

## FEDERAL COMPLAINT NUMBER 98.520

### FINDINGS AND RECOMMENDATIONS

#### I. PRELIMINARY MATTERS

- A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on May 22, 1998.
- B. The complaint was filed by Ms. [parent] on behalf of her daughter, [student], against the Wiggins School District, Ms. Sherry Gerner, Superintendent ("the District") and the South Platte Valley BOCES, Ms. Norma Gillmore, Director of Special Education ("the BOCES").
- C. The timeline within which to investigate and resolve this complaint expired on July 21, 1998, but was extended by one month to allow the complainants extra time to respond to the request for specific information.
- D. The process for receipt, investigation and resolution of the complaint 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 and the BOCES as recipients of federal funds under the Act. It is undisputed that the District and BOCES are program participants 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 a 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 a student with hearing disabilities residing within the Ft. Morgan School District, whom the parents have enrolled in the Wiggins School District and whose enrollment was accepted. [Student] is eligible for special education services from the District and BOCES 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 complaint; and consideration of relevant case law and federal agency opinion letters.

#### II. ISSUE

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

Whether or not the District and BOCES have violated the provisions of the Act by failing to provide [student] a free appropriate public education as a result of omitting required portions of the 5-14-97 IEP and delaying implementation of that IEP at the beginning of the 1997-98 school year.

## B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18), (20); and 1414, as amended by 20 U.S.C. 602, 612, and 614 and its implementing regulations (as amended by statute), including but not limited to 34 C.F.R. 300.2, 300.5, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, and 300.350, and

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

## C. FINDINGS

1. At all times relevant to the complaints, the District and BOCS were receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District and BOCES, in part, based on the assurances contained within their application.
3. One of the assurances made by the District and BOCS is that in accordance with the Act, they will provide a FAPE, including special education and related services, to each eligible student with disabilities within their jurisdiction to meet the unique needs of that child.
4. [Student] is a student with hearing disabilities as indicated on an IEP addendum dated 5/14/97. The purpose of that meeting was to discuss [student]'s transition from the Wiggins Elementary School to the Wiggins Jr. High School. Services listed on that IEP are as follows:
  - (1) [Student] will use her FM system during her classes. She will carry the system with her from class to class. The equipment will be kept in the first hour classroom. The first hour teacher will be responsible for checking the system.
  - (2) [Student] will have access to the tabletop microphone. It will be placed on a movable cart and will be moved from class to class as needed.
  - (3) [Student]'s teachers will be inserviced in the fall regarding the FM system, tabletop microphone and needed accommodations.
  - (4) [Student]'s films and videos will be presented with closed captioning as possible.
  - (5) Information will be provided verbally and in a written format.
  - (6) [Student] classroom will be kept free of distractions as much as possible. [Student] may need preferential seating in the classroom.
  - (7) [Student] will participate in the student orientation in the fall along with all other students.
  - (8) Every attempt will be made for presenters to wear the FM system at assemblies, presentations, etc.
  - (9) Teachers will write notes in class on an overhead, provide copies of teacher or student notes and list information on the board as necessary.

(10) [Student]'s grade reports will be available to parents as requested.

5. The complainant alleged omitting required portions of the 5/14/97 and delaying of implementation of the above for the 1997-1998 school year. No specifics were provided. After several attempts at contacting the complainant by telephone, this was done and the allegations were clarified by Ms. [parent]. The allegation of omitting required portions of the IEP relates to services not being provided, not to the written document; therefore the issues are identical. Ms. [parent] gave the following clarifications as to her allegations:

- (1) [Student] never use her FM for a whole day.
- (2) The microphone was not always with her.
- (3) The first inservice training for the teachers was poorly done, and Ms. [parent] demanded another. The second was done and was acceptable.
- (4) Not all films and videos were captioned, and the District usually had a "lame excuse". Sometimes the films were sent home to view, thus requiring [student] to view them twice.
- (5) Information via the intercom was never provided to [student] in writing.
- (6) Preferential seating was provided.
- (7) [Student] did participate in student orientation but Ms. [parent] doubted that her FM system was utilized.
- (8) No attempts were made for presenters to wear the FM system at assemblies.
- (9) Teachers did not write notes on the overhead or provide copies of notes.
- (10) Grade reports were false; Teachers gave [student] better grades than her work warranted.

6. The BOCES, in its response to the complaint, states the following:

**Regarding the FM system:** [student] did carry the FM system with her from class to class. However the equipment could not be housed in the first hour classroom, because it was the music room. Instead, the equipment was placed in the principal's office. Initially, [student] did not go to the principal's office daily, and the principal did not find her daily to check the equipment. This issue was discussed at meetings on 9/16/97 and 9/24/97 and the IEP was amended to state that [student] was to check her system daily and if there was a problem, she would come to the principal who would then check it and, if needed, call the audiologist. The audiologist and/or speech pathologist would check the equipment weekly. The only time [student] may not have had a working FM system with her was after school for extracurricular activities, when her FM system was charging.

**Regarding the microphone:** The microphone was always with [student] as that was so important.

**Regarding the inservice training:** An inservice prior to the students arriving was held to teach the teachers and an advocate how to work with [student]'s hearing equipment. The educational staff rallied around, and [student] was immediately a part of the secondary school. She has friends, is a good student, takes volleyball, band and extracurricular activities, and participates in inclusion totally.

**Regarding captioned films:** All of the schools' TVs have closed captions and were utilized. Once, at Thanksgiving, the social studies teacher utilized a 20 year old

documentary that wasn't captioned. Thinking she was helping [student], she told her she could take it home if she wanted and perhaps she would be able to understand it a little better. Ms. [parent] was enraged, indicating that the school was discriminating against [student], that it is the school's job to teach, not the parents, and that the school had no right to force this on her. The teacher regretted her offer, but was only trying to be helpful.

**Regarding intercom information in writing:** All intercom announcements were written and that sheet of paper was left in the office for [student] to pick up and read.

**Regarding presenters using FM system at assemblies:** The school has no knowledge of this not happening.

**Regarding teachers writing on the overhead or providing notes:** All teachers did this as necessary.

**Regarding grade reports:** [student] is a good student and participates in inclusion totally. She is ranked 5<sup>th</sup>, academically, in a class of 60 students. Once, [student] got a "C" grade in algebra. Ms. [parent] was enraged, indicating to several persons that [student] was "failing".

7. Documentation shows the following:

**Regarding the FM system:** An IEP addendum dated 9/24/97 states that [student] will be responsible for checking the system, if there is a problem she will go to the principal who will call in the audiologist, and [student] will keep a log book relative to her hearing equipment. The FM system will be kept in the principal's office. [Student] will check with the principal each morning to determine whether the equipment is working or not. A battery tester and listening stethoscope were provided. According to a CDE hearing consultant and the District audiologist, [student] needs to learn to check her own system so that she can become independent. A Phonic Ear representative was also brought into the District, and he stated that [student] needed to check her own equipment and then go for help when needed.

**Regarding inservice training:** There is documentation dated 8/21/97, of a meeting in which the audiologist introduced the hearing aid and information concerning [student]'s hearing aid to staff. Mrs. V. informed the staff about people with hearing loss. All attendees tried the hearing aid. Staff considered this an informative meeting.

**Regarding captioned films:** A note in the files states that Ms. [parent] indicated that [student] was not doing well in Spanish class because the videos are not closed captioned. [Student]'s current grade at that time was at 98%. A note also indicates that personal travel documentaries cannot be captioned, as Ms. [parent] has requested.

**Regarding PA announcements:** An IEP addendum dated 9/24/97, states that [student] will pick up a copy of PA notes daily.

**Regarding academics:** A note in the files indicated the principal checks each week on [student]'s academics. She does well academically. Ms. [parent] indicated that [student] was not doing well in Spanish class; however, [student]'s current grade was

at 98%. Academic testing done on 2/9/98 revealed that [student] scored in the normal to above average, or bright normal classification in Letter-Word Identification, Passage Comprehension, Calculation, Applied Problems, and Writing Samples. She scored at or above her grade level and age level.

#### IV. DISCUSSION

The following relates to the specific allegations relative to services on the IEP not being provided:

1. A review of records shows that the District and Ms. [parent] have not agreed on a plan for monitoring the FM system. Although District personnel and outside specialists have supported the plans written in the IEPs and their addendum, Ms. [parent] has not agreed with this. Basically Ms. [parent] wants the school to be responsible for monitoring the equipment; the school and hearing consultants believe [student] should have some responsibility for that process. The District does and has followed the process written in [student]'s IEPs, but has not agreed to what Ms. [parent] wants.
2. The District states firmly that the tabletop microphone was always available. Ms. [parent] disagrees. The complaint process is not one in which testimony can be taken under oath and a judgment made as to credibility of the persons. However, Ms. [parent] has simply offered an opinion as to whether or not this was done; and there are no facts to substantiate this allegation.
3. The records clearly indicate that inservice training was provided to the teachers prior to the beginning of the school year. When this was not acceptable to Ms. [parent], the District brought in the territory manager for the FM System to do the inservice. Ms. [parent], by her own admission, approved of this training.
4. The school has made great effort to obtain films which are captioned and to provide closed captioning on its television programs. The incident of issue, is the 20 year old Thanksgiving documentary which could not be captioned. Ms. [parent] was upset that the school sent the video home for [student] to review; the teacher believed she was being helpful, given the fact that this was not captioned.
5. Ms. [parent] alleges that PA announcements are not provided in writing. The District writes all PA announcements and has them available for [student] to pick up. Whether or not she chooses to do so, is up to her; just as other students may choose to "tune-out" the PA verbal announcement.
6. Preferential seating is not an issue, according to the complainant.
7. [Student] did not participate in the student orientation.
8. The District states that presenters did wear the FM system when possible. Ms. [parent] disagrees. The complaint process is not one in which testimony can be taken under oath and a judgment made as to credibility of the persons. However, Ms. [parent] has simply offered an opinion as to whether or not this was done; and there are no facts to substantiate this allegation.

9. The District states that teachers did write on overheads and provide notes when necessary. Ms. [parent] disagrees. As the IEP says, "as necessary", it would be within the teacher's discretion to make that determination. Obviously, Ms. [parent] does not agree with their determination of "necessary".
10. Grade reports were available to the parents, as indicated on the IEP. The issue appears to be Ms. [parent]'s lack of trust of those grade reports. She has indicated to this complaints investigator that [student] is "failing" and they are just giving her those grades. Yet testing reveals [student] is achieving at or above her age level and grade level. In addition, she is academically considered to be 5<sup>th</sup> in her class of 60.

[Student] has been attending the Wiggins School District since the 3<sup>rd</sup> grade and Wiggins receives no funding reimbursement for the special education services provided to [student]. Rather, the District has suggested many times that [student] is a "terrific student, active in sports and music and a good student and that she is well liked by staff and fellow students." At the third meeting for the triennial review, last spring, the District indicated that, "due to the parents' apparent disapproval of the Wiggins staff and [student]'s educational program [as identified on the IEP] and due to the continually repetitious demands [for a program that doesn't exist]", the District can no longer accept [student] into the District as a non-resident of the District. Mr. and Mrs. [parents] have expressed their desire to appeal that decision, but have not done so. Relative to this matter, it may be helpful to clarify what the law requires:

1. Services to be provided to a student are determined by IEP teams. Should the parents disagree with the decisions of the team, they may exercise their right to appeal those decisions by requesting a due process hearing. The complaint investigation process does not allow for questioning the decisions of the IEP team. Rather it is utilized to make certain that which is written on the IEP is provided.
2. Under the public schools of choice law, a District may accept nonresident students to enroll without requiring the nonresident student to pay tuition. However, no district is required to establish or offer any particular program, if such program is not currently offered in that district. Admission may be denied when there is a lack of teaching staff within a particular program, the school requested does not offer appropriate programs or is not structured or equipped with the necessary facilities to meet special needs of the student and/or does not offer a particular program requested. In this case, Wiggins School District does not currently have a program desired by the parents nor does it have a teacher with credentials desired by the parents. It does have a program to provide services commensurate with [student]'s IEP; however this is not acceptable to the parents.

### III. CONCLUSIONS

The District and BOCES have not violated the provisions of the Act by failing to provide [student] a free appropriate public education ("FAPE") as a result of omitting required portions of the 5/14/97 IEP and/or delaying implementation of that IEP at the beginning of the 1997-98 school year. Not only is [student] receiving a FAPE, this is being provided to her as a nonresident student, and she is achieving at or above age level and grade level.

IV. REMEDIAL ACTION

None.

Dated this 5th day of August, 1998

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Carol Amon, Federal Complaints Investigator