

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

**State-Level Complaint 2017:520
Douglas County School District**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on September 28, 2017, 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 State Complaints Officer (SCO) determined that the Complaint identified four allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failing to provide Parents with proper notice of who would be attending the IEP meeting scheduled for September 28, 2016;
2. Failing to consider letters from Student's Pediatrician and Psychologist provided by Parents at the September 28, 2016 IEP meeting;
3. Failing to develop an IEP that addressed Student's needs in the area of social-emotional functioning during the September 28, 2016 IEP meeting; and
4. Denying parental request that Student be placed in an alternative school.

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).

FINDINGS OF FACT

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

Background:

1. At all times relevant to the Complaint, Student was [age] and resided with Parents within the District's boundaries. Student is eligible for special education and related services as a child with an Autism Spectrum Disorder.⁴ Student was initially determined eligible for special education and related services by a Colorado school district in the spring of 2014, with demonstrated needs in the areas of emotional regulation and social/pragmatic skills.⁵
2. Parents' primary concern, and a significant motivation for filing this Complaint, involved the reduction and ultimate removal of mental health support that Student was receiving as a related service between March of 2015 and May of 2016.⁶ Pursuant to 34 CFR § 300.153 (c) and Colorado's state-level complaint procedures, the SCO does not have authority to investigate any alleged violations of IDEA that occurred more than one year prior to the filing of the Complaint. This restriction applies even if the alleged violation is continuing or the complainant is requesting compensatory services. *Questions and Answers on IDEA Part B Dispute Resolution Procedures*, Question B-18 (OSERS 2013).
3. Because Parents filed this Complaint on September 28, 2017, this investigation is limited to events that occurred no earlier than September 28, 2016. Consequently, this investigation involves only those allegations concerning the IEP meeting conducted on September 28, 2016, and will not include Parents' allegation that the District improperly removed mental health services from Student's IEP in May of 2016.

September 2016 IEP Meeting

4. From the beginning of August through mid-September, Parents expressed concerns about Student's anxiety, changes to staff, and the special education services Student was receiving at Charter School. During this time, Charter School staff responded to Parent's various requests for information and followed-up with Student's teachers and paraprofessionals to ask if they had observed any behavior or changes in academic performance that concerned them.

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

⁴ Exhibit A, p.1.

⁵ Exhibit 16, p. 46.

⁶ Complaint, pp. 5-10; Reply, pp. 2-5.

Because Parents disagreed with the Charter School's response to their concerns, the family obtained the assistance of an Advocate.⁷

5. On September 21, 2016, Parents, through their Advocate, requested that the Charter School schedule an IEP meeting as soon as possible to discuss their concerns about Student's escalating anxiety.⁸ According to Parents, Student was so anxious about school that he was now refusing to attend.⁹ Parent and Charter School agreed to a date and time for the meeting around 5 P.M. on September 26.

6. Because this was an urgent meeting requested by Parent, the Charter School did not send the formal Notice of Meeting (Notice) ten days in advance, as is the general practice.¹⁰ Instead, the Notice was sent to Parents via email around 1 P.M. on September 27, 2016, the day prior to the IEP meeting.¹¹ The Notice informed Parents that "Legal Counsel" would be attending the meeting.¹² Legal Counsel was invited to the IEP meeting based on the belief that the Advocate was also an attorney and may try to intimidate the IEP team.¹³ Indeed, the Advocate is an attorney currently on inactive status in Colorado.¹⁴

7. Although the Notice informed Parents that Legal Counsel would be in attendance, Parent did not realize an attorney would be present until she arrived for the meeting because she had not yet read the Notice.¹⁵ Recognizing that Parent and Advocate were surprised by the presence of Legal Counsel, the Charter School offered to reschedule the meeting.¹⁶ Parent and Advocate briefly discussed whether to participate in the meeting or reschedule. Despite being uncomfortable with the presence of Legal Counsel, Parent decided to proceed with the meeting because Student was refusing to attend school and she did not want to wait for another meeting to be scheduled.¹⁷ Parent indicated that she would have attempted to find "an active status attorney" if she had received more notice that an attorney for the Charter School would be present at the meeting.¹⁸

8. As evidenced by the recording of the IEP meeting, the attendance and participation of Legal Counsel created an adversarial and combative atmosphere. Despite this atmosphere,

⁷ Reply; Recording of IEP meeting; Exhibit D-1.

⁸ Exhibit F, p. 133. There was some initial confusion regarding receipt of a signed release of information for the Charter School to communicate with Advocate. Exhibit F, pp. 102-107.

⁹ Interview with Parents; Exhibit D, p. 1.

¹⁰ Interview with Special Education Director, Special Education Coordinator, and Special Education Case Manager.

¹¹ Exhibit F, pp. 152-56, and 200 (email correspondence).

¹² Exhibit C, p.1.

¹³ Interview with Special Education Director, Special Education Coordinator, and Special Education Case Manager.

¹⁴ Inactive status confirmed through a search on the Colorado Supreme Court's Office of Attorney Regulation Counsel website on November 14, 2017.

¹⁵ Exhibit 22; Reply, p. 6.

¹⁶ Exhibit D-1, p. 1; Interviews with Special Education Coordinator and Special Education Case Manager.

¹⁷ Reply, p. 6; Interview with Parents.

¹⁸ Reply, p. 6. According to the Office of Attorney Regulation Counsel, an attorney must have a status of "active" and in good standing in order to practice law within the state of Colorado.

however, Parent and Advocate actively participated in the meeting by asking questions, sharing their input and perspective, and making requests.¹⁹

9. The adversarial tone of the meeting was also driven by the significant discrepancy between what Charter School staff observed and what Parents observed with regard to Student's anxiety. While Student's teachers and other support staff reported that they had not observed any concerning behavior, Parents reported that Student was refusing to eat and pulling out his hair. Parent also reported that Student's anxiety was escalating and that he was now refusing to go to school. Notably, Student had not missed school with any regularity until the week of September 26, 2017.²⁰

10. Because Charter School staff had not observed the anxiety reported by Parent, various members of the IEP team asked Parent to provide additional information about Student's school-related anxiety. For example, the IEP team asked Parent to indicate how many times Student had called her from school, what time he had called, and why he felt unsafe. The IEP team requested this information to better understand the source of the anxiety and to help identify any patterns or possible triggers that were occurring at school so that they could discuss and develop supports that could be implemented immediately at Charter School.²¹

11. In response to questions about Student's anxiety, Parent refused to provide the specific information that the team was requesting, stating that she did not have to provide this information because Charter School had not provided the information she had previously requested concerning the staff working with Student.²²

12. Immediately following the request for information, Advocate further informed the team that there was "no point" in discussing Student's needs with Charter School because Parents had decided that Student would not be returning.²³ Although the first fifteen minutes of the meeting involved a discussion about how to support Student at Charter School, such as designating a consistent check-in person, this discussion essentially ended when Advocate informed the IEP team that trust was gone and Parents simply did not want Student to return to Charter School.²⁴ Consequently, Student's IEP was not reviewed or revised at this meeting.

13. Parent also refused to provide consent for reevaluation and consent to speak with Student's Private Psychologist and Private Pediatrician about Student's anxiety both during and

¹⁹ Recording of IEP meeting.

²⁰ Exhibit D, p. 1 (attendance records).

²¹ Recording of IEP meeting at approximately 17:20 and 30. Exhibit D-1, p. 14 (Parent prepared transcript of IEP meeting).

²² Recording of IEP meeting at approximately 17:10; Exhibit D-1, p. 14-23. (Parent prepared transcript of IEP meeting). During her interview, Parent stated that she believed she had already provided all of the information that she could and the Charter School was not listening. Parent did not communicate this at the IEP meeting. Instead, she refused to provide any additional information.

²³ Recording of IEP meeting at approximately 18:52; Exhibit D-1, p. 15 (Parent prepared transcript of IEP meeting).

²⁴ *Id.*

after the IEP meeting.²⁵ Parents rescinded previous consent to speak with Private Psychologist, dated November 2015, because the Charter School had never utilized it and Parents no longer trusted how the information would be used.²⁶

14. Parents also alleged that the IEP team failed to consider letters from private providers during the meeting. Contrary to this allegation, there is no credible evidence that these letters were provided during the meeting. First, the letters from Private Pediatrician and Private Psychologist that were provided by Parents as supporting documents with their initial Complaint were dated October 4 and October 10.²⁷ Because they were dated after the September IEP meeting, these letters could not have been provided or considered at the meeting.

15. Parents submitted two additional letters from Private Psychologist and Private Pediatrician with their Reply. Although these additional letters were dated prior the IEP meeting, i.e., September 26 and 27, it is unclear that copies were provided at the meeting.²⁸ For example, Advocate referenced letters from Private Psychologist and Private Pediatrician at the beginning of the meeting, asserting that these letters would demonstrate Student's need for structure and predictability.²⁹ Later in the meeting, however, Advocate stated that she could "show" that the letter from the doctor was "coming in sometime today," demonstrating that this letter was not actually provided at the meeting.³⁰ Immediately following this statement, Advocate informed the IEP team that they had a "doctor's letter, a therapist, and psychologist you know letter for you as well."³¹ Because the "doctor's" letter was included in this list and was clearly not provided at the meeting, the SCO finds it more likely than not that the letters from Private Psychologist and Private Pediatrician were not yet available and consequently were not provided at the IEP meeting.³²

16. Toward the end of the meeting, Parent and Advocate requested an administrative transfer to a different school.³³ In response, the IEP team informed Parent that they could not grant the request. The prior written notice dated September 28, 2016, informed Parent that the

²⁵ *Id.*; Exhibit F, p. 217.

²⁶ Interview with Parents. Consent was dated November 2015. Exhibit 20.

²⁷ Exhibit 21.

²⁸ Recording of IEP meeting; Exhibit D-1, p. 18; Interviews with Special Education Case Manager, Special Education Teacher, General Education Teacher, District Special Education Coordinator, Parent, and Advocate.

²⁹ Exhibit D-1, p. 6. This is the same page/passage of the IEP meeting transcript that Parent referenced for support that the letters were provided during the meeting in an email to the SCO following the interview.

³⁰ Exhibit D-1, p. 18.

³¹ *Id.*

³² The parent-prepared transcript of the IEP meeting included a description of certain actions that occurred at the meeting, e.g., "[Advocate] reads letter [Student] wrote." Notably, there is no similar description indicating that letters from Private Psychologist and Private Pediatrician were provided at the meeting. Exhibit D-1.

³³ Recording of IEP meeting; Exhibit D-1, p. 38

request for an administrative transfer was denied because “there was no information to suggest that [Student] could not be successful at [Charter School].”³⁴

17. Following the meeting, Parents informed the District that Student would not be returning to Charter School.³⁵ Parents further informed the District that they would be keeping Student at home until “an appropriate District placement is made.”³⁶

18. On October 6, 2016, five school days following the IEP meeting, Special Education Director used her authority to approve an administrative transfer from Charter School to New School, Student’s neighborhood school.³⁷ Special Education Director’s decision to approve a transfer was based on her recognition that the trust between the Charter School and Parents was irreparably damaged, and that as a result, Parents would not allow Student to return to Charter School. Although Special Education Director believed that Student was receiving FAPE at Charter School, she ultimately approved the administrative transfer in an effort to get Student back in school as soon as possible.³⁸

19. Special Education Director notified Parents that she had approved the administrative transfer and that Student could enroll at New School on October 6, 2016.³⁹ Due to the District’s fall break, from October 7 through October 14, the transfer paperwork could not be completed until classes resumed on Monday, October 17, 2016.⁴⁰ The District convened an IEP team on October 19, and Student began attending school on October 20, 2016.⁴¹ There is no dispute that Student received FAPE at New School.⁴²

CONCLUSIONS OF LAW

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

Conclusion to Allegation One: The District provided proper notice of who would be attending the September 28, 2016 IEP meeting.

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 School District No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008). Essential to a parent’s ability to participate in the IEP process is the requirement that parents be invited and encouraged by the school district to attend the IEP meeting. To that end, the federal

³⁴ Exhibit B, p. 1.

³⁵ Exhibit F, p. 215 (email correspondence).

³⁶ Exhibit F, p. 215 (email correspondence).

³⁷ Response, p. 6; Exhibit F, p. 256; Interview with Special Education Director.

³⁸ Interview with Special Education Director.

³⁹ Exhibit F, p. 253.

⁴⁰ Exhibit F, p. 259.

⁴¹ Exhibit A, p. 47-48.

⁴² Reply, p. 1.

regulations specifically require that the school district notify parents of the meeting early enough that they have an opportunity to attend and “schedule the meeting at a mutually agreed on time and place.” 34 CFR § 300.322(a). The invitation, or “notice of meeting” as it is commonly known, must also indicate who will be in attendance. 34 CFR § 300.322(b). Although IDEA does not prescribe specific timelines for providing notice in advance of the meeting, the notice must be provided in sufficient time for parents to be able to attend. The failure to provide sufficient notice of who will be in attendance may impede a parent’s right to participate in the IEP meeting.

Based on the following facts, the SCO concludes that that District provided adequate notice that Legal Counsel would be attending the IEP meeting. First, this was an urgent IEP meeting request, not a routine or periodic request, such as an annual review. To accommodate the urgency of the request, the Charter School worked with Parent and Advocate to find a mutually agreeable date and time within five school days of the request. Parent was provided with the Notice of Meeting, which identified that Legal Counsel would be in attendance, one day after the parties had agreed to the meeting date, and one day prior to the IEP meeting. Second, Parent was provided with the option of continuing the meeting or rescheduling. After conferring with her Advocate, an attorney on inactive status in Colorado, Parent chose to continue with the meeting, as scheduled. The fact that Advocate is an attorney, albeit on inactive status, was persuasive in concluding that Parent was provided with adequate notice that an attorney for the Charter School would also be attending the IEP meeting. Finally, Parent actively participated in this meeting by asking questions, sharing her input and perspective, and making requests of the IEP team. Consequently, there is no evidence that the presence of Legal Counsel impeded Parent’s ability to participate in the IEP meeting.

The presence of Legal Counsel did, however, contribute to an adversarial and combative tone that under different circumstances could have resulted in a conclusion that the presence of an attorney, particularly on short notice, impeded the Parent’s right to participate in the IEP meeting. Although IDEA does not prohibit attorneys from attending IEP meetings, the Office of Special Education Programs (OSEP) “strongly discourages” attorneys from participating in IEP meetings based on “the potential for creating an adversarial atmosphere that would not necessarily be in the best interests of the child.” *Letter to Clinton*, 37 IDELR 70 (OSEP 2001). For the same reasons, the Department strongly discourages attorneys from participating in IEP meetings and cautions that their attendance may, under different circumstances, impede a parent’s right to meaningfully participate in the IEP meeting.

Conclusion to Allegation Two: The District did not fail to consider letters from Student’s Pediatrician and Psychologist during the IEP meeting because these letters were not provided.

Meaningful consideration happens when the educational agency listens to parental concerns with an open mind, such as when the educational agency answers parent’s questions, incorporates some suggestions or requests into the IEP, and discusses privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of

the student. *O'Toole v. Olathe Dist. Schools*, 144 F.3d 692 (10th Cir. 1998); *See Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109 (6th Cir. 2004), *cert denied*, 546 U.S. 936 (2005). Meaningful consideration does not require a school district to simply agree to whatever a parent has suggested or requested. In this case, there is no credible evidence that Parent provided the various letters from Student's Pediatrician and Psychologist in advance of or during the September 28, 2016 IEP meeting. Consequently, this information could not have been considered by the IEP team.

Conclusion to Allegation Three: The District did not deny Student a FAPE by failing to develop an IEP that addressed Student's needs in the area of social-emotional functioning during the September 28, 2016 IEP meeting.

Any analysis of the appropriateness of an IEP must begin with the standard established by the United States Supreme Court in *Rowley v. Board of Education*, 458 U.S. 176 (1982), in which the Court set out a two-pronged analysis for determining whether an IEP has offered a FAPE. The first part of the analysis looks to whether the IEP development process complied with the IDEA's procedures; the second looks to whether the resulting IEP was reasonably calculated to confer some educational benefit upon the child. *Id. at 207*; *see also Thompson R2-J School Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008). If those two questions are satisfied in the affirmative, then the IEP is appropriate under the law.

The procedures for developing a child's IEP "emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances." *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174, 137 S. Ct. 988, 997 (U.S. 2017). In this case, Student's IEP was not reviewed or revised at the IEP meeting because Parent was primarily interested in obtaining a transfer from Charter School to another school in the District. Because Parent had decided that Student would not be returning to Charter School, she refused to provide additional and specific information about Student's anxiety or provide consent for the Charter School to consult with Student's Private Providers. The fact that Charter School had not previously utilized the consent to speak with Student's Psychologist that Parents had signed in 2015 does not warrant Parent's refusal to sign consent at the September 2016 IEP meeting when Parent was asserting that Student was now experiencing "debilitating anxiety," and the IEP team had requested consent to better understand how to support Student at Charter School.

Most significantly, however, Parent also refused to sign consent for reevaluation. Federal courts 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. *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”). The Department has followed and consistently enforced this rule in its State Complaint decisions, and will continue to do so here. *See In re: Douglas County Sch. Dist.*, 61 IDELR 119 (CO SEA 2013). Consequently, the SCO concludes that Parent cannot complain that the Charter School failed to develop an appropriate IEP in September of 2016 when she refused to cooperate and collaborate in the IEP process.

Conclusion to Allegation Four: The District did not deny Student FAPE by refusing to grant Parent’s request that Student be transferred to an alternative school.

In Colorado, a decision concerning the location, i.e., the specific school, classroom, or teacher, where a student’s IEP will be implemented is not an element of “placement” and is an administrative determination made at the discretion of the school district. The ECEA specifically provides that:

The terms “placement” or “educational placement” are used interchangeably and mean the provision of special education and related services and do not mean a specific place, such as a specific classroom or specific school. Decisions regarding the location in which a child’s IEP will be implemented and the assignment of special education staff responsibilities shall be made by the Director of Special Education or designee. ECEA Rule 4.03 (8)(a).

This means that the District has the right to determine the specific school, where Student’s IEP will be implemented. In this case, Parent requested an administrative transfer to another school within the District during the September 2016 IEP meeting. Because this request constituted a change in location, and not a change in placement, it was not an IEP team decision. Consequently, the refusal to grant the request at the IEP meeting does not constitute a violation of IDEA. Moreover, Special Education Director used her authority to grant the administrative transfer approximately one week after the IEP meeting.

REMEDIES

Because the SCO has concluded that the District did not violate IDEA as alleged in this Complaint, no remedies are ordered.

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 22nd day of November, 2017.

Candace Hawkins, Esq.
State Complaints Officer

Appendix

Complaint, pages 1-12.

- Exhibit 1: Child welfare referral.
- Exhibit 2: 10/2016 Letter from Private Psychologist.
- Exhibit 3: 2008 IEP.
- Exhibit 4: Draft 2009 IEP.
- Exhibit 5: 2009 IEP.
- Exhibit 6: 2009 Occupational therapy assessment.
- Exhibit 7: 2011 Mental health treatment plan.
- Exhibit 8: 2011 ADD/ADHD questionnaire.
- Exhibit 9: 2011 School data questionnaire.
- Exhibit 10: 2011 SNAP-IV rating scale.
- Exhibit 11: 2012 medical/office visit summary.
- Exhibit 12: 2012 ROI.
- Exhibit 13: 2012 evaluation report.
- Exhibit 14: 2013 medical/office visit summary.
- Exhibit 15: 2013 504 plan.
- Exhibit 16: 2014 District evaluation report.
- Exhibit 17: 2014 IEP amendment.
- Exhibit 18: 2015 IEP.
- Exhibit 19: 3/2016 and 5/2016 IEPs.
- Exhibit 20: 2015 ROI.
- Exhibit 21: 10/2016 letter from Private Pediatrician.
- Exhibit 22: 9/2016 notice of IEP meeting.
- Exhibit 23: 9/2016 PWN.
- Exhibit 24: 10/2016 PWN.
- Exhibit 25: 2017 District evaluation report.
- Exhibit 26: Email correspondence.

Response, pages 1-11.

- Exhibit A: IEPs in effect for the 2016-17 school year.
- Exhibit B: All prior written notices issued from September 1, 2016 to present.
- Exhibit C: All notices of meeting issued from September 1, 2016 to present.
- Exhibit D: All evaluation/assessment reports, including progress monitoring, for the 2016-16 and 2016-17 school years.
- Exhibit E: All requests for consent to evaluate issued from September 1, 2016 to present.

Exhibit F: Correspondence related to Complaint allegations.

Exhibit G: District policies and procedures related to notice of meeting, PWN, parent participation, and IEP development.

Exhibit H: Contact information.

Parent's Reply, pages 1-8. (Exhibits provided with the Reply were relabeled to differentiate from the District's Exhibits.)

Exhibit A-1: Resolution meeting tracking form.

Exhibit B-1: Prior written notice date October 2016 and documentation previously provided.

Exhibit C-1: Email correspondence.

Exhibit D-1: Parent prepared transcript of September 2016 IEP meeting recording.

Exhibit E-1 through O-1: Email correspondence.

Exhibit P-1: Letters from Private Psychologist and Private Pediatrician dated September 26 and 27, 2016.

Exhibit Q-1: Note written by Student and read at September 2016 IEP meeting.

Exhibit R-1 through S-1: Email correspondence.

Exhibit T-1: Signed consent for reevaluation dated 1/11/2017.

Exhibit Other: Email correspondence.

Interviews with:

- Parents
- Advocate
- Private Tutor
- District Special Education Director
- District Special Education Coordinator
- Special Education Case Manager
- Special Education Teacher
- General Education Teacher

Note: The SCO requested an interview with SLP, but this individual was no longer employed by the Charter School or District.