

Colorado Department of Education
Decision of the State Complaints Officer (“SCO”)
Under the Individuals with Disabilities Education Act (“IDEA”)¹

**State-Level Complaint 2017:501
Thompson School District R2-J**

DECISION

INTRODUCTION

This state-level complaint (“Complaint”) was brought against Thompson School District R2-J (“District”) by attorney Igor Raykin (“Family Attorney”) on behalf of a child (“Student”) identified as a child with a disability under the IDEA and his mother (“Mother”). The Complaint was properly filed on February 3, 2017.

The SCO determined that the Complaint raised a number of issues subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

COMPLAINT ALLEGATIONS

The Complaint raised the following issues, in summary:

1. Whether the District failed to develop an individualized education program (“IEP”) based upon Student’s individual needs, specifically Student’s social/emotional needs, since October 20, 2016;
2. Whether the District has failed to implement or comply with Student’s IEP, specifically necessary support to develop and practice social skills in the areas of engagement and empathy, since October 20, 2016;
3. Whether the District has failed to evaluate Student in all areas of suspected disability, specifically Student’s social/emotional needs, since the beginning of the 2016-17 school year.
4. Whether the District failed to assemble an appropriate IEP team, specifically to include a general education teacher, for a manifestation determination review (“MDR”) meeting held on January 25, 2017;

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

5. Whether the District failed to provide Mother with sufficient prior written notice (“PWN”) of the proposed actions to be discussed at the MDR meeting on January 25, 2017; and
6. Whether the District improperly changed Student’s placement on January 25, 2017.

Summary of Proposed Remedies. To resolve the Complaint, the following was proposed, in summary:

- District to immediately return Student to regular programming at School;
- District to conduct a functional behavior assessment (“FBA”) followed by a behavior intervention plan (“BIP”);
- Development of a new IEP to incorporate Student’s social/emotional needs;
- District to pay for all compensatory services Student will require to address social/emotional needs, particularly with respect to empathy, that District has failed to provide;
- District to pay for costs of therapy Student has had as a result of his expulsion; and
- Issuance of corrective actions against the District by the CDE to ensure compliance, to include training by an outside professional for District and School administration and staff in the general areas of IDEA and the identification of special education students.

FINDINGS OF FACT

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

Background

1. Student is a [grade level] grader with medical diagnoses of both attention deficit hyperactivity disorder (“ADHD”) and autism spectrum disorder (“ASD” or “autism”) who was found eligible for special education and related services under the IDEA as a child with a disability. Student attended School continuously, with no behavioral or disciplinary incidents, since the beginning of the 2015-16 school year until he was suspended on January 19, 2017 due to a violation of the District’s Student Code of Conduct.³
2. District’s most recent reevaluation of Student was in October 2015 and included a records review, collection of information from Parents, observations, and assessments in the areas of communication, adaptive behavior, social/emotional functioning, and transition planning. The evaluation also included assessments related to Student’s autism, including the

³ Response

Autism Diagnostic Observation Schedule (“ADOS-2”) and the Gilliam Autism Rating Scale (“GARS-3”).⁴

3. On October 29, 2015, Student’s IEP team met to review the results of the reevaluation and determine his eligibility for special education services under the IDEA. The team considered the eligibility categories of speech or language impairment, autism, and other health impairment (“OHI”), and determined Student’s eligibility only under the OHI category.⁵

October 20, 2016 IEP

4. On October 20, 2016, Student’s IEP team met for an annual review of his IEP. The present levels section of the IEP noted that both ADHD and autism continued to be current concerns. The IEP team discussed that Student had social/emotional needs which Parents worked on extensively outside of school, including working on modeling social interactions and having two sided conversations. Referring to the 2015 evaluations, the IEP team noted in the document itself that Parents shared concerns about Student’s social skills, i.e., difficulty initiating conversations with peers, difficulty understanding teasing and ridicule and predicting probable consequences in a social group or not understanding that people have different thoughts or feelings. Teachers concerns were also noted from the 2015 evaluations, i.e., lack of initiation of peer interaction and not trying hard to make friends. The IEP also specifically noted the following from the 2015 evaluation report:

“[Student] will benefit from support to develop and practice social skills in the areas of engagement and empathy. Building opportunities to connect with peers who share similar interests, communication skills for joining activities of interest, and practice with collaboration will be life-long critical skills for [Student]. In addition, helping [Student] identify when someone is upset and appropriate ways to offer support will also allow him to build critical social skills for independent living and to prepare him for post-secondary education and the work force.”

5. Despite all of the social/emotional concerns shared with the IEP team, the needs identified in Student’s IEP focused solely on academics, specifically work initiation, organization, and self-advocacy. The IEP included organization and self-advocacy goals and provided for Student to receive direct support in a study hall with a special education teacher to assist with work initiation and classwork completion, the only special education service on Student’s IEP. Student’s IEP also provided him with accommodations in all of his general education classes, i.e., use of a planner and extra time to complete tests and assignments. Student has made educational progress in terms of his advancement through the general education curriculum and with respect to the goals on his October 20, 2016 IEP.⁶

⁴ Exhibit A-1

⁵ Exhibit A-1

⁶ Exhibit A-2

January 19, 2017 Suspension

6. On January 19, 2017 Student violated District's Student Code of Conduct by making statements to other students that he wanted to hold the world record for killing others in a school shooting, referencing the Columbine school shooting. A fellow student reported the statements to the Assistant Principal. After speaking with other students and the school counselor, Assistant Principal reported the incident to a school resource officer who, together with the police, went to Student's home to ensure that he was safe and to investigate the matter since the school day had already ended. When the officers arrived at the family's home, only Mother and Student were present. Student had no idea why the officers were there for him and, while he admitted to making the comments and to related internet searches, he was stunned that anyone interpreted what he had said as a threat, explaining that it was a joke. Student and Mother both became anxious as they began to realize that Student may be in trouble and Student stopped making eye contact with the officers and became withdrawn. The officers, still concerned about Student's safety, encouraged Student to talk to a professional, to which Mother and Student agreed. Mother and Student were accompanied by the officers to Private Hospital where Student was immediately placed on a 72 hour hold for a mental health evaluation.⁷

7. The discharge summary from Private Hospital ("Discharge Summary") reveals that throughout the course of the hospitalization Student had no homicidal or suicidal ideation. It also notes that "[d]uring the initial psychiatric evaluation, Student showed significant remorse, guilt, and regret for making the statements as a joke. He was able to understand at the time of the initial psychiatric evaluation that what he reported had significant consequences, which he was unable to anticipate when he made the joke." The Discharge Summary further shared the treatment team's shared view that "[Student's] high functioning autism did interfere with his ability to understand the serious nature of the consequences of what he was saying" and that he felt "some relief at being in the hospital and being able to discuss his mistakes in group and responded well to therapy." The Discharge Summary indicates that the treatment team concluded that Student did not present any risk factors for homicide and that he was not homicidal in any way. The Discharge Summary also shared the treatment team's recommendation that "[Student's] school team revisit his IEP to consider counseling at school to discuss any sources of social support and regular individualized counseling while at school."⁸

8. Student was released from Private Hospital on January 23rd. On the same day, Assistant Principal called Mother to inform her that Student was suspended for five days⁹ and that Coordinator would contact Mother to schedule an MDR meeting. Coordinator, School

⁷ Interviews with Assistant Principal, Mother, and Father; Exhibits G and L

⁸ Exhibit G

⁹ SCO notes that there is some confusion amongst School administrators about the length of time of Student's initial suspension and that there is nothing in the documentation to provide clarification other than a letter stating that he was suspended for ten days beginning on January 19, 2017. Interviews with Principal, Mother, and Assistant Principal; Exhibit G

Psychologist, and Case Manager also met that morning to discuss the January 19th incident and to schedule an MDR meeting to determine whether it was a manifestation of Student’s disability. They decided the MDR meeting would be held on January 25th and should include Coordinator, Student, Parents, Case Manager, School Psychologist, and Assistant Principal, but none of Student’s teachers.¹⁰

9. Based on a review of the credible evidence, SCO concludes that District did not provide Parents with sufficient PWN prior to January 25th MDR meeting of the possible change of placement. Coordinator called Mother during their January 23rd meeting and recalled explaining to Mother that they had scheduled an MDR meeting to determine whether the January 19th incident was a manifestation of Student’s disability and also that it was District’s practice to conduct an MDR prior to making any decisions regarding expulsion. Coordinator also offered to provide Mother with procedural safeguards, which Mother declined. Coordinator informed Mother that she could invite anyone she would like as an advocate for Student. Mother requested that a District autism specialist be invited to the meeting.¹¹

10. Mother recalled that her understanding of the January 25th meeting at the time of the phone call was that it would be an IEP meeting to discuss services for Student to return back to school, which is why she wanted an autism specialist involved in the discussion. Following their January 23rd meeting, Case Manager emailed Mother notices of the meeting. The boxes checked on the notices indicate that an IEP meeting was scheduled for January 25, 2017 “[t]o review and update your child’s present levels of academic achievement and functional performance, needs, goals, and to develop a plan to provide special education and related services” and “Other: Manifestation Determination.”¹²

11. Mother stated that she was unaware that there was a real possibility that Student could be expelled until two hours before the MDR meeting when Assistant Principal called to tell her that Student’s suspension was being extended to ten days pending an expulsion hearing. SCO notes that at some point District did send Parents a letter notifying them that Student was suspended for ten days beginning on January 19th, however, it is unclear on what date that letter was sent or received.¹³

MDR meeting

12. The group assembled for the January 25th MDR meeting included Student, Parents, Coordinator, Case Manager, School Psychologist, Assistant Principal, and Autism Specialist. Coordinator, whose role was to facilitate the MDR discussion, gave Parents the first opportunity to present their perspective. Parents felt that the comment Student made on January 19th was obviously a manifestation of Student’s autism. They explained that Student had intended the

¹⁰ Interviews with Mother, Assistant Principal, Coordinator, Case Manager, and School Psychologist; Exhibit G

¹¹ Interviews with Mother, Coordinator, Case Manager, and School Psychologist

¹² Exhibit C-1; Interviews with Mother and Case Manager

¹³ Exhibits G and K; Interviews with Assistant Principal, Principal, and Mother

comment to be a joke and had failed to anticipate that others might not share his sense of humor or that it could even be perceived a threat. Parents explained that this is not out of the ordinary for Student, who has a dark sense of humor and sometimes does not anticipate people's reactions. They explained that they have worked with him extensively on social communication and socialization generally as it has been a consistent issue related to Student's high functioning autism. The group did not have Discharge Summary to review at the meeting, but Parents referenced the information in it for the group as further support that the January 19th incident was a manifestation of Student's autism.¹⁴

13. Autism Specialist was involved in Student's 2015 reevaluation, but did not personally know Student as she had never worked with him or consulted about him. Prior to the MDR meeting, Autism Specialist searched Student on infinite campus and briefly reviewed the 2015 evaluation report. At the meeting, Autism Specialist questioned Student about the incident and judged that he sincerely had not intended it as a threat, but as a dark joke that he later realized was not funny, and that he was beginning to realize that he may be expelled. Student never spoke again during the meeting and was not questioned by anyone else. Student's autism was discussed at length at the meeting and it was evident that Case Manager believed that Student's autism did not manifest itself the same way at school as it did at home, nevertheless, Autism Specialist pointed out that there were some indicators of autism in the 2015 evaluation report, specifically with regard to empathy. Autism Specialist also specifically noted that the evaluation report indicated that Student may need direct instruction in "feeling bad when others are sad." Autism Specialist explained to the group that in her years of experience working with teenagers with autism similar to Student, the comment Student made on January 19th could be a manifestation of his autism. She also shared her belief that he did not anticipate the reactions to the comments he made in the conversation. Autism Specialist recalled feeling uncomfortable weighing in on the MDR decision because she did not know Student and she felt her role was to serve as a resource for the group about autism, misunderstanding that Case Manager and School Psychologist both knew Student and would have had a better understanding of Student.¹⁵

14. Case Manager had been Student's special education case manager since he started at School in 2015, but never worked directly with him and explained that her involvement with Student was limited to "facilitating" with his teachers and "checking in with him" briefly once or twice a month to make sure he was doing okay. Prior to the meeting, Case Manager went through the October 2015 evaluation report, searched for discipline referrals, reviewed Student's grades and attendance on infinite campus, reviewed her emails, and spoke with Student's math teacher and Teacher, who both reported having no concerns about Student. Case Manager confirmed that at IEP meetings Mother has consistently discussed all of Student's challenges, including executive functioning, as related to Student's autism. Parents

¹⁴ Exhibits C-1 and G; Interviews with Mother, Father, Case Manager, Autism Specialist, School Psychologist, Assistant Principal, and Coordinator

¹⁵ Interviews with Autism Specialist, Coordinator, Case Manager, Mother, Father, School Psychologist, and Assistant Principal; Exhibit C-1

have also consistently shared that they worked with Student often outside of school on social skills, i.e., how to have a conversation with someone, how to make friends, taking an interest in what other people do. Case Manager also explained that when considering Student's eligibility in October 2015 and during IEP meetings, they discussed that Student did display some behaviors related to autism, but that they did not manifest in the school setting as impacting his success in general education classes. Case Manager explained that none of his teachers had ever shared any concerns about Student's behavior with her and, moreover, Student's eligibility and resulting IEPs were all related to executive functioning, which she had attributed to Student's ADHD. Case Manager did not feel that based on the description of the disability under which Student qualified (OHI) the January 19th misconduct was a manifestation.¹⁶

15. Assistant Principal recalled that there was a great deal of discussion about empathy at the meeting and believed that Parents really know Student well and know what they are doing with him and that Case Manager knew Student the best out of all of the professionals at the meeting. She also stated that Assistant Principal explained that she viewed Student as a "kid that just made a mistake." Like Autism Specialist, Assistant Principal explained that she did not feel comfortable weighing in on the MDR decision because she did not know Student.¹⁷

16. School Psychologist prepared for the MDR meeting by reviewing Student's special education file and the 2015 evaluation report, searching for disciplinary referrals, and reviewing his attendance and grades on infinite campus. School Psychologist opined that, based only on the data, there was no correlation between the incident on January 19th and Student's OHI disability. School Psychologist also did not know Student.¹⁸

17. Coordinator determined that the consensus of the group was that the January 19th behavioral incident was not a manifestation of Student's OHI disability. Parents disagreed and felt that it was a manifestation of Student's autism. The team agreed to set a meeting for January 31st to discuss possible changes to Student's IEP pending the outcome of the expulsion hearing on February 1st.¹⁹

18. Principal notified Parents by letter, dated January 26, 2017, that Student had been suspended ten days, that an expulsion was being recommended, and that an expulsion hearing was scheduled on February 1st. On January 27th, Case Manager emailed Mother notices of the January 31st meeting. The boxes checked on the notices themselves indicate that an IEP meeting was scheduled for January 31, 2017 "[t]o review and update your child's present levels of academic achievement and functional performance, needs, goals, and to develop a plan to provide special education and related services", "Other: IEP review and possible placement

¹⁶ Exhibit C-1; Interviews with Autism Specialist, Mother, Father, Coordinator, Assistant Principal, and School Psychologist

¹⁷ Interview with Assistant Principal

¹⁸ Interview with School Psychologist, Case Manager, Coordinator, Mother, Father, and Autism Specialist

¹⁹ Interviews with Coordinator, Case Manager, Mother, Father, Assistant Principal, Autism Specialist, and School Psychologist; Exhibits C-1 and C-2

changes”, and “Transition”.²⁰

19. On January 26th, Family Attorney notified District that he had been retained by Student’s family and, in summary, set forth Parents’ challenges to the District’s compliance with disciplinary and special education processes. Subsequently, Case Manager emailed Mother new notices for the January 31st meeting that included “Manifestation Review” under the IEP section and added “School District Attorney” to the attendance list. On January 30th, Mother emailed Coordinator Discharge Summary and requested that Autism Specialist attend the January 31st meeting.²¹

20. SCO concludes, based on a thorough review of the credible record, that the January 31st meeting was an IEP meeting and that the IEP team did not reconsider the MDR decision made on January 25th. The group that assembled for the January 31st meeting were Parents, Student, Family Attorney, District’s attorney, Coordinator, Autism Specialist, Principal, Assistant Principal, School Psychologist, Case Manager, and Teacher. The Discharge Summary was shared with the group at the meeting. Family Attorney questioned members of the MDR team about their decision and the 2015 evaluation. Because they did not yet know whether Student would be expelled, the team discussed plans in the event that Student returned to School and in the event that he was expelled. The team also agreed to Parents’ request for District to conduct another evaluation to gain more data in the following areas: cognitive, social emotional, communication, a functional behavior assessment, and executive functioning and obtained their consent at the meeting.²²

21. The expulsion hearing was held on February 1, 2017. Parents were notified by letter, dated February 2, 2017, that the School’s request to expel Student had been approved and that Student was expelled through the end of the 2016-17 school year (May 26, 2017).²³

22. On February 3rd Case Manager provided Mother with PWN regarding the change of placement. Since his expulsion, Student has accessed the general education curriculum through Online School with special education services provided by a homebound teacher for 60 minutes three times a week under the direction of a special education teacher. In addition, District is currently in the process of reevaluating Student.²⁴

²⁰ Exhibits G and C-2; Interviews with Case Manager and Principal

²¹ Interviews with Mother, Father, Case Manager, and Coordinator; Exhibits G and N

²² Interviews with Principal, Coordinator, Autism Specialist, Assistant Principal, School Psychologist, Case Manager, Teacher, Mother, and Father; Exhibit C-2

²³ Exhibit G

²⁴ Exhibit C-2; Interviews with Mother, Father, Director, Coordinator, and Case Manager

CONCLUSIONS OF LAW

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

Allegations 1, 2, and 3

1. Regarding Student's October 2016 IEP, Mother alleges that District failed to develop the IEP based upon Student's individual needs; that District failed to implement or comply with the IEP; and that District failed to evaluate Student in all areas of suspected disability. Specifically, Mother alleges that the October 2016 IEP focused strictly on academics and executive functioning while ignoring Student's social/emotional needs. District argues that the October 2016 IEP team did not identify any social/emotional needs that impacted Student's access to the general education curriculum, and thus, did not need to be addressed through goals, services, or accommodations.

2. Under the IDEA, public school districts are required to provide children with disabilities with a "free appropriate public education" (or FAPE) by providing special education and related services individually tailored to meet the student's unique needs, and provided in conformity with an individualized education program (or IEP) that is developed according to the IDEA's procedures. 20 U.S.C. § 1401(9); 23 C.F.R. § 300.17; ECEA Rule 2.19. The IDEA's extensive procedural requirements relate to the development of the IEP, including the requirements that it be developed by a team of individuals with knowledge about the child and that it be based upon the input of the IEP meeting participants as well as evaluative data derived from valid, scientifically based assessments conducted in accordance with the IDEA's requirements. *See, e.g.*, 34 C.F.R. §§ 300.301-300.304 and 300.320-300.324. With the intention of developing an IEP that is tailored to the unique needs of the child, the IDEA places particular emphasis on collaboration among parents and school districts, requiring that parents be afforded the opportunity to participate and that their participation be meaningful, including giving careful consideration to their concerns about their child. 34 C.F.R. §§ 300.321 (a)(1), 300.322, and 300.324(a)(ii).

3. In the formative case of *Board of Education v. Rowley*, the United States Supreme Court stressed the importance of compliance with the IDEA's procedural requirements.

"[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g. 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrate[s] the legislative conviction that adequate compliance with the procedures prescribed would

in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.”

Board of Education v. Rowley, 458 U.S. 176, 205-206 (1982).

4. Among the procedural requirements for the development of IEPs is the requirement that school districts consider parental suggestions and requests and to the extent appropriate, to incorporate them into the IEP. 34 C.F.R. § 300.501(b); *O’Toole v. Olathe Dist. Schools*, 144 F.3d 692, 107 (10th Cir. 1998). A school district is said to have impermissibly “predetermined” a child’s placement if it makes its determination prior to the IEP meeting. *R.L. v. Miami-Dade County Sch. Bd.*, 757 F.3d 1173 (11th Cir. 2014)(school district personnel cannot come into an IEP meeting with closed minds, having already decided material aspects of the child’s educational program without parental input); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004); *Ms. S. ex. rel. G. v. Vashon Island School Dist.*, 337 F.3d 1115, 1131 (9th Cir. State Complaint Decision 2014:516 Page 22 2003)(superseded on other grounds, 341 F.3d 1052(9th Cir. 2003)). Predetermination of placement deprives the child’s parents of meaningful participation in the IEP process, and amounts to a per se denial of FAPE. *Deal, supra*.

5. In *Andrew F. v. Douglas County School Dis. RE-1* the United States Supreme Court further clarified the substantive standard in the development of an IEP by drawing upon the very purpose of the IDEA, which is a focus on the particular child. The *Andrew F.* court held that “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate *in light of the child’s circumstances.*” *Andrew F. v. Douglas County School Dis. RE-1*, 69 IDELR 174 (U.S. 2017)(emphasis added). The law is unequivocal in requiring that a school district develop an IEP that is based upon each child’s individual needs. Moreover, it is well-settled that the unique needs of a student with a disability encompass more than a mastery of academic subjects, rather, unique needs are broadly construed to include academic, social, health, emotional, physical, and vocational needs, all relating to the provision of education services. *See County of San Diego v. California Special Educ. Hearing Office*, 24 IDELR 756 (9TH Cir. 1996).

6. There is no dispute in this case that Student’s academic needs were discussed at the October 20, 2016 IEP meeting and that the goals related to these needs were appropriately developed, rather, Mother’s allegation is that Student’s social/emotional needs were ignored. SCO agrees. It is evident that, based on flawed reasoning and a misunderstanding of the regulations, School and District team members believed that because Student was not found to be eligible under the autism label, his unique needs that they attribute to autism were not to be considered in the development of his IEP.

7. The category under which Student was determined eligible was OHI, which is defined in the regulations as “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment” due to a chronic or acute health problem, *including but not limited* to asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes,

epilepsy, a heart condition,, leukemia, kidney disease, sickle cell anemia or Tourette syndrome. ECEA Rule 2.08(7)(a)-(c)(emphasis added); 34 C.F.R. §300.8(c)(9). District asserts that its basis for determining Student's eligibility under OHI was based on ADHD, but not autism. District bolsters its argument with the fact that executive functioning has continuously been Student's identified area of need, despite the fact that children with autism frequently face the same challenges with executive functioning. SCO finds District's reasoning and interpretation of the regulations to be flawed. The eligibility team was not charged with determining whether Student had autism, the same way they were not charged with determining whether Student had ADHD. There is no dispute that Student is a child who has both diagnoses and that a discussion about Student within the special education processes must be focused on his unique needs. Whether those needs are attributable to ADHD or to autism is completely irrelevant. District, and certainly the October 2016 IEP team, understood that Student was a child with both autism and ADHD, that both of these diagnoses could factor into his overall profile, and they had sufficient information available regarding his challenges in the area of social skills. Despite all of this, there was no discussion about addressing Student's social/emotional needs. SCO notes that the IEP team was quite small and included only Mother, Case Manager, Teacher, and a student teacher²⁵ and that, while Teacher and possibly the student teacher presumably had more contact with Student than Case Manager, Mother was the only member of the team with a real understanding of how Student's social/emotional needs affected him, yet her concerns were not given any consideration in the process. Accordingly, SCO finds that the October 20, 2016 IEP team failed to develop Student's IEP with regard to his unique needs, depriving Student of FAPE.²⁶

8. SCO next addresses Mother's allegation that the District failed to implement or comply with Student's IEP in the area of social/emotional needs. Under the IDEA, local education agencies such as the District are required to provide eligible students with disabilities with FAPE 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. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a material failure to implement an IEP can result in a denial of FAPE. *Id.*; *see also K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005); *Van Duyn v. Baker Sch. Dist.* 5J, 481 F.3d 770 (9th Cir 2007), *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003). As previously discussed, Student's social/emotional needs were not addressed in the development of his IEP. Accordingly, SCO cannot find that the District failed to implement or comply with something that does not exist.

9. Mother also alleges that District failed to evaluate Student in all areas of suspected disability since the beginning of the 2016-17 school year. District argues that, given Student's progress with the IEPs in place, there was no reason to suspect that another reevaluation was necessary. SCO agrees. The IDEA provides that a reevaluation must occur if the school district

²⁵ SCO also notes that there was no Special Education Director or Designee at the meeting, a violation of 34 C.F.R. §300.321(a).

²⁶ SCO notes that failure to develop Student's IEP with regard to his unique needs was due to Case Manager's misunderstanding regarding the limitations of the identified disability category and that, in effect, this also amounts to predetermination of Student's needs.

determines that the education or related service needs of the child warrant a reevaluation or if the child's parent or teacher requests one. 34 C.F.R. § 300.303(a). Mother concedes that Student was doing well academically, yet argues that Student's problems extended past academics into the social/emotional realm. Again, as previously discussed, Student's social/emotional needs were not addressed in the development of his IEP, however, there is no allegation that the team had insufficient information, rather, they simply failed to utilize it. There is also no dispute that Parents requested a reevaluation. Accordingly, SCO finds that District did not fail to evaluate Student. SCO further notes that the parties have agreed that District will conduct another comprehensive evaluation of Student's educational needs, which is currently in progress.

Allegations 4, 5 and 6

10. The remainder of the allegations center on the Student's suspension and MDR meeting, which ultimately led to his expulsion. Mother alleges that the District failed to provide Mother with sufficient notice of the proposed actions to be discussed at the MDR meeting; failed to assemble an appropriate team for the MDR meeting; and improperly changed Student's placement at the MDR meeting.

11. As previously discussed, the Supreme Court explained in *Rowley* that the IDEA established a procedure that would involve full participation of all concerned parties, including parents, at every stage of the process. *Rowley at 205-206*. The Notice of Meeting serves as the parents' invitation and must indicate the purpose, time, and location of the meeting, as well as who will be in attendance. The Notice of Meeting must also inform the parent that they may invite others who they believe have knowledge or special expertise regarding the child. 34 C.F.R. § 300.322(b)(1). The federal regulations also provides procedural safeguards which include the requirement that a school district must give a parent PWN a reasonable time before it proposes or refuses to change the educational placement of a child with a disability. 34 C.F.R. § 300.503(a). A change of placement due to disciplinary removals (suspensions or expulsions), triggers the requirement for PWN if a child is subjected to a removal of more than 10 consecutive school days. 34 C.F.R. § 300.536 (a)(1).

12. In the event of a disciplinary removal of a Student with a disability, the IDEA provides for specific procedures (an MDR) to ensure Student's actions were not related to their disability. An MDR is an evaluation of the student's misconduct to determine whether the misconduct was a manifestation of the child's disability and requires that

“[w]ithin 10 school days of any decision to change the placement of a child with a disability because of a violation of a student code of conduct, the LEA, the parent, and relevant members of the child's IEP Team (*as determined by the parent and the LEA*) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine-

- (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

34 C.F.R. §300.530(e)(emphasis added).

13. Mother alleges in this case that District failed to provide her with proper notice of the purpose of the January 25th meeting, specifically, the decision to suspend Student for ten days pending an expulsion hearing. District argues that the decision to suspend Student for ten days and recommend expulsion was not made until January 26th, at which point a written notice of that decision was provided. District also argues that Coordinator conferred with Mother regarding the nature and purpose of an MDR meeting in advance of the meeting.

14. District knew of the proposed change of placement, specifically, the possibility of expulsion, as early as January 19th according to Principal's letter, but certainly no later than January 23rd when they began discussing the MDR meeting. Moreover, by the District's own policy, as well as statements by witnesses, the MDR meeting was being held because Student's expulsion was a consideration. Although Coordinator discussed the January 25th meeting with Mother by phone and Coordinator believes she explained the MDR process and the District's policy of conducting an MDR pending a possible expulsion and a Notice of Meeting was emailed to Mother on January 23rd noting a Manifestation Review, it makes no other mention of a suspension or expulsion. Likewise, although District presumably mailed Parents a disciplinary letter which explained the possibility of expulsion, it is unclear when it was mailed or when it was received. Rather, Parents first learned that Student was being suspended for 10 days pending an expulsion hearing two hours prior to the MDR meeting when Assistant Principal notified her by phone. Accordingly, SCO finds that District failed to provide Mother with proper notice of the purpose of the January 25th meeting or PWN of a possible change of placement.

15. Finally, with regard to the MDR meeting and the change of placement itself, SCO concludes that, based on the totality of the record, the MDR did not include all relevant information as required by the regulations. SCO also concludes that the decision of the MDR team deprived Student of FAPE for the same reasons previously discussed concerning the development of Student's October 2016 IEP.

16. In conducting the MDR, the regulations provide that the conduct must be found to be a manifestation of the child's disability if:

- 1. The conduct in question was caused by or had a direct and substantial relationship to the child's disability; or
- 2. The conduct in question was the direct result of the [district's] failure to implement the IEP.

34 C.F.R. §300.530(e)(1).

The MDR must involve a review of "all the relevant information in the [child's] file, including the child's IEP, any teacher observations, and any relevant information provided by the parents." 34 C.F.R. §300.530(e). District's policy further provides, with regard to team members who vote at an MDR that a student's conduct is not a manifestation of their disability, that "The Team should assess the dissenting member's qualifications, knowledge of the student, level of interaction with the student, and knowledge of the disciplinary incident."²⁷

17. Mother alleges that there was no person who worked closely with Student on a daily basis, i.e., a general education teacher, and that the two District team members at the MDR meeting who worked most closely with Student and were in the best position to assess whether it was a manifestation of his disability were Case Manager and Autism Specialist. SCO agrees.

18. With regard to the decision itself at the MDR meeting, District's own policy provides that the group should assess each member's qualifications, knowledge of the student, level of interaction with the student, and knowledge of the disciplinary incident who votes that a student's conduct is not a manifestation of their disability. In this case, it is clear that only Parents could understand Student's unique social/emotional needs since those needs were being addressed only by them and not in Student's IEP. Parents disagreed with the decision that the incident was not a manifestation of his disability. SCO notes that Student was not a part of the discussion, with the exception of the questioning by Autism Specialist, who opined that the incident could have been a manifestation of his autism, but deferred to other MDR team members who she believed worked with Student and knew him well. SCO also notes that the Discharge Summary was not available for the meeting, nor was anyone at Private Hospital contacted to discuss their assessment of Student, despite the fact that the 72 hour hold was prompted by District's actions during their investigation of the disciplinary incident. Certainly that would have been important information for the team to consider. Also notable is that only two of Student's teachers or administrators, from whom the team may have gleaned some information about Student's behaviors at school, were contacted before the MDR meeting. Ultimately, the same flawed reasoning and misunderstanding of the regulations led to the determination that Student's misconduct was not a manifestation of his disability. However, SCO concludes that if the team had followed the procedures laid out in the regulations and their own policy, they would have concluded that the misconduct was a manifestation of his autism. Accordingly, SCO finds that District violated Student's right to FAPE by determining that his conduct was not a manifestation of his disability and changing his placement.

²⁷ See Exhibit I.

REMEDIES

The SCO has concluded that the District committed the following violations of IDEA:

- a. Failure to develop an IEP according to the unique needs of a child with a disability (34 C.F.R. §300.321);
- b. Failure to provide parents with sufficient notice of the purpose of a meeting (34 C.F.R. 300.322(b)(1));
- c. Failure to provide parents PWN a reasonable time before it proposes to change the educational placement of a child with a disability due to a disciplinary action (34 C.F.R. §§300.503(a) and 300.536(a)(1)); and
- d. Failure to conduct an MDR in accordance with 34 C.F.R. §300.530(e).

To remedy these violations, the District is ordered to take the following actions:

1. By May 1, 2017, the District 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 District 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 violation, no later than June 5, 2017.
 - b. Effective training must be conducted for all School administrators, special education case managers, and District coordinators concerning the policies and procedures, to be provided no later than August 4, 2017.
 - c. 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 18, 2017.
2. Immediate reinstatement of Student to School and implementation of the IEP developed on January 31, 2017. Once the reevaluation that is already in process is complete, the IEP team will reconvene within two weeks to review and revise Student's IEP, as necessary, to address his social/emotional needs. The IEP team must include an autism specialist. The IEP team must also discuss a plan for compensatory services to address any deficiencies that is consistent with its consideration of Student's present levels and needs related to his social/emotional needs and the absence of services related to those needs from October 20, 2016 until the date of this decision.

- a. These compensatory services shall be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory education services will be provided, with special consideration to Student's needs, stamina, cooperation, and schedule.
 - b. A complete copy of any new IEP developed for Student, including a plan for compensatory services, and PWN, as well as the evaluation report shall be provided to the Department within five days after the IEP meetings occur or consent form is provided.
3. Removal of the expulsion from Student's permanent record.

The Department will approve or request revisions of the CAP. Subsequent to the approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely compliance with this Decision. Please submit the documentation detailed above to the Department as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn: Gail Lott
1560 Broadway, Suite 1100
Denver, CO 80202-5149

Failure by the District to meet the timelines set forth above will adversely affect the District's annual determination under the IDEA and will subject the District 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.

This 4th day of April, 2017.

Lisa A. Weiss, Esq.
State Complaints Officer

APPENDIX

Complaint, dated January 30, 2017, pages 1-9

- Exhibit 1: SSIS Report (10/28/15)
- Exhibit 2: IEP (10/20/16)
- Exhibit 3: Notice of Meeting (1/23/17)
- Exhibit 4: Discharge Summary (1/27/17)
- Exhibit 5: CDE ESSU Technical Assistant document regarding Autism Spectrum Disorder (February 2015)

Reply, dated March 6, 2017, pages 1-10

Response, dated February 23, 2017, pages 1-13

- Exhibit A1: IEP (10/29/15); Eligibility Determination documentation (10/29/15 and 12/2/15); Evaluation Report (10/29/15); Prior Written Notice (10/29/15); Notice of Meeting (10/19/15); Prior Written Notice and Consent for Evaluation (9/16/15)
- Exhibit A2: IEP and handwritten Meeting Notes (10/20/16); Notices of Meeting (10/5/16)
- Exhibit C1: Manifestation Determination Review documentation (1/25/17); Meeting Notes (1/25/17); Notices of Meeting (1/23/17)
- Exhibit C2: Prior Written Notice (2/3/17); Meeting Notes, provision of Procedural Safeguards, and IEP Participants page (1/31/17); Prior Written Notice and Consent for Evaluation 1/31/17); Request to Release or Secure Confidential Information from Private Hospital (1/31/17); Notices of Meeting (1/27/17)
- Exhibit F: Official School Transcript (2/16/17); Progress Reports (10/25/15 and 2/21/17)
- Exhibit G: Correspondence; email correspondence; Notices of Meetings (1/23/17 and 1/27/17); Discharge Summary (1/26/17)
- Exhibit I: Power point presentation titled "Manifestation Determination: IDEA 2004"
- Exhibit K: Behavior Detail Report (1/25/17); Police Report (1/20/17)
- Exhibit L: Discharge Summary (1/27/17)
- Exhibit M: Proof of Delivery
- Exhibit N: Email correspondence requested by SCO

Interviews with:

Mother
Father
Evaluator
Executive Director
Autism Specialist
Coordinator
Principal
Assistant Principal
Teacher
Case Manager

School Psychologist
Study Hall Teacher