

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

**State-Level Complaint 2018:529
Jefferson County School District**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on September 20, 2018, by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).

Based on the written Complaint, the SCO determined that the Complaint identified allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. § 300.153(c), CDE has the authority to investigate allegations of violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from September 20, 2017 through September 20, 2018 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failing to conduct a comprehensive evaluation in all areas of suspected disability, specifically visual impairment and behavioral issues, consistent with 34 C.F.R. §§ 300.304-305.

2. Failing to properly determine eligibility in the category of visual impairment, and subsequently develop an IEP tailored to Student's unique needs in the area of vision for the 2017-18 school year, consistent with 34 C.F.R. § 300.324(a).
3. Failing to provide Prior Written Notice (PWN) of its refusal to conduct an evaluation in the area of visual impairment, as well as its refusal to provide a paraprofessional, consistent with 34 C.F.R. § 300.503.
4. Making changes to Student's September 2017 IEP in March of 2018 without agreement from Parents and outside of an IEP meeting as required by 34 C.F.R. § 300.324(a)(6), specifically as follows:
 - a. Changing eligibility to include visual impairment;
 - b. Adding a media plan dated September 2017;
 - c. Adding reference to a comprehensive assessment conducted by a teacher endorsed in the area of visual impairment in September of 2017; and
 - d. Revising meeting minutes for the September 2017 IEP meeting that removed a reference to follow-up from a Teacher for the Visually Impaired (TVI).
5. Evaluating Student without parental consent on or around March 8, 2018, in violation of 34 C.F.R. § 300.300.

FINDINGS OF FACT

After an analysis of the record detailed in the appendix, the SCO makes the following findings:

Background:

1. At all times relevant to the Complaint, Student was [age] years old and resided within the boundaries of the District and attended school there. Student is currently identified as a student with a Visual Impairment, Orthopedic Impairment, and a Speech Language Impairment. (May 2, 2018 IEP, Ex. 1-1 at 108.)
2. Student was delivered via emergency C-section at 39 weeks due to fetal distress. After delivery, Student stopped breathing and had to be resuscitated twice, suffered multiple seizures, and sustained bilateral strokes. Student spent four weeks in the NICU. (May 2, 2018 IEP, Ex. 1-1 at 111; Complaint at 2.)
3. Parents immediately initiated various medical and therapeutic interventions for Student. Due to a risk of possibly impaired vision, a neuro-ophthalmologist began treating

Student at 6 months old. During this time, Parents learned that Student suffered from major right field cuts in his vision in both eyes. (Complaint at 2).

4. Family moved to Colorado in May of 2016. Prior to the move, Parent had a packet of Student's medical documentation, including vision reports, sent to District's child find coordinator. (Complaint at 3 and Ex. 1.)

5. On September 23, 2016, an IEP team convened and developed an initial IEP for Student. Although the IEP team determined Student was eligible in the categories of orthopedic impairment (OI) and developmental delay (DD), the IEP team also identified need in the area of visual impairment. For example, the IEP stated under "Student Needs and Impact of Disability" that Student's "visual field cut will impact his ability to fully see both environmental and academic information." (September 23, 2016 IEP, Ex. 1-1 at 4.) Though this IEP was developed outside the one-year jurisdiction for this Complaint, the SCO finds it is relevant for the purpose of showing when the District was on notice that Student may have needs in the area of visual impairment.

September 2017 IEP

6. On September 20, 2017, the IEP team reconvened to review and update Student's IEP for his second year of preschool. Although the IEP identified Student as eligible in the categories of OI and DD, the IEP team noted several observations and concerns related to visual function. Under "Consideration of Special Factors," the IEP noted that Student "is followed closely by an Ophthalmologist" and "has no peripheral vision in either of his eyes." The team also reported that Student "may have difficulty navigating his surroundings, may turn his head to the side to look at an object, and may have an inability to understand his surroundings." Further, the IEP instructed educators that "[a]nyone approaching [Student] will need to approach him from his left side." Elsewhere in the IEP it states that Parent "did report vision concerns that include right visual field is cut." (September 20, 2017 IEP, Ex. 1-1 at 19 and 21.)

7. According to Special Education Teacher and Speech Language Pathologist, the team discussed these concerns during the September 2017 IEP meeting. As a result of this discussion, the team agreed that Student had needs in the area of visual impairment and entered "yes" to the question "is the Student Blind or Visually Impaired" in the "Consideration of Special Factors" section of the IEP in Enrich. When yes is selected for this question, the IEP software automatically generates several new fields in the IEP, including a Learning Media Plan and a note regarding a comprehensive assessment by a teacher of the visually impaired. Once the Learning Media Plan auto-populated, both Special Education Teacher and Speech Language Pathologist realized they were unfamiliar with this function in the IEP software, and did not know how to complete the additional forms. The team did not complete these sections during the IEP meeting. (Interviews with Special Education Teacher and Speech Language Pathologist; Response at 13-14.)

8. The IEP developed for Student did not address or accommodate a visual impairment. The section titled "Student Needs and Impact of Disability" states: "[Student] ability to demonstrate knowledge impact his ability to independently participate in the majority of preschool activities, Furthermore, his inability to positively interact with peers impact his ability to develop healthy relationships with others. And [Student's] hand strength and dexterity, as well as visual motor difficulties, impact his ability to express what he knows through drawing and writing." Nine annual goals were developed for Student, none of which related to his visual impairment. Additionally, the accommodations and modifications did not specifically address a visual impairment. Finally, the service delivery statement provided specialized instruction in Early Childhood Special Education Services, Speech/Language Therapy, Occupational Therapy, and Physical Therapy but did not describe any special education or related services for visual impairment. (September 20, 2017 IEP, Ex. 1-1 at 21-27.)

9. All school staff members told the SCO they believed that Student received sufficient supports regarding his visual impairment during the 2017-18 school year. All staff knew that Student had right field cuts in his vision. They also all stated that materials were presented to Student at "midline" to address this need. In addition, Special Education Teacher noted that it was important to reduce clutter in student's line of sight, and that it was important that Student's chair was turned at the correct angle.

Request for Evaluation in the Area of Visual Impairment

10. Based on the correspondence between Special Education Teacher and Parent described below, the SCO finds that Parent requested an evaluation in the area of visual impairment on September 25, 2017. Between September 25th and 26th, Parent and Special Education teacher exchanged a number of emails related to Student's IEP meeting on September 20th. Of note are the following excerpts directly related to Parent's concern about an assessment in the area of visual impairment:

On September 25, 2017 at 1:25 PM, Special Education Teacher emailed Parent, in part:

"Also, regarding the "Special Considerations," I had an opportunity to chat with [prior case manager] about the question of being blind and/or visually impaired and learn more about why "yes" was not checked in the last IEP.

I will still follow-up with a district specialist about potential eligibility however in the past [Student's] visual acuity issue was not considered an impairment due to his ability to participate without additional accommodations." (Ex. 8-8 at 6.)

On September 25, 2017 at 1:44 PM, Parent replied, in part:

"I do not understand why he does not qualify for a vision assessment, at the very least. We are indeed making accommodations for him to participate appropriately in regards to his visual impairment. I would like to see what the

qualifications are for a child to be screened. [Student] isn't blind, but he does absolutely have a major visual impairment that requires classroom accommodations. Can you provide me the districts vision therapy qualifications guidelines, or point me to where I could find them online?" (*Id.* At 4-5.)

Then on September 26, 2017 at 3:59 PM, Special Education Teacher replied, in part:

"I do not know if [Student] qualifies for a visual assessment, however as noted I will reach out to [District's] vision specialist to see what next steps are and what type of time-line they are on. I will be sure to inquirer (sic) about the district's vision therapy qualification guidelines." (*Id.* At 3.)

11. After this email exchange, Special Education Teacher contacted Assistant Director of Special Education for guidance regarding the Learning Media Plan, and learned that this section of the IEP could only be completed by a Teacher of the Visually Impaired (TVI), after an evaluation in the area of visual impairment was completed. (Interviews with Special Education Teacher, Speech Language Pathologist, and Assistant Director of Special Education.)

12. Also during this conversation, Assistant Director told Special Education Teacher that the School needed a current medical vision report from Parents before the School would conduct their own evaluation in the area of visual impairment. Special Education Teacher confirmed to the SCO that the District did not offer to conduct an evaluation in the area of visual impairment of Student at this time. (Interviews with Special Education Teacher and Assistant Director of Special Education.)

13. The District did not provide Prior Written Notice when it refused to evaluate Student in the area of visual impairment. In its response, the District argues that Parent did not request a visual impairment evaluation on September 25, 2018, but rather Parent requested information about a vision evaluation and then obtained these evaluations on her own on March 7, 2018 and March 21, 2018. (Ex. 3-3 at 14 and 36). Once Parent provided the District with the results of the private evaluations, the District then asked for consent on March 14, 2018, to conduct its own evaluation in the area of visual impairment. (Ex. 2-2 at 7; Complaint at 12.)

Amendments to Student's September 2017 IEP

14. On October 3, 2017, the parties executed an amendment to Student's IEP without convening an IEP team meeting to address several issues. Relevant to the issues in this decision, the amendments are summarized as follows:

- Under the "Consideration of Special Factors" section, the response for visual impairment was changed from "yes" to "no." The amendment states the reason for this change being: "parent has not provided report from physician and district vision specialist has not be (sic) consulted."

- Additionally, Parent did not believe the IEP accurately captured the topics discussed, and requested that the meeting minutes be amended to include the following:

“Vision: last year at [Student’s] IEP meeting we were told that they didn’t know if he qualifies for vision therapy. They did not include it in the IEP, but said they’d have him assessed. That never happened because it wasn’t actually notated in his IEP. I do not want a repeat of that issue this year.

Behavior: At the IEP meeting everyone seemed to agree that [Student] was not quite at the point of needed (sic) a Behavior Intervention Plan (BIP), but it is mentioned almost every time I pick [Student] up. I propose that we collect data on how often and duration of behaviors (spitting, hitting and throwing) each day.

Last year I asked for a 1:1 aid for [Student]. It was denied. However, I feel even stronger this year that he needs one. I’ve been told recently that it’s difficult to discipline [Student] appropriately because it takes away from the group. If [Student’s] behavior needs can’t be attended to due to a lack of staff, then an aid (specifically for him) should be considered.” (October 3, 2017 amendment, Ex. 1-1 at 36.)

15. Once the parties signed the amendment, Special Education Teacher changed the Special Factors question back to “no”, and added Parent’s concerns into the meeting minutes. In its response, the District states that after changing the response back to “no”, the Media Plan and the note regarding a comprehensive assessment by a Teacher of the Visually Impaired were automatically removed from the IEP by the IEP software. (Interview with Special Education Teacher; Response at 13-15.)

16. As described above, the changes made by the October 3, 2017 amendment did not alter Student’s special education and related services, including the modification, accommodations, and IEP goals in the IEP.

17. The SCO also finds that Parent’s proposal to collect data on Student’s behavior did not constitute a request for an evaluation relating to Student’s behavior. Rather, Parent was requesting that School note and summarize their observations of Student so both Parents and School could collaborate and work to find solutions to address Student’s behavioral needs. Also, based on Parent’s other clear requests for a vision evaluation and a 1:1 aid for Student, the SCO finds that if Parent were asking for a formal behavioral evaluation, she would have clearly stated that request.

18. The SCO further finds that the IEP team addressed and noted Student’s behavior needs in the IEP. In “Present Levels of Academic Achievement & Functional Performance” it is noted by both Parents and School that student had been hitting and spitting. There is a discussion about various strategies the parties are employing to help stop this behavior, and Parents note they plan to begin “time outs” at home to correct the behavior.

19. Parent alleges that the District made changes to the IEP in September 2017 and March of 2018 without her agreement. Based on the facts described below, the SCO disagrees. The parties presented the SCO with different versions regarding the portion of the amendment changing the response in the Consideration of Special Factors section from “yes” to “no” for visual impairment which in turn removed the Learning Media Plan and the other fields that the software had automatically added. Parent stated that she did not see that particular amendment and that Special Education Teacher did not advise her about it. Parent also questioned why she would agree to that change, while simultaneously adding notes about her concern that there had not been a vision evaluation. Special Education Teacher stated that she explained that checking “yes” had been a mistake, and that the team could not make that determination without input from a TVI. (Interviews with Parents and Special Education Teacher.) Here, the SCO finds that because both Special Education Teacher and Parent signed the amendment, they are presumed to have both read it and understood its contents.

20. On February 12, 2018, Parent emailed Special Education Teacher requesting a hardcopy of Student’s September 2017 IEP. Special Education Teacher provided the hard copy in Student’s cubby the next day. (Ex. 8-8 at 15.) Then on March 28, 2018, Parent contacted the District’s records office to request digital copies of Student’s files to share with private evaluators. When Parent compared the digital copy of Student’s 2017 IEP to the hardcopy she had received on February 13th, there were several discrepancies, including: vision status marked as “yes” under “Consideration of Special Factors”, an added Media Learning Plan, a note stating Student received a comprehensive evaluation from a TVI, and a statement about a follow up with a TVI had been removed. (Complaint at 8.)

21. When questioned about this, Assistant Special Education Director explained that after IEP meetings, the IEP document is finalized, submitted to the District, imaged as a pdf file, and then placed into the official record. (Interview with Assistant Director.) The SCO finds that, more likely than not, the hard copy IEP Parent received in February was the version after the October 3, 2018 amendment had been executed, and special considerations had been checked back to “no”, thus removing all references to a media plan, consult with a TVI, etc. Also, the digital copy Parent received in March was likely submitted and saved before the amendment had been applied, and therefore still had “yes” checked on special considerations, and included all references previously discussed.

22. Parent believes that District personnel purposely altered Student’s IEP sometime in the winter and spring of 2018 to add vision services, in an attempt to cover-up their failure to have Student evaluated. The SCO disagrees with this explanation for several reasons. First, Special Education Teacher denied falsifying the IEP in this manner when questioned by the SCO, and the SCO finds her credible. Second, all school staff interviewed confirmed that Parent never brought this to their attention or made this accusation any time before filing the complaint in this case. All School staff interviewed stated that Parents did not allege that Student’s IEP had been modified without their consent or approval, either during the April 4, 2018 IEP meeting, or

afterward. (Interviews with Special Education Teacher, Speech Language Pathologist, and Assistant Director of Special Education.)

Evaluation in the Area of Autism

23. Parent alleges that the District conducted an evaluation of Student in the area of autism without her consent. In December of 2017, Student's neurologist recommended to Parents that Student be screened for Autism due to issues with his social gaze. Around this time, Parent mentioned to Special Education Teacher that they planned to have Student evaluated for autism. After the winter break, Parent states that Special Education Teacher approached her and asked Parent to sign consent for school staff to have Student evaluated for Autism in the educational environment. Parent states that she explicitly refused consent, informing Special Education Teacher that the family was pursuing this testing privately. Parent also told the SCO that she intentionally did not complete and return several autism scales that School provided to her, including the: Child Sensory Profile 2, CARS-2, and SRS-2. (Complaint at 5-6; Interviews with Parents.)

24. Although School staff state Parent never explicitly told them not to test for autism, the SCO finds this unpersuasive. Special Education Teacher explained that when Parent mentioned the family intended to pursue private autism testing, her instructional coach was present, and told Special Education Teacher that the School should also pursue testing in the educational environment. Special Education Teacher then ran out to catch parents in the parking lot to talk to them about this testing. Special Education Teacher stated that Parent refused to speak to her, and while not explicitly saying she did not want Student tested, it "was clear she didn't want to talk to me." (Interview with Special Education Teacher.) Teacher then followed up with the email referenced below in FF# 28.

25. Around this time, Speech Language Pathologist took over as Student's case manager. She provided Parent with the autism scales referenced in FF# 23. Speech Language Pathologist confirmed that Parent refused to complete and return these forms. (Interview with Speech Language Pathologist.) Parents' refusal is documented in subsequent evaluations. On Jefferson County Special Evaluation Report dated April 4, 2018, it is noted under the "Social Responsiveness Scale 2 (SRS-2)" that "Parents were provided the scales but did not return them reporting that they did not feel that the information from these scales was appropriate for [Student] due to his vision, physical and communication impairments." (Ex. 3-3 at 63.) On another District Evaluation Report, under the "Childhood Autism Rating Scale" section, it is noted "A Child Autism Rating Scale Parent/Caregiver Questionnaire was distributed to [Student's] parents, which has not yet been returned to be reported on." (Ex. 3-3 at 29.)

26. On January 12, 2018, Parent signed a "Prior Notice & Consent for Reevaluation." On this form, the areas to be evaluated are listed as: "communicative status, academic performance, social and emotional status, health, and motor abilities." (Ex. 2-2 at 4.) It is this consent that School relied on when they conducted their autism testing. When asked whether Parent would

have been specifically advised that this consent would authorize testing for autism, Speech Language Pathologist stated that typically it would be explained to parents that this consent would include autism testing, but could not specifically remember if it had been explained to Parent. (Interview with Speech Language Pathologist.) However, the SCO finds that more likely than not, the District did not follow their typical practice here. Based on Parent's refusal to complete the autism related screener questions, her refusal to speak to Special Education Teacher when asked to consent to autism testing, and the conflict this testing caused during the April 4, 2018 IEP meeting, the SCO finds that Parent may not have signed consent on January 11 had she known it would authorize autism testing.

27. In January and February of 2018, Parents had Student privately evaluated for autism by a psychologist. The psychologist believed she could not accurately diagnose Student without more information on his visual disability, and requested Parents have Student's vision evaluated. Parents then made appointments with an ophthalmologist and with the Anchor Center for Blind Children. (Complaint at 6.)

28. On February 9, 2018, Special Education Teacher emailed Parent at 2:18 PM:

"Thank you for taking the time earlier this week to discuss ESY for [Student] and for sharing that you all are exploring the possibility of a medical Autism diagnosis for [Student]. With this information in mind, the team will gather additional information that could be helpful with identifying if an Autism Education Identification designation would be appropriate.

We look forward to meeting with you both in a few weeks for [Student's] meeting...In the meantime, if you have any questions or concerns please feel free to send them my way." (Ex. 8-8 at 14.)

29. When asked by the SCO, Parents could not recall receiving this email. (Interview with Parents.) There is no reply or any other related emails that were submitted to the SCO in the District's response. However, as stated in FF# 31 below, it appears that the District had already administered the Childhood Autism Rating Scale -2 on January 24, 2018. The SCO finds that the lack of response to this email is consistent with Parent's previous actions in expressing her lack of consent for autism testing for Student.

30. On March 8, 2018, according to Parent, as she was picking up Student from school, Speech Language Pathologist said something to the effect of "its looking like [Student] has autism." Parent relayed to the SCO that this comment surprised and distressed her, as she believed School was not conducting any autism screens on Student. (Complaint at 6; Interview with Parent.) Speech Language Pathologist denies making this statement. (Interview with Speech Language Pathologist.)

31. According to an Evaluation Report dated March 9, 2018, Student was screened/tested for autism in the academic environment. The Social Responsiveness Scale – 2 was administered

on February 27, 2018. As noted above, Parents did not complete and return the scales for the SRS-2. On January 24, 2018, a variety of Social and Emotional Assessments were administered, including the Childhood Autism Rating Scale -2 (CARS-2). This assessment noted symptoms showing a mild degree of autism in the educational setting. It is also noted that “A Child Autism Rating Scale Parent/Caregiver Questionnaire was distributed to [Student’s] parents, which has not yet been returned to be reported on.” (District Evaluation Report, Ex.3-3 at 19-29.) Notably, Parents completed and returned all other assessments for this evaluation. Additionally, all parties report that autism testing was a point of contention at the April 4, 2018 IEP meeting.

32. The IEP team convened on April 4, 2018, to review and update Student’s IEP. In anticipation of this meeting, Parents provided School with the results of a private vision evaluation, a private functional vision evaluation, and a private cognitive and autism assessment. Parents paid \$177.69 for one private vision evaluation and \$273.23 for the other private evaluation after insurance. (Explanation of Benefit Statements provided by Parent.) After receiving the visual impairment evaluations from Parents, District requested consent on March 16, 2018 for a TVI to evaluate Student. (Ex. 2-2 at 7.)

33. Considering the data and input provided by parents, and the results from both district and private evaluations, the team revised Student’s IEP and made significant changes. The team changed Student’s primary disability category to Visual Impairment. Under “Consideration of Special Factors” Student was listed as blind or visually impaired, and a Learning Media Plan was completed by a TVI. Three new annual goals were added that specifically addressed Student’s visual impairment. Finally, direct and indirect vision services were added to Student’s service delivery grid. (May 2, 2018 IEP, Ex. 1-1 at 108-142.)

34. Additionally, the “Student Needs and Impact of Disability” section of the IEP states, in part, “[Student’s] Cortical Visual Impairment and right visual field cuts impact his ability to get around the school environment as well as access visual materials presented within the classroom setting.” Three new goals were added specifically relating to Student’s vision impairment, addressing compensatory skills, orientation and mobility, and self-determination. A host of new accommodations and modifications specifically related to visual impairment were added, including: presenting materials in black and white, use of clutter free materials, presenting near materials at 7-10 inches on Student’s left side, preferential seating near visual displays and on the right side of the classroom, extra time to explore objects tactually. Finally, general vision services and orientation and mobility services provided by a TVI were added. The September 20, 2017 IEP contained none of the items described above. (*Id.*)

35. Student is currently being served under this IEP, and Parents are satisfied that the services and accommodations now being implemented are providing Student with FAPE. (Complaint at 9-10; Interview with Parents.)

CONCLUSIONS OF LAW

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

Conclusion to Allegation One: The District failed to conduct a comprehensive evaluation when it did not timely conduct an evaluation of Student in the area of visual impairment following Parent's request in September of 2017.

The IDEA places an affirmative obligation on School Districts to "ensure that [a] child is assessed in all areas related to the suspected disability..." 34 C.F.R. § 300.304(c)(4). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. § 300.304(c)(6). Parental input is a key component in this process, and School Districts must consider information from Parents: "In conducting the evaluation, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities)." 34 C.F.R. § 300.304(b)(1)(ii).

The key question in this case is whether the District should have evaluated Student in the area of visual impairment when it had information that Student may have disability-related needs in this area, and Parent had specifically requested that the District conduct such an evaluation. "The IDEA requires that, if a school district has notice that a child has displayed symptoms of a covered disability, it must assess that child in all areas of that disability using the thorough and reliable procedures specified in the act." *Timothy O. v. Paso Robles Unified School Dist.*, 822 F.3d 1105, 1118-19 (9th Cir. 2016). Here, because Parent voiced concerns about Student's vision and specifically requested an evaluation, the District was on notice that Student may have a disability in the area of visual impairment and need specialized instruction. Notably, several statements in the September 2017 IEP illustrate that the IEP team was aware that Student's vision was an area of concern, and Parent's September 25, 2017 email explicitly asked that Student be evaluated in this area. Both Special Education Teacher and Speech Language Pathologist state that during the IEP meeting the team came to a consensus that Student had a visual impairment, and therefore checked "yes" under consideration of special factors. This caused the IEP software to add several sections to the IEP, which led Special Education Teacher to reach out to Assistant Director for guidance. Assistant Director told Special Education Teacher that Parents needed to obtain a medical vision evaluation before the District would conduct its own vision evaluation. While it is unclear from the record whether this information was relayed to Parents, it is contrary to the requirements of the IDEA, which places the obligation on the District to ensure that a child is evaluated in all areas of suspected disability.

Eventually, Parent arranged for a private vision evaluations for Student on March 5, 2018 and March 7, 2018, and a Functional Vision Assessment on March 21, 2018. The family paid out-of-pocket for the private vision evaluations, totaling \$450.92, as detailed in FF # 32. It was after the District received the private evaluations that it requested consent to conduct its own evaluation in the area of visual impairment. Under IDEA, a school district may not abdicate its obligation to conduct an initial evaluation by requiring that parents obtain a private evaluation or diagnosis as a prerequisite to initiating the special education referral process. See *N.B. V. Hellgate Elem. Sch. Dist.*, 541 F.3d 1202, 1212-14 (9th Cir. 2008). And while a district may refer a child to a third party to conduct an evaluation, it may not require the parents to pay for it. *Letter to Anonymous*, 34 IDELR 35 (OSEP 2000).

The SCO finds and concludes that the District had sufficient notice that Student had a vision impairment, and therefore it was obligated to conduct an evaluation at public expense. The District's failure to do so for over 6 months, and only after Parents obtained a private evaluation at their own expense is a violation of the IDEA. The SCO notes that the District offered to reimburse Parents for the cost of these evaluations following interviews. The SCO accepts this offer as an appropriate remedy.

Parents also allege that the District failed to conduct an evaluation in the area of behavior. The SCO finds and concludes that the District was not required to conduct a behavioral evaluation of Student, and therefore did not fail to conduct a comprehensive evaluation in this area. As noted in FF# 17-18, School and Parents communicated effectively during the September 20, 2017 IEP meeting regarding Student's behavioral issues. Both sides explained what they had observed and shared the strategies they employed. Additionally, the SCO finds that Parent did not request a behavior evaluation through her comments, as added by the October 3, 2017 amendment, but rather simply requested that data be collected. The purpose of collecting data in this situation would be to measure frequency and intensity of Student's behavior, and decide, based on that data, whether an evaluation was warranted. The SCO also finds that the information that School had and that Parents provided (i.e., that Student was spitting and hitting) did not put the District on notice that Student may have a disability related to these behaviors. For these reasons the SCO finds and concludes that the District did not fail to conduct a comprehensive evaluation with regards to Student's behavior.

Conclusion to Allegation Two: The SCO finds and concludes that the IEP team did not have the required information it needed, and the IEP created on September 20, 2017 was not uniquely tailored to Student's individualized needs, resulting in a denial of FAPE.

A complete and thorough evaluation is crucially important in the development of an IEP. "It allows the child's IEP Team to have a complete picture of the child's functional, developmental, and academic needs, which in turn allows the team to design an individualized and appropriate educational plan tailored to meet the needs of the individual child." *Timothy O. v. Paso Robles Unified School Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016). Failing to evaluate in areas of

suspected disability may lead to an incomplete picture of the child's needs. *Id.* It follows that without the necessary information, it is impossible for an IEP team to properly consider eligibility in certain disability categories. When an IEP team does not have critical evaluative information, it cannot "consider and recommend appropriate services" necessary to address a student's unique needs. *Id.* This lack of information also impedes parent's statutory rights to participate in the IEP's formation. *Id.*

Without evaluating Student in the area of visual impairment, the District did not have the information it needed on September 20, 2017, to create an IEP that specifically addressed all of Student's disability-related educational needs. Indeed, it would be impossible because the team did not have a vision evaluation to explain to them what Student's needs were, or the accommodations that would be beneficial to him. As noted in FF# 8, the IEP developed did not contain sufficient accommodations or modifications pertaining to Student's visual impairment. None of the annual goals developed pertained to Student's vision, his vision was not noted under his "needs and impact of disability," and the service delivery statement provided no specialized instruction or related services to address visual needs.

To satisfy the substantive requirements of the IDEA, an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S.Ct 988, 1000 (2017). Here, the District's failure to conduct an evaluation in the area of visual impairment deprived the IEP team of crucial information about Student's unique needs, specifically his visual impairment. Without this information, the IEP team developed an IEP that was not tailored to Student's unique needs, and subsequently did not provide FAPE. ("In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE." 34 C.F.R. § 300.513(a)(2)(i)). The significant change in the provision of services and accommodations between Student's September 2017 and May 2018 IEP, including changing Student's primary disability category to Visual Impairment, indicate that the September IEP did not provide FAPE.

The District argues that it is improper to engage in a "hindsight based review" using the May 2018 IEP to show the September 2017 IEP was inadequate, and cite to *Schaffer v. Weast* for that proposition. (Response at 11; 554 F.3d 470, 476 (4th Cir. 2009)). The SCO finds the current facts distinguishable from those of *Schaffer*. There, parents attempted to show that student's eighth grade IEP was inadequate by pointing to a drastically changed placement in his tenth grade IEP. The Fourth Circuit Court of Appeals stated that "the evidence demonstrates that [school] took careful measures in [tenth grade] to reassess Brian's disability and to offer him the specialized education services that were appropriate for him at the time." (*Id.* At 478.) The court found that because student's needs change over time, it isn't appropriate to use subsequent IEPs to "Monday morning quarterback" a prior IEP team's decision. That is not the case here. Here, the District did not take careful measures to evaluate Student, and there is no evidence in the record that Student's disability in the area of visual impairment was new or

progressive or didn't exist since birth. In other words, Student's disability in the area of visual impairment was not the kind of impairment that worsens or changes with time. Accordingly, it is not inappropriate to consider the differences between the 2017 and 2018 IEP in evaluating whether Student was denied FAPE when the District failed to conduct an evaluation in September of 2017.

Conclusion to Allegation Three: The District's delay in conducting a vision evaluation resulted in a constructive refusal to evaluate, and the subsequent failure to provide a PWN to document the refusal violated the IDEA. Also, the PWN embedded in the September 20, 2017 and October 3, 2017 amendment did not contain all the statutorily required information, and therefore did not meet the requirements of the IDEA.

The IDEA requires a district to provide Prior Written Notice to parents within a reasonable time whenever a district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a). To be valid, Prior Written Notice must contain the following information: "(1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) a statement that the parents of a child with a disability have protection under the procedural safeguards and...the means by which a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the provisions of this part; (6) a description of other options that the IEP team considered and the reasons why those options were rejected; and (7) a description of other factors that are relevant to the agency's proposal or refusal. 34 C.F.R. § 300.503(b).

1. The SCO finds and concludes that the District's delay in conducting an evaluation in the area of visual impairment after Parent's request amounted to a constructive refusal, which triggered the requirement to provide PWN. The failure to do so is a substantive violation of the IDEA.

In its Response, the District argues that Parent simply requested information about a vision evaluation and then decided to obtain a private evaluation. Consequently, the District asserts that it did not need to provide PWN because it had not refused to conduct an evaluation in the area of visual impairment. The SCO disagrees. As noted in FF# 10, Parent's September 25th email to Special Education Teacher constituted a clear request for an evaluation in the area of visual impairment. When a district refuses to initiate an evaluation, Prior Written Notice is required to ensure meaningful parental participation. Eventually, Parent arranged for private vision evaluations for Student on March 5, 2018 and March 7, 2018, and a Functional Vision Assessment on March 21, 2018. The private vision assessments were paid for by Parents.

School did not seek consent for their own evaluation in the area of visual impairment until March 16, 2018, after Parents provided both of these reports. In other words, the District waited 5 months and 19 days between Parent's request for an evaluation, to issue its request for consent. Even if the District did not explicitly refuse to perform an evaluation, this delay constituted a constructive refusal to conduct the evaluation. Before a parent can provide consent for an initial evaluation, the district must request it. Although IDEA does not specify how long a district may take to seek parental consent for an evaluation, it would not be acceptable for a district to wait several months to seek parental consent when the district suspects that the child may have a disability. 71 Fed. Reg. 46637; Memorandum to State Directors of Special Education, 56 IDELR 50 (OSEP 2011)("[I]t has been the Department's longstanding policy that the LEA must seek parental consent within a reasonable period of time after the referral is made, if the LEA agrees that an initial evaluation is needed.").

The SCO finds and concludes that the District's five-month delay in conducting an evaluation in the area of visual impairment after Parent's request, constituted a constructive refusal to perform the evaluation, which triggered the District's obligation to provide PWN. The District's failure to do so is a procedural violation of the IDEA.

The SCO also concludes that the District's failure to provide PWN for its denial of an evaluation in the area of visual impairment is a substantive violation of the IDEA. A child is deprived of FAPE when procedural deficiencies: impede the child's right to a FAPE; significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). Here, the failure to provide PWN caused Parent to obtain private evaluations for Student, which led to the IEP team determining Student's eligibility in the same category Parent requested an evaluation in. The SCO further finds that this violation was likely due to the unique circumstances of this case and that any training ordered in the remedies section of this decision should only apply to members of this IEP team.

2. The SCO finds and concludes that Parent requested a 1:1 aid for student in the October 3, 2017 amendment, and that the PWN embedded in the September 20, 2017 IEP does not contain the information required in 34 C.F.R. § 300.503(b), and is therefore not sufficient PWN.

In her September 25th email, Parent clearly stated her request for a 1:1 paraprofessional for Student. The District decided to provide "close adult supervision" instead. By refusing Parent's proposed change in accommodations, the District was obligated to provide Parents with PWN. 34 C.F.R. § 300.503(a)(2). The District acknowledges it was obligated to provide PWN by arguing in its response that the September 20, 2017 IEP contains all the information the IDEA requires in a PWN. The district further argues that Parent's request to add meeting minutes expressing her desire for a 1:1 paraprofessional show that the IEP provided sufficient notice of the District's intent to provide "close adult supervision" rather than a 1:1 aid. While it may be

acceptable to use the IEP to provide PWN to Parents, the IEP must contain all of the notice requirements laid out in 34 C.F.R. § 300.503(b); 71 Fed. Reg. 46, 691 (2006). The first piece of information required in a PWN is “a description of the action proposed or refused by the agency.” 34 C.F.R. § 300.503(b)(1). Here, the only reference in the IEP to a 1:1 paraprofessional was added to the meeting minutes by the October 3, 2017 amendment at the behest of Parent. Providing a full and complete PWN is the District’s obligation. Without Parent’s request to add comments about her request for a 1:1 aid, the IEP would not contain any reference to it. The District cannot rely on Parent’s comment to fulfil its obligation to provide PWN.

The SCO finds and concludes that the information in the September 20, 2017 IEP including the October 3, 2017 amendment does not contain the information required in 34 C.F.R. § 300.503(b), and therefore does not constitute an adequate PWN, resulting in a procedural violation of the IDEA. However, the SCO does not find that this error resulted in a substantive violation of the IDEA. Parent’s request for a 1:1 aid centered around behavioral concerns. There is no evidence in the record that school staff did not effectively manage Student’s behavior without a dedicated 1:1 aid, or that Student’s behavioral issues interfered with Student’s progress. Additionally, the lack of sufficient PWN did not prevent Parent from participating in the IEP team meeting. Because the failure to provide sufficient PWN regarding Parent’s request for a 1:1 aid did not impede Student’s right to a FAPE, or Parent’s right to participate in the decision making process, and did not cause a deprivation of educational benefit, the failure to provide adequate PWN did not result in a substantive violation. Finally, the failure to provide PWN here appears to be unique to the circumstances of this case and does not indicate a systemic issue.

Conclusion to Allegation Four: Parent agreed with and signed the October 3, 2017 IEP amendment, therefore the District did not change or modify Student’s IEP without Parent’s consent.

If both parents and members of the public agency agree, the IDEA permits amendments and modifications to an IEP after an annual IEP team meeting, without re-convening the IEP team and conducting an official meeting. 34 C.F.R. § 300.324(a)(4)-(6).

The parties here agreed via amendment on October 3, 2017, to modify Student’s IEP to include Parent’s proposed meeting minutes, and change the vision response to “no” after it had been marked as “yes” during the meeting. Once Special Education Teacher changed the response in the IEP software program back to “no”, the fields that had been added were automatically removed. The SCO finds and concludes that the District’s explanation in FF #21 credible and persuasive, and finds that, more likely than not, a clerical error is to blame for the discrepancy in the IEPs that Parent obtained in February and March of 2018.

Because Parent agreed to the amendment and there is no credible evidence that Special Education Teacher altered any part of the IEP that Parent did not expressly agree to, the SCO finds and concludes there is no violation on allegation 4.

Conclusion to Allegation Five: The District did not have Parent’s informed consent to test for autism in the educational environment, and subsequently violated the IDEA by testing Student for autism.

The IDEA requires parents to provide informed consent before a District performs any evaluations or reevaluations of students pursuant to developing an IEP. 34 C.F.R. § 300.300(c)(1)(i). The IDEA defines consent as follows: “consent means that – (a) the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; (b) the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and (c)(1) the parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime. (2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).” 34 C.F.R. § 300.9. To be “informed” consent, a Parent does not need to know “the precise nature of all...services or activities” their consent would authorize. *See Letter to Johnson*, 56 IDELR 51 (OSEP 2010). However, as noted above, Parents must be fully informed of what they are consenting to, and the consent must describe the activity to which the Parent is consenting. 34 C.F.R. § 300.9(a)-(b).

Parents mentioned to school staff in December 2017 that they were planning to have Student privately evaluated for autism. (FF# 23.) On January 12, 2018, Parent signed a consent for Student to be re-evaluated in the areas of communicative status, academic performance, social and emotional status, health, and motor abilities. Speech language pathologist explained that her typical practice would be to explain to parents that these categories could include testing for autism, but could not remember if she had followed her typical practice here. (FF# 26.) However, both parties state that school staff separately asked Parent for permission to conduct autism testing on Student. Parent states that she unambiguously refused consent. Special Education Teacher claims that Parent did not explicitly say no to the testing, however Parent would not speak to her in the parking lot when asked if she would give consent, and that it “was clear that she didn’t want to talk to me.” (FF# 24.) The SCO finds and concludes that if school staff believed they had valid consent to test for autism based on the January 11, 2018 consent to reevaluate, they would not have sought additional consent from Parent.

Additionally, Parent’s other actions indicate that the District did not obtain Parent’s informed consent. Namely, Parent’s refusal to complete and return the Childhood Autism Rating Scale 2 (CARS-2) and the Social Responsiveness Scale 2 (SRS-2), while at the same time completing and returning all other screens needed for Student’s reevaluation. (FF# 25) Parent’s refusal was

specifically documented in FF# 25, when Parent stated that they did not feel this testing was appropriate due to Student's "vision, physical, and communicative impairments." That the autism testing was a point of contention at the April 4, 2018 IEP meeting also supports the finding that Parent did not give informed consent. Parents state they were "horrified" to learn that the school had conducted autism testing when they received a draft copy of the evaluation report. (Complaint at 7.) Assistant Director also noted that this testing caused tension during this meeting. While parties may disagree with the results of testing, the facts listed above show that Parent was contesting both the results and the fact that the tests had been administered in the first place. This, in turn, indicates that she was not "fully informed of all information relevant to the activity" that she was asked to consent to, and therefore did not give informed consent.

Accordingly, the SCO finds and concludes that Parent was not sufficiently advised that the consent she signed would allow staff to conduct autism evaluations on Student, and that she did not give informed consent, resulting in a procedural violation of the IDEA. However, the SCO does not find that this error resulted in a substantive violation of the IDEA. The autism testing did not change Student's placement in any way, did not affect Student's provision of FAPE, and did not impede Parent's participation in the decision making process. Rather, when Parent raised her concerns and presented the private autism evaluation during the May 2018 IEP meeting, the team agreed that Student was not autistic. Finally, the failure to obtain informed consent here appears to be unique to the circumstances of this case and does not represent a systemic issue.

REMEDIES

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

- a) Failing to conduct a comprehensive evaluation in all areas of suspected disability, specifically visual impairment, consistent with 34 C.F.R. §§ 300.304-305;
- b) Failing to properly determine eligibility in the category of visual impairment, and subsequently develop an IEP tailored to Student's unique needs in the area of vision for the 2017-18 school year, consistent with 34 C.F.R. § 300.324(a);
- c) Failing to provide Prior Written Notice (PWN) of its refusal to conduct an evaluation in the area of visual impairment, as well as its refusal to provide a paraprofessional, consistent with 34 C.F.R. § 300.503;
- d) Evaluating Student without parental consent on or around March 8, 2018, in violation of 34 C.F.R. § 300.300.

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

- 1) By January 25, 2019, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violations noted in this Decision. The CAP must effectively address how the cited 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) The District shall provide training in the area of special education referral and evaluation for the eligibility category of visual impairment, including blindness. This training must be provided to all licensed teachers employed by the District of students who are visually impaired, including the Supervisor and/or Special Education Coordinator who oversees services for students with visual impairment by March 31, 2019. At the District's request, the CDE is willing and able to provide this training through Dr. Tanni Anthony, CDE Director of Access, Learning, and Literacy. If the District chooses to utilize Dr. Anthony, the District and Dr. Anthony shall collaborate in designing and scheduling this particular training, with final approval by CDE. If the District chooses to conduct the training itself, the agenda and training materials must be approved by CDE prior to the training. Evidence that this training has occurred, including agenda, materials, and sign-in sheets must be provided to the Department no later than April 15, 2019.
 - b) Following this training and no later than May 15, 2019, the District must develop a plan to ensure that staff in the position of receiving a request for special education evaluation or initiating a request for referral know how to proceed when they suspect a student may be eligible in the area of visual impairment, including blindness. This plan must be consistent with the violations cited in this decision as well as the training provided in section 2 above. The District must provide a proposed plan for approval to the Department by May 21, 2019.
 - c) Effective training must be conducted for Special Education Teacher, Speech Language Pathologist, and Assistant Director, no later than February 15, 2019. Training must address concerns noted in this Decision, specifically when and under what circumstances PWN is required and what information the PWN must contain, as well as what information must be communicated to parents when seeking their consent for evaluations for special education. Evidence that such training has occurred must be documented (i.e. training schedules, agendas, curriculum/training materials, and legible attendee sign-in sheets) and provided to CDE no later than March 1, 2019. This training may consist of the individuals referenced above meeting with the District's Legal Counsel to review the requirements of PWN consistent with this Decision.
 - d) The Department will approve or request revisions to the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance.

2) Reimbursement for Denial of FAPE:

- a) The District shall reimburse Parents for the cost of the private vision evaluations obtained by Parents on March 5, 2018 and March 7, 2018, in the amount of \$450.92, as detailed in FF# 32. The District is ordered to make this payment within 30 days of receipt of this decision, and provide proof of payment to CDE no later than January 31, 2019.

3) Compensatory Education for Denial of FAPE:

- a) Monthly consultation between the TVI delivering visual services and the OT and PT providing direct services on Student's IEP to evaluate Student's progress and adjust instruction accordingly. The purpose of this consultation is to incorporate strategies to support specialized instruction and services based on Student's visual needs. The District must submit documentation that these consultations have occurred by the second Monday of each month until Student's next annual IEP review, currently scheduled to occur on or before May 1, 2019.

The Department will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the Department 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 the Department as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Beth Nelson
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 the Department.

CONCLUSION

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

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

Dated this 18th day of December, 2018.

Thomas Treinen
State Complaints Officer

Appendix

Complaint, pages 1-11

- Exhibit 1: email dated April 28, 2016
- Exhibit 2: September 23, 2016 IEP meeting minutes
- Exhibit 3: September 20, 2017 IEP meeting minutes
- Exhibit 4: October 3, 2017 added notes per amendment
- Exhibit 5: October 3, 2017 IEP amendment
- Exhibit 6: email correspondence September 25, 2017-September 26, 2017
- Exhibit 7: email correspondence September 26, 2017
- Exhibit 8: email correspondence February 12, 2018
- Exhibit 9: IEP September 20, 2017
- Exhibit 10: IEP September 20, 2017
- Exhibit 11: Child Find IEP dated September 23, 2016

Response, pages 1-18

Exhibit 1-1: IEP documentation: September 23, 2016 IEP; September 20, 2017 IEP; October 3, 2017 amendment; January 12, 2018 amendment; February 16, 2018 amendment; May 2, 2018 IEP; May

15, 2018 Kindergarten Transition Meeting; June 8, 2018 amendment; August 15, 2018 amendment; August 21, 2018 amendment; August 30, 2018 amendment; September 25, 2018 amendment; April 26, 2018 draft IEP; April 30, 2018 draft IEP;

Exhibit 2-2: requests for consent

Exhibit 3-3: Evaluation reports: December 13, 2017 Jeff Co Assistive Tech Consultation; January 12, 2018 Jeff Co Special Evaluation Report; March 1, 2018 Private Neurology Consultation; March 7, 2018 Private Vision Evaluation; March 9, 2018 Jeff Co Evaluation Report; March 21, 2018 Private Functional Vision Assessment; March 29, 2018 Private Cognitive & Autism Assessment; April 4, 2018 Jeff Co Special Evaluation;

Exhibit 4-4: eligibility determinations

Exhibit 5-5: prior written notices

Exhibit 6-6: notices of meetings

Exhibit 7-7: Grade and IEP progress reports 2016-17 and 2017-18

Exhibit 8-8: email correspondence between District Staff and Parents

Exhibit 9-9: list of district and school staff with knowledge of underlying facts of complaint

Exhibit 10-10: additional meeting documentation

Reply, pages 1-5

Exhibit 12: enrich audit logs

Exhibit 13: letter from Anchor Center for Blind Children

Exhibit 14: explanation of benefits provided by Parents

Interviews with:

Parents

Special Education Teacher

Speech Language Pathologist

Assistant Director of Special Education