

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

**State-Level Complaint 2018:510
El Paso County School District 11**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on March 16, 2018, by the parent 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 have an IEP in effect at the beginning of the 2017-18 school year;
2. Failing to provide special education and related services in accordance with a properly developed IEP, from the beginning of the 2017-18 school year to present;
3. Failing to educate Student in the least restrictive environment (LRE) by not providing her with the opportunity to each lunch with non-disabled peers, from the beginning of the 2017-18 school year to present; and
4. Denying Parent a meaningful opportunity to participate in the development of Student's individualized education program, from the beginning of the 2017-18 school year to present.

FINDINGS OF FACT

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

Background:

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).

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

1. Student is [age]-years old and at all times relevant to this Complaint has resided within the boundaries of the School District and attended School. Student is currently identified and served as a student with a developmental delay.⁴
2. During the 2016-2017 school year, Student resided with her parents in a school district located in another state, hereinafter referred to as "Transfer District." On April 12, 2017, Transfer District convened a reevaluation meeting for Student, a preschooler at the time. Student was identified as a student with autism, eligible to receive special education and related services under the IDEA. Student was educated pursuant to the IEP (out-of-state IEP) developed at that meeting. The IEP covered the remaining months of Student's preschool year and set-out the provision of services contemplated to begin Student's kindergarten year through April 2018.
3. Student's out-of-state IEP described the impact of Student's autism as "social/emotional and academic delays that impact her learning and development by impairing her ability to complete age-appropriate tasks, follow routines, and sustain engagement with her peers. [Student's] communication delays also impair her ability to clearly express her ideas, thoughts, and knowledge in the educational setting."⁵
4. As it pertained to kindergarten, the out-of-state IEP included six goals and provided the following special education and related services:
 - a. Student was to receive 395 minutes 5 days a week (i.e. 1975 minutes a week) every week of special education in the general education classroom.
 - b. 20 minutes of para support for lunch.
 - c. 20 minutes of speech services 2 days a week for 3 out of 4 weeks a month.⁶
5. On April 24, 2017, Mother provided a copy of Student's out-of-state IEP to School District in anticipation of the family's move over the summer. On May 17, 2017, Mother provided another copy of the out-of-state IEP directly to School. School Case Manager and School Principal acknowledge that they received and reviewed Student's out-of-state IEP at the end of the 2016-2017 school year. In fact, School Principal reports that she and School District had discussions pertaining to the staffing requirements should Student enroll. At that time, the 2016-2017 School District Coordinator informed School Principal that, upon her review, there would be no need to increase staffing.⁷

Student's Move to School District

6. On July 6, 2017, Mother officially enrolled Student in School District and again provided School District a copy of Student's out-of-state IEP.⁸
7. It is School District's practice to reject out-of-state IEPs because of the differing eligibility criteria and educational standards between Colorado and other states and to develop transfer (or interim) IEPs until the District evaluates the student and develops a new IEP.⁹ School District's written policy governing transfer students specifically provides as follows:

⁴ Complaint, Exhibit C.

⁵ Exhibit E, p.58.

⁶ Exhibit E, pp .53 -61.

⁷ Interviews with Mother, School Case Manager and School District Coordinator.

⁸ *Id.*

⁹ School District's response, Exhibit I, p.73. Interviews with Mother, School District Coordinator, Special Education Director and School Case Manager.

The AU assures that when a child transfers into the AU from another public agency outside of the state and has an IEP in effect: the AU in consultation with the parents, provides FAPE to the child including services comparable to those described in the child's IEP from the previous public agency until the AU:

- conducts an evaluation , if determined to be necessary by the AU; and
 - develops, adopts and implements a new IEP, if appropriate, that meets all applicable requirements of evaluation an IEP development.¹⁰
8. The first day of school was August 17, 2017. School Principal, along with two other staff members, reported to work at the beginning of August to begin processing student enrollments. The rest of the staff, including the special education staff, returned on August 14, 2017, 3 days before the students. School Principal reports she notified the special education staff of Student's enrollment upon their return.¹¹
 9. Student began attending School on August 17, 2017. That same day Mother and Father met with Special Education Teacher and Special Education Teacher 2. In addition to addressing Mother's questions regarding Student's services, the parties discussed Student's lunch room placement. The parties agreed that Student would initially eat in the special education classroom with School Case Manager though they dispute the reason behind the agreement and its expected duration.¹² Nevertheless, as of August 28, 2017, the SCO finds that School was aware that Mother expected Student to eat in the regular lunch room with paraprofessional assistance as indicated in the out-of-state IEP.
 10. On August 21, 2017, Mother e-mailed Special Education Teacher to inquire about Student's paraprofessional and the other supports Student was receiving. Special Education Teacher e-mailed back "I am working with our facilitator to see how to proceed with [Student's] service time. The IEP is written a lot differently than those we write in Colorado..." The following day, Mother reached out to the Transfer District's Special Education Teacher to get additional information/clarification. Mother shared Transfer District's explanation with the Special Education Teacher upon receiving it.¹³
 11. Special Education Case Manager, Special Education Teacher and Kindergarten Teacher report that while School had not prepared an IEP the first day of school, the services provided were equivalent to or more than what was in the out-of-state IEP. They stated that they needed those first few days to observe Student in the school setting in order to determine what she needed and thus had many of the special education team members in the classroom observing and providing support.¹⁴ While the SCO finds the special education team provided support in the classroom the first few days of school as they were trying to determine Student's needs, the SCO finds that School District did not have an IEP in effect the beginning of the 2017-2018 school year and the services provided were not in accordance with a properly developed IEP.
 12. On August 22, 2017, School completed a form titled Transfer Student from Another State Form (August Transfer Form). The Form provided that Student's out-of-state's IEP was not adopted.

¹⁰ Exhibit H, p. 6.

¹¹ Interviews with Principal, School Case Manager, and School District Coordinator.

¹² Interviews with Mother and School Case Manager. Exhibit C, p. 3 and Exhibit I, p. 20.

¹³ Exhibit I, pp. 8 and 11. Interviews with Mother, Special Education Teacher and School Case Manager.

¹⁴ *Id.* Interview with Kindergarten Teacher.

Additionally, the August Transfer Form described a plan to provide comparable services which included:¹⁵

- a. 6.5 hours a week of direct specialized instruction by Special Education Teacher;
 - b. 2 hours a month of indirect specialized instruction by Special Education Teacher;
 - c. 2.5 hours a month of direct Speech-Language Services by a Speech Language Pathologist (SLPA);
 - d. .25 hours a month of indirect occupational therapy by an occupational therapist;
 - e. The six goals contained in out-of-state IEP minus the objectives;
 - f. The Comparable Service Delivery Statement: support in the general education classroom for sensory input; sensory breaks in a separate environment; support for sensory needs during lunch in a separate environment; support in social skills in a small group environment; speech/language services and OT consult for sensory input.¹⁶
13. The SCO finds that the August Transfer Form is not an IEP as it was not developed through an IEP meeting and in consultation with or agreement (as in an amendment) with the Parent. Rather, the SCO finds that the August Transfer Form is a statement or proposal by the School District describing the programming, including a comparable service delivery statement that would be provided to Student on an interim basis pending School District's completion of evaluations and determination of Student's eligibility. Furthermore, the SCO notes that when School District formally rejected out-of-state's IEP, they should have requested Mother's consent to evaluate. In this case, School formally rejected Student's IEP on August 22, 2017. School should have requested consent that same day. School would have 90 days, at the latest, to develop an IEP upon receipt of Mother's consent pursuant to the IDEA and ECEA rules.
14. There is general agreement among the school staff that they initially believed that the August Transfer Form provided the same amount of service time as in the out-of-state IEP. Special Education Teacher acknowledges they initially misread the document, reporting that the out-of-state IEP was confusing.¹⁷
15. In response to Mother's continuing questions and concerns as expressed via e-mail and through telephone calls, Special Education Teacher scheduled a meeting for August 28, 2017. According to Special Education Teacher the meeting was to be "informal." On August 25, 2017, in preparation for the meeting and upon Mother's request, Special Education Teacher provided Mother a copy of the August Transfer Form¹⁸ and a Prior Written Notice both dated August 22, 2017.¹⁹
16. On August 27, 2017, in advance of the meeting, Special Education Teacher sent an e-mail to Mother responding to her concerns indicating that School is providing interim, comparable services based on the "current IEP." Special Education Teacher reported that the service time was taken directly from Student's current IEP. Additionally, she reported that the School would

¹⁵ The SCO notes that School District did not view this document as a "formal" IEP rather documentation regarding the provision of services School District would provide pending evaluation and development of new IEP.

¹⁶ Exhibit C p. 3. School reports that they did not provide the September Transfer Form immediately to Mother due to Student being absent the day after it was developed.

¹⁷ School reports that Out-of-state IEP included certain terms School was unfamiliar with and the service grid did not make sense to them given Student's presentation. Interviews with Special Education Teacher, School Case Coordinator, and School District Facilitator.

¹⁸ The Transfer paperwork is also identified as the Transfer IEP or Interim IEP.

¹⁹ Exhibit I, p. 15 and Audio dated 9/13/2017. The Prior Written Notice mother received was blank due to issues with the District's IEP software system.

be seeking consent to reevaluate after the School Psychologist, Physical Therapist and School Nurse looked at the evaluations and determined what if any more testing they would like to conduct.²⁰

17. School convened the August 28, 2017 meeting and in attendance were Special Education Teacher, School Case Manager, School District Coordinator and Mother. Additionally, the parties discussed comparable services and Mother's disagreement with School's proposal. They discussed Student's schedule as it related to the provision of services, School's continuing confusion regarding out-of-state IEP and Student's lunch time arrangement. Special Education teacher reported that providers from the special education team were "checking-in" on Student throughout the day and providing sensory breaks; but acknowledged they were not providing the continuous support as contemplated by the out-of-state IEP.²¹
18. Based on the facts described here, the SCO finds that this meeting was not an IEP meeting.²² While services were addressed, School did not convene or issue a notice that the meeting was an IEP meeting.
19. Additionally, based on the evidence and credible reports from witnesses, the SCO finds that School District's August Transfer Form did not provide services comparable to those outlined in the out-of-state IEP, especially as it relates to special education services in the general education classroom. School District proposed providing 390 minutes/week of special education services in the general education classroom for sensory input. These services included sensory breaks outside of the general education classroom. Out-of-state IEP provided 1, 975 minutes a week of special education services in the general education classroom and included additional support in the form of sensory breaks in the accommodations sections. Furthermore, School acknowledged that it was not providing comparable services, in other words the continuous support, as it pertained to the 1, 975 minutes a week during the August 28, 2017 meeting.²³
20. Acknowledging that some provisions in the out-of-state IEP were confusing, there is no evidence that School District clarified the confusing elements of the IEP with Transfer District or responded to clarifications offered by Mother and Transfer District Special Education Teacher. Specifically, Transfer District Special Education Teacher stated in an e-mail "...the team had felt that para support in the gen ed classroom throughout all of her instructional day, and lunch time would be needed for her to be successful and leave her with her peers as much as possible."²⁴ On August 31, 2017, Mother forwarded an explanation of services provided by Transfer District Asst. Special Education Director. She stated "[s]tarting this year in kindergarten, [Student] was to receive 395 minutes, 5 days per week of special education services in the regular education classroom working on social, emotional, cognitive and behavior goals in her IEP. This direct service could be from a special education teacher or a paraprofessional working under the supervision of the SPED teacher."²⁵ Furthermore, School had time prior to the start of school to

²⁰ Exhibit I, p. 15.

²¹ The SCO notes that continuous in this case did not mean that special education support needed to be next to Student all day. However, out-of-state IEP contemplated that the support would be available to the Student in the classroom throughout the day.

²² After the meeting, Mother provided a summary of what transpired. Special Education Teacher responded that Mother "recapped the meeting well" making no corrections or additions. Exhibit I, p. 20. Interviews with Mother, Special Education Teacher, School Case Manager and School District Facilitator.

²³ Interview Mother, Special Education Teacher and School Case Manager. Exhibit C, p. 3, Exhibit E, pp.53-61.

²⁴ Exhibit I, p. 95.

²⁵ Exhibit E, page 147.

reach out to Transfer District and get clarification, if needed. Specifically, School District was provided a copy of out-of-state IEP in April of 2017, May of 2017 and again in the beginning of July of 2017.²⁶

21. Despite the lack of continuous support from a special education teacher or paraprofessional, Kindergarten Teacher reported that she felt that Student was adequately supported from day one because she had additional adult support from a student teacher and a general education paraprofessional that covered approximately ¼ of the school week. Kindergarten Teacher stated that while these extra adults were not specifically in the classroom to help those children with special education service minutes, they were available and did assist when needed. Additionally, Kindergarten Teacher reported that the special education staff showed up as scheduled throughout the day and were nearby if she required additional assistance.²⁷
22. Mother continued to voice concerns regarding Student regressing and not receiving the services outlined in the out-of-state IEP.
23. On September 13, 2017, School convened another meeting to discuss Mother's ongoing concern with Student's services. In attendance were Special Education Teacher, School District Coordinator, School Principal, School Psychologist, Kindergarten Teacher, Mother, Parent Advocate 1 and Parent Advocate 2. While Mother thought this should be an IEP meeting, School District made it clear that it was not. When asked why it wasn't an IEP meeting since Student's services were being discussed, School District Coordinator responded "[w]e don't have an IEP to work with because we have not conducted evaluations yet...It's a transfer meeting."²⁸
24. During this meeting, the attendees discussed the status of services provided to Student as they compared to out-of-state IEP, Student's lunch arrangement and the consent for evaluation. As for the services pertaining to in class support, similar to the August 28, 2017 meeting, School acknowledged Student was only receiving check-ins and sensory breaks.²⁹ From the School's perspective, that is all Student required. Additionally, Mother was informed that at some time prior to the meeting, School increased Student's special education service time to 11 hours or 660 minutes week which was documented on another Out-of-State Transfer Form (September Transfer Form).³⁰ As for Student's lunch arrangement, Mother voiced her concern that Student continued eating in the special education classroom. She stated that per the August 28, 2017 meeting, School District Coordinator had indicated that "measures were being taken" to move Student into the regular lunchroom. In response, School Principal directed School Case Manager to address the lunch issue. The School District Facilitator discussed the need to evaluate Student and provided Mother the Consent to Evaluate. Lastly, School agreed to provide Mother a schedule of services Student receives throughout the day.³¹

²⁶ Interviews with Mother, School Case Manager, Special Education Teacher and School District Facilitator. The SCO notes that the outcome may have been different had School made documented efforts to reach out to school and or parent, etc. in an attempt to gain some understanding of the out-of-state IEP.

²⁷ Interview with Kindergarten Teacher, School Psychologist, School Case Manager, Special Education Teacher and Speech and Language Pathologist.

²⁸ September 13, 2017 Audio, Interviews Mother, Special Education Teacher, School Case Manager and School District Facilitator.

²⁹ September 13, 2017 Audio. School's position is that Student didn't really require nor did she want the sensory breaks.

³⁰ The SCO notes that the September Transfer Form was dated August 22, 2017, similar to the August Transfer Form. Mother was provided a copy of the September Transfer Form at the meeting.

³¹ September 13, 2017 Audio, Interviews with Mother, School District Facilitator and Special Education Teacher.

25. Based on the record and interviews with School staff and Mother, the SCO finds that the September 13, 2017 meeting was not an IEP meeting. Additionally, the SCO finds that changes were made to Student's services without Mother's input or knowledge and outside of a properly constituted IEP meeting or without Mother's consent. While it is apparent that School District was trying to address Mother's concerns and meet Student's needs, the SCO finds that the September Transfer Form did not provide comparable services. As previously discussed, the out-of-state IEP provided for 1975 minutes of special education services a week in the general education classroom. As indicated by Transfer District Assistant Special Education Director and out-of-state IEP, the special education services provided by out-of-state IEP were to assist Student in completing age-appropriate tasks, follow routines, sustain engagement with peers, attend to age-appropriate instructional activity, and apply reasoning and logical thinking skills to age-appropriate scenarios or questions throughout her instructional day. School's provision of services was mainly focused on transitions and sensory breaks outside of the general education classroom. While out-of-state IEP's provision of services may have seemed excessive given Student's high level of functioning, those were the services documented in Student's out-of-state IEP. Until School completed its own evaluations and developed an IEP, the SCO finds that School was obligated to provide FAPE, including comparable services.
26. As directed by School Principal, School Case Manager arranged for Student to eat in the "general education" lunch room with paraprofessional support the following day. The SCO finds that Student was removed from her LRE lunchroom setting as provided in her out-of-state IEP for approximately 19 school days when School assigned her to eat lunch in the special education classroom. There is no evidence that Student experienced educational harm as a result of this delay. Accordingly, the SCO finds that this issue was addressed as of September 14, 2017.
27. On September 20, 2017, Mother was provided a copy of Student's Schedule of Special Education Support. The schedule provided that Student would receive 160 minutes of support a day. The SCO finds that, even if School provided all the service minutes towards the special education services described in the out-of-state IEP, it would add up to 800 minutes of support depending on the minutes considered.³² In contrast, the out-of-state IEP provided for 1,975 special education service minutes a week of in class support provided by either a special education teacher or a paraprofessional supervised by a special education teacher.
28. On September 22, 2017 Mother signed the consent to evaluate.³³
29. Mother continued expressing her concern to School and School District regarding School not providing comparable services while the evaluations were being conducted and pending the development of an IEP. While the parties continued to exchange e-mails and talk via telephone there were no follow-up meetings and Student's programming didn't change until the development of her IEP.³⁴
30. As part of the documentation for the evaluation, School provided progress monitoring data on the six goals from Student's out-of-state IEP. The documentation provided the following:
 - a. Goal 1: Student will be able to transition from a preferred activity to a non-preferred activity independently without displaying verbal or physical negative reactions (stomping, yelling, grunting, etc.) after an adult requests for transitions during 4 out of 5 opportunities on data collection days. Student met this goal as of October 24, 2017.

³² Exhibit F and Exhibit D, pp. 153-272.

³³ Interview Mother.

³⁴ Interview Mother, Special Education Teacher and School Case Manager. Exhibit E.

- b. Goal 2: Student will increase her overall language skills by answering “when, why” questions during structured activities with minimal cues with 80% average accuracy based on data collection in a therapy setting. Student met this goal as of December 15, 2107.
 - c. Goal 3: Student will increase her overall language skills by using subjective and possessive pronouns spontaneously with 80% average accuracy during unstructured activities over 3 consecutive sessions based on data in a therapy setting. Student met this goal on October 13, 2017.
 - d. Goal 4: Student will successfully initiate and sustain cooperative play or cooperative learning activities with one or two peers with minimal adult support for 4 out of 5 opportunities during data collection days. Student met this goal on as of October 24, 2017.
 - e. Goal 5: Student will be able to attend to and participate in a large group instructional time for 10 minutes with minimal adult support for 4 out of 5 opportunities during data collection. Student made insufficient progress in this goal as of October 24, 2017. The SCO is not sure why there was not continued monitoring data as with the others for the December 15, 2017 reporting period. Nevertheless, the SCO disagrees that Student made insufficient progress based on School’s notes. Student’s baseline was 0 minutes of being able to attend to and participate in a large group. Student’s target was 10 minutes. The first reporting period documented Student as being able to attend to or participate for on average 5 minutes, more than half-way to reaching her goal.³⁵
 - f. Goal 6: Student will use logic and reasoning skills to demonstrate an understanding of patterns by completing patterns, identifying patterns and creating patterns with objects/images with 80% accuracy during data collection days. Student made progress on this goal though the SCO notes that there is no measuring data included in the progress report or in the eligibility report. However, reviewing the evidence and listening to the audio recordings provided, the SCO does not dispute this conclusion.³⁶
31. The SCO finds that despite School’s failure to provide comparable services, Student made progress. Student not only made progress but actually met four of her six goals.
32. School District completed the evaluation and issued an evaluation report dated November 9, 2017. The eligibility meeting and the resulting IEP was developed over the course of 4 meetings; November 9, 2017, November 28, 2017, December 4, 2017 and December 14, 2017. Accordingly, as of December 14, 2017, the SCO finds School District has an IEP in place.

CONCLUSIONS OF LAW

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

Conclusion to Allegations One, Two and Four:

Mother alleges that School District violated IDEA when it failed to have an IEP in effect at the beginning of the 2017-2018 school year, denied Mother meaningful opportunity to participate in the development of Student’s individualized education program from the beginning of the school year,

³⁵ Exhibit D, p. 49.

³⁶ Exhibit D, pp 287-299.

and failed to provide Student special education and related services in accordance with a properly developed IEP from the beginning of the school year.

This complaint presents the central question of what IDEA requires when a student with an IEP transfers from one state to another during the summer. For students with IEPs in effect who transfer from one state to another *within the same school year*, IDEA's transfer provisions require that the new public agency, in consultation with Parents, provide FAPE (including comparable services) until the public agency conducts an evaluation (if determined necessary) and develops, adopts, and implements an IEP that meets the relevant requirements for developing an IEP. 34 CFR § 300.323 (f).

Although IDEA's transfer provisions do not directly apply to students who transfer during the summer, IDEA contains other provisions designed to ensure continuity of services for students with disabilities moving from one jurisdiction to another. In response to a question regarding the responsibilities of public agencies for students who transfer over the summer, the ED clarified that the public agency, here the School District, must have an IEP in effect for each child with a disability in the agency's jurisdiction. 71 Fed Reg. 46,682 (2006). Consequently, "public agencies need to have a means for determining whether children who move into the State during the summer are children with disabilities and for ensuring that an IEP is in effect at the beginning of the school year." *Id.* Consistent with OSEP guidance, CDE's IEP Procedural Guidance states that AUs must have IEPs in effect at the beginning of each school year for all students with disabilities, regardless of changes in district enrollment/attendance. CDE IEP Procedural Guidance, p. 52; *see also Ute Pass Board of Cooperative Educational Services*, State Complaint 2014.507 (SEA CO 2014), reported at 114 LRP 31981. CDE guidance further provides that students who transfer over the summer are considered "new enrollments" who should be provided with comparable services, with any changes occurring through an official IEP meeting or IEP amendment. CDE IEP Procedural Guidance, p. 111.

Here, the District's policy required "that when a child transfers in to the AU from another public agency outside of the state and has an IEP in effect: [t]he AU, in consultation with the parents, provides FAPE to the child including services comparable to those described in the child's IEP from the previous public agency until the AU conducts an evaluation, if determined to be necessary by the AU; and develops, adopts and implements a new IEP, if appropriate, that meets all applicable requirements of IEP development."³⁷ In rejecting Student's out-of-state IEP, the District was obligated to determine if an evaluation was necessary. If it determined that an evaluation was necessary, the District was obligated to promptly request consent for evaluation. Pending the evaluation, the District's own policy provided that it was to develop a plan to provide comparable services through an IEP meeting/process. In this case, upon receipt of the Student's out-of-state IEP on July 6, 2017 when Student officially enrolled, School District should have had a process in place to determine what, if any, evaluations needed to be conducted and provide a corresponding consent to evaluate.

If, as was its practice, the District intended to conduct its own evaluations, it should have provided a consent for evaluation and a corresponding prior written notice within a reasonable time period. In this case, Mother did not receive a consent for evaluation until almost a two months after School District was on notice regarding Student's special education needs. Pending the completion of evaluation and resulting IEP, if appropriate, School District should have provided FAPE, including services comparable to those described in the Student's IEP. In this case, as previously found in FF 19 and FF 25, School District's out-of-state transfer form did not provide comparable services.

³⁷ Exhibit H, p. 6.

School District argues that, though they believe they provided comparable services, they argue they were not obligated to provide comparable services because the out-of-state IEP and the corresponding services identified to begin at the beginning of Student's kindergarten school year were not "in effect." School District argues that Transfer District had not implemented the services for the Kindergarten school year citing *A.M. v. Monrovia Unified School District*, 55 IDELR 215 (9th Cir.2010). The SCO finds that the A.M. case is not applicable in this case. In the A.M. case, student was enrolled in a charter school that educated the student through an independent study in the student's home. Student was initially educated pursuant to a valid IEP developed in 2002. Charter school and parents attempted to develop IEPs in 2003 and 2004 but were unable to agree to the goals and objectives and parent refused to sign. On December 9, 2005, the parties agreed on an IEP that changed student's placement to a general education classroom, a placement charter school could not provide. Three days later Mother enrolled student in school district. At no point in time, did charter school implement any portion of the IEP nor could it implement any part of the IEP.³⁸ In the present case, the Out-of-state IEP identified the services to be provided from April 12, 2017 through the end of Student's preschool year and another set of services set to begin upon Student's entry into Kindergarten as contemplated by 34 C.F.R. § 300.320 (a)(7). As student was moving from a ½ day program to a full-day program during the 365 days the IEP was in effect, Transfer District doubled the services they contemplated beginning the following school year. Accordingly, the SCO finds Student's out-of-state IEP developed April 12, 2017 was in effect at the time of Student's enrollment in School District and the A.M. vs. Monrovia case does not apply.

As to the question of whether School District had an IEP in effect at the beginning of the school year, the SCO finds it did not. School District received Student's IEP after she enrolled on July 6, 2017. School District's practice was to reject all out-of-state IEPs, which it did in this case. Given this practice, School District was obligated to promptly begin the process to evaluate Student, including obtaining consent to evaluate. While the SCO realizes the difficulty in completing evaluations over the summer especially those pertaining to observations in the educational settings, School District has to have a process in place to determine eligibility and appropriate services in a timely manner. In this case, Mother did not receive consent to evaluate until almost a month into the school year, two months after receiving Student's IEP upon enrollment. Such a delay was unreasonable under the circumstances.

Pending the evaluations, School District was obligated to provide FAPE, including comparable services. School acknowledges that they did not have a written document in place the first 3 days of school because they wanted to first conduct observations in order to determine Student's needs. They report that even though they did not have a written document in place various members of the special education staff were providing Student special education services. On August 22, 2017, the School team filled out the Transfer-Out of State Form memorializing the services School District planned on providing. School initially thought the 6.5 hours a week they were providing was the same that was provided in Student's out-of-state IEP. In actuality, the Out-of-state IEP provided for 1,975 minutes of special education services a week or 395 minutes a day, 5 days a week. A few weeks after they realized that the Out-of-state IEP provided for significantly more services, they increased the special education service minutes to 660 minutes a week in the September Transfer Form. The SCO finds that, even with this increase, the service time was still less than what the out-of-state School IEP provided. Again, School District disputed Student required the level of services

³⁸ Additionally, it is important to note that in this case, School District was concerned that the newly developed IEP was not based on any formal assessment of student's academic or cognitive abilities.

provided in the out-of-state IEP. While School District's informal assessments may have been accurate in terms of the level of services Student ultimately required, until School District conducted its own evaluations and developed its own IEP, it was required to provide the services and accommodations listed on the out-of-state IEP or comparable services.³⁹ Additionally, School District did not have a properly convened IEP until November 9, 2017 despite Mother's request to discuss Student's services and wanting to address the issue in an IEP meeting. The IDEA is clear that an IEP cannot be amended or modified without parental participation at an IEP meeting or upon agreement of the IEP team, including the parents, not to convene the IEP Team to modify or amend the IEP. 34 C.F.R. § 300.501(b); 34 C.F.R. 300.324 (a)(4) and (a)(6); see *Ute Pass Board of Cooperative Educational Services*, State Complaint 2014.507 (SEA CO 2014). In this case, Mother requested the meetings to be IEP meetings but School District made it clear that the meetings conducted in August and September were not IEP meetings and they believed they were not required to have IEP meetings. Despite these procedural violations, it is clear that School District was responsive to Mother's concerns by scheduling meetings to address issues, creating forms to provide Mother information on Student's day, and ultimately, providing Student with the services appropriate for her to make progress.

As previously discussed, School District did not have an IEP in effect from August 17, 2017 through December 14, 2017 when School District developed its own IEP nor did it provide comparable services to the out-of-state IEP, except as it pertained to speech services. Nevertheless, the SCO finds that in this case, Student did not suffer educational harm. Student met three of her six goals by October 24, 2017, the first reporting period. She met another goal by December 15, 2017, the second reporting period. Lastly, she was making progress on the remaining two goals.

The SCO notes that the facts of this case could have been a denial of FAPE had Student been unable to meet and make progress on her IEP goals because the evidence indicates that the level of supports implemented by District were not comparable to those services outlined in the April 2017 IEP.

Conclusion to Allegation Three: LRE/lunch

"Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements." *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004). The IDEA requires that students with disabilities receive their education in the general education environment with typical peers to the maximum extent appropriate, and attend the school they would attend if not disabled. 34 CFR §§ 300.114 and 300.116. "Each student's educational placement must be determined on an individual case-by-case basis depending on each child's unique needs and circumstances, rather than on the child's category of disability, and must be based on the child's IEP." 71 Ed. Reg. 46 586 (2006).

Because the IDEA requires that eligible students be provided with a free appropriate public education (FAPE) in the least restrictive environment (LRE) to the maximum extent appropriate, a substantive IDEA violation may be shown by demonstrating that the school district failed to provide a free appropriate public education, or by showing that although FAPE has been provided, it was not

³⁹ The SCO notes that comparable services do not always mean exact services, especially when a School District does not have the same services available. That argument is not pertinent in this case because School District had the ability to provide similar services as outlined in the out-of-state IEP.

provided in the LRE. *Nebo*, 379 F.3d at 973; *See also Thompson R2-J Sch. Dist. V. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008) *citing Nebo, supra*.

In this situation, Student's out-of-state IEP identified that she should eat lunch with her typical peers with paraprofessional support. While at the start of the school year, the parties agreed that Student could eat with School Case Manager in the special education classroom with other peers with special education needs, the school was made aware that Mother wanted Student to be in the regular lunchroom as of August 28, 2017. Additionally, from that meeting, School Case Manager informed mother that measures were being taken to move Student into the lunch room. Mother addressed the issue again on September 13, 2017. At that time, School Principal directed School Case Manager to make it happen. Student was moved to the general lunch room the following day on September 14, 2017 with paraprofessional support. Accordingly, the SCO finds that School District failed to provide comparable services to enable Student to eat in the general lunch room for approximately 19 school days. No remedies are needed as School addressed that issue.

REMEDIES

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

- a) Failure to have an IEP in effect at the beginning of the 2017-2018 school year;
- b) Denying parent a meaningful opportunity to participate in the development of Student's individualized education program, from the beginning of the 2017-2018 school year to present.

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

- 1) By no later than June 15, 2018, the District must submit to the Department a proposed corrective action plan (CAP) that addresses each and every violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Students and all other students with disabilities for whom the School District is responsible. The CAP must, at a minimum, provide for the following:
 - a. Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violations, no later than August 1, 2018.
 - b. Effective training concerning these policies and procedures, which include effectively addressing students who transfer in the summer and developing and implementing an Individualized Education Program. The training must be conducted for all intended designees (which may include case managers, special education teachers, building administrators, district administrators, disability specific service providers, and general education teachers).

- c. Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department no later than September 28, 2018

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 15th day of May, 2018.

Jacqueline Esquibel, Esq.
State Complaints Officer

Appendix

Complaint, dated March 14, 2018, pp 1-4

- Exhibit 1 Out-of-State Special Education Documentation
- Exhibit 2 School District Prior Notices
- Exhibit 3 School District Consent for Evaluation
- Exhibit 4 Comprehensive Plan for the Provision of Special Education Services
- Exhibit 5 Transfer-Out of State w/PWN
- Exhibit 6 Student's Special Education Support Schedule
- Exhibit 7 E-mail Communication and IEP Procedural Guidance
- Exhibit 8 E-mail Communications

Response, dated April 10, 2018, pp 1-13

- Exhibit A Notice of Meetings issued from July 2017 to present
- Exhibit B Written notices issued from July 2017 to present
- Exhibit C IEPs in effect for the 2017-2018 school year
- Exhibit D Evaluations, assessments, grade reports, and progress monitoring conducted by the District from July 2017 to present, including any evaluation and eligibility reports
- Exhibit E Information concerning Student's needs provided by Parent and/or school staff in out-of-state IEP from April of 2017 to present
- Exhibit F Student's class schedule for the 2017-2018 school year
- Exhibit G District calendar for the 2017-2018 school year
- Exhibit H District policies and procedures relevant to the Complaint allegations
- Exhibit J Complete name, title and contact information for each District and School staff member who has knowledge of the facts underlying the Complaint allegations
- Exhibit K Speech Language Service provider's service log
- Exhibit L Transfer-Out-of-State Form with increased hours
- Exhibit M Prior Written Notice dated November 14, 2017.

Reply, dated April 20, 2018, pp 1-4

- Exhibit 9 Letter from Private Evaluator dated April 16, 2018
- Exhibit 10 Out-of-State Special Education Directors explanation of Out-of-state IEP

Interviews conducted:

Mother
Transfer District Assistant Special Education Director
Special Education Director
School District Coordinator
Principal
Kindergarten Teacher
Special Education Teacher
School Case Manager
Special Education Teacher
School Counselor
Speech-Language Pathologist
Paraprofessional