

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

**State-Level Complaint 2019:569
El Paso County School District 11**

DECISION

INTRODUCTION

The parent (“Parent”) of a student (“Student”) 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 11 (“District”) on October 25, 2019.

The State Complaints Officer (“SCO”) determined that the Complaint identified one allegation subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.152. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

The Colorado Department of Education (“CDE”) has authority to investigate alleged 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 25, 2018 to determine 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 non-compliance, if any, shall be limited to one year prior to the date the Complaint was filed.

COMPLAINT ALLEGATION

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

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.* The Exceptional Children’s Education Act (“ECEA”) governs IDEA implementation in Colorado.

1. Failing to provide Student with special transportation consistent with Student's IEP, from August 14, 2019 to present, in violation of 34 C.F.R. § 300.323.

FINDINGS OF FACT

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

A. Background

1. Student is eligible for special education and related services under the disability category of Visual Impairment. *Exhibit A*, p. 1.
2. Student currently attends sixth grade at a middle school in the District ("Middle School"). *Interview with Parent*. During the 2018-2019 school year, Student attended his neighborhood elementary school in the District ("Elementary School"). *Id.*
3. The District provided special transportation to Student as a related service pursuant to an IEP from kindergarten to fifth grade. *Id.* During that time, the District transported Student to and from Elementary School and his home. *Id.*
4. Parent describes Student as smart, innovative, and caring. *Id.* Student enjoys serving other people and acting as a peacemaker. *Id.* Student has strong verbal skills but struggles to complete non-verbal tasks, especially writing and math. *Id.* Transitions also pose a challenge for Student.

B. Student's IEP

5. On January 24, 2019, the District convened a properly constituted IEP team to conduct Student's annual IEP review. *Exhibit A*, pp. 1-2. The IEP Team determined that Student required special transportation as a related service pursuant to 34 C.F.R. § 300.34. *Id.*, p. 5. At the time of the IEP meeting, Student still attended Elementary School. *Id.*, p. 1.
6. The IEP ("IEP")—dated January 24, 2019—reflects the IEP Team's decision, indicating that Student requires transportation as a related service. *Id.*, p. 5.
7. Pursuant to the IEP, Student spends at least 80% of the time in a general education class. *Id.*, p. 13. Per week, Student receives 90 minutes of direct "written language" instruction and 60 minutes of direct instruction from a Teacher of the Visually Impaired ("TVI"). *Id.*, p. 12.

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

In addition, Student receives 90 minutes per month of direct instruction from an Orientation and Mobility Specialist. *Id.*

8. The IEP remains in effect. It has not been changed since it was finalized following the January 24, 2019 meeting. *Interview with Executive Director of Special Education.* The District has not held any additional IEP team meetings or issued any prior written notices proposing to initiate or change the offer of FAPE for Student. *Id.*

C. Open Enrollment & Selection of Student's Middle School

9. In fall 2018—with Student set to begin middle school the following school year—Parent began to plan for Student's transition to middle school. *Interview with Parent.*

10. District has an open enrollment process, which permits students to apply for enrollment in a school outside of their attendance area (i.e. a District school other than the student's neighborhood school) ("Open Enrollment"). *Exhibit G, p.3.*

11. Because of Open Enrollment, Parent wanted to consider other District middle schools in addition to Student's neighborhood middle school ("Neighborhood Middle School"). *Interview with Parent.*

12. Using her own criteria, Parent narrowed her list to five District middle schools, including, in part, Middle School and Neighborhood Middle School. *Id.* Parent visited each of the five schools and evaluated various features of the schools, such as the staff, physical accessibility of the buildings, and available educational and extracurricular programs. *Id.*

13. Former Lead Special Education Facilitator accompanied Parent on these visits. *Interviews with Parent and Former Lead Special Education Facilitator.* At the time of the visits, Former Lead Special Education Facilitator informed Parent that, under the District's Open Enrollment policy ("Policy"), Parent would be responsible for transporting Student to any school other than Neighborhood Middle School. *Id.*

14. That Policy—specifically, Policy JBBA/JFBB—states as follows:

Transportation for students granted permission to attend a school outside their designated attendance area (see Policy JC) will not be furnished by the District[] unless it is determined that transportation is necessary for the District to comply with federal and state law.

Exhibit G, p. 3. Later, in specific reference to students with disabilities and students with a 504 plan, the Policy indicates:

A student's current Individualized Education Plan (IEP) or 504 plan shall be used to determine if the requested school or program has the resources to meet the

student's needs. Transportation will not be provided as a related service when attending a school of choice.

Id., p. 6.

15. Despite the Policy, Parent decided to apply for Open Enrollment in Middle School, instead of enrolling Student in Neighborhood Middle School. *Interview with Parent*. The structure of the program and the relationship between the staff at Middle School had the strongest influence on Parent's selection of Middle School. *Id.*

16. Former Lead Special Education Facilitator provided Parent with a copy of the Choice Open Enrollment Application form. *Interview with Former Lead Special Education Facilitator*. Former Lead Special Education Facilitator read the form to Parent and reiterated the District's Policy regarding transportation of open-enrolled students. *Id.*

17. On January 15, 2019, Parent submitted a Choice Open Enrollment Application to District (the "Application"), indicating that Student wished to enroll at Middle School, instead of Neighborhood Middle School. *Exhibit K*, p. 2.

18. One section of the Application asks Parent to state the reason for requesting Open Enrollment. *Id.* There, Parent checked boxes indicating: (a) Choice school offers better education or environment, (b) More variety/better sport or extracurricular activities, and (c) Educational programs offered at choice school (for example: IB, AVID, Gifted Magnet, ELL, SPED, etc.). *Id.*

19. The Application required Parent to sign, indicating that she understood and accepted the conditions listed in the form. *Id.*, p. 2. One of the conditions states: "I understand that transportation to and from school will be my responsibility. District transportation is not provided." *Id.* Parent signed the Application. *Id.*

20. During her interview, Parent stated that she was aware of the Policy at the time she submitted the Application but she was still "trying to investigate" the interplay between the Policy (which precluded transportation) and Student's IEP (which required special transportation). *Interview with Parent*.

21. Middle School approved Student's Application in April 2019. *Exhibit K*, p. 2.

D. Dispute over Transportation Arises

22. Following approval of Student's Application, Parent began exploring whether the District would make an exception to the Policy and provide transportation to Student. *Interview with Parent*.

23. On May 3, 2019, Parent met with Former Executive Director of Special Education (“Former Executive Director”) and Former Lead Special Education Facilitator to discuss—at least, in part—Student’s transportation to and from Middle School. *Interviews with Parent, Former Executive Director of Special Education, and Former Lead Special Education Facilitator.*

24. During that meeting, Former Executive Director explained the District’s Policy to Parent and reiterated that the District would not transport Student to Middle School. *Interview with Former Executive Director of Special Education.* In Former Executive Director’s view, the issue was not a special education issue but, rather, a choice issue. *Id.*

25. Former Executive Director recalls Parent expressing her dislike for Neighborhood Middle School and expressing her desire that Student attend Middle School. Former Executive Director does not recall Parent indicating that Neighborhood Middle School could not meet Student’s special education and related service needs. *Id.*

26. Parent does not dispute that Student’s educational needs can be met at Neighborhood Middle School. *Interview with Parent.* But Parent strongly believes that Middle School is a better option for Student. *Id.* In her view, the involvement of Middle School’s administrators, the communication and collaboration between the school’s general education and special education teachers, and the collective experience of the special education staff elevate Middle School above Neighborhood Middle School. *Id.*

E. Current School Year

27. Student began sixth grade at Middle School on August 14, 2019. *Complaint*, p. 1; *Interview with Parent.* Parent reports that Student’s adjustment to Middle School has been “phenomenal.” *Reply*, p. 2.

28. Citing to the Policy, the District has refused to provide Student transportation to Middle School. *Complaint*, p. 2. Instead, Student has utilized a local paratransit service for individuals with disabilities. *Id.*; *Interview with Parent.* Parent pays \$7.00 per day for Student to use the paratransit service. *Interview with Parent.* Though Parent can schedule the paratransit service for a particular time, the service has a thirty minute window—fifteen minutes before or after the scheduled time—to arrive. *Id.* This window has caused Student to be late to school on several occasions. *Id.* Parent has concerns that Student’s late arrivals as a result of his reliance on the paratransit service may become an issue later in the school year. *Id.*

29. With the exception of transportation, Student currently receives the special education and related services specified in his IEP. *Interview with Executive Director of Special Education.* Per week, Student has 90 minutes of direct “written language” instruction and 60 minutes of direct instruction from a TVI. *Exhibit A*, p. 12. Additionally, Student receives 90 minutes per month of direct instruction from an Orientation and Mobility Specialist. *Id.*

30. The District utilizes itinerant TVIs and Orientation and Mobility teachers. *Interview with Executive Director of Special Education.* These teachers travel from school to school and provide services at multiple schools within the District. *Id.* As a result, Student likely would have had the same TVI and Orientation and Mobility teacher at both Middle School and Neighborhood Middle School. *Id.*

31. Middle School has an affective needs program, which Neighborhood Middle School does not offer. *Id.* However, Student neither participates in that program nor demonstrates any significant social, emotional, or behavioral issues that would warrant the supports of an Affective Needs program. *Id.; Interview with Parent.*

32. Former Executive Director, Former Lead Special Education Facilitator, and Executive Director all agree that Neighborhood Middle can meet Student's educational needs. *Interviews with Former Executive Director of Special Education, Former Lead Special Education Facilitator, and Executive Director of Special Education.*

33. The District remains willing to provide Student special transportation should Student return to Neighborhood Middle School. *Interview with Executive Director of Special Education.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: The District did not violate IDEA or deny Student FAPE by refusing to provide Student with special transportation from August 14, 2019 to present. However, the District failed to appropriately amend Student's IEP or provide prior written notice once Student enrolled in Middle School, resulting in a procedural IDEA violation.

This dispute arises out of the District's refusal to transport Student to a school Parent selected through the District's Open Enrollment Process. Parent contends the District denied Student a FAPE by failing to provide transportation in accordance with his IEP. She asserts that Student's IEP should govern, regardless of Student's participation in Open Enrollment or the District's Policy.

Here, the District does not dispute that it would be required to provide Student with special transportation to Neighborhood Middle School. But District contends its transportation obligation ended when Student enrolled in Middle School through Open Enrollment, because Parent selected Middle School based solely on personal preference.

The IDEA guarantees all children with disabilities access to a FAPE. 20 U.S.C. § 1400(c); *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174, 580 U.S. ____ (2017), 137 S. Ct. 988, 994. To provide a FAPE, a school district must offer an IEP "reasonably calculated to enable a child to make progress in light of the child's circumstances." *Id.* at 999. That IEP may include related

services, such as transportation, where appropriate. 34 C.F.R. § 300.320(a)(4). As a related service, transportation may include: (a) travel to and from school and between schools; (b) travel in and around school buildings; and (c) specialized equipment required to provide special transportation for a child with a disability. *Id.* § 300.34(c)(16).

A child's IEP team determines whether the child requires transportation to receive a FAPE. *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46576 (Aug. 14, 2006). A school district must implement a student's IEP in its entirety. *Id.* § 300.323(c). Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to implement an IEP can result in a denial of a FAPE. *Id.* § 300.17.

Here, Student's IEP indisputably requires special transportation as a related service. Yet, on August 14, 2019, the District refused to provide that transportation. However, where a student with a disability chooses—based on personal preference and not on a disability-related education need—to attend another school in the district other than his neighborhood school, the district is not obligated to provide transportation to that school. *See, e.g., Fick v. Sioux Falls Sch. Dist.*, 337 F.3d 968 (8th Cir. 2003); *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999); *Baltimore County Pub. Sch.*, 61 IDELR 210, 113 LRP 14987 (Md. SEA 12/21/12). If the disability-related educational needs of a child with a disability can be met by a neighborhood school and the parents or child select a school outside the neighborhood for “reasons of personal preference,” then a school district may refuse to provide special transportation. *Fick*, 334 F.3d at 970. “[A] school district may apply a facially neutral transportation policy to a disabled child without violating the law when the request for a deviation from policy is not based on the child's educational needs, but on the parents' convenience or preference.” *Id.*

The Findings of Fact indicate that Parent selected Middle School based solely on personal preference. The parties do not dispute that Neighborhood Middle School can meet Student's educational needs. (FF #s 26, 30, 32.) Indeed, given that the District utilizes itinerant TVIs and Orientation and Mobility teachers, those services likely would have been provided by the same teacher at both Middle School and Neighborhood Middle School. (FF #30.) Middle School has programs that Neighborhood Middle School does not offer (such as an affective needs program), but Student neither receives nor requires services from those programs. (FF #31).

Ultimately, Parent concedes that she chose Middle School based solely on personal preference. Parent believes Middle School is a better option for Student because of the involvement of Middle School's administrators, the communication and collaboration between the school's general education and special education teachers, and the collective experience of the special education staff. (FF #26.) The SCO's interview with Parent confirmed that Parent chose Middle School because she liked the school better, not because Parent believed Neighborhood Middle School could not adequately meet Student's needs. (FF #15.)

Even if Middle School were a better choice for Student, it does not mean that Student can only receive a FAPE at Middle School (versus Neighborhood School). Indeed, a FAPE requires only that Student’s educational programming be “reasonably calculated to enable a child to make progress in light of the child’s circumstances.” *Endrew*, 137 S. Ct. 988, 994. Nothing in the record suggests a FAPE was not available to Student at Neighborhood Middle School. As a result, Parent’s choice to have Student attend Middle School—instead of Neighborhood Middle School—rendered Student ineligible for special transportation per District Policy. The District’s Policy obligates parents to transport students attending a school other than their neighborhood school. This Policy is facially neutral—that is, it applies equally to all students, regardless of disability. As a result, the SCO concludes that the District is not obligated to transport Student to Middle School.

Unfortunately, the dispute in this case appears to stem primarily from the contradiction between Student’s IEP and the District’s actions. Student’s current IEP clearly indicates that Student requires special transportation to receive FAPE. (FF #6.) Yet, the District refuses to provide special transportation, citing the Policy. (FF #28.) An IEP “embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP.” *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1197 (9th Cir. 2017). Therefore, the SCO understands how this contradiction could create confusion for Parent. Such confusion could have been avoided had the District amended Student’s IEP in accordance with 34 C.F.R. §§ 300.324(a)(4), (a)(6), and (b)(ii)(E).³

By virtue of the Policy, the District essentially removed related services from Student as a result of Student’s participation in Open Enrollment. However, the District removed these services without amending Student’s IEP or providing prior written notice to Parent. Therefore, the District failed to comply with 34 C.F.R. §§ 300.324(a)(4), (a)(6), (b)(ii)(E) and 34 C.F.R. § 300.503(a). This is a procedural violation of the IDEA.

The United States Supreme Court has stressed the importance of complying with the IDEA’s procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238

³ In its Supplemental Response, the District argues any consideration of the District’s obligation to amend or revise the IEP falls outside the scope of the allegation accepted for investigation. *District’s Supplemental Response*, p. 1-2. However, the accepted allegation related to implementation of services in Student’s IEP (i.e., provision of transportation services). So a failure by the District to amend the IEP and provide prior written notice for the removal of transportation services falls squarely within the allegation initially accepted for investigation.

F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent’s opportunity to participate in the IEP process).

Here, the District’s procedural violation did not amount to a violation of FAPE. Since the District was not required to transport Student to Middle School, Student experienced no impediment to a FAPE or deprivation of educational benefit. Indeed, Parent reports that Student has made a “phenomenal” adjustment to Middle School. (FF #27.) Other than transportation, Middle School has fully implemented Student’s IEP. (FF #29.) The District did not deny Parent an opportunity to participate in the decision to remove Student’s transportation services. Parent was aware of the District’s Policy prior to Student’s participation in Open Enrollment. (FF #s 19, 20.) And Parent engaged in multiple conversations with District about the Policy before, during, and after the Open Enrollment process. (FF #s 13, 16, 22, 23.) At each point, the District informed Parent that the District would not transport Student to Middle School. Thus, the District’s procedural violation did not cause substantive harm—though it led to the filing of this Complaint.

REMEDIES

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

- 1) Amending Student’s IEP in accordance with 34 C.F.R. § 300.324 to remove special transportation as a related service; and
- 2) Providing prior written notice (either within or apart from the amended IEP) in accordance with 34 C.F.R. § 300.503(a) regarding the District’s basis for removing special transportation as a related service.

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

- 1) By **January 21, 2020**, the District shall submit to CDE a corrective action plan (“CAP”) that adequately addresses the violation noted in this Decision regarding prior written notices and related services. 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) By **February 18, 2020**, the District must ensure that Student’s IEP is amended pursuant to 34 C.F.R. § 300.324(a)(6) to reflect that Student does not currently require special transportation because he attends a school other than his neighborhood school.

If Parent and the District agree to amend the IEP outside of an IEP meeting, the District shall submit evidence of this agreement and a copy of the amended IEP to CDE by February 25, 2020.

If the District convenes an IEP meeting with Parent to amend the IEP, it must do so at a mutually convenient time and setting. The District must provide proof that this IEP meeting occurred by submitting a copy of the Notice of Meeting, amended IEP, and any relevant prior written notice to CDE no later than 10 days following the IEP meeting. If Parent does not respond to the District's efforts to amend the IEP by agreement or convene an IEP meeting by February 11, 2020, the District must still hold an IEP meeting, consistent with 34 C.F.R. § 300.322(d). If Parent refuses to attend the IEP meeting, the District must submit documentation of its attempts to convince Parent to attend, including records of telephone calls made or attempted and the results of those calls, copies of correspondence, and detailed records of visits to Parent's home, consistent with 34 C.F.R. § 300.322(d).

b) CDE will approve or request revisions to the CAP.

Please submit the documentation detailed above to the Department 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 aggrieved party may 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 23rd day of December, 2019.

Ashley E. Schubert
State Complaints Officer

Appendix

Complaint, pages 1-2

- Exhibit 1: January 24, 2019 IEP
- Exhibit 2: Correspondence regarding Student's transportation

Response, pages 1-8

- Exhibit A: January 24, 2019 IEP
- Exhibit B: Blank
- Exhibit C: Blank
- Exhibit D: Blank
- Exhibit E: Correspondence between District officials regarding Student's transportation
- Exhibit F: Correspondence between District and Parent regarding Student's transportation
- Exhibit G: District's Policy and relevant regulations
- Exhibit H: District's Witness List
- Exhibit I: Choice Open Enrollment Application Form
- Exhibit J: Correspondence with Parent regarding Policy
- Exhibit K: Completed Choice Open Enrollment Application

Reply, pages 1-2

Supplemental Response, pages 1-3

Telephonic Interviews:

- Former Executive Director of Special Education: December 3, 2019
- Parent: December 3, 2019
- Executive Director of Special Education: December 6, 2019
- Former Lead Special Education Facilitator: December 9, 2019