [student] as a student with disabilities during his kindergarten, 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> grade years. A specific referral for special education was never made by the parents, and the behaviors exhibited by [student] would not have indicated an automatic referral to child study or to special education. It is not the responsibility of the District to refer or evaluate for ADHD.
2. The District did **not** violate the provisions of the Act when its psychologist unilaterally determined that [student]'s ADHD screening results were non-conclusive. A specific referral for special education was never made by the parents, and the behaviors exhibited by [student] would not have indicated an automatic referral to special education.
3. The District **did** violate the provisions of the Act by:
  - (a) unilaterally determining [student] did not qualify of special education without full evaluation and team determination of eligibility and by
  - (b) failing to provide Ms. [parent] with procedural safeguards, specifically the right to appeal the District's refusal to evaluate [student] for special education eligibility.
4. The District did **not** violate the provisions of the Act by failing to conduct evaluation and determination of eligibility in a timely manner upon special education referral on 1/29/96. That evaluation and determination of eligibility was completed by 4/8/96 which was within the 45 school day time period allowed.
5. The District did **not** violate the provisions of the Act by failing to have the required participants at [student]'s 4/8/96 IEP meeting. All necessary participants were there except for [student]'s classroom teacher; however the student teacher was there in his place and conveyed all necessary information.
6. The District did **not** violate the provisions of the Act by unilaterally determining disability. The team determined one disability on 4/8/96, but added another disability upon reconvening on 4/29/96 based upon recent information. If the complainant did not agree with that determination, she had a right to appeal that decision.
7. The District did **not** violate the provisions of the Act by failing to provide special education and related service commensurate with [student]'s IEP from 4/8/96 through 10/25/96. Those services listed on the IEP were provided. Additional items listed under "needs" which may not have been provided (including medication) and Ms. [parent]'s not receiving all weekly reports she had asked for, do not constitute the failure to provide services, as these were not listed as services or adjustments/modifications/adaptations on the IEP.

8. The District did **not** violate the provisions of the Act by failing to provide the parents with a complete set of special education records. All special education records were provided. There was a delay in the provision of two regular education discipline records, but this would not constitute a violation of the Act.
9. The District did **not** violate the provisions of the Act by failing to complete the IEP (including the evaluation of goals) begun on 10/14/97. [Student] was not enrolled in the District at that time and the parents requested, through their attorney, that the District not continue the IEP.
10. The District did **not** violate the provisions of the Act by failing to provide special education and related services commensurate with [student]'s IEP from 3/10/98 through the remainder of the school year. The 3/6/97 IEP was more than a year old and could not be utilized. Services listed on the 3/11/98 interim IEP and subsequent IEPs were provided. Although not in direct violation of the law, the District's policy to continue IEPs having ongoing IEP meetings (rather than finalizing them) in hopes of getting full parental support, **is not good practice**. In this case, the parent does not have a completed IEP which she can appeal, if necessary.
11. The District did **not** violate the provisions of the Act by failing to conduct the annual review within a year of the 3/6/97 IEP. [Student] was not enrolled in the District until 4/10/98, and the IEP review was begun on 4/30/98.
12. The District did **not** violate the provisions of the Act by failing to include services in the area of written language. That was an IEP decision which Ms. [parent] could appeal.

### III. DISCUSSION

Several things were observed by this complaint's investigator during the course of this complaint and as a result of the meeting of the parties:

The District's willingness to continue IEP meetings at length, allow parental change of the IEP after the meeting and generally delay finalization unless there is parental approval, is not helpful in this case. Ms. [parent] desperately needs a completed IEP, of which she is given a copy (even if handwritten) at the end of the IEP meeting, which she can understand and consider final. Then it will be clear as to which items she agrees with and which she may want to appeal. Services to be given will also then be clearer.

Ms. [parent] often gave conflicting opinions during the course of this complaint and discussion. Given the discussion at hand, her opinions may either change, or simply be expressed differently under that set of circumstances. The District must be certain that it provides those services as specifically listed on the IEP and not change them based on Ms. [parent]'s verbal request.

Ms. [parent] may have unrealistic expectations of public schools, of the law, of the IEP process and of the parameters of the complaints process. It is helpful for her to have a consistent advocate with her to assist with this knowledge and sorting-out process.

While the District conveys the positive aspects of [student]'s behavior, achievement and attitude and his success in school, Ms. [parent] conveys the negative aspects. There appears to be a tendency for Ms. [parent] to micro-manage [student]'s education. Perhaps viewing his successes in the "big picture" would be more helpful than scrutinizing each event.

#### IV. REMDIAL ACTION

On or before September 1, 1998, the District must hold an IEP meeting for [student] and must finalize that IEP. Ms. [parent] must be notified of and must attend that meeting. [Student] must be invited to that meeting, as he will then be 14 years of age and transition planning must begin. Either Dr. Bill Porter or Amanda Hesterman must also attend that meeting, having been a part of this complaint process. A copy of the decisions of that IEP team must be given to Ms. [parent] at the end of the meeting. The meeting should, under no circumstances take longer than 3 hours. One three hour block of time or two 90 minute blocks must be allocated. Should consensus not be reached on any item, the facilitator must accept, as a decision, that which the majority of the team agrees to and record such. The following must be considered:

- a. Determination of disability. Although new assessment is not necessary, the team must re-visit the determination and discuss criteria for determination of disability.
- b. Needs and characteristics must be converted into goals and services or adjustments, where applicable.
- c. When writing goals, last years goals must be evaluation as to progress and there must be documentation of any evaluation procedures as listed in the evaluation criteria and procedures.
- d. When determine services and placement, the "complainant's desires", as indicated on page 23 of the above analysis, must be considered.
- e. The team must also consider the need for compensatory services, that is any services which might compensate for the year of special education [student] may have missed due to the District's refusal to evaluate him or provide Ms. [parent] with information on her right to appeal that decision.

On or before September 15, 1998, the District must forward to this office a copy of the above IEP.

Dated this 27th day of July, 1998

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Carol Amon, Federal Complaints Investigator