

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

State-Level Complaint 2012: 508
El Paso County School District 3, Widefield

DECISION

INTRODUCTION

This state-level complaint (Complaint) was properly filed on September 5, 2012, by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

To comply with the federal privacy laws (i.e., Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA))² and to protect the anonymity of the Complainants and their child, the persons and locations identified in this Complaint investigation and Decision will be labeled as follows and redacted prior to publication:

[Parents], parents of Student, (“Parents”);
[Student], child of Parent, (“Student”);
Student’s age of [Age], [Age];
El Paso County School District 3, Widefield, (“District”);
[School], (“School”);
[New School], (“New School”);
[Assistant Superintendent], District Assistant Superintendent, (“Assistant Superintendent”);
[Special Education Director], District Executive Director of Student Support Services, (“Special Education Director”);
[School Principal], School Principal, (“School Principal”);
[Assistant Principal], Assistant School Principal, (“Assistant Principal”);
[School Counselor], School counselor, (“School Counselor”);
[School Psychologist], School psychologist, (“School Psychologist”);
[Language Arts Teacher], School language arts teacher, (“Language Arts Teacher”);

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

² FERPA, codified at 20 U.S.C. § 1232g, was enacted to protect a parent’s access to education records and to protect the privacy rights of students and their parents. The IDEA regulations are found at 34 CFR § 300.1, *et seq.*

[Special Education Teacher], School special education teacher, (“Special Education Teacher”); and
[Parents’ Advocate], Parents’ advocate, (Parents’ Advocate).

Based on the written Complaint and an interview with Mother on September 5, 2012, the State Complaints Officer (SCO) determined that the Complaint identified three allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.³ The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

On September 7, 2012, the District’s Special Education Director was notified of Parents’ allegations in a letter which included a complete copy of the Complaint.

On September 24, 2012, the SCO timely received the District’s Response and Exhibits “1” through “19.” A copy of the District’s Response and all supporting documentation was delivered to Parents on September 26, 2012.

On October 5, 2012, the SCO timely received Parents’ Reply. A copy of Parents’ Reply and all supporting documentation was hand-delivered to the District’s Legal Counsel on October 9, 2012.

On October 9, 2012, the SCO conducted in-person interviews of the following individuals:

- Special Education Director
- School Principal
- Assistant Principal
- School Psychologist
- School Counselor
- Language Arts Teacher
- Special Education Teacher

On October 10, 2012, the SCO conducted in-person interviews of Parents and Parents’ Advocate.

On October 11, 2012, the SCO conducted a follow-up interview with School Psychologist by phone.

³ Hereafter, only the IDEA regulation and any corresponding Exceptional Children’s Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

On October 11, 2012, Parents provided additional information requested by the SCO and marked as Exhibit C. District's Legal Counsel was provided a copy of this Exhibit with the Decision.

On October 16, 2012, the SCO interviewed Assistant Superintendent by phone.

On October 22, 2012, the SCO closed the record.

PARENTS' COMPLAINT ALLEGATIONS

Parents' Complaint contained three allegations, summarized as follows:

1. From September 5, 2011, through April 24, 2012, Student was denied a free appropriate public education when the District failed to timely identify and evaluate Student for special education eligibility even though it was on notice that Student may be a child with a disability.
2. From April 24, 2012, to present, the District denied Student a free appropriate public education by predetermining Student's IEP services and failing to develop an IEP based on Student's individual needs.
3. From May 1, 2012, through the end of the 2011-2012 school year, the District failed to implement Student's IEP dated April 24, 2012, and failed to educate Student in the least restrictive environment (LRE) when the District's only response to Parents' ongoing concerns about Student's safety was the proposal to remove Student from class with typically developing peers.

Summary of Proposed Remedies. Parents proposed that School administration apologize to Student and educate School staff on how bullying prevents students with disabilities from receiving an education.

SUMMARY OF DISTRICT'S RESPONSE

Denying allegation 1, the District asserted that it had fully complied with its child find obligation and parental request for an initial evaluation. In support of its compliance with these obligations, the District asserted that it had no reason to believe that Student may be a child with a disability prior to January 2012 because Parents had not yet expressed concerns that Student may have a traumatic brain injury, had not shared a diagnosis for a traumatic brain injury, and had not requested a special education referral. Further, Student's academic performance and behavior during the first half of the 2011-2012 school year did not indicate that [Student] may be a child with a disability in need of special education.

According to the District, Parents first expressed concerns that Student may have a traumatic brain injury in early January 2012. Because Mother indicated that she was having Student evaluated, the District asserted that Parents agreed to wait for the results of the neuropsychological evaluation before initiating a special education evaluation. On April 10, 2012, after reviewing the results of the neuropsychological evaluation provided by Parents to the District on March 22, 2012, the District requested parental consent for an initial evaluation. On April 24, 2012, Student's IEP team determined that [Student] was eligible for special education and developed [Student's] initial IEP.⁴

Denying allegation 2, the District asserted that Parents' meaningfully participated in the development of Student's April 2012 IEP, and that the IEP developed was designed to provide Student with a free appropriate public education (FAPE). As evidence of meaningful parental participation, the District pointed to the accommodations listed on the April 2012 IEP and asserted that they were either accommodations developed by Mother and School Psychologist following a parent-teacher conference in January of 2012, or were accommodations suggested in the neuropsychological report obtained by Parents. Further, Parents actively participated in Student's IEP meeting by expressing their hopes and concerns for Student. Because the IEP team carefully considered the neuropsychological report, classroom observation and data from Student's response to intervention (RtI) plan, and parental input, the IEP developed was tailored to Student's unique needs and reasonably calculated to enable [Student] to receive educational benefit.⁵

Denying allegation 3, The District asserted that Parents chose to remove Student from School without providing Student's IEP team an opportunity to revise the IEP or otherwise address parental concerns about Student's safety from alleged bullying. Contrary to Parents' allegation that the District's only response to bullying was to remove Student from class, School Principal informed Parents that he believed that removing Student from class was not the best option, preferring to either leave Student in class with heightened and continual monitoring by administration or to have Student receive classroom instruction for the first half of class and go to study hall to receive extra instruction for the second half of class. Rather than allowing the District an opportunity to resolve their concerns about bullying, Parents withdrew Student from School. The District further noted that Parents' decision to withdraw Student from School was based on concerns about bullying rather than concerns about Student's IEP.⁶

SUMMARY OF PARENTS' REPLY

Concerning allegation 1, Parents asserted that the District took advantage of their lack of knowledge regarding special education law and procedure by not informing them of the special

⁴ Response, pp. 4-10.

⁵ Response, pp. 9-11.

⁶ Response, pp. 12-17.

education evaluation process. As an example of how the District took advantage of their lack of knowledge about IDEA, Parents reiterated the allegation that the District advised them to obtain an evaluation from Student's family doctor because testing was too expensive for the School to do. Parents also denied that they agreed to wait for the results of the neuropsychological report to have Student evaluated for special education. Instead, Parents asserted that the District continued to ignore their concerns about Student's grades until they received a copy of the neuropsychological report that was obtained by Parents in March 2012.⁷

Concerning allegations 2 and 3, Parents referred the SCO to their initial Complaint for "the facts and timeline."⁸

Parents also identified contradictions and omissions in the District's Response that they believed would undermine the District's credibility.

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,⁹ the SCO makes the following FINDINGS:

Factual Background:

1. At all times relevant to the Complaint, Student was a resident of the District and attended School.
2. Sometime during the 2010-2011 school year, Parents became concerned with Student's academic performance. Parents' concerns intensified during the 2011-2012 school year because they believed that Student's academic problems were becoming more severe and [Student] was not getting the help [Student] needed at School.¹⁰
3. In addition to their concerns about Student's academic performance, Parents believed that Student was being bullied.¹¹ Parents' concern for Student's safety from alleged bullying escalated sharply during the last week of April 2012.¹² After Student confided that [Student] was contemplating suicide, Parents withdrew [Student] from School because they believed that the School could not provide a safe environment for [Student].¹³

⁷ Reply, pp. 3-5.

⁸ Reply, p. 6.

⁹ Appendix A, attached and incorporated by reference, details the entire Record.

¹⁰ Interviews with Parents, School Principal, and Assistant School Principal.

¹¹ Complaint; interviews with Parents.

¹² Complaint; Response; interviews with Parents, School Principal, and Assistant School Principal.

¹³ Complaint; interviews with Parents.

4. Although Parents primarily filed this Complaint to address the District's response to the alleged bullying of Student, the SCO's authority to investigate this issue is limited to allegations that the District has violated the IDEA. Accordingly, this investigation concerns when and how Student was evaluated to determine eligibility for special education, and the development and implementation of Student's initial IEP.¹⁴ To the extent that the District's response to the alleged bullying was relevant to potential IDEA violations, it was investigated.

Initial Evaluation.

5. The District's policy regarding initial evaluations provides that a referral for evaluation may be made when a parent "believes that the student has or may have a disability that would cause the student to be eligible for special education services."¹⁵ Once a special education referral is received, the District must review the referral and existing information about the student to determine if the referral is appropriate.¹⁶

6. The District's general practice regarding parental requests for initial evaluations is to evaluate a student for special education eligibility whenever a parent specifically requests a special education evaluation or testing.¹⁷ If, however, a parent is expressing concerns about academic performance and not specifically requesting testing or evaluation based on suspected disability, the District's practice is to review existing data about the student and schedule a parent-teacher conference to explore parental concerns with the student's teachers. At this conference, the District also explains the special education referral process and Response to Intervention (RtI) to parents. Based on the results of the file review and the parent-teacher conference, the District may begin RtI and monitor the student's progress, immediately initiate a special education evaluation, or both. Special Education Director, School Psychologist, and School Counselor all agreed that they would immediately initiate a referral for special education evaluation if a parent specifically requested testing or evaluation at any time during this process. Further, all agreed that they would not refuse a parent's request for an initial evaluation, regardless of its appropriateness.¹⁸

7. Parents have alleged that they asked the District to evaluate Student in the fall of 2011, but they were told that they needed to see Student's doctor because such testing would be too expensive for the School to do.¹⁹ The District denied this allegation and asserted that Parents did not request a special education referral, and did not share concerns about Student's academic performance or suspicions that [Student] may have a traumatic brain injury until

¹⁴ Complaint; Reply; interviews with Parents. The remedies proposed by Parents in their Complaint exclusively addressed harm they believed to be caused by bullying.

¹⁵ Response, p. 5; Exhibit 10, p. 4.

¹⁶ Exhibit 10, p. 4.

¹⁷ Interviews with Special Education Director, School Psychologist, and School Counselor.

¹⁸ *Id.*

¹⁹ Complaint, p. 5; interviews with Parents.

January of 2012, at which time Parents informed the District that they were having Student evaluated by a neuropsychologist for a possible traumatic brain injury.²⁰

8. Based on the credible evidence in the record, as described below in FF 9-23, the SCO finds it more likely than not that Parents requested a special education referral in January of 2012, and the District's response to their request led Parents to reasonably conclude that they would have to obtain their own evaluation before school would address their concerns about Student's declining academic performance. Parents' specific factual allegation that the District told them that testing would be too expensive need not be resolved because it is the District's response to Parents' request to evaluate that is dispositive of this issue, not the reason allegedly given.

9. Although the District asserted that Parents did not express concerns about Student's academic performance until January of 2012, the SCO finds that Mother met with School Counselor on at least three occasions during the fall of 2011 to discuss her concerns about Student's academic performance and to ask for guidance on what could be done to help [Student].²¹ In her 2011 daily planner, Mother recorded that she met with School Counselor on September 21, October 13, and November 14.²² Due to the number of medical appointments that must be routinely scheduled for one member of the family, Mother carries a planner with her everywhere. School Counselor did not recall meeting with Mother in the fall of 2011 and did not have a record of any contact with her on the specific dates she recorded in her planner, though he was working on the days in question.²³ School counselor does not, however, routinely document contact with parents unless they have made formal and advance appointments through the counseling center.²⁴ Because Mother often drops by School to discuss her concerns and recorded the meetings in her planner, the SCO finds it more likely than not that Mother met with School Counselor on these three dates.²⁵

10. On September 21, 2011, Mother met with School Counselor to discuss her concerns about Student's academic performance during the 2010-2011 school year and to ask if there was any testing that the School could do to help figure out why Student was struggling and how to help [Student]. Mother informed School Counselor that Student used to get better grades and was an above-average student in grade school. During the 2010-2011 school year, however, Student's grades declined and [Student] seemed to be struggling academically.

²⁰ Response, pp. 5-8.

²¹ Response, pp. 6-7; interviews with School Counselor and Parents.

²² The daily planner was reviewed by the SCO during in-person interviews with Parents. Because these calendar pages contain personal medical information related to other family members, the SCO did not request that Parents submit copies for the District.

²³ Interview with School Counselor and email correspondence with District Legal Counsel.

²⁴ Confirmed in email correspondence with District's Legal Counsel.

²⁵ Although Mother did make formal appointments on occasion, Parents proximity to the School made it convenient for her to drop-in to see if anyone was available to discuss her current concerns. Interviews with Parents, School Principal, and Assistant Principal.

Mother also likely expressed concerns that Student was not able to read as well as [Student's] younger brother and was having trouble paying attention or remembering what [Student] had been asked to do.²⁶

11. In response to Mother's concerns, School Counselor suggested that many students struggle as they transition from elementary to secondary school and instructed Mother to ask Student's therapist about her concerns.²⁷ To help remember what she needed to discuss with Student's therapist at [Student's] next appointment, Mother wrote in her 2011 planner that School Counselor wanted her to ask Student's therapist for his "thoughts on [Student's] internal thoughts and distractibility."²⁸

12. On October 13, 2011, Mother met with School Counselor for a second time to inform him that she had discussed her concerns about Student's academic performance with [Student's] therapist, but that he had informed her that this was a matter for School to address.²⁹ Again, Parent asked School Counselor what could be done to figure out why Student was struggling. In response, School Counselor suggested that they continue to track Student's assignments with an organizer/planner to see if that would help with Student's grades.³⁰

13. On November 14, 2011, Mother met with School Counselor for a third time to ask why nothing was being done to help Student.³¹ Although Mother had met with School Counselor three times since the start of the 2011-2012 school year to discuss her concerns about Student's academic performance, he did not follow the District's policy or practice, as described above in FF 5-6. This failure to initiate the special education referral process, or at the very least to schedule a parent-teacher conference where Parents could discuss their concerns with Student's teachers, led Parents to reasonably conclude that they would have to obtain a private evaluation before School would do anything to help them figure out why Student was struggling. Consequently, Parents asked Student's therapist for help in early December of 2011.

14. On December 7, 2011, Mother met with Student's therapist and expressed her frustration that School was not doing anything to help her figure out why Student was having difficulty in school.³² At Mother's request, Student's therapist referred Student to [Student's] primary care doctor for further evaluation. On December 12, 2011, Student's primary care doctor referred Student for a neuropsychological evaluation based on Parents' concerns about Student's declining academic performance and on his review of Student's medical history, a

²⁶ Complaint, p.5; interviews with Parents; review of Mother's planner.

²⁷ Interviews with Parents. Although the District asserted that the planner was Mother's idea, Student did carry a planner in the fall of 2011. Response, p.5; interviews with Parents, School Counselor, and Language Arts Teacher.

²⁸ Interviews with Parents. Words in quotation taken from notes in Mother's 2011 planner.

²⁹ Interview with Parents and review of Mother's personal daily planner. The SCO notes that Student's therapist was providing family counseling and not individual counseling to Student.

³⁰ Interviews with Parents and review of Mother's daily planner.

³¹ Interviews with Parents and review of Mother's daily planner.

³² Interviews with Parents and review of Mother's daily planner.

history which presented the possibility of a traumatic brain injury due a number of documented concussions.³³

15. On January 11, 2012, Mother dropped by the School Counseling Center because she was upset that “nothing was being done” about Student’s traumatic brain injury.³⁴ During this meeting, she told School Counselor that Student had suffered at least four head injuries.³⁵ Although Parents have asserted that they suspected Student had a traumatic brain injury as early as 2010, the SCO finds it more likely than not that the first time Mother mentioned to School Counselor, or anyone else at School, that she suspected Student’s academic difficulties may be the result of multiple head injuries was when she met with School Counselor on January 11, 2012.³⁶ The SCO bases this finding on the fact that Mother has consistently stated that it was Student’s primary care doctor who first expressed the possibility that Student’s academic problems may be related to a traumatic brain injury when he reviewed Student’s medical records in December of 2011 and noted a history of multiple concussions.³⁷

16. Although Mother had previously expressed her concern about Student’s academic performance, the District did not have reason to suspect that Student may be a child with a disability until Mother informed them that Student had a history of multiple concussions. The effects of brain injury can be subtle and may present as behavior or characteristics that are typically associated with the great changes that accompany the teenage years, such as unstable emotions and poor self-control.³⁸ Without the context that Student may have a traumatic brain injury, Student’s academic performance and behavior at School was not declining in a way that would have reasonably put the District on notice that Student may be a child with a disability in need of special education.³⁹ For example, at the end of the first semester for the 2011-2012 school year, Student had earned “C”s in language arts and geography, and “D”s in math and science.⁴⁰ The previous school year, Student finished the fourth quarter with “C”s in math, science, writing, and literacy.⁴¹ From 2010 to 2011, Student’s CSAP results in reading dropped from partially proficient to unsatisfactory, but [Student] remained partially proficient in writing and math.⁴² And although Mother was distraught over Scantron results that identified Student

³³ Interview with Parents; review of Mother’s daily planner; Exhibit 7, p. 8.

³⁴ Response, p. 6; interviews with Parents and School Counselor.

³⁵ Exhibit 12; interviews with Parents and School Counselor.

³⁶ Mother did provide Assistant Principal with documentation that Student had suffered a concussion in September 2010 as a result of an altercation with another Student on the bus. This isolated incident would not have put the District on notice that Student’s academic difficulties in the fall of 2011 were the result of a concussion in 2010. Interviews with Parents and Assistant Principal.

³⁷ Interview with Mother on September 5, 2012; and interviews with Parents on October 10, 2012.

³⁸ Interviews with Dr. Karen McAvoy (CDE consultant on traumatic brain injury), Special Education Director, School Psychologist, and School Counselor.

³⁹ Interviews with School Counselor, School Psychologist, Special Education Director, and Special Education Teacher.

⁴⁰ Exhibit 5, pp.3-4.

⁴¹ Exhibit 5, pp.1-2.

⁴² Exhibit 5, p. 5.

as “at-risk” in certain sub-tests, these assessments are used to guide instruction District-wide and are not perceived as reliable indications of an individual student’s academic performance.⁴³ School Psychologist, School Principal, and Special Education Director have all described to Mother how a student’s academic performance is measured through a variety of tests and assessments, including grades and classroom observations. Mother, however, has remained focused on the Scantron results as evidence that the District should have known Student had a disability on the basis of these scores alone.⁴⁴ Finally, Student received one in-school detention during the fall of 2011, but otherwise did not have any disciplinary action or exhibit any troubling behavior at School.⁴⁵

17. During the meeting with Mother on January 11, 2012, School Counselor explained the School’s Rtl process, a process that is designed to provide Student with educational interventions and accommodations when a parent or educator first expresses concerns about a student’s academic performance.⁴⁶ He also asked Mother if Student had been diagnosed with a traumatic brain injury.⁴⁷ Mother informed him that she was having Student evaluated.⁴⁸ Based on this meeting with Mother, School Counselor scheduled a parent-teacher conference and asked Student’s teachers to note any difficulties they have observed and any interventions they have tried regarding Student.⁴⁹

18. The parent-teacher conference on January 20, 2012, was attended by Mother, School Psychologist and six of Student’s teachers, including Language Arts Teacher. Overall, Student’s teachers reported that [Student] had difficulty completing [Student’s] assignments, but that [Student] had shown improvement when using a planner that is signed by both Parents and teachers. Although Student did not typically exhibit unusual or troubling behavior, two of [Student’s] teachers reported that Student occasionally “zoned-out,” a condition described as having a fixed gaze and not responding to prompts or to what the class was doing.⁵⁰ In addition, one teacher reported that Student had been observed being rude in Spanish class, and one teacher reported that Student had to be separated from friends in math class.⁵¹

19. After Student’s teachers left the parent-teacher conference, Mother asked School Psychologist if Student could be on an IEP based on traumatic brain injury.⁵² In response, School Psychologist asked Mother if Student had ever been diagnosed with a traumatic brain

⁴³ Interviews with School Psychologist and Special Education Director.

⁴⁴ Interviews with School Psychologist, School Principal, Special Education Director, and Parents.

⁴⁵ Exhibit 8, p. 1; interviews with School Principal and Assistant Principal.

⁴⁶ Response, p.7; Exhibit 12; Interviews with School Counselor, School Psychologist, Special Education Director, Language Arts Teacher, and Special Education Teacher.

⁴⁷ Interviews with Parents and School Counselor.

⁴⁸ Interview with School Counselor.

⁴⁹ Exhibit 12; interview with School Counselor and Parents.

⁵⁰ Response, p.7; interviews with Language Arts Teacher and School Psychologist.

⁵¹ Response, p. 7; Exhibit 13; interviews with School Psychologist, Language Arts Teacher, and Mother.

⁵² Response, p. 7; interviews with School Psychologist and Parents.

injury.⁵³ Mother informed School Psychologist that Student had an appointment with a neuropsychologist on January 31, 2012, to explore this possibility.⁵⁴ School Psychologist asked Mother to provide her with a copy of the report as soon as she received it but did not otherwise explain the special education referral process or inform Mother that School could conduct its own evaluation to determine if Student was eligible for special education. In hindsight, School Psychologist reported that she would have initiated the evaluation process had she known how long it would take to receive Student's neuropsychological report.⁵⁵

20. The District asserted that, following the parent-teacher conference on January 20, 2012, Mother agreed that "it was appropriate to provide [Student] with some accommodations in [Student's] classes until she obtained a diagnosis which would trigger the need for a special education evaluation."⁵⁶ Parents denied that they ever agreed to delay a special education evaluation until after the neuropsychological evaluation was completed. Rather, Parents were seeking the private evaluation because School had not responded to their previous requests for evaluation and they had been told to have their own doctors evaluate Student.⁵⁷

21. Concerning this factual dispute, the SCO finds that Parents could not have agreed to delay a special education evaluation when the special education process had not yet been explained to them by School Counselor or School Psychologist and they had not been informed that the District could or would conduct its own evaluation. Further, School Counselor and School Psychologist both responded to Mother's disclosure, that she believed Student was struggling academically as a result of possible traumatic brain injuries, by asking her if Student had been diagnosed—as if the diagnosis was required to trigger the need to evaluate.⁵⁸

22. The criteria for physical disability in the area of traumatic brain injury, as approved by CDE and described on the District's own eligibility form, states that eligibility in this area is characterized by medical documentation of traumatic brain injury OR history of traumatic brain injury AND educational impact related to the traumatic brain injury.⁵⁹ Once Mother expressed concern that Student was struggling academically and may have a traumatic brain injury, the District had reason to suspect that [Student] may be a child with a disability in need special education and could have conducted its own evaluation for special education eligibility by reviewing Student's medical records for documentation or a history of traumatic brain injury and by assessing Student for cognitive, academic, social/emotional and behavioral impact related to the injury. In fact, Special Education Director explained that evidence of a traumatic brain injury could be obtained by getting a release of information to review Student's medical

⁵³ Interview with School Psychologist.

⁵⁴ Exhibit 13, p. 1; interview with School Psychologist.

⁵⁵ Interview with School Psychologist.

⁵⁶ Response, p. 7; interview with School Psychologist.

⁵⁷ Reply, pp. 3-4; interviews with Parents.

⁵⁸ Response, p. 7; interviews with School Counselor and School Psychologist.

⁵⁹ Exhibit 1, p. 14.

records and/or through the use of a detailed, seven-page health form that is completed by the school nurse.⁶⁰ Despite the fact that the District had the in-house capacity to evaluate Student for special education eligibility based on a traumatic brain injury, neither School Counselor nor School Psychologist explained that to Mother.⁶¹ Consequently, Parents had no choice but to obtain their own evaluation.

23. Student's written neuropsychological report was provided to Parents on March 22, 2012.⁶² Parents faxed a copy of this report to School on the same day. The neuropsychological evaluation was paid for by Parent's insurance, with Parents expending \$61 in co-pays.⁶³ Due to School's spring break, from March 26 through March 30, and School Psychologist's unexpected absence, the District did not review the report until April 10, 2012.⁶⁴

24. On April 10, 2012, School Psychologist called Mother to discuss Student's neuropsychological report.⁶⁵ During this conversation, School Psychologist spent considerable time with Mother explaining Student's neuropsychological report, and Section 504 and special education eligibility. School Psychologist also described in detail what Student's eligibility and IEP meeting would look like as Mother seemed to have many questions and concerns about the special education process.⁶⁶ School Psychologist also explained the Instructional Lab class where Student could receive additional help with organizational and study skills.⁶⁷ Mother requested that Student be placed in this class the very next day, rather than wait to discuss it at Student's IEP meeting on April 24, 2012.⁶⁸

25. On April 11, 2012, the District requested Parents' written consent for evaluation. The consent form notified Parents that the District was requesting to evaluate Student for special education in the areas of speech language and occupational therapy and would use the evaluation data from the neuropsychological report for all other areas to be evaluated.⁶⁹

26. The consent form indicated that Parents had been given a copy of the Procedural Safeguards Notice.⁷⁰ Mother stated that she received a copy of the Procedural Safeguards Notice for the first time at Student's IEP meeting on April 24, 2012.⁷¹

⁶⁰ Interview with Special Education Director.

⁶¹ Interviews with Parents.

⁶² Exhibit 7; interviews with Parents,

⁶³ Exhibit C.

⁶⁴ Response, p. 8; interview with School Psychologist.

⁶⁵ Exhibit 14; interviews with School Psychologist and Parents.

⁶⁶ Interviews with School Psychologist and Parents.

⁶⁷ Exhibit 14; interviews with School Psychologist, Special Education Teacher, and Parents. Instructional Lab includes students who are in the RtI process and is not exclusively a special education class.

⁶⁸ Exhibit 14; interviews with School Psychologist and Parents.

⁶⁹ Exhibit 4, p. 1.

⁷⁰ Exhibit 4, p. 1.

⁷¹ Interview with Parents.

27. From approximately January 20, 2012 through April 24, 2012, Student received the following interventions, as developed from Mother's input and the parent-teacher conference: 1) teachers will have Student repeat back directions to check understanding, 2) be given close activities in which partial answers are given, 3) be given models of work to be completed, 4) be asked to get up and walk when [Student] appears to be "zoning-out," e.g., get a pencil from teacher's desk.⁷² Student's teachers reported that the interventions seemed to be helping Student, with the exception of Student's math class.⁷³

Development of Student's Initial IEP.

28. On April 24, 2012, a properly constituted IEP team determined that Student was eligible for special education on the basis of traumatic brain injury. Student's IEP team included Parents, School Psychologist, Language Arts Teacher, Special Education Teacher, and a speech language pathologist.⁷⁴ Due to its comprehensiveness, Student's IEP team relied extensively on the privately obtained neuropsychological evaluation to determine eligibility and accommodations/modifications.⁷⁵ The District did conduct additional evaluations in the areas of speech-language and occupational therapy. As a result of these evaluations, the IEP team determined that Student qualified for Speech Language services and did not qualify for occupational therapy.⁷⁶ Student's initial IEP provided that [Student] would have 30 minutes of direct speech language therapy each week and 400 minutes of specialized instruction each week that would be delivered through the Instructional Lab class.⁷⁷

29. Parents have alleged that Student's initial IEP was predetermined because School Psychologist informed Mother on April 10, 2012, that Student would qualify for special education based on the results of [Student's] neuropsychological evaluation and then went on to describe exactly what services [Student] would be receiving, including the Instructional Lab class.⁷⁸ The SCO finds that School Psychologist explained Student's upcoming IEP meeting in detail, including the services Student may be receiving, so that Mother would feel more comfortable at the meeting. And, as noted above in FF 24, it was Mother who requested that Student be placed in the Instructional Lab class prior to [Student's] IEP meeting.⁷⁹ In addition,

⁷² Exhibit 13; interviews with School Psychologist, Language Arts Teacher; and Parents.

⁷³ Interviews with School Psychologist, Language Arts Teacher, and Special Education Teacher.

⁷⁴ Exhibit 1, pp. 2-3.

⁷⁵ Exhibit 6; Exhibit 7; Exhibit 1; and interviews with School Psychologist and Special Education Director.

⁷⁶ Exhibit 1, pp. 2 and 14-16; interview with School Psychologist. During the face-to-face interview, Mother alleged that School never completed Student's occupational testing. The occupational therapist no longer works for the District. School Psychologist confirmed that the occupational therapist had completed most of her testing and did not have concerns that Student was in need of occupational therapy based on the results of testing she had completed. The occupational therapist intended to complete the testing when Student felt better, but Student was disenrolled the following week. The SCO further notes that Student's current IEP team did not have concerns that Student was in need of further assessment in this area. Exhibit 1; interview with School Psychologist.

⁷⁷ Exhibit 1, p. 11.

⁷⁸ Interview with Mother on September 5, 2012.

⁷⁹ Exhibit 14; interviews with School Psychologist and Special Education Teacher.

Parents were present at Student's IEP meeting and actively participated in discussing their concerns for Student with the IEP team, including their concerns that Student was being bullied in one of [Student's] classes.⁸⁰

Implementation of Student's IEP.

30. During the 2011-2012 school year, Student told Parents that [Student] was being bullied in one of [Student's] classes and in an after school program that this same teacher supervised. Parents contacted this teacher numerous times to express their concerns about his classroom management and alleged bullying, but they did not believe that the teacher had the willingness or the ability to stop the bullying. Although Parents eventually removed Student from the after school program, they alleged that Student continued to be bullied in class.⁸¹ Parents have alleged that the School's only response to their concerns that Student was being bullied was to remove [Student] from class, in violation of [Student's] IEP.⁸²

31. In approximately late March or early April of 2012, Parents spoke to School Principal and Assistant Principal about their concerns and asked that Student be transferred to a different class. School Principal informed Parents that he was not willing to remove Student from the class at this time, but that he would have the teacher change the class seating chart so that Student would be separated from the alleged bullies. In addition, he told Parents that he would occasionally drop-by the class to monitor the situation.⁸³

32. On April 24, 2012, before Student's IEP meeting, Parents caught Assistant Principal as he was leaving his office and again expressed their concerns about bullying. Assistant Principal told Parents that he would investigate their concerns and get back to them.⁸⁴ At the end of April 2012, Assistant Principal investigated Parents' concerns by interviewing seven Students who attended this class and were not friends with Student or friends with the alleged bullies.⁸⁵ As a result of this investigation, Assistant Principal concluded that both Student and the alleged bullies were acting out in class and trying to get each other in trouble, i.e., this was a case of mutual antagonism, not bullying.⁸⁶

33. On April 30, 2012, Mother stopped by School Principal's office after school hours because she was extremely upset after Student told Father that [Student] had been covered with spit balls in class that day. School Principal reported that Mother was extremely worried about Student's safety, particularly now that [Student] had just been diagnosed with a

⁸⁰ Interviews with Parents, School Psychologist, Special Education Teacher, and Language Arts Teacher.

⁸¹ Complaint; Interviews with Parents, School Principal, and Assistant School Principal. The SCO could not interview the teacher of the class in question as he no longer works for the District.

⁸² Complaint 6-10; interview with Parents.

⁸³ Interviews with School Principal, Assistant Principal, and Parents.

⁸⁴ Interviews with Parents and Assistant Principal.

⁸⁵ Interview with Assistant Principal.

⁸⁶ Interviews with School Principal and Assistant Principal.

traumatic brain injury. Mother also requested that Student be removed from this class. In response, School Principal stressed that it would be best for Student to remain in the class to receive adequate instruction. Because Mother was not satisfied with this response, School Principal and Mother decided they would meet the next day to further discuss how this situation could be resolved.⁸⁷

34. On May 1, 2012, Parents and Parents' Advocate met with School Principal and Assistant Principal to discuss Parents' concerns about bullying and their request that Student be removed from this class. At this meeting, School Principal presented three possible solutions: 1) Student could remain in class and administration would monitor the situation more closely; 2) Student could spend the first half of the 78 minute block in class to receive instruction with [Student's] peers and spend the second half of class in a supervised study hall; or 3) [Student] could spend the entire class in study hall where [Student] would receive instruction from School Principal, who is a former math teacher, and Special Education Teacher.⁸⁸ Because the School does not offer a supervised study hall, Student would be supervised in the same room designated for in-school detention (ISD).

35. As soon as School Principal used the word ISD, Mother became extremely upset and asked why Student was the one being punished instead of the alleged bullies. School Principal assured Parents that Student would not be in detention and that there were other students in this room, like Student, who were not serving detention.⁸⁹

36. Mother stated that the only way she would allow Student to remain in this class was if the alleged bullies were removed and School Principal or Assistant Principal agreed to monitor the class for the entire period.⁹⁰ When School Principal explained that they could not and would not do this, Father suggested that he pick Student up and take [Student] home during this class period. Although School Principal stated that he preferred that Student stay in class where [Student] would receive instruction, he also told Parents that he would excuse Student from attending this class—which is what he understood Parents had been requesting all along. At the end of the meeting, it was understood that Father would pick-up Student before this class and take [Student] home.⁹¹

37. When Father picked Student up from School that day, Student told him that [Student] had been bullied on the basketball court at lunch and that one student had pushed [Student]. Later that night, Student confided to Mother that [Student] wanted to kill [her/himself] because the bullying kept getting worse and nobody would do anything about it.⁹² Parents immediately called the police and Student was taken by ambulance to a local hospital for

⁸⁷ Interviews with School Principal and Parents.

⁸⁸ Response; interviews with School Principal, Assistant Principal, Parents, and Parents' Advocate.

⁸⁹ Interviews with School Principal and Assistant Principal.

⁹⁰ Interviews with School Principal, Assistant Principal, Parents, and Parents' Advocate.

⁹¹ Interviews with Parents, School Principal, Assistant Principal, and Parents' Advocate.

⁹² Complaint; interviews with Parents.

evaluation. During the evaluation, Student promised the mental health professionals evaluating [Student] and Parents that [Student] would not hurt [her/himself] as long as [Student] did not have to return to School.⁹³ Student was released from the hospital after Parents promised [Student] that [Student] would not have to return to School.⁹⁴

38. On May 2, 2012, Parents met with Assistant Principal and informed him that Student had threatened to kill [her/himself], and that they were withdrawing [Student] from School.⁹⁵ Student was disenrolled on May 2, 2012.⁹⁶ School Principal called Mother on May 3, 2012, to discuss this situation, including the email Mother had sent to Student's teachers about bullying, but she never returned his call.⁹⁷

39. On May 7, 2012, Parents and Parents' Advocate met with Assistant Superintendent, who at that time was serving as the Executive Director of Student Services, to discuss bullying at School and to demand that something be done about it. The majority of the meeting was spent discussing the alleged bullying and Student's safety, in light of [Student's] recent suicidal ideation. Parents demanded that Assistant Superintendent investigate the alleged bullying and inform them of the results, which he agreed to do.⁹⁸

40. During their meeting on May 7, 2012, Assistant Superintendent also asked Parents to reconsider removing Student from School to allow School the opportunity to respond to their concerns. Parents informed him that Student was never returning to School and that they wanted [Student] enrolled in New School for the 2012-2013 school year. Assistant Superintendent informed Parents that he would approve a transfer to New School, and he did so. At the end of the meeting, everyone understood that Student would not be returning to School or starting New School for the remainder of the 2011-2012 school year and that [Student] would be enrolled at New School for the 2012-2013 school year.⁹⁹ Parents and Student visited New School during the week of May 14, 2012, and May 21, 2012.¹⁰⁰

41. By May 2, 2012, one day after Student was to begin receiving the special education programming and services listed on [Student's] initial IEP, Parents had withdrawn Student from School for the remainder of the 2011-2012 school year because they believed that this was the only way they could ensure [Student's] physical safety and emotional well-being.¹⁰¹

⁹³ Interview with Parents.

⁹⁴ Interview with Parents.

⁹⁵ Complaint, p. 8; interviews with Parents and Assistant Principal.

⁹⁶ Interviews with Parents and Assistant School Principal.

⁹⁷ Exhibit 18; interview with School Principal.

⁹⁸ Assistant Superintendent did conduct an investigation and concluded, like Assistant Principal, that this was not a case of harassment or bullying. Rather, the Assistant Superintendent's investigation found that Student contributed to the dysfunctional classroom environment by being disrespectful and acting out in class, along with the alleged bullies.

⁹⁹ Interviews with Parents, Parents' Advocate, and Assistant Superintendent.

¹⁰⁰ Dates confirmed with District's Legal Counsel by email.

¹⁰¹ Interviews with Parents, School Principal, and Assistant Principal.

Consequently, the SCO finds that School did not fail to implement Student's IEP or educate Student in the LRE because it was Parents who chose to remove Student from class on May 1, 2012, and to remove Student from School on May 2, 2012, without giving the School an opportunity to address their escalating concerns.

42. Student is doing well at New School and Parents are satisfied with the special education services [Student] is currently receiving.¹⁰²

CONCLUSIONS OF LAW

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

Allegation One: The District violated the IDEA at 34 CFR § 300.301 (b) by requiring Parents to obtain a diagnosis before they would initiate the special education referral process.

1. A parent of a child may initiate a special education referral by requesting an evaluation. 34 CFR § 300.301 (b); ECEA Rule 4.02 (3)(a)(ii). Once a special education referral has been initiated, the administrative unit, here the District, must complete the initial evaluation within 60 days. 34 CFR § 300.301 (c); ECEA Rule 4.02 (c). The special education referral process is initiated, and the 60-day clock starts, when the district has received a request for an initial evaluation from the parent *and* the parent has provided written consent for the initial evaluation. 34 CFR § 300.301 (b); ECEA Rule 4.02 (3)(c)(ii).

2. 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.”). For the reasons explained below, the SCO concludes that by January 20, 2012, the District suspected that Student may have a disability and be in need of special education. Because the District waited until April 10, 2012, to request parental consent for an evaluation, the SCO concludes that it violated federal and state regulations regarding initial evaluations at 34 CFR § 300.301 (b) and ECEA Rule 4.02 (3)(a).

3. Although Parents first requested testing in the fall of 2011, the District’s response to Parents’ request for evaluation did not ripen into a violation of 34 CFR § 300.301 until January of 2012, the first time Mother mentioned to School Counselor that she suspected Student may have a traumatic brain injury. (FF 8-20). While parents should not be required to use the words “special education” evaluation, cite the federal regulation governing initial evaluations, i.e., 34

¹⁰² Interviews with Parents and Special Education Director.

CFR § 300.301, reference an IEP, or provide a diagnosis in order to trigger a special education referral, school districts should not be expected to recognize and respond to any parental request for testing as a request for a special education evaluation. Because Mother's previous requests for testing were made without reference to a suspected disability, and identified characteristics commonly associated with typical teenagers, the District was not reasonably on notice that she was requesting a special education evaluation in the fall of 2011. (FF 15-16). Because the effects of brain injury can be subtle, Mother's concern for Student's grades, difficulty reading, and difficulty following instructions would not have reasonably suggested that she suspected Student had a disability when she did not also mention Student's history of multiple concussions, particularly when considering that Student was not suddenly failing classes or exhibiting unusual or troubling behavior. (FF 15-17). The SCO notes that it is unfortunate that School Counselor did not follow the District's proactive practice and schedule a parent-teacher conference when Mother first came to him in the fall of 2011 with concerns about Student's academic performance.

4. By January 20, 2012, the District was aware that Student may be a child with a disability in need of special education, as evidenced by the accommodations it began providing to Student while waiting for Parent to provide the neuropsychological report. (FF 16-20, and 27). On January 11, 2012, Mother informed School Counselor for the first time that she suspected Student was struggling academically as a result of four previous head injuries. (FF 15). At this time, School Counselor should have understood that Mother was requesting a special education evaluation based on traumatic brain injury. Both School Counselor and School Psychologist asked Mother if she had a diagnosis, but they did not request parental consent for evaluation or otherwise inform Parents that the District could or would conduct its own evaluation. (FF 17-21). Accordingly, Parents could not have agreed to delay a special education evaluation because the District had not explained that they may be entitled to one. (FF 21).

5. Further, it is the suspicion that a child may have a disability and be in need of special education that triggers the District's obligation to conduct an initial evaluation, not a particular diagnosis. 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, 1212-1214 (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).

6. In this case, the District's response to Parents' concerns about Student's declining academic performance and requests for testing led Parents to reasonably conclude that they would have to obtain a diagnosis through a private evaluation before the District would conduct its own evaluation. (FF 9-21). When Mother first consulted School Counselor in the fall of 2011 about Student's grades, he suggested that she talk with Student's therapists about her concerns. (FF 10-11). When Mother informed School Counselor that she had done as he

suggested and was told by Student's therapist that this was a matter for the School to address, School Counselor simply suggested that Student continue to carry a planner. (FF 12). Frustrated that the School would not address her concerns, Mother began pursuing a private evaluation of Student in December of 2011. (FF 10-14).

7. When Mother informed School Counselor and School Psychologist in January of 2012 that she suspected Student was having difficulty in school because [Student] had a traumatic brain injury, they asked her if Student had been diagnosed as such. (FF 17 and 19). Due to the kind of accommodations Student was being provided following the January 20, 2012 parent-teacher conference, the SCO concludes that the District also now suspected that Student may have a disability based on a traumatic brain injury. (FF 27). The fact that Mother informed them that she was in the process of having Student evaluated by a neuropsychologist, at her own expense, did not absolve the District of its obligation to conduct an initial evaluation when it suspected that Student had a disability. (FF 20-22). By asking Mother if she had a diagnosis and not informing her that the District could or would evaluate Student, they impermissibly shifted the obligation for obtaining the evaluation to Parents. (FF 17-22).

8. A comprehensive neuropsychological evaluation, like the one obtained by Parents in this case, is not required to determine whether a student has a traumatic brain injury and is need of special education. Rather, the existence of the injury can be evidenced by a review of Student's medical records and/or comprehensive health screening, and educational impact can be evaluated by using standard assessments in the areas that the multidisciplinary team suspects have been impacted by the injury, e.g., cognitive, speech language, social/emotional, and behavior. ECEA Rule 2.08 (1). See the Traumatic Brain Injury Networking website developed by the Colorado TBI Trust Fund at <http://cokidswithbraininjury.com/educators-and-professionals/tbi-identification-protocol/> for assessments and screening tools that can be used to evaluate special education eligibility on the basis of traumatic brain injury. Although Special Education Director acknowledged that the District could fully evaluate Student for special education eligibility based on a traumatic brain injury, it waited for Parents to provide the evaluation it would essentially use to establish [Student's] eligibility. (FF 22-23 and 28).

9. By requiring Parents to obtain a private neuropsychological evaluation before they would initiate a special education referral and seek parental consent to conduct an evaluation, the District has violated the IDEA's procedural requirements. However, it is well-settled that procedural violations of the IDEA are only actionable to the extent that they impede the child's right to FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

10. The question now is whether School's failure to initiate a special education referral and not seek parental consent for evaluation until April 11, 2012, resulted in substantive harm to

Student, i.e., impeded [Student's] right to FAPE or caused a deprivation of educational benefit. The definition of a free appropriate public education is special education and related services that "are provided in accordance with an [IEP]." 34 CFR §§ 300.17 and 300.101. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to timely evaluate and develop an IEP for a student who is eligible for special education and related services certainly impedes [Student's] right to FAPE. Accordingly, the SCO concludes that this procedural violation resulted in substantive harm to Student and entitles [Student] to compensatory education services.

11. Compensatory education is an equitable remedy intended to place a student in the same position they would have been, if not for the violation. *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Because ECEA Rule 4.03(1)(d)(i) requires that an initial IEP be developed within 90 calendar days of receiving parental consent for the initial evaluation, Student should have been receiving the services listed on [Student's] initial IEP beginning on or around April 20, 2012, through May 2, 2012, if not for the District's failure to timely request parental consent. (FF 28 and 38). According to Student's initial IEP, direct services for these two weeks would have provided [Student] with 60 minutes of speech language services and 800 minutes of specialized instruction, as delivered through the Instructional Lab class. (FF 28). The SCO is awarding Student 60 minutes of speech language services and 360 minutes of special education services that are consistent with those that would have been provided in the Instructional Lab class.

12. In addition, the School District shall reimburse Parents \$61 for the cost of Student's neuropsychological evaluation. (FF 23).

Allegation Two: The District did not predetermine Student's initial IEP.

13. Parents alleged that Student's IEP was predetermined because they were told what the IEP meeting would be like and what services Student would likely receive, including the Instructional Lab class. The development of a student's IEP is a collaborative process that "places special emphasis on parental involvement." *Sytsema v. Academy School District No. 20*, 538 F.3d 1306, page, (10th Cir. 2008). In developing an IEP, a school district is required to consider parental suggestions and requests, and to the extent appropriate, incorporate them into the IEP. *O'Toole v. Olathe Dist. Schools*, 144 F.3d 692, 107 (10th Cir. 1998). Predetermination happens when the District comes to the IEP meeting with a closed mind or presents the IEP as "take-it-or-leave it." Preparation in advance of an IEP meeting is not predetermination. *T.P. v. Mamaronek Union Free Sch. Dist.*, 554 F.3d 247, 253 (2nd Cir. 2009). In this case, Parents were present at Student's initial IEP meeting on April 24, 2012, and participated in the meeting by providing input about Student and discussing their concerns. School Psychologist's detailed explanation of what the IEP meeting would look like, including a description of services Student may be receiving, was done to help prepare Mother for

Student's initial IEP meeting. (FF 28-29). Such preparation does not constitute predetermination when Parents attended Student's IEP meeting and actively participated.

Allegation Three: The District's response to allegations that Student was being bullied did not result in a failure to implement Student's initial IEP.

14. In this case, Parents have alleged that Student's IEP was not implemented in the least restrictive environment from April 24, 2012, to May, 24, 2012, because the District's only response to allegations that Student was being bullied was to remove [Student] from class. Parental concerns about bullying generally raise disability-based harassment or discrimination claims that fall under the jurisdiction of federal civil rights statutes such as Section 504 or Title II of the Americans with Disabilities Act (ADA), rather than the IDEA. While jurisdiction to investigate bullying is still quite limited under IDEA, several courts have held that bullying can amount to a denial of FAPE when it negatively impacts the ability of a student receiving special education services to learn. *M.L. v. Federal Way School District*, 394 F.3d 634, 651 (9th Cir. 2005); *Shore Regional High School Board of Education v. P.S.*, 381 F.3d 194 (3rd Cir. 2004); *Charlie F. v. Board of Education of Skokie School District 68*, 98 F.3d 989 (7th Cir. 1996) (concluding that, in principle, relief would be available under the IDEA for a student who suffered loss of self-esteem and educational progress after his teacher repeatedly invited his classmates to openly complain about him); *T.K. vs. New York City Dep't of Educ.*, 779 F. Supp. 2d 289 (E.D.N.Y. 2011) (collecting cases and summarizing recent social science research on bullying and its impact on students).

15. A District may be liable for a denial of FAPE if it is deliberately indifferent to allegations of bullying. *M.L. v. Federal Way School District*, 394 F.3d 634, 651 (9th Cir. 2005) ("If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE.") In this case, the District was not deliberately indifferent to Parents' allegations that Student was being bullied. School Principal and Assistant Principal investigated Parents' allegations of bullying and concluded that Student was not being bullied. Rather, [Student] was participating in the disruptive class environment by being disrespectful and acting out in class. (FF 32-33). Not every incident of student to student conflict amounts to bullying. *Jenison Pub. Sch. Dist.*, 47 IDELR 81 (OCR 2006) (on-going feud between former friends did not constitute bullying). Further, the District offered to more closely monitor the class where Student was allegedly being bullied, even though it had concluded through its investigation that Student was not being bullied in this class. (FF 32-41). Because the District investigated and responded to Parents' allegations, the SCO concludes that it was not deliberately indifferent.

16. Although a district may be liable for a denial of FAPE if it is deliberately indifferent to bullying and the bullying negatively impacts a student's ability to learn, parents must give the school district a reasonable opportunity to respond to the allegations and offer solutions. *M.L.*

v. Federal Way School District, 394 F.3d 634, 651 (9th Cir. 2005)(Parent failed to give the school a reasonable opportunity to respond to bullying concerns when she withdrew the student after five days.) In this case, Parents did not give the District a reasonable opportunity to respond and refused to consider a variety of options presented by removing Student from class on May 1, 2012, and disenrolling [Student] from School on May 2, 2012. (FF 30-41). On April 30, 2012, in response to Parents' concerns and their previous request that Student be removed from this class, School Principal outlined three possible solutions, including leaving Student in class and closely monitoring the situation. (FF 34-36). Upset that School would not remove the alleged bullies from class and assign School Principal or Assistant Principal to monitor the class for its entirety, Parents chose to take Student home for that class period. (FF 43-37). On May 1, 2012, Student informed Parents that [Student] wanted to kill [her/himself] because things at School kept getting worse. (FF 37). Because Parents believed that the only way to protect Student was to never allow [Student] to return to School, they disenrolled [Student]. Mother did not return a call from School Principal on May 3, 2012, to further discuss the situation, or request to enroll Student in New School for the remainder of the 2011-2012 school year. Parents did what they believed was best for Student when they withdrew [Student] from School following [Student's] release from the hospital. The District, however, is not responsible for Student not receiving the services described on [Student's] IEP when it was Parents who chose to withdraw Student from School rather than allow the District an opportunity to address their escalating concerns. (FF 37-41).

REMEDIES

The SCO has concluded that the District violated the following IDEA and ECEA requirements:

- a) Initial Evaluation at 34 CFR § 300.301 and ECEA Rule 4.02 (3).

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

- 1) **By November 19, 2012**, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the failure to respond to the parent's special education referral, as noted in the 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 suspected of having disabilities enrolled in School. The CAP must, at a minimum, provide for the following:
 - a) Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the failure to initiate a special education referral, no later than November 19, 2012.
 - b) Effective training must be conducted for anyone at School in the position to receive a request for special education referral/evaluation, including school psychologists, school

counselors, special education teachers and service providers, and intended designees concerning the policies and procedures, to be provided no later than January 30, 2013. The CDE will provide this training, if requested.

- c) Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department no later January 30, 2013.

2) Compensatory Education Services for Failure to Provide Student with a FAPE.

The District shall provide Student with the following compensatory education services: 1) 60 minutes of direct speech language services; and 2) 360 minutes of specialized instruction services. The Parties shall cooperate in determining how the compensatory education services will be provided. Within 10 days of receiving this Decision, the District shall convene a meeting with Parent to determine a schedule for delivering the compensatory education services described above. The District must provide the Department with a copy of the schedule for compensatory services within 10 days of this meeting.

By January 21, 2013, the compensatory education services must be completed. To document compliance with this remedy, the District must record the compensatory education provided on service logs that include the following information: the name and title of the provider, the date and duration of service, a brief description of the service, and an indication of whether the services were compensatory or services required by the IEP. The District should also use this log to document whether Parent cancelled or Student failed to attend any scheduled services. By January 10, 2013, written documentation that the District is in full compliance with this remedy must be submitted to the Department.

- 3) Within 7 days of the date of this Decision, the District must reimburse Parents \$61 for the cost of Student's neuropsychological evaluation. The District must submit documentation that it has complied with this remedy by November 19, 2012.

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.

The District shall provide the Department with documentation that it has complied with this requirement no later than January 30, 2013.

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

Colorado Department of Education
Exceptional Student Leadership Unit
Attn.: Joyce Thiessen-Barrett, Senior Consultant

1560 Broadway, Suite 1175
Denver, CO 80202-5149

NOTE: Failure by the District to meet any of the timelines set forth above will 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 1st day of November, 2012.

Candace Hawkins

Candace Hawkins, Esq.
State Complaints Officer

Appendix A

Complaint, pages 1-10.

Exhibit A: Email sent by Parents to Student's teachers.

Exhibit B: Student's April 2012 IEP, special education referral form, consent for evaluation, prior written notice, consent for initial provision of services, and determination of eligibility.

Exhibit C: Documentation of payment for private neuropsychological evaluation.

Reply, pages 1-6.

Response, pages 1-18.

Exhibit 1: Special education referral form, IEP dated April 2012, IEP amendment dated May 2012, IEP dated September 2012, including meeting notes.

Exhibit 3: Notices of Meeting.

Exhibit 4: Prior Written Notices.

Exhibit 5: Student's grade reports

Exhibit 6: Email exchanges between Parent and School staff concerning Student's initial evaluation.

Exhibit 7: Neuropsychological report obtained by Parents dated March 2012.

Exhibit 8: Attendance records for the 2010-2011 and 2011-2012 school years.

Exhibit 9: District Calendar for the 2011-2012 school year.

Exhibit 10: District policy and procedures.

Exhibits 12-15: Correspondence between School staff concerning Student.

Exhibits 16-19: Correspondence between Parents and school staff concerning allegations of bullying.

In –person interviews with:

- Parents
- Parents' Advocate
- Special Education Director
- School Principal
- Assistant Principal
- Special Education Director
- School Psychologist
- School Counselor
- Language Arts Teacher
- Special Education Teacher

Telephone interview with Assistant Superintendent.