

**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 2017:502  
Harrison School District Two**

**DECISION**

**INTRODUCTION**

This state-level complaint (“Complaint”) was properly filed on February 10, 2017 by his mother (“Mother”) and Father (“Father”) of a child (“Student”) who was identified as a child with a disability(ies) under the Individuals with Disabilities Education Act (IDEA.)<sup>1</sup>. Parents bring this Complaint against Harrison School District Two (School District).

Based on the written Complaint, dated February 10, 2016, the State Complaints Officer (SCO) determined that the Complaint allegations identified sixteen 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.<sup>2</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**COMPLAINT ALLEGATIONS**

Parents’ Complaint raised the following issues:

Whether, in IEP meetings held and decisions made regarding Student’s educational programming between February 19, 2016 and December 14, 2016, the School District violated Student’s and Parents’ rights under the IDEA and denied Student a free appropriate public education (FAPE) by:

- 1) denying Parents their right to meaningful participation in the development of Student’s individualized education program (IEP), including limiting their ability to ask questions and have those questions answered in IEP meetings, failing to consider parental concerns and input relevant to the IEP, making a final placement decision outside of the IEP meeting, and failing to provide Parents with sufficient information regarding the School District’s offer of placement to allow Parents to understand what was being proposed;
- 2) predetermining Student’s placement, including deciding that Student would be removed from Private School in advance of and outside of the IEP process, determining placement pursuant to a School District policy disfavoring “out of district” placements, and determining Student’s placement based upon where the School District preferred to offer related services;

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<sup>1</sup> 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.

<sup>2</sup> 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).

- 3) convening IEP meetings without required members of the IEP team, including at least one special education teacher or provider of the child, by failing to ensure the attendance and participation of at least one of Student's teachers from Private School;
- 4) failing to consider or accurately and appropriately describe Student's present levels of performance and functioning in the IEP;
- 5) failing to develop appropriate IEP goals for student based upon Student's individualized abilities and needs;
- 6) failing to offer Student FAPE in the least restrict environment (LRE);
- 7) failing to conduct Student's reevaluation, including the functional behavioral assessment (FBA), consistent with the IDEA's requirements governing evaluations;
- 8) failing to respond appropriately to Parents' request for an evaluation in April 2016, including failing to provide proper prior written notice (PWN) in response to that request;
- 9) failing to respond appropriately to Parents' request for an independent educational evaluation;
- 10) amending related services in Student's IEP, including Student's transportation services, without input from Parents and without providing PWN;
- 11) refusing parental requests to convene IEP meetings without providing PWN;
- 12) offering a new IEP/placement in December 2016 without providing Parents with proper PWN;
- 13) failing to properly excuse members of the IEP team at the IEP meeting in December 2016;
- 14) failing to provide Parents with a proper notice of meeting in advance of the IEP meetings, and including individuals in IEP meetings who were not identified on notices of meetings;
- 15) failing to allow Parents access to student's educational records;
- 16) refusing to amend Student's education records and then failing to notify Parents of their right to a hearing to challenge that refusal.

**Summary of Proposed Remedies.** To resolve the Complaint, Parents proposes:

- Student continue to receive FAPE in his LRE at Private School;
- District conduct an IEE;
- Training for the Staff in the area of evaluations in order to more accurately assess children with ASD;
- Training for the staff so that they can develop an accurate record keeping system including but not limited to the destruction of records and the parent's ability to access their children's educational records;
- Any out of pocket expenses that the family has in tuition for the unilateral placement of Student at Private School;
- Compensatory time for the missed instruction for the period that transportation was miscalculated;

- Copy of all records from incomplete CORA, District furnishes a video camera so there is no confusion as to what is being given;
- District waives all rights to file due process for IEE because they did not do so timely; and
- Funding for the District for them to properly implement FAPE for all children in the District;

### **FINDINGS OF FACT**

After a thorough and careful analysis of the entire record, including listening to the recording of Student’s IEP meetings as well as interviews with witnesses knowledgeable about the fact of the case, the SCO makes the following FINDINGS:

#### **Background**

1. At all times relevant to the Complaint, Student has lived with Parents within the boundaries of the District and has attended Private School since he was a preschooler. He is identified as a student with Autism Spectrum Disorder (ASD) eligible for special education and related services.<sup>3</sup>
2. Private School is a school specializing in working with students with autism. Student was initially enrolled in Private School by Mother in January 2011. The School District continued his placement in Private School due to the severity of his behaviors and because District could not meet his educational needs. Private School is responsible for implementing District’s IEP, at the School District’s expense, since that time.<sup>4</sup>
3. Private School uses the Skills Curriculum through the Center for Autism and Related Disorders Curriculum. It focuses on 8 skill areas including academics, play, adaptive skills, cognition, executive function, language, motor, and social skills in every activity and piece of instruction. The Skills curriculum assesses all skill areas and breaks them down into smaller, teachable steps. The program is individualized for each student.<sup>5</sup>
4. By all accounts, Student has been successful in this program and has made significant progress behaviorally. As for Student’s academic progress, the Parents and Private School believe that Student has made progress as evidenced by his meeting some of his IEP goals and making significant progress towards meeting others. The School District on the other hand, believes that Student is significantly behind academically and that Private School does not offer a meaningful academic program.<sup>6</sup>

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<sup>3</sup> Interview with Mother and Private School Coordinator.

<sup>4</sup> Interview with Mother, Private School Coordinator and Private School Teacher 2, Special Education Director 2

<sup>5</sup> Interview with Mother, Private School Coordinator and Private School Teacher; Ex. 3.

<sup>6</sup> Interviews Mother, Private School Coordinator, Advocate 1, Advocate 2, Special Education Director 2, School Psychologist 1 and School S.W.,

5. The issues involved in this case are not new to the parties or to the state complaint process. This family, along with three other Students attending Private School, filed a state complaint in 2014 successfully challenging the School District's proposed change from Private School to School District placements. In her decision, as it relates to Student, the SCO found that School District predetermined to move Student out of Private School and into a public school placement, thereby denying his Parents meaningful participation in the IEP process and failing to develop IEPs based upon the Student's individual needs; the School District violated the Student's right to Prior Written Notice regarding the decision to discontinue Student's placement at Private School; School District violated the IDEA's requirement to provide a FAPE to Student to the extent that it did not fully fund their placements at Private School during the 2013-2014 school year; School District violated the ECEA by significantly changing the Students' placement without considering reevaluation.<sup>7</sup>
6. As a result, there is much mistrust, defensiveness and skepticism among the parties and about the process. Throughout this investigation, the SCO finds that this distrust has detracted from the focus being on the Student and impacted the IEP's team ability to create an individualized educational plan that will meet Student's needs in a timely matter. The SCO finds that all parties, including District, Private School and Parent share the responsibility for continued tension.

#### Transportation

7. In January 2016, Mother communicated with the District requesting an IEP meeting to discuss concerns regarding implementation of Student's IEP, concerns regarding the safety vest.<sup>8</sup> Student was required to use when transported to and from school,<sup>9</sup> and to address lines of communication. Despite numerous communications (primarily via e-mails between Mother and District), an IEP meeting<sup>10</sup> was not scheduled until April 11, 2016. The School District did not invite anyone from Private School and they did not attend.<sup>11</sup>
8. A few weeks later, the April 2016 "Transportation" IEP meeting was convened to specifically address transportation issues and concerns. Mother renewed a request she had made at the May 2015 IEP meeting<sup>12</sup>, specifically that District consider allowing Student to ride the bus without the use of a safety vest.<sup>13</sup> She produced documentation demonstrating that, in her opinion, Student's behaviors on the bus had improved to the degree he no longer required

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<sup>7</sup> State Complaint 2014:516

<sup>8</sup> Mother referred to a "harness" in much of her documentation. The Transportation Director clarified that the term they use is safety vest. Throughout the decision, either term will be referencing the same system.

<sup>9</sup> During the May 2015 IEP, Mother requested Student not be required to wear a safety restraint. Pursuant to the May 2015 IEP, the Special Education Director was going to follow-up on this request. It does not appear that District followed through and Student continued being obligated to wear the "harness" or safety restraint.

<sup>10</sup> The School District's attorney recommended convening an IEP amendment meeting to discuss the transportation issue.

<sup>11</sup> Exhibit 6, 9, 34 and J.

<sup>12</sup> Exhibit 59

<sup>13</sup> At the May 2015 IEP meeting, District Director 1 agreed to follow-up on the request.

the safety vest.<sup>14</sup> Director of Transportation and his staff voiced their reluctance to remove the requirement to wear the safety vest due to safety concerns. At the meeting, the parties agreed that School SW would conduct an “evaluation”<sup>15</sup> on the bus in order to assess Student’s behaviors. The parties discussed performing this as part of the Functional Behavioral Assessment conducted in conjunction with the reevaluation. However, the IEP team acknowledged that it would not be completed in time for the eligibility meeting scheduled for April 19, 2016.<sup>16</sup> Unexpectedly, the School SW went on maternity leave earlier than planned and the completion of this evaluation was not completed nor was it delegated to anyone else. The SCO finds that the District intended to evaluate Student’s behavior on the bus to be included with the FBA and failed to do so.<sup>17</sup>

9. Approximately four months later, in August and without Mother’s knowledge, transportation personnel gathered observation data over a one-week period and decided that Student no longer needed to wear the safety vest when riding the bus. The safety vest issue was addressed at the September 2016 IEP meeting. While Mother was ultimately in agreement with this decision, she voiced her frustration that she had requested this type of observation at the April meeting and was denied. The SCO finds that the School District failed to address Mother’s concern as it pertains to the safety vest for well over a year concerning given that Student was in the most restrictive restraint and it may not have been necessary. Additionally, she requested the team develop a behavioral plan to support Student as he transitions to wearing no restraint in order to ensure success and safety on the bus. Again, Mother’s request was denied.<sup>18</sup> The SCO finds that the observation by the School District in August did not fulfill the School District’s obligation to complete the agreed upon evaluation and they did not provide a PWN memorializing this risk.

#### Re-evaluation

10. In February 2016, around the same time period as the discussions pertaining to the transportation issue, the School District convened a pre-evaluation meeting to identify the areas to be evaluated in anticipation of Student’s triennial evaluation. In attendance were District Coordinator, Mother, School OT1, School Psychologist 1, School SW, School Special Education Teacher, School Principal, School SPL 1 and School SPL 2. Mother and her advocates were in agreement with the School District’s plan. The School District did not invite anyone from Private School to this meeting and they did not attend.<sup>19</sup>

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<sup>14</sup> Exhibit 38

<sup>15</sup> There is some disagreement as to whether the term “evaluation” was correctly used. While the School District questions using the term “evaluation” in this instance, it was the term used by the School District’s employee and was contemplated to be performed by School SW.

<sup>16</sup> Exhibit B and 38

<sup>17</sup> Interview with Mother, Advocate 1 and Advocate 2, School SW, School Special Education Director, Director of Transportation; Exhibit J, B. This is not memorialized in the minutes from the April 11, 2016 meeting but is evident from the recordings of the meeting.

<sup>18</sup> Interview with Mother, Advocate 1 and Advocate 2, School SW, School Special Education Director, Director of Transportation; Exhibit B, 7, 8, 37, 38.

<sup>19</sup> Exhibit 9, D, J. Interview Mother, Director 2, Private School teacher, Private School therapist.

11. Upon completion of the assessments, the School District convened Student's eligibility meeting on April 19, 2016. School Psychologist 1, School SW, School SLP 1, School SLP 2, School OT1 conducted the re-evaluation. These employees had never met or worked with Student prior to the reevaluation. While evaluations were performed at Private School and information was obtained from Private School via their completion of questionnaires and rating scales and one in person interview with the Private School Coordinator, Private School staff had minimal contact with District Staff both during and after the evaluations.<sup>20</sup>
12. School Psychologist 1 compiled the report dated April 19, 2016. The evaluations/assessments and summaries were as follows:
  1. Social Development History (Administered by School SW)
  2. Differential Ability Scales, 2<sup>nd</sup> Edition (DAS-II) (Administered by School Psychologist 1). Student's General Cognitive Ability was in the Low range. Student demonstrated a relative strength in the area of verbal reasoning though it was in the Below Average range and a relative weakness in the area of nonverbal reasoning. *The evaluator recommended interpreting the results with caution based on observations of Student during the evaluation.* (Emphasis Added)
  3. Adaptive Behavior Assessment System, 2<sup>nd</sup> Edition (ABAS-III)(Administered by School SW). Student's General Adaptive Composite was in the Low or Extremely Low range of functioning for all 3 adaptive domains (Conceptual, Social, and Practical) across both home and school environments. Based on these scores, Student is likely to have extreme difficulty engaging in play, interacting socially, initiating and maintaining friendships, and recognizing emotions. Additionally, he has a limited ability to protect his physical well-being, demonstrate caution, and follow safety rules.
  4. Oral and Written Language Scales-II (OWLS-II) (Administered by School SLP1)
  5. Goldman Fristoe Test of Articulation-II (GFTA-2) (Administered by School SLP 2) Student presents with articulation errors and an interdentalized /s/. He is 90-95% intelligible to both familiar and unfamiliar listeners. He currently exhibits a severe disorder in his articulation and phonological skills.
  6. Pragmatic Language Skills Inventory (PSLI) (Administered by School SLP 1, instruments completed by Parent and Private School). Student scored in the poor range for overall pragmatic language skills and in the average or above average range in classroom interaction.
  7. Sensory Processing Measure (SPM) (Administered by School OT). Compared to students with autism, Student scored in the typical range on each subscale of the SPM, in the main

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<sup>20</sup> Interviews with Mother, Private School Coordinator and Teacher, School Psychologist 1, School SW, School SLP 1; Exhibit N, 14

classroom setting. Compared with other students with autism, Student scored in the typical range on almost all subscales in the home setting. He scored in the elevated range on the body awareness scale, meaning at home he has increased difficulty with appropriate body awareness.

8. The Beery Buktenica Developmental Test of Visual Motor Integration – 6<sup>th</sup> Edition (Berry-VMI) (Administered by School OT). Student scored below average in each category. Specifically, his best score in visual-motor placed him in the .9<sup>th</sup> percentile and he placed in the .02<sup>nd</sup> percentile on the visual perception and motor coordination subtests, respectively.
  9. Childhood Autism Rating Scale, 2<sup>nd</sup> Edition (CARS2) (Administered by School Psychologist). Student is currently demonstrating moderate to severe symptoms characteristic of ASD. The conclusion drawn from this assessment is that Student demonstrates significant deficits in the educational environment with regard to verbal and non-verbal social communication and social interaction. Additionally, he engages in repetitive activities, resistance to environmental changes and resistance to changes in daily routine.
  10. Behavior Assessment System for Children 3<sup>rd</sup> Edition (BASC-3)(Administered by School SW). The Private School teacher assessment rated Student within the Clinically Significant range in 3 domains (Externalizing Problems, Behavioral Symptoms Index and Adaptive Skills) and within the At Risk range for Internalizing Problems. The parent assessment rated Student within the At Risk range for Adaptive Skills and Internalizing problems. Both Private School Teacher and Parent rated Student within the Clinically Significant range in the areas of Hyperactivity and Adaptability.
  11. Functional Behavioral Assessment (FBA) (Administered by School Psychologist). The FBA identified three target behaviors as the most impactful for Student’s access to the educational environment: 1) Non-Compliance, 2) Off-Task Behavior/Self Stimulatory Behavior, and 3) Physical Aggression. The hypothesis as to the function of the behavior is to avoid specific situations, requests and/or activities that are non-preferred or that he perceives to be different from his normal expectations and to avoid tasks that he perceives to be too difficult even when he has the ability to complete that task.
  12. Wechsler Individualized Achievement Test 3<sup>rd</sup> Edition (WIAT-III) (Administered by School Psychologist). Student’s performances varied between the Very Low to Low range. *The evaluator recommended results be interpreted with caution.* (Emphasis Added).
  13. Behavioral Observations (Conducted by School Psychologist).<sup>21</sup>
13. The psycho-educational report identified 5 areas where Student would benefit from intervention via special education and related services;

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<sup>21</sup>Exhibit 14; SCO wrote summaries as provided in the evaluation report.

1. Adaptive skills development
  2. Academic skills development
  3. Speech-language development
  4. Fine/visual motor development
  5. Social/emotional development.<sup>22</sup>
14. Based on those areas, the report made six recommendations
1. Intensive reading intervention
  2. Intensive math intervention
  3. Intensive writing intervention
  4. Implementing strategies to assist with sensory processing and regulation
  5. Implementing strategies to assist Student in the areas of social development and emotional regulation
  6. Implementing strategies to assist with Student's behaviors as identified in the FBA<sup>23</sup>
15. While Mother agreed with the determination that Student continued to qualify for special education and related services she had numerous questions regarding various aspects of the assessments and disagreed with the results of some evaluations as not being reflective of Student's present functioning. Specifically, Mother disputed the "accuracy" of the School District's evaluations given there were significant discrepancies between School District's findings of Student's present levels and Private School's reports.<sup>24</sup>
16. The questions and discrepancies were not and could not be addressed during the eligibility meeting because Private School staff did not attend the meeting. The School District did not invite Private School staff but indicated to Parent that she could invite them if she wanted their attendance. This position is confirmed in the School District's response. School Psychologist 1 reported that he was aware of the discrepancies and had hoped to discuss this with Private School personnel at the eligibility meeting. Since they were not in attendance he was not able to get that clarification nor did he follow-up with any further communications.<sup>25</sup>
17. As previously mentioned, Student was not parentally placed in Private School. Rather, Student attended Private School having been placed there by a School District IEP team, at public (i.e., School District) expense-in other words, Student placement at Private School constituted the School District's offer of FAPE. Thus, Private School staff, under the authority and supervision of School District, was responsible for implementing the IEP on the District's

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<sup>22</sup> Exhibit 14.

<sup>23</sup> Exhibit 14.

<sup>24</sup> Interviews with Mother, Advocate 1 and Advocate 2, School Special Education Coordinator, Exhibit 20.

<sup>25</sup> Interviews with Mother, Special Education Coordinator, School Psychologist, Advocate 1. Exhibit J, N, P and Response.

behalf, have been educating Student since 2011 and have essential information about Student’s educational needs, abilities and progress. Despite this, according to Coordinator<sup>26</sup>, it was School Special Education Director 1’s position that Private School was not a required IEP team member. This position is echoed in School District’s response “[Private School] did not attend because [Mother] chose not invite them to attend.”<sup>27</sup> SCO finds that the failure to invite teachers and service providers from Private School to the eligibility meeting tainted the validity of the evaluation results and the subsequent IEP meetings.

18. Following the eligibility meeting Mother e-mailed Coordinator requesting a separate meeting to address questions she had regarding the evaluation and she provided her availability for such a meeting.<sup>28</sup> Mother insisted that all of Student’s IEP team be available for that meeting and that for her to have “meaningful participation, a “face-face” meeting [was] imperative.”<sup>29</sup> District first attempted to schedule an IEP meeting on May 10, 2016, one of Mother’s available dates, but informed Mother that two of the IEP members who conducted the evaluations would not be available but there were others from the team that would be able to answer Mother’s questions. Mother requested the meeting be scheduled for a time when all team members were present in order for the meeting to be meaningful. District scheduled the IEP meeting for May 19, 2016, the date Student’s IEP was due. District notified Mother that School SW would still be unavailable as she was on maternity leave but that School Psychologist 1 would be there to answer any questions. While it is understandable that Mother would want everyone who conducted the evaluations together to ask questions, the SCO finds that the School Districts attempts to coordinate a meeting with the requested individuals or find alternative means to get Mother’s questions answered were appropriate and responsive.<sup>30</sup>
19. The first of four IEP team meetings was held on May 19, 2016 and was facilitated by a district employee (Facilitator 1) not associated with the Student or any of the schools.<sup>31</sup> Again, District did not invite individuals from Private School but informed Parent that she could invite them. A draft IEP was provided which had five academic goals and one speech goal. There were no goals addressing the social and behavioral needs of Student. Of those goals,

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<sup>26</sup> School Special Education Coordinator assumed the School Special Education Director 1’s position on or about September 2016.

<sup>27</sup> Interviews with Mother, Special Education Coordinator, Advocate 1 and Advocate 2.

<sup>28</sup> Mother’s availability was often limited by the availability of her child care providers.

<sup>29</sup> Exhibit 11 and 20

<sup>30</sup> Interviews with Mother, School Psychologist 1, Special Education Coordinator.

<sup>31</sup> While the use of a facilitator was contemplated in the State Complaint decision 2014:516, this was the first time District had utilized a facilitator. District provided draft IEPs either a day or so before the meeting or at the IEP meeting. *See Exhibit*

one he had mastered and two had no baseline data. <sup>32</sup> At the beginning of the meeting Mother asked why Private School staff were not invited and not considered a required IEP team member, Coordinator responded “[Private School] is providing [Student] behavioral support, they are not providing [Student] special education services.”<sup>33</sup>

20. During this meeting, Mother was able to ask questions but a considerable portion of the meeting also consisted of identifying how Mother would get her questions answered. In her complaint, Mother alleges that the discussions around how to get the questions answered was the School District’s attempt to “coerce” her to not get those questions answered. Many of Mother’s questions were in the context of how the District employees came to their conclusions and how that fit with her understanding of Student’s present levels and needs.<sup>34</sup>
21. It is clear that in the three years since Mother’s State Complaint, Mother continues to be distrustful of the School District staff and questions their motivation, especially because School District refuses to acknowledge Private School’s relevance and role in these IEP meetings. While the SCO does not believe that the School District was attempting to coerce Mother, it is apparent that School District personnel, felt that Mother was engaging in delay tactics and setting the stage to file a complaint.<sup>35</sup> In other words, the SCO finds that District perceived Mother motivation in asking these questions was for litigation purposes rather than the development of an appropriate IEP. The SCO finds that the manner in which Mother communicates with District, whether it be via e-mail or in meetings, contributes to this impression. Nevertheless, by not having Private School in attendance at these meetings, the discussions around present levels and needs was inherently flawed given the complexity of this student. The meeting concluded with numerous issues remaining to be addressed.<sup>36</sup>
22. After numerous e-mails, a follow-up IEP meeting was scheduled for June 2, 2016. This meeting was cancelled because Facilitator 1 was ill. Thereafter, Facilitator 1 was unavailable for any future IEP meetings due to a change in employment. The next IEP meeting was not scheduled until September 9, 2016 due to the time it took the School District to identify and coordinate schedules with a new facilitator and the other parties.<sup>37</sup>

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<sup>32</sup> Interviews Mother, Private School Coordinator and Teacher and Special Education Coordinator; Exhibit 11, 20, P, A2.

<sup>33</sup> See Exhibit 18. The SCO finds this statement a bit bewildering given that Student’s placement at Private School was via the School District’s 2015 IEP which requires 1650 minutes a week for special education instruction and only 300 minutes a week of behavior intervention. Essentially, the School District appears that in placing Student at Private School it was denying him FAPE.

<sup>34</sup> Interviews Mother, Advocate 1, Special Education Coordinator, School Psychologist, Facilitator 1 and School SPL 1; Exhibit N

<sup>35</sup> Interviews with SpEd Direct 2, School Psychologist 2. Exhibit P-The NOM do not list Private School, the NOM dated October 7, 2016 list Private School participants but as a parent request, NOM dated November 22, 2016 do not list Private School at all. Mother’s exhibit show that Private School was hand written on a NOM provided to her. Nevertheless, the SCO references the NOMs maintained by the school as it is unclear when and when they were utilized.

<sup>36</sup> Interviews with Mother, Facilitator 1, Special education Coordinator, School Psychologist, Advocate 1 and Advocate 2.

<sup>37</sup> Exhibit 24.

23. Discussions and a review of Student’s present levels, as well as the drafting of IEP goals spanned three meetings including the September 9, 2016 meeting. While the School District notified and invited Private School staff to all of these meetings, the SCO finds that Private School staff continued to be viewed as an ancillary participant and their input was not sought to the degree necessary to ensure Student’s present levels and needs were accurately reflected. Again, School District staff and Facilitator noted in these subsequent meetings that Private School coordinator asked for their input and they didn’t have a lot to offer. Private School states that while they were asked for their input it was difficult to give feedback because they didn’t have substantive input in the drafting of the goals and the behavioral plan. Private School Coordinator states that a few times when she tried to really engage in the conversation, she felt District Director 2 did not appear interested to really consider her input. Facilitator 2 noted that in her opinion, the school district IEP team members tried to answer Mother’s questions and avoid predetermining anything. She noted that Mother was able to meaningfully participate but often chose not to. Facilitator stated that when she started facilitating at that first meeting she did not perceive District had predetermined placement. Nevertheless, Facilitator 2 states that both parties came into that final meeting on December 13, 2016 knowing what they wanted.<sup>38</sup>
24. The section of the IEP entitled Student Needs and Impact of Disability states “[Student] displays behaviors that interfere with his learning and these are currently being targeted. These behaviors include non-compliance, elopement, whining, physical aggression, property destruction, inappropriate comments, inappropriate language and echolalia. He needs to decrease these behaviors and develop appropriate behaviors. Behaviors that are being targeted to increase include: appropriate communication, appropriate social and verbal interaction with others, appropriate communication of wants and feelings, appropriate play with peers, increased eye contact, etc. He also needs to improve academic skills such as pre-reading skills and math skills. Related skills in need of improvement include his motor and adaptive skills. Student would benefit from direct and consultative occupational therapy services, to directly support his visual-motor integration skills, as well as provide consultation regarding his independent sensory self-regulation skills. [Student] would benefit from direct and indirect speech-language therapy services to support age appropriate articulation, expressive language, and receptive language skills. If not addressed [Student’s] language and articulation deficits can impact his understanding of spoken material and the ability to be understood within the general education setting.” These are the exact same needs in the 2015 IEP with the addition of speech/language therapy services and occupational therapy services.<sup>39</sup>

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<sup>38</sup> Interviews with Mother, Special Education Director 2, School Psychologist 2, Facilitator 2, Private School Coordinator and Private School Teacher. Exhibit P-The NOM dated 8/29/2016 and 9/26/2016 does not list Private School. Similarly, NOM of dated 10/7/2016 list Private School participants but designates them as invited at parent request, NOM dated November 22, 2016 does not list Private School but lists Neutral Facilitator, Advocate 1 and Advocate 2. The December 13, 2016 meeting is where the IEP team finalized the goals and determined Student’s LRE.

<sup>39</sup> Exhibit 3 and 9

25. Initially, the draft goals did not accurately reflect Student's baseline, specifically as it pertained to academics and did not provide goals identified as a need. While the School District staff asserts that the goals and present levels had to be updated because of the length of time it took to finalize the IEP, the SCO disagrees. Beginning from the eligibility meeting held on April 19, 2016, there was a discrepancy between what the School District identified as present levels and what Private School staff and Parent identified as Student's present levels. While School District acknowledged this at the time, it also opined that if Student can't demonstrate the task during the evaluation he may not have the skill mastered. While this may be true, it is difficult to say whether there were other factors that prohibited Student from demonstrating his true abilities because the communication/collaboration between the School District and Private School staff was significantly limited.<sup>40</sup> The SCO acknowledges that this communication breakdown is not solely attributable to the School District; Mother and Private School staff<sup>41</sup> also played part in this breakdown. Regardless, the goals had to be revised.<sup>42</sup>
26. The Final 2016 IEP had a total of 12 goals as opposed to the 26 goals it had in 2015. The School District's position is that reduction in goals is due to Student mastering some of them and shifting focus based on the recent evaluation.<sup>43</sup>
27. The goals created are as follows:
1. Writing: By the end of the IEP year, when using paper with defined writing spaces, [Student] will legibly write 26/26 uppercase letters from memory, in 80% of opportunities.
  2. Writing: By the end of the IEP year, when using paper with defined writing spaces, [Student] will legibly write 26/26 lowercase letters from memory, in 80% of opportunities.
  3. Reading: By the end of the annual IEP period, [Student] will be able to increase his reading readiness skills as demonstrated by correctly isolating the initial sound when presented with verbal or written simple two and three-phoneme words. [Student] will be able to identify the sounds from 80% of the letters in the alphabet when presented in words.
  4. Mathematics: By the end of the annual IEP period, [Student] will improve his addition fluency as demonstrated by performing two-digit to single-digit addition equation without regrouping (carrying/borrowing) through the use of TouchMath or similar strategies with 80% accuracy as measured by correct problems completed in 3 out of 3 opportunities.
  5. Mathematics: By the end of the annual IEP period, [Student] will improve his subtraction fluency as demonstrated by performing subtraction computation problems with regrouping (carrying/borrowing) using TouchMath or similar strategies with 80% accuracy as measured by correct problems completed in 3 out of 3 opportunities.

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<sup>40</sup> Interview Mother, Advocate 1, Private School Coordinator, Private School Teacher, School Psychologist 2, School Social Worker, Special Education Director.

<sup>41</sup> The SCO finds Private School's complete deference to parent hinders communication with the District that has placed Student.

<sup>42</sup> Interview Private School, Mother, SpEd Director, School Psychologist 1, School Psychologist 2, School SW,

<sup>43</sup> Exhibit 3 and 9

6. Language: Given a short story, [Student] will continue to build his receptive language skills by sequencing, internecline, and answer questions with proper information/concise about the story with 80% accuracy in  $\frac{3}{4}$  consecutive sessions by the end of the IEP year.
7. Language: When given an oral or written trial, [Student] will be able to define a figurative language examples with 70% accuracy in 2 out of 3 consecutive sessions by the end of the IEP year.
8. Articulation: Given articulation therapy, [Student] will be able to produce age appropriate phonemes (speech sounds) in words and phrases with 80% accuracy in 3 out of 4 consecutive sessions by the end of the IEP year.
9. Communication: By the end of the of the IEP year, [Student] will refrain from interrupting others by exhibiting appropriate social interaction skills during instruction and assessment 4/5 opportunities in 3 out of 4 consecutive sessions.
10. Self Determination: By the end of the IEP period, [Student} will accurately label his emotions (happy, sad, frustrated, angry, excited, tired, etc. ) when presented with a scenario or when involved in an emotional situation in 80% of opportunities for three consecutive weeks as measured by teacher observation and data collection.
11. Social/Emotional Wellness: By the end of the annual IEP period, [Student] will reduce the incidents of aggression: defined as nail dig, scratch, hit with an open hand, hit with closed hand (fist), kick, pinch, bite, poke with objects, throw items at individual, and grabbing(arm/face/any part of body/clothing/etc.) towards peers and teachers to one or fewer incidents each day for the semester as measured by teacher observation and data collection.
12. Self-Determination: By the end of the annual IEP period, [Student] will reduce the incidents of non-compliance, (defined as putting face in arms, turning away, throwing, swiping, flopping to the floor, engaging in comments such as "I don't know" and "I'm not doing this" but not limited to other behaviors to delay/escape demands); to three or fewer incidents per day in the quarter with incidences lasting not more than one minute; as measured by teacher observation and data collection.<sup>44</sup>

Notably missing or incomplete are goals that address the needs identified such as increasing appropriate communication, appropriate social and verbal interaction with others, appropriate communication of wants, and appropriate play with peers and increased eye contact. In other words, what is missing are those adaptive skills identified as a need in both the evaluations and the IEPs statement of Student Needs and Impact of Disability.

28. A Behavioral Intervention Plan was also drafted. The School District SW and School Psychologist 2 report that they used Private School's BIP and also sought their input. Private School acknowledges that they received an e-mail asking for their input. However, Private School Coordinator and Private School teacher states that the documents are so different that it was difficult for them to offer feedback. SCO finds that School SW and School Psychologist 2 made minimal efforts to collaborate with Private School regarding his behavioral needs. District e-mailed requests for input on a few occasions. However, given

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<sup>44</sup> Exhibit 3

the complexity of this Student's behavioral needs and the expertise Private School has in this area, District needed to be more engaged with Private School staff.

29. The Behavioral Plan that Private School implements is very detailed and it is clear that they have an understanding of the function of Student's behaviors. While it is evident that District attempted to incorporate a significant portion of Private School's BIP, the SCO finds that the District's BIP is lacking in the specificity necessary to meet the needs for this Student. First, the District BIP identified only three target behaviors omitting a number of target behaviors for reduction including elopement, inappropriate vocals, property destruction, inappropriate comments, echolalia and mimicking. These behaviors were identified in the needs statement as behaviors that are impacting Student's education. Notably, the BIP from the prior two years more closely represented the level of detail in the target behaviors and their function than the most current one.<sup>45</sup> Additionally, District BIP does not include a main intervention<sup>46</sup> to Student's behaviors while Private School's BIP does. Furthermore and most concerning, District BIP grouped all behaviors together rather than defining a specific consequent plan for each behavior that everyone working with Student could understand and follow when problem behaviors present themselves. Lastly, the School District's BIP does not designate an individual responsible for communicating the BIP to staff or define the term "as need". The SCO finds that the BIP as written does not address positive interventions to address Student's identified behavioral issues as documented in the needs statement.<sup>47</sup>
30. Student's service delivery statement provides for 120 minutes a month of Direct Speech/Language therapy, 15 minutes a month of indirect speech/language, 120 minutes of occupational therapy and 45 minutes a quarter of indirect occupational therapy. Student was also determined eligible for Extended School Year. Specifically, he requires 'academic, behavioral, fine motor, and communication supports comparable to those provided in his typical day, during summer break.'" He also qualifies for alternate assessments.<sup>48</sup>
31. Once the goals and service delivery statement were completed, the discussion moved to the LRE for Student. Two placements were discussed-Private School and District Placement General education less than 40%. The IEP team discussed the pros and cons of the two possible placements. The SCO notes that the documentation of the pros and cons was done inconsistently often highlighting whether it was Mother (Parent in the notes), her advocates or Private School giving commentary. In only one instance did it identify that an opinion was a district employee's opinion. This practice appeared to detract from the validity of Mother's opinion.<sup>49</sup>
32. With respect to the Private School, the advantages identified in the meeting were that Student has been successful, the program breaks down skills and they can be targeted, that

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<sup>45</sup> Exhibit 3 and 9

<sup>46</sup> Also referred to as Differential Response to Other Behaviors (DRO)

<sup>47</sup> Exhibit 3

<sup>48</sup> *Id.*

<sup>49</sup> Exhibit 3 and J

it has the ability to be very individualized, the curriculum is tailored to Student, it is a program designed for students with autism, student is safe and supervised, he has access to ABA therapy and access to a BCBA therapist and [addresses] behaviors versus academics. The disadvantages are that Student is not around “typical” non-disabled children, Private School is designed for children with autism, it lacks common core standards, and there is not an SLP or OT on staff. With respect to the placement proposed by the District, the pros were that District staff are trained and supported with autism training, Student could access typical peers, he would have access to common core curriculum, he could chunk and celebrate successful interactions, there is frequent academic instruction, it is academics versus behavior, he would have a one on one paraprofessional. The disadvantages included the type of de-escalation District uses inappropriate for Student, lack of focus on executive functioning, uprooting Student could be harmful, school culture may not be ready for him, Student’s scores don’t support that he is ready to reenter mainstream, they do not have RBT with ABA to serve him and splinter skills not taught.<sup>50</sup> What is notable is that District did not have one thing to say regarding the disadvantages District school may have. A vote was taken and District employees voted for District placement and Mother, advocates and Private School voted for Private School. District placement won.<sup>51</sup>

33. In many of the interviews, District staff voiced concern that Private School provided minimal academics and this was something Student was clearly lacking and needed. District staff reported their concern regarding Private School not having licensed special education teachers on staff. Lastly, District reports that they need to educate Student in the least restrictive setting and if possible, provide Student with access to typical peers and practice social interaction that children with autism need.<sup>52</sup>
34. The argument that Private School does not provide academics seems to be an ongoing argument made in the 2014 state complaint, the more recent state complaints and the due process hearing. While the SCO is not making a determination as to whether it is providing enough academics for Student, the SCO finds that Private School contains an academic component that has been approved (maybe circuitously) in the eligibility determination and other decisions.<sup>53</sup>
35. District concluded the meeting by offering FAPE, via a PWN, to implement the IEP at Elementary School 2, where Student would participate in The Autism Program with access to the Communication and Social Development Program. The offer also included adult support consisting of a 1:1 paraprofessional, special education teacher support, speech/language

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<sup>50</sup> Exhibit 3. The SCO wrote the pros and cons as written in the IEP document.

<sup>51</sup> Exhibit 3 and J.

<sup>52</sup> Interviews with School Psychologist 1, School SW, Special Education Director 2, School Special Education Teacher, School 2 and Special Education Teacher.

<sup>53</sup> See Exhibit 14. The Determination of Eligibility Form completed on April 19, 2016 required the school to check whether the child’s performance is due to a lack of appropriate instruction in reading and math and School District checked that it was not. Furthermore, as referenced in footnote 32, Student’s May 2015 IEP requires Student receive 1650 minutes a week for special education instruction.

support and behavior support. District School's offer included 120 minutes of speech-language direct services, 120 minutes direct pull-out OT 580 minutes of academic achievement support, 580 minutes per week of social emotional support and 580 minutes per week of behavior support. There was nothing in the PWN stating when Student was to be enrolled in the district's school. However, in the final IEP, the service deliver statement identifies December 14, 2016 as the start date for Student to begin receiving services under the new IEP.<sup>54</sup>

36. The Final IEP document is 66 pages long. However, Mother's most recent parent input document is not included, specifically September 2016, November or December 2016. The parent input documents included are from May 2015, April 2016 and May 2016.<sup>55</sup> The SCO finds that, at a minimum, the most recent and relevant parent input document is not included but an out-of-date one is.
37. District sent Mother a copy of the final IEP, PWN and BIP on December 14, 2016. In that e-mail she asked Mother to provide her availability to discuss transitioning Student to Elementary School 2. On January 6, 2017, District sent out a Notice of Meeting for January 17<sup>th</sup>, 2017. District notified Mother that the team from the offered district program would be attending to assist in the transition planning. On January 7, 2017, District sent out an e-mail stating Student had to be removed from Private School by February 8, 2017. Mother responded that she rejected the IEP and the formal offer of FAPE. The meeting scheduled for January 17, 2017 was convened but when they were unable to get Mother by phone it was rescheduled. District e-mailed Mother informing her that the meeting was rescheduled for January 24, 2017 and that Student would need to begin transitioning by February 1, 2017. Again, there is no indication that District took steps to ensure the attendance of Private School staff at this "transition" meeting. While district sent e-mails to Mother informing her of the meeting, it deviated from its normal practice of actively seeking dates from Mother. Equally significant is that Mother was not as responsive to District's initial inquiry into her availability. As a result, a transition meeting occurred that had neither a parent of Student nor providers from Private School where he has been educated for 7 years.<sup>56</sup>
38. The absence of individuals who have first-hand knowledge of the student at the transition meeting is concerning. The teacher assigned to Student, at that point, had only observed Student for 30 minutes and had no communications with Private School regarding their recommendations. The para assigned to be Student's 1:1 had no real knowledge of Student or his needs, does not have autism specific training and is not currently certified in RBT.<sup>57</sup>
39. It is evident that District is striving to provide a program to meet the unique needs of children like Student diagnosed with autism. For the 2016/2017 school year, district

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<sup>54</sup> Exhibit 3

<sup>55</sup> *Id.*

<sup>56</sup> Exhibit 3, 41, 39, 46 and Exhibit K.

<sup>57</sup> Interviews with School 2 Special Education Teacher, School 2 Para, Private School Coordinator.

teachers in the TAP program and CSD program received one week of autism specific training. District has hired a BCBA to offer support. Teachers and Paras are currently in the process of getting certified in RBT. Nevertheless, the behavioral supports, structure and consistency that Private School has provided and that has benefitted Student cannot be discounted and the degree of expertise they bring to the discussion is invaluable in creating a plan for this Student.<sup>58</sup>

40. School District staff has not provided a copy of the most recent IEP and corresponding BIP. Furthermore, it has not provided any SLP services or OT services from December 14, 2017 to present.<sup>59</sup>

#### IEE

41. Mother requested an IEE at the conclusion of the November 11, 2016 meeting. Mother's letter stated "[b]ased on reviewing the reevaluation, it is not sufficiently comprehensive to identify all of [Student's] special education and related services needs. I am requesting an Independent Educational Evaluation (IEE). I am requesting The School District provides to me in writing the District's standards for independent education evaluators."<sup>60</sup> Special Education Director 2 provided Mother a "Parental Request Form For an Independent Educational Evaluation (IEE)" at the meeting. Mother asked if she had to fill it out and SpEd Director responded that she did not but it would be helpful. District provided Mother with another IEE request form and a form outlining her rights when she sent the final IEP, offer of FAPE on December 14, 2016. The SCO is not aware of any other communication that occurred between District and Mother regarding the IEE outside of IEP meetings. The Director 2 acknowledged that she did not provide a list of evaluators or the criteria and was waiting for the form to be completed by Mother. Mother acknowledges that she did not fill out the form provided by District. Both parties voiced concern that the other would misuse the information in some way. However, since District informed Mother that it was not necessary to fill out the form, the SCO finds that based on Mother's written notice requesting an IEE, District was on notice to either agree to the IEE by providing Mother with the district's standards for IEE evaluators as requested or file for a due process hearing.<sup>61</sup>

#### Excusal of IEP team member

42. The SCO notes that the District violated the IDEA's procedural requirements by not inviting and ensuring the attendance of Student's special education provider, Private School Teacher 2. As for Mother's concerns regarding other team members, the SCO notes that in the situations where team members were not available, District ensured another team member could fill that role and District ensured the absent team member was available for questions

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<sup>58</sup> Interview Special Education Director, School 2 Special Education Teacher and School Psychologist 2.

<sup>59</sup> Interview Private School Coordinator and Special Education Director.

<sup>60</sup> See Exhibit 27

<sup>61</sup> Interviews with Mother and Special Education Director. Exhibit O, K.

outside of the IEP meeting. The SCO finds that as it pertains to IEP team members, with the exception of including at least one special education teacher of the child, the IEP team was properly constituted.

#### Access to records

43. Mother began seeking copies of Student records in December 2015. Upon completion of the reevaluation, Mother sought access to the protocols associated with the assessments. Throughout this process there were two different Special Education Directors and there was some confusion as to the policy/practice for allowing parents access to the protocols. Mother was allowed access to review the protocols on two separate occasions though she was not allowed to copy them. While Mother states that this infringed on her ability to have meaningful participation, the SCO disagrees. Mother was provided access to the protocols and District employees were present to answer questions about them. While Mother would have liked additional time or access, District provided Mother with an opportunity to inspect the protocols. The SCO acknowledges that while there was some delay, Mother was able to get much of the information she needed to participate in the IEP meetings.<sup>62</sup>

#### Amending Student's Educational Records

44. Mother states that she requested District amend some of Student's records and District refused and failed to notify her of her right to a hearing to challenge that refusal. The SCO disagrees. Mother did make a number of requests to amend records. i.e. in one instance requested to note the late arrive of one of the non-required team members in one of the meeting notes. District refused but offered to attach her request to the meeting note. While District did not verbally provide information how to challenge their refusal, Mother was provided copies of the Procedural Safeguards throughout this process which informs her of her rights in this circumstance.<sup>63</sup>

#### Conclusions of Law

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

1. Under the IDEA, local education agencies (such as the School District) are required to provide eligible students with disabilities with a free appropriate public education ("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 developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. The Act contains extensive procedural requirements relating to the development of the IEP meeting, including requirements that the IEP be a written document, reviewed at

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<sup>62</sup> Interviews Mother, Special Education Director, School Psychologist 1, School Psychologist 2, Facilitator 1 and Facilitator 2; Exhibit 36, 21, 84 and 85 and 87.

<sup>63</sup> *Id.*

least annually, that it be developed by a team of individuals with knowledge about the child, including the child's parents, 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 Act's requirements. See, e.g. 34 C.F.R. §§ 300.301-304; 300.320-300.324.

2. In the seminal case of *Board of Education v. Rowley*, the United States Supreme Court highlighted the importance of compliance with the IDEA's procedural requirements, particularly given the paucity of specificity provided by the Act with respect to the substantive requirements for FAPE.

When the elaborate and highly specific procedural safeguards embodied in [20 U.S.C.] § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we 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 the procedures giving parents and guardians a large measure of participation at every stage of the administrative process... as it did upon the measurement of the resulting IEP against a substantive standard.

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

3. Any analysis of the appropriateness of an IEP must begin with the standard established by the United States Supreme Court in *Rowley v. Board of Education*, 458 U.S. 176 (1982), in which the Court set out a two-pronged analysis for determining whether an IEP has offered a FAPE. The first part of the analysis looks to whether the IEP development process complied with the IDEA's procedures; the second looks to whether the resulting IEP was reasonably calculated to confer some educational benefit upon the child. *Id.* at 207; see also *Thompson R2-J school Dist. V. Luke P.*, 540 F.3d 1143, 1148 (10<sup>th</sup> Cir. 2008). If those two questions are satisfied in the affirmative, then the IEP is appropriate under the law.
4. Under the first "prong" of *Rowley*, the analysis looks to whether the IEP was developed according to the IDEA's procedures. The IDEA's procedural requirement for developing, reviewing, and revising the IEP require a school district to timely convene an IEP with the required participants (including the child's parents) in order to review the student's progress, new evaluative information, parent concerns, etc. in order to develop a current education plan. In the development of an IEP, parents must be afforded the opportunity to attend and meaningfully participate, which includes giving consideration to their concerns about their child. 34 §§ 300. 321 (a)(1), 300.324(a)(ii) and 300.501(b). 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. Miam-Dade County Sch. Bd.*, 757 f.3d 1173 (11<sup>th</sup> 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 (6<sup>th</sup> Cir. 2004); *Ms. S. ex. Rel. G. V. Vashon Island School*

Dist., 337 F.3d 1115, 1131 (9<sup>th</sup> Cir. State Complaint Decision 2014:516 Page 22 2003)(superseded on other grounds, 341 F.3d 1052(9<sup>th</sup> Cir. 2003)). The IDEA’s procedural requirements for developing a student’s IEP are designed to provide a collaborative process that “places special emphasis on parental involvement.” *Systema v. Academy School District No. 20*, 538 F.3d 1306, 1313 (10<sup>th</sup> Cir. 2008).

5. Moreover, the law is unequivocal in requiring that a school district develop an IEP based upon each child’s individual needs, and that it make a formal, written offer of a specific placement. *Systema*, 538 F.3d at 1315-16, citing with approval, *Union School Dist. V. Smith*, 15 F.3d 1519 (9<sup>th</sup> Cir. 1994) formal, written offer of placement must be included in the IEP); *see also*, *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6<sup>th</sup> Cir. 2011); *J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672 (4<sup>th</sup> Cir. 2007)(school district violated IDEA by offering an IEP that did not specify a placement for the student).
6. In *Endrew 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 *Endrew 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.” *Endrew 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 (9<sup>th</sup> Cir. 1996).

#### Allegations 3, 4, 5, & 7 and 13

7. As discussed above, the first part of the *Rowley* analysis requires an examination of the IEP in question was developed in compliance with the IDEA’s procedures. Parent has alleged six main procedural violations in the development of Student’s IEP: 1) District convened IEP meetings without required members of the IEP team, including at least one special education or provider of the child, 2) failing to consider or accurately and appropriately describe Student’s present levels of performance and functioning in the IEP, 3) failing to develop appropriate IEP goals for Student based upon Student’s individualized abilities and needs and 4) failing to conduct Student’s reevaluation, including the functional behavioral assessment (FBA) consistent with the IDEA’s requirements governing evaluations 5) failing to properly excuse members of the IEP team at the IEP meeting in December 2016.
8. As noted above, the SCO has found that the School District violated IDEA by failing to include Private School special education teacher as a required member of the IEP team in violation of 34 C.F.R. § 300.321. Private School providers have been Student’s special education

provide since 2011. Their input was essential for eligibility meeting that laid the foundation for the subsequent meetings. The SCO found that while Private School was invited to the later meetings, District still viewed them as ancillary. This view impacted the development of an appropriate IEP as it was not based on a comprehensive understanding of Student's needs and abilities.

9. The second part of the *Rowley* analysis looks to whether, as a result of the procedural violation, the IEP is substantively inappropriate because it is not reasonably calculated to allow the student to achieve educational benefit. In this case, the SCO finds that the procedural deficiencies in the IEP process were fatal to the resulting IEP and that it was not reasonably calculated to allow Student to receive a free appropriate public education. As it stands, the goals that are present, appear to be appropriate though SCO notes that it took the culmination of the four meetings to get them drafted. However, there are needs that are identified that are not addressed by appropriate and measurable goals in violation of 34 CFR § 300.320 (a)(1)-(2). Specifically, the IEP fails to include goals addressing Student's needs around social interactions, appropriate communication of wants and other adaptive skills that are deficient and impeding his access to education. This is particularly concerning given the fact that there was a possibility of his LRE placement changing. Similarly, District's FBA was deficient in that failed to comprehensively identify the target behaviors and define the function of those behaviors. The failure of District SW to collaborate with Private School to get an understanding of Student's behavioral need resulted in inadequate BIP. Accordingly, the cumulative effect of these procedural violations resulted in a substantive violation which denied Student a FAPE.
10. The SCO finds that there was no violation as it pertains to excusing IEP team members for the December 2016 meeting.

#### Allegations 8,10, 11 & 12

11. Next, SCO turns Mother's other allegations. Mother has a number of allegations that pertain to PWNs. Mother alleges that District failed to respond to Parents' request for an evaluation in April 2016, including failing to provide proper prior written notice in response to that request. Mother also alleges that District failed to provide a prior written notice when it amended the related services that pertain to Student's transportation when it refused to convene IEP meetings and offered a new IEP /placement in December 2016 without a proper PWN.
12. The IDEA provides that before a school district proposes or refuses to initiate or change the identification, evaluation or educational placement of a child with a disability, the school district must provide the parents with "prior written notice" describing and explaining the basis for the school district's action. 24 C.F.R. § 300.503. The regulations specify the content required in the PWN, which must include an explanation of why the agency proposes or refuses to take action. 34 C.F.R. § 300.503 (b)(2)

13. Mother’s allegations as they pertain to PWNs cover a number of situations that occurred over the course of the year. Initially, Mother requested an IEP meeting to address implementation of the IEP and transportation issues. It took District approximately 3 months to schedule a meeting to address Mother’s issues. An outcome of that meeting was that District was going to conduct an evaluation based on Mother’s request. This request mirrored a request she made the year before at the May 2015 IEP. Ultimately, the evaluation did not occur and District did not provide a PWN explaining why it didn’t occur.<sup>64</sup> Approximately 7 months later, Mother’s request was granted based on informal observations and Student’s related service was modified. District did not provide a prior written notice. Accordingly, SCO finds that District failed to provide Parents with PWNs in each of these situations.
14. Next the SCO considers Mother’s allegation that the PWN provided to her with an offer of FAPE in Student’s LRE was not proper. The SCO disagrees. The PWN provides the name of the school, the programs he will participate in as well as the supports he will be getting specifically, 1:1 adult support, SLP, OT and behavior support. While District should have included a time period for the proposed change, it provided that information in an e-mail with the PWN. Accordingly, the SCO finds that Mother was given proper notice of the proposed action.

#### Allegation 9

15. 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 public agency must, without unnecessary delay, either – (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.” 34 C.F.R. § 300.502(b).
16. 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. § 300.503(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 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).
17. Mother requested an IEE. While District Director 2 provided Mother with District’s IEE Application Request form for her to complete she also had indicated that it was not

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<sup>64</sup> District staff that was charged with completing the evaluation went on maternity leave earlier than expected.

necessary to complete them in order to get the IEE.<sup>65</sup> The SCO finds that District violated Parent's right to an IEE by not providing her the criteria for an IEE evaluator as requested in writing by Mother.

#### Allegation 15 and 16

18. The IDEA provides that each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained or used by the agency ... 34 C.F.R. § 300.5134. The Act also provides that if a parent requests to amend the record and the agency refuses, the agency must inform the parent of their right to a hearing under §300.619.
19. Mother began seeking copies of Student records in December 2015. Upon completion of the reevaluation, Mother sought access to the protocols associated with the assessments. Throughout this process there were two different Special Education Directors and there was some confusion as to the policy/practice for allowing parents access to the protocols. Despite this confusion, Mother was allowed access to review the protocols on two separate occasions though she was not allowed to copy them. While Mother states that this infringed on her ability to have meaningful participation, the SCO disagrees. Mother was provided access to the protocols and District employees were present to answer questions about them. While Mother would have liked additional time or access, District provided Mother with over four hours to inspect the protocols. The SCO acknowledges that while there was some delay, Mother was able to get the information she needed to participate in the IEP meetings.

#### Allegation 14

20. The IDEA requires Districts to notify parents of meetings early enough to ensure that they will have an opportunity to attend. The District's notice to parents is not required to identify individuals who will be attending the IEP meeting by name, as long as the notice identifies individuals by position. *Letter to Livingston*, 21 IDELR 1060 (OSEP 1994).
21. Mother alleges that District did not provide her with proper notice because the NOMs listed titles and not the names of the individuals. The SCO does not find a violation as it pertains to this issue.

#### Allegation 1, 2 & 6

22. Finally, SCO considers Mother's allegations that she was denied the right to meaningfully participate, that Student's placement was predetermined and that District failed to offer Student FAPE in the LRE. As noted above, the SCO has already found that the School District's IEP was developed in violation of the IDEA's procedural requirement and, as a result, did not

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<sup>65</sup> Exhibit 25.

offer Student a free appropriate public education. Accordingly, the SCO does not need to reach the question of whether the IEP was predetermined.

### REMEDIES

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

- a. Failure to develop an IEP in accordance with the procedural requirements of the IDEA, including:
  - a) failing to convene IEP meetings without required members of the IEP team, including at least one special education or provider of the child (34 C.F.R. § 321);
  - b) failing to consider or accurately and appropriately describe Student's present levels of performance and functioning in the IEP (34 C.F.R. § 320) ;
  - c) failing to consider or accurately and appropriately describe Student's present levels of performance and functioning in the IEP (34 C.F. R. §320) ;
  - d) failing to develop appropriate IEP goals for Student based upon Student's individualized abilities and needs (34 C.F.R. §320); and
  - e) failing to conduct Student's reevaluation, specifically the functional behavioral assessment (FBA) consistent with the IDEA's requirements (34 C.F.R. 300.304 & 305) ;
- b. Failure to develop an IEP according to the unique needs of a child with a disability, including the determination of appropriate positive behavioral interventions and support and other strategies for the child. (34 C.F.R. §§ 300.321 & 300.324);
- c. Failure to provide a PWN a reasonable time before it proposed or refused to take an action. (34 C.F.R. § 503);
- d. Failure to provide Parent the criteria for IEE evaluations upon Mother's request or in the alternative request a due process hearing to demonstrate that its own evaluation of the child was appropriate. (34 C.F.R. § 502).

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

1. By no later than April 27, 2017, the School 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 violations, no later than June 13, 2017.

- a. Effective training concerning relevant policies and procedures to address the cited violations must be conducted for School administrators, special education, and School District evaluators. 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. By no later than June 12th, the School District, upon receipt of documentation, shall reimburse Parents for out-of-pocket costs they have incurred (or reimburse insurance upon appropriate documentation) for services provided by Private School.
3. The School District shall immediately resume public funding for the full costs of Student's tuition at Private School, including providing transportation to the Center.
4. The School District shall provide an IEE in all identified and suspected areas of disability. Within two weeks of the IEE's completion, **but no later than June 19<sup>th</sup>, 2017**, the School District shall convene an IEP conducted by a neutral facilitator and ensure Student's Private School teacher and a third party autism specialist is present.
5. The School District must provide compensatory services for any deficiencies as a result of this decision. 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.
6. 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 5 days after the IEP meeting occurs.

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 School 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: Fran Herbert  
1560 Broadway, Suite 1100  
Denver, Co 80202

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

Signed this 11<sup>th</sup> day of April 2017.

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Jacqueline N. Esquibel, Esq.  
State Complaint Officer

## Appendix

### Complaint Exhibits:

Complaint page 1-48

Exhibit 1: Decision from SC 2014:516

Exhibit 2: Student's Educational History

Exhibit 3: Email Correspondence, December 14, 2016, IEP, BIP, and PWN attached

Exhibit 4: Email Correspondence, April 1, 2016, School Psychologist 1 to Mother

Exhibit 5: Bus Report dated September 8, 2016

Exhibit 6: Request for IEP Mtg from Parent, January 22, 2016

Exhibit 7: Bus Reports, through 2015

Exhibit 8: Behavioral Recommendations for Bus

Exhibit 9: Email Correspondence, April 13, 2016, Lloyd to Mother regarding April 11, 2016 IEP Meeting

Exhibits 10, 12 and 13: Audio Recording of IEP Meeting on April 19, 2016

Exhibit 11: Email Correspondence, May 12, 2016, Mother to Special Education Coordinator re: Private School

Exhibit 12: See April 19, 2016 recording

Exhibit 13: See April 19, 2016 recording

Exhibit 14: Email correspondence, April 19, 2016, School Psychologist 1 to Mother

Exhibit 15: Parent input on May 19, 2016 IEP meeting

Exhibit 16: Email Correspondence, July 28, 2016 RE Scheduling IEP

Exhibit 17: Facilitator 1's Meeting Agenda for May 19, 2016

Exhibit 18/19: Audio Recording of IEP meeting on May 19, 2016

Exhibit 20: Email Correspondence, April 27, 2016, Mother requesting IEP meeting

Exhibit 21: FERPA Request, May 12, 2016

Exhibit 22: Email Correspondence, May 16, 2016, Request from parent for test data

Exhibit 23: Email Correspondence, May 26, 2016, School Psychologist 1 and Special Education Coordinator

Exhibit 24: Email Correspondence, May 19, 2016-May 23, 2016 Special Education Coordinator, Special Education Director 1 and Mother regarding scheduling IEP meeting in June

Exhibit 25: Audio Recording of November 11, 2016 IEP Meeting

Exhibit 26: Email Correspondence, December 12, 2016, Special Education Director 2 and Mother regarding November 11, 2016 IEP Meeting and Agenda for December 13, 2016 IEP Meeting

Exhibit 27: November 11, 2016, Request for IEE

Exhibit 28: School District IEE Request Form

Exhibit 29: Insufficient Progress Checklist

Exhibit 30: [Private School] Quarterly Review and Email Correspondence between Mother and Rossi dated 4/1/16. Also Parent Input

Exhibit 31: Email, December 13, 2016, Special Education Director 2 with Observation notes

Exhibit 32: Parent Input and Email RE Observations dated November 10, 2016

Exhibit 33: Emails RE FERPA Request, September 9, 2016

Exhibit 34: Emails RE May 19, 2016 meeting participants, dated May 5, 2016  
Exhibit 35: Email Correspondence, November 2016  
Exhibit 36: Emails from November 3, 2016 regarding CORA Request  
Exhibit 37: Email from Special Education Director 2 dated October 5, 2016 w/bus observations  
Exhibit 38: Parent agenda for April 11, 2016 IEP Meeting  
Exhibit 39: December 13, 2016 IEP  
Exhibit 40: Emails RE Meeting on January 17, 2017  
Exhibit 41: Notice of January 17, 2017 Meeting from Special Education Director  
Exhibit 42: Emails RE June 2, 2016 IEP Meeting attendees  
Exhibit 43: Notice of January 24, 2017 Meeting  
Exhibit 44: Emails RE Notice of Meeting for June 2, 2016 Meeting  
Exhibit 45: Emails from May 16 from School Psychologist 1  
Exhibit 46: Emails RE Meeting on January 17, 2017  
Exhibit 47: School District Mission Statement  
Exhibit 48: Roles of the Itinerant  
Exhibit 49: Email from Special Education Director 1 RE May 19, 2016 Meeting  
Exhibit 50: Email follow up to September 2016 Meeting  
Exhibit 51: Parent Input Document  
Exhibit 52/53: Parent Input Document  
Exhibit 54: Parent Input Document  
Exhibit 55: Parent Input Document  
Exhibit 56: Training Report, April 12, 16  
Exhibit 57: Audio Recording of November 11, 2016 IEP Meeting  
Exhibit 58: Audio Recording of April 11, 2016 IEP Meeting  
Exhibit 59: Emails and attachments RE PWN  
Exhibit 60: Emails RE January 17, 2017 Meeting  
Exhibit 61: Emails from December 2015 and October 11, 2016 regarding observations  
Exhibit 62: Emails from May 2014 RE change in placement  
Exhibit 63: Emails and Attachments from September 2016 RE Special Ed Policy  
Exhibit 64: Audio Recording from September 9, 2016 meeting and follow up email  
Exhibit 65: Notice of Meeting for September 30, 2016 with emails  
Exhibit 66: Notice of May 19, 2016 Meeting  
Exhibit 67: Email from Mother "rejecting" IEP, January 10, 2017  
Exhibit 68: Parent Input Document  
Exhibit 69: Graph of bus data  
Exhibit 70: Emails from March 2016 RE Transportation Request  
Exhibit 71: Email from January 22, 2016 requesting IEP meeting  
Exhibit 72: Emails from January 2, 2016 regarding transportation  
Exhibit 73: Email from January 17, 2016 from Special Education Director 1 RE Transportation Request  
Exhibit 74: Exhibit 73 with response and attachments  
Exhibit 75/76: Missing  
Exhibit 77: Emails from January 13, 2016 RE transportation

Exhibit 78: Clinical Service Quarterly Review, December 31, 2015  
Exhibit 79: Email from June 8, 2016 RE protocols  
Exhibit 80: Identical to Exhibit 79  
Exhibit 81: Email from Special Education Director 2 to Dude  
Exhibit 82: Special Education Manual  
Exhibit 83: Insufficient Progress List  
Exhibit 84: Emails from December 2016 RE CORA  
Exhibit 85: Emails from September 2016 RE CORA  
Exhibit 86: Email from Special Education Director 2  
Exhibit 87: Emails from December 2016 RE changing meeting notes  
Exhibit 88: Emails from January 2017 RE scheduling meetings  
Exhibit 89: Email from January 17, 2017 RE meeting  
Exhibit 90: Email from February 8, 2017 RE "rejection" of IEP

**Response Exhibits:**

Response pages 1-7  
Exhibit A: Transportation Request, December 12, 2017  
Exhibit B: Audio Recording, Transportation Meeting  
Exhibit C: Transition Plan  
Exhibit D: Audio file-Pre-Eval Meeting  
Exhibit E: 10-13 Observation at Center  
Exhibit F: Meeting Notes November 11, 2016  
Exhibit G: Various Emails addressing pre-meeting questions for multiple IEPs  
Exhibit H: Agenda and Parent Input for May 2016 Meeting  
Exhibit I: BIP, December 12, 2016  
Exhibit J: IEP Meeting notes, February 2016 to December 2016  
Exhibit K: Emails regarding IEE and Scheduling for January 2017  
Exhibit L: Emails from April 2016 RE FBA questionnaire  
Exhibit M: Certified mail Receipt, March 1, 2017  
Exhibit N: IEP Meeting Audio Recordings (April 19, 2016, May 19, 2016, September 9, 2016)  
Exhibit O: IEP Meeting Audio Recordings (November 11, 2016, December 13, 2016)  
Exhibit P: IDEA Documentation from May 2016 to December 2016  
Exhibit Q: Video Recordings of Meeting

**Reply:**

Reply pages 1-11

**Other Exhibits:**

Exhibit A1 – September 9, 2016 Draft IEP  
Exhibit A2 – May 19, 2016 Draft IEP

**Interviews with:**

Mother  
Advocate 1  
Advocate 2  
Private School Coordinator  
Private School Teacher 2  
Private School Operations Director  
Special Education Coordinator/Special Education Director 2  
Private School Operations Director  
Facilitator 1  
Facilitator 2  
School Psychologist 1  
School Psychologist 2  
School Special Education Teacher1  
School Special Education Teacher 2  
School 2 Special Education Teacher  
School 2 Special Education Paraprofessional  
School Special SLP 1  
School OT 2  
School Asst. Principal1  
School SW  
Director of Transportation