

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

State-Level Complaint 2017:527
Arapahoe County School District 6

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on November 3, 2017, by the mother (Mother) of a student (Student) who attends school in the Arapahoe County School District 6 (School District). Student is currently identified as an eligible child with a disability under the Individuals with Disabilities Education Act.¹

Based on the written Complaint, the State Complaints Officer (SCO) determined that the Complaint identified four allegations 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

COMPLAINT ALLEGATIONS

Whether the School District has violated the IDEA and denied Student a free appropriate public education (FAPE) by:

1. By failing to provide comparable services provided in Student's Individualized Education Program (IEP) from previous school district;
2. By failing to appropriately develop, review and revise Student's IEP based on Student's individual needs, including but not limited to addressing concerns around Student's behavior;
3. By denying Parents meaningful opportunity to participate in the development of Student's educational program, including the development of Student's IEP by

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).

- a. Developing an “interim” IEP on or about August 27, 2017 without parent participation and outside of an IEP meeting without parental consent;
 - b. Failing to properly notify Parents of the purpose of meeting held on September 27, 2017;
 - c. Developing an “interim” IEP without considering Parents’ input at the September 27, 2017 meeting;
 - d. Failing to provide a Prior Written Notice upon Student’s change of educational placement;
 - e. Developing an IEP without parent participation on October 12, 2017;
4. By failing to educate student in the Least Restrictive Environment (LRE).

FINDINGS OF FACT

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

1. Student is a [age] year-old boy who resides with his mother within the boundaries of the School District. Student is identified and served as an eligible child with a primary disability under the Developmental Delay category and a secondary disability of Speech or Language Impairment.

Student’s Enrollment in School District

2. Student currently attends Kindergarten at the elementary school (“School”), which is located within the School District’s boundaries. Mother began the enrollment process on August 11, 2017 and the process was completed on August 22, 2017.⁴ The Individual Education Program (“IEP”) in effect at the time of enrollment was developed in October 2016 (“2016 IEP”) by School District 1 where he attended preschool (“Preschool”) from August 2016 through February 2017.⁵ Student attended this program for 13.35 hours a week. Mother then briefly enrolled Student in School District 2 but he never attended any school within that district. Accordingly, the SCO finds that Student has only been enrolled in School District during the 2017-2018 School year. The SCO also

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

⁴ School District’s first day of school was August 17, 2017. Student started school on August 29, 2017.

⁵ Preschool is a fully inclusive preschool program that serves students 3-5 years of age. It uses a trans disciplinarian model which, in this case, meant there was always a special education provider in conjunction with the two general education teachers. The class size was no more than 15 students of which five students had services as outlined in an IEP. Mother states she removed him from Preschool due to Student having major dental surgery and the family moving soon thereafter.

finds that the IEP in effect at the time of his enrollment was the 2016 IEP developed by Preschool.

3. The relevant IEP, the 2016 IEP, provided the following:

i) The Needs and Impact of Disability statement (“2016 IEP Needs Statement”) provides “[Student’s] limited skills in attending and reciprocal communication and social engagement as well as motor difficulties, significantly impact his ability to gain knowledge and experiences in an age expected manner.”⁶

ii) The IEP contains five goals, consisting of one in the area of preacademics, one in the area of social/emotional wellness, two in the area of communication and one in the area of writing.⁷

iii) The 2016 IEP provides that “[Student] will receive all his specialized instruction within the classroom.” Student’s Least Restrictive Environment setting (“LRE”) is 100.00 % in the general education classroom.” The Prior Written Notice (“PWN”) stated that “[t]he team considered having [Student] attend specialized programming but this option was rejected due to the benefits of generalization and peer interactions within an integrated program.”⁸

iv) Lastly, the 2016 IEP provided:

(1) 600 minutes of direct specialized instruction a month inside the general education classroom;

(2) 120 minutes of direct speech language instruction a month;

(3) 60 minutes a month of direct occupational therapy a month; and

(4) The number of hours Student was in preschool was documented as 13.35 hours a week. The placement option selected was “[r]egular early childhood program at least 10 hours a week AND receiving sped and related services hrs in the regular EC program.”⁹

4. Mother made School aware that Student had an IEP upon his enrollment but did not provide a copy. As previously stated, Student’s enrollment was complete on August 22, 2017 and School District registrar notified School that same day. On August 25, 2017, School SLP¹⁰ made contact with Preschool, School District 1

⁶ Exhibit A, page 5.

⁷ *Id.*

⁸ *Id.* at 11 and 12.

⁹ *Id.* at 11.

¹⁰ School SLP is also the School Department Chair for Special Education thus she is the primary contact in the school setting.

and School District 2. Preschool provided Student's initial eligibility report and the 2016 IEP that same day.¹¹ Upon receipt of this information and a confirmation from Mother that Student had a diagnosis of Autism, School SLP immediately reached out to District Coordinator and inquired about the possibility of using a center-based program.¹² School SLP continued to gather additional information from Preschool, including trying to obtain end of year progress report and information regarding what the level of support Student needed. While Preschool was not able to provide a lot of documentation from the year, Preschool SLP 2, who worked briefly with Student, reported that based on her recollection Student required a great deal of support for transitions and non-preferred activities, that they tried to engage him but were okay if they didn't, and they didn't push him.¹³ As for Mother's contact with School prior to Student's attendance, Mother recalls only having two conversations with School and that there was minimal discussion regarding Student's needs or his IEP. Mother reported that the first time both she and Student met any staff member was Student's first day of school. She states that she believed Student was assigned to General Education Teacher, that he would be in the general education classroom and that nothing was said to the contrary during that first day.¹⁴ SCO finds that School SLP's initial inquiry into the possible appropriateness of the center-based program does not amount to predetermination.

2017-2018 School Year

5. Student started school on August 29, 2017, approximately one week after his enrollment was finalized. School SLP states that while School assigned Student to General Education Classroom, they planned Student's initial days as a "soft start" or a slow transition into the Kindergarten classroom with significant supports from the special education staff due to his extended absence from a school environment and starting two weeks into the school year.¹⁵ On that first day, School SLP reports that Mother brought Student to school in a stroller with a number of transition toys, Student did not respond when she attempted to engage with him, Mother advocated for a 1:1 support person, informed them that he may cry to communicate, that he may need a visual schedule and a toilet schedule, that he may run, he may push kids and he needed time to

¹¹ Exhibit F, page 12.

¹² *Id.* at page 15.

¹³ Exhibit F, page 19. Interview with Preschool SLP 2, School SLP and Mother. Preschool was unable to provide a lot of information because most of Student's teachers and providers were no longer worked there.

¹⁴ Exhibit F. Interview with Mother.

¹⁵ Special Education Director stated that School District has a thorough process, which begins after the winter break, to help determine appropriate placements for preschooler's with special education needs as they transition to kindergarten. Based on Student being new to the School District, starting almost two weeks into the school year and having not been in any formal program since March, they anticipated Student would need time to adjust.

develop trust with adults.¹⁶ Additionally, during that first day Student was observed taking things off the walls, throwing things, crying a lot, and exhibited limited language skills. While Student exhibited that he could be redirected and he was inquisitive regarding the items in the general education classroom, School SLP and General Education Teacher both noted that he seemed overwhelmed and over-stimulated by the size of the classroom and the number of items/distractions present. At this time, General Education teacher reports knowing that he may have been diagnosed with autism but was not familiar with Student's needs nor had she read Student's IEP.¹⁷

6. Based on their observation, in addition to the information obtained from Preschool and Mother, School determined that Student, at least initially, required a higher level of intervention and a different setting than what was outlined in the 2016 IEP to address needs in the areas of toileting, safety, compliance, academic readiness, social engagement and other skill sets. During those initial days, School provided adult support at all times and started and ended Student's days in the center-based classroom (also known as the Learning Lab classroom "LL classroom") in order to help with the transitions. Over the course of the next few days, School staff determined that Student continued to require more intensive services than outlined in his IEP. Even with this support, based on School report, Student was only able to manage between 5 to 15 minutes at any given time in the general education classroom. Some of the behaviors Student exhibited included running away from staff, crawling on the floor, screaming, yelling, refusing requests, throwing things and having toileting accidents that School staff suspected might be intentional. During this first week, School SLP states that she communicated with Mother on a daily basis regarding Student's day, student's needs and the interventions staff was utilizing. She additionally obtained more information on strengths and needs from Private OT. The SCO finds that School was operating under the belief that the intrastate provisions applied to this situation.¹⁸
7. Mother states she became aware that Student was not in the general education classroom by the second day. She states she went to talk to General Education Teacher and was redirected to the School SLP. She states this, along with having to pick up and drop off Student at the LL classroom, made her distrust School and believe they were trying to "seclude" Student.¹⁹ The SCO finds Mother's initial concerns and expectations reasonable in light of her understanding of Student's experience with Preschool's full inclusion program. However, the SCO finds that Preschool's full inclusion program is not typical of

¹⁶ Exhibit C page 1. Interview with Mother, School SLP, General Education Teacher and Special Education Teacher.

¹⁷ Interview School SLP, General Education Teacher and Special Education Teacher.

¹⁸ Interview with School SLP, General Education Teacher, Special Education Teacher, Private OT and Special Education Coordinator.

¹⁹ Interview with Mother and Private OT.

most early childhood education programs in that it provided significant supports, benefitted from a 5:1 student-teacher ratio and always had a special education provider in the classroom. Additionally, the SCO finds that the transition from preschool to kindergarten often results in increased expectations of Student's, increase in general education class size, increase in academic rigor and increase in the length of the academic school day.

8. On September 6, 2017, in response to a request for a meeting by Mother, School convened a meeting titled "Conference-planning." In attendance were School Principal, Mother, Father, School SLP, School OT, Special Education Coordinator, and Special Education Teacher. Notably missing was the General Education teacher. A discussion was held regarding the best supports for Student, historical information, creating a Behavior Intervention Plan, moving to a partial day and additional therapeutic behavior supports for home, among other things. The team discussed that Student was receiving center-based supports based on the information they gathered from the previous school, Mother and their observations, including noting that Student's behaviors seemed to increase in the afternoon. Special Education Teacher reports that she was very direct with Mother regarding the supports Student needed, the skills they were addressing and that the goal was to work towards Student spending more time in the general education classroom. The team, including Mother, discussed and decided that Student would benefit from a partial-day program given Student's need for a nap. The conference notes also reference that transfer paperwork and permissions would be sent with Mother. School SLP was unsure when permissions went home but states that around this time there were numerous conversations regarding the need to evaluate Student. Special Education Teacher states that based on her recollection, Mother appeared to be in agreement with School's plan and was actively engaged in the discussion. Mother states she was not in agreement with Student being removed from the general education classroom though she was initially in agreement with the partial school day.²⁰ The SCO finds, that while many of the components of an IEP existed in this meeting, this was not an IEP meeting. Furthermore, the SCO finds that while School provided significant supports to Student that surpassed what was provided in Student's 2016 IEP, School changed Student's educational setting to a more restrictive setting outside of an IEP meeting and without a Prior Written Notice. Additionally, the SCO finds that Mother was, at least initially, in agreement with Student attending Kindergarten on a partial day basis.
9. Student's partial day began September 7, 2017. The hours were from 8:10 a.m. to 11:25 a.m. amounting to approximately 16.25 hours a week.²¹ Within a

²⁰ Exhibit A, page 58. Interview with School SLP, Special Education Teacher, General Education Teacher and Mother.

²¹ The full-day Kindergarten class was approximately 35 hours and 40 minutes.

week, Mother began expressing concerns. These concerns involved the safety restraint system on the bus; that School was not following School District 1's IEP; that School might not be a good fit; that School was not being honest with her; that she had not seen Student behave in the manner described by School and that in summary, Student's behavior wasn't as severe as perceived by School (SCO summary).²²

10. Over the course of the following three weeks, from the Conference Meeting to September 27, 2017 when School held a meeting titled "Transfer Meeting," School states they planned for and provided almost continuous 1:1 support due to Student's needs and behaviors. (See FF 6 for list of behaviors). At times, due to School being short staffed, different School providers would provide that support, including Positive Behavior Support Team Member ("PBST Member"). On September 12, 2017, PBST Member reached out to the Special Education Teacher, Coordinator and others to share her "observations and to brainstorm intervention systems to support [Student]." ²³ The Special Education Team, through e-mail exchanges, meetings and conversations, continued to work to identify positive interventions to help Student engage. Among these interventions/supports included obtaining an IPAD and identifying applications Student could use, communicating with the special education team to discuss providing consistency with interventions, advocating for another paraprofessional to support the team, utilizing mats to help him for those times he needed sensory calming and or as a barrier to keep him safe, reaching out again to Preschool in an attempt to gather more information, use of visual schedules, "first, then" visual chart, allowing Student to choose reinforcers, removing reinforcer and work material if unsafe, using a visual timer to help with transitions, provide place for sensory/movement breaks, refer to visuals and verbally prompt to engage in safe behavior and developing different systems to document Student's day both for School use and to inform Mother.²⁴
11. While Student's behavior continued to be challenging, Student also made progress during this time. He complied more, could take walks around the school and was increasing his attention span. Student continued receiving the majority of his services in the LL classroom with some push-in services occurring in the general education classroom. Based on the record and credible reports by witnesses, SCO finds Student was only able to maintain between 5 to 10 minutes in the general education classroom even with 1:1 support, and at times not even that much time. The SCO finds School made significant efforts to address Student's individual needs through accommodations and interventions, especially in the area of Student's behavior. At the same time,

²² Exhibit F, page 4. Interview with Mother.

²³ Exhibit F, page 43. Interview PBST Member

²⁴ Exhibit F. Interview School SLP, Special Education Teacher, Coordinator and Mother.

the SCO notes that some of the accommodations and supports listed on the 2016 IEP, the IEP in effect, were not added to the interventions; including clear direct communication, gaining [Student's] eye contact and supporting him with gesture cues as well as environmental supports like flashing lights or songs during transitions, and use of play dough, putty or clay to help when he's upset.

12. Mother continued to express her frustration. On September 20, 2017, there were a number of e-mail exchanges not only between Mother and School but also among School staff regarding Mother's concerns. Among these concerns were that Student's IEP was not being properly implemented, there wasn't proper written notice, she wanted documentation regarding Student's unsafe behavior, and stating that Student's regression was due to being antagonized or agitated, etc. and that there were no assessments.²⁵ In addition to the e-mails, Mother and Special Education Coordinator had a telephone call during which Mother requested "documentation of behaviors...", "paperwork for what they are doing in the classroom ..." and "paperwork for the meeting with the advocate..." In response to that request, District Coordinator e-mailed Special Education Teacher that Mother no longer wants to communicate with her without her advocate and to provide her with documentation around her schedule and include incident timelines with responses.
13. That same day, the PBST Member e-mailed the team regarding wanting to conduct observations, included a back and forth log to address Mother's concerns and wanting to do some data collection but inquiring if it required consent.²⁶
14. On September 22, 2017, School sent Mother a Notice of Meeting for the "Transfer Meeting" calendared for September 27, 2017. The Transfer Meeting was held. In attendance were Private OT, Special Education Coordinator, School Psychologist, Advocate, Mother, Father, Principal, Occupational Therapist, Special Education Teacher and School SLP. Again, General Education teacher was not present. The meeting was intended to provide a description of Student's day, his behaviors, progress and the supports provided including accommodations. School team discussed their proposal, which consisted of Student being in a center-based program with significant support. By all accounts, the meeting was very tense. One School Staff member reports that Mother was yelling at them, was hostile and accusatory and would not allow others to speak. Mother walked out of the meeting before it was finished. She later returned after talking with Advocate. All agreed that the meeting should be discontinued to give Mother time to review the paperwork, consult with Advocate and allow Advocate to conduct an observation. Mother was provided

²⁵ Exhibit F, page 83.

²⁶ Exhibit F, page 94.

a copy of the Interim IEP and Notice for Consent to Reevaluate. All agree that the team was not able to discuss the Transfer IEP because the meeting was discontinued. Nevertheless, School finalized the "Interim IEP" which according to school has been implemented since.²⁷

15. The Interim Plan (Transfer Not Adopted) ("Interim Plan") was developed from the transfer meeting and laid out the services that would be provided.²⁸ The schedule was based on a full day program. Based on that plan, all the Goals remained the same as outlined in the 2016 IEP. The Service Delivery Statement provided the following:

"[Student] receives support and services through the center-based program at [School]. The center-based special education/integrated team consists of a special education teacher, school psychologist, speech language pathologist, occupational therapist or occupational therapist assistant, and paraprofessionals. Paraprofessionals will support [Student] under the supervision of a certified team member. Speech language services will be provided for 1 hour weekly outside of the general education classroom with 30 minutes of monthly consultation. Occupational therapy will be provided for 45 minutes weekly outside of the general education classroom. [Student] will be supported in pre-academics, planned breaks and school readiness skills for 9.5 hours per week outside of the general education setting provided by the integrated team. In order to help ensure compliance, classroom engagement and safety of himself and others, the integrated team will support [Student] for 8.5 hours inside the general education classroom."²⁹

16. The Interim's Service Grid provided 570 minutes a week of specialized academic instruction outside the general education classroom; 60 minutes a week of speech language services outside the general education classroom, 30 minutes indirect speech language services, 510 direct specialized academic instruction and 45 minutes a week of direct physical motor services outside the general education classroom.³⁰ The provision of services is not at issue in this case, the placement is. However, the SCO finds that given Student's schedule, School's is unable to fully implement Student's Interim IEP because the IEP

²⁷ Exhibit A, page 33 and 61. Interview Mother, School SLP, Special Education Teacher, General Education Teacher, Special Education Coordinator, and Advocate.

²⁸ The SCO notes that the form School used was one for Transfer from Another State rather than from another District within the State. Nevertheless, the use of the incorrect form did not impact the services outlined by the District as in both situations the current School District is required to provide comparable services.

²⁹ Exhibit A, page 36.

³⁰ *Id.* at 37.

provides more services than Student is currently in school. At this point in time, SCO is unaware of a plan to transition Student to full time.

17. Mother contends that School developed the Interim Plan without her participation, consent and outside of an IEP meeting. Additionally, she contends that she was not properly notified of the purpose of the meeting. School District agrees that they did not convene an IEP meeting to adopt the Interim Plan. However, they disagree that they did it without her participation. They contend that they have involved Mother and “considered her input at every stage,” including having meetings in person and by phone and exchanging e-mails. While the SCO agrees that School has really worked to involve Mother, including responding to her requests for information and meetings, the SCO finds School modified Student’s IEP outside of a properly constituted IEP meeting by changing student’s LRE and increasing service delivery time in specialized instruction, speech and language services and physical motor therapy. The SCO finds that School finalized the Interim IEP despite the fact that meeting was discontinued before it was concluded denying Mother of meaningful participation. As for the Notice, it states its purpose is “to discuss [Student’s] strengths and needs as documented in the IEP from the prior school or district. It did not state the purpose was to develop an “interim IEP” which is what happened. Additionally, the meeting did not have the benefit of the general education teacher, which given that the 2016 IEP identifies Student’s placement as the general education classroom is a significant omission. While Special Education teacher reports that she collaborates on a daily basis with general education teacher to develop Student’s programming, it is not apparent from any of the documentation including daily logs, attendance at meetings and the fact that General Education teacher lacks knowledge of Student’s IEP and its content. Due to School’s misapplication of the IDEA provision pertaining to intrastate transfers, School was proceeding to formalize the “Transfer IEP” pending an IEP meeting. While the notice was deficient in specifics, School reports they had numerous conversations regarding the upcoming meeting.³¹ The SCO finds the Notice of Meeting was insufficient. While the notice of meeting was insufficient, the SCO finds School staff provided Mother verbal notice both by phone and in person regarding the nature of the Transfer meeting. Mother was aware of the importance of the meeting as demonstrated by her bringing not only Student’s Private OT but also Advocate.
18. The SCO notes that the Transfer IEP was only to be in place on a temporary basis because Student’s annual review meeting needed to be held on or before October 13, 2017. School scheduled the IEP meeting for October 12, 2017 (2017 IEP Meeting). On October 5, 2017, School sent Notice of Meeting to Mother.

³¹ Exhibit A, page 61 and 37. Interview School SLP, Special Education Teacher, Advocate, Mother, Special Education Coordinator and Private OT.

The Notice listed the participants who would be attending the meeting. School did not list General Education Teacher or anyone else who would fulfill that role. Similarly, the General Teacher was not listed on the 2017 Draft IEP document.³² The SCO finds that School failed to include General Education Teacher in the 2017 IEP Notice, on the 2017 Draft IEP and meaningfully include the General Education Teacher in Student's programming from the start of the school year, especially as it pertains to Mother's participation and understanding of the process.

19. Between the time of the Transfer Meeting and the scheduled IEP meeting, Mother's frustration and distrust with School increased to the point where she contacted School Superintendent on October 2, 2017. School Superintendent returned Mother's call and discussed her concerns which included [Student's] IEP not being handled in accordance with law" and offered for her to meet with Special Education Director prior to the 2017 IEP meeting. Special Education Director met with Mother on October 4, 2017. Special Education Director developed a list of "action items" from that meeting which included identifying the case manager, Mother's goal of having Student in general education 50%, having the general education teacher at the next meeting, clarifying the para professional working with Student, whether assessments had been offered and if she could come to the next meeting. School responded to each of these items in the affirmative, including working to get Student into the general education classroom more often. Special Education Director states that from her perspective the meeting was productive and she believed Mother felt School was addressing concern, Mother was willing to sign the Consent to Evaluate and she was planning on attending the 2017 IEP team meeting. On October 4th and October 6, 2017, Mother again communicated her willingness to sign the consent via phone message and voice mail.
20. Additionally, during this time, Advocate conducted her observation of Student with Coordinator in order to provide feedback on School's programming for him. Advocate observed Student during his entire day. After her observations she concluded that Student had significant behavioral needs that were appropriately being addressed by School's programming. Advocate noted that during that one day, Student had two minor meltdowns and one major meltdown which consisted of yelling, intense screaming, crying and throwing things. Advocate noted that School staff really worked to have Student exposed to the general education classroom but it was clear that he was only able to withstand brief periods of time and even during those times he seemed over stimulated. Advocate reports informing Mother of her observations after which Mother terminated her services later that evening. School provided Mother a draft IEP on October 11, 2017. That same day, Mother e-mailed Special

³² Exhibit A, page 44; F and J. Interview Mother, School SLP, Special Education Coordinator, Special Education Teacher and General Education Teacher.

Education Director and informed her, among other things, that she would not make the meeting.³³

21. Special Education Director attempted to reschedule the 2017 IEP for October 17, 2017³⁴ and again on October 27, 2017. The October 27, 2017 Notice of Meeting's list of participants included General Education Teacher. Mother refused to attend. Mother filed a due process complaint. Soon thereafter she filed this State Complaint. The parties attempted to mediate through the due process procedure and Mother cancelled the scheduled mediation. The parties attempted to mediate early in the process of the State Complaint and later Mother decided not to proceed with the mediation. The parties attempted a third time to mediate. While the parties ultimately engaged in mediation, it was unsuccessful. Throughout this time period from October 12, 2017 to the present, School states that they have not proceeded with an IEP meeting because they were hopeful that the mediations would be successful and Mother would participate. The SCO finds that review of Student's IEP is past due. Nevertheless, While School District has failed to conduct an annual review in a timely manner, the SCO finds that under the circumstances listed below, School has made reasonable efforts to resolve the dispute and get Mother to participate. Additionally, the SCO finds that School has made significant efforts to address Student's needs and has provided more services than what is outlined in the 2016 IEP. The SCO finds that at this time, Mother is refusing to sign the consent. The SCO finds that this refusal has inhibited School's ability to either ensure that the services they are providing Student meets his needs or if not, to develop an IEP that will including identifying the correct educational placement.
22. At this point in time, Student's annual review date has passed. School District is implementing the Interim IEP. The SCO finds that as the Interim IEP was developed outside of a properly constructed IEP meeting, the IEP in effect at this time continues to be the 2016 IEP. Student is currently still attending only partial kindergarten days.

CONCLUSIONS OF LAW

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

³³ Exhibit F. Interview with Mother, Advocate and Special Education Coordinator.

³⁴ The e-mails show that School was attempting to schedule but Special Education Director states that the meeting that was finalized was on October 27, 2017.

Allegation 1 and 4: Whether School District violated the IDEA by failing to provide comparable services provided in Student's Individualized Education Program from previous school District.

1. The IDEA provides that when a student with an IEP transfers from school district to another school district within the same state *within the same school year*, the receiving school district must implement the student's existing IEP or develop a new IEP for the student consistent with the procedural requirements governing the development of IEPs. "If a child with a disability (who had a disability that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency) until the new public agency either adopts the child's IEP from the previous public agency or develops, adopts and implements a new IEP that meets the applicable requirements in §§300.320 through 300.324." 34 C.F.R. § 300.323(e). The relevant provision in this section is whether the transfer happened within the same school year. In this situation it did not. Mother began the enrollment process prior to the School Year beginning at School District. While the enrollment process did not conclude until after the school year began, Student was not enrolled in any other School District. In fact, Mother withdrew Student from School District 1 in February of the previous school year. The SCO finds the intrastate transfer provisions do not apply in this case.

2. Under the IDEA, local education agencies 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 IEP developed according to the ACT's requirements. 20 U.S.C. § 1401(9); 34 C.F.R., §300.17; ECEA Rule 2.19. The IDEA requires that students with disabilities receive their education in the general education environment with typical peers to the maximum extent appropriate, and that they attend the school they would if not disabled. 34 CFR §§300.114 and 300.116. The applicable provision in this case is 34 C.F.R. § 300.323(a) which provides "[a]t the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP as defined in § 300.320." In this case, Student's 2016 IEP was in effect and should have been implemented until such time School convened an IEP. What is not at issue in this case, is the provision of services. There is no dispute that School provided more specialized instruction, speech therapy and physical motor therapy than what is outlined in the 2016 IEP. The issue in this case is whether School implemented the provision of special education services in the LRE identified in the 2016 IEP. The SCO finds that though the school implemented many provisions as outlined in the IEP, they did not adhere to the IEP requiring the provision of services be provided in the general education classroom thereby violating the LRE provision in the IEP.

3. School initially utilized their center based program or LL classroom during Student's first week of school to assist with the transition given that Student was transitioning from an inclusive preschool program to a kindergarten program, had been out of school for an extended period of time, had difficulty with transitions, required 1:1 support, needed time to get to know adults, and sometimes communicated by screaming, and had toileting issues among other things. School determined that Student would continue to require this more intensive support to address Student's behavior that not only impacted his but others' safety, toileting issues, compliance, academic readiness, limited ability to attend, sensory concerns, issues around social engagement and other skill sets that were lacking. Although School assigned Student to General Education Teacher, the reality is Student's primary educational setting was the LL classroom or center based program as referred to in the notes for the Conference Meeting. Moreover, this is supported by the fact that General Education Teacher had very little to do with Student on a day-to-day basis. General Education Teacher was not familiar with Student's IEP, did not attend the Conference Meeting on September 6, 2017, the Transfer Meeting on September 27, 2017 and was not listed as a participant to attend the October 2017 IEP meeting and was rarely included on the early e-mails regarding Student. Furthermore, General Education Teacher did not complete any of the daily logs. While Special Education Teacher and General Education Teacher consulted frequently regarding curriculum and schedules, this alone does not make his placement a general education setting. Accordingly, the SCO finds that School District failed to implement the IEP in effect at the time of Student's enrollment.

4. However, in spite of this failure, the SCO finds that in these unique set of circumstances, this procedural failure did not result in a denial of FAPE. First, Student, a child with an identified disability of developmental delay and speech or language impairment, had the opportunity to attend an inclusive preschool program that not only had a 5:1 student-teacher ratio, but also had a special education provider available at all times. Second, the fact that Student, whom all agree has difficulty with transitions, had been out of a structured educational setting for an extended time period of time exacerbated the issue. Third, the challenges Student experienced due to his tendency to be overwhelmed and overstimulated, limited attention span and disruptive behaviors impacted his ability to engage meaningfully in the general education classroom without more supports. Fourth, the move from preschool to kindergarten meant increased academic rigor, expectations around behavior, educational time and larger class sizes. All of these things, coupled with Student starting school after the school year added to the difficulty of programming for Student. In this situation, while School committed procedural violations, given Student's needs, the SCO finds that School provided special education services tailored to meet Student's needs. Furthermore, School wanted to conduct evaluations in order to understand Student's strengths and needs to more appropriately develop an IEP, including way to support him in the general education classroom. Given Mother's anger and frustration, that while understandable, impeded the ability of School and Mother to work together to determine the best services to meet Student's

needs. Lastly, the SCO notes that while Mother is an incredible advocate for Student, she refuses to consider that Student's difficulties may be more significant in the academic setting.

Allegation 2: Whether School District failed to appropriately develop, review and revise Student's IEP based on Student's individual needs, including but not limited to addressing concerns around Student's behavior.

5. The IDEA provides that school districts must review each child's IEP "periodically, but not less than annually." 34 CFR § 300.324 (b)(1)(i). Under the IDEA, each school district has an affirmative duty to ensure that a child's IEP team meets no less than annually to review and revise the IEP. 34 CFR §300.324(b). In conducting an annual IEP review, the IEP team must consider whether the annual goals are being achieved, and revise the IEP, as appropriate, to address an lack of expected progress toward annual goals in the general education curriculum, the results of any reevaluation, information about the child provided to or by the parents, the child's anticipated needs, or other matters. 34 CFR § 300.324(b).

6. In this situation, School District has not developed, reviewed and revised Student's IEP according to the Acts requirements. School District did not convene an IEP team meeting in conformity with the IDEAs procedural requirements. Nevertheless, School developed a "Transfer IEP" that provided significant services in the area of specialized academic instruction, speech language services, and physical motor services to address Student's individual needs. While the School did not follow the proper procedures, they made significant efforts to address Student's needs. This is evidenced by Advocate, after having observed Student while in School, stating that, in her opinion, School's programming was meeting Student's needs. Unfortunately, School was somewhat limited in what they could provide in terms of behavior support due to not receiving consent from Mother. School District made numerous attempts to not only obtain consent to conduct evaluations on Student, especially in the area of behavior, but they have also attempted to encourage Mother's attendance in Student's IEP meetings and through mediations. Mother has refused to sign consent, has refused to attend IEP meetings and refused to attend two of three scheduled mediations. Mother cannot fault School District for failure to develop an appropriate IEP when she has not signed the necessary consents to allow them to conduct evaluations, has refused to attend meetings and insists on full inclusion without data to support it.

Allegation 3: Failing to provide parents with the opportunity to meaningfully participate in the development of Student's IEP.

7. 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 (10th Cir.2008). 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 ... demonstrates [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)

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 the 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). It is well-established that where the procedural inadequacies seriously infringe upon the parents' opportunity to meaningfully participate in the IEP process, the result is a "per se" denial of FAPE. See, e.g., *O.I. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11th Cir. 2014); *Deal v. Hamilton County Bd. Of Educ.*, 392 F.2d 840 (6th Cir. 2004); see also, 34 C.F.R. §300.513(A)(2)(i)-(iii) ("In matters alleging a procedural violation, a hearing officer may find that the child did not receive a FAPE only if the procedural inadequacies (i) [i]mpeded the child's right to a FAPE; (ii) [s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (iii) [c]aused a deprivation of educational benefit").

8. In this case, the SCO made findings that School committed a number of procedural violations, including making changes to Student's IEP outside of a properly constituted IEP team meeting, failure to provide proper notice of meeting where changes to an IEP are to be discussed, not involving the proper team members and without prior written notice. On September 6, 2017, School convened a conference upon Mother's request. At that conference, Mother and School team discussed the provision of services and that Student was being served in the center-based program. While School believes that Mother was in agreement with School's provision of services in the center-based program, there is no amendment or other document memorializing this agreement. Additionally, Mother has been insistent that she wants

Student in the general education classroom. In this same meeting, School modified Student's school day from a full-day kindergarten schedule to a partial day. As previously discussed, this meeting was not an IEP team meeting, it did not include General Education Teacher and Mother was not provided an Amendment memorializing any agreements or a Prior Written Notice describing the modifications to Student's IEP. On September 27, 2017, a Transfer Meeting was held in which an Interim IEP was developed, including changing student's LRE.³⁵ This meeting was not an IEP meeting and modifying Student's LRE in this manner was a violation. Additionally, given the fact that Student's IEP was to be discussed, School District failed to include General Education Teacher and provide a Notice of Meeting which notified Mother that there might be changes to Student's IEP. Despite these violations, School District was prepared to discuss Student, his needs and his educational programming. Mother, by discontinuing the meeting before the team members could discuss Student, impacted her own ability to participate. The SCO also notes that the Interim IEP is written in anticipation of a full day while the PWN attached acknowledges Student's partial day.

9. Accordingly, the SCO finds that School District violated 34 C.F.R. §§300.321(a)(1). The Interim IEP was finalized even though the meeting was discontinued and parents were no longer present. While Mother bears responsibility for it terminating early, based on the conference summary, School anticipated that Mother and Advocate would review the paperwork and recommendations. There was an inherent assumption that there would be a follow-up meeting after Advocate's observations. The SCO finds that School District violated 34 C.F.R. 300.324(a)(4) in that, if a change is made outside of an IEP meeting, the parent and School District may agree and instead develop a written document to amend or modify the child's current IEP. In this situation, there was no IEP meeting and there was no amendment. The SCO finds that School District violated 34 C.F.R. §300.322(b) in that the Notice it provided Mother regarding the Transfer Meeting was insufficient. The SCO finds that School District violated 34 C.F.R. §300.503(a) in failing to issue a Prior Written Notice when it modified the provision of special education services and education placement in the September 6, 2017 meeting. While it is clear to the SCO that School District has worked and continues to work diligently to provide Student with appropriate services to meet his needs, the SCO finds that the failure to follow the necessary procedures impacted Mother's ability to initially participate in the development of Student's IEP through the October 12, 2017 meeting. However, the SCO finds that School District ultimately addressed the omission of the General Education Teacher by ensuring she would be there at both the October 17, 2017 meeting and the October 27, 2017 meeting. The team worked around Mother's schedule in an attempt to reschedule the October 12, 2017 IEP meeting. They allowed Mother to have her Advocate observe Student and the provision of services he was receiving so that she could provide feedback. School SLP reached out to Mother's private OT therapist on Mother's

³⁵ Had this been an intrastate transfer case and no change was made in Student's LRE, this type of meeting would have been appropriate.

suggestion. School District provided the 2017 Draft IEP prior to the meeting so that Mother could review it. Various School District staff engaged with Mother to encourage a dialogue about Student and address concerns. While School District denied Mother meaningful participation in the manner in which they initially modified Student's provision of services and educational placement, School District has tried to continuously communicate with Mother, address her concerns through in person meetings and telephone calls, provide her daily updates on Student and timely respond to her requests for information. At this point in time, Mother's refusal to sign the consent to reevaluate, attend the IEP team meeting scheduled on October 17, 2017 or October 27, 2017 and engage with School District staff has delayed the process. School District has a right and an obligation in this circumstance to request Consent to Reevaluate to determine Student's educational needs. If Mother consents and does not agree with the evaluations, she has a right to request an Independent Educational Evaluation.

REMEDIES

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

- 1) Misapplication of the transfer IEP provision, in violation of 34 C.F.R. § 300.323(e).
- 2) Failure to implement IEP. (34 C.F.R. §300.323(a).
- 3) Amendment of an IEP outside of an IEP meeting or without an agreement to modify without an IEP meeting, resulting in a violation of Parents' procedural rights and a denial of FAPE, in violation of (34 C.F.R. 324 (a) 4 and (6));
- 4) Failure to develop an IEP according to the procedural requirements and the unique needs of a child with a disability, including
 - a) Providing parent with an opportunity for meaningful participation, including providing adequate Notice of Meeting in violation of 34 C.F.R. §§ 300.322(b) and 300.321(a)(1);
 - b) Providing parent Prior Written Notice. (34 C.F.R. 300.503(a))
 - c) Ensuring the IEP team includes not less than one regular education teacher of the child. (34 C.F.R. §300.321)

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

- 1) By February 26, 2018, 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 School 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 March 26, 2018.
 - b) Effective training must be conducted for all School administrators, special education case managers, and School District coordinators concerning the policies and procedures, to be provided no later than April 16, 2018.
- 2) Within 24 hours of School District's receipt of this Decision, School District must make reasonable efforts to provide Mother a Notice and Consent for Reevaluation. If Mother does not sign the consent, School District may choose to pursue the reevaluation by using the consent override procedures. If School District declines to pursue the reevaluation due to Mother's lack of consent, per IDEA it will not violate its obligation under §300.111 and §§300.301 through 300.311.
 - 3) By February 9th, 2018, School District must conduct an IEP team meeting in order to develop Student's IEP that complies with all procedural requirements of the IDEA.
 - a) The IEP team meeting must include all professionals who currently provide services to Student and must include General Education Teacher and a provider who specializes in serving children with Developmental Delays and Autism.
 - b) The IEP team must discuss a plan for Student to increase his school day with the goal of Student attending full day.
 - 4) If the reevaluation is not complete at that time, the IEP team will reconvene within one week to review and revise Student's IEP, as necessary.

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: Beth Nelson
1560 Broadway, Suite 1100
Denver, Colorado 80202-5149

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 is 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).

Dated this 26th day of January, 2018.

Jacqueline Esquibel, Esq.
State Complaints Officer

APPENDIX

Complaint, dated October 27, 2017, received November 3, 2017, pages 1-8

Exhibit 1: School District 1, Student Profile Snapshot dated October 28, 2015.

Exhibit 2: School District 1, IEP dated October 14, 2016.

Exhibit 3: Student Daily Logs and Schedule.

Exhibit 4: Conference Summary.

Exhibit 5: Notice of Transfer Meeting dated September 22, 2017 and Draft IEP dated October 12, 2017.

Exhibit 6: Notice of Dismissal.

Exhibit 7: Private Occupational Therapy Visit Note.

Exhibit 8: Consent for Reevaluation dated September 27, 2017.

Exhibit 9: Page 2 of Prior Notice & Consent for Reevaluation dated September 27, 2017; Page 2 of Draft IEP dated October 12, 2017.

Response, dated December 13, 2017

Exhibit A: All IEPs for Student from 2016 to present; including meeting notes and any audio recordings.

Exhibit B: Any eligibility determinations and evaluation reports from 2016-2017 school year to present.

Exhibit C: All service provider logs, progress monitoring data, verification of accommodations and modifications provided to Student, assessment data, for the 2017-2018 school year.

Exhibit D: All notices of meeting and prior written notices issued for the 2017-2018 school year.

Exhibit E: All requests to consent to evaluate for the 2017-2018 school year.

Exhibit F: All correspondence by School District staff that pertains to Student.

Exhibit G: The Complete name, title and contact information for each School District staff member who has knowledge of the facts underlying the Complaint allegations.

Exhibit H: All policies and procedures maintained by the School District relating to the provision of special education services, intra state transfers,

addressing behavioral concerns, Least Restrictive Environment and parental participation.

Exhibit I: All other relevant information.

Exhibit J: Additional Information Requested by SCO

Reply, dated January 3, 2018

Exhibit 10: Documents from Mother regarding failure to provide comparable Services.

Exhibit 11: Documents around appropriately developing, reviewing and revising IEP.

Exhibit 12: Documents around meaningful participation.

Exhibit 13: Documents around failure to education in the LRE.

Exhibit 14: Documents around FERPA.

Exhibit 15: Letter from Mother

Interviews/Contact with:

Mother

Father

Private OT

Advocate

Preschool SLP 2

Special Education Director

Special Education Coordinator

School SLP

Special Education Teacher

General Education Teacher

PBST Member