

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

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**State-Level Complaint 2011:509**  
**Pueblo School District 60**

**DECISION**

**INTRODUCTION**

This pro-se, state-level complaint (Complaint) was properly filed on 7/28/2011 by the [Parent] of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup>

To comply with the federal privacy laws (i.e., Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA))<sup>2</sup> and to protect the anonymity of the Complainant and [Parent's] child, hereafter, the persons and locations identified in conjunction with the Complaint investigation and Decision will be labeled as follows and redacted prior to publication:

[Parent], [Parent] of Child, ("Parent");  
[Student], Child of Parent, ("Student");  
Student's age of [Age], [Age];  
[School], ("School");  
[School Principal], School principal, ("School Principal");  
Pueblo School District 60, ("District");  
[Special Education Director], District Exceptional Student Services (ESS) Executive Director, ("Special Education Director");  
[ESS Specialist], District ESS specialist, ("ESS Specialist");  
[ESS Secretary 1], District ESS secretary, ("ESS Secretary 1");  
[ESS Secretary 2], District ESS secretary, ("ESS Secretary 2"); and  
[ESS Secretary 3], District ESS secretary, ("ESS Secretary 3").

The Complaint consisted of five pages. The SCO interviewed Parent by telephone on 7/29/2011 to clarify the allegations and proposed remedies provided by Parent in the Complaint.

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

<sup>2</sup> FERPA, codified at 20 U.S.C. § 1232g, was enacted in 1974, to protect a parent's access to education records and to protect the privacy rights of students and their parents. The IDEA regulations are found at 34 CFR § 300.1, *et seq.*

Based on the written Complaint and interview with Parent on 7/29/2011, the State Complaints Officer (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 CFR §§ 300.151 through 300.153.<sup>3</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

The overriding issue and, therefore, the scope of the investigation identified by the SCO is:

Whether the District committed procedural violations of the IDEA from 7/28/2010 to 7/28/2011, and if so, whether the procedural violations denied Student a free appropriate public education (FAPE).

On 8/2/2011, the District's Special Education Director was notified of Parent's allegation in a cover letter which included a complete copy of the Complaint. The District was specifically directed to supply the SCO with:

- 1) A written response that admits or denies the Complaint's specific allegation;
- 2) All documentation supporting the District's Response, including, but not limited to:
  - a) A copy of Student's current IEP;
  - b) A copy of any and all correspondence, including emails, between District/School staff, and between District/School staff and Parent, concerning the allegation;
  - c) Complete copies of the District's policies and procedures in effect between 7/28/2010 and 7/28/2011 concerning the collection, storage, disclosure to third parties, retention, and destruction of personally identifiable information;
  - d) The name of the District staff responsible for ensuring confidentiality of personally identifiable information;
  - e) A list of the names and positions of District staff who may have had access to Student's personally identifiable information between 7/28/2010 and 7/28/2011;
  - f) Documentation of training or instruction received by any District staff who collected or used Student's personally identifiable information between 7/28/2010 and 7/28/2011;
  - g) A list (i.e., record of access) of individuals who accessed Student's education records between 7/28/2010 and 7/28/2011; and
  - h) The complete name, title and contact information for each District staff member who has knowledge of the facts underlying the Complaint allegation.

On 8/17/2011, the SCO timely received the District's one-page Response and Exhibits marked "A" through "H." A copy of the District's Response and all supporting documentation was delivered to Parent on 8/18/2011.

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<sup>3</sup> Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

On 8/30/2011, the SCO received Parent's six-page Reply and accompanying documentation, which the SCO marked as Exhibits "1" through "5." Parent's Reply, due 8/29/2011, was untimely. Although the Reply was untimely, the SCO elected to consider it. The SCO sent a complete copy of Parent's Reply and Exhibits 1 through 5 to the District by certified mail.

On 8/30/2011, the SCO conducted on-site interviews with School Principal, Special Education Director, ESS Specialist, ESS Secretary 1, ESS Secretary 2, and ESS Secretary 3. The SCO also toured the physical location where Student's special education records were kept between 7/28/2010 and 7/28/2011.

On 8/30/2011, the SCO requested and received additional documentation from the District. This documentation was marked as Exhibit "I." On 8/31/2011, the SCO sent Parent a copy of Exhibit I by certified mail.

On 9/1/2011, the SCO closed the Record.

### **PARENT'S COMPLAINT ALLEGATION**

Parent's Complaint alleged that the District failed to notify [Parent] that Student's records had been destroyed in a July 2009 flood, that the District lied to [Parent] about Student's records being destroyed in the flood, and that Student failed Physical Education ("PE") in 2009 because Parent complained about the price of the mandatory PE uniform.

On 7/29/2011, in a telephone conversation with the SCO concerning the Complaint allegations, Parent asserted that the District provided [Parent] with copies of Student's records that [Parent] believed had been destroyed in the July 2009 flood on 6/13/2011, causing [Parent] to question whether Student's records were being properly safeguarded.<sup>4</sup> Parent also alleged that the District lied to [Parent] about these records being destroyed to prevent [Parent] from filing a civil rights complaint.

The SCO rejected Parent's claims from 2009 because they occurred over two years ago and/or did not raise claims arising under the IDEA, and thus were outside the SCO's subject matter jurisdiction.

Based on Parent's assertion of a continuing violation concerning the proper safeguarding of Student's education records, the SCO determined that Parent's Complaint contained one allegation subject to the SCO's jurisdiction. The allegation is summarized as follows:

- 1) Between 7/28/2010 and 7/28/2011, the District failed to properly safeguard Student's education records, in violation of 34 CFR § 300.623.

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<sup>4</sup> Although Parent adamantly believed that Student's education records were destroyed in the July 2009 flood, the records were not destroyed in the flood and there is no evidence supporting Parent's allegation that District staff told [Parent] the records were destroyed. See FF # 2-4.

**Summary of Proposed Remedies.** Parent proposed that the District be required to: 1) admit it did not handle Student's education records properly; 2) fire various District staff and school board members who allegedly lied about the destruction of Student's education records; 3) dismiss the District's current legal counsel; 4) award Parent monetary damages in the amount of \$150,000; and 5) notify other parents in the District about the status of student education records.

### **THE DISTRICT'S RESPONSE**

The District's Response is summarized as follows:

The District denied that it had failed to properly safeguard Student's education records from 7/28/2010 through 7/28/2011. The District submitted documentation to support its Response and asserted that there was no evidence suggesting that the confidentiality of Student's education records had been breached.

### **PARENT'S REPLY**

Parent's Reply is summarized as follows:

Parent reiterated allegations that the SCO had previously and repeatedly informed [Parent] were beyond the scope of this investigation, including the cost of Student's PE uniform in 2009, Student's 2009 grade in PE, and investigation into a July 2009 flood that occurred at District headquarters.<sup>5</sup>

Parent raised an additional allegation that the District violated 34 CFR § 300.623 by moving Student's education records to another location following the July 2009 flood without sending Parent written notice or securing Parent's written permission to move the records. Parent's allegation, even if assumed to be true, does not constitute a violation of the IDEA or ECEA because an educational agency is not required to notify a parent or secure parental permission before moving a student's education records under either regulatory scheme. Accordingly, the SCO rejected this allegation.

Parent submitted additional documentation with [Parent's] Reply for the purpose of explaining "what really happened at [District]" during the July 2009 flood.<sup>6</sup>

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<sup>5</sup> In multiple phone conversations and in letters dated 8/1/2011 and 8/5/2011, the SCO informed Parent that she did not have jurisdiction to investigate Parent's allegations concerning events in 2009, including the July 2009 flood.

<sup>6</sup> Reply at page 4. Parent informed the SCO that [Parent] had documentation that would prove Student's confidential information had been improperly disclosed. The SCO requested that Parent supply this documentation in telephone interviews with Parent on 7/29/2011 and 8/5/2011 and in letters to Parent dated 8/1/2011 and 8/5/2011. Parent did not submit this documentation with [Parent's] Reply or at any other time during the course of the SCO's investigation.

## FINDINGS OF FACT

After thorough and careful analysis of the entire Record,<sup>7</sup> the SCO makes the following FINDINGS:

### **Factual Background:**

1. At all times relevant to the Complaint, Student was [age] years of age, a resident of the District, and eligible for special education.<sup>8</sup>
2. This Complaint arises out of Parent's discovery on 6/13/2011 of documentation in Student's special education file concerning a 6/18/2009 IEP meeting.<sup>9</sup> Parent, who up until this time believed that documentation of this meeting had been destroyed in a July 2009 flood at District's headquarters, filed this Complaint alleging that the District had lied to [Parent] about Student's records being destroyed and had failed to properly safeguard Student's education records.<sup>10</sup>
3. Even without Parent's recent discovery of the 6/18/2009 IEP meeting notes, Parent had the information necessary to file a state complaint and/or due process complaint concerning Student's PE grade and the alleged destruction, mishandling, or access to Student's education records immediately following the July 2009 flood because [Parent] was present at the meeting on 6/18/2009 and was aware that the building where Student's special education records were maintained had had a flood.<sup>11</sup> Despite having these concerns, Parent did not file a state complaint until 7/28/2011. Accordingly, the SCO's investigation is limited to events that occurred 12 months from the date Parent's Complaint was received by the Department, i.e., from 7/28/2010 through 7/28/2011.
4. The SCO finds that the education records Parent has alleged were not properly safeguarded were the records maintained in Student's special education file at District's ESS

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<sup>7</sup> Appendix A, attached and incorporated by reference, details the entire Record.

<sup>8</sup> Exhibit A at page 1.

<sup>9</sup> On 10/22/2009, the District sent an envelope to Parent which contained a copy of the 6/18/2009 IEP meeting notes, a CD recording of the meeting on 6/18/2009, and Student's 5/14/2009 IEP. Exhibit 5. Parent did not receive this letter because it was not properly addressed. Rather than verify Parent's address, the District filed the unopened mail in Student's special education file. *Id.* On 6/13/2011, Parent discovered this mail when [Parent] went to the ESS office to inspect Student's special education file. Interviews with Parent, ESS Specialist, and ESS Secretary 1. The SCO is troubled that District staff did not verify Parent's address when the envelope was returned and notes that the confusion this situation caused led to Parent filing this Complaint.

<sup>10</sup> Complaint; Interview with Parent. The District headquarters where Student's special education records were being maintained had a flood in July 2009. However, Student's special education file was not destroyed in this flood. In addition, there is no credible evidence to support Parent's allegation that District staff told [Parent] Student's records had been destroyed in the July 2009 flood. Interviews with Parent, Special Education Director, ESS Specialist, ESS Secretary 1, ESS Secretary 2, ESS Secretary 3, and School Principal.

<sup>11</sup> Reply at page 3; Exhibit 2. Parent was provided with a copy of the Procedural Safeguard's Notice on 5/11/2010. Exhibit E at page 2. The Procedural Safeguards Notice provided information on parental rights under the IDEA, such as a parent's right to request mediation, file a due process and/or a state complaint concerning confidentiality of student education records. Exhibit C, pages 88-100.

office, specifically, the meeting notes from the 6/18/2009 IEP meeting.<sup>12</sup> Accordingly, the SCO's investigation into the District's safeguarding of Student's education records is limited to those education records maintained in Student's special education file at District's ESS office.<sup>13</sup>

**Allegation: From 7/28/2010 and 7/28/2011, the District failed to properly safeguard Student's education records, in violation of 34 CFR § 300.623.**

5. The District's policy concerning the safeguarding of student education records, which incorporates the language found in the Department's Procedural Safeguard's Notice and 34 CFR § 300.623, specifically requires that:

Each participating agency must protect the confidentiality of personally identifiable information at the collection, storage, disclosure, and destruction stages. One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information. All persons collecting or using personally identifiable information must receive training or instruction regarding your State's policies and procedures regarding confidentiality under Part B of the IDEA and the Family Educational Rights and Privacy Act (FERPA). Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.<sup>14</sup>

**Physical location of Student's special education records from 7/28/2010 until on or around 7/18/2011:**

6. From 7/28/2010 until on or around 7/18/2011, Student's special education records were kept in the ESS office, which during this time was located on the third floor of the District's headquarters.<sup>15</sup> As part of her investigation, the SCO toured the physical location where the files were being kept. Based on the following credible evidence, the SCO finds that ESS office procedures and the physical location of Student's records ensured proper safeguarding at the collection, storage, and disclosure stages:

- The ESS office rarely received any visitors from the general public or other District staff at this location.<sup>16</sup>
- All student files were kept in a locked vault at the very back of the ESS office suite.<sup>17</sup> To reach the vault, one would have to walk directly past the receptionist and through the

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<sup>12</sup> Reply, pages 2-4; Interviews with Special Education Director, ESS Specialist, ESS Secretary 1, and School Principal. School Principal stated that prior to filing this Complaint, Parent had not requested education records from Student's cumulative file, a file which is maintained at School. School did not have a flood in July 2009.

<sup>13</sup> Parent's allegation is limited to Student's paper file. Safeguarding of electronic records is not at issue in this Complaint.

<sup>14</sup> Exhibit C, pages 74-75. Special Education Director identified this as the District's policy on safeguarding student education records that was in place at all times relevant to the Complaint.

<sup>15</sup> Interviews with Special Education Director, ESS Specialist, ESS Secretary 1, and ESS Secretary 2.

<sup>16</sup> Interviews with Special Education Director, ESS Secretary 1, and ESS Secretary 2.

entire suite, a route which would require walking past all other ESS staff cubicles and offices.<sup>18</sup>

- Unless an ESS staff member was working in the file room, it was kept locked.<sup>19</sup> ESS Secretary 1 was the only staff who had the combination to the vault.<sup>20</sup>
- Since the file room was small and accessible through only one door, anyone working in the file room would have easily noticed someone walking into the room.<sup>21</sup>

### **Physical location of Student's special education records from on or around 7/18/2011 until 7/28/2011.**

7. On or around 7/18/2011, the ESS office moved from the third floor to the lower level of the District's headquarters.<sup>22</sup> Although other ESS staff members occasionally helped with moving the files, ESS Secretary 1 and ESS Secretary 2 moved most of the student special education files to the new office location by themselves.<sup>23</sup> The District did not use volunteers, outside contractors, or District staff members who were not part of the ESS office to move the files.<sup>24</sup> In addition, ESS staff members were careful to ensure that student special education files were not left unattended in an elevator or hallway while waiting to be unloaded or shelved. For example, ESS Secretary 1 made sure that someone was waiting by the elevator door on the lower level before she sent the files down the elevator to be unloaded.<sup>25</sup> There is no evidence suggesting that Student's special education files were not properly safeguarded during the move from the third floor to the lower level of the building.

8. From on or about 7/18/2011 to 7/28/2011, Student's special education file was maintained in the new ESS office location.<sup>26</sup> The file room is located toward the front of the ESS office and is accessible by two doors.<sup>27</sup> The door near the entrance of the ESS office is almost always locked and is within direct sight of the front desk, where ESS Secretary 2 sits.<sup>28</sup> This door is locked when closed and there is a large sign on the door indicating that it is to remain closed at all times. Because the ESS office has noticed a slight increase in visitors at this location, Special Education Director implemented an ESS office procedure which required the

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<sup>17</sup> *Id.*

<sup>18</sup> SCO tour of ESS office space.

<sup>19</sup> Interviews with ESS Specialist, ESS Secretary 1, ESS Secretary 2, and ESS Secretary 3. The SCO notes that from approximately October 2010 to July 2011, ESS Specialist was the interim Special Education Director.

<sup>20</sup> Interviews with ESS Secretary 1 and ESS Secretary 2.

<sup>21</sup> SCO tour of ESS office space; Interviews with ESS Secretary 1, ESS Secretary 2, and ESS Secretary 3.

<sup>22</sup> Interview with Special Education Director.

<sup>23</sup> Interviews with Special Education Director, ESS Secretary 1, and ESS Secretary 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Interview with Special Education Director.

<sup>27</sup> SCO tour of office.

<sup>28</sup> SCO tour of office; Interview with ESS Secretary 2. During the initial move, the ESS staff did not have a key to this door and it had to remain open. ESS Secretary 3 reported that she feels the records are better protected now that they can keep this door locked. Interview with ESS Secretary 3.

front desk (ESS Secretary 2) to be staffed at all times to ensure that an ESS staff member is present to greet visitors.<sup>29</sup> In addition, a sign has been posted at the front of the office that asks visitors to first sign-in at the front desk.

9. Unlike the vault where special education files had been previously stored, the current ESS file room also serves as the workspace for District school psychologists and is used to store their resources and testing materials. There are currently nine District school psychologists who use the file room as their workspace.<sup>30</sup> Because the special education files are not stored in locked file cabinets, the SCO finds that District school psychologists have unfettered access to all special education files maintained in this location, including files that they are not assigned to manage.<sup>31</sup> This means that each of the school psychologists using this workspace would have access to confidential information in which they do not have a legitimate educational interest. Therefore, Student's education records were not protected from potentially unauthorized access by District staff from 7/18/2011 to 7/28/2011.

10. The Special Education Director is the official responsible for ensuring the confidentiality of personally identifiable information in student special education files that are maintained at the District's ESS office.<sup>32</sup>

11. A record of access was kept in the front of Student's special education file which included the date of access, the name of the individual accessing the records, and the purpose for which the records were being accessed.<sup>33</sup>

12. Based on interviews with District staff, the SCO finds that the District has provided staff that use or collect personally identifiable information with instruction on FERPA and IDEA requirements concerning the confidentiality of student education records.<sup>34</sup> School psychologists, ESS specialists, ESS Secretaries, teachers, and paraprofessionals receive

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<sup>29</sup> Interviews with Special Education Director, ESS Secretary 1, ESS Secretary 2, and ESS Secretary 3.

<sup>30</sup> Interview with Special Education Director.

<sup>31</sup> SCO tour of ESS office.

<sup>32</sup> Although Special Education Director started her position on 7/1/2011, she confirmed that this is the position charged with this responsibility. The previous Special Education Director retired on or about October 2010. ESS Specialist was the interim Special Education Director until Special Education Director started in 7/1/2011 and confirmed that the Special Education Director is the official responsible for ensuring confidentiality of special education records. Interviews with Special Education Director and ESS Specialist.

<sup>33</sup> Exhibit G; Inspection of file. During this time, ESS Secretary 1 was responsible for handling requests to access Student files and confirmed that the record of access in Exhibit G was accurate to the best of her memory for the time relevant to the Complaint. Interview with ESS Secretary 1. From 7/28/2010 through 7/28/2011, there is no evidence that Student's record of access is not accurate.

<sup>34</sup> Interviews with Special Education Director, ESS Specialist, ESS Secretary 1, ESS Secretary 2, and ESS Secretary 3. The SCO notes that the District could not produce documentation of training on confidentiality issues and that this finding was established by the content of the SCO's interviews with ESS staff, all of whom demonstrated an understanding of their responsibilities to maintain confidentiality of personally identifiable information. Although not required under current regulation, the SCO encourages the District to conduct and *document* regular trainings on confidentiality for staff members who use or collect personally identifiable information.



instruction on the importance of protecting education records containing student's personally identifiable information when they are first hired as part of job orientation.<sup>35</sup>

13. ESS Secretary 1, ESS Secretary 2, and ESS Secretary 3 have all, at various times relevant to this Complaint, been the ESS staff primarily responsible for processing requests to copy or otherwise provide access to student special education records.<sup>36</sup> In addition, their work stations are in visible locations where they are the ESS staff most likely to greet the public or other District staff entering the ESS office.<sup>37</sup> All three ESS secretaries have received instruction on the importance of safeguarding student education records from the acting special education director as soon as they were hired and demonstrated an understanding of their responsibility to maintain the confidentiality of personally identifiable information under FERPA and the IDEA.<sup>38</sup>

14. At all times relevant to this Complaint, the District has not maintained a current list of staff authorized to access student special education records.<sup>39</sup>

15. Although the SCO finds that the District did not properly safeguard Student's education records at all times relevant to the Complaint, there is no evidence that confidentiality of Student's personally identifiable information has been breached. During telephone interviews on 7/29/2011 and 8/5/2011, Parent claimed to possess documentation that [Parent] asserted would prove that the confidentiality of Student's education records had been breached, including an identity theft report and a photograph showing that the ESS office was open with no staff present. The SCO notes that Student's social security number, which Parent alleged had been improperly disclosed to third parties because the District had not properly safeguarded Student's special education records, is not listed on documents in Student's special education file.<sup>40</sup> Although the SCO specifically and repeatedly requested that Parent supply the documentation [Parent] claimed to possess, Parent did not do so.<sup>41</sup> Documentation submitted with Parent's reply was provided to explain "what really happened at [District]" during the 2009 flood and did not support the allegation accepted for investigation in this Complaint.<sup>42</sup>

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<sup>35</sup> Interviews with Special Education Director, ESS Secretary 1, ESS Secretary 2, ESS Secretary 3, and ESS Specialist.

<sup>36</sup> Interviews with Special Education Director, ESS Secretary 1, ESS Secretary 2, and ESS Secretary 3.

<sup>37</sup> SCO tour of ESS office and Interviews with ESS Secretary 1, ESS Secretary 2, and ESS Secretary 3.

<sup>38</sup> Interviews with ESS Secretary 1, ESS Secretary 2, and ESS Secretary 3.

<sup>39</sup> Interview with Special Education Director.

<sup>40</sup> Interviews with Parent and Special Education Director.

<sup>41</sup> The SCO requested that Parent supply this documentation during the telephone interviews with Parent on 7/29/2011 and 8/5/2011 and in letters to Parent dated 8/1/2011 and 8/5/2011. Although the SCO attempted to interview Parent about this incident, Parent frequently interrupted the SCO to make demands or argue about the scope of the investigation, and was non-responsive to direct questions.

<sup>42</sup> Reply at page 4.

## CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact (FF), the SCO enters the following CONCLUSIONS OF LAW:

**Allegation: From 7/28/2010 through 7/28/2011, the District failed to properly safeguard Student's education records, in violation of §300.623.**

1. While confidentiality of all student education records is generally governed by FERPA regulations, found at 34 CFR, part 99, confidentiality of special education student records are more specifically governed by the IDEA regulations, found at 34 CFR §§300.610 through 300.627. The IDEA regulations concerning confidentiality "are tailored specifically to the special education environment." *Letter to Anderson*, 50 IDELR 167 (ED 2008). Because Parent has alleged that Student's special education records have not been properly safeguarded, the IDEA regulations, specifically 34 CFR § 300.623, primarily guide the analysis.<sup>43</sup> (FF# 4.)

2. To ensure that personally identifiable information contained in student special education records is properly protected, 34 CFR § 300.623 requires that:

(a) Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under Sec. 300.123 and 34 CFR part 99.

(d) Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

3. First, to comply with 34 CFR § 300.623 (a), the District must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages. Although there are no specific security guidelines, methods, or requirements that an educational agency, here the District, must follow to protect student education records, the U.S. Department of Education (ED) has issued recommendations that are helpful to evaluate the methods used to

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<sup>43</sup> Colorado state law does not provide greater protection concerning confidentiality of student education records. ECEA rules import the IDEA regulations concerning confidentiality of special education records. ECEA Rule 6.01 (1) -(16).

safeguard student records. 73 Fed. Reg. 74806, 74844 (Dec. 9, 2008). Because the ED recognizes that no system for protecting student records can guarantee that records will be safe from any unauthorized disclosure, education agencies are encouraged “to consider actions that mitigate the risk and are reasonably calculated” to protect personally identifiable information. *Id.* Methods for protecting confidential information are reasonable when they reduce the risk of unauthorized disclosure to a level proportionate to the likely threat of, and potential harm from, unauthorized disclosure. *Id.* For example, education records that contain social security numbers that could be used for identity theft should receive greater protection because these records are more likely to be targeted and more likely to result in significant harm if improperly disclosed. *Id.*

4. Although Student’s special education records do not contain [Student’s] social security number, they do contain personally identifiable information, such as evaluation and progress data, that is deserving of greater protection than records that do not contain such personal information. (FF# 15.) However, the ESS office, where Student’s special education records were maintained, was not often visited by the general public and was not a likely target for individuals seeking unauthorized access to personally identifiable information. (FF# 6 and 8.) Therefore, the reasonableness of the District’s methods for protecting Student’s special education records will be considered in light of the fact that the ESS office is not a high risk target.

5. In this case, the SCO concludes that the District used reasonable methods to protect the personally identifiable information contained in Student’s special education records from 7/28/2010 through 7/18/2011 because Student’s special education files were kept in a locked vault that could only be accessed by ESS Secretary 1. (FF# 6.) The physical location of the locked file room itself afforded reasonable protection from unauthorized access, particularly in a location that rarely received any traffic from the general public. *Id.* Because the vault was locked at all times and only one ESS staff member had the combination, the special education records were also protected from unauthorized access by District staff members who did not have a legitimate educational interest in a particular student’s special education file. *Id.* Accordingly, the SCO concludes that, from 7/28/2010 to 7/18/2011, the District’s methods for protecting personally identifiable information complied with 34 CFR § 300.623 (a) because Student’s special education records were protected by physical safeguards, such as locked doors, as well as ESS office procedures, that limited the threat of improper disclosure to the general public or other District staff members in a manner proportionate to the risk.

6. However, the SCO concludes that, from 7/18/2011 to 7/28/2011, the District did not properly protect personally identifiable information contained in Student’s special education records from potential improper disclosure to District staff, in violation of 34 CFR § 300.623 (a). In the new ESS office location, student special education records are kept in the same room that the District’s school psychologists use as their work stations. (FF#9.) Because the special education files are not kept in locked cabinets, District school psychologists have unfettered access to all special education files, including files in which they would not have a legitimate educational interest. Therefore, Student’s special education files were not properly safeguarded from potential improper disclosure to District staff members in this location.

7. To comply with 34 CFR § 300.623 (b) and (c), the District must have an official who assumes responsibility for protecting confidentiality of student records and must provide training on FERPA and IDEA confidentiality requirements to all staff who use and collect personally identifiable information. In this case, the Special Education Director is the District official responsible for ensuring the confidentiality of personally identifiable information. (FF# 10.) In addition, District staff members who collect and use personally identifiable information in Student's special education records have received instruction concerning the confidentiality of student records under requirements of FERPA and the IDEA. (FF# 12-13.) Accordingly, the SCO concludes that the District has complied with 34 CFR § 300.623 (b) and (c).

8. Finally, to comply with 34 CFR § 300.623 (d), the District must maintain a current listing of the names and position of those employees who are authorized to have access to personally identifiable information in student education records. Because the District has not maintained a current listing of authorized individuals, the SCO concludes that the District has violated 34 CFR § 300.623 (d). (FF# 14.)

9. A procedural violation does not, in and of itself, deny a student a free appropriate public education (FAPE) unless it impedes the student's right to a FAPE, significantly impedes a parent's right to participate in educational decision making regarding the provision of a FAPE, or deprives a student of educational benefit. 34 CFR § 300.513 (a) (2). Despite the technical violations of 34 CFR § 300.623 described above, there is no evidence that Student's special education records have been disclosed to an unauthorized individual. (FF# 15.) Accordingly, the SCO concludes that Student has not been harmed by these violations and has not been denied a free appropriate public education.

### **REMEDIES**

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

- a) Education record safeguards at 34 CFR § 300.623 (a); and
- b) Education record safeguards at 34 CFR § 300.623 (d).

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

- 1) Provide a secure location for student special education files where files are not openly accessible to District staff members, including District school psychologists, who may not have a legitimate educational interest in a particular student's special education file.**
- 2) Develop and maintain, for public inspection, a current listing of the names and positions of those employees within the District who may have access to personally identifiable information.**

The District shall provide the Department with documentation that it has complied with this requirement no later than 10/17/2011.

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

Colorado Department of Education  
Exceptional Student Leadership Unit  
Attn.: Joyce Thiessen-Barrett, Senior Consultant  
1560 Broadway, Suite 1450  
Denver, CO 80202-5149

**NOTE:** Failure by the District to meet any of the timelines set forth above will 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 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

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

Dated this 16<sup>th</sup> day of September, 2011.

*Candace Hawkins*

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Candace Hawkins, Esq.  
State Complaints Officer

## **Appendix A**

### **2011:509 Record**

#### **Complaint, pages 1 through 5.**

##### **Reply, pages 1 through 6.**

Exhibit 1: Student's IEP dated 5/14/2009.

Exhibit 2: Notice of Meeting and Meeting notes dated 6/18/2009.

Exhibit 3: Copy of manila envelope addressed to Parent and returned as undeliverable to District On 10/28/2009.

Exhibit 4: Student's IEP dated 5/17/2011.

Exhibit 5: Documentation that Parent picked up articles from ESS office, including Exhibit 4 on 6/13/2011.

##### **Reply, pages 1-2.**

##### **Response, page 1.**

Exhibit A: Student's IEP dated 5/17/2011.

Exhibit B: Copy of Parent's Complaint delivered by Parent to District ESS office.

Exhibit C: District policies concerning retention and confidentiality of student education records.

Exhibit D: Statement identifying District staff responsible for ensuring confidentiality of student education records.

Exhibit E: Documentation showing Parent received Procedural Safeguards Notice on 5/11/2010 and 5/17/2011.

Exhibit F: Statement by Special Education Director that all District staff are provided with ongoing training regarding confidentiality of student education records.

Exhibit G: Record of Access for Student's ESS education file.

Exhibit H: Names and contact information of District staff with knowledge of Complaint.

Exhibit I: Letter from Parent to District Superintendent received 5/24/2011, email from Special Education Director concerning confidentiality of records dated 8/5/2011, and documentation concerning articles Parent collected from ESS office on 6/13/2011.

**Interviews with:** Parent, Special Education Director, ESS Specialist, ESS Secretary 1, ESS Secretary 2, ESS Secretary 3, and School Principal.

On-site examination of the two physical locations where Student records were kept from 7/28/2010 through 7/28/2011.