

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

**State-Level Complaint 2019:533
Douglas County School District**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on May 8, 2019, by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

Based on the written Complaint, the SCO determined that the Complaint identified 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. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate allegations of violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from May 8, 2018 through May 8, 2019 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* and its corresponding regulations are found at 34 C.F.R. § 300.1, *et seq.* IDEA implementation in Colorado is governed by the Exceptional Children’s Educational Act (“ECEA”), found at 1 CCR 301-8, 2220-R-1.00, *et seq.*

1. Failing to conduct a reevaluation in the area of Autism Spectrum Disorder (ASD) after Parent notified the District in January 2019 that Student had recently been diagnosed with ASD, consistent with 34 C.F.R. §§ 300.303 through 300.305;
2. Convening an IEP team meeting without Parents present on January 23, 2019, after failing to properly notify Parents of the date of the meeting and failing to schedule the meeting at an agreed upon time and place, consistent with 34 C.F.R. § 300.321(a)(1) and 34 C.F.R. § 300.322(a).

FINDINGS OF FACT

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

1. Student is a twelve-year-old currently eligible for special education and related services under the disability categories of Traumatic Brain Injury (TBI) and Autism Spectrum Disorder (ASD). Student recently finished seventh grade at School which is located within the District. *Exhibit C*, p. 28. Student and his family are in the process of moving from Colorado to another state, and Student is therefore not enrolled in the District for the upcoming school year. *Exhibit H*, p. 3.
2. Student is described as a mild-mannered, fun loving child, who has a quirky sense of humor and is an excellent artist. *Interviews with Parents and Social Worker*.
3. However, Student also has significant difficulties with impulse control and behavioral issues. As a result, Student has consistently struggled academically and socially at School, and is significantly below grade level in most classes. For instance, progress reports indicate that Student reads at a second grade level. *Exhibit G*, p. 7. *Interviews with Parents, Special Education Teacher, Social Worker, Speech Language Pathologist*. Special Education Teacher also reported that she believed the “gap was widening” between Student and his peers in seventh grade. Although she did not believe Student was regressing, she also did not believe Student was making sufficient growth. *Interview with Special Education Teacher*.
4. Student’s behavioral and academic struggles were also documented in IEP progress reports and grade reports. For instance, Student’s progress report from May 2018 pertaining to his IEP social emotional goal explained:

[Student] has made insufficient progress this year to reduce conflict evidenced by teacher feedback and student behavior. [Student] has required adult intervention numerous times due to name calling other students and making disparaging remarks about others. Additionally, [Student] has been seen by the assistant principal for various behavior incidences-one resulting in

physical interaction with a student. [Student] is able to identify strategies to solve problems but is not able to connect strategies to problems. Also, [Student] demonstrates difficulty identifying the non verbal signs (facial or body) a person is mad or worried. [Student] does not appear to understand how his actions may effect [sic] others and their reactions to him.

Exhibit G, p. 9.

Though a progress report dated December 31, 2018 notes progress was made on his social/emotional goal, it is noted this was still an area of struggle for Student:

[A] social curriculum has been used with [Student] to help him understand how his actions may effect [sic] others and their reactions to them. He has demonstrated some growth in this area during informal discussions in SE sessions. When given a social story, [Student] identifies an appropriate problem solving strategy but is unable to place these strategies into practice. [Student] continues to struggle with making disparaging remarks towards others and this may be effecting [sic] his peer relationships.

Id.

Student's May 31, 2019 progress report on this goal states that he made insufficient progress:

[T]his goal has been difficult for [Student] to attain this school year. There have been behavioral incidences reported in [data base] and teachers/staff report [Student] is making inappropriate comments to peers (name calling, negative comments). He continues to struggle socially and his conflict with peers appears to have increased in intensity resulting in a threat assessment.

Exhibit G, p. 6.

Additionally, grade reports from the spring and fall of 2018 note that Student's behavior was "affecting learning" in several classes. *Exhibit G, pp. 2-3.*

Referral for private evaluation and ASD diagnosis

5. In the fall of 2017, Parent spoke to Student's pediatrician regarding Student's persistent educational and social emotional struggles. *Interview with Parent; Exhibit 1, p. 20.* Based on Parent's concerns, Pediatrician referred Student to Hospital for a psychological evaluation. *Interview with Parent.*

6. On January 25, 2018, Student's IEP Team convened to review his IEP following reevaluation. During that meeting, Parent told the team that Student had suffered a significant head injury when Student was eighteen months old. Based on that report from Parent, Student's disability category was changed from Specific Learning Disability (SLD) to TBI. *Exhibit C*, pp. 1, 5.

7. The January 25, 2018 IEP also notes that Parent expressed his concern that Student was struggling at School:

[Student's] dad stated he is aware that [Student] has a very difficult time in school and that it is challenging to meet his needs with a large number of kids in classes. He also stated that [Student] is on a waiting list for some additional testing at [Hospital] but the waiting list is approximately 8 months.

Exhibit C, p. 5.

8. In November 2018, Student underwent a pre-evaluation at hospital. *Interview with Parent*. Following this appointment, on November 26, 2018, Parent emailed Special Education Teacher, stating:

I just I wanted to let you know that we finally got [Student] into [Hospital]. The psychologist there was wonderful and is almost positive that he has autism. We are going back in January for more testing and to figure out which type and to what degree. He could also have a combination of ADHD. Feeling positive that we are finally finding out something and have some more answers on how his brain operates and why he does the things he does or does not do. We will keep you posted as we find out more.

Exhibit 1, p. 17.

9. The same day Special Education Teacher replied: "This sounds great. I would also agree that I see autism and ADHD. Please let me know if you guys need anything from us for [Hospital]." *Exhibit 1*, p. 17.

10. On January 8, 2019, Student underwent a formal psychological evaluation at Hospital. Based on the results of this evaluation, Student was diagnosed with ASD. *Exhibit 1*, pp. 20-37.

Scheduling Student's January 2019 annual IEP review

11. Pursuant to IDEA regulations, Student's annual IEP review was to be conducted on or before January 24, 2019. *Exhibit C*, p. 1. In order to meet this deadline, Special

Education Teacher emailed Parents on January 16, 2019, with a notice of meeting indicating that Student's IEP meeting would be held on January 23, 2019. *Exhibit H*, p. 33. The stated purpose of the meeting was to "to review and update [Student's] present levels of academic achievement and functional performance, needs, and goals, and to develop a plan to provide special education and related services." *Exhibit F*, p. 1.

12. On January 21, 2019, Parent replied and stated that due to their work schedules, they could not attend the January 23 meeting. Parent further explained that Student had undergone formal testing and had been diagnosed with ASD. Based on this new information, Parents asked to postpone the IEP meeting:

[U]nfortunately we are both working on that day. During the winter break we were finally able to get [Student] in at [Hospital] for testing. He indeed has been diagnosed with autism We have another appointment with professionals at [Hospital] on January 28th. We think it would be best if we postpone his IEP meeting until we meet with them. All of this new information most likely will effect [sic] his IEP and methods of teaching.

Exhibit H, p. 33.

13. Parent did not recall any other communication surrounding the scheduling of Student's IEP meeting. Parent further explained that he works as a [occupation], and his wife works as a [occupation]. Because both of their work schedules are set at least one month in advance, it is very difficult for either of them to rearrange their schedules on short notice. *Interview with Parent*.
14. Special Education Teacher explained that she replied to Parents, stating that the plan was to continue with the current IEP until the team could meet to discuss the private evaluation. *Interview with Special Education Teacher*. However, Special Education Teacher could not find this email, and no other email communication surrounding this IEP meeting was provided by the Complainants or the District.
15. Special Education Director explained that the District's special education coordinators receive regular training on scheduling IEP Team meetings. Teams are encouraged to schedule IEP meetings in advance, and to ask parents about their availability and give them several options for dates and times. The teams are also told to communicate with families before sending meeting notices. If parents are unavailable or state they do not wish to attend, staff are to make attempts to renegotiate the date and time of the meeting to try and convince parents to participate. Teams are also encouraged to make three "print attempts", i.e., by email or certified mail, in order to document their efforts to encourage parents to attend IEP meetings. Finally, if a parent refuses to participate, the IEP team is to conduct the meeting in their absence. After the meeting, someone

from the team must attempt to communicate with parents and explain what happened. The District should then provide parents with a copy of the IEP and offer to reconvene the IEP team. *Interview with Special Education Director.*

16. Based on Special Education Director's explanation, the SCO finds that the District's practice and training on scheduling IEP meetings and ensuring parental participation are consistent with IDEA's requirements.
17. However, the SCO also finds that Special Education Teacher did not follow District protocol, and did not make adequate attempts to ensure Parents participated in Student's January 23, 2019 IEP review.

January 2019 annual IEP review

18. Though previously scheduled, an IEP meeting was not held on January 23, 2019. Special Education Teacher explained her intent was to accommodate Parent's request to hold an IEP team meeting after the evaluation from Hospital was completed, but also to abide by IDEA's requirements that an annual review is held on time. *Interview with Special Education Teacher.* The Prior Written Notice (PWN) embedded within the January 23, 2019 IEP is consistent with this explanation:

Parents have let school know that they would like to meet after the IEP date. They are currently in the middle of getting outside testing for [Student] at [Hospital] in [City]. As team [sic], the IEP was written to stay in time line compliance. When the results of the outside testing are in, we will review and evaluate as necessary. We will reconvene as a team after the testing results are received.

Exhibit C, p. 26; Interview with Special Education Teacher.

19. However, based on the Complaint and interviews with Parents, it is clear that Parents were not told that the IEP team did not convene. *Complaint, p. 3; Interview with Parents.*
20. Social Worker explained that on that date, she and Special Education Teacher met for a few minutes to discuss the situation and the need to reschedule the meeting after Parents provided the evaluation from Hospital. According to Social Worker, she did not review or update Student's IEP in any way, and annual goals were not discussed. Social Worker described this discussion as more of a "case management" meeting than an IEP meeting. *Interview with Social Worker.*
21. Special Education Teacher confirmed that on January 23 an IEP Team meeting was not held and further stated that Student's IEP was not reviewed. She recalled meeting with

Social Worker and discussing the plan to continue Student's current IEP until staff received the evaluation from Hospital. Special Education Teacher also stated that she spoke with the other members of Student's IEP team but could not recall when that happened. She specifically remembered speaking with Speech Language Pathologist to discuss the fact that the team could not move forward without Parents, and therefore needed to keep the IEP the same. *Interview with Special Education Teacher.*

22. Speech Language Pathologist recalled speaking with Special Education Teacher regarding Student's IEP review. She explained that Special Education Teacher stated that Parents could not attend the meeting and that she had asked to reschedule after they received the private evaluation. However, since the team did not know when the evaluation would be complete, and Student's IEP was up for review the next day, the team had to have an IEP in place to provide services to Student.
23. Additionally, because Student had met the two communication goals on his 2018 IEP, Speech Language Pathologist felt it necessary to update his communication goals. *Interview with Speech Language Pathologist.* Accordingly, Speech Language Pathologist replaced the two communication goals on Student's 2018 IEP with a new communication goal. *Exhibit C*, pp. 8-9. The explanation for this change was stated in Student's May 27, 2019 draft IEP: "In January, [Student's] goal was rewritten to focus more on the classroom content than just random content." *Exhibit C*, p. 31. Speech Language Pathologist later explained that she felt that, because Student had met the previous communication goals, an updated goal was better suited to his needs. She also stated that she did not communicate this change with Parents. *Interview with Speech Language Pathologist.*
24. Following Student's January 2019 evaluation at Hospital, Student started receiving services from several different private providers, including TBI Specialist 1 and TBI Specialist 2. On January 28, 2019, TBI Specialist 1 emailed Special Education Teacher, requesting to be involved in Student's upcoming IEP meeting:

I understand that [Student] has unique learning styles and some behavioral challenges at school. I do also know that he has an IEP meeting soon that we'd like to participate in. . . . He also has a new diagnosis from another clinic here and his parents left clinic today with the paperwork. All of this information is relevant for his upcoming IEP meeting so we appreciate the opportunity to collaborate and provide support to make sure that [Student] is well supported and connected to all agencies. Can you please reply to ALL and include a copy of his most recent IEP up for review.

Exhibit H, p. 41.

25. On January 30, 2019, Special Education Teacher replied, stating:

Here is the most recent IEP. In order to stay in compliance with dates we had to honor the meeting date that parents couldn't make it to. Knowing that there is new information coming that will impact school, we finalized the IEP that was due and realize we will be opening another new IEP to put all the updated info on once we have it all and can meet again. Do you have an idea of when we will have copies of the reports so I will know when to schedule the new IPE meeting?

Exhibit H, p. 49.

26. On February 11, 2019, TBI Specialist 1 replied and requested to schedule an IEP meeting, stating in part: "We'd love to discuss behavioral concerns, ongoing academic concerns, the new diagnosis of autism, the role of [consulting program] and [resource center], etc?" *Exhibit H, p. 48.*
27. On February 11, 2019, Special Education Teacher replied "we are waiting for the testing results from [Hospital]. When do you think the testing results will be ready?" *Exhibit H, p. 47.*
28. Special Education Teacher received a copy of the private evaluation on or around February 20, 2019.

Special Education Teacher's attempts to schedule IEP team meeting

29. As described more fully below, the SCO finds that Special Education Teacher diligently attempted to schedule an IEP meeting after receiving a copy of Student's private evaluation in mid-February. However, the IEP meeting had to be rescheduled three times due to Parents' work schedules, a school closure due to snow, and at Parent's request so they could continue to meet with Hospital staff and have an opportunity for TBI Specialist 1 to attend the IEP meeting in person.
30. On February 20, 2019, the day she received a copy of the private evaluation, Special Education Teacher sent a meeting notice to convene an IEP team meeting on February 28, 2018. This notice indicated that the purpose of the meeting was to discuss a possible amendment to Student's IEP. Additionally, it is noted that: "due to new testing information from [Hospital], the team would like to meet to discuss how this may impact the education for [Student]." *Exhibit F, p. 2.* However, Parents were again unavailable on that date due to their work schedules. *Interview with Parents.*
31. On March 1, 2019, Special Education Teacher sent another meeting notice to Parents, attempting to reschedule the IEP meeting for March 14, 2019. Again, the notice stated

the purpose of the meeting was to discuss an IEP amendment. *Exhibit F*, p. 3. This meeting was cancelled due to School being closed on March 14 for a snow day. *Exhibit H*, p. 14.

32. On March 25, 2019, Special Education Teacher attempted to reschedule the meeting for a third time, and sent a notice of meeting for April 4, 2019. This notice stated the purpose of the meeting was to consider an amendment to the IEP. The notice also stated: “[Student] has had additional testing at [Hospital]. The team would like to meet to revue [sic] these testing results and look at adding additional accommodations to the current IEP.” *Exhibit F*, p. 4. TBI Specialist 1 was copied on this email. *Exhibit H*, p. 15.
33. On March 28, 2019, TBI Specialist 1 met with Student. That day, in anticipation of the IEP meeting, TBI Specialist 1 emailed Special Education Teacher a list of suggestions for updating Student’s IEP goals. *Exhibit H*, p. 29.
34. On April 1, 2019, Parent emailed Special Education Teacher requesting to reschedule the IEP meeting:

It was great meeting with all the specialists at [Hospital] last week as we learn more about autism and traumatic brain injury. We are finally feeling like we are getting some answers. We would really like to have TBI Specialist 1 or TBI Specialist 2 at the meeting in person if possible. So if we could find another day that works, I think it would be much more beneficial for [Student]. Obviously, we are running short on time as we get close to the end of the school year, but we really want to have all of our ducks in a row when [Student] starts in a new school in [State]. We visited the school during Spring break, and they know that a lot of information is on the way. Do any of the following dates in April work? I am off 5, 11, 12, 19, 22, 23. Also, [Special Education Teacher], can we get a draft of the IEP?

Exhibit H, p. 20.

35. On April 2, 2019, Special Education Teacher emailed TBI Specialist 1, TBI Specialist 2, and Parents, stating that everyone would be available April 22 except Speech Language Pathologist. Special Education Teacher stated “if we are adding an Autism diagnosis it is imperative that she is there since that is specifically what she is trained in and serves the speech goals for.” *Exhibit H*, p. 17.
36. On April 2, 2019, Special Education Teacher emailed Parents, TBI Specialist 1, and TBI Specialist 2 with two possible dates for a rescheduled IEP meeting. Significantly, she wrote, in part:

[H]ere is what I have left for the rest of the year. It gets very complicated with several days of state testing where all hands are on board in the building and no meetings are scheduled due to testing conflicts. We also have several full days of transition meetings for sped where all service providers are out of the building to attend.

Exhibit H, p. 26.

37. Finally, on April 3, 2019, Special Education Teacher sent a notice of meeting attempting to schedule a meeting on May 10, 2019. This notice now stated: “the purpose of this meeting is to discuss appropriate evaluation data to determine whether [Student] continues to be eligible for special education services. If so determined, the current individualized education program (IEP) will be reviewed and an updated IEP will be developed.” That notice further states: “Parent rescheduled and would like to meet to discuss results from [Hospital]. We have opened a reevaluation to consider all of [Student’s] academic and social emotional needs.” *Exhibit F, p. 5.* The accompanying email states that May 10 is the next available date when the entire team, including non-District members from Hospital could attend. *Exhibit H, p. 11.* This meeting notice is the first reference to a reevaluation in the record.

38. On April 25, 2019, Special Education Teacher emailed Parents a permission to test form, explaining:

Because there is a new diagnosis of Autism we will consider adding that to [Student’s] IEP as a possible disability. In order to go through the eligibility process at the meeting to consider adding Autism we need the permission to test signed. We are not doing anymore testing for the IEP – this is a formality when we have outside testing and want to consider adding it to the IEP.

Exhibit H, p. 12.

39. Special Education Teacher explained that, at that time, the IEP team was planning to proceed with only the private evaluation. *Interview with Special Education Teacher.* However, in April of 2019 Student was involved in a disciplinary incident at School. *Complaint, p. 3.* Following that incident, the IEP team decided as part of the reevaluation it also wanted to conduct a functional behavioral assessment (FBA).

40. On May 3, 2019, Special Education Teacher sent Parents a PWN and Consent for Reevaluation. *Exhibit E, p. 1.* The stated reason was: “New information from [Hospital] is relevant to consider at this time. Due to new diagnosis the IEP team needs to consider changes to be made to disability category services or placement based on that

diagnosis. This will include a review of records, a pragmatic language assessment, and a functional behavioral assessment.” *Exhibit E*, p. 1.

41. Parents strongly opposed School conducting the proposed FBA, and on that basis, refused consent to reevaluate. *Interview with Parents*. The May 10 evaluation notes this by saying, in part:

[Parents] . . . refused consent for the IEP team to complete a full reevaluation and FBA at school. This resulted in a review of existing data. The school deems it is appropriate to do a reevaluation and FBA at school based on recent behavior concerns that have been present in the school environment. In the absence of consent we have gone forward with the existing data we have.

Exhibit E, p. 15.

42. The May 10, 2019 evaluation therefore consisted of a review of existing data which is required as part of any reevaluation pursuant to 34 C.F.R. § 300.305(a)(1). The private evaluation provided by Parents was also reviewed. The assessments completed as part of Student’s January 2018 reevaluation are incorporated and discussed, as well as reading and math assessments conducted through April 2019. Finally, a classroom observation is also documented. *Exhibit E*, pp. 4-12. The SCO finds that this evaluation therefore constituted a review of existing data consistent with 34 C.F.R. § 300.305(a)(1).

CONCLUSIONS OF LAW

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

Conclusion to Allegation 1: The District’s obligation to conduct a reevaluation was triggered on January 21, 2019. The failure to begin the reevaluation process until April 3, 2019 resulted in a procedural violation of IDEA.

The IDEA requires a district to conduct a reevaluation under two circumstances: “(1) if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child’s parent or teacher requests a reevaluation.” 34 C.F.R. § 300.303(a). If a reevaluation is conducted, the IEP Team must review existing evaluation data on the student, including: “(i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers.” 34 C.F.R. § 300.305(a)(1). “On the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to

determine whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.” 34 C.F.R. § 300.305(a)(2)(iv).

IDEA requires that Districts must ensure that Students are assessed “in all areas related to the suspected disability, including, if appropriate . . . social and emotional status.” 34 C.F.R. § 300.304(c)(4). “This provision places upon school districts ‘a continuing obligation . . . to identify and evaluate all students who are reasonably suspected of having a disability under the statutes.’” *Phyllene W. v. Huntsville City Bd. of Educ.*, 630 Fed.Appx. 917, 924 (11th Cir. 2015)(citing *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir. 2009)).

The pertinent question here is when the District had “notice that the circumstances warranted a reevaluation” based on the suspicion that Student may be eligible under an additional disability category. *Phyllene W. v. Huntsville City Board of Education*, 630 Fed.Appx. 917, 924 (11th Cir. 2015)(unpublished). In answering this question, the SCO finds the 11th Circuit Court of Appeal’s case, *Phyllene W. v. Huntsville City Board of Education*, instructive. *Id.* In *Phyllene W.*, the student began receiving special education and related services under the disability category of Specific Learning Disability (SLD) at the end of second grade. For several years student received IDEA services, yet persistently struggled in reading and math. At her sixth grade IEP meeting, parent told the team that student had a history of tubes in her ears, and that the family was seeking treatment. However, the district did not follow up with the family or pursue its own hearing evaluation, and services remained substantially the same. Student continued to struggle academically, and during the meeting to finalize her tenth grade IEP, parent alerted the team that student was being fitted for a hearing aid. The district still did not pursue a hearing evaluation, and parent subsequently withdrew student from the district and filed a due process complaint.

In finding that the district violated the IDEA by failing to reevaluate student, the 11th Circuit considered when the district “was on notice that the circumstances warranted a reevaluation.” *Id.* at 924. In reaching its determination, the Court found that both the sixth and tenth grade instances of parent alerting the IEP team that student had issues with her hearing, combined with her struggles in school, “put the Board on notice that [student] suffered from a hearing disability that warranted further investigation.” *Id.* at 926. The Court also found it significant that, during the sixth grade IEP meeting, parent told the team that student’s hearing loss was significant enough to require treatment. The Court stated:

We recognize that, perhaps, a statement that a student’s hearing is ‘worse’ than it was two years ago may not, in and of itself, prompt a school board to suspect a hearing impairment. But here, the statement was coupled with information that the hearing loss was

significant enough to require *treatment*. The fact that the Board knew that [parent] was actively seeking treatment for [student's] hearing loss supports a finding that the Board should have at least 'suspected' that a hearing impairment might be present. *Id.* at 925.

For the following reasons, the SCO concludes the District had sufficient information to warrant a reevaluation on January 21, 2019. Critical to this analysis is the information Student's IEP team had leading up to this date.

First, the District was aware of Parents' concerns with Student's academic and behavior struggles, and notably, that Parents were pursuing private evaluations to address these concerns. These concerns were expressed repeatedly from January of 2018 through January of 2019. During the January 2018 IEP meeting, Parent alerted the team that family was pursuing private testing. Significantly, Parent framed the family's pursuit of private testing around Student's persistent struggles at School. Next, following Student's initial visit at Hospital in November 2018, Parent emailed Special Education Teacher to tell her that the evaluator strongly suspected an ASD diagnosis.

Second, the District also had information that Student was not progressing, behaviorally or academically, as expected. Significantly, upon learning that Parents were pursuing a private evaluation in the area of autism, Special Education Teacher replied by stating: "I would also agree that I see autism and ADHD." This response adds to the weight of evidence showing that the District suspected that Student may qualify under an additional disability category, and that it was reasonable to suspect the additional category was ASD. Additionally, IEP progress reports show that Student continued to struggle making progress on his social emotional goal by failing to identify non-verbal cues, continuing to make inappropriate comments towards peers, and failing to understand the effect his behavior was having on others. Given all of the above information, the knowledge that Student had been assessed and formally diagnosed with ASD was sufficient to alert the District that a reevaluation was required.

Having concluded that the failure to reevaluate Student resulted in a procedural violation, the SCO must determine if the violation resulted in a denial of FAPE. A procedural violation results in a denial of FAPE if it "(1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefit." 34 C.F.R. § 300.513(a)(2).

The District contends that because Parent refused consent to reevaluate on May 3, they forfeited their right to now complain Student was denied FAPE. Based on the unique circumstances presented here, the SCO disagrees. The case law cited by the District references instances where a district requests consent to evaluate or reevaluate a student, and parents refuse consent, thereby preventing the district from conducting an evaluation. In such

circumstances, a refusal to provide consent to evaluate prevents Parents from later obtaining relief. *E.g., G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258, 1263-64 (11th Cir. 2012) (“Every court to consider the IDEA’s reevaluation requirements has concluded if a student’s parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student”).

The circumstances presented here are distinguishable from the long line of cases cited by the District. First, the District did not formally request consent to reevaluate until May 3. At that point, based on opposition to the newly added request to conduct an FBA, Parent refused consent to conduct the FBA. Thereafter, the District conducted a review of existing data, which does not require parental consent. 34 C.F.R. § 300.300(d)(1)(i). As discussed above, the SCO concluded that a reevaluation process should have been initiated in January by conducting a review of existing data. Because Parent’s refusal here did not prohibit the District from conducting the reevaluation during the period when it was obligated to do so, the SCO concludes that Parents are not barred from seeking relief.

Although Parents have not forfeited their right to relief by refusing consent for the District to conduct an FBA, the SCO concludes that the procedural violation did not result in a denial of FAPE. Based on the relatively short period of time between when the District’s obligation to reevaluate was triggered, and the initiation of the reevaluation, the SCO concludes that the failure to reevaluate did not result in substantive harm. As discussed above, the District was on notice that a reevaluation was necessary after learning of Student’s diagnosis on January 21, 2019. The meeting notice issued on April 3, 2019 indicates that the District had opened a reevaluation. During this period, Student continued to receive the special education and related services required in his January 23, 2019 IEP. Additionally, unlike the district in *Phyllene W.* referenced above, the District did not ignore the information it received from Parent regarding Student’s diagnosis. On the contrary, Special Education Teacher made diligent efforts to convene the IEP team. Accordingly, the SCO concludes that this procedural violation did not significantly impede Parent’s opportunity to participate in the decision-making process or cause a deprivation of educational benefit.

Conclusion to Allegation 2: The District did not take appropriate steps to ensure Parent’s participation in January 2019, resulting in a denial of FAPE.

“Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate – including (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed on time and place.” 34 C.F.R. § 300.322(a). “Parental participation in the creation of a student’s IEP is widely considered to be one of the most critical procedural safeguards in the IDEA.” *Oskowis v. Sedona-Oak Creek Unified Sch. Dist.*, 73 IDELR 257 (U.S. Dist. AZ 2019).

For the following reasons, the SCO concludes that Special Education Teacher did not abide by IDEA's requirements to ensure Parents were present at the January 2019 IEP review, resulting in a violation. First, the District did not notify parents of the meeting early enough to ensure that they would have an opportunity to attend, consistent with 34 C.F.R § 300.322(a)(1). For example, Special Education Teacher emailed Parents on January 16, attempting to schedule Student's IEP meeting on January 23, one day before the annual review deadline. Second, the District did not attempt to schedule the meeting at a mutually agreed upon time and place in advance of the annual review date, consistent with 34 C.F.R § 300.322(a)(2). There is no evidence that Special Education Teacher communicated with Parents prior to sending the meeting notice, inquired about their availability, or gave more than one date as an option for the meeting. The only communication provided in the record is the January 16 email with an attached meeting notice, and Parent's subsequent response asking to postpone the IEP meeting until after the private evaluation was completed.

Third, even though Parents asked to postpone the meeting, the District was still obligated to try and convince them to attend before holding a meeting without one of them, consistent with 34 C.F.R. § 300.322(d). Here, there is no evidence that Special Education Teacher made any attempts to reschedule the meeting or otherwise convince Parents to attend. Finally, Parent's request to postpone the meeting was not an affirmative refusal to attend the IEP meeting, which would have justified the District in proceeding without Parents present. *See Drobnicki v. Poway Unified Sch. Dist.*, 358 Fed.Appx. 788 (9th Cir. 2009)(holding parent's request to reschedule IEP meeting not an affirmative refusal to attend)(unpublished). The SCO therefore concludes that scheduling the IEP meeting one week in advance, with no additional communication with Parents, did not give Parents sufficient notice of the IEP meeting, resulting in a procedural violation of the regulation governing parent participation at 34 C.F.R. § 300.322.

Having concluded that the failure to ensure parental participation in January 2019 resulted in a procedural violation, the SCO must determine if the violation resulted in a denial of FAPE. A procedural violation results in a denial of FAPE if it "(1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefit." 34 C.F.R. § 300.513(a)(2).

For the following reasons, the SCO concludes that Speech Language Pathologist's decision to unilaterally change Student's communication goal significantly impeded Parent's right to participate in the decision making process, and therefore resulted in a denial of FAPE. Speech Language Pathologist explained that because Student had met his communication goals in the 2018 IEP, she felt it necessary to update the goal to better serve Student's educational needs. However, this change was made without Parent's input and outside of the IEP team meeting process. *See M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1197 (9th Cir. 2017)("any such unilateral amendment is a per se procedural violation of the IDEA because it vitiates the parents' right to participate at every step of the IEP drafting process"). Further,

though Parents were provided a copy of the IEP, there is no evidence this change was ever discussed with them after the fact. For these reasons, the SCO concludes that the District's unilateral change to Student's IEP significantly impeded Parents' opportunity to participate in the decision-making process.

The SCO notes that the District did not willfully ignore IDEA's procedural requirements, rather it was attempting to navigate the tension between two essential IDEA requirements – parental participation and annual review. With Student's annual IEP review approaching, Special Education Teacher became concerned that the IEP had not been reviewed. The District repeatedly stated its willingness and desire to convene the IEP team and review the private evaluation from Hospital and update Student's IEP accordingly, as stated in the PWN embedded in the January 23, 2019 IEP as well as all of the meeting notices issued. Special Education Teacher thereafter did not alter Student's goals and kept the IEP mostly the same, thinking the team would receive the private evaluation and the IEP team would be quickly reconvened. However, due to various circumstances in the winter and spring of 2019, Student's IEP meeting was delayed until May 2019. The meeting in February was delayed based on Parent's work schedules. The meeting in March was cancelled due to School being closed for inclement weather. Finally the April 4 meeting was rescheduled at Parent's request so they could continue to consult with Hospital personnel and so TBI Specialist 1 could participate in the meeting in person. The delays therefore are not attributable to the District. Notably, in April the District granted Parent's request to postpone the meeting in order to ensure Parent's requested outside participants could attend.

In *Doug C. v. Hawaii Department of Education*, the school district faced a similar problem of confronting an impending annual IEP review date and parent's unavailability to participate in the scheduled meeting. 720 F.3d 1038, 1046 (9th Cir. 2013). There, the district chose to convene an IEP team meeting without parent in order to comply with the annual review deadline, which the court held resulted in a denial of FAPE. The 9th Circuit issued the following guidance:

When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. In reviewing an agency's action in such a scenario, we will allow the agency reasonable latitude in making that determination.

Id. The court also pointed to the central purposes of IDEA: “to provide disabled students a free appropriate public education and to protect the educational rights of those students.” *Id.*

Though Speech Language Pathologist altered Student's communication goal unilaterally, the SCO concludes that she did so to ensure the provision of FAPE, consistent with IDEA's central purpose, and that Student did not suffer educational harm as a result. As stated above, Speech Language Pathologist changed Student's goal because she felt it would better suit his individualized needs based on progress he had made during the previous year. She worked with Student on this goal throughout the winter semester, and memorialized Student's progress on the May 27 draft IEP. Essentially, the effect of this violation was that Student likely had a more appropriate IEP goal than he otherwise would have had. Additionally, Parents asked to postpone the IEP meeting initially so the team could consider Hospital's private evaluation, and then so TBI Specialist 1 could attend the meeting in person. This may have taken longer than anticipated, but the team did meet to discuss the private evaluation with TBI Specialist 1 present in May. Accordingly, the delays were partially attributable to Parents and consistent with their requests to delay the meeting to obtain additional information and/or have participants with knowledge of Student participate in the IEP meeting. Finally, the District remedied this violation in May of 2019 when it convened the IEP team. Because Student did not suffer educational harm, despite impeding Parent's right to participate in the decision making process, the remedies ordered below do not include individualized relief for Student.

REMEDIES

The SCO concludes that the District has violated the following IDEA requirements:

- a) Failing to timely conduct a reevaluation of Student, consistent with 34 C.F.R. §§ 300.303 through 300.305
- b) Failing to take the appropriate steps to ensure parents were properly notified of the date of the meeting and failing to schedule the meeting at an agreed upon time and place, consistent with 34 C.F.R. § 300.321(a)(1) and 34 C.F.R. § 300.322(a).

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

- 1) By July 19, 2019, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violations 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. Special Education Teacher and Speech Language Pathologist must review this decision as well as the requirements for conducting reevaluations found at 34 C.F.R. §§ 300.303 through 300.305 and ensuring parental participation in IEP meetings found at 34 C.F.R. § 300.322, as well as meet with Special Education Director to review the District's guidance on ensuring and documenting attempts to ensure parents participate in IEP meetings. If Special Education Teacher and Speech Language Pathologist are no longer employed, the District may substitute

individuals with similar roles at School. This review must occur no later than August 16, 2019. A signed assurance that the above materials have been reviewed must be completed and provided to CDE no later than August 23, 2019.

The Department will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance.

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

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

NOTE: Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the 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. 46607 (August 14, 2006).

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

Dated this 3rd day of July, 2019.

Thomas Treinen
State Complaints Officer

Appendix

Complaint, pages 1-22

Exhibit 1: Child Study; 1/25/18 IEP; Private Evaluation; various email correspondence

Response, pages 1-6

Exhibit A: *District uses CDE's IEP Procedural Guidance Manual for policies*
Exhibit B: *District uses CDE's IEP Procedural Guidance Manual for policies*
Exhibit C: 1/25/18 IEP; 1/23/19 IEP; 5/27/19 IEP
Exhibit D: *progress monitoring reflected in notes of Ex. G*
Exhibit E: PWN and Consent for Re-evaluation dated 5/3/19
Exhibit F: Notices of Meeting dated: 1/16/19, 2/20/19, 3/1/19, 3/25/19, 4/3/19, 5/13/19
Exhibit G: Grade Reports and Progress Reports
Exhibit H: email correspondence
Exhibit I: List of District personnel

Interviews with:

Parents
Social Worker
Special Education Teacher
Special Education Director
Speech Language Pathologist