

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

**State-Level Complaint 2019:554
Mesa County School District 51**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on August 16, 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 one allegation subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

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 August 16, 2018 through August 16, 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 ALLEGATION

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.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

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

1. Denying Parents a meaningful opportunity to participate in Student's May 10, 2019 IEP meeting, by predetermining Student's placement in the District's Severe Needs Autism program, consistent with 34 C.F.R. §§ 300.321(a)(1), 300.324(a)(ii), 300.327, and 300.501(b)-(c).

FINDINGS OF FACT

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

Background

1. Student is a nine-year-old child currently eligible for special education and related services under the disability category of Autism Spectrum Disorder (ASD). *Exhibit C*, p. 21. During the 2018-19 school year Student attended School, which is located within the District, as a third grader. *Id.*
2. Parents and School staff describe Student as a funny, affectionate, and sweet child. Student enjoys watching YouTube videos on his iPad, and loves being outdoors as he is also very physically active. *Exhibit 2; Interviews with Parents, Private Speech Language Pathologist, Special Education Teacher, and Classroom Teacher.*
3. Student's disability considerably impacts his educational performance and access to general education. *Exhibit B*, p. 55. For instance, Student performs significantly below his peers academically, and requires extensive supports and modifications. *Exhibit C*, p. 23. Student is non-verbal, and communicates with the assistance of a communication device. Student's current communication skills "are a significant barrier to his ability to demonstrate what he knows." *Id.* at 27. Student also requires adult assistance to use the restroom. Additionally, Student engages in self-injurious behaviors, including biting and chewing his fingers, and will leave both his seat and the classroom without permission. *Id.* at 23-24.
4. Student's IEP was reviewed and updated on November 12, 2018. *Exhibit B*, p. 62. Pursuant to this IEP, Student received various accommodations, including: consistent adult support throughout the day for safety monitoring, general education classwork adaptations, adult and peer modeling, sensory strategies throughout the day to assist with emotional regulation and attention, and personal care services. Additionally, all classwork, homework, and assessments were modified to account for Student's current level of functioning. *Id.*
5. The November 12, 2018 IEP specified that Student's placement in the Least Restrictive Environment (LRE) was the general education classroom forty to seventy-nine percent

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

of the time. Specifically, based on the service delivery grid, Student was to spend 53.2% of the time in the general education classroom, and 46.8% outside general education. *Id.* at 19. During the 2018-19 school year, Student's specialized instruction was provided both inside and outside the general education classroom.

6. The instant dispute arises from Parents' contention that the District predetermined Student's placement in the District's Severe Needs Autism (SNA) program at School 2 prior to an IEP meeting held on May 10, 2019 ("the IEP Meeting"). Parents base their belief, in large part, on comments made by District members of the IEP team during a discussion held after Parents and Advocate had left the IEP Meeting ("the Post-meeting Discussion"). The District accidentally provided a recording of the Post-meeting Discussion to Parents in July 2019 in conjunction with their request for an audio recording of the IEP Meeting. According to Parents, because the District predetermined Student's placement, they were denied the opportunity to meaningfully participate in the IEP Meeting.
7. The District responds that the IEP team did not predetermine Student's placement, but based it on the fact that Student "did not make sufficient progress toward his IEP goals and showed no improvement in target avoidance behaviors with the level of supports offered" *Response*, p. 5. Additionally, the District argues that "the IEP team considered the continuum of placements for the Student, including allowing the Student to remain at [School], as requested by [Parents], and appropriately determined that the Student's educational needs required him to be placed in a more restrictive setting" *Id.* at 6. The SCO first reviews the IEP Meeting, and then turns to the Post-meeting Discussion.

The May 10, 2019 IEP Meeting

8. The District sent Parents two notices prior to the IEP Meeting. On April 15, they sent a "Prior Notice & Consent for Reevaluation" which specified that a reevaluation was needed because "changes in service times may be determined by the team. Changes in service times may result in a change in placement or least restrictive environment (LRE)." *Exhibit E*, p. 1. The "Prior Notice & Consent for Reevaluation" also indicated that based on a review of existing information, "no additional evaluation data are needed to determine if your child continues to be eligible for special education services or to determine your child's educational needs." *Id.* The SCO finds no evidence in the record that Parents were consulted when the District determined that no additional data was required to determine Student's continuing IDEA eligibility or educational needs. This finding is bolstered by the fact that when Mother returned the PWN on May 2, she requested that the District conduct an academic assessment on Student. Additionally, the District provided Parents with a "Notice of Meeting" on April 22. This notice stated the purpose of the upcoming meeting was 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. 6.

9. On May 10, 2019, the District held a properly constituted IEP team meeting. In attendance at the IEP Meeting were: Special Education Director, Speech Language Pathologist, School Psychologist, Occupational Therapist, Special Education Teacher, Significant Support Needs (“SSN”) Coach, Principal, Parents, and Advocate. *Exhibit J-4*, p. 1.
10. The IEP Meeting lasted for over two and a half hours. *Exhibit J-3*. The participants discussed Student’s strengths, present levels of academic achievement, and functional performance at school, as well as accommodations and specialized instruction. The IEP team also discussed behavior concerns, academic progress, and annual goals. See *Exhibit J-4*. A review of the audio recording of the IEP Meeting shows Parents offering their thoughts, concerns, and perspective throughout the meeting.
11. The meeting began with a discussion of Student’s present levels of academic achievement. Regarding strengths, SSN Coach and Special Education Teacher noted that Student is attentive of his classmates’ behavior during transitions between activities. Father explained the family uses voice prompts at home if Student does not understand it is not yet time to leave the house, and asked whether the paraprofessionals used similar strategies in the classroom. Special Education Teacher confirmed that she and the paraprofessionals use voice prompts to help Student when transitioning between activities. *Exhibit J-4*, pp. 18-21. Student’s finalized IEP includes an additional paragraph in the “student strengths” section stating that Student “combines signs, symbols, or words to communicate with familiar adults for multiple purposes.” *Exhibit C*, p. 23.
12. The IEP team next discussed academic progress. Special Education Teacher explained that Student’s difficulties with maintaining attention and staying on task were affecting progress on his IEP goals. Specifically, Student had not met his imitation or matching goal. The imitation goal called for Student to imitate novel one-step or two-step actions performed by a peer or teacher. The matching goal required Student to match various items throughout the school environment with adult support. *Exhibit B*, pp. 59-60. Parents stated that the daily log always indicated Student worked on matching colors, and that this may not be challenging enough since Student knows his colors. Special Education Teacher replied that she and the paraprofessionals work with matching various items throughout the whole school day, which makes it difficult to document the matching exercises with more precision. Parents then questioned whether the matching exercises were purely academic, or functional skills Student could use in day to day life. Speech Language Pathologist and Special Education Teacher explained that while both academic and functional examples were used, all matching exercises were difficult because Student has difficulty maintaining his attention. *Exhibit J-4*, pp. 36-43.

13. The IEP team then discussed behavior data that had been collected since November 2018. Special Education Teacher remarked that she did not see progress on reducing Student's problem behaviors. Mother reported that Student had been chewing his fingers less at home, and was surprised he was not showing progress at School. Special Education Teacher and Mother then discussed that when Student stops one problem behavior, he replaces it with another. *Exhibit J-4*, pp. 53-54. Later in the discussion, School Psychologist noted that despite recommendations from a behavioral specialist in November and the addition of a dedicated paraprofessional in February, School staff continued to see variability in the data, but did not see an overall decrease in the targeted behaviors. *Id.* at 60.
14. The IEP team then addressed the results of an academic assessment, the Conceptual Development Scales of the Transdisciplinary Play-Based Assessment-2. The District completed this assessment prior to the IEP Meeting following Parents' request for additional information in response to the Prior Notice and Consent for Reevaluation. School Psychologist explained that due to Student's deficits with following directions and joint attention, a transdisciplinary play-based assessment was used rather than a standardized test. During the discussion of Student's results, Mother stated that Parents believe Student can sight read based on his ability to find certain videos on YouTube. Special Education Teacher agreed that Student's ability to use symbols and pictures to communicate was a strength that was reflected as his highest score on the assessment. *Id.* at 60-64. Parents suggested that Student does better when he is challenged and high expectations are placed on him. Special Education Teacher replied that they were placing high expectations on Student, but that his lack of ability to maintain focus and attention was a barrier to continued progress. *Id.* at 67-68.
15. Next, the IEP team discussed the "impact of disability" section of the IEP. Special Education Teacher commented that the only thing she added to this section from the previous IEP was a paragraph stating: "in order to move to higher level goals, [Student] needs very highly specialized individualized programming with that continual progress monitoring to be responsive to his needs." *Id.* at 86. During the ensuing conversation, Special Education Director explained that any progress Student made was sporadic. She attributed this in part to the length and unpredictable nature of a typical school day, and explained that Student likely responded better at home because of his comfort and familiarity at his own house. Father agreed that the family's home life is predictable, which is very beneficial for Student, and stressed that it is important to get Student in his comfort zone at School. SSN Coach then commented that it takes a very intense collaborative effort to ensure Student gets into his comfort zone in the school setting. *Id.* at 90-94.
16. The IEP team then moved to annual goals. Special Education Teacher explained that she and Speech Language Pathologist discussed adding a goal for joint attention. SSN Coach, Special Education Teacher, and Advocate discussed the parameters for this goal,

including measureable benchmarks. *Id.* at 103-107. Later, as the IEP team discussed an annual goal in the area of Speech/Language, Mother asked that the paraprofessionals not model words that Student would not use. Special Education Teacher explained that doing so would be contrary to Private Speech Language Pathologist's recommendations. Mother then requested to have different categories on Student's communication device for the paraprofessionals to distinguish between verbal prompts and "talker words." Special Education Teacher agreed to tell the paraprofessionals to differentiate the categories of words used, though this agreement was not memorialized in the IEP. *Id.* at 116-18.

17. The IEP team's conversation then transitioned to accommodations, and sensory strategies in general. Parents asked that Student be allowed to have a resistance band on his desk. Special Education Teacher reminded Parents that they had tried having the resistance band on Student's desk, but that it had caused him to be agitated. Parents requested they again try it at the beginning of the year. Special Education Teacher agreed to include the resistance band on a list of sensory items available to Student. *Id.* at 118-121. The finalized IEP documents the addition of the resistance band in the list of sensory items specified in the accommodations section, demonstrating that Parent's input was included in Student's IEP. *Exhibit C*, p. 35.
18. The IEP team then discussed what supports and services Student needed. While discussing the service delivery statement, Speech Language Pathologist explained that Student's time in the general education classroom was not productive, and that she would like to adjust his minutes to reflect more time outside of general education in the special education resource room. *Exhibit J-4*, p. 126. Special Education Director concurred, stating: "with everything I'm hearing, we have got to start focusing on just really, really finite instruction. . . I would agree. . . . I do not think bringing something else into a general education classroom is beneficial to him." *Id.* at 127. Mother and Advocate then questioned why Speech Language Pathologist removed 90 minutes of indirect consultation from the IEP. Speech Language Pathologist explained that those minutes were for consultation time with paraprofessionals and others, and that most of this communication happened informally, making it difficult to track the time. Rather than dedicated minutes, the service delivery statement now reads: "[c]onsultation with paraprofessionals, teachers, and other staff will be provided throughout the school year to address specific communication needs." *Exhibit C*, p. 38. The SCO finds that Speech Language Pathologist's explanation is demonstrative of the IEP team listening to Parents' concerns and answering their questions.
19. In discussing the service delivery statement, Special Education Director stated that despite the intensive services put in place at School in the 2018-19 school year, the IEP team did not believe Student was making sufficient progress. *Exhibit J-4*, p. 140. Special Education Director stated that based on Student's communication, social, and behavioral needs, he would benefit from the more intensive SNA program at School 2.

Id. at 141. Special Education Director offered to give Parents the opportunity to look into the program and to take a tour. *Id.*

20. The SNA program is located within the District at School 2. The SNA program serves students with autism that are non-verbal and have intensive behavioral needs. There is a low student to teacher ratio, consisting of SNA Teacher and five paraprofessionals serving between five to eight students. Additionally, owing to safety concerns that may result from elopement and aggressive behavior, the SNA program has a dedicated classroom, as well as a private playground and lunchroom. Placement in the SNA program is therefore more restrictive, with students spending very limited time around general education peers. SNA Teacher explained that her students' IEPs typically state time in the general education classroom between two percent and five percent of the day. *Interview with SNA Teacher.*
21. At the IEP Meeting, Parents immediately voiced their opposition to the SNA program as a placement option for Student. As soon as Special Education Director stated the IEP team believed the SNA program to be the appropriate placement, Mother stood up and left the IEP Meeting, while Father and Advocate remained. *Interview with Parents.*
22. The ensuing conversation thus took place mostly between Special Education Director, Father, and Advocate. Advocate explained that Parents' main concern has always been Student's exposure to peers in general education. *Exhibit J-4*, p. 141. Special Education Director responded that even with enhanced services, Student was not meaningfully interacting with his peers. The District's hope was that the SNA program could more intensively focus on socialization skills so Student could return to a less restrictive setting and have meaningful interactions with his peers. *Id.* at 142. Special Education Director went on to state: "[w]e're obligated to offer you . . . what we feel is appropriate for him – and I guess the team is feeling like this is not the best setting . . . for him to make the growth and be able to do that." *Id.* at 144-45.
23. Father adamantly opposed placing Student in the SNA program, explaining that the family's primary goal was the social element of school and having Student spend time with peers in general education. Father also stated: "[h]e's not going to an autism class. I will homeschool him before he comes to – and I'll just pay for outside services. That's honestly just the baseline of it." *Id.* at 143-144. Father was also upset that the IEP team waited until the end of the IEP Meeting before bringing up the change in placement. *Id.* at 146. However, the SCO finds that having the placement discussion at the end of the IEP Meeting is both consistent with and required by IDEA. See 34 C.F.R. § 300.116(b)(2) (requiring that a child's placement be based on the child's IEP). Therefore, beginning the IEP Meeting with a discussion regarding Student's placement, rather than first discussing the specific terms of the IEP, would have been inconsistent with IDEA.

24. Special Education Director reiterated that even with the extensive services in place, Student was not meaningfully accessing his peers, and was not making progress on his IEP goals. *Exhibit J-4*, p. 142. Special Education Director also suggested that the additional supports provided by the District still did not help Student achieve desired progress: “We do not believe his needs can be met, you know, intensively enough to make progress and get him where we need to go without those services.” *Id.* at 147.
25. Advocate confirmed the increase in services that the IEP team proposed would change Student’s LRE from around fifty percent to below forty percent. *Id.* at 142-43. Advocate then suggested keeping Student at School and implementing the IEP there with increased time outside of the general education classroom. *Id.* at 145-46. Special Education Director countered that it was not possible to maintain the intensity of support in Student’s current placement, even with increasing the time spent outside of the general education classroom. *Id.* at 150. Special Education Teacher further explained that Student’s progress would suffer without more intensive supports. *Id.* at 150.
26. Advocate then protested that Parents did not have notice that the IEP team would be discussing a change of placement at the IEP Meeting. To this, Special Education Director replied: “That’s what we’re doing right now, [Advocate]. We are explaining to the parents where our decision is coming from, what is happening at the school, [and] why we believe that this is probably what we need to offer as FAPE.” *Id.*
27. At this point, any back and forth between Father, Advocate, and the rest of the IEP team ended. Special Education Teacher, Special Education Director, and SSN Coach continued to explain why they felt the SNA program was an appropriate placement, however Parent and Advocate were non-responsive, and the IEP Meeting ended. *Id.* at 150-155.

District IEP Team Member Discussion Following the IEP Meeting

28. On May 11, Parents emailed Special Education Director requesting a copy of the audio recording from the IEP Meeting the day before. *Exhibit H*, p. 39. The District submitted a partial copy of the audio recording that did not contain the discussion surrounding the change in placement, and unintentionally submitted a thirty-minute audio recording of a discussion that occurred between District members of the IEP team after Parents had left the meeting. *Complaint*, p. 4; *Exhibit 3*.
29. Present for the Post-meeting Discussion were: Special Education Director, Speech Language Pathologist, School Psychologist, Occupational Therapist, Special Education Teacher, SSN Coach, and Principal. Owing to the candid nature of this conversation, it is clear that the staff members did not know they were being recorded, and thus the SCO finds that this recording provides an authentic and unique insight into the thought processes of the District members of the IEP team.

30. Several times during the Post-meeting Discussion, District IEP team members reiterated their professional opinions that Student was not making adequate academic progress and needed more intensive services, and that the SNA program was the correct placement. Two comments made by Special Education Director are representative of this sentiment. First, when discussing how to complete the LRE section of the IEP, she stated “[h]e needs an intensive program, but that we put the reason for rejecting the 40%-79% or even the below 40% at his home school was because we have had such intensive services and we are not seeing growth. I mean everything that we said.” *Exhibit J-5*, p. 2. After Principal posited that Parents would likely homeschool Student rather than accept the District’s placement offer, Special Education Director responded: “[t]hat’s okay, we have made an offer of FAPE. Our job is to seek, find and offer. We can’t force them to do it, and we have offered what we believe educationally is best for this child.” *Id.* at 3-4.
31. Special Education Teacher, Speech Language Pathologist, SSN Coach, and Special Education Director all confirmed that they did not speak to anyone at the SNA program prior to the IEP Meeting. *Interviews with Special Education Teacher, Speech Language Pathologist, SSN Coach, and Special Education Director*. Two weeks prior to the meeting, Special Education Director checked with Coordinator, the District employee with oversight responsibility for School 2, to see about availability in the SNA program. *Interview with Special Education Director*. SNA Teacher confirmed no one at the District spoke to her about Student, and the first time she heard of him was when Parents requested to tour the SNA program following the IEP Meeting. *Interview with SNA Teacher*.
32. During the Post-meeting Discussion, Special Education Director explained why she did not include anyone from the SNA program at the IEP Meeting: “It’s probably good that [Coordinator] wasn’t here because . . . if we’d had her here to answer questions about that, it would’ve looked like we had already decided to do that. . . . That’s why I was worried about having [SNA Teacher] or anybody else here.” *Exhibit J-5*, p. 13.
33. Special Education Teacher’s explanation is consistent with an email exchange between Coordinator, Principal 2, and Special Education Director on May 14. Coordinator wrote: “I hadn’t alerted the team at [School 2] about this previously; I explained to [Former Director] that due to the parent’s opposition and the challenges that have been happening, it seemed prudent to wait until the meeting happened and a decision made for the consideration.” *Exhibit H*, p. 42. The SCO finds this statement, in conjunction with the entirety of these findings, shows that placement in the SNA program was not determined by the IEP team prior to the IEP Meeting.
34. Adding to this evidence, Speech Language Pathologist explained that during a previous telephone consultation she spoke to Private Speech Language Pathologist about potential placements, including the SNA program. Private Speech Language Pathologist

previously worked for the District at the SNA program, so Speech Language Pathologist asked her about the program and whether she thought it would be an appropriate placement. Private Speech Language Pathologist confirmed that she spoke to Speech Language Pathologist on April 26, and that while different placements for Student were discussed – including the SNA program – she did not get the sense the IEP team had made a final decision regarding placement. *Interview with Private Speech Language Pathologist.*

35. A comparison of the draft IEP provided to Parents before the IEP Meeting and the finalized IEP also suggests that the IEP team did not make a final decision regarding placement prior to the IEP Meeting. This comparison shows that modifications were made based on the overall discussion and on Parents' input. Additions to sections detailing Student's strengths, present levels of academic achievement, and accommodations were made based on Parents' comments. For example, the paragraph added to the student strengths section—detailing how Student uses a combination of signs, symbols and words—is representative of the discussion between Father and Special Education Teacher regarding verbal prompts. The inclusion of a resistance band into Student's accommodations documented at FF #17 also illustrates the District incorporating Parents' requests into Student's IEP. Also, the finalized IEP contains a new paragraph stating "the IEP team believes that the student's needs will be best met at the district's Severe Needs Autism program." Finally, the sections indicating Student's new proposed placement were left blank on the draft IEP, and completed on the finalized IEP. *Compare Exhibit C, pp. 1-20 with Exhibit C, pp. 21-42.*
36. Finally, prior written notice (PWN) was embedded in the finalized IEP. The PWN explained that the IEP team recommended the SNA program because Student needs highly specialized and individualized programming. The PWN also explained other placement options considered and why the team rejected them:

[t]he option of continuing programming at the 40-79% LRE in the home school, and the option of less than 40% at the home school were considered. However, [Student] is not making sufficient progress on the goals of the IEP and the target avoidance behaviors have not improved with the current level of support. Current supports have included Behavior Specialist consultation, Significant Needs Program consultation, and implementation of the recommendations with continual progress-monitoring.

Id. at 42.

Parental Follow Up and District Actions

37. On May 11, Parents requested to tour the SNA program at School 2. They stated they were not agreeing to the placement, but wanted to go and visit. *Exhibit H*, p. 40. Within the next two weeks, Parents toured the SNA program and met with Principal 2 and SNA Teacher. Parents were impressed with certain aspects of the SNA program. For instance, Father felt the paraprofessionals appeared to be highly trained on using communication devices with the students. However, Parents were also very concerned about the lack of exposure to general education peers, and the aggressive behavior demonstrated by the students in the program. *Interview with Parents*. Following their visit, Parent emailed Former Director requesting a meeting to discuss why they felt the SNA program was inappropriate. *Exhibit H*, p. 41.
38. On May 29, 2019, Parents met with Former Director to discuss their visit to the SNA program and alternative placements for Student. Parents told Former Director that, based on their visit, they did not believe the SNA program was an appropriate placement for Student. Former Director then explained that she was in the process of developing a new program meant for students with ASD that had significant needs, but not to the level of needing the SNA program. Parents then waited to hear back from Former Director to see if the new program would be a viable placement. However, between this meeting in May and the beginning of the 2019-20 school year, Former Director resigned, and plans for the new ASD program were abandoned. *Reply*, p. 5.
39. Based on their opposition to the SNA placement, and the possibility that a new program was being created, Parents waited to enroll Student in the District for the 2019-20 school year. *Id.* However, once they heard that Former Director had resigned, they enrolled Student at School 2 in the SNA program one week before the school year began. Parents, however, called Student in sick and he never attended the SNA program. On August 12, the District began attempting to schedule meetings with Parents to assist with the transition between School and the SNA program. *Exhibit K*. Parents did not schedule a meeting, and Mother is currently homeschooling Student. *Interview with Parents*.

CONCLUSIONS OF LAW

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

Conclusion to Allegation 1: District did not predetermine Student’s placement, and therefore provided Parents with the opportunity to meaningfully participate in the May 10, 2019 IEP meeting. However, the District committed a procedural violation related to parent participation by not including Parents in its review of existing information in determining no additional data was needed as part of reevaluation.

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." *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008). To that end, the IDEA requires that parental participation be meaningful, to include carefully considering concerns for enhancing the education of the child. 34 C.F.R. §§ 300.321(a)(1), 300.322, and 300.324(a)(1)(ii). Meaningful consideration occurs where the IEP team listens to parental concerns with an open mind, exemplified by answering questions, incorporating some requests into the IEP, and discussing privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of the student. *O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F.3d 692, 703 (10th Cir. 1998). Meaningful consideration does not require that a school district simply agree to whatever a parent has requested. *Jefferson Cnty. Sch. Dist. RE-1*, 118 LRP 28108 (SEA CO 3/22/18).

Although the emphasis on parental involvement does not mean that a parent has veto power over an IEP team decision, meaningful parent participation is prevented when an educational agency has made its determination prior to the IEP meeting, including when the agency presents one placement option at the IEP meeting and is unwilling to consider others. See *Ms. S. ex. rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003) ("A district may not enter an IEP meeting with a 'take it or leave it' position"); *Ms. S v. Vashon Sch. Dist.*, 39 IDELR 154 (9th Cir. 2003). When parents are prevented from meaningful participation because an aspect of their child's IEP, such as educational methodology or placement, has been predetermined, the resulting procedural violation denies the student a free appropriate public education. *Deal v. Hamilton Cnty. Bd. of Educ.*, 42 IDELR 109 (6th Cir. 2004), cert denied, 546 U.S. 936 (2005); *Larimer Cnty. Sch. Dist.*, 115 LRP 36469 (SEA CO 7/14/15).

Based on the below analysis, the SCO concludes that the District did not predetermine Student's placement in the SNA program before the IEP Meeting.

First, the transcript of the IEP Meeting shows Parents participating by offering their thoughts, concerns, perspectives, and suggestions throughout the discussion. Parents asked questions, made requests, and contributed their viewpoint during the discussion of present levels of academic achievement, academic progress, behavior data, the academic assessment, annual goals, accommodations, and the service delivery statement. Though Parents were active participants in the IEP Meeting, they did not ask for many changes or modifications during the discussion. When they did, however, the record shows the District being receptive and incorporating several of Parents' suggestions into the IEP. As discussed above at FF # 35, Father's question regarding verbal prompts was captured in a new paragraph in the student strength section, and a resistance band was added to Student's accommodations at Parents' request. Additionally, throughout the discussion, School staff listened thoughtfully to Parents' concerns and answered their questions. *Garden Grove Unified Sch. Dist.*, 115 LRP 20924 (SEA CA 5/5/15) (finding parents meaningfully participated in IEP meeting in part because "the District team members did not suppress any viewpoint, did not prevent other team members

from speaking, and did not ignore any inquiries”). Here, for example, the IEP team answered Parents’ questions regarding Student’s matching goal, the academic assessment, and Speech Language Pathologist’s recommendation for reduced, direct service minutes.

Second, District members of the IEP team also repeatedly stated their concerns that Student’s progress was being hampered by his communication delays and inability to sustain attention. Accordingly, Special Education Director attempted to discuss the other placement options considered and the reasons for rejecting them, though as recounted more fully below, this discussion was largely stifled by Parents’ actions. As detailed at FF# 24, when Advocate asked why they could not try to first implement Student’s updated IEP at School, Special Education Director explained that the intensive services provided were meant to be temporary, and had not resulted in progress. The IEP team was therefore concerned that without those supports, Student would continue to not make progress. The fact that alternative placements were discussed weighs against a finding of predetermination. *M.C.E. v. Bd. of Educ. of Frederick Cnty.*, 111 LRP 47724 (D. MD 2011) (finding no predetermination where several placement options were discussed, and IEP team members took parent’s concerns seriously).

Third, the record strongly indicates that the District members of the IEP team came into the meeting with opinions that the SNA program was the appropriate placement for Student based on behavior data and Student’s progress on annual goals. Additionally, Speech Language Pathologist’s conversation with Private Speech Language Pathologist indicates that, as early as April 26, the SNA program was being considered as an option. FF# 33. However, “Predetermination is not synonymous with preparation. Federal law prohibits a completed IEP from being presented at the IEP Team meeting or being otherwise forced on the parents, but states that school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions.” *Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006)(citing *N.L. v. Knox Cnty. Sch.*, 315 F.3d 688, 694 (6th Cir. 2003)). Though members of the IEP team came to the IEP Meeting with the pre-formed opinion that the SNA program was the most appropriate placement for Student, Parents were given the opportunity to ask questions and voice their opinion throughout the entire meeting, including the placement discussion. The record shows that Special Education Director explained why the IEP team felt the SNA program was necessary, and answered Advocate’s question about attempting to implement Student’s IEP at School for the 2019-20 school year. Accordingly, the SCO concludes that the IEP team appropriately prepared for the IEP Meeting, and provided Parents a meaningful opportunity to participate.

Fourth, as noted in FF #35, the draft IEP was added to and modified pursuant to the discussion during the IEP Meeting, including Parents’ input. Importantly, the ultimate placement recommendation and LRE sections of the draft IEP were not completed prior to the meeting, and were only finalized after the meeting. *A.P. v. N.Y.C. Dept. of Educ.*, 66 IDELR 13 (U.S. S.D.N.Y. 7/30/15) (noting there was no predetermination where the “final IEP also contain[ed]

the ultimate recommendation and placement – which were left blank in the draft IEP”). Additionally, the PWN embedded in the finalized IEP was not present in the draft IEP, indicating that it was not completed until after the IEP Meeting. FF #35.

Fifth, Special Education Director’s offer for Parents to tour the SNA program supports the conclusion that the District provided Parents a meaningful opportunity to participate. *Garden Grove Unified Sch. Dist.*, 1115 LRP 20924 (SEA CA 5/5/15) (“[a]n adequate opportunity to participate can include a visit by the parent to the proposed placement.”) (*citing J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 461 (9th Cir. 2010)). As described in FF #18, after Special Education Director proposed the SNA program, she gave Parents the opportunity to learn more about the proposed placement and take a tour. Though Parents left the IEP Meeting without making arrangements to tour the program, they requested to do so the next day via email, and did complete a tour shortly thereafter. FF #36. The fact that a tour was offered supports the conclusion that the District provided Parents a meaningful opportunity to participate in the IEP development process, and that Student’s placement was not predetermined. Similarly, Coordinator’s decision not to contact anyone at the SNA program until after the meeting happened and a decision was made indicates that the placement decision, had not in fact, been made prior to the meeting.

Finally, the SCO concludes that Parents’ actions during the IEP Meeting contributed to their lack of participation in the placement discussion. Mother left the meeting at the first mention of the SNA program and did not return. Though Father remained, he strongly opposed the placement, at one point stating he would homeschool Student before accepting the SNA program. Though the record clearly indicates that Parents were caught off guard by the proposed placement, and they quickly scheduled a tour of the SNA program, their actions at the IEP Meeting contribute to the analysis of whether the District denied them meaningful participation. *A.B. v. Franklin Tp. Comm. Sch. Corp.*, 898 F.Supp.2d 1067, 1077 (S.D. Ind. 2012) (finding that a statement by parent’s advocate effectively ended an IEP meeting, foreclosing the possibility of further participation by parents).

For the above reasons, the SCO concludes that the District did not predetermine Student’s placement prior to the IEP Meeting, and therefore Parents were not denied an opportunity to meaningfully participate in the meeting.

Though the District did not predetermine Student’s placement, the SCO concludes that the District committed a procedural violation related to parent participation by failing to include Parents in the District’s review of existing data as part of reevaluation prior to a significant change in placement.

Colorado law mandates that a significant change in placement be made upon consideration of a reevaluation. ECEA Rule 4.03(8)(b)(ii)(B). As part of any reevaluation, the IEP team and other qualified professionals must review existing evaluation data on the child. 34 C.F.R. §

300.305(a)(1). Based on that review and input from the student's parents, the IEP team must determine if additional data is needed to determine: whether the student is a child with a disability or continues to have such a disability, the student's present levels of academic achievement and educational needs, whether the student needs or continues to need special education and related services, and whether any additions or modifications are needed for the student to meet annual goals and to participate in general education. 34 C.F.R. § 300.305(a)(2). If the IEP team determines after this review that no additional data is needed, the district must notify parents of that determination and the reasons for it, and that parents have the right to request an assessment. 34 C.F.R. § 300.305(d)(1).

Here, as noted in FF #9, there is no evidence the District consulted Parents before making the determination that no additional information was necessary and sending them a "Prior Notice & Consent for Reevaluation," consistent with 34 C.F.R. § 300.305(a). That notice stated that based on a review of existing information, no additional data was needed. However, as noted above, a student's "IEP team . . . must review existing evaluation data on the child" before that determination is made. 34 C.F.R. § 300.305(a)(1). Parents are essential and mandatory members of the IEP team. 34 C.F.R. § 300.321(a)(1). The fact that Parents here were not consulted prior to this decision is further evidenced from Mother's request after receiving the notice that an additional assessment be conducted. And although IDEA does not require that the review of existing evaluation data be conducted through an IEP meeting, parental input must be sought and considered when determining what, if any, additional information is needed. 34 C.F.R. § 300.305(a)-(b). The District's failure to include Parents before making that determination is a procedural violation of IDEA.

Having concluded that the failure to include Parents in the review of existing data before determining that no additional information was needed 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).

Here, the SCO concludes that the procedural violation did not result in substantive harm. Though the District failed to include Parents in the review of existing data, it did inform Parents of their right to disagree with its determination and request evaluations. Parent did so on May 2 by requesting an academic assessment, which the District provided and the IEP team discussed during the IEP Meeting. FF #9, 14. Therefore, the District conducted a reevaluation, despite the initial procedural error, and Student's change of placement was made upon consideration of this reevaluation, consistent with Colorado law and IDEA. ECEA Rule 4.03(8)(b)(ii)(B); 34 C.F.R. § 300.305. Because the District conducted the assessment requested by Parent and used it as part of the required reevaluation, Parents' opportunity to provide and

request additional information was not impeded. Accordingly, the procedural violation did not result in a denial of FAPE.

REMEDIES

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

- a) Failing to include Parents in the review of existing data required in Student's reevaluation, consistent with 34 C.F.R. § 300.305.

To remedy this procedural violation, the District is ordered to take the following actions:

- 1) By **Tuesday, November 5, 2019**, the District must submit to CDE a proposed corrective action plan ("CAP") that effectively addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
 - a. Comprehensive training on the requirements of 34 C.F.R. § 300.305, in accordance with this Decision, must be conducted with all members who composed Student's IEP team in May 2019 (i.e. Special Education Director, Speech Language Pathologist, School Psychologist, Occupational Therapist, Special Education Teacher, SSN Coach, and Principal), District Special Education Coordinators, and any other staff deemed appropriate by the District, no later than **Thursday, December 5, 2019**. The training must include the requirement that the District request and consider input from parents as part of the review of existing data. If the individuals listed above are no longer employed by the District when the training occurs, the District may train staff occupying identical roles in order to demonstrate compliance with this remedy. At the request of the District, CDE personnel will develop and present the training ordered in this Decision to District staff. The District must contact Michael Ramirez to coordinate any training requested of the CDE.
 - b. Evidence that such training has occurred must be documented (i.e. training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets, with roles noted) and provided to CDE no later than **Monday, December 16, 2019**. These trainings may be conducted in-person, or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.

CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, CDE 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 CDE.

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 15th day of October, 2019.

Thomas Treinen
State Complaints Officer

Appendix

Complaint, pages 1-7

- Exhibit 1 Transcript of 5/10/19 post IEP meeting discussion
- Exhibit 2 Parents' statement
- Exhibit 3 Audio files from 5/10/19 IEP Meeting and staff only meeting

Response, pages 1-10

- Exhibit A no documents provided per SCO's request
- Exhibit B 2/2/17 IEP and evaluation report; 1/25/18 IEP; 11/12/18 IEP
- Exhibit C 5/10/19 draft IEP; 5/10/19 finalized IEP; IEP meeting agenda
- Exhibit D Speech Language Pathologist service logs
- Exhibit E 4/15/19 PWN; 4/27/18 PWN; 5/2/19 PWN
- Exhibit F Notice of meetings
- Exhibit G IEP progress reports; team meeting notes
- Exhibit H email correspondence
- Exhibit J-1 Pediatrician letter
- Exhibit J-2 Collaboration meeting notes
- Exhibit J-3 Audio recording of 5/10/19 IEP meeting
- Exhibit J-4 Transcript of 5/10/19 IEP meeting
- Exhibit J-5 Transcript of 5/10/19 post-IEP meeting discussion
- Exhibit K Communication and Contact Log

Reply, pages 1-6

- Exhibit 4 Audio recording of April 4, 2019 collaborative meeting

Interviews with:

Parents
Private Speech Language Pathologist
Speech Language Pathologist
Classroom Teacher
Special Education Teacher
SSN Coach
SNA Teacher
School Principal 2
Special Education Director