

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

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**State-Level Complaint 2009: 508**

Boulder Valley RE-2 School District

**Decision**

**INTRODUCTION**

This state-level complaint (Complaint), dated 08/28/2009, was properly filed on 08/28/2009.

The Complainant, is the mother of a child with a disability. Hereafter, the Complainant is referred to as “Parent” and the child is referred to as “Student.”

The State Complaints Officer (SCO) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaints process under the federal Individuals with Disabilities Education Act (IDEA).

The overriding issue and therefore the scope of the investigation identified by the SCO, between the dates of 08/28/2008 and 08/28/2009, is:

Whether the District’s failure to administer a Part B evaluation prior to [Student’s] third birthday or to supply [Parent] with a written copy of the 08/05/2009 draft Individualized Education Program (IEP) constituted procedural errors that resulted in the denial of a free appropriate public education (FAPE) to [Student] in violation of IDEA, 20 U.S.C. § 1400 et seq. and its implementing regulations, 34 CFR Part 300.

The Parent’s Complaint contained no supporting documentation.

The SCO notified the Boulder Valley RE-2 School District (District) of the Parent’s allegations in a letter dated 08/31/2009. The letter to the District included a complete copy of the Parent’s Complaint. The SCO also enumerated inquiries that the District was directed to answer in conjunction with any response (Response).

The District’s Response, including a cover letter, supporting documentation and answers to each of the SCO’s inquiries, was timely received on 09/16/2009.

In a letter dated 09/17/2009, Parent was supplied with a complete copy of the Response, including answers and supporting documentation, and advised that any reply (Reply) was due within 10 days of receipt of the Response. The Parent’s Reply was due on 10/01/2009. [Parent] did not file a Reply to the Response.

The SCO interviewed [Parent] at her residence on 10/05/2009.

On 10/05/2009, the SCO unsuccessfully attempted to hand deliver a Consent for Release of Information Form, properly executed by [Parent], to administrators of the private preschool (Private Preschool) where [Student] is currently enrolled.

On 10/06/2009, the SCO conducted a brief follow-up telephone interview of [Parent].

On 10/06/2009, after speaking by telephone with the Director (Director) at [Private Preschool], the SCO promptly emailed to [Director] a cover letter and [Parent's] release, in order to obtain copies of [Student's] enrollment and attendance records.

On 10/12/2009, the SCO interviewed the following District staff: [Early Childhood Special Educator]; [Office Assistant for Child Find]; [Assistant Director of Early Childhood]; [Early Childhood Special Education Coordinator]; and [Special Education Teacher/Special Education Director Designee] who was also at the 08/05/2009 IEP meeting. District legal counsel, Melissa Mequi, was present during all of these interviews.

The SCO went to [Private Preschool] on 10/12/2009 and personally spoke with [Director] and again requested that copies of [Student's] enrollment and attendance records be supplied, per [Parent's] release, by 10/13/2009.

On 10/12/2009, the SCO left a telephone message at [Parent's] residence noting that needed documentation had not yet been supplied by [Private Preschool].

On 10/14/2009, the SCO received [Student's] [Private Preschool] enrollment and attendance documentation from [Director] via email.

On 10/15/2009, the SCO conducted a telephone interview with [Speech Language Pathologist] (SLP), who wrote the 07/07/2009 Transition Report.

On 10/15/2009 the SCO closed the record.

### **THE PARENT'S COMPLAINT ALLEGATIONS**

The Parent's Complaint, in relevant part, alleges as follows:

Allegation #1: [Student] was not evaluated before [Student's] third birthday which resulted in [Student] not receiving the speech therapy [Student] needs; and

Allegation #2: The District never supplied [Parent] with a copy of [Student's] [08/05/2009] IEP.

Complaint, pg. 3.

To resolve the complaint, [Parent] proposed that: 1) the District supply special education services to [Student] at [Private Preschool] where [Student] was enrolled by [Parent] in July, 2009; and 2) that District reimburse [Parent] for private special education services that she has paid to be supplied to [Student] from the date of the complaint and until the matter is resolved. Complaint, pg. 4.

### **THE DISTRICT'S RESPONSE**

The District's Response to Allegation # 1, above, is summarized as follows:

[Student] turned three years old on 07/15/2009. The District offered to schedule [Student's] evaluation under Part B of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415, on or before [Student's] third birthday. It was choices of [Parent] which caused [Student] to not be evaluated for Part B services on or before [Student's] third birthday.

On 06/29/2009, the District conferred with [Parent] and offered a Part B evaluation on 07/15/2009. Since the family had planned a trip out of town between 07/11/2009 and 08/02/2009, the IEP team meeting was scheduled for 08/05/2009.

On 08/05/2009, [Parent] participated in the IEP Team meeting. Due to computer problems, the IEP document was not generated that day. However, [Parent] left the IEP meeting knowing that [Student] qualified for District special education and related services beginning with the 2009/2010 school year, with only the location of the provision of services to still be determined.

[On] 08/11/2009, the District verbally communicated with [Parent] that the District preschool started on 08/26/2009, and that although the District would not be contracting with the [Private Preschool] desired by Parent, the District was prepared to provide [Student] with the special education and related services identified during the 08/05/2009 IEP meeting at another location.

The District has no legal obligation to provide [special education services] at the private preschool preferred by [Parent], nor did it ever promise to do so. [Parent] was advised that [Private Preschool] was not one of the private preschools with which the District contracted during the 2009/2010 school year. However, [Parent] has made no effort to enroll [Student] in the District program.

Any delay in the [Part B] evaluation had no impact whatsoever on the services available to [Student] if [Parent] had chosen to enroll [Student] in the District program.

District Cover Letter of 09/16/2009, pgs. 1-4.

The District's Response to Parent's Allegation # 2, is summarized below:

On 09/08/2009, the District mailed the written IEP documentation to [Parent] for review and signature. In that letter, [Parent] was advised that space was available at two District preschools, [Elementary School #1] and [Elementary School #2], both during the morning session which was [Parent's] preferred time.

Any loss of services is attributable solely to [Parent's] decision to keep [Student] enrolled in [Private Preschool]. Since 08/26/2009, the District has remained ready, willing and able to provide [Student] with a FAPE. Any delay in receipt of the written IEP had no impact whatsoever on the services available to [Student] if [Parent] had chosen to enroll [Student] in the District program.

While denying that the delay in supplying [Parent] with the written IEP had resulted in any detriment to [Student], District offered compensatory services in the form of double speech/language services for four weeks since [Student] has missed the first three plus weeks of school.

District Cover Letter of 09/16/2009, pgs. 2 and 4-5.

### **THE PARENT'S REPLY**

[Parent] did not submit a Reply to the District's Response.

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire record,<sup>1</sup> the SCO makes the following FINDINGS:

1) A Part C referral was made to the District on 03/13/2009 and the Part C evaluation was completed by the District on 04/20/2009. As a result of that evaluation, an Individualized Family Service Plan (IFSP) was completed due to an eligibility determination based on [Student's] significant delay in development. As a result, [CCB], the Community Centered Board for Boulder County, provided [Student] Part C early intervention services consisting of ten

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<sup>1</sup> The record consists of the following: [Parent's] 08/28/2009 State Complaint; [District's] 09/16/2009 Response, consisting of a cover letter (including written Response to SCO's inquiries A-H); Part C referral, evaluation and Individualized Family Service Plan; 09/08/2009 cover letter from [Early Childhood Child Find Coordinator] to [Parent] including attachments (i.e., copies of 08/05/2009 draft IEP containing: 08/03/2009 Parental Prior Notice; 08/05/2009 Permission for Initial Assessment (unsigned by Parent); 08/05/2009 Participants at Meeting (unsigned by Parent); Parental Agreement for Initial Placement (unsigned by Parent); Home Language Survey (unsigned by Parent); Medicaid Reimbursement form (unsigned by Parent)); 07/07/2009 [Part C] Transition Report; 06/29/2009 to 08/14/2009 Parent Contact Record; Phone Log of Assistant Director of Early Childhood Special Education); 06/11/2009 District Letter to Parents w/07/09/2009 Parent Survey (unsigned by Parent); 06/15/2009 Application to [Private Preschool]; 06/20/2009 [Private Preschool] Membership Agreement; [Student's] [Private Preschool] attendance records, 09/01/2009 through 10/08/2009; 07/17/2009 letter from [Private Preschool] to Parent; 10/05/2009 SCO Interview with [Parent]; 10/06/2009 Brief SCO Telephone Interview with [Parent]; 10/12/2009 SCO Interviews with: [Early Childhood Special Educator], [Office Assistant for Child Find], [Assistant Director of Early Childhood], [Early Childhood Special Education Coordinator], and [Early Childhood Special Education Teacher/Special Education Director Designee]; and 10/15/2009 telephone interview with [SLP].

sessions of 60 minutes each, between 05/11/2009 and a projected ending date of 07/15/2009, when [Student] would turn age three and Part C services would end.

2) In early May, 2009, during the first week of [Student's] Part C early intervention services, [Early Childhood Special Educator] spoke with [Parent] by telephone to schedule the Part B evaluation. During that telephone conversation, [Early Childhood Special Educator] offered to schedule a Part B evaluation between the weeks of 05/13/2009 and 05/25/2009 or, alternatively, to wait and schedule the evaluation closer to [Student's] third birthday. [Parent] opted to have the evaluation scheduled closer to [Student's] third birthday, 07/15/2009. If [Student] was determined eligible as a result of the initial Part B evaluation, any needed services after age three would be provided under Part B of IDEA.

3) On 06/11/2009, [Assistant Director of Early Childhood] mailed a letter and Parent Survey to [Parent]. The letter explained that, pursuant to a Colorado Department of Education directive:

[B]eginning in August 2009, preschool children in need of special education services must be enrolled in a preschool classroom in order for eligible children to receive services. Enrollment and attendance in a preschool classroom will be required in order for your child to receive reasonable benefit from his/her special education services.

Federal law requires that special education be provided at no cost to families (this is known as a free and appropriate public education or FAPE), therefore, the [District] will provide 10 hours a week of preschool at no cost to families.

In order to plan for this significant change in service provision for children with identified [disabilities], we need to gather some information from families regarding current or planned preschool attendance. Please take a few minutes to answer the enclosed survey questions and return in the enclosed envelope as soon as possible.

Again, the purpose of this letter is to inform you of changes to IEP services. We ask for your assistance in completing the enclosed information [Parent Survey], as well as your patience, as we plan for expanded options for all children. We will be contacting families throughout July with additional information about preschool services for the 2009-2010 school year...

Letter of 06/11/2009 Letter from [Assistant Director of Early Education] to [Parent].

4) The Parent Survey accompanying the [Assistant Director of Early Education's] 06/11/2009 letter noted in bold lettering "Please write your initials after the *option you would like the District to consider* regarding your child's preschool programming for the 2009/2010 BVSD school year" (emphasis added). The three options listed in the survey were i) have child stay at his/her current preschool; ii) enroll child in a BVSD Preschool; [or] iii) decline all special education services at this time and withdraw child from enrollment in BVSD Preschool services. Parents were asked to initial one of the three listed options, date, sign and return the survey to the District in the enclosed self-addressed envelope.

5) On 06/15/2009, [Parent] submitted an application to [Private Preschool] for [Student's] enrollment for the 2009-2010 school year and signed a membership agreement with [Private Preschool] concerning [Student's] enrollment on 06/20/2009. According to attendance records, [Student] attended [Private Preschool] on Tuesdays and Thursdays, 8:30 a.m. to 11:30 a.m. between 09/01/2009 and 10/08/2009. The SCO finds, based on this documentation, coupled with interviews of [Parent], that [Student] was enrolled in [Private Preschool] prior to scheduling of the Part B evaluation and long before the IEP Team had determined that [Student] was a child with a disability eligible for special education services.

6) On 06/29/2009, [Office Assistant for Child Find] spoke with [Parent] by telephone in order to schedule the Part B evaluation. [Office Assistant for Child Find] offered an evaluation date of 07/15/2009. [Parent] declined this evaluation date explaining that the family would be out of town on vacation between 07/11/2009 and 08/02/2009. Consequently, [Office Assistant for Child Find] scheduled and [Parent] agreed to a Part B evaluation on 08/05/2009. During this telephone conversation [Parent] also advised [Office Assistant for Child Find] that [Student] was attending [Private Preschool] Tuesdays and Thursdays, 8:30-11:30 a.m., and that [Parent] preferred that the District consider having [Student] stay at [Student] current preschool. [Parent] authorized [Office Assistant for Child Find] to place [Parent's] initials on Option 1 of the Parent Survey (as detailed in paragraphs 3-4, above).

7) On 07/07/2009 a Part C Transition Report was completed by [SLP] and emailed to both [Parent] and the District on 07/29/2009. In the report, [SLP] recommended further speech-language therapy to address [Student's] speech clarity, voice pitch, and conversation turn-taking. A caveat at the top of the first page of the Transition Report provides "This report is intended for informational purposes only is [sic] not a guarantee of services from the school district or any other providers or organizations." The SCO specifically finds that the Transition Report was not a guarantee that the District would supply any special education services to [Student] although it was one of many pieces of information considered by the IEP Team during the subsequently scheduled Part B initial evaluation.

8) On 07/09/2009, [Assistant Director of Early Education] spoke with [Parent] by telephone concerning the Parent Survey and [Parent's] expressed desire to have [Student] remain at [Private Preschool] during the 2009-2010 school year. There are conflicting recollections concerning the content of this telephone conversation concerning the private preschools the District might contract with during the 2009-2010 school year:

- a) According to [Parent]: [Assistant Director of Early Education] stated that the District would most likely be contracting with private [preschools] already on the list and [Private Preschool] was on the current list as they [i.e., District] contracted with that school several years back.
- b) According to [Assistant Director of Early Education]: she reviewed with [Parent] the reasons for a change in the model of providing special education services and the intent of the Parent Survey regarding if and where children were currently enrolled in preschool so that the District could plan the best use of resources. [Assistant Director of Early Education] explained that the District had sent surveys only to licensed

preschools in the District that had previously contracted with the District within the last two years. [Assistant Director of Early Education] advised [Parent] that [Private Preschool] was not one of those schools. [Parent] was told that a final determination as to which private preschools that the District would contract with in the 2009-2010 school year would not be made prior to the end of 07/2009. [Assistant Director of Early Education] also advised [Parent] that until a Part B evaluation of [Student] had occurred, a final determination concerning services and the delivery location of those services could not be determined.

9) After weighing the conflicting recollections of the 07/09/2009 telephone conversation between [Parent] and [Assistant Director of Early Education], as well as documentation in the record, the SCO concludes that it is more likely than not that [Assistant Director of Early Education's] recollection of the telephone conversation is the accurate portrayal of the conversation.

10) On 07/15/2009, [Student] turned age three.

11) On 07/16/2009, [Office Assistant for Child Find] mailed the Parent directions to the District offices and also a Notice of Meeting concerning the initial Part B evaluation scheduled for 08/05/2009 to determine [Student's] eligibility for special education and, if the need existed, for the development of an IEP.

12) Although the evaluation date was scheduled, [Office Assistant for Child Find] did not mail [Parent] the Consent for Initial Assessment in conjunction with other documents on 07/16/2009 since, "as a practice, the document is presented to the parent(s) for signature on the day of the evaluation" (quoting statements made to SCO by [Office Assistant for Child Find] during 10/12/2009 interview).

13) In late July, 2009, the District Special Education Director, [Assistant Director of Early Childhood] and [Early Childhood Special Education Coordinator] met and determined which private preschools with which the District would contract during the 2009-2010 school year. [Private Preschool] was not one of the preschools with which the District elected to contract.

14) [Parent] signed the Notice of Meeting on 08/03/2009 and also completed and signed a Student Health Questionnaire which described [Student] as "a very active child" with no current health concerns noted.

15) On 08/05/2009, [Parent] brought [Student] to the District offices where an initial Part B evaluation was conducted and, immediately thereafter, an IEP Team Meeting was conducted.

16) The following persons were present during the evaluation and also attended the subsequent IEP Team Meeting on 08/05/2009: [Parent]; [Student]; [Early Childhood Special Educator who also served as the Special Education Director Designee]; [Speech Language Pathologist]; [Occupational Therapist]; and [School Nurse].

17) As a result of the 08/05/2009 evaluation, the IEP Team determined [Student] was a child with a disability and eligible for special education services. Consequently, the IEP Team proposed to provide [Student] 120 minutes per month of direct services and 15 minutes per month of indirect services in a preschool education program occurring 10 hours per week, between 08/26/2009 and 08/05/2010. At the conclusion of the IEP Team Meeting [Parent] expressed agreement with the [Student's] eligibility determination as well as the offered special education and related services.

18) Due to a continuing computer malfunction on 08/05/2009 and despite consultation with computer personnel, the IEP Team was unable to print any of the relevant documents (i.e., Parent Consent for Initial Assessment; Participants at Meeting; draft IEP containing Parental Agreement for Initial Placement; or Medicaid Reimbursement). Consequently, [Parent] was not supplied with the draft IEP nor any of the aforementioned documents requiring her signature on 08/05/2009.

19) At the conclusion of the 08/05/2009 meeting, the IEP Team adjourned without identifying a District person who would mail [Parent] the draft IEP and other documentation requiring execution once the computer was functional.

20) On 08/11/2009 [Early Childhood Special Education Coordinator] notified [Parent] that the District would not be contracting with [Private Preschool] for the supply of special education services during the 2009-2010 school year but offered [Student] a placement in a public District preschool although a specific District preschool was not identified during the telephone conversation. [Parent] advised [Early Childhood Special Education Coordinator] that she did not want [Student] to attend a public District preschool.

21) On 08/20/2009, [Parent] left a telephone message with [Assistant Director of Early Childhood] requesting a copy of [Student's] 08/05/2009 IEP. As a result of this telephone message, [Assistant Director of Early Childhood] requested that [Early Childhood Special Education Coordinator] mail [Parent] a copy of the draft IEP.

22) On 09/08/2009, [Parent] was mailed a cover letter as well as copies of the 08/05/2009 draft IEP and the other relevant documents (i.e., Permission for Initial [08/05/2009] Assessment; 08/05/2009 Participants at Meeting; Parental Agreement for Initial Placement; Home Language Survey; and Medicaid Reimbursement) for [Parent's] review and signature. [Early Childhood Special Education Coordinator] noted in the cover letter "The IEP is considered to be in draft format until parental consent for initial placement is obtained."

23) [Parent] admitted during interviews with the SCO that she had never signed and delivered to the District the Parental Agreement for Initial Placement or any of the other documentation accompanying the 09/08/2009 letter and draft IEP.

### **In Summary:**

**24) As to Allegation #1 the SCO specifically finds:**



- a) Student was not evaluated and, therefore, an IEP was not in effect on or before 07/15/2009, [Student's] third birthday. However, given the credible evidence in the record, the SCO concludes that the District made reasonable attempts to schedule the Part B evaluation and IEP meeting within the mandatory timeline. In early May 2009, the District offered dates between the weeks of 05/13/2009 and 05/25/2009 but [Parent] opted to have the initial evaluation conducted closer to [Student's] third birthday. When contacted on 06/29/2009 and offered a date of 07/15/2009, [Parent] declined the offered date due to vacation plans. The evaluation was then scheduled for 08/05/2009, within three days of the family returning from vacation. The SCO concludes that any delay in conducting [Student's] initial evaluation on or before 07/15/2009 is attributable solely to the decisions of [Parent].
- b) The 08/05/2009 draft IEP constituted an *offer* to provide [Student] with a FAPE through an initial placement for the purposes of providing special education and related services which, to date, [Parent] has not accepted.
- c) [Parent] seeks reimbursement for private special education services for which she has allegedly paid but has supplied the SCO with no documentation concerning the specific dates or costs of said services.
- d) [Parent] enrolled [Student] in [Private Preschool] on 06/20/2009. The [Student] was not determined to be eligible for Part B special education and related services until 08/05/2009. The District solicited parental input through the Parent Survey and considered [Parent's] preference for delivery of special education services during the 2009-2010 school year. However, on 08/11/2009, well in advance of the starting school date of 08/26/2009, [Parent] was notified that special education services would not be delivered at [Private Preschool] but at a public District preschool. On 09/08/2009, the District offered delivery of services at either [Elementary School #1] or [Elementary School #2]. [Parent] has not communicated an acceptance of the District's offer of an initial placement.

**25) As to Allegation #2 the SCO specifically finds:**

- a) [Parent] was not timely supplied with a copy of the draft IEP and other relevant documentation subsequent to the 08/05/2009 evaluation and IEP Meeting. However, since parent has never agreed to the initial placement by signing the Parental Agreement for Initial Placement form, the District's actions did not constitute a denial of FAPE to [Student] but did constitute a technical procedural violation.
- b) Although untimely, District did mail [Parent] a complete copy of the draft IEP on 09/08/2009.

## CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the SCO enters the following CONCLUSIONS OF LAW:

1) Under IDEA and the corresponding Colorado law, the Exceptional Children's Educational Act (ECEA), students with disabilities have the right to a FAPE. (20 U.S.C. §1400 *et seq.*; 34 CFR Part 300; Colo. Rev. Stat. §22-20-101 *et seq.*; and 1 CCR 301-8, Rules 2220-R-1.00 *et seq.*)<sup>2</sup>

2) As a result of a Part C referral, [Student] was evaluated and, at the age of 33 months, was determined to be eligible for early intervention services under Part C of the IDEA. An IFSP was completed and early intervention services were subsequently delivered between 05/11/2009 and 07/15/2009. The Part C services ended when [Student] turned age three on July 15, 2009. Prior to [Student] turning age three, a Part B referral was properly made to the District in order to determine whether [Student] was eligible for IDEA Part B special education services.

3) Any services delivered to [Student] at age three would be provided pursuant to Part B of IDEA. In fact, a FAPE must be made available to all eligible children residing in Colorado between the ages of 3 and 21. The relevant regulation provides:

(b) FAPE for children beginning at age three.

(1) Each State must ensure that-

(i) The obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and

(ii) An IEP . . . is in effect for the child by that date . . .

(2) If a child's third birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP . . . will occur.

34 CFR §300.101(b).

4) An IEP was not in place by [Student's] third birthday (i.e., 07/15/09) due to the fact that [Parent] chose not to schedule the Part B evaluation from the dates offered by the District prior to the timeline expiring. Because the delays in conducting the initial evaluation and developing the initial IEP by [Student's] third birthday are attributable to the parent, the District did not violate 34 CFR §300.101(b).

5) A Part B initial evaluation and an initial IEP Meeting were conducted on 08/05/2009. As a result, the IEP Team, including [Parent], determined that [Student] was a child with a disability entitled to receive special education and related services.

6) Prior to conducting an initial evaluation, a district must obtain a [Parent's] consent. 34 CFR §300.300(a). The District attributed its failure to obtain [Parent's] written consent (i.e., signing of the Permission for Initial Assessment form) to computer problems occurring on 08/05/2009, the day of the evaluation. However, it is clear that the District could have mailed

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<sup>2</sup> Hereafter, only the IDEA regulation and any corresponding ECEA rule will be cited.

[Parent] the consent form on 07/16/2009 in conjunction with mailing of the Notice of Meeting and directions for the meeting location. [Parent] obviously consented to the initial evaluation, by virtue of the fact that she brought [Student] to the evaluation on 08/05/2009. Nevertheless, the District's failure to obtain [Parent's] written consent for the initial evaluation, prior to conducting the evaluation, constituted a procedural violation of 34 CFR § 300.300(a).

7) A parent is entitled to receive a copy of the child's IEP. 34 CFR §300.322(f). As noted above, the District attributed the failure on 08/05/2009 to supply [Parent] with a copy of the draft IEP and other documents requiring her signature, to computer problems. However [Special Education Director Designee] failed to ensure that arrangements were made to mail [Parent] the IEP documentation once the computer problems were resolved. [Parent] then called and requested a copy of the IEP on 08/20/2009. Although the IEP and accompanying documentation were mailed to [Parent] on 09/08/2009, this was untimely.

8) In conjunction with supplying [Parent] a copy of the draft IEP and the Parental Agreement for Initial Placement on 09/08/2009, the District proposed to make a FAPE available to [Student] through an initial placement. However, [Parent] has never consented in writing to the initial provision of special education services. Until and unless [Parent] consents to the initial provision of special education services by supplying the District with the fully executed Parental Agreement for Initial Placement, the District has no duty and, in fact, no ability to provide [Student] with a FAPE. The relevant regulation provides:

...

(b)Parental consent for services.

(1) *A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.*

...

(3) *If the parent of the child . . . fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency-*

(i) *Will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent. . .*

34 CFR § 300.300(b)(emphasis added).

9) Furthermore, because [Parent] has never executed the Parental Agreement for Initial Placement, and the District having no duty to provide [Student] a FAPE, the District also has no duty to reimburse the costs of any private special education services which [Parent] may have incurred.

10) Although an IEP Team determines a child's placement (i.e. special education and related services), a district, in its sole authority, selects the geographical location where special education and related services are delivered. *See*, ECEA Rule 4.03(8)(a). *See also*, Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46687 (August 14, 2006) ("The Department's longstanding position is that the placement refers to the provision of special

education and related services rather than a specific place, such as a specific classroom or specific school.”). Consequently, even if subsequent to issuance of this Decision, [Parent] elects to execute the Parental Agreement for Initial Placement, special education services would be deliverable at a location of the District’s choosing, not at [Private Preschool].

11) Finally, the procedural violations committed by the District (i.e., failure to obtain written consent prior to administration of the initial evaluation and failure to make provision for supplying [Parent] with a copy of the draft IEP after the 08/05/2009 meeting, and untimely supply of the draft IEP after [Parent’s] 08/20/2009 request) were technical in nature and did not constitute substantive deprivations resulting in the denial of FAPE.

### **REMEDIES**

1) [Parent] did not establish that the District’s failure to administer a Part B initial evaluation prior to [Student’s] third birthday or the failure to timely supply a written copy of the 08/05/2009 draft IEP constituted procedural errors resulting in the denial of a FAPE. Accordingly, no remedies are appropriate as to [Parent’s] allegations.

2) The Complaint and subsequent investigation revealed that the District committed two procedural violations in conjunction with the [Student’s] initial Part B evaluation and IEP matters:

- a) Failure to comply with the parent consent requirements regarding an initial evaluation as specified in 34 CFR 300.300(a); and
- b) Failure to timely supply [Parent] with a copy of the draft IEP as specified in 34 CFR 300.322(f).

The District must correct the cited noncompliance detailed in this paragraph as soon as possible but, in any event, no later than **01/31/2010**. Failure to timely correct the cited noncompliance will subject the District to enforcement action by the Department. Consequently, on or before **12/15/2009**, the District must submit to the Department a proposed Corrective Action Plan (CAP) that effectively addresses how the District will ensure that the cited noncompliance will be corrected so as not to recur as to [Student] and all other students with disabilities between the ages of 3 and 5 for whom the District is responsible. See, 34 CFR §300.151(b). Please submit the CAP to the Department to the attention of the undersigned SCO. The Department will review and then either approve or request revisions to the CAP. The enclosed sample templates provide suggested formats for the CAP and include sections for “improvement activities” and “evidence of implementation and change.”

**NOTE:** Failure by the District to meet any of the timelines set forth above will adversely affect the District’s annual determination under the IDEA and subject the District to enforcement action by the Department.

The Decision of the SCO is final and not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint provided that the aggrieved party has the right to file a due process complaint on the issue with which the party disagrees. See, 34 CFR §300.507(a); Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46607 (August 14, 2006).

**CONCLUSION**

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Dated this 19th day of October, 2009.

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Jeanine M. Pow, Esq.