STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman St., Denver, CO 80203	
DOUGLAS COUNTY SCHOOL DISTRICT RE-1 Complainant, vs. **[MOTHER] AND [FATHER]** Respondents.	**COURT USE ONLY** **CASE NUMBER:** **EA 20180022**

DECISION

Complainant, Douglas County School District RE-1 ("School District") filed this due process complaint after a State Complaints Officer ("SCO") found that the School District failed to provide meaningful participation to the parents in the Individualized Education Program ("IEP") process for their child, [Student][1] This proceeding is subject to the provisions of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.,* as implemented by federal regulation 34 C.F.R. § 300.510 and Colorado's Exceptional Children's Educational Act ("ECEA"), and implementing state regulation 1 CCR 301-8, § 2220-R-6.02. Hearing was held at the Office of Administrative Courts ("OAC") in Denver, Colorado, Courtroom 2, before Administrative Law Judge ("ALJ") Alice Hosley on August 27 – 29, 2018. The hearing was recorded and transcribed by a registered professional reporter from Stevens-Koenig Court Reporting and Videoconferencing. The School District was represented by Elliott Hood, Esq. and William Stuller, Esq. of Caplan and Earnest, LLC. Respondents, [Student]'s parents, were represented by Elie Zwiebel, Esq. and Matthew Sandler, Esq. The following stipulated exhibits were admitted at hearing: Exhibits 1-4, 6-21, 24, 27-30. Exhibit 31, pp. 2 and 26 only, were admitted at Respondents' request, over the objection of Complainant.

PROCEDURAL BACKGROUND AND ISSUES PRESENTED

It is necessary to summarize the extensive procedural background of this case to give context the narrow issues raised in this appeal. [Student] has had an IEP and received special education services from the School District since elementary school. He started attending [School] ("[School]"), a charter school in Douglas County, in the seventh grade and was enrolled at [School] for his junior year of high school in the 2017-2018 school year. In preparation for his junior year of high school, [Student] applied and was

[1] In compliance with 1 CCR 301-8, § 2220-R-6.02(7.5)(h)(ii)(D), the ALJ will use the student's initials in this decision.

accepted to participate in two programs offered to all students enrolled at [School]: concurrent enrollment ("CE") and career wise ("CW").

CE is a program that allows students to take college level courses while enrolled in high school and receive both high school credits towards graduation as well as college credits towards a college degree. As relevant in this case, the same CE course (ENG 121) was offered at both [School] and [College] ("[College]") for the fall semester of the 2017 school year.

CW is a program in which private businesses partner with the school to provide students with apprenticeship opportunities. The 2017-2018 school year was the inaugural year of the CW program at [School]. The CW program was designed for the student to participate in the program for 16 hours a week during the school year. Through the CW program, [Student] was offered an apprenticeship with the IT department at [Company], a company located in Denver, Colorado. [Student] was scheduled to participate in the apprenticeship for eight hours a day on Tuesday and Thursdays in the fall semester of 2017.

In May 2017, either one or both of the Respondents participated in multiple meetings with [School] staff to discuss the options for [Student] to participate in both CE and CW and also receive the special education services and needs identified in his IEP. On May 30, 2017, [Student]'s IEP team met to discuss the options available to successfully schedule his participation in all of those programs. By the end of the meeting, several options were identified, but no consensus was reached by the IEP team regarding [Student]'s schedule or participation in all three educational programs being considered.

On June 7, 2017, Respondents filed a state-level complaint with the Colorado Department of Education. A SCO conducted an investigation of Respondents' allegations and issued a written decision on August 3, 2017. Based upon the conclusions made by the SCO in her written decision, she ordered the School District to complete several tasks, including to provide an Independent Education Evaluation ("IEE") in all identified and suspected areas of disabilities and to convene an IEP to review and revise [[Student]'s] IEP, including transitional services, if appropriate. The SCO also ordered that the follow-up IEP team meeting be conducted by a neutral facilitator.

On November 14, 2017, the IEP team reconvened, with a facilitator from the Colorado Department of Education, as ordered by the SCO. At the conclusion of the November 14, 2017 meeting, the IEP team had identified two areas necessary for further evaluation – one identified by the staff at [School] and one identified by [Student]'s mother. The IEP team did not discuss a number of items in [Student]'s IEP, including service delivery statement, least restrictive environment ("LRE"), or his goal, and therefore, did not discuss or reach consensus on amending [Student]'s IEP in several substantive areas.

Respondents filed a subsequent state-level complaint on December 7, 2017, alleging that the School District failed to comply with specific remedies ordered by the SCO and that, as parents, they were denied meaningful participation in the IEP process. The same SCO conducted an investigation and issued a written decision on March 7, 2018. The SCO concluded that the School District committed the following violations of the IDEA:

> 1. Failure to provide meaningful participation to the child's parents in the IEP process. (34 C.F.R. §§ 300.322(f), 324, 300.501);
>
> 2. Failure to ensure the attendance of individuals at Student's IEP meeting as required by Decision or in the alternative, obtain a written excusal. (34 C.F.R. 300.321).

On May 4, 2018, the School District filed a Due Process Complaint with the Colorado State Department of Education, seeking an order consistent with its position that it did not deny Respondents meaningful participation in the IEP process and that the School District made an offer of free and appropriate public education ("FAPE") available to [Student].

The OAC received the Due Process Complaint on May 8, 2018. The issues presented for the ALJ's resolution in this case are as follows: (1) whether the School District failed to provide meaningful participation to Student's parents in the IEP process that resulted in the issuance of the IEP on November 17, 2017; (2) if so, whether any such denial of meaningful participation resulted in the denial of FAPE to the Student; and (3) if so, what is the appropriate remedy under the circumstances in this case.

FINDINGS OF FACT

Based upon the evidence in the record, the ALJ finds the following:

1. [Student] finished his sophomore year at [School] in the 2016-2017 school year.

2. [Student] started attending [School] in the seventh grade and had an IEP during his entire academic career at the school.

3. [Student] has been diagnosed with dyslexia, dysgraphia, and Attention Deficit Disorder ("ADD").

4. [Student]'s primary disability, as identified in his IEP, is "Specific Learning Disability." Exhibit 2.

5. [School] is on a rotating block schedule, which means classes meet for an extended class period every other day, instead of a shorter class period every day. Exhibit 20.

6. [Student] was evaluated in November 2016, which resulted in a determination by his IEP team in December 2016 that his writing goal should be modified to support his planning of an outline prior to writing to narrow down his focus and help him stay on target with his research. As a result, at that time, [Student]'s identified area of need was "writing" and his measurable goal was identified as follows: "[g]iven a writing assignment that requires research, [[Student]] will create an outline prior to beginning his research 75% of the time in all classroom settings as measured by teacher check-ins via Google docs." The IEP team determined [Student]'s primary educational environment was "general education class at least 80% of the time" and [Student] was entitled to receive "400 minutes per month of direct, specialized instruction inside the general education classroom." Exhibit 1.

7. Prior to the end of the 2016-2017 school year, [Student] submitted applications for, and was accepted to participate in both the CE and CW programs offered through [School]. [Student] accepted the invitation to participate in both the CE and CW without consulting with his IEP team.

8. The CE program is offered to all students enrolled at [School] and allows students to receive high school credit towards high school graduation and college credit towards a college degree simultaneously for successful completion of the same college level course. A college level course taken through the CE program allows a student to receive a full year's worth of high school credit hours during one college semester.

9. The application for CE included a minimum grade point average check and an expression of interest. There is nothing on the application that identifies whether an applicant is entitled to receive special education services through an IEP.

10. [Assistant Principal] was an Assistant Principal at [School] during the 2016-2017 year. She was responsible for reviewing students' applications and approving admission into the CE program. At the time that she authorized [Student] to participate in the CE program for the 2017-2018 school year, she did not know that [Student] was receiving services through an IEP. [Assistant Principal] would not encourage a student to forego special education services in order to participate in the CE program.

11. The CW program partners participating businesses with students to provide apprenticeship opportunities in a real-world work environment. The 2017-2018 school year was the first year the CW program was implemented at [School]. The program was designed for a student to work at the business location for sixteen hours a week. Exhibit 3.

12. Before the end of the 2016-2017 school year, [Student] was partnered through CW with [Company], a private sector business, to apprentice in the IT department for eight hours a day on Tuesdays and Thursdays for the 2017-2018 school year. [Company] is located in downtown Denver.

13. In May 2017, [Student] had identified ENG 121, offered at [College] ("[College]") on Mondays and Wednesdays, as the course in which he wanted to enroll for participation in the CE program.

14. Respondents believed that participation in the CE program would help [Student] reduce the number of core subject course he would need to take every semester for his last two years of high school. Respondents understood the CE program would allow [Student] to satisfy year-long high school credit hour requirements in one semester. Participation in CE would allow him to meet the credit hours required for high school graduation while taking fewer classes each semester.

15. Respondents believed that the CW opportunity was valuable to [Student] because it would cater to his propensity for hands-on learning.

16. In light of [Student]'s anticipated schedule for the 2017-2018 school year, to include attending [College] on Mondays and Wednesdays for ENG 121 and participating in his apprenticeship at [Company] for 8 hours each day on Tuesdays and Thursdays, an issue arose regarding [Student]'s availability to attend any classes at [School] in order for him to receive the services identified in his IEP.

17. On May 10 and May 16, 2017, [Student]'s mother met with [School] staff and School District Special Education staff to discuss [Student]'s schedule for the 2017-2018 school year, with a focus on how the School District planned to comply with the terms of [Student]'s IEP in conjunction with his participation in CE and CW.

18. On May 30, 2017, the IEP team met to discuss the delivery of [Student]'s IEP services for the 2017-2018 school year. Both Respondents, and their advocate, were present for the meeting.

19. At the May 30, 2017 IEP meeting ("May IEP meeting"), Respondents' goal was to retain the IEP and have [School] meet its obligations of the IEP in a "creative" way. Exhibit 3.

20. The [School] staff proposed for [Student] receive his 400 minutes of direct, specialized instruction for his writing goal by attending the CE ENG 121 course offered at [School] the fall semester of 2017-2018. As a result of [School]'s rotating block schedule, ENG 121 was scheduled to meet on Mondays, Wednesdays and Fridays every other week, but Tuesdays and Thursdays on the alternating weeks for the fall semester.

21. The [School] staff informed Respondents that [Company] had agreed to allow [Student] to work less than 8 hours a day on the weeks that ENG 12 met on Tuesdays and Thursdays and still participate in the CW program. Exhibit 3.

22. In discussion of the [School] staff proposal, [Student]'s mother expressed her preference for [Student] to work as many hours as possible at [Company] because she thought the apprenticeship optimized his learning. [Student]'s mother stated "[[Student]]

learns better in an environment where is doing as opposed to sitting and reading and writing." She also expressed her preference that "ideally [I] do not want him to miss hours to be reading and writing in a classroom." Exhibit 3.

23. During the May IEP meeting, Respondents proposed that the School District could meet its obligations under [Student]'s IEP by: (1) allowing [Student] to enroll at [School] in a study hall on Fridays; (2) [Student] could attend a writing lab at [College] and keep a log of attendance that [School] could audit; or (3) [Student] could get "virtual" assistance from a learning specialist at [School] with the writing work he was doing for the CE course offered at [College].

24. Respondent's advocate proposed that a [School] staff member accompany [Student] to the ENG 121 course taught at [College].

25. The School District's position was that none of the options presented by Respondents would allow it to provide the services it was required to provide to [Student] as his IEP was currently written. The study hall option would preclude [Student] from receiving his services in a general education classroom, the identified least restrictive environment ("LRE"); the writing lab at [College] is staffed by students, not special education teachers, as required by the IDEA; and [School] could not meet the direct instruction in a general education classroom requirement by providing "virtual" tutoring services for a course taught at a different institution.

26. The only way for the School District to accommodate Respondents' requests was to change the LRE or the service delivery statement in [Student]'s IEP. In order to change either of those items in the IEP, the IEP team needed to determine that any change in the IEP still met [Student]'s unique educational needs to ensure he was receiving a reasonable educational benefit.

27. To change [Student]'s IEP, the School District requested that a new evaluation be completed in order to determine [Student]'s specific needs for specialized instruction

28. During the May IEP meeting, Respondents did not express to the School District that [Student]'s educational needs had substantively changed since the previous evaluation in November 2016. [Student]'s mother did express her opinion that his needs had changed "because we are electing to do [the] CW program because [it] fits his needs better than sitting in a classroom." Exhibit 3.

29. There was discussion at the May IEP meeting about [Student]'s writing goal being offered only for the ENG 121 course taught at [School]. Due to [School]'s rolling block scheduling, the same challenge of scheduling existed, and [Student]'s availability for any course taught at [School] on Tuesdays and Thursdays – even every other week – regardless of the class in which he would receive his direct instruction services. The issue was not that the School District would not or could not provide the direct instruction for [Student]'s writing goal, the real issue was that [School]'s rolling block scheduling conflicted with the hours at [Company] for the CW program.

30. At the May IEP meeting, [Student]'s IEP team did not agree that CE was best for [Student]. It had not been determined, and there was no evidence presented from previous evaluations or assessments, that CE was necessary for [Student] to receive reasonable education benefits. Respondents believed that CE was best for [Student]'s learning style, the School District and [School] staff believed that if [Student] needed the supports as detailed in his current IEP, then CE was not the best choice, but if he was going to participate in CE, it was best to have him take the ENG 121 course at [School] so he could continue to receive services for his writing goal. Exhibit 3.

31. The School District informed Respondents that in order to provide the special education services defined in [Student]'s IEP, [Student] would need to be enrolled in a general education course at [School] in the fall of 2017. If [Student] was not available on the [School] campus for a general education course, [School] would not be able to provide him 400 minutes a month of direct specialized instruction in a general education classroom.

32. The final option the IEP team discussed was to suspend [Student]'s IEP for fall 2017, if he did not attend any general education courses at [School], and seek accommodations for [Student] at [College] under the American Disabilities Act ("ADA").

33. The School District also informed Respondents that in order to change [Student]'s IEP to accommodate Respondents' requests, new evaluations would be required in order to change the services or service delivery to [Student].

34. At the May IEP meeting, Respondents declined to consent to any additional evaluations to that would have facilitated amending [Student]'s IEP.

35. [Student]'s mother wanted the same IEP services for [Student] in the fall of 2017, at a "mutually agreeable time." It was her position that a re-evaluation prior to changing [Student]'s IEP was "unreasonable" because he had been re-evaluated in November 2016.

36. On June 7, 2017, Respondents filed a state-level complaint alleging that the School District had violated their parental rights and denied [Student] FAPE. Exhibit 30.

37. On August 3, 2017, the SCO issued a decision finding that the School District had committed five violations of the IDEA, and ordering the following three remedies:

1. The School District must submit a corrective action plan ("CAP") to the Colorado Department of Education by September 5, 2017;

2. The School District must provide an Independent Education Evaluation ("IEE") in all identified and suspected areas of disabilities. Within two weeks of the

IEE completion, but no later than October 3, 2017, the School district shall convene an IEP to review and revise Student's IEP.

3. A complete copy of any new IEP developed for the Student shall be provided to the Department of Education within five days after the IEP meeting.

Exhibit 30.

38. Prior Written Notice ("PWN") was issued to Respondents on August 15, 2017. Respondents were informed that [School] stood ready to implement [Student]'s May 30, 2017 IEP, but since the schedule designed for [Student] by his parents did not include attendance in any general education course at [School], [School] was prevented from providing FAPE to [Student]. Exhibit 4.

39. The follow-up IEP team meeting was held on November 14, 2017 ("November IEP meeting"). Between 20-25 people were in attendance, including [Student], his mother, his grandparents, and his advocate, [Advocate]. Exhibit 10.

40. Prior to the November IEP meeting, a member of the [School] staff prepared a "DRAFT" IEP for consideration at the meeting. Exhibit 7.

41. The November IEP meeting was conducted by an independent neutral facilitator from the Colorado Department of Education. The facilitator informed the participants of the meeting that she was not part of the IEP team, she was not a decision maker, advocate, or representative for either party. During her introduction, the facilitator stated that everyone had a voice and it was her role to make sure everyone's voice was represented. Exhibit 10.

42. The November IEP meeting was scheduled for two hours.

43. The facilitator started the meeting with a discussion of the recently completed evaluations.

44. [Developmental Neuropsychologist], Developmental Neuropsychologist, conducted an IEE at the request of Respondents. She attended the November IEP meeting by phone, and summarized the results of her testing and observations of [Student]. Prior to testing [Student], [Developmental Neuropsychologist] reviewed his previous evaluations. Her focus was to determine with more specificity the accommodations that would work for [Student]'s learning profile. As the result of her testing, she recommended learning strategies, organizational strategies and accommodations for [Student]. Exhibit 10.

45. [Developmental Neuropsychologist] did not observe for [Student]'s attention issues in an educational setting.

46. [Developmental Neuropsychologist] reported to the IEP team that she did not know how much a teacher must modify instruction for [Student] as much as how he shares his knowledge needs modification. Exhibit 10.

47. [Student] also participated in a speech language evaluation conducted by a speech therapist at the private entity, [Therapy Center] ("[Therapy Center]"), in September 2017. School District staff with the requisite training to interpret the evaluation summarized the results of the evaluation at the November IEP. Exhibit 10.

48. An occupational therapist from [Therapy Center] also conducted an evaluation of [Student]. The results of that evaluation were again presented at the November IEP meeting by a School District staff qualified to interpret the results. Exhibit 10.

49. An evaluation directed at concerns regarding [Student]'s auditory processing was completed by [Private Entity] ("[Private Entity]"), a private entity selected by Respondents. A School District staff member qualified to interpret the results presented the evaluation to the IEP team. She reported that two subtests given to [Student] in this evaluation were outside the average range: (1) speech and noise test – which is an auditory separation test where the student receives multiple inputs and tries to focus on one; and (2) masking level difference test – which focuses on integration from multiple inputs to get information. Exhibit 10.

50. The School District staff member who interpreted the auditory processing evaluation expressed concerns to the IEP team that [Student]'s attention issues may not truly be auditory processing disorder, it may be a more global processing concern. Attempts to explain what is going on with [Student] as only central auditory processing disorder may be missing some key issues that could not be simply addressed with focus on his central auditory processing. She used the fact that even when [Student] is in a quiet environment, he needs to read at a slower pace in order to process the information successfully. Exhibit 10.

51. The School District staff member reported that the auditory processing evaluation listed a number of accommodations to support [Student], but that these were only "best practices." She explained that because the evaluation was done in a clinical environment only, there was no assessment or information about how [Student]'s auditory processing manifests in the real world, including a classroom setting. She further explained that when she conducts such testing, she observes students in different listening environments to observe how the student is impacted so that she can target modifications and accommodations more specifically. Exhibit 10.

52. The School District had previously offered its services and staff to conduct the auditory process evaluation that would have included the real world observation, but Respondents declined and chose to have the evaluation conducted by [Private Entity].

53. The summaries of the IEEs, discussions about the results, and clarifying questions from various members of the IEP team, including multiple from [Student]'s mother to the School District staff interpreting the evaluations, lasted just over one-and-a-half hours. Exhibit 10.

54. After the summaries of the evaluations were presented, the facilitator asked the IEP team if there additional evaluations the team needed. School District staff opined that it would like an additional evaluation to observe [Student]'s auditory processing in a classroom setting. Respondent's mother requested an evaluation to pursue having a twice exceptional diagnosis for [Student] identified on his IEP.

55. Respondent's mother responded to the School District's request for an additional evaluation in a classroom setting by stating "[i]n theory it sounds good" but expressed concern that in practice it might be hard because [Student] is not in the [School] building. She also stated that she did not know if he would be coming back to [School] because taking classes at [College] was "working well for him." Exhibit 10.

56. [Former Director], former Director of Special Education for the School District, stated that she did not think it was a problem to have [Student] observed while in the [College] classroom, the School District would need to coordinate with [College]. Exhibit 10.

57. [Special Education Teacher], special education teacher who was [Student]'s case manager when he attended [School], noted that his current IEP needs were in writing, but the IEEs showed he was exceeding writing standards on every measure. In her opinion, additional evaluations needed to be done because, given the results of the evaluations, she did not feel that [Student]'s needs were appropriately identified on his existing IEP. Exhibit 10.

58. The IEP team discussed the options for having [Student] evaluated through the School District's gifted and talented program to determine his eligibility for services under that program. Exhibit 10.

59. The ALJ finds the testimony from [Former Director] that questions arose at the November IEP meeting about whether [Student]'s needs had been accurately identified. The IEP team agreed that there was a need for additional evaluations to fill the gap left by the previous IEE because there was no observations done in real world or classroom settings to evaluation [Student]'s auditory processing skills. [Former Director]'s testimony is supported by the discussions of the IEP team at the November IEP meeting. Further, [Student]'s mother also requested an additional evaluation to pursue a twice exceptional diagnosis for [Student]. As such, the ALJ declines to find that the School District had predetermined an explicit intent to conduct a re-evaluation. The evidence supports the finding that the IEP team decision to conduct further evaluations materialized from the discussions that occurred at the November IEP.

60. At this point in the meeting, Respondents' advocate, [Advocate], stated her understanding that the IEP team was stopping the meeting for more assessments and would rely on the past IEP for services. Exhibit 10.

61. The facilitator asked whether there was an IEP currently in place and Respondent's mother responded that it was currently on hold status. Exhibit 10.

62. A School District representative stated that the current offer of FAPE to [Student] were those services in his current IEP. The School District reiterated that it continued to stand by its offer of FAPE as set forth in the current IEP, but he had to be available for a class at [School] in order to receive those services. Exhibit 10.

63. In response, [Student]'s mother stated "[h]e is not unavailable to come here, [he is] just not available to come here during class time." Exhibit 10.

64. After the November IEP meeting, the School District updated [Student]'s IEP to include discussions from the meeting, which Respondents received on November 17, 2017 ("November IEP"). Exhibit 8.

65. [Student]'s mother was surprised to receive the November IEP because the November IEP meeting was incomplete. She was not concerned about the process or the November IEP meeting until she received the November IEP.

66. The School District updated [Student]'s IEP with the items that were discussed and decided by the IEP team the November IEP meeting. The School District's offer of FAPE, however, did not change. Nor did [Student]'s writing goal, LRE, or service delivery statement. To the extent the IEP team did not discuss certain portions of [Student]'s IEP, those portions were not amended in the IEP that was issued on November 17, 2017. Similarly, portions of the DRAFT IEP provided prior the November IEP meeting that were not discussed at the meeting were not included in the IEP issued on November 17, 2017.

67. In December 2017, one week before grades were due at [College], Respondents found out that [Student] was struggling in his [College] classes. He failed one course and got a "D" in another. Even though Respondents knew [Student] would receive IEP services if he returned to [School], they decided to allow him to stay at [College] another semester and declined the offer of FAPE from the School District.

68. Respondents consented to further evaluations in December 2017.

69. Throughout the 2017-2018 school year, even though Respondents declined the School District's offer of FAPE for [Student] by choosing to have him take CE courses at [College] and participate in the CW program for the full 16 hours a week, the School District and [School] continued to meet with Respondents, and pursue the task of identifying [Student]'s unique educational needs by paying for IEEs.

CONCLUSIONS OF LAW

Respondents' Motion to Dismiss

At the beginning of the hearing, Respondents renewed their motion to dismiss the case – arguing that, absent an allegation that Respondents violated the IDEA, (1) the ALJ lacked jurisdiction to hear the case under the Due Process provision of the IDEA; and (2) Complainants lack standing to bring a Due Process Complaint.

According to the Department of Education's discussion of the IDEA regulations establishing the state complaint process, although the regulations do not provide for an appeal from an SCO decision, a party who disagrees with an SCO decision "may initiate a due process hearing" provided that the subject of the state complaint involves an issue about which a due process hearing may be filed. 71 Fed. Reg. 46, 607 (2006). As such, the School District has exercised that right. *See* 34 C.F.R. § 300.503(a)(1). In this case, the issue for resolution relates to the provision of FAPE to [Student], and whether there existed procedural violations of the IDEA that impeded Respondents' opportunity to participate in the IEP process. As such, the ALJ concludes that Complainants have the right to bring this Due Process Complaint and the ALJ has the jurisdiction to hear the case on its merits.

Standard of Review

The District filed this due process complaint pursuant to 34 C.F.R. § 300.507(a), which permits a parent or a public agency to file a complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child). As such, this matter is not an appeal or review of the SCO order. State complaints are not considered actions or proceedings. *Vultaggio v. Board of Educ., Smithtown Cent. Sch. Dist.,* 39 IDELR 261 (2nd Cir. 2003). Because the SCO's findings were not developed following an adversarial hearing providing due process to both parties, the ALJ deems it inappropriate to give any weight to the SCO's findings or conclusions. Rather, the ALJ concludes that the *de novo* review standard applies in this case to determine: (1) whether the School District failed to provide meaningful participation to Student's parents in the IEP process, specifically relating to the November 14, 2017 IEP meeting and the issuance of an IEP for [Student] on November 17, 2107; (2) if so, whether the denial of meaningful participation resulted in the denial of FAPE to [Student]; (3) if so, what is the appropriate remedy in this case.

Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005), places the burden of persuasion "where it usually falls, upon the party seeking relief." That is to say, "the person who seeks court action should justify the request." *Id.* at 56 (quoting C. Mueller & L. Kirkpatrick, Evidence § 3.1, p. 104 (3d ed. 2003)). Although parents are typically the party seeking relief, the rule applies with equal effect to a school district when it is the party seeking court action. *Id.* at 62. Because the School District is the party asking the ALJ to enter an order finding that it did

not violate the IDEA by denying meaningful participation to Respondents, it bears the burden of proof in this case.

The Requirement of FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). Central to the IDEA is the requirement that school districts develop, implement, and revise an IEP calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d); *Endrew F. v. Douglas County Sch. Dist. RE-1,* 137 S. Ct. 988, 994 (2017) ("[t]he IEP is 'the centerpiece of the statute's education delivery system for disabled children'. . . and is the means by which special education and related services are 'tailored to the unique needs' of a particular child") (internal citations omitted).

The threshold issue in this case is whether the School District complied with the procedures set forth in the IDEA.

Procedural FAPE: In enacting the IDEA, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Id.* at 205-06. However, failure to comply with the procedural safeguards amounts to a violation of FAPE only if: (1) the procedural violations impeded the child's right to FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; of (3) caused a deprivation of educational benefit. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 CFR § 300.513(a)(2); *C.H. by Hayes v. Cape Henlopen Sch. Dist.,* 606 F.3d 59, 66 (3rd Cir. 2010) ("[a] procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.")

Least Restrictive Environment

The IDEA requires that, to the maximum extent appropriate, children with disabilities be educated in the "least restrictive environment." 20 U.S.C. § 1412(a)(5). This means that disabled students must be educated "[t]o the maximum extent appropriate . . . with children who are not disabled" in a "regular educational environment." 20 U.S.C. § 1412(a)(5)(A); *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1236 (10th Cir. 2009). Disabled students may be removed from the regular classroom only "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.*; 34 CFR § 300.114(a)(2)(ii).

Educational Placement

Parents have the right to be involved in any decision regarding the educational placement of their child. 34 CFR §§ 300.116(a)(1), 300.327 and 300.501(b)(1)(i). Although the term "educational placement" is not defined by either the IDEA or the federal regulations, the State Department has adopted a rule that does address the term:

> [T]he determination of placement must be based on the child's IEP and made by the IEP Team. 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.

1 CCR 301-8, Rule 4.03(8)(a) (emphasis added).

Despite the italicized language, other portions of the rule make it clear that some changes in location, such as referral to a private school, transfer from a brick and mortar school to an online school and vice versa, or changes which would result in the addition or termination of an instructional service, would amount to a significant change in placement. *Id.,* Rule 4.03(8)(b)(ii). Taken as a whole, then, although the State Department rule does not automatically equate change of placement with change of location, it does take change of location into account when other factors are present that amount to a significant change in the educational setting.

The educational placement decision must be made by "a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." 34 CFR § 300.116(a)(1). Furthermore, the placement must, among other things, be "based on the child's IEP." 34 CFR § 300.116(b)(2). However, if the parents are allowed to meaningfully participate in the decision, they do not have the right to veto a decision they do not agree with. *Ms. S. v. Vashon Island Sch. Dist.,* 337 F.3d 1115, 1131 (9th Cir. 2003); *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 449 (2nd Cir. 2015) ("a parent's right of participation is not a right to 'veto' the agency's proposed IEP.")

Meaningful Participation

The IDEA requires that school districts provide the parents of a disabled child the opportunity to meaningfully participate in the IEP process. 20 U.S.C. § 1415(b)(1). A parent's right to participate in the IEP process is not merely the right to speak. *F.L. v. Bd. of Educ. Of the Great Neck U.F.S.D.,* 274 F. Supp. 3d. 94, 116 (EDNY 2017). Rather, parental participation requires an opportunity to examine records, participate in meetings, and to obtain an independent evaluations. *Id.* (citations omitted). Although a school district need not adopt a parent's recommendation for any particular aspect of an IEP, it may not refuse to consider any of the parent's concerns. *Id.* (citations omitted). Therefore, as long as the parents are listened to, this burden is met even if the school district ultimately decides not to follow the parents' suggestions. *Id.* (citations omitted).

Discussion

Respondents contend that the School District's conduct, during the IEP meeting held on November 14, 2017 and leading to the issuance of the November 17, 2017 IEP, denied them meaningful participation in the process to such a degree that it amounted to the denial of FAPE for [Student]. The ALJ concludes that the School District met its burden to show that Respondents were not denied meaningful participation in the IEP process in the fall of 2017, leading up to and including the November IEP meeting and subsequent issuance of the IEP on November 17, 2017.

At the time that the parties were scheduling and pursuing the completion the IEEs in the early fall of 2017, [Student]'s current IEP was on hold. There is no dispute that the School District offered [Student] services for the 2017-2018 school year consistent with the goals and service delivery statement that were in place prior to the May IEP meeting. Since there had not been agreement among the IEP team at the May IEP meeting, and insufficient evidence to amend [Student]'s goals, LRE, or service delivery statement, those provisions of the IEP remained unchanged. Absent a re-evaluation establishing that [Student]'s needs had changed in order to justify an amending his goals, LRE or service delivery statement, the School District was unable to adjust [Student]'s IEP services in any of the "creative" ways Respondents had previously proposed. Prior to the fall of 2017, Respondents had not provided the necessary consent to conduct these re-evaluations.

The evidence in the record overwhelmingly supports the conclusion that the decision to forego the IEP services offered at [School] in the 2017-2018 school year was solely the decision of the Respondents. This was not an IEP team decision. The evidence in the record demonstrates that Respondents chose to have [Student] maximize his participation in CW, at 16 hours a week, based upon their opinion that the hands-on learning experience was more valuable than participation in a classroom experience. Respondents repeatedly expressed their preference for the hands-on experience, multiple times stating that it suited [Student] more than spending his time in a classroom reading and writing. The evidence demonstrates that in the fall of 2017, when considering all of the educational options available to [Student], Respondents considered [Student]'s receipt of IEP services to be the lowest priority.

The decision to maximize [Student]'s apprenticeship participation was also the driving force behind Respondents' decision to have [Student] take ENG 121 at [College] instead of [School] in the fall of 2017. If he had taken the course at [School], and received all the benefits of CE enrollment, he could have received the services identified in his IEP. Again, this was the solely the decision of Respondents, it was not an IEP team decision. This decision was mandated upon a consideration of [Student]'s schedule, and ensuring that he was available on Tuesdays and Thursdays for 8 hours each day. Due to [School]'s rolling block schedule, any course made available to him at [School] would have created a conflict with his Tuesday/Thursday commitment to [Company].

The IEEs conducted in the fall of 2017 were designed to determine [Student]'s needs so that his IEP could be amended to accurately reflect his individual needs, if

necessary. This was a work in progress. [Student] was assessed by a number of professionals, all focused on identifying [Student]'s deficits and needs. Respondents actively participated in the IEE process and selected several of the evaluators, including [Developmental Neuropsychologist], [Therapy Center] and [Private Entity]. Respondents chose these evaluators despite the fact that the School District offered the qualified professionals on its staff to conduct the evaluations.

At the November IEP meeting, [Student], his mother, advocate and grandparents were in attendance. [Developmental Neuropsychologist] participated by phone to deliver her own summary of the evaluation she conducted. The other IEEs were summarized and presented by School District staff with the training and credentials to interpret the results of the evaluations. The IEP team engaged in dialogue about the results of the evaluations for the first one and half hours of the two-hour meeting. All IEP team members were given the opportunity to ask questions and make comments, including Respondents. The meeting was conducted by an independent facilitator, committed to the role of ensuring that everyone had a voice at the meeting.

At the end of the meeting, [Student]'s mother agreed "in theory" with the School District's request for additional auditory processing evaluations in a realworld setting, specifically the classroom environment. Again, [Student]'s mother's hesitation can be attributed to [Student]'s schedule, acknowledging that access to [Student] by the School District staff would be limited because [Student] was not taking any classes at [School]. [Student]'s mother did not know if [Student] would even be coming back to [School] because taking classes at [College] was "working well for him." The School District responded that [Student] could be evaluated during class time at [College], and [Student]'s schedule should not be an obstacle.

In addition, [Student]'s mother also expressed her desire to have [Student] evaluated for a possible "twice exceptional" diagnosis. The School District accepted this proposal and informed her that it would require an eligibility determination by the Gifted and Talented Program staff. The School District did not reject this proposal. Instead, the School District staff agreed that [Student]'s eligibility for gifted and talented services should be evaluated.

At the end of the November 2017 IEP meeting, there was consensus that [Student]'s auditory processing should be observed and evaluated in the classroom setting and [Student] should be evaluated for eligibility in the gifted and talented program. There was further discussion surrounding the current status of [Student]'s IEP, with [Student]'s advocate expressing her understanding that the team would be relying on the past IEP for the identification of services. The School District reiterated that it continued to stand by its offer of FAPE as set forth in the May IEP. Pending completion of the evaluations, there had been no change to [Student]'s writing goal, LRE, or service delivery statement.

On November 17, 2017, the School District issued an updated IEP to incorporate the changes that were made to [Student]'s IEP at the November 2017 meeting. The School District understood this to be an update to the IEP, necessary to incorporate what

had happened at the previous meeting, to remain in place until the next IEP team meeting. The School District's offer of FAPE had not changed, as did Respondents' decision to reject that offer. Respondents were surprised to receive the document because they understood that the November 2017 IEP meeting was incomplete and would be continued after the final round of evaluations.

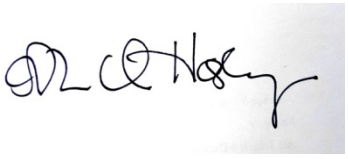
The IEP issued on November 17, 2017, was an updated version of the pre-existing document. The only changes were those discussed by the IEP at the November 2017 meeting. There were no changes made to the portions of the IEP that had not been discussed, including, [Student]'s goals, LRE, and service delivery statement. This document was not the final decision, it was an update, until the next meeting, when it would be updated again. Respondents participated in the IEEs and dialogue that led to the updated IEP.

Given the evidence in the record, Respondents' position that they were not provided meaningful participation in [Student]'s IEP process is untenable. [Student]'s mother's testimony that she was not concerned about the process or her involvement in the process until she received the IEP issued on November 17, 2017 supports this conclusion. The ALJ infers she was not concerned about the process because she participated in choosing the IEE evaluators, the discussions during the IEP meeting and had direct input into the additional evaluations to be conducted. Even if no new IEP had been issued, all of the IEP team understood that the IEP in place was the one [Student]'s mother described as "on hold." The only changes were to update the items discussed by the IEP team at the November meeting. There were no substantive changes to [Student]'s goals, LRE, or service delivery statement – as those could not be done without the additional evaluations. The IEP issued on November 17, 2017 was the most current and was to remain in place until updated after the next IEP team meeting.

Based upon the conclusion that Respondents were not denied meaningful participation in [Student]'s IEP process, which resulted in the issuance of the November 17, 2017 IEP, all other issues related to this matter are moot.

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: October 1, 2018



Alice Q. Hosley
Administrative Law Judge