

Colorado Department of Education
Decision of the State Complaints Officer
Under the Individuals with Disabilities Education Act (IDEA¹)

State-Level Complaint 2014:507

Ute Pass BOCES

DECISION

INTRODUCTION

This is a pro-se, state-level complaint (Complaint), filed April 3, 2014. The Complainants are the mother and father (Mother, Father, or collectively, Parents) of Student, who is identified as a child with a disability under the IDEA.

The State Complaints Officer (SCO) determined that the Complaint, dated March 21, 2014, identified three allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

PARENTS' COMPLAINT ALLEGATIONS

Parents' Complaint raised three allegations, summarized as follows:

1. Since the beginning of the 2013-2014 school year, the BOCES has denied Student a free appropriate public education (FAPE) by failing to appropriately implement Student's Transfer Individualized Education Program (Transfer IEP) from another school district.
2. In August/September 2013, the BOCES violated Parents' procedural rights under the IDEA and ECEA by denying them meaningful opportunity to participate in an IEP meeting.
3. Since September 2013, the BOCES has failed to provide an independent educational evaluation (IEE) requested by Parents.

To resolve the Complaint, Parents proposed that Student remain on an IEP.

¹ The IDEA is codified at 20 U.S.C. §1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

² Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

FINDINGS OF FACT

After a thorough and careful analysis of the entire record,³ the SCO makes the following FINDINGS:

1. At all times relevant to the Complaint, Student has lived with Parents and has attended [grade] at School, which is within the boundaries of the BOCES.⁴
2. Parents applied for Student to attend School by an application dated June 14, 2013.⁵ The application provided a space intended to inform School that the applicant receives special education services, which was left blank; however, "IEP" was handwritten on the form directly beneath that area.⁶ Student was accepted and enrolled in School sometime in the beginning of August 2013.⁷ Student entered School at the beginning of the school year with an IEP, dated September 7, 2012, from a previous school district in Colorado.⁸
3. School staff did not immediately understand that Student was a child with a disability with an IEP and did not provide Student with special education or related services at the beginning of the school year.⁹ Mother stated that she never contacted School to inform them that Student had an IEP.¹⁰
4. On September 17, 2013, School received Student's IEP from Student's previous school district.¹¹ School did not implement the special education and related services on Student's IEP.¹² Upon review of the IEP, Case Manager/Special Education Teacher realized that Student's IEP was past due for its annual review and was imminently due for a triennial determination of eligibility.¹³
5. Case Manager/ Special Education Teacher, believing that the transfer provisions of the IDEA were applicable, quickly consulted with School staff, who were just becoming familiar with Student, in order to determine the special education and

³ The appendix, attached and incorporated by reference, details the entire record.

⁴ Exhibit 4.

⁵ Exhibit 4, Page 3.

⁶ Ibid.

⁷ Exhibit 4.

⁸ Exhibit 2.

⁹ Interview with General Education Teacher and Response.

¹⁰ Interview with Mother.

¹¹ Interviews with Case Manager/Special Education Teacher and Special Education Director.

¹² Exhibits D and 1 and Interviews with Case Manager/Special Education Teacher and Special Education Director.

¹³ Interview with Case Manager/Special Education Teacher.

related services that Student required in order to develop an interim plan.¹⁴ After reviewing Student's IEP, the School team¹⁵ determined that Student's needs would be better met by reducing Student's service hours from the previous school district's IEP.¹⁶ Case Manager/Special Education Teacher scheduled an IEP team meeting for September 24, 2013, prepared a Notice of Meeting, dated September 19, 2013¹⁷ and a Prior Notice and Consent for Reevaluation. At the same time, Case Manager/Special Education Teacher also prepared an amended IEP for Student on the District's forms; the amended IEP reduced the number of service hours that Student would receive. There is no dispute that this amended IEP was prepared without Parents' participation, nor did Parents consent to amend Student's IEP outside of an IEP meeting.¹⁸

6. On September 17, 2013, Case Manager/Special Education Teacher attempted to reach both Parents by phone, but then decided to meet Mother at her car, when she was picking up Student from School at the end of the school day, to give her the aforementioned prepared documents, including the amended IEP, as well as procedural safeguards and evaluation forms for Parents to complete as expeditiously as possible.¹⁹ Case Manager/Special Education Teacher recalls that she explained to Mother at the car window that there was a reduction of service hours from the previous district's IEP, explained the documents she was giving to Mother, and asked her to sign the documents and return them, providing Mother with her phone number if she had any questions.²⁰ Mother recalls the car window conversation differently, stating that Case Manager/Special Education Teacher never mentioned the reduction of service hours, but did stress that the forms would need to be signed immediately in order for Student to receive special education

¹⁴ Exhibit 1, Interviews with Case Manager/Special Education Teacher and Special Education Director.

¹⁵ The School team was comprised of the Case Manager/Special Education Teacher, School Psychologist, and Speech/Language Pathologist.

¹⁶ Case Manager/Special Education Teacher contacted Special Education Director to ask if it was possible to extend the eligibility meeting. At Special Education Director's direction, the School team developed the interim service plan to comply with the transfer IEP provisions of the IDEA. The School team believed that the modifications they were making to the service hours were an interim plan to be provided until the IEP team could meet on September 24, 2013.

¹⁷ The Notice of Meeting stated that the purpose of the meeting was "Eligibility Determination."

¹⁸ Interviews with Case Manager/Special Education Teacher and Mother. The September 17, 2012 IEP indicates that the "Type of Meeting" was an "Individualized Education Program" and a "Transfer IEP." The document also refers to Student's "transfer" from another school district and also notes that "The IEP team has not agreed to adopt this IEP."

¹⁹ Interviews with Case Manager/Special Education Teacher and Mother.

²⁰ Interview with Case Manager/Special Education Teacher.

services.²¹

7. Mother also recalled that she did not read through the amended IEP, as she assumed by the September 17, 2012 date at the top of the pages that it was simply Student's IEP on District's own form, rather than a new IEP that the District had unilaterally developed.²² Mother signed the document in the places Case Manager/Special Education Teacher indicated with flags, believing that she must do so quickly in order for Student to receive special education services.²³ Mom states that she was most concerned with filling out the paperwork she had been given related to the evaluations.²⁴
8. The SCO finds that Mother was not adequately informed of the modifications to the IEP, and that Parents were denied meaningful participation in the development of the IEP. First, the document itself was confusing on its face and was dated back to the previous year, leading Mother to believe that it was simply the previous district's IEP on the new District's form, rather than an amended IEP that had been developed without Parents' input. Second, it is clear that the Case Manager/ Special Education Teacher and Mother both felt rushed; handing documents to a mother in her car as she is picking up kids at school is certainly not conducive to effective communication. Third, Mother was made to feel a sense of urgency to sign the paperwork for fear that her child would not be receiving necessary special education services due to the misconception by Case Manager/Special Education Teacher that the IEP had "expired" and was no longer effective, *i.e.*, did not have to be implemented any longer. Lastly, any parent is presumably less experienced in the format or legalities of IEP paperwork than a special education professional, and Mother could not have been expected to understand what was been done with this IEP without some clear explanation. For all of these reasons, it is clear to SCO that Mother was confused and believed that School was following Student's previous IEP.
9. Case Manager/Special Education Teacher contacted Student's case manager from the previous school district on September 18, 2013 to obtain previous evaluation reports and eligibility determination.²⁵ The School team proceeded to evaluate Student, which included Social/Emotional, Communicative and Health Individual

²¹ Interview with Mother.

²² Interview with Mother and Exhibit 2.

²³ Ibid.

²⁴ Interview with Mother.

²⁵ Interview with Case Manager/Special Education Teacher and Exhibit 3.

- Assessments, as well as situational assessments gathered through observations in the school setting and academic performance on formal and informal assessments.²⁶
10. On September 24, 2013, the IEP team held an eligibility meeting and the school team's evaluation was discussed.²⁷ The IEP team did not develop a draft IEP or proceed to convene an IEP meeting, as the School team felt that Student was able to receive reasonable educational benefit from general education alone.²⁸ Parents disagreed.²⁹ Yet, rather than change Student's eligibility and "exit" Student from special education, Special Education Director decided to stop the meeting in order to gather more information from Student's previous school, reconvene within two weeks in order to determine eligibility, and continue to provide Student services from the amended IEP.³⁰
 11. On September 25, 2013 and again on September 27, 2013, Parents requested an independent educational evaluation (IEE) of the School team's evaluation.³¹ On September 27, 2013, Special Education Director agreed and on October 2, 2013 provided Parents with a list of evaluators.³² The list provided to Parents for the IEE was comprised of four different public school teams from neighboring districts, including Student's previous school team.³³ The qualifications that the BOCES required of the chosen evaluator were also provided on the list, which included the requirement that the IEE be performed by an evaluator who holds a current Colorado Department of Education (CDE) license.³⁴
 12. On October 10, 2013, Mother emailed Special Education Director with Parents' choice of a private evaluator.³⁵ On October 14, 2013, Special Education Director emailed Mother agreeing to the IEE by the private evaluator.³⁶ Special Education Director scheduled an initial appointment for November 17, 2013 with the private evaluator.³⁷ Mother could not attend at the scheduled time.³⁸ On or about

²⁶ Exhibits 1 and 2.

²⁷ Interviews with Case Manager/Special Education Teacher, Special Education Director, and Mother.

²⁸ Response and Interviews with Special Education Director, Case Manager/Special Education Teacher, and Mother.

²⁹ Interviews with Mother, Case Manager/Special Education Teacher, and Special Education Director.

³⁰ Interview with Special Education Director and Response.

³¹ Exhibit 2, Page 29 and Exhibit 1, Page 1.

³² Exhibit 1, Page 5.

³³ Ibid.

³⁴ Ibid.

³⁵ SCO notes that later that same day, Mother emailed Special Education Director to inform Special Education Director that she was aware that IEPs do not expire and that Student's IEP should be followed until a new IEP is developed.

³⁶ Exhibit 1, Page 19.

³⁷ Exhibit 1, Page 24.

November 11, 2013, after Mother called the private evaluator's office to attempt to reschedule the appointment, an assistant from the private evaluator's office informed BOCES Administrative Assistant that they should find another evaluator.³⁹

13. Mother continued to seek a private sector professional who has a current CDE license.⁴⁰ Mother found a number of qualified evaluators who were available to perform the evaluation, but none who had a current CDE license.⁴¹ Mother and Special Education Director exchanged numerous emails confirming the BOCES' requirement that IEE evaluator hold a current CDE license.⁴² SCO confirmed with Special Education Director that the BOCES requires that the evaluator must hold a current CDE license.⁴³
14. School has continued to provide services as provided on the unilaterally amended IEP, but has never either implemented Student's IEP from the previous school district or developed a new IEP for Student consistent with the IDEA's procedures.⁴⁴

CONCLUSIONS OF LAW

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

A. The BOCES violated Parents' procedural rights under the IDEA and ECEA and denied Student FAPE.

1. Parents allege that the BOCES violated their procedural rights under the IDEA and ECEA when Student's IEP was amended without parental participation or agreement and, as a result, Student was denied FAPE. SCO agrees, and further finds that the BOCES denied Student FAPE when the School failed to implement Student's IEP that was in effect when Student began the 2013-14 school year.
2. Under the IDEA, local education agencies such as the BOCES are required to provide eligible students with disabilities with a "free appropriate public education" (FAPE),

³⁸ Exhibit 1 and Interview with Mother.

³⁹ Interviews with Mother, Special Education Director, and BOCES Administrative Assistant, and Exhibit 1 and D .

⁴⁰ Interview with Mother, Special Education Director, and Exhibits 1 and D.

⁴¹ Interview with Mother.

⁴² Exhibits 1 and D, Interviews with Mother and Special Education Director.

⁴³ Interview with Special Education Director.

⁴⁴ Interview with Mother, Special Education Director, and Case Manager/Special Education Teacher.

by providing special education and related services individually tailored to meet the student's unique needs, and provided in conformity with an IEP developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. The IDEA unequivocally provides that at the beginning of each school year, a district must have an IEP in effect for each child with a disability within its jurisdiction. 34 C.F.R. § 300.323(a).

3. Student enrolled in School during the summer of 2013. Student started attending School at the beginning of the 2013-2014 school year with an IEP, dated September 7, 2012, from a previous school district in Colorado. It is unclear why School staff was unaware that Student had an IEP from the previous school district when Student began the school year, but there is no dispute that from the beginning of the school year until now, Student's IEP from the previous district has never been implemented.
4. On September 17, 2013, School received Student's IEP from the previous school district. Upon review of the IEP, Case Manager/Special Education Teacher immediately realized that the annual review date for the IEP had already passed and that a triennial determination of eligibility was imminent. While it is true that the date for Student's annual IEP review had already passed, this did not mean that Student was no longer entitled to receive special education and related services.⁴⁵ IEPs do not expire in the sense that once the annual review date has passed, they must no longer be implemented. The BOCES, therefore, was obligated to provide Student with the special education and related services listed on the IEP, and their failure to do so resulted in a denial of FAPE. 34 C.F.R. § 300.323(a).
5. Case Manager/Special Education Teacher hurriedly began collecting information to prepare an interim plan under the misconception that the transfer requirements of 34 C.F.R. § 300.323(e) were applicable.⁴⁶ Based on this mistaken application of the

⁴⁵ Curiously, both Case Manager/Special Education Teacher and Special Education Director seem to misinterpret the IDEA's requirement for an annual review to mean that if an IEP has not been reviewed in that timeframe, it is no longer in effect and need no longer be implemented. Mother, who did not understand that the interim service plan was, in actuality, different than Student's IEP, brought this to the Special Education Director's attention in at least two emails. While Mother was apparently confused about the fact that the IEP had actually been changed, she was certainly correct about the law.

⁴⁶ The IDEA expressly states that the transfer IEP provision applies to students who **enroll in a new school within the same school year**. Since Student did not enroll in School within the same school year, the IDEA's transfer provisions are not applicable to this case. The BOCES refers to the document Case Manager/Special Education Teacher prepared as an interim service plan or transfer IEP, but it was, in fact, an amended IEP. 34 C.F.R. § 300.323(e)

transfer rule, the School team actually amended the IEP, reducing the service hours provided for in Student's IEP based on their assessment of Student's current need. With regard to changes to an IEP, the IDEA is clear that an IEP cannot be amended or modified without parental participation at an IEP team meeting or upon agreement of the IEP team, including the parents, not to convene the IEP Team to modify or amend the IEP. 34 C.F.R. § 300.501(b); 34 C.F.R. §§ 300.324(a)(4) and (a)(6). In this case, Parents were not participants in the modification of Student's IEP, nor were they ever consulted. Likewise, there was never any agreement to amend the IEP without a meeting. Indeed, Parents were not even aware that the IEP had been modified until months later.

6. In the seminal *Rowley* case, the Supreme Court explained that the IDEA established a procedure that would involve full participation of all concerned parties, including parents, at every stage of the process. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176 at 205-206 (1982). The IDEA thus requires educational agencies, teachers, and parents to jointly prepare and update an "individualized educational program" ("IEP") tailored to the unique needs of the child, specifying the child's present educational performance, annual goals, required services, and criteria for evaluating progress. *Id.* at 181. The IDEA's procedural requirements for developing a student's IEP are specifically designed to provide a collaborative process that places particular importance on parental involvement. Typically, contemplation of the two prong analysis set forth in *Rowley* is necessary to determine whether the procedural violation resulted in a denial of FAPE; however, it is well-established that where, as is the case here, the procedural inadequacies seriously infringe upon the parents' opportunity to meaningfully participate in the IEP process, the result is a "per se" denial of FAPE. Accordingly, when the School team unilaterally amended Student's IEP, they violated Parents' procedural rights, resulting in a denial of FAPE.

B. The BOCES excluded Parents from the IEP process by placing unduly restrictive criteria on an IEE requested by Parents, resulting in a denial of FAPE.

7. Parents allege that since September 2013, the BOCES has failed to provide an IEE requested by Parents. For the reasons set forth below, SCO agrees.
8. Under the IDEA, parents have the right to an IEE at public expense if they disagree with an evaluation obtained by the district. 34 C.F.R. § 300.502(b)(1). The IDEA also provides that when parents request an IEE, the district must provide information

about where the parents may obtain an IEE, as well as the district criteria for IEEs. 34 C.F.R. § 300.502 (a)(2). With regard to the district criteria for an IEE, the IDEA sets forth the following:

“(1) If an independent education evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, **to the extent those criteria are consistent with the parent’s right to an independent educational evaluation.** 34 C.F.R. § 300.502(e)(1)(emphasis added).

9. In this case, the School team evaluated Student and presented and discussed their evaluation at the September 24, 2013 eligibility meeting. The evaluation included Social/Emotional, Communicative and Health Individual Assessments, as well as situational assessments gathered through observations in the school setting and academic performance on formal and informal assessments. On September 25, 2013 and again on September 27, 2013, Parents requested an IEE by a private sector evaluator. On October 2, 2013, Special Education Director provided Parents with a list of IEE evaluation teams from neighboring school districts, along with the requirement that the IEE be performed by an evaluator who had a current CDE license. The parties agreed on an IEE by a private evaluator, which ultimately did not take place. Thereafter, Parents searched for an evaluator, finding a number of qualified professionals, but were unsuccessful in finding an evaluator who held a current CDE license, as the BOCES’ required.
10. Special Education Director ignores that the IDEA regulation states that the same criteria are only applicable “to the extent those criteria are consistent with the parent’s right to an IEE.” 34 C.F.R. § 300.502(e)(1) The restriction that the examiner hold a current CDE license unduly restricted Parents’ ability to find an examiner to professionals who currently or very recently worked in a public school setting. Requiring an examiner to hold a CDE license that a professional would presumably only obtain if they were, in fact, working in the public school system is inconsistent with Parents’ right to an IEE. In fact, the federal Office of Special Education Programs (OSEP), which implements and enforces the IDEA, has specifically rejected efforts by school districts to require that “IEE examiners have ‘recent and extensive experience in the public schools’ [as] inconsistent with the parent’s right to an IEE. *Letter to Petska*, 35 IDELR 191 (September 10, 2001). This qualification may

undermine the parent's ability to obtain an independent evaluation. Accordingly, SCO finds that the CDE licensure criteria placed on this IEE is simply too narrow and, in effect, excluded Parents from the IEP process, resulting in a denial of FAPE.

REMEDIES

The SCO has concluded that the BOCES violated the following IDEA requirements:

- a) Misapplication of the transfer IEP provision, in violation of 34 C.F.R. § 300.323(e).
- b) Amendment of an IEP without parent participation or an agreement to modify the IEP without an IEP meeting, resulting in a violation of Parents' procedural rights and a denial of FAPE, in violation of 34 C.F.R. §§ 300.501(b), 300.324(a)(4), and 300.324(a)(6).
- c) Failure to provide Student with the special education and related services listed on the IEP, resulting in a denial of FAPE, in violation of 34 C.F.R. § 300.323(a).
- d) Failure to provide an Independent Educational Evaluation at public expense, in violation of 34 C.F.R. § 300.502(a).

To remedy these violations, the BOCES is ordered to take the following action:

- 1) By July 9, 2014, the BOCES must submit to the Department a proposed corrective action plan (CAP) that addresses each and every violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the BOCES is responsible. The CAP must, at a minimum, provide for the following:
 - a. Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violations, no later than August 6, 2014.
 - b. Effective training must be conducted for all Special Education Directors and intended designees (which may include Case Managers and Special Education Teachers) concerning the policies and procedures. Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department no later than August 22, 2014.
- 2) By August 1, 2014, an Independent Educational Evaluation must be conducted by a private professional of Parents' choosing who meets the BOCES criteria (not to include

the CDE licensure requirement).

3) No later than August 22, 2014, the administrative unit must convene an IEP team meeting. The IEP team meeting and the resulting decision of Eligibility and resulting IEP must be consistent with the IDEA and this Decision. In conjunction with this IEP team meeting, the BOCES shall:

- a. Include the evaluator Parents choose to perform the Independent Educational Evaluation either in person or by phone;
- b. Share and consider the results of the Independent Educational Evaluation;
- c. Include a behavioral specialist of the BOCES' choosing who has demonstrated experience in Student's disability category;
- d. If Student is found eligible for special education services, develop Student's IEP consistent with § 300.324;
- e. Supply a complete copy of the Eligibility determination and resulting IEP, including prior written notice, detailed team meeting notes and verification of items a-d to the Department within five days after the IEP team meeting and no later than August 29, 2014.

The Department will approve or request revisions of the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the BOCES' timely correction of the areas of noncompliance.

Please submit the documentation detailed above to the Department as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn: Joyce Thiessen-Barrett
1560 Broadway, Suite 1175
Denver, CO 80202-5149

NOTE: Failure by the BOCES to meet the timeline set forth above will adversely affect the BOCES' annual determination under the IDEA and subject the BOCES to enforcement action by the Department.

CONCLUSION

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) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

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

Dated this 11th day of June, 2014.

Lisa A. Weiss, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1-2

Exhibit A: Evaluation Report

Exhibit B: September 25, 2013 IEE Request

Exhibit C: Prior Notice and Consent for Reevaluation, District IEP dated September 17, 2012, Prior District Checklist, Prior District IEP dated September 7, 2012, Overview of Parent's Rights, and Notice of Meeting

Exhibit D: Emails with handwritten notes and February 7, 2014 meeting minutes

Exhibit E: January 7, 2014 letter from physician

Exhibit F: Student's Special Education records from 2007 through 2011

Exhibit G: Printed Pages with handwritten notes

Response, pages 1-11

Exhibit 1: Email correspondence, Evaluation Report, District IEP dated September 17, 2012,

Exhibit 2: District IEP dated September 17, 2012 with Comments, IEE request, Notice of Meeting, Prior

Exhibit 3: Progress Reports, email correspondence provided by Case Manager/Special Education Teacher, and notes

Exhibit 4: School admission document for Student

Exhibit 5: BOCES Procedural Safeguards, CDE IEP Process Manual, AU Comprehensive Plan, and ECEA Rules

Reply, pages 1-2

Additional Documents

Exhibit 6: Updated BOCES contact list

Interviews with:

Mother

Special Education Director

Special Education Teacher/Case Manager

General Education Teacher

BOCES Administrative Assistant