

Colorado Department of Education

FEDERAL COMPLAINT DECISION 2001:523

Montrose County SD RE-1J

ORDER

EDUCATIONAL SURROGATE PARENT/COMPENSATORY EDUCATION

INTRODUCTION

In his Decision dated July 20, 2001, the Federal Complaints Officer included Remedies making possible compensatory education, and the appointment of a new educational surrogate parent (ESP), or other legal educational spokesperson, for the student subject to the Complaint. The appointment of a new ESP or educational spokesperson is now moot, since this student has moved into a new school system and that new school system has the responsibility to see to it, if it has not already done so, that an appropriate educational spokesperson is appointed to represent the student. Thus, this student is going to have, if he does not have already, a new educational spokesperson. However, it remains for the Federal Complaints Officer to decide the issue of compensatory education, since the complainant and the school have been unable to reach agreement on this issue. The complainant proposed the following as compensatory education:

“1. I am requesting that the Montrose County School District contract for a private tutor for (the student) with the new district in which (the student) will reside this next school year. I calculate that (the student) missed 106 days of school (including subtraction of Labor Day, Thanksgiving and the day after, and a two week Christmas Break) multiplied by 6 hours in a school day = 636 hours of instruction. Subtract (the student’s) homebound instruction hours – 67.5, and there are still 568.5 hours he missed of school. The tutor could assist (the student) in achieving his academic goals as stated on the 2/1301 IEP, ‘(The student) will demonstrate proficiency in using the four basic

operations (addition, subtraction, multiplication and division) in problem solving situations.’

“2. I am also requesting that the Montrose County School District fund a day camp program for (the student) during the summer of 2002. I researched various camp programs in the Denver Metro area, and I learned that Arapahoe Community College offers classes in a variety of academic areas for students from Kindergarten through 12th grade in the ED-venture Summer Youth College program. The instruction schedule this summer included classes in math, science, language arts, study skills and life skills. The A.C.C. classes could help (the student) not only improve his academics, but give him the opportunity to continue to develop ‘work study skills necessary for successful and accurate completion of academic work.’ This goal is stated on (the student’s) 2/13/01 IEP.

“3. I am also proposing a third option to the Montrose County School District as a means to provide compensatory services to (the student). During the school year, A.C.C. offers classes in managing anger and communication skills in addition to math, science, language arts, study skills and life skills for students. By participating in these classes during the school year, (the student) could have the advantage of additional peer interactions in another school environment and he would be able to continue to progress on the following 2/13/01 IEP goal, ‘(The student) will demonstrate appropriate interpersonal relations and conflict management skills.’ ” Complainant’s submission regarding compensatory education at pages one (1) and two (2). Student’s name deleted.

For a variety of reasons, the school opposed all of the proposals of the complainant, but the school did offer the following:

“ Even though the District continues to believe that it provided (the student) with a FAPE and that a remedy of compensatory services is not warranted here, the District is willing to offer compensatory education services to (the student), should (the student) return to the District, for the approximately six (6) weeks that (the student) did not receive any services in the fall of 2000. If and when (the student) returns to the District, the District will convene an IEP meeting for (the student) and determine the appropriate programming to compensate (the student) for the six (6) weeks in the fall of 2000 when he was awaiting a residential placement through DDHS that never transpired. Once this determination is made by the District’s IEP team, the District will supplement (the student’s) then current program accordingly.” School’s submission regarding compensatory education at page four (4). Student’s name deleted.

FINDINGS AND DISCUSSION

Compensatory education is not a fine or damages to be imposed on a school district to punish the school district for violation of the law. It is a remedy that may be employed when an educational harm has occurred to a student that can be remedied by compensatory education. This is, as paraphrased by the Federal Complaints Officer, a part of the school's argument in its submission. With this part of the school's argument, the Federal Complaints Officer agrees. However, the school also argues that "...no legal authority exists to substantiate an obligation to provide compensatory education services to a student residing elsewhere." School's submission at page two (2). For the purpose of deciding the issue of compensatory education in this Complaint Decision, the Federal Complaints Officer is proceeding with the assumption that no legal authority exists which resolves this issue. The school has cited him to no such authority. Absent controlling legal authority which dictates that schools, or other public agencies responsible for the provision of a free appropriate public education (FAPE), are not obligated to provide compensatory education to a student residing elsewhere, once it has been determined that the school district, or other appropriate public agency, denied the student FAPE, the Federal Complaints Officer is also proceeding with the assumption, and finding, that such a legal obligation can be imposed.

The authority to impose a legal obligation to provide out of district compensatory education to a student does not, however, resolve the issue of whether, and, if so, how, such a legal obligation should be imposed or enforced. The complainant argues for 568.5 hours of tutoring, a day camp program, and anger management classes. The school argues that these proposals are "inappropriate and excessive", because, with regard to the tutoring, the tutoring would be one on one, and, therefore, as the Federal Complaints Officer understands the school's argument, the tutoring time needed to compensate the student would be less than the actual number of classroom hours not provided. Also, the school argues, the complainant's proposal for tutoring fails to acknowledge that the student "...received significant one-on-one time and made educational progress during the 2000-2001 school year." School's submission at pages two (2) and three (3). The school also argues that there is no guarantee that the compensatory services proposed by the complainant would be provided by qualified personnel, or that they would enable the student to work towards his IEP goals and objectives, or help him overcome lost educational opportunity.

The words compensatory education are easy to speak and write. It is much more difficult to determine what they should mean for a particular student. Since it is the school's position that this student was not denied FAPE, it is not surprising that the school is arguing that the complainant's proposals are inappropriate and excessive. However, whatever the validity of the school's argument in its submission that the complainant's compensatory education proposals are inappropriate and excessive, the Federal

Complaints Officer has determined that the school's proposal for the method of determining what compensatory education should be awarded to this student is appropriate – although the persons employing that method, and the location for providing compensatory education, are not the same as contemplated by the school. The school stated, in its submission, that – “If and when (the student) returns to the District, the District will convene an IEP meeting for (the student) and determine the appropriate programming to compensate (the student) for the six (6) weeks in the fall of 2000 when he was awaiting a residential placement through DHHS that never transpired.” Id. at page four (4). Student's name deleted. It is the finding of the Federal Complaints Officer that it should be up to the IEP team in the school district to which this student has transferred to make this determination, with the qualification that this student was determined by the Federal Complaints Officer to have been denied FAPE from the beginning of the 2000-2001 school year until February of 2001, and not for a period of six (6) weeks as stated by the school.

The public agency that is now responsible for the provision of special education services to this student is not a party to this Complaint, and therefore the Federal Complaints Officer has no authority to order it how to proceed. The new service provider's IEP team may decide that compensatory education is warranted, or not. If the school district now responsible for providing special education services to this student fails to meet the requirements of the law to provide this student with FAPE, which might include the provision of compensatory education, then all the legal relief that has been available to those in a position to act on this student's behalf in addressing a denial of FAPE in this Complaint, will again be available.

Should the IEP team in the new school district determine that compensatory education is warranted, that school district shall have the authority of this Order, and the governing Decision, to enforce any legal obligation the new school district decides to seek to enforce, against the school district subject to this Complaint, in assisting it in providing compensatory education to this student. That compensatory education could include the purchase of services for which reimbursement would be appropriate. The Federal Complaints Officer does not interpret the language of the complainant - “in lieu of compensatory services” - or Jefferson County School District R-1 v. S.M. through T.M., ED 2001-08 (Colo. Div. Of Admin. Hearings 2001) “Monetary relief is available only in the form of reimbursement when parents have unilaterally obtained special education and related services that a school district has failed to provide...”- as quoted in the school's submission at page three (3) – to be referencing compensatory education relief which would be prohibited for this student. The monetary relief in the form of reimbursement that might be provided here would be for special education and related services provided for denial of FAPE – as determined by the student's IEP team. The Federal Complaints Officer finds that such relief would not be inconsistent with the relief contemplated by the ALJ in ED 2001-08.

Moreover, the Federal Complaints Officer finds the school's argument, based upon Board of Education of Downer's Grove Grade School District No. 58 v. Steven L., 89 F.3d 464 (7th Cir. 1996), and Thomas R. W. v. Massachusetts Department of Educ., 130

F.3d 477 (1st Cir. 1997), that compensatory education in the form of reimbursement can not be awarded because it is “prospective relief”, to be inapplicable to the facts subject to this Complaint. In Downer’s Grove , the case became moot because the student continued to receive the IEP services that the parents wanted, due to the stay put requirements of the law, pending resolution of the dispute. Thus, the student in Downer’s Grove, due to the stay put provisions in the law, was never denied FAPE. Any relief contemplated had nothing to do with FAPE, and therefore the court’s finding of mootness is inapplicable to the facts of this Complaint, in which the Federal Complaints Officer has found a denial of FAPE. In Thomas R. W. , the appellant’s claim for damages became moot in the 1st Circuit Court of Appeals because the appellant failed, according to the court of appeals, to adequately raise the issue of damages in the federal district court litigation, and because the student in the case had been unilaterally placed in a private school by his parents, from which he subsequently graduated. The parents had also sought injunctive and declaratory relief. The lower court found no denial of FAPE, unlike this Complaint, where the Federal Complaints Officer has found a denial of FAPE. In Thomas R. W. , had the parents timely raised the issue of damages, the student’s attendance and graduation from a private school would not have rendered a case otherwise brought for injunctive and declaratory relief moot. The reimbursement for denial of FAPE relief sought by the parents in the 1st Circuit would not, therefore, have been prospective relief. In the Complaint before the Federal Complaints Officer, there was a timely request made for the relief of compensatory education, and a finding of a denial of FAPE by the Federal Complaints Officer. Therefore, Thomas R.W. is inapplicable.

CONCLUSION

Were the Federal Complaints Officer to enter some order for compensatory education, other than any such relief determined to be appropriate by the student’s current IEP team, more harm than good might result. The determination of this student’s educational needs is now entrusted with the IEP team of the new school district obligated to serve him. That IEP team must be given the opportunity, unencumbered by orders of the Federal Complaints Officer, to determine whether, and if so how much, and in what form, compensatory education should be provided. The complainant’s request for 568.5 hours of instruction for this student amounts to almost nineteen weeks of schooling, assuming a thirty (30) hour school week. This would be on top of the schooling this student should already be receiving. If it is appropriate for this student to bear such an extra burden in order to compensate him for what he has missed, his IEP team is the most appropriate authority to impose this burden. The day camp proposed by the complainant would not take place until the summer of 2002, and, in the view of the Federal Complaints Officer, a decision about whether such services are appropriate should be made by the student’s IEP team in light of all the student’s circumstances at a time in closer proximity to next summer. Likewise, the Federal Complaints Officer is not in a position to know how this student’s receipt of services at A.C.C. during the school year would impact the educational services this student’s IEP team might otherwise determine that he be provided. Moreover, this student’s ability to receive FAPE will continue to be

complicated, obviously, if he continues to be unable to obtain and maintain a stable placement. The Federal Complaints Officer has no control over the student's living circumstances and can only offer his encouragement to the complainant and her employing agency in their efforts to obtain and maintain a stable placement for the student.

The school shall submit a copy of this Order, and the governing Decision, to the new school's IEP team, within thirty (30) days of the school's certified receipt of this Order. The school shall submit to the Federal Complaints Officer, within thirty (30) days of the school's certified receipt of this Order, a statement of assurance that the ordered submission of documents has taken place as ordered.

The Federal Complaint Decision entered by the Federal Complaints Officer on July 20, 2001, is now final, as dated by the signature of the Federal Complaints Officer on this Order, and the appeal time shall now begin to run as stated in the appeal procedure. A copy of the appeal procedure was provided to the parties with the July 20, 2001 Decision. A copy is also attached to this Order.

Charles M. Masner
Federal Complaints Officer