STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor, Denver, Colorado 80203	
[Complainant], on behalf of [Student] [the Student], Complainant, vs. **MESA COUNTY VALLEY SCHOOL DISTRICT NO. 51,** Respondent.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **EA 2018-0018**

AGENCY DECISION

On March 29, 2018 the Complainant filed a due process complaint with the Colorado Department of Education ("CDE"), Exceptional Student Services Unit, against Mesa County School District No. 51 ("Respondent" or "District".) On March 30, 2018 CDE referred the complaint to the Office of Administrative Courts ("OAC"). In his complaint, the Complainant alleges the following:

> On March 29, 2018 [Elementary school] staff sought parent consent to perform an initial evaluation of [the Student] for a disability under the IDEA due to the [the Student's] pronunciation of the letter R. [The Student's] mother and I share joint decision making. She consented to the evaluation. Since [the Student's] core academic performance is at and above grade level, I do not suspect a disability, and I believe that [the Student] just needs a little time to develop that sound, so I did not consent. I was informed that the evaluation would proceed without my consent. I then requested mediation per federal regulation 300.300 (3)(i) which provides that when a parent does not consent, the school may pursue the evaluation by utilizing the procedural safeguards including the mediation procedures under Section 300.506. On March 26 my request for mediation was denied on the grounds that consent of [the Student's] mother alone was adequate to proceed. Proceeding without meeting the procedural requirements taken on by pursing the evaluation over my objection is a violation of due process.

On April 6, 2018 the District filed a Motion to Dismiss Due Process Complaint. The Complainant filed his response to the motion on April 13, 2018. In its motion, the District states that the Complainant's allegations, even if true and viewing them in the most favorable light to the Complaint, do no not entitle Complainant to any relief under the IDEA because, as a matter of law, the District does not need both parents' consent to evaluate the Student under the circumstance of this case. For the following reasons,

the Administrative Law Judge ("ALJ") agrees.

In support of its position, the District cites to a recent Colorado State Complaints Officer's decision regarding parental consent. *See*, *Arapahoe County School District 5*, Colo. State-Level Complaint 2016:528 (January 6, 2017). In that case, the Officer explained:

> Under IDEA, a parent is a biological or adoptive parent and has the right to make educational decisions on behalf of the child unless there is some legal authority restricting that right. 34 C.F.R. §300.30. The commentary to the IDEA regulations reiterates this position: "in situations where the parents of a child are divorced, the parental rights established by the Act apply to both parents." 71 Fed. Reg. 46568 (August 14, 2006).
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> Parents who are divorced have those same rights subject to the terms of "a custody agreement that spells out the educational rights of the parents, [in which case] courts will look at that agreement to determine the extent of the parent's rights." *Rockaway Twp. Bd. of Educ.* 43 IDELR 80 (SEA NJ 2005). If there is a joint custody order that does not otherwise delegate or limit one parent's educational decision-making rights, an IDEA action requiring parental consent may proceed with the consent of only one parent-it is not necessary to obtain consent from both. *See Pueblo School District 70*, Colo. State Complaint 2002:502 (April 1, 2002), reported at 102 LPR 12929. "Generally, either parent may grant consent. In the case of divorced parents with joint custody, either parent may grant consent. However, in the event that one parent grants consent and the other parent refuses, then the school is obligated to initiate the action for which consent has been granted." *Biddeford Sch. Dep't.*, 44 IDELR 87 (SEA ME 2005); *see also Letter to Ward*, 56 IDELR 237 (OSEP 2010) (there is no requirement in Part B that the public agency obtain consent for the initial provision of special education and related services, or accept revocation of consent for the child's continued receipt of special education and related services, from both parents with legal authority to make educational decisions on behalf of that child.) In other words, either parent with legal authority to make educational decisions may consent or revoke their consent barring a court order that says otherwise.

Arapahoe County School District 5, Colo. State-Level Complaint 2016:528, at ¶¶ 11 – 12 at pp. 5 – 6. When resolving the issue of parental consent in cases where the parents are divorced or separated, the courts first look to the terms of the custody agreement. In this case, it is undisputed that the parents have equal authority to make educational decisions. A copy of the parenting plan was provided with the District's motion. See, Amended Court Order Parenting Plan, Section A, ¶ 2 ([ ]). There is no provision in the parenting plan as to who makes the final decision if there is a disagreement between the child's parents. Further, the parenting plan does not require both parents to consent to educational decisions, including, but not limited to,

evaluations. Therefore, the ALJ concludes that both parents have equal rights to consent to evaluations and the district is not obligated to obtain consent of both parents in order to perform an evaluation if one parent has requested and provided written consent for the evaluation.

In addition to the conclusions reached by the State Complaints Officer's in *Arapahoe County School District 5*, other states and the federal Office of Special Education Programs ("OSEP") have reached similar conclusions in cases of shared custody. In *West Washington School Corp*, Indiana St. Ed. Agency, 114 LRP 52923 (October 8, 2014), the Indiana Department of Education determined that the district was in compliance with the IDEA relating to the procedural requirements for parental participation in an IEP meeting where the district sent notice to both parents who are divorced and share custody of the child and only one parent attended the meeting. The department stated that the district wasn't required to secure the attendance of both parents to satisfy the requirements for parental participation at an IEP meeting.

Further, in a decision issued by the U.S. District Court for the Eastern District of Pennsylvania, the Third Circuit held that for the purposes of stay-put so long as one parent with decision-making authority agrees with an administrative decision about a student's educational placement, the decision becomes binding on the district and the district does not have to obtain consent of both parents before modifying a student's current educational placement. *Sheils v. Pennsbury Sch. Dist.*, 64 IDELR 294, 115 LRP 3687 (U.S. Dist. Ct., Eastern Dist. of Pennsylvania) (January 26, 2015).

Moreover, in 2009 OSEP addressed the issue of consent between parents who were divorced and shared educational decision-making. *Letter to Cox*, 110 LRP 10357 (OSEP 2009). In *Letter to Cox*, OSEP acknowledged "that disputes between parents who share the right to make educational decisions for their child, and who disagree about the provision of special education and related services for their child, may place an LEA in a difficult situation." *Id*. OSEP went on to pronounce that regardless of the fact that the parents could not agree about the provision of special education and related services, the public agency could not use the procedural safeguards due process procedures (Subpart E) of the IDEA's Part B regulations to overcome a parent's written revocation of consent for the continued provision of special education and related services.

In the same opinion, OSEP further stated that one parent may not use the due process procedural safeguards in Part B of the IDEA regulations to overcome the other parent's revocation of consent. "[D]ue process complaints 'must allege a violation' of a Part B requirement. 34 CFR §300.507(a)(2). In the situation [presented in *Letter to Cox*], no violation of the IDEA has occurred or could be alleged – it is not a violation of IDEA for one parent to revoke parental consent for special education and related services over the objection of the other parent. In effect the hearing officer would have no role to play as the matter is not one over which he or she has jurisdiction." *Id*.

Just as in *Letter to Cox*, the Complainant in this case may not use the due

process complaint procedures to overcome the Student's mother's consent for the evaluation. Because both the Complainant and the Student's mother share equally in the Student's educational decision-making, the District does not need the consent of both parents in order to perform the evaluation. The District may proceed using the written consent it obtained from the Student's mother.

The Complainant also alleges a violation of his constitutional and due process rights on the basis that the District refused to participate in mediation as contemplated by 34 C.F.R. §300.300(a)(3)(i). This issue was also addressed by OSEP in *Letter to Cox*. OSEP stated:

> Similarly, States are not required to offer mediation under 34 CFR §300.506. . . as mediation is designed to resolve disputes between a public agency and a parent. The regulations provide that if parties resolve a dispute through the mediation process, they must execute a legally binding agreement that sets forth the resolution that, among other things, is "signed by both the parent and a representative of the agency who has the authority to bind such an agency." 34 CFR §300.506(b)(6). Thus, the regulation contemplates that public agencies be included as a "party" to mediation. Accordingly, the IDEA does not provide a mechanism for parents to resolve disputes with one another; such disputes must be settled privately or through whatever State law processes exist.

In this case, the District has already obtained valid consent to perform the evaluation. Therefore, the District has not invoked the IDEA's "consent refusal override" provision by filing a due process complaint to obtain consent. Accordingly, the District need not participate in mediation as contemplated by 34 C.F.R. §300.300(a)(3).

It is the decision of the ALJ that the Complainant has failed to state a claim under the IDEA that would entitle him to relief. Accordingly, the District's motion to dismiss the complaint is granted.

This decision is considered a final decision and subject to appeal pursuant to 34 C.F.R. §§ 300.514(b) and 300.516.

DONE and SIGNED this 3nd day of May, 2018

/s/ MICHELLE A. NORCROSS
Administrative Law Judge