

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

**State-Level Complaint 2019:562
El Paso County School District 49**

DECISION

INTRODUCTION

The parent (“Parent”) of a student (“Student”) not currently identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against El Paso County School District 49 (“District”) on October 1, 2019. The Parent notified the State Complaints Officer (“SCO”) of an additional allegation via email on October 21, 2019. The additional allegation was accepted for investigation along with the Complaint.

The SCO determined that the Complaint and Parent’s October 21, 2019 email identified two allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R §§ 300.151 through 300.153. *See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46603 (Aug. 14, 2006) (discussing acceptance of additional allegations during the investigation process). The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

The Colorado Department of Education (“CDE”) has the authority to investigate allegations of violations that occurred not more than one year from the date the original complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, this investigation will consider only events that occurred not earlier than October 1, 2018 in determining whether or not a violation of IDEA occurred. *Id.* Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 C.F.R § 300.1, *et seq.* IDEA implementation in Colorado is governed by the Exceptional Children’s Educational Act (“ECEA”).

SUMMARY OF COMPLAINT ALLEGATIONS

1. Whether the District failed to comply with the remedy ordered in the decision on State-Level Complaint 2019:514 because the District:
 - a. Failed to provide Parent with an Independent Educational Evaluation (“IEE”) at public expense by refusing to pay for \$1,050.00 of the cost attributable to an evaluation review meeting. 34 C.F.R. § 300.502(b)(1); *Questions and Answers on IDEA Part B Dispute Resolution Procedures* (OSERS 2013) at B-12;
2. Whether the District disclosed Student’s personally identifiable information (“PII”) without obtaining parental consent on October 17, 2019, in violation of 34 C.F.R. § 300.622(a).

FINDINGS OF FACT

After thorough and careful analysis of the entire record,² the SCO makes the following FINDINGS OF FACT (“FF”):

1. Student attended a school (“School”) in the District during the 2018-2019 school year. *Interview with Parent*. During the 2018-2019 school year, Student was not identified as eligible for special education and related services as a child with a disability under the IDEA. *Id.*
2. Student did not return to the District for the 2019-2010 school year but, instead, enrolled in a school in another district. *Id., District’s Response*, p. 2.
3. A discussion of Student’s background and educational history is unnecessary to resolve the allegations in the current Complaint. The allegations relate solely to legal questions.

A. Prior State Complaint

4. On March 7, 2019, Parent filed a state-level complaint against the District (“Prior State Complaint”). The Prior State Complaint—identified as State-Level Complaint 2019:514—alleged, in part, that the District: (a) unnecessarily delayed approval of an IEE after Parent’s request, in violation of 34 C.F.R. § 300.502(b)(2), and (b) refused to provide an IEE in the area of Autism Spectrum Disorder, consistent with 34 C.F.R. § 300.502(b)(1). *Decision in Prior State Complaint*, p. 1.
5. CDE issued a decision in the Prior State Complaint on May 15, 2019 (“Decision”). *Id.* That Decision resulted in findings of noncompliance against the District. *Id.*, p. 16. As a remedy, the SCO ordered the District to “provide Parent the opportunity to obtain an IEE at public expense, consistent with 34 C.F.R. § 300.502 and the District’s criteria for IEEs.” *Id.*, p.

² The appendix, attached and incorporated by reference, details the entire record.

17. The Decision required the IEE to include evaluations in the areas previously evaluated by the District (both educational and psychological), as well assessments for Autism Spectrum Disorder (“ASD”) and Other Health Impairment (“OHI”). *Id.*

B. The IEE

6. Parent approved the use of a School Nurse from another district to review Student’s medical records and perform the IEE for OHI. *Exhibit B*, p. 30. School Nurse completed that IEE for OHI on July 18, 2019 and provided a copy to the District and Parent. *Exhibit 21*, p. 3. The District paid School Nurse \$462.50 for the IEE for OHI. *Exhibit E*, pp. 3, 4, 9. The allegations in this Complaint do not involve the IEE performed by the School Nurse.

7. On May 22, 2019, Special Education Director provided Parent with a list of potential evaluators to perform the IEE in the areas previously evaluated by the District and for ASD. *Exhibit A*, p. 1. The list included, among others, a Child Psychology Practice. *Id.*

8. On May 23, 2019, Parent selected the Child Psychology Practice to perform the IEE and returned the signed IEE Application Request form (“Form”). *Id.*, pp. 1-2, 13-14. Upon request from the Special Education Director, Child Psychology Practice provided an estimated cost of \$5,862.50 for the IEE (“Cost Estimate”). *Exhibit 20*, p. 1-2; *Exhibit 19*. The Cost Estimate included \$1,050.00 allocated for an IEE review meeting with the District. *Exhibit 19*.

9. Special Education Director approved Parent’s selection of Child Psychology Practice on May 28, 2019 by signing the Form. *Exhibit A*, pp. 13-14; *Exhibit D*, p. 1. The Form noted that the maximum allowable charges shall not exceed \$5,900.00. *Exhibit A*, pp. 13-14.

10. Subsequently, Child Psychology Practice assigned one of its psychologists to perform the IEE (“Evaluator”). *See, e.g., Exhibit C*, pp. 5-6. The Evaluator completed the IEE (in the areas previously evaluated by the District and ASD) and provided a copy of the IEE to District and Parent on September 12, 2019. *Exhibit C*, p. 9.

C. Dispute over IEE Review Meeting

11. Shortly after Evaluator completed the IEE, a dispute arose over the amount allocated in the Cost Estimate for an IEE review meeting. Because Student no longer attended school in the District, Special Education Director did not intend to hold an IEE review meeting with the Evaluator. *Interview with Special Education Director*.

12. At the time Child Psychology Practice prepared the Cost Estimate, it was unclear to Special Education Director whether Student would re-enroll in the District for the 2019-2020 school year. *Id.* Indeed, the District allows students to enroll as late as the day before school starts. *Id.*

13. On September 12, 2019, Special Education Director contacted an individual in CDE's General Supervision and Continuous Improvement group ("CDE Specialist") to determine whether the Decision in the Prior State Complaint required District to hold an IEE review meeting with Evaluator. *Exhibit C*, p. 12.

14. On September 16, 2019, CDE Specialist responded, indicating that District was not required to convene an IEP review meeting with Evaluator:

You do not have to convene a meeting at this time. If mom wants a meeting, it would be more productive to have [Student's new school district] meet with the parents. I suggest you ensure the parent has a copy of the report- so they can use it in the future.

Exhibit B, p. 62.

15. Citing CDE Specialist's comments, Special Education Director asked Child Psychology Practice to submit a new invoice without the costs for the IEE review meeting with Evaluator. *Exhibit B*, p. 62. Specifically, Special Education Director stated: "[Parent] has moved her son to another district and we do not intend to have an IEE review meeting. I have checked with CDE and they are not requiring us to do so." *Id.*, p. 59.

16. Child Psychology Practice submitted a revised invoice but objected to the District's rationale. According to Child Psychology Practice, Evaluator planned to attend an IEE review meeting with Student's new school district and District was contractually obligated to pay for the IEE review meeting, regardless of location. *Id.*, p. 61.

17. Parent became aware of this dispute when Child Psychology Practice copied her on the email correspondence with Special Education Director. *See Exhibit B*, pp. 58-59. As a result, Parent emailed CDE Specialist on September 18, 2019, alleging that:

[Special Education Director] has taken it upon herself to contact [Child Psychology Practice] and inform [Child Psychology Practice] she was not going to pay for a portion of the contractual agreement without notifying me. I was cc'd in an email [Child Psychology Practice] sent out addressing this issue. Once again [Special Education Director] is trying to change the IEE contractual agreement without communicating with me. Regardless of what school [Student] goes to; he is entitled to a full IEE process.

Exhibit D, p. 14.

18. CDE Specialist responded to Parent's email on September 20, 2019. *Exhibit CDE-1*, p. 7-8. That email informed Parent that "[f]or state-level complaint 2019:514, CDE has determined that [District] provided ordered remedies consistent with the Decision." *Id.* CDE Specialist told Parent she could file another state-level complaint if she believed CDE had failed to adequately enforce the remedies in the Decision. *Id.*

19. Despite the ongoing dispute, District paid Child Psychology Practice \$4,812.50 (the Cost Estimate less \$1050.00 allocated for the IEE review meeting). *Exhibit E*, pp. 1, 7-8.

D. Student's PII

20. On October 21, 2019, Parent notified the SCO of an additional allegation via email. *See Exhibit 24*, p.1. Parent asserted that the District disclosed Student's PII without Parent's consent. *Id.*

21. The District's response to the Complaint was due on October 17, 2019 ("Response"). CDE's State-Level Complaint Procedures require the District to provide a complete copy of the Response to Parent. *State-Level Complaint Procedures*, p. 2.

22. On October 16, 2019, a District employee ("District Employee") left Parent a voicemail inquiring whether Parent would be home on October 17. *Interview with Special Education Director*. The District intended to hand-deliver the Response to Parent, as the District had done with Parent's prior state complaints. *Id.* Parent did not return the District's phone call. *Id.*

23. On October 17, 2019, District Employee attempted, without success, to reach Parent a second time to determine whether Parent would be home to accept a hand-delivered Response. *Id.* Nonetheless, District Employee went to Parent's home to hand-deliver the Response. *Id.* Parent did not answer the door, so District Employee left the Response in an alcove on Parent's front porch. *Id.*

24. Parent has not been able to locate the Response left on her front porch. *Interview with Parent*. The District subsequently sent a second copy of the Response to Parent via FedEx, which Parent received. *Id.*

25. Parent did not consent to the District leaving the Response unattended on her front porch. *Interviews with Special Education Director and Parent*.

26. The District has conceded that it should not have left the Response on Parent's front porch. *Interview with Special Education Director; Exhibit 25*, p. 1. Such action violated the District's policy on Privacy and Protection of Confidential Student Information. *Interview with Special Education Director; see also Exhibit J*, pp. 1-4. The District took disciplinary action against District Employee for leaving the Response on Parent's front porch. *Interview with Special Education Director; Exhibit 25*, p. 1.

27. District's Response contained, in part, Student's full name and the results of the IEE. *See, e.g., District's Response*, p. 1; *Exhibit F*, pp. 1-39. The IEE discusses Student's educational history, assessment results, mental health, and medical history. *Exhibit F*, pp. 1-39.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District complied with the remedy ordered in the Decision on the Prior State Complaint by providing Parent with an IEE at public expense.

Parent contends that District failed to provide the IEE at public expense because the District did not pay for Evaluator to attend an IEE review meeting. Specifically, Parent argues the District became contractually obligated to pay for the IEE review meeting by virtue of Special Education Director's approval of the Cost Estimate. Citing 34 C.F.R. § 300.502(b)(2), Parent asserts that—if the District no longer wanted to adhere to the services agreed to in the Cost Estimate—the District was required to initiate a due process hearing. Because the District neither paid for the IEE review meeting nor initiated due process, Parent contends the District violated both the IDEA and the remedies ordered in the Decision. In Parent's eyes, Student has been denied an opportunity for "a full IEE process/procedure because he moved districts." *Parent's Reply*, p. 3.

As a preliminary matter, the SCO does not—and, indeed, cannot—consider Parent's arguments regarding any contractual duty the District may or may not owe to Child Psychology Practice. The SCO's authority, or jurisdiction, extends only to allegations that the District violated a requirement of IDEA. *See* 34 C.F.R. § 300.153(b)(1); *State-Level Complaint Procedures*, p. 1. Whether or not the District entered into a legally binding contract with Child Psychology Practice that obligates District to pay for the IEE review meeting falls beyond that jurisdiction.

Though Parent contends receiving an IEE at public expense entails Evaluator attending an IEE review meeting, the law does not support this argument. Parents have a right to an IEE at public expense if they disagree with the District's evaluation of their child. 34 C.F.R. §§ 300.502(a)(1), (b)(1). An IEE is "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." *Id.* § 300.502(a)(3)(i). "Evaluation" refers to "procedures used . . . to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." *Id.* § 300.15. Therefore, an IEE is merely a type of evaluation. The term "evaluation", as used in the regulations, contemplates only the *process* of assessing a student's needs. *See id.* By definition alone, neither an evaluation nor an IEE includes a meeting to discuss the results of that process.

Obtaining an IEE at public expense "means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent." *Id.* § 300.502(a)(3)(ii). The IDEA regulations make clear that school districts must consider the results of an IEE obtained at public expense when making decisions regarding providing FAPE to a child. *Id.* § 300.502(c)(1). However, nothing in the regulations requires the independent evaluator to be present at the IEE review meeting. *Letter to Anonymous*, 110 LRP 52283 (OSEP 2010) ("34 C.F.R. § 300.502(c) does not require that the independent examiner be present at

the meeting where the results of the IEE are considered and while the district could request (and pay for) the examiner's participation, such participation cannot be required"); see also *B.B. ex rel. Bruner v. Perry Twp. Sch. Corp.*, Nos. 1:07-cv-0323, 1:07-cv-0731, 2008 WL 2745094, at *11 (S.D. Ind. July 11, 2008) ("Neither the regulation that discusses independent evaluations nor the regulation that discusses the composition of the [IEP Team] requires independent evaluators to be present at the meetings.").

Indeed, under 34 C.F.R. § 300.321(a)(5), an IEP team must include "[a]n individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section."³ Section 300.321(a)(5), thus, does not require *the* evaluator to be in attendance, as long as another individual can interpret the evaluation results. Because the law does not require an independent evaluator to attend an IEE review meeting, a parent may obtain an IEE at public expense consistent with the IDEA even if the district does not pay for the evaluator to attend the IEE review meeting.

Here, Parent received an IEE at public expense in accordance with the Decision. The District satisfied its obligation to provide the IEE when Parent received a copy of the IEE (covering the appropriate evaluation areas) and when District paid for the IEE. (FF#s 6, 10 and 19.)

Neither the IDEA nor its implementing regulations require District to pay for Evaluator's attendance at an IEE review meeting. Special Education Director's acceptance of the Cost Estimate indicated the District was willing—at least initially—to incur these extra costs. (FF# 8.) But the law does not require the District to pay for the Evaluator's attendance (even if Student remained in the District). The SCO will not impose a requirement on the District that does not exist under the law. Parent has the opportunity to invite Evaluator to attend an IEE review meeting with Student's new district pursuant to 34 C.F.R. § 300.321(a)(6).

Finally, contrary to Parent's argument, the District was not required to initiate due process when it decided it would not pay for Evaluator's attendance at the IEE review meeting. Section 300.502(b)(2) dictates how the District must respond when a parent initially requests an IEE. 34 C.F.R. § 300.502(b)(2). That section does not apply to decisions made by the District regarding costs that fall outside the scope of an IEE at public expense, such as Evaluator's attendance at an IEE review meeting.

³ Paragraphs (a)(2) through (a)(6) refer to the child's regular education teacher, the child's special education teacher, a representative of the school district, and—at the parents' discretion—any other individuals with knowledge or special expertise regarding the child. 34 C.F.R. §§ 300.321(a)(2)-(a)(6).

Conclusion to Allegation No. 2: The District disclosed Student’s PII without Parent’s consent on October 17, 2019, in violation of 34 C.F.R. § 300.622(a).

Parent asserts that the District disclosed Student’s PII without her consent, in violation of 34 C.F.R. § 300.622(a), when it left the Response unattended on her front porch.

The IDEA requires a public agency to protect the confidentiality of any personally identifiable data, information and records it collects or maintains. *Id.* §§ 300.610-627. “PII” refers to information that contains:

- (a) The name of the child, the child’s parent, or other family member;
- (b) The address of the child;
- (c) A personal identifier, such as the child’s social security number or student number; or
- (d) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

34 C.F.R. § 300.32. Under 34 C.F.R. 300.622(a), “[p]arental consent must be obtained before [PII] is disclosed to parties, other than officials of participating agencies in accordance with paragraph (b)(1) of this section, unless the information is contained in education records, and the disclosure is authorized without parental consent under [the Family Education Rights and Privacy Act (“FERPA”).” *See also CDE Parent and Child Rights in Special Education: Procedural Safeguards Notice*, p. 9. Section 300.622(a), thus, incorporates FERPA’s exceptions to the consent requirement. FERPA permits disclosure of PII without parental consent:

- (a) To school officials with legitimate educational interests,
- (b) To officials of another school where student seeks or intends to enroll or is already enrolled,
- (c) To government officials for audit or evaluation purposes,
- (d) In connection with a student’s financial aid,
- (e) To state and local authorities within the juvenile justice system pursuant to state law,
- (f) To organizations conducting students on behalf of the school,
- (g) To organizations conducting studies on behalf of the school,
- (h) To accrediting organizations,
- (i) To comply with a judicial order or lawfully issued subpoena,
- (j) In connection with a health or safety emergency,
- (k) As directory information,
- (l) To the parent or the student,
- (m) To the victim of an alleged perpetrator of a crime of violence or non-forcible sex offense,

- (n) In connection with a disciplinary proceeding at an institution of postsecondary education,
- (o) To a parent of a student at an institution of postsecondary education regarding the student's violation of any law or rule governing the use or possession of alcohol or a controlled substance, or
- (p) Where the disclosure concerns registration of sex offenders and other individuals.

34 C.F.R. § 99.31.

Here, the District clearly disclosed Student's PII without Parent's consent. The Response contained Student's full name, education history, assessment results, mental health history, and medical history. (FF# 27.) This information indisputably constitutes PII within the meaning of 34 C.F.R. § 300.32.

The District left the Response unsecured on Parent's porch without her consent. (FF# 23.) Parent has been unable to locate the Response, and it is unclear who may now have access to Student's PII as a result of the District's actions. (FF# 24.) Under the present circumstances, 34 C.F.R. § 300.622(a) required the District to obtain Parent's consent before it disclosed Student's PII, and none of the exceptions in 34 C.F.R. § 99.31 applies. As a result, the District violated its obligations under 34 C.F.R. § 300.622(a). No evidence indicates that this procedural violation impeded Student's right to FAPE, significantly impeded Parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefit under 34 C.F.R. § 300.513(a)(2). In recognition of its error, the District took disciplinary action against District Employee for leaving the Response on Parent's front porch (FF# 26); however, the SCO finds remedies necessary.

REMEDIES

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

- a) Disclosing Student's PII without Parent's consent on October 17, 2019, in violation of 34 C.F.R. § 300.622(a).

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

- 1) By **December 16, 2019**, the District must submit to CDE a proposed corrective action plan ("CAP") that effectively addresses the violation noted above. The CAP must effectively address how the noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:

- a. Comprehensive training on the requirements of 34 C.F.R. § 300.622(a) conducted with Special Education Director and all administrative staff under Special Education Director's supervision or within the special education group, as well as any other staff deemed appropriate by District, no later than **February 17, 2020**. This training may be conducted in-person or through an alternative technology-based format, such as video conference, web conference, webinar, or webcast.
- b. Training materials for the above-described training must be submitted to CDE for review and approval **at least 30 days prior to the delivery of training**.
- c. Evidence that such training occurred (i.e. training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) must be provided to CDE no later than **February 24, 2020**.

CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance.

Please submit the documentation detailed above to CDE as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Michael Ramirez
1560 Broadway, Suite 1100
Denver, CO 80202-5149

NOTE: Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by CDE.

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, the party's 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 25th day of November, 2019.

Ashley E. Schubert
State Complaints Officer

Appendix

Complaint, pages 1-8

- Exhibit 1: Records from Student's prior school district
- Exhibit 2: Prior evaluation results
- Exhibit 3: Prior evaluation results
- Exhibit 4: Records from Student's prior school district
- Exhibit 5: Records from Student's prior school district
- Exhibit 6: Email correspondence with District
- Exhibit 7: Prior written notice, email correspondence with District, and IEE request form
- Exhibit 8: Email correspondence with District
- Exhibit 9: Email correspondence with District
- Exhibit 10: Email correspondence with District
- Exhibit 11: Email correspondence with District
- Exhibit 12: Communications with Safe2Tell
- Exhibit 13: Email correspondence with Office of Civil Rights ("OCR")
- Exhibit 14: Email correspondence with District
- Exhibit 15: Email correspondence with OCR
- Exhibit 16: Correspondence from OCR
- Exhibit 17: Correspondence related to Student's transfer
- Exhibit 18: Email correspondence regarding Student's transfer
- Exhibit 19: Child Psychology Practice Cost Estimate
- Exhibit 20: Email correspondence with District and Child Psychology Practice
- Exhibit 21: IEE request form and School Nurse's IEE report
- Exhibit 22: Child Psychology Practice IEE report
- Exhibit 23: Email correspondence regarding IEE cost dispute
- Exhibit 24: Email correspondence from Parent regarding PII allegation
- Exhibit 25: Email correspondence from District regarding PII allegation

Response, pages 1-2

- Exhibit A: Email correspondence regarding Complaint's allegations
- Exhibit B: Email correspondence regarding Complaint's allegations
- Exhibit C: Email correspondence regarding Complaint's allegations
- Exhibit D: Email correspondence regarding Complaint's allegations
- Exhibit E: Cost Estimate, invoices for IEE, and proof of payment
- Exhibit F: IEE reports by Child Psychology Practice and School Nurse
- Exhibit G: District's IEE request form
- Exhibit H: District staff with knowledge of Complaint's allegations
- Exhibit I: District's legal support
- Exhibit J: District's policies related to PII

Reply, pages 1-5

- Exhibit 26: List of persons with knowledge from Prior State Complaint

CDE Exhibits

- Exhibit CDE-1: Email correspondence between CDE Specialist and District and between CDE Specialist and Parent regarding Complaint's allegations

Interviews

- CDE Specialist: November 5, 2019
- Special Education Director: November 11, 2019
- Parent: November 13, 2019