

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

State-Level Complaint 2014:512
Adams-Arapahoe School District 28J

DECISION

INTRODUCTION

This is a pro-se, state-level complaint (Complaint), filed June 13, 2014. The Complainant is the mother (Mother) of Student, who is identified as a child with a disability under the IDEA.

The State Complaints Officer (SCO) determined that the Complaint, dated May 22, 2014, identified one allegation 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.

MOTHER'S COMPLAINT ALLEGATION

Mother's Complaint raised one allegation, summarized as follows:

On March 18, 2014 District denied Mother's request to provide Student a free appropriate public education (FAPE) in the least restrictive environment (LRE), in violation of 34 C.F.R. §§ 300.114 through 300.118.

To resolve the Complaint, Mother proposes that Student attend Neighborhood High School with interpreter support services.

FINDINGS OF FACT

1. At all times relevant to the Complaint, Student has lived with Mother and has attended eighth grade at D/HH (Deaf/Hard of Hearing) Middle School, which is within the boundaries of the District. Student is eligible for special education and related services as a child identified with a hearing disability. Student utilizes binaural amplification with a hearing aid in the left ear and a cochlear implant in the right ear.

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).

IEP team meeting on October 10, 2013

2. An IEP team meeting was held on October 10, 2013. A Communication Plan incorporated into the IEP from that meeting states that “[Student] chooses to communicate orally. [Student] uses sign language receptively to reinforce new concepts, and [Student] uses it expressively to clarify [Student’s] speech and [Student’s] ideas.” The Communication Plan also notes that “[Student] is highly successful in the regular classroom with the support of an interpreter and [Student’s] FM³.” The IEP team determined that the Least Restrictive Environment (LRE) setting for Student was the General Education classroom at least 80% of the time. The IEP team also agreed that Student would receive services from a teacher of the deaf for two hours per week on a consult basis, speech and language services thirty minutes per week, an educational interpreter in all classes, sixty minutes of audiology services annually, and access to special transportation.

3. With regard to Student’s transition into high school, the IEP team agreed that Student would attend Neighborhood High School in 2014-15 providing that Student maintained high grades throughout the 2013-14 school year. The Communication Plan listed Neighborhood High School with D/HH support as the first placement option and D/HH High School as the second placement option⁴. Teacher of the D/HH explained that the difference between the first two placements listed on Student’s IEP is that Neighborhood High School does not provide as much “exposure” [to D/HH peers and adult role models as well as other D/HH related services] as D/HH High School. The IEP team agreed to meet again toward the end of the 2013-2014 school year to discuss Student’s transition from middle school to high school.

4. Teacher of the D/HH explained that during the IEP team meeting, Mother requested that a meeting be scheduled with the District’s Exceptional Student Services (“ESS”) staff and, despite efforts to do so from November 2013 through February 2014, Teacher of the D/HH was unable to schedule a meeting. Teacher of the D/HH wanted to get “everyone in the same room to discuss” Student

³ “FM” refers to hearing assistive technology.

⁴ Two other schools for the D/HH were listed after these two placement options, but were refused in a Prior Notice of Special Education Action (PWN) dated October 10, 2013, because “[Student] is proficient, and utilizes [Student’s] auditory information.” The PWN made no reference to the first two placements.

attending Neighborhood High School, but ultimately ESS staff members instructed Teacher of the D/HH to have Mother contact the secretary for the ESS office instead. Teacher of the D/HH stated that no meeting was scheduled at the end of the school year because “the end of the year was a mess” and “[Student attending Neighborhood School] was out of [Teacher of the D/HH and the IEP team’s] hands.”

Teacher of the D/HH consultation services

5. Teacher of the D/HH has worked as a teacher of the D/HH in schools for close to twenty years, worked extensively with Student, and is familiar with Student’s needs, abilities, and educational program. Accordingly, the SCO finds Teacher of the D/HH highly credible and gives her input great weight. Teacher of the D/HH stated that Student is proficient across all academic levels, both in the classroom and on state assessments, which is highly unusual for D/HH students. Teacher of the D/HH explained that D/HH students typically graduate from high school with a third grade literacy level and that the other D/HH students at D/HH Middle School perform much lower than Student academically. The IEP document contained reports from teachers who noted that Student is performing on grade level on reading assessments, “is always working to truly understand the content we are covering and delivers quite proficient work,” is a “great student,” and is “advanced compared to [Student’s] peers” in Student’s writing skills. Teacher of the D/HH stated that Student is “incredibly motivated and smart.” Teacher of the D/HH, Mother, and Student all explained that Student is advanced in Math⁵ and English and is college-bound.
6. Teacher of the D/HH explained that D/HH students typically experience some challenges transitioning from middle school to high school, regardless of the educational setting or the student’s academic level. Teacher of the D/HH explained that Student may benefit from beginning high school with some assistance from a teacher of the D/HH, special education teacher, or teachers in specific academic content areas, but anticipates that Student will require little, if any, support in the near future. Teacher of the D/HH stated that Student does not require D/HH center-based support services, with the exception of an educational interpreter.

⁵ Student was taking 11th grade level math in the 8th grade.

7. Throughout the 2013-14 school year at D/HH Middle School, Student attended a class every morning for fifty minutes taught by Teacher of the D/HH with other D/HH students. Teacher of the D/HH explained that the class, which was intended to be a resource class period for D/HH students, was primarily used for pre-teaching and post-teaching of concepts related to science and social studies with the other D/HH students, but that Student used the time in the class to work on homework. Student also described the resource class period as a study hall where Student only worked on homework. Mother confirmed that Student rarely had any homework to do at home. Student stated that the only tutoring Student received last year was in math from an educational interpreter.

Speech and language services

8. Speech Language Pathologist explained that Student has a single articulation concern in conversational speech, which is unusual for D/HH students who typically have multiple articulation concerns and are not as easy to understand in conversational speech as Student. During the 2013-14 school year, Student received services once or twice a month from Speech Language Pathologist at D/HH Middle School with a small group of D/HH students⁶. Speech Language Pathologist stated that Student was brought in with the small group in order to observe Student in spontaneous speech and that the other D/HH students all have multiple articulation errors. Speech Language Pathologist further explained that the reason Student was brought in with the other D/HH students was for the benefit of the other students, as Student serves as an outstanding academic and speech role model for the other D/HH students; there was no other reason that Student would receive speech services in a group with other D/HH students. Speech Language Pathologist stated that Student could receive the services provided for on Student's IEP with any speech language pathologist, as Speech Language Pathologists are all typically trained and have experience with articulation issues. Speech Language Pathologist also clarified a statement attributed to Speech Language Pathologist in the IEP meeting notes by explaining that the IEP team discussed that Student could spend some time without an educational interpreter in order to assess how Student functions without an interpreter in order to foster greater independence. Based upon Speech

⁶ Mother's understanding of the IEP service agreement was that Student's speech goals would be addressed in individual sessions with a speech language pathologist, but that did not happen at D/HH Middle School last year. Mother stated that she does not believe Student has benefitted from the speech services Student has been receiving at D/HH Middle School and that she is currently seeking speech services for Student privately.

Language Pathologist's experience and familiarity with Student's educational abilities and program, the SCO finds Speech Language Pathologist credible and affords Speech Language Pathologist's input great weight.

D/HH peers and adult role models

9. Teacher of the D/HH has observed that Student maintains friendships and socializes outside of school with D/HH classmates and has observed Student socializing with both D/HH and hearing students. Teacher of the D/HH explained that Student is very good at "code switching," which was described as switching between spoken language and sign language, depending on with whom Student is communicating. Student and Mother also stated that Student maintains friendships with D/HH friends from both elementary and middle school outside of school and that Student has friends in the neighborhood who will be going to Neighborhood High School, as well as from Student's former D/HH Elementary School⁷. Mother stated that she also maintains relationships with families with D/HH children. Mother and Student explained that Student feels secure as a D/HH person and that having D/HH peers at school is not at all a concern. Further, Student's access to D/HH peers at school was never discussed at the IEP team meeting or in any way a factor in the development of Student's IEP or educational placement.

10. Teacher of the D/HH stated that at the D/HH Middle School, D/HH staff members try to bring in adult role models who are D/HH to visit; she gave one example in the 2013-14 school year of a role model who visited D/HH Middle School. Student confirmed that there was one D/HH adult role model who visited D/HH Middle School last year. Teacher of the D/HH also stated that there is a teacher of the D/HH who is hard of hearing and a District audiologist who is also D/HH. Mother stated and Student confirmed that Student has access to adult role models who are D/HH outside of the school setting; access to adult role models who are D/HH is not a concern for Student, was not discussed at the IEP team meeting, and thus was not a factor in Student's educational placement.

⁷ At the time Student attended D/HH Elementary School, District's D/HH elementary program was located in Student's neighborhood and, as a result, many of Student's neighborhood peers learned to sign in elementary school and Student has maintained friendships with former elementary school classmates.

Educational interpreter services

11. Student's academic schedule for the 2013-14 school year at D/HH Middle School consisted of Honors Math, Literacy, Science, Social Studies, Humanities, Visual Arts, Literacy Intervention, and Physical Education. Student attended all classes with an educational interpreter. Student was the only D/HH student who attended Honors Math; Student attended Literacy with one other D/HH student; and Student attended Science and Social Studies with three or four other D/HH students; all other classes were attended with four or more D/HH students. Student explained that there were a number of educational interpreters used throughout the school day and that the same educational interpreter was normally present for each academic class. Teacher of the D/HH stated that Student could be effectively served by a single educational interpreter through an entire school day.
12. SCO interviewed Student with an interpreter present who was hired through an interpreting agency. Interpreter stated to SCO that she was not an educational interpreter. Student appeared to be easily following and participating in the lengthy group conversation. Student looked at the interpreter occasionally for clarification when SCO was speaking and seldom looked at the interpreter when Mother was speaking.
13. Student shared that Student played the [Music Instrument] in the school orchestra in fifth and sixth grades, but had to "drop" orchestra in seventh grade because there was no educational interpreter available for Student at D/HH Middle School. Student believed it was not an option to participate in orchestra without an educational interpreter, but felt that Student could have if given that option. Student stated that another D/HH student also had to "drop" orchestra because there was no educational interpreter and, because of that, Student's understanding was that D/HH students who used educational interpreters were "not allowed" to participate in orchestra without an educational interpreter.

Student's access to before and after school activities

14. Student expressed a desire to have participated in extracurricular [sports] while at D/HH Middle School, but did not because District transportation was unavailable and Student's parents could not provide transportation from after-school activities. When asked whether Student had ever asked at D/HH Middle School

if District transportation was available, Student explained that another D/HH student played [sports] and that student's father had to pick up the student, so Student's understanding was that District transportation was not available for D/HH students for after-school activities and, as a result, did not participate. Teacher of the D/HH confirmed that Student's participation in after school activities was problematic because Student's parents could not easily provide transportation after school and that Student chose not to participate in after school activities as a result.

15. Mother and Student both talked about Student wanting to participate in [SportTeam] and in [School] club in high school, but transportation would continue to be problematic if Student attended D/HH High School. Student's participation in before and after school activities at Neighborhood High School would not pose a problem since Student's home is within easy walking distance to Neighborhood High School and Student would also be able to get rides with other students in the neighborhood.

Effect of attending D/HH programs

16. Mother stated that "[Student] has gotten all [Student] can get out of the District's D/HH programs" and stated that she believes "that the goal of the IDEA has been achieved [with Student] in that [Student] is now fully ready and needs to move on to the real world challenges of attending a [non-D/HH program]." Teacher of the D/HH, Mother, and Student all noted that exposure to D/HH peers and adult role models was never discussed at the IEP team meeting. Mother stated that she believes that the District's decision to place Student at the D/HH High School was made solely as a financial benefit to the District, but serves as a restriction on Student's ability to obtain independence and self-advocacy skills that are crucial for Student's success in high school and beyond.
17. Student and Mother explained that Student is planning to attend college and that continuing to attend a D/HH school would impede Student's ability to participate in before and after school clubs and activities, to become independent, to develop self-advocacy skills that are essential for Student's success and are not a reality in D/HH programs, and to provide a supportive social environment within Student's neighborhood community.

18. D/HH Consultant has worked in the field of D/HH education for over thirty years in a variety of capacities, including teacher of the D/HH in elementary, middle and high school, program administrator, college level instructor of teachers of the D/HH, and consultant. D/HH Consultant explained that some students who are D/HH and attend center-based D/HH programs such as District's can actually be too restrictive for some students in terms of gaining the skills necessary to be successful beyond high school. D/HH Consultant explained that students who are D/HH can develop a dependence on D/HH peers and personnel as well as the relative safety of the D/HH program and that it can actually inhibit students who are D/HH in terms of growing in their ability to communicate, develop self-advocacy skills, and independence. D/HH Consultant stated that, although there is value in center-based D/HH programming for some students, it always must be a decision based on each student's individual needs.

May 14, 2014 meeting with ESS staff members and District's decision to centralize educational interpreter services

19. On March 14, 2014, Teacher of the D/HH informed Mother that there would be no meeting at the end of the 2013-14 school year and that ESS was placing Student at D/HH High School for the 2014-15 school year. On the same day, Mother spoke with ESS Consultant by telephone and requested that Student attend Neighborhood High School during the 2014-15 school year, as Student's IEP provided. On March 17, 2014, ESS Consultant informed Mother by telephone that Mother's request for Student to attend Neighborhood High School was being denied.
20. By a PWN dated March 18, 2014 District notified Parents that "[t]he district refuses parent request to provide FAPE as defined in the IEP dated 10/11/13 [sic] at [Neighborhood High School]." The PWN specified that District's refusal was because "[Student's] IEP requires access to an educational interpreter in the general education classroom as a supplementary aide/service. The district retains the right to determine the location where these services will be provided. The district will provide the required services at [D/HH High School]." The PWN further notes that the District's refusal was "[b]ased on the reports, evaluations and communication plan incorporated in the IEP dated 10/11/13 [sic] which state [Student] requires an Educational Interpreter to access general education."
21. Mother requested a meeting with Director of ESS in a letter received on April 29, 2014. Mother expected that the meeting would be an IEP team meeting to

discuss Student's placement. Instead, Mother met only with Director of ESS, Assistant Director of ESS, and ESS Consultant on May 14, 2014. The discussion by the ESS staff members was focused on Student attending D/HH High School because educational interpreters were not available at any other location in District. Director of ESS stated that Student would not be able to attend Neighborhood High School due to District's "need to consolidate resources⁸."

22. Director of ESS, Assistant Director of ESS, and District's response to the state complaint confirm that District has chosen to consolidate the educational interpreter staff for high school students at D/HH High School. The ESS staff members confirmed that there are no students in the District who use an educational interpreter outside of the D/HH elementary, middle, or high schools. ESS Consultant stated that the ESS staff looks at an individual student's IEP and students who require an educational interpreter are automatically placed at one of the District's D/HH schools. Assistant Director of ESS stated that, with the exception of educational interpreting and the production of braille for visually impaired students, there were no other services that were only available in a single location in District.
23. Director of ESS stated that every student must be considered individually, but that if a D/HH student's needs would require a duplication of services at their neighborhood school, that student would be assigned to one of the D/HH schools. Director of ESS explained that centralization of educational interpreter services "maximizes allocation of resources." Director of ESS denied knowing how the District could provide educational interpreter services to Student at anywhere other than D/HH High School.
24. District's response details the District's rationale with regard to their decision to centralize educational interpreter services at D/HH schools:
 - "Interpreters are in short supply and can be difficult to find and maintain. By centralizing services, the District maximizes the availability of staff and, thus, is more readily equipped to cover absences and scheduling difficulties so as to avoid lost instructional time;

⁸ Mother noted the direct quote on the back of Student's Communication Plan during the May 14, 2014 meeting and included it with the state complaint.

- Centralization allows for interpreting services to be provided to multiple students in a single class;
 - Centralization allows for interpreters to be paired with content areas of strength, thereby ensuring students access to high quality instruction;
 - Centralization allows for students to work with a variety of interpreters throughout their educational experience, thereby decreasing dependence on a single individual;
 - Centralization provides opportunities for training and increasing the proficiency of personnel; and
 - Centralization allows interpreters the time necessary for breaks and rotation in order to decrease the risk of injury posed by full-time interpreting.”
25. Educational Interpreter Coordinator has over twenty-five years of experience working as an educational interpreter and is currently working with a single high school student who is D/HH in a neighborhood school. Educational Interpreter Coordinator explained that interpreting for a student who is D/HH and communicates orally, utilizes auditory information, and uses sign language to reinforce or clarify new concepts is quite different than interpreting for a student who is D/HH and reliant on sign language for full access. Educational Interpreter Coordinator explained that the demand on the interpreter for signing in such a situation is not as “taxing” when a student is using an educational interpreter for clarification rather than full access. Educational Interpreter Coordinator further explained that there are sufficient breaks naturally built in for an interpreter in such a situation at the high school level between lectures. Educational Interpreter Coordinator stated that having only one educational interpreter for a student is not necessarily a detriment in services provided to a student, particularly when the student is not reliant on the interpreter for access. Educational Interpreter Coordinator also stated that there are a variety of ways to schedule a staff of educational interpreters to serve a single student at their neighborhood school.
26. Director of ESS further stated that the decision to implement Student’s IEP was both a placement decision determined by the services required on Student’s IEP, as well as a location decision in providing services that are only available at a centralized location. Director of ESS admitted that Director of ESS did not have the knowledge or authority to make a placement decision for Student and stated that placement should have been determined by Student’s IEP team.

CONCLUSIONS OF LAW

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

A. District's refusal of Mother's request for Student to attend Neighborhood High School and implement Student's IEP at D/HH High School violated Student's right to a free appropriate public education (FAPE) in the Least Restrictive Environment (LRE) under 34 C.F.R. §§ 300.114 through 300.118.

1. Mother alleges that District's refusal of Mother's request for Student to attend Neighborhood High School is a violation of Student's right to FAPE in the LRE under 34 C.F.R. §§ 300.114 through 300.118. For all of the following reasons, SCO respectfully agrees.
2. Under the IDEA, local education agencies such as the District are required to provide eligible students with disabilities with FAPE by providing special education and related services individually tailored to meet the student's unique needs, and provided in conformity with an IEP developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19.

The IEP is the basic mechanism through which each child's individual goals are achieved. The IDEA contains both procedural requirements to ensure the proper development of an IEP, and substantive requirements designed to ensure that each child receives a FAPE. States must comply with the IDEA's requirements, including providing each disabled child with a FAPE in an LRE, in order to receive funds under the statute.

L.B. v. Nebo School District, 379 F.3d 966, 974 (10th Cir. 2004), *citing Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 925 (10th Cir. 1995) and 20 U.S.C. § 1412 (a)(1) and (a)(5).

3. The LRE requirement is an explicit Congressional mandate "that disabled children be educated in regular classrooms to the maximum extent appropriate." *Nebo, supra, see also*, 20 U.S.C. 1412(a)(5); 34 C.F.R. § 300.114. The use of "special classes, separate schooling, or other removal of children with disabilities from the regular education environment [may] occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. §

300.114(a)(2)(ii). Further, the IDEA also requires a school district to “provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.” 34 C.F.R. § 300.107(a).⁹ Finally, in determining a student’s educational placement, the IDEA requires that the school district “ensure that ... [u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.” 34 C.F.R. § 300.116(c).

4. As the *Nebo* court noted, “[e]ducating children in the least restrictive requirement in which they can receive an appropriate education is one of the IDEA’s most important substantive requirements. [Citing *Murray, supra.*] The LRE requirement is a specific statutory mandate. It is not . . . a question about educational methodology.” *Nebo, supra.*
5. With regard to determining LRE, in *Nebo* the Tenth Circuit adopted the test set out by the Court of Appeals for the Fifth Circuit in *Daniel R.R. v. Board of Education*, 874 F.2d 1036 (5th Cir. 1989), which looks to “(1) whether education in a regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily; and (2) if not, whether the school district has mainstreamed the child to the maximum extent appropriate.” *Nebo*, 379 F.3d at 976, citing *Daniel R.R., supra.* Applying that test to the facts of this case, the SCO concludes that placing Student in the D/HH High School violates Student’s right to be educated in the LRE.
6. Student is an “atypical” D/HH student in that Student performs academically at a much higher level than most D/HH students (and certainly much higher than the other students in the D/HH Middle School) – Student is an honors student who performs on grade level, including in reading, and is college-bound. Student is able to achieve at this high academic level by participating in regular education classes with the support of an educational interpreter. Student does not require the support of a teacher of the D/HH or D/HH center-based support services. Furthermore, Student chooses to communicate orally, using sign language to reinforce new concepts or to clarify speech and ideas, and Student seeks to build upon those oral communication skills in order to foster greater independence,

⁹ “Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, [and] special interest groups or clubs sponsored by the public agency...” 34 C.F.R. § 300.107(b).

both in school and the community, including eventually in college. Access to other D/HH students or adult role models is not an educational priority or concern for Student, nor a necessary aspect of Student's educational placement; rather, Student seeks educational opportunities in a non-D/HH setting in order to develop self-advocacy skills and independence. Under the plain language of the LRE statutory and regulatory provisions, as well as the *Daniel R.R.* test applicable in this Circuit, Student can be educated in a regular classroom with the use of supplementary aids and services (in this case, an educational interpreter, consultation with a teacher of the D/HH, and some weekly speech language services). In this case, the least restrictive environment for Student is the regular education classroom at Neighborhood High School, where Student has the most access to non-D/HH peers and adults with whom Student can communicate in Student's chosen communication mode, consistent with Student's goals for self-advocacy and independence.

7. Another factor in this analysis is whether District is providing access to "nonacademic and extracurricular services and activities in the manner necessary to afford [Student] an equal opportunity for participation in those services and activities." 34 C.F.R. § 300.107(a). It is clear that in this case, placing Student in the center-based D/HH schools have denied Student an equal opportunity to participate in nonacademic and extracurricular services and activities. Specifically, Student's ability to participate in extracurricular activities such as orchestra, [Sport], [Sport] team, and [School] club would all be significantly limited, if not eliminated entirely, if Student is placed in D/HH High School.
8. District argues that the choice between placing Student in Neighborhood High School and D/HH High School is simply a question of the location in which the IEP should be implemented, and that such location determinations are made at the discretion of District. Again, the SCO disagrees. Generally, a student's "placement" means the provision of special education and related services provided in the student's IEP, not the physical location in which the IEP is implemented and the services are provided. Although placement is not specifically defined in the IDEA, the term refers to a point along the student's continuum of placement options, while location is where the child receives the services, such as a particular school or classroom. 71 Fed. Reg. 46588 (Comments to the 2006 Federal IDEA Regulations). As District has noted in this case, in Colorado a decision concerning location – i.e., the specific school,

classroom, or teacher, where a student's IEP will be implemented – is not an element of “placement” and is one that can be made unilaterally by a District.

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

ECEA Rule 4.03(8)(a). The essential question, therefore, is whether the determination to implement Student's IEP at D/HH school was truly only a matter of *where* Student would be served. If so, the failure to include Mother in the decision would not implicate the IDEA. On the other hand, if D/HH High School amounted to a substantively different *placement* from Neighborhood High School, or violated Student's right to receive FAPE in the LRE, then a substantive IDEA issue exists.

9. In this case, it is clear that Neighborhood High School and D/HH High School are not simply different locations in which Student's IEP and Communication Plan may be implemented. They are distinct placements on the LRE continuum, with Neighborhood High School representing the less restrictive environment in which Student can be appropriately educated. Teacher of the D/HH explained the difference between D/HH High School and Neighborhood High School, which is essentially that D/HH High School is a more restrictive environment. Indeed, the IEP team had clearly already considered Student's need for this level of D/HH “exposure” or support at D/HH High School and the differences between the two placement options and, in fact, had already determined that the LRE placement for Student was Neighborhood High School with an educational interpreter. The IEP team specifically contemplated placement for Student with respect to FAPE in the LRE; the placements listed on Student's IEP represented the continuum of placement options provided for in the IDEA and considered by the IEP team. Two placements had already been determined by the IEP team to be inappropriate; with respect to the other two (Neighborhood High School and D/HH High school), they noted that they were waiting until the end of Student's middle school year to confirm that Neighborhood High School would provide Student with FAPE in the LRE, if Student maintained high grades. Had the IEP

team met at the 2013-2014 school year to finalize its placement recommendation, rather than the ESS staff members unilaterally deciding to place Student at D/HH High School due to the centralization of a single service that Student required, the IEP documentation would have been clear on its face. This meeting, however, never took place. Although District's ESS staff contends that their decision to implement Student's IEP at D/HH High School was simply a location determination, it was, in fact, a different placement option altogether. The D/HH High School is a more restrictive placement for Student – it is a “separate school” that cannot serve as Student's placement because the nature of Student's disability does not prevent Student from being educated satisfactorily in “regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii). The Office of Special Education and Rehabilitative Services (OSERS) addressed the question of providing appropriate supports to a student in their home school, including the ability to provide qualified interpreters in the following advice letter, stating:

Students should not be sent to a separate school solely because they have a disability. Just as the IDEA requires placement in a general education setting when it is appropriate for the unique needs of a child who is deaf, it also requires placement elsewhere when the child's needs cannot be met in that setting. With appropriate supports in place, including qualified interpreters, attending their home school may be the answer.

Letter to Bosso, 56 IDELR 236 (OSERS 2010).

10. Another OSERS advice letter illustrates District's misplaced assertion that their decision to consolidate resources gives them an absolute right to determine location of services for all D/HH students who require educational interpreter services: “[c]hildren with disabilities must not be placed in separate schools merely because of the availability of placement options, administrative convenience, or institutional barriers to providing related services in regular school settings rather than because of their individual needs.” *Letter to Johnson*, 213 IDELR 182 (OSERS 1988). The IDEA makes it clear that placement decisions must not be based on a public agency's needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff. 34 C.F.R. § 116.

11. District cites to a number of federal court cases in support of their contention that the IDEA permits school districts to centralize services and to make location decisions such as this one, including the Tenth Circuit Court of Appeals' decision in *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921 (10th Cir. 1995). *Murray* involved a student with multiple disabilities due to cerebral palsy, including significant mental and physical impairments, as well as speech difficulties. The family challenged the school district's decision to move the child from his neighborhood school to another of the school district's elementary schools that housed a specific program for children with severe/profound needs such as the child's. Although the court found that the child's IEP *could* be implemented in the child's neighborhood school, they ultimately ruled in favor of the school district based on an Administrative Law Judge's finding that the child had not achieved any meaningful educational progress at the neighborhood school and that because of the severity of the child's disability, the specialized program was, in fact, the appropriate placement for the child. The *Murray* court noted that there was no dispute by the family about the amount of time the child was educated outside of the general classroom. *See also*, *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003); *Kevin G. v. Cranston Sch. Comm.*, 130 F.3d 481 (1st Cir. 1997); *Hudson v. Bloomfield Hills Public Sch.*, 108 F.3d 112 (6th Cir. 1997); *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720 (10th Cir. 1996); *Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 937 F.2d 1357 (8th Cir. 1991); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991); *Wilson v. Marana Unified Sch. Dist. Of Pima County*, 735 F.2d 1178 (9th Cir. 1984).
12. The SCO finds the facts and rationale in *Murray* and similar cases to be distinguishable from the present case, because they either involve creating entire, extensive programming for more severely disabled students, there was no argument that the student in question is receiving FAPE in the centralized school, or involve modes of communication that are clearly distinguishable from sign language, which is a fairly common visual language that is well-known and commonly available even in public venues such as concerts, plays, and other public events. In fact, in *Murray*, the child in question required the more restrictive placement in a center-based program in order to receive FAPE. Student, on the other hand, requires no such restrictive placement, and can be educated appropriately in the general education environment with supplemental supports.

13. The aforementioned cases are also cited by District in support of their contention that there is no mandate for neighborhood schooling in the IDEA. It is true that the IDEA does not **require** neighborhood schooling, that “school location” is a matter left to the discretion of school districts, and that the *Murray* court found that a student does not have an *absolute right* to placement in a neighborhood school. Nonetheless, the *Murray* court also noted that the IDEA created a specific *preference* for students with disabilities to be educated at their neighborhood schools. Indeed, the plain language of the IDEA regulations states that “in determining the educational placement of a child with a disability, ... each public agency must ensure that ... [u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if not disabled.” 34 C.F.R. 300.116(c). This language creates a presumption that the first placement option considered for every child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. 71 Fed. Reg. 46588 (2006).

14. Indeed, the District’s own policy, which cites the IDEA and ECEA rules, states that educational placement and LRE is:

- “Determined at least annually by a group of persons, including the parents, and others who are knowledgeable about the child;
- Based upon the IEP;
- **Provided in the child’s home school of school the child would be educated in if not disabled, unless the IEP of the child requires a different setting;”**

Exhibit 4A, Page 5 of 5 (emphasis added).

It is abundantly clear that school location must still be based on the individual needs of each student and cannot supersede the requirement that students with disabilities receive FAPE in the LRE.

15. The District also argues that the law supports their rationale for providing educational interpreters in only one centralized location. Again, SCO disagrees. When determining the appropriateness of inclusion, public agencies should consider both academic and nonacademic benefits. *Sacramento City Unified Sch. Dis., Bd. Of Educ. V. Holland*, 20 IDELR 812 (9th Cir. 1994), cert. denied, 109 LRP

34833, 512 U.S. 1207 (1994). Public agencies must not make placement decisions based on a public agency's needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff. 34 C.F.R. § 300.16 ; see 71 Fed. Reg. 46586 (2006). Thus, while the law does recognize that certain disabilities might involve highly intensive and comprehensive services, such that a "center-based" approach makes sense, an argument that any individual related services can be centrally provided – regardless of whether the student in question can otherwise be educated in a fully inclusive general education environment – becomes the exception to the LRE requirement that swallows the rule. Children with disabilities must not be placed in separate schools merely because of the availability of placement options, administrative convenience, or institutional barriers to providing related services in regular school settings rather than because of their individual needs. See *Letter to Johnson*, 213 IDELR 182 (OSERS 1988). Districts cannot argue lack of adequate personnel or resources as an excuse to relieve them of their obligations to make FAPE available to students in the LRE. See *Letter to Van Wart*, 20 IDELR 1217 (OSEP 1993).

16. There is no exception made to the generally applicable LRE requirements for D/HH students. According to the discussion accompanying the publication of the final 2006 IDEA regulations:

The process for determining the educational placement for children with low-incidence disabilities (including children who are deaf, hard of hearing , or deaf-blind) is the same process used for determining the educational placement for all children with disabilities. That is, each child's educational placement must be determined on an individual case-by-case basis depending on each child's unique educational needs and circumstances, rather than by the child's category of disability, and must be based on the child's IEP.

71 Fed. Reg. 46586 (2006).

17. In making a placement decision, "first consideration" should be given to placement in a regular classroom before considering more restrictive placement options. See *Letter to Cohen*, 25 IDELR 516 (OSEP 1996). While District's ESS staff members may indeed believe that Student's placement at D/HH High School is the same as placement at Neighborhood High School, this is simply not

the case. First, District's rationale for centralizing the location of educational interpreter services, in part, is to "[a]llow for interpreting services to be provided to multiple students in a single class." This rationale necessarily puts Student in class with other disabled students, rationale that is a direct contradiction to the IDEA's intention to mainstream students with disabilities to the maximum extent possible. *See Nebo*. Second, it is clear that Student has already been restricted in the past in terms of limited opportunities to participate in extracurricular activities and has even been limited in participating in elective classes and activities at District's D/HH Middle School. Third, it is a legitimate concern that Student's placement at the D/HH High School is a restriction placed on Student who needs to develop skills necessary for success in high school and beyond.

18. Consideration of the unique needs of students who are D/HH to ensure FAPE is further discussed in policy guidance developed by the U.S. Department of Education's Office of Special Education Programs (OSEP), which states:

"Meeting the unique communication and related needs of a student who is deaf is a fundamental part of providing a free appropriate public education (FAPE) to the child. Any setting, including a general education classroom, that prevents a child who is deaf from receiving an appropriate education that meets his/her needs, including communication needs, is not the LRE for that individual child [57 Fed. Reg. 49274, October 30, 1992].

Attachment to OSEP Memorandum 94-15, February 4, 1994.

19. Taking into consideration the factors unique to students who are D/HH, the National Association of State Directors of Special Education (NASDE) notes that to ensure that placement is appropriate, the IEP team should consider a multitude of factors, including potential of the setting to support social and emotional development, access and availability of extracurricular activities; and "the need for deaf and hard-of-hearing students to learn to function in the "hearing environment" to the greatest extent possible." With regard to support of social and emotional development in a student who is D/HH, NASDE notes that "[o]ver-dependence upon others will adversely impact a student's social and emotional development and his/her ability to function independently. Every effort should be made to ensure sufficient opportunities for active and authentic involvement in school functions independent of support personnel." *Meeting the*

Needs of Students Who Are Deaf or Hard of Hearing: Educational Services Guidelines, NASDE, July 2006.

20. In this case, Student has already shown a lack of development in self-advocacy skills and independence in relying on information from other D/HH students. Student's experience at D/HH Middle School evokes an image of a school setting that would naturally create a restriction on the development of those crucial life skills. Restricting *all* D/HH students who require an educational interpreter to be placed in D/HH programs that exist in order to achieve FAPE for *some* D/HH students who benefit from the exposure and services provided at a center-based D/HH program, is using the protection D/HH students have been provided *to the detriment* of a child such as Student, who is actually encumbered by such a program. Certainly the purpose of the IDEA and Deaf Child's Bill of Rights,¹⁰ which enabled districts to create such programming for D/HH students, was not to restrict the educational options of students who would otherwise be easily and appropriately educated in their neighborhood schools.
21. SCO finds, for all of these reasons, that District's refusal to place Student at Neighborhood High School is a violation of Student's right to FAPE in the LRE.

B. District's failure to consider Student's individual needs in the Communication Plan used in the development of Student's IEP violated Student's right to FAPE in the LRE under 34 C.F.R. §§ 300.114 through 300.118.

22. In May of 1996, recognizing the unique nature of children who are D/HH and their needs, the Deaf Child Bill of Rights was enacted which requires IEP teams in Colorado to consider the communication needs of the student who is D/HH through the use of the "communication plan." As such, the Communication Plan must be reviewed annually at the IEP meeting, completed prior to the development of the IEP goals, with input from all members of the IEP team, including parents, and modified when necessary.
23. The Communication Plan is not intended to be merely a checklist, but rather, individualized for each student and produced after thoughtful discussion about the student and his/her communication access, social, and instructional needs.

¹⁰ Colorado State Law 96-1041 (also known as the Deaf Child Bill of Rights), in summary, recognized the unique nature of children who are D/HH and the necessity of developing and implementing programming for children who are D/HH to ensure the availability of appropriate, ongoing, and fully accessible educational opportunities.

Meaningful discussion of each of the five Communication Plan components is intended to inform the team of any necessary "Action Plans" to address relative needs. The IEP team must insure that there is meaningful correlation between the Communication Plan, the student's IEP goals, and how the student functions in his/her educational environment.

24. In this case, it is clear that the Communication Plan was not utilized as it was intended, but rather, as a checklist. The second section of the Communication Plan provides that "[i]t is important to [Student's] development that [Student] receive as much exposure to [Student's] D/HH peers and deaf adult role models." This statement remained on the Communication Plan despite having never been discussed at all by the IEP team.
25. While it is clear that the IEP team determined placement and were thoughtful about Student's needs, it is apparent to SCO that the Communication Plan itself was not utilized. Accordingly, SCO finds that District's failure to consider Student's individual needs in the Communication Plan used to develop the IEP violated Student's right to FAPE in the LRE under 34 C.F.R. §§ 300.114 through 300.118.

REMEDIES

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

Failure to consider Student's individual needs in the Communication Plan used to develop Student's IEP and to provide Student with FAPE in the LRE, in violation of 34 C.F.R. §§ 300.114 through 300.118.

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

- 1) Immediate placement of Student in Neighborhood High School with the special education and related services of a teacher of the D/HH, speech language pathologist, audiologist, and educational interpreter.
- 2) Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violations, no later than October 10, 2014.
- 3) Effective training must be conducted for the Special Education Director and any intended designees (which may include Case Managers, Special Education Teachers or

related service providers, and Teachers of the Deaf/Hard of Hearing) concerning the policies and procedures. 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 October 31, 2014.

- 4) No later than September 30, 2014, the IEP team must convene to determine appropriate services and supports for Student in Neighborhood High School, including a transition plan. No later than October 8, 2014, District will submit a complete copy of the IEP, including the Communication Plan, prior written notice, and detailed team meeting notes.

The Department will approve or request revisions of the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify District's timely correction of the areas of noncompliance.

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

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

NOTE: Failure by the School District to meet the timeline set forth above will adversely affect District's annual determination under the IDEA and subject District to enforcement action by the Department.

CONCLUSION

The Decision of the SCO is final and not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *See*, 34 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Dated this 6th day of August, 2014.

Lisa A. Weiss, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1-3

- Exhibit A: Letter from Mother to Director of Exceptional Student Services
- Exhibit B: Prior Notice of Special Education Action, dated March 18, 2014
- Exhibit C: Student's Communication Plan for Student who is Deaf/Hard of Hearing, dated October 11, 2013 (with handwritten notes)
- Exhibit D: Student's IEP, dated October 10, 2013

Response, pages 1-7

- Exhibit 1A: Student's 2013-14 District special education records
- Exhibit 1B: Student's 2013-14 Infinite Campus records
- Exhibit 2: D/HH Middle School's enrollment-related forms regarding student and Student's most recent TCAP scores
- Exhibit 3: All correspondence, including email correspondence between District, D/HH Middle School staff members, and parents.
- Exhibit 4A: CDE Model Comprehensive Plan, pp. 39-40, which has been adopted by District
- Exhibit 4B: District's relevant/Equal Opportunity policies, as well as its protocols and guidelines related to obtaining ESS interpreter services
- Exhibit 5: Copy of certified mailing receipt
- Exhibits 6 & 7: Districts job descriptions for educational sign language interpreter and lead interpreter
- Exhibit 8: District's classified salary schedule
- Exhibit 9: Interpreter contract from the agency used most frequently by District
- Exhibit 10: List of D/HH students that District presently anticipates will attend D/HH High School at the outset of the 2014-15 school year
- Exhibit 11: Sample interpreting schedule from the beginning of the 2013-14 school year at D/HH High School

Interviews with:

- Student
- Mother
- Director of ESS
- Assistant Director of ESS
- ESS Consultant
- Teacher of the D/HH
- Speech Language Pathologist
- D/HH Consultant

Educational Interpreter Coordinator