

Colorado Department of Education
Decision of the State Complaints Officer
Under the Individuals with Disabilities Education Act (IDEA¹)

State-Level Complaint 2014:502
Academy 20 School District

DECISION

INTRODUCTION

This is a pro-se, state-level complaint (Complaint), filed February 3, 2014. The Complainants are the mother and father (Mother, Father, or collectively, Parents) of Student, who is identified as a child with a disability under the IDEA.

The Complaint consisted of two separate documents, dated January 23, 2014 and February 3, 2014, which the State Complaints Officer (SCO) treated as a single Complaint. The SCO determined that the Complaint identified six allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

PARENTS' COMPLAINT ALLEGATIONS

Parents' Complaint raised six allegations, summarized as follows:

1. Since the beginning of the 2013-2014 school year, the District has denied Student a free appropriate public education (FAPE) by failing to appropriately implement Student's Transfer Individualized Education Program (Transfer IEP) from another State.
2. Since the beginning of the 2013-2014 school year, the District has denied Student FAPE by failing to develop, adopt or implement a new Individualized Education Program (IEP).
3. Since the beginning of the 2013-2014 school year, the District has denied Student FAPE by failing to conduct a timely or comprehensive evaluation.

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).

4. Since October 8, 2014, the District has failed to provide independent educational evaluations (IEEs) requested by Parents.
5. On January 28, 2014, the District violated Parents' procedural rights under the IDEA and ECEA by denying them meaningful opportunity to participate in an IEP meeting.
6. Since the beginning of the 2013-2014 school year, the District has violated Parents' procedural rights under the IDEA and ECEA, including failing to provide them with prior written notice and failing to obtain parental consent prior to conducting evaluations.

Summary of Proposed Remedies: To resolve the Complaint, Parents proposed that the District immediately implement the draft IEP; authorize IEEs; reimburse parents for an optometry evaluation; transfer Student; provide a tutor to Student; and provide staff education on the IDEA and common core curriculum.

SUMMARY OF DISTRICT'S RESPONSE

In its Response, the District denied all six allegations. Moreover, the District made the following assertions:

1. Student's Transfer IEP was implemented and continued to be implemented in good faith.
2. An optometry evaluation agreed to by Student's previous school district in Jackson³ is not a comparable service.
3. The District has made good faith efforts to develop a new IEP, but the IEP team has failed to reach consensus.
4. The District conducted an assistive technology (AT) evaluation which was requested by and consented to in writing by Parents; however, Parents have refused to provide written consent for the District to conduct further evaluations.
5. Parents, by refusing written consent, have not allowed the District to conduct their own evaluations and, as such, Parents are not entitled to IEEs. Moreover, the District asserted that Parents' refusal to consent to a comprehensive evaluation amounts to a forfeiture of their right to IEEs and FAPE.

³ The names "Jackson" and "Hudson" are being used throughout this Decision to replace the actual names of the two states where Student had previous IEPs.

6. The District remains willing to convene an IEP meeting to attempt to finalize Student's IEP.

SUMMARY OF PARENTS' REPLY

Parents' Reply reiterated the allegations in the Complaint. Parents further asserted that the District's observations and assessments were, in fact, evaluations, such that Parents were therefore entitled to request IEEs. Parents also stated that they were not allowed to participate in the Transfer IEP, and that they are willing to reconvene in order to finalize Student's IEP.

Parents further asserted that the District has obtained records from prior school districts in other States without their consent and, therefore, any reference by the District to those documents should be stricken from the District's Response and the documents should be surrendered to Parents.

FINDINGS OF FACT (FF)

After a thorough and careful analysis of the entire record,⁴ the SCO makes the following FINDINGS:

1. At all times relevant to the Complaint, Student has lived with Parents within the boundaries of the District and has attended [grade] at School.
2. Family had been residing in Jackson and at some point during the summer of 2013, moved to Colorado. On July 18, 2013, Mother registered Student at School and provided the District with Student's previous IEP from Jackson (Jackson IEP).⁵ Mother also signed consent for the District to obtain records from Student's previous school in Jackson.⁶ The District immediately requested records from Student's previous school in Jackson.⁷
3. The Jackson IEP document provided by Mother was not a complete document and was missing some essential information, including information related to Student's eligibility category.⁸ Documents that the District subsequently received from the previous school in Jackson included a page from a previous IEP from Hudson that

⁴ The appendix, attached and incorporated by reference, details the entire record.

⁵ Exhibit G at Page 43 and Interview with Mother.

⁶ Exhibit 1.

⁷ Interview with Director for Special Education.

⁸ Exhibit 1 and Interviews with Director for Special Education and Case Manager/Resource Room Teacher.

showed Student's eligibility category for special education services as OHI.⁹ The Jackson IEP indicated that student was receiving special education services from a special education teacher, as well as related services from an occupational therapist, physical therapist, and speech pathologist.¹⁰

4. On August 29, 2013, the District used the eligibility category and the services from the Jackson IEP to prepare an IEP that the parties refer to as the "Transfer IEP."¹¹ The eligibility category was accepted for the purpose of preparing the Transfer IEP.¹² At Parents' request, the District agreed to modify the Transfer IEP, including the addition of services and increased service hours.¹³ The District did not, however, accept or adopt the Jackson IEP, and the District provided Parents with Prior Written Notice (PWN) that an IEP meeting was scheduled for September 17, 2013 to develop an IEP for Student. Parents signed the Transfer IEP, indicating their agreement with it, on September 14, 2013.¹⁴

5. In a section of the Jackson IEP entitled "Supplementary Aids and Services/Program Modifications/Supports for School Personnel," the document states that "[the Jackson school district] will be financially responsibility [*sic*] for cost of one office visit to Doctor of Optometry."¹⁵ The District, in developing the Transfer IEP based upon the documents from Jackson and Hudson, did not interpret or understand the office visit to the optometrist to be specialized instruction or a related service, but rather an agreement by the Jackson school district to pay for an evaluation. As such, the Transfer IEP did not address the optometry office visit and the District has denied requests by Parents to reimburse them for an optometry evaluation as a comparable

⁹ Exhibit J at Page 13 and Interviews with Mother, Director for Special Education and Case Manager/Resource Room Teacher. The District later also requested and received education records from Student's former school district in Hudson.

¹⁰ Exhibit J at Page 13 and Interviews with Mother, Director for Special Education and Case Manager/Resource Room Teacher. The District later also requested and received education records from Student's former school district in Hudson.

¹¹ Exhibit 1 and Interview with Director for Special Education, Case Manager/Resource Room Teacher. As explained in the Conclusions of Law herein, technically, the District was not required to nor was Student entitled to a Transfer IEP because the Student's transfer to the District did not happen within the same school year as the previous IEP in Jackson.

¹² Exhibit 1 and Interview with Director for Special Education.

¹³ Exhibit 1 and Interview with Case Manager/Resource Room Teacher, Director for Special Education and Mother.

¹⁴ Exhibit 1 and Interview with Mother.

¹⁵ Exhibit 1. In SCO's Interview with Mother, Mother stated that the family was transferred to Colorado before this evaluation had occurred.

service in the Transfer IEP.¹⁶

6. Father requested that the District perform an assistive technology (AT) evaluation, and on September 12, 2013, Mother signed a Consent for Evaluation (Consent) for “Assistive Technology to include speech-language and occupational therapy; observations by psychologist.”¹⁷ An AT evaluation was completed on September 13, 2013.¹⁸ In addition, on or around September 12, 2013, the District’s school psychologist observed Student and reviewed prior records, but performed no new evaluations or assessments, and did not prepare an evaluation report with findings or recommendations.¹⁹
7. Thereafter, the IEP Team, which included Parents, held consecutive weekly IEP meetings on September 17 and 24, and October 1, 2013, in order to develop a new IEP.²⁰ Parents provided the District with private evaluation reports, were well-prepared and actively participated in the meetings, reporting about Student’s needs, abilities, and present level of functioning, from their perspectives.²¹ Parents and the District both recorded the meetings by audio, and Parents’ participation was directly noted in the IEP.²² Parents were also accompanied at the IEP meetings by advocates.²³
8. The school-based IEP Team members based their opinions and recommendations on information gleaned from previous evaluations reported on in the Jackson IEP, information from private evaluations provided by Parents, and their own observations of Student and informal assessments of Student’s work.²⁴ With the exception of the AT evaluation, however, no other formal evaluations had been conducted by the District.²⁵ The IEP Team ultimately determined that it could not proceed with

¹⁶ Exhibit 1 and Interviews with Mother and Director for Special Education.

¹⁷ Exhibit 1.

¹⁸ Exhibits 1 and 3 and Interview with Speech and Language Pathologist.

¹⁹ Interview with School Psychologist.

²⁰ Exhibit 1.

²¹ Exhibit 1 and Interviews with Mother, Case Manager/Resource Room Teacher and Principal.

²² Exhibit 1.

²³ Exhibit 1 and Interviews with Mother, Principal, Assistant Director for Special Education and Case Manager/Resource Room Teacher. It was noted in SCO’s interview with Principal that Parents were assisted by two advocates at the September 17, 2013 meeting.

²⁴ Interviews with School Psychologist, Physical Therapist, Case Manager/Resource Room Teacher, and Principal.

²⁵ Exhibit 1 and Interviews with Mother, Case Manager/Resource Room Teacher, Assistant Director for Special Education, Director for Special Education, Speech and Language Pathologist, Physical Therapist, and School Psychologist.

developing an IEP for the Student in the absence of comprehensive evaluations.²⁶

9. At the conclusion of the October 1, 2013 IEP meeting, Parents verbally requested IEEs.²⁷ In a letter dated October 3, 2013, the Assistant Director for Special Education confirmed that Parents had requested IEEs in the areas of achievement, auditory processing, optometry, reading, neuropsychology, executive functioning, and assistive technology, but responded that the Parents' IEE request was premature because the District "[h]as not had an opportunity to conduct its own 'full and individual evaluation.'" The letter attached a PWN and a request for consent for evaluations in the areas of "[a]chievement, social emotional, physical therapy, occupational therapy, audiology, assistive technology and cognitive functioning."²⁸ Accordingly, the SCO finds that as of October 3, 2013, the District formally requested consent to conduct comprehensive evaluations of the Student by evaluators of its choosing.
10. Parents refused to provide consent to the District to conduct its own evaluations (with the exception of the AT evaluation to which they had previously consented), contending that District's evaluations had already been performed.²⁹ The District continued to reiterate their position that they had not had the opportunity to perform their own comprehensive evaluations.³⁰ Despite Parents' refusal to allow District evaluations to proceed, the District continued to provide services to student consistent with the Transfer IEP.³¹
11. On January 28, 2014³² the IEP Team, including Parents, reconvened in an effort to proceed with development of the IEP. The stated purpose of the IEP meeting was to attempt to reach an agreement about which evaluations should be conducted in order to proceed with determining eligibility and the development of the IEP.³³ Parents were present, they again recorded the meeting by audio, expressed their concerns and

²⁶ Interview with Mother, Assistant Director for Special Education, and Case Manager.

²⁷ Interviews with Mother and Assistant Director for Special Education.

²⁸ *Id.*

²⁹ Exhibit 3 and Interview with Mother.

³⁰ Exhibit 3 and Interviews with Director for Special Education and Assistant Director for Special Education.

³¹ Interviews with Mother, Director for Special Education, and Assistant Director for Special Education.

³² It should be noted that in the interim time period between the October 8, 2013 IEP meeting and the January 28, 2014 meeting, Parents (with the assistance of an Attorney) and District were engaged in discussions about the IEEs/evaluations (see Exhibit 3). Also, during this time period Student suffered from a concussion, which prevented Student from attending school at times and further made District evaluations impracticable. Although Parents included issues related to Student's concussion in their Complaint, the SCO does not have jurisdiction under the IDEA to consider these issues and, thus, they are not addressed in this Decision.

³³ Exhibit 1 and Interviews with Mother and Assistant Director.

opinions, had a private psychologist attend by phone, and were again accompanied by an advocate.³⁴ Accordingly, the SCO finds that on January 28, 2014, the Parents were provided with the opportunity to participate meaningfully in the IEP process, and took full advantage of that opportunity.

12. Subsequent to the meeting, Parents were provided with PWN and Consent for Evaluations.³⁵ Case Manager/Resource Room Teacher followed up on efforts to obtain written consent, but Parents never provided written consent for District to perform the evaluations.³⁶
13. The SCO finds that, with the exception of the AT evaluation completed on September 13, 2013, the District has not been able to conduct any of its own evaluations by evaluators of its own choosing because Parents have refused to provide written consent.
14. Mother confirmed that Student has been receiving services consistent with the Transfer IEP throughout the school year.³⁷ Progress reports from the District also confirm that the services set forth in the Transfer IEP have been continuously provided throughout the school year.³⁸ With the exception of the optometry office visit, discussed above, the Parents did not identify with any specificity any deficiencies in the content of the Transfer IEP or in its implementation, nor do they dispute with any specificity that Student has received services in accordance with the Transfer IEP and made appropriate progress throughout the 2013-2014 school year.

CONCLUSIONS OF LAW

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

I. The District did not violate Student's rights under the IDEA or deny her FAPE.

1. Under the IDEA, local education agencies such as the School District are required to provide eligible students with disabilities with a "free appropriate public education"

³⁴ Exhibit 1 and Interviews with Mother and Assistant Director.

³⁵ Exhibit 1, page 118.

³⁶ Interviews with Case Manager/Resource Room Teacher, Principal, Director for Special Education, and Assistant Director for Special Education.

³⁷ Interview with Mother.

³⁸ Exhibit 1 and Interview with Director for Special Education.

(FAPE), by providing special education and related services individually tailored to meet the student's unique needs, and provided in conformity with an IEP developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19.

2. The development of an IEP for a student with a disability requires a school district to follow certain steps set out in the law. At the outset, a school district must determine that the child is, in fact, an eligible child with a disability, by evaluating the student in all areas of suspected disability. 34 C.F.R. §§ 300.301 – 300.305; ECEA Rule 4.02 (3) – (5). The law sets out extensive requirements for these evaluations. *Id.* Upon completion of the evaluations, the information and data gleaned from the evaluations, as well as other information such as teacher reports, education records, and input from the parents, is used to make a determination that the child falls into one of the IDEA's thirteen eligibility categories. 34 C.F.R. §§ 300.306 – 300.311 (describing the eligibility determination process and requirements) and 300.8 (setting out the eligible disability categories); ECEA Rule 4.02(6). Once a child is found eligible to receive special education and related services, an IEP team is convened to develop an IEP for the student. 34 C.F.R. §§ 300.320 – 300.324; ECEA Rule 4.03. The IDEA sets out specific requirements detailing who must participate in the development of the IEP, what the IEP team must consider, what elements the document must contain, and when the IEP must be in effect. *Id.*

A. The District complied with the IDEA's requirements related to transfer IEPs

3. The Parents in this case allege that the District failed to provide Student with FAPE by failing to appropriately implement a Transfer IEP, by failing to provide comparable services in a Transfer IEP, and by failing to develop a new IEP. The SCO disagrees, for the reasons set out below.
4. Under the IDEA, when a student with an IEP transfers from one state to another, the following requirements apply:

If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfer to a public agency in a new State, ***and enrolls in a new school within the same school year***, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency –

- (1) Conducts an evaluation pursuant to §§ 300.304 through 300.306 (if determined to be necessary by the new public agency); and
- (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324.

34 C.F.R. § 300.323(f) (emphasis added). According to the federal Office of Special Education and Rehabilitative Services, which, *inter alia*, administers and oversees compliance with IDEA, when a student with a disability transfers into a new state, if the Student's previous IEP is not available and the receiving school district determines that an evaluation is necessary to determine the nature and extent of the student's disability and/or educational needs and abilities, that evaluation would constitute an *initial* evaluation. See, *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, September 11, 2011, Quest. A-2. If the parents refuse consent to evaluate the child, the receiving school district would be entitled to treat the child as a general education student and not provide the student with special education. *Id.*

5. In this case, Student moved from Jackson into the District during the summer of 2013 and was registered at the School on July 18, 2013. (FF 2). The IDEA expressly states that the transfer IEP provision applies to Students who ***enroll in a new school within the same school year***. Accordingly, because Student did not enroll in the School within the same school year, the IDEA's transfer provisions are not technically applicable to this case.
6. Nonetheless, the SCO will proceed with the analysis under the IDEA's transfer regulations. The parties clearly acted in good faith under the assumption that the transfer requirements of Section 300.323(f) **did** apply, and developed the Transfer IEP by incorporating into it the eligibility designation and special education and related services from the Jackson and Hudson IEP records. (FF 3.) Parents provided the District with Student's previous IEP from another state (Jackson), which was incomplete. Indeed, the District had to look to IEP documents from yet another state, Hudson, in order to determine the student's eligibility category. The District also requested records from the Student's previous school and school district. Based on the documentation available to them at that time, the District accepted the eligibility category for the purposes of preparing the Transfer IEP on August 29, 2013, and even included in the Transfer IEP additional services and service hours, as requested by the Parents.

7. Because of the Parents' refusal to consent to the District conducting evaluations by evaluators of its own choosing, the Transfer IEP has remained in effect far longer than the parties anticipated; indeed, it continues to be implemented to this day. The question is then whether the Parents are correct in their allegation that the District has denied Student FAPE in its implementation of the Transfer IEP by failing to provide "comparable services" to those listed in the Jackson IEP, as required by 34 C.F.R. § 300.323(f) (requiring the receiving school district to "provide the child with FAPE (including services comparable to those described in the child's IEP from the previous agency)").

8. The SCO rejects the Parents' allegation and finds that the Parents have not met their burden of proving that the District has denied Student FAPE. The SCO notes that in bringing this State Complaint, the Parents have not identified any aspect of the Transfer IEP with which they disagree, either in terms of the substantive content of Student's educational program, or in the implementation thereof, except for the optometry exam discussed below. Throughout the school year, as confirmed by both Mother and the District's progress reports, Student has been receiving special education and related services consistent with those agreed to by the parties in the Transfer IEP. (FF 2-5). There is no evidence that the services were inadequate or that Student failed to make appropriate educational progress. Accordingly, the Transfer IEP was appropriately implemented.

9. With respect to the optometry evaluation, Parents insist that District should be obligated to reimburse them for this as a "comparable service" in the Transfer IEP. Again, the SCO disagrees. Though the IDEA does not expressly define the term "comparable services," the term has been interpreted to mean special education or related services (*i.e.*, the "services" in the previous IEP) that are similar or equivalent to those provided by the previous school district. In this case, the Jackson IEP (which was, after all, incomplete, and thus impossible to analyze *in toto*) stated that the Jackson school district "will be financially responsibility [*sic*] for cost of one office visit to Doctor of Optometry." (FF 5.) This statement was not in the section of the IEP that set out Student's special education or related services; rather, it was included a section entitled "Supplementary Aids and Services/Program Modifications/Supports for School Personnel." This indicates to the SCO, as it clearly indicated to the District, that the optometry office visit was neither special education instruction nor a related service, but rather an agreement by the Jackson school district to fund an optometry evaluation. Under the IDEA's transfer regulation, there is nothing that requires a receiving district to

conduct evaluations agreed to by a previous school district. 34 C.F.R. § 300.323(f). Accordingly, SCO finds that the District was not required to reimburse the Parents for an optometry evaluation and, thus, there was no violation of FAPE.³⁹

B. The District did not deny Student FAPE by failing to develop or implement a new IEP.

10. Parents further assert that the District violated Student's right to FAPE in failing to develop or implement a new IEP. SCO disagrees, because the Parents' refusal to provide consent to the District to conduct comprehensive evaluations of Student by evaluators of its own choosing bars them from asserting a claim that the District denied Student FAPE. Federal courts analyzing this question have consistently and unequivocally held that when the parents of a child with a disability refuse to allow a school district to conduct comprehensive evaluations by evaluators of its choosing, the parents lose any right to demand special education services or to complain about a denial of FAPE. See *M.T.V. v. DeKalb County School District*, 446 F.3d 1153 (11th Cir. 2006)(where parents refuse to allow school district to conduct evaluations by evaluators of its choosing, parents/student lose entitlement to special education services); *Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450 (5th Cir. 2006)(student who desires special education services under IDEA must consent to evaluations); *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176, 178-79 (5th Cir. 1995)("if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation"); *Johnson by Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir. 1996); *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1315 (9th Cir. 1987); *M.S. v. Mullica Township Bd. Of Educ.*, 485 F. Supp. 2d 555 (D.N.J. 2007). The Department has followed and enforced this rule in its State Complaint decisions, and will continue to do so here. See, *In re: Douglas County Sch. Dist.*, Case No. 2012:514, 61 IDELR 119 (CO SEA 2013).

11. Parents apparently believe that by providing consent to an AT evaluation and to limited observations by the school psychologist, they did allow the District to conduct evaluations, thereby entitling them to request IEEs. Again, the SCO disagrees. In this case, the District requested consent to conduct comprehensive evaluations of Student in order to develop an IEP for her, including "[a]chievement, social emotional, physical therapy, occupational therapy, audiology, assistive technology and cognitive

³⁹ It should be again noted that the District was not required to provide a Transfer IEP to this Student, so the argument that the optometry evaluation should have been provided as a comparable service is technically moot.

functioning.”⁴⁰ The District had a clear legal right – indeed, a legal obligation – to obtain current, comprehensive, and reliable evaluative data about Student in order to determine the nature and extent of Student’s disability and special education and related services that would be appropriate for Student. 34 C.F.R. §§ 300.301 through 300.304 (establishing that before a student may be provided with special education and related services, a school district must conduct comprehensive evaluations to determine the child’s disability and special education and related service needs). Particularly given the limited and incomplete educational records from Jackson and Hudson, the District would have been remiss had it **not** requested the right to conduct comprehensive evaluations. When it requested that consent, however, the Parents refused to give it, and the limited observations/record review by the school psychologist and other school-based service providers obviously did not come close to constituting comprehensive evaluations.⁴¹ Thus, the Parents’ limited consent to evaluate amounted to no consent at all.

12. Notwithstanding Parents’ forfeiture of their right to FAPE by refusing to consent to evaluations, the SCO notes that the District, acting in good faith, has continued to provide Student with educational services in accordance with the Transfer IEP. Here, no later than October 3, 2013, Parents had an outstanding request for their consent to comprehensive evaluations by the District. (FF 9-12). Accordingly, because Parents have refused to consent to District evaluations, they have essentially forfeited the right to demand special education services or FAPE, or to complain about a denial of same. If the Parents wish to demand FAPE for Student or complain about the special education and related services Student receives, they must provide consent to the District to conduct comprehensive evaluations by evaluators of the District’s choosing.

C. The District has complied with the IDEA’s procedural safeguard requirements.

13. Finally, the SCO finds that Parents’ allegations that their IDEA procedural safeguards were violated by denying them the opportunity to participate meaningfully in the IEP

⁴⁰ Exhibit 1 at Page 104.

⁴¹ Indeed, SCO notes that according to the record and an interview with Mother, Parents appear to have been attempting to completely control the evaluation process by continually having Student tested and evaluated by private evaluators, using protocols they knew District evaluators to be using in their evaluations, rendering potential evaluative tools useless. Parents’ efforts to totally control the flow of information in the IEP process are not supported under the law.

meeting on January 28, 2014, failing to provide them with PWNs, and conduct evaluations without consent, are without merit.

14. The IDEA provides that in the development of an IEP, parents must be afforded the opportunity to attend and participate, and that the parents' participation must be meaningful, including giving consideration to their concerns about their child. 34 C.F.R. §§ 300.321 (a)(1) and 300.324(a)(ii). In this case, at the January 28, 2014 IEP meeting, Parents were present, they recorded the meeting by audio, expressed their concerns and opinions, had a private psychologist attend by phone, and were accompanied by an advocate.⁴² (FF 11). The Parents' right to meaningful participation in the IEP process was not denied in this case.

15. The IDEA provides that before a school district proposes or refuses to initiate or change the identification, evaluation or educational placement of a child with a disability, the school district must provide the parents with "prior written notice" (PWN) describing and explaining the basis for the school district's action. 34 C.F.R. § 300.503. Further, a school district must obtain parental consent prior to conducting evaluations. 34 C.F.R. § 300.300. In this case, the Parents allege that the District failed to provide them with PWN relative to the District's request to conduct evaluations, and that the District conducted evaluations without parental consent. The record in this case demonstrates that this contention is simply not true; attached to the District's October 3, 2013 letter to the Parents were PWN and consent forms requesting parental consent for the District to conduct evaluations. (FF 9.) The Parents refused to provide consent, such that those evaluations have never been conducted. Further, the one evaluation that the District has conducted – the AT evaluation – was conducted with parental consent. (FF 6.) Accordingly, the SCO finds no violation with respect to either the IDEA's PWN or parental consent requirements.

II. With the exception of the denial of an IEE for an AT evaluation, the District has not violated the Parents' IEE rights.

16. Parents assert that the District violated their procedural rights under the IDEA by refusing their request for IEEs. With the exception of District's denial of Parents' request for an IEE of the AT evaluation, the SCO disagrees.

⁴² Exhibit 1 and Interviews with Mother and Assistant Director.

17. Parents have the right to request an IEE of their child at their own expense. 34 CFR § 300.502(a)(1). That right, however, does not arise until the public agency (*i.e.*, the District) conducts its own evaluation with which the parent disagrees. 34 CFR § 300.502(b)(5). In this case, Parents requested IEEs in achievement, auditory processing, optometry, reading, neuropsychology, executive functioning, and assistive technology. (FF 9.) With the exception of the assistive technology evaluation, the District has not had had the opportunity to conduct evaluations in any of these areas. Accordingly, Parents' request for IEEs in auditory processing, optometry, reading, neuropsychology, and executive functioning are rejected.

18. Parents suggest that the limited observations and assessments they permitted were evaluations and, therefore, their request for IEEs in all of the areas they requested was appropriate. These suggestions are not credible or supportable. First, as noted above, under no reasonable analysis can some classroom observations and reviews of existing educational documents constitute evaluations in the areas of auditory processing, optometry, reading, neuropsychology, or executive functioning, which would trigger the Parents' right to request IEEs. Second, while reviewing existing data and observing a child in class can clearly be **part** of a comprehensive evaluation, *see* 34 C.F.R. § 300.304, under these circumstances, the District's efforts to obtain what little information it could in order to gain some insight into how to serve Student, did not constitute an evaluation triggering the Parents' right to request comprehensive IEEs in all areas of Student's functioning.

19. Parents did, however, include in their IEE request a District AT evaluation, which the District denied in total. (FF 7). The District did perform an AT evaluation (FF 7) and, therefore, Parents' request for an IEE in that instance was appropriate. With regard to the District's denial of this one request for an IEE, "[t]he public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to Sec. 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria." 34 CFR § 300.502(b). District did neither of these things and, therefore, SCO finds that the District violated Parents' procedural rights in this single instance.

III. The District properly obtained records consistent with the Family Educational Rights and Privacy Act (FERPA).

20. Parents also assert that the District wrongfully obtained records from previous schools districts (Jackson and Hudson) without their consent. While it is true that schools must generally have written permission from parents in order to release any information from a student’s educational record, FERPA does allow schools to disclose those records without consent to certain parties under certain conditions. Specifically, FERPA does not require a school district to obtain parental consent prior to disclosing educational records “to school officials with legitimate educational interest” or “to other schools to which a student is transferring.” 34 CFR § 99.31; *see also* 34 CFR 300.622(a) (incorporating into IDEA FERPA’s provisions relating to disclosure of educational records without parental consent). Accordingly, the District did not improperly request, receive or rely upon the education records from the Jackson and Hudson school districts, because Student was transferring to the District.

REMEDIES

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

- a) Failing to provide an Independent Educational Evaluation at public expense, as consistent with 34 CFR § 300.502(b).

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

- 1) District will pay for an IEE on the AT evaluation no later than forty-five (45) days from the date of this Decision.

The Department will approve or request revisions of 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 area of noncompliance.

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

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Joyce Thiessen-Barrett
1560 Broadway, Suite 1175
Denver, CO 80202-5149

NOTE: Failure by the District to meet the timeline 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 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 1st day of May, 2014.

Lisa A. Weiss, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1- 16.

Exhibit A: Private evaluations

Exhibit B: Student work samples

Exhibit C: Notices of Meeting, Prior Written Notices and Consents for Evaluations

Exhibit D: IEP Meeting notes

Exhibit E: Correspondence between District and Parents' Attorney

Exhibit F: Table of Contents included with Complaint

Exhibit G: District evaluation report

Exhibit H: Parent input from January 28, 2014 IEP meeting

Exhibit I: Jackson IEP

Exhibit J: Email correspondence

Exhibit K: Parents' audio recording of October 1, 2013 IEP meeting

Response, pages 1-8.

Exhibit 1: Copy of District's entire file, including files from other Districts in other States.

Exhibit 2: Copy of School's entire file.

Exhibit 3: Correspondence between District, School staff members and Parents.

Reply, pages 1-8.

Exhibit L: Disc provided by Parent

Interviews with:

Mother

Director for Special Education

Assistant Director for Special Education

School Principal

Case Manager/Resource Room Teacher

Physical Therapist

Autism Specialist

Speech Language Pathologist

School Psychologist