

Colorado Department of Education  
Decision of the State Complaints Officer  
Under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup>

State-Level Complaint 2016:525  
Douglas County School District

DECISION

INTRODUCTION

Complainant is the mother (“Mother”) of a child (“Student”) who is identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”).<sup>2</sup> Mother brought this Complaint against the Douglas County School District (“School District”) on behalf of Student, who attends Charter School in the School District. The complaint was properly filed on October 11, 2015, requiring that the decision be issued by December 10, 2016. Based on extraordinary circumstances, the State Complaint Officer (“SCO”) extended the deadline to December 20, 2016. The SCO determined that the Complaint identified allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.<sup>3</sup>

COMPLAINT ALLEGATIONS

The SCO accepted for investigation the following issues:

1. Whether in February 2016, the School District conducted evaluations that complied with the requirements of the Individuals with Disabilities Education Act (IDEA);
2. Whether in a meeting held on February 10, 2016, the School District violated the IDEA by:
  - a. Failing to provide proper notice to Student’s parents (Parents), thereby denying them meaningful participation in the special education eligibility determination process;
  - b. Failing to include a classroom teacher in the meeting;
  - c. Failing to determine that Student is an eligible child with a disability under the IDEA;
  - d. Failing to provide Parents with proper Prior Written Notice (PWN).
3. Whether in an IEP/eligibility meeting held on August 22, 2016, the School District violated the IDEA by:
  - a. Failing to provide Parents with proper notice of the meeting;
  - b. Failing to give appropriate consideration to an independent educational evaluation (IEE) obtained by Parents;
  - c. Failing to determine that Student is an eligible child with a disability under IDEA.
4. Whether in an IEP/eligibility meeting held on September 27, 2016, the School District violated the IDEA by failing to properly interpret and consider the results of all evaluations,

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 C.F.R. § 300.1, *et seq.*

<sup>2</sup> The Complaint was filed by Family Friend on behalf of Student. The SCO permitted Mother to substitute herself as the complainant on October 17, 2016. Family Friend has continued to participate in the complaint investigation process as an advocate for Mother.

<sup>3</sup> 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).

including the IEE obtained by Parents, in determining that Student is not an eligible child with a disability under IDEA.

5. Whether the School District violated the IDEA by failing to implement Student's IEP from February 12, 2016 through September 27, 2016.

### FINDINGS OF FACT

Based upon a careful and thorough review of the record, the SCO finds as follows:

1. Student is a [age]-year-old girl who resides with her parents ("Parents") within the boundaries of the School District. Student is in 6<sup>th</sup> grade and attends Charter School, a charter school within the School District. Student has attended Charter School since 3<sup>rd</sup> grade.
2. From May 2013 to February 2016,<sup>4</sup> Student was identified and served as an eligible child with a disability under the Specific Learning Disability category, with a learning disability in reading fluency. Reading fluency refers to the ability to read a text accurately, quickly, and with expression.<sup>5</sup> Reading fluency is important because it provides a bridge between word recognition and comprehension. "Students who read with automaticity and have appropriate speed, accuracy, and proper expression are more likely to comprehend material because they are able to focus on the meaning of the text," rather than on decoding the actual words.<sup>6</sup>
3. At the beginning of the 2015-2016 school year, when Student was in 5<sup>th</sup> grade, Student was being educated pursuant to an IEP developed in February 2015. The February 2015 IEP stated that Student's disability impacted her ability to access general education "across multiple content areas."<sup>7</sup> Student's classroom teacher reported that Student was somewhat disorganized and was inconsistent with homework and turning in assignments, but that she was a "pleasure to have in class."<sup>8</sup> Student's reading interventionist (*i.e.*, Special Education Teacher) reported that Student was "inconsistent with her progress monitoring in reading." Student did better with topics that interested her than she did with passages in which she did not have the background knowledge.<sup>9</sup>
4. Student's 2014-2015 IEP contained one goal: "When reading a fourth grade level passage, [Student] will read 110 words correct per minute with 98% accuracy." The February 2015 IEP stated that Student was "close to reaching this goal," but had "a hard time being consistent with her reading fluency," and that Student "would still benefit from reading intervention to increase her fluency ability to be more consistent with her fluency as well."<sup>10</sup>

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<sup>4</sup> Student enrolled at Charter School already on an IEP. The Charter School staff and teachers had no involvement in determining Student's eligibility for special education and related services, or in the development of her initial IEP.

<sup>5</sup> *Oral Reading Fluency Norms: A Valuable Assessment Tool for Reaching Teachers* (Hasbrouk & Tindal, 2006), [https://www.cde.state.co.us/cdesped/article\\_oralfluencynorms](https://www.cde.state.co.us/cdesped/article_oralfluencynorms); Interview with Special Education Teacher.

<sup>6</sup> *Oral Reading Fluency* (Rasplica & Cummings, University of Oregon, 2013), <http://www.council-for-learning-disabilities.org/what-is-oral-reading-fluency-verbal-reading-proficiency>.

<sup>7</sup> Ex. F, p. 5.

<sup>8</sup> *Id.*, p. 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

5. Overall, during the 2014-2015 school year, Student did very well in school and was a successful student. Her grades for the 2014-2015 year were all As and Bs, except for a D in language arts because of from some missed assignments.<sup>11</sup>
6. The February 2015 IEP contained two goals, both for reading. Goal 1 provided that “when given a fifth grade reading passage, [Student] will consistently read 130 words per minute with 98% accuracy as measured by progress monitoring data.” Goal 2 provided that “using informational text, [Student] will answer comprehension questions using the strategies of locating information, making inferences and supporting conclusions with the details from the passages with 80% accuracy.”<sup>12</sup>
7. The February 2015 IEP also included the following accommodations:

extra time (up to 1.5x), oral presentation, and teacher read directions on assignments, projects, instruction, tests, and quizzes in reading, writing, math, social studies, and science.  
Check in for understanding and provide the opportunity for her to ask for help if needed.  
Provide small group or one-on-one support in class.<sup>13</sup>
8. Student’s special education services were as follows: “60 minutes [per week] of direct outside of the classroom instruction as well as 60 minutes [per week] of direct inside the classroom instruction to work on her reading goals with a learning specialist.”<sup>14</sup> Student’s special education services were provided by Special Education Teacher, who provided Student with one hour per week (in two thirty minute sessions) of pull-out instruction, and one hour per week of in-class instruction, broken up into smaller sessions throughout the week. The in-class instruction was provided either by Special Education Teacher herself, or by a paraprofessional under the supervision of Special Education Teacher.<sup>15</sup>
9. Student’s services, both inside and outside of the classroom, “piggy-backed” on the work Student was doing in class, including “chunking down” reading passages and going through comprehension exercises. The pull-out services also included fluency drills to build Student’s reading fluency.<sup>16</sup>
10. At periodic intervals, Special Education Teacher administered a normed assessment used for fluency called DIBELS. Over the course of the 2015-2016 school year, Student’s DIBELS scores were slightly below her grade level benchmarks for reading fluency.<sup>17</sup> However, Student’s performance on the DIBELS progressed steadily. Special Education Teacher reported that Student “made huge progress” during the school year, and while her benchmark scores were low, they were close to meeting their target, such that Special Education Teacher felt that Student was essentially performing at grade level. Further, via regular comprehension drills

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<sup>11</sup> *Id.*, p. 3; interview with Special Education Teacher.

<sup>12</sup> Ex. F, pp. 5-6.

<sup>13</sup> *Id.*, p. 6.

<sup>14</sup> *Id.*, p. 8.

<sup>15</sup> Interview with Special Education Teacher.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*; Ex. F.

(also part of Student's progress monitoring), Student consistently demonstrated comprehension of what she was reading.<sup>18</sup>

11. The progress monitoring data was borne out by Student's performance in class, where she demonstrated an understanding of what she read, raised her hand and answered questions correctly, and participated successfully in class discussion. Former General Education Teacher reported that in her reading class, Student was "independent" and rarely used her IEP accommodations. Whereas most students who have trouble with reading fluency would stumble over words and have difficulty with comprehension, Student was able to read with relatively good fluency, was able to comprehend what she was reading, and was engaged and demonstrating that she was engaged in the material. She followed along in class, was able to answer questions, was able to do the work, and presented like an average general education student. "She walked out of class knowing what fifth graders should know." Student's grades were in the average range, and any low grades reflected Student's failure to turn in some assignments, not difficulty doing the actual work. Former General Education Teacher described Student as a good student who was not a "stand-out," i.e., there was nothing about her performance or conduct in class that set her apart as a student who had difficulties functioning in the general classroom or who was having trouble accessing the general curriculum.<sup>19</sup>
12. Special Education Teacher echoed the observations of Former General Education Teacher, noting that Student received "minimal" specialized instruction (only one hour per week out of class and one hour per week in class), and that over the course of 5<sup>th</sup> grade, Student's fluency progressed to the point that she was reading well and clearly comprehending what she was reading.<sup>20</sup>

### The February 2016 Reevaluation

13. The IDEA requires a child with a disability to be reevaluated at least every three years. Student's "triennial" evaluation was due in February 2016. The School District began preparing for the evaluation in December 2015, when it provided Parents with a Prior Written Notice & Consent for Reevaluation on December 14, 2015.<sup>21</sup> The notice stated:

The school is proposing to reevaluate your child for special education eligibility. 300.300(c).

Based on a review of existing information, additional evaluation data are needed to determine if your child continues to be eligible for special education services or to determine your child's educational needs. 300.305(d)(i). Supporting reason:  
Eligibility review is required on a triennial basis and/or when significant changes to the IEP are being considered.

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<sup>18</sup> Interview with Special Education Teacher.

<sup>19</sup> Interview with Former General Education Teacher.

<sup>20</sup> Interview with Special Education Teacher.

<sup>21</sup> Ex. A, p. 1.

Comprehensive assessments are required in all areas of suspected disability.<sup>22</sup>

14. The Special Education Teacher attached a note to the consent form that said:

Please sign where highlighted and return to me by 12/18. This is a consent for reevaluation. This happens every 3 years to determine if [Student] is still in need of special education services. Let me know if you have any questions. Thanks!<sup>23</sup>

Parents do not dispute that they received this form.

15. In a follow-up email on January 3, 2015, Special Education Teacher wrote to Parents when she had not received back the signed consent form that had been provided to the Parents in mid-December. Special Education Teacher wrote:

[t]his consent gives you ok for me to test [Student] since she is up for reevaluation. It has been 3 years since she was tested and we need to reevaluate to determine her needs and how much she has grown. This is not a national standardized test or anything. These are tests we use only in special education determinations. No one else will see the results except for us.<sup>24</sup>

16. On January 8, 2016, the School District issued a Notice of Meeting to Parents, informing them of the reevaluation meeting on February 10, 2016. The notice described the purpose of the meeting as "Reevaluation: The purpose of this meeting is to discuss appropriate evaluation data to determine whether [Student] continues to be eligible for special education services. If so determined, the current individualized education program (IEP) will be reviewed and an updated IEP will be developed."<sup>25</sup> Parents do not dispute that they received the Notice of Meeting.

17. Special Education Teacher sent another email to the Parents on February 8, 2016, letting them know that a special education coordinator for the School District would be attending the February 10 meeting:

There is absolutely nothing wrong and it is not to alarm you. I ask her to attend an occasional meeting of mine to go through options and to help interpret data in eligibility meetings. There is no cause for concern at all, but I wanted to let you know that she will be there to help answer any questions we may have during the meeting.<sup>26</sup>

18. Parents contend that they did not receive proper notice of the purpose of the February 10 meeting. They contend that Special Education Teacher was "very vague and misleading about

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<sup>22</sup> *Id.*

<sup>23</sup> Ex. A, p. 5.

<sup>24</sup> Ex. 5.

<sup>25</sup> Ex. B, p. 1.

<sup>26</sup> Ex. 7.

the purpose of the meeting.”<sup>27</sup> “For a parent unfamiliar with Special Education, it was very misleading and the parent did not understand the purpose of the meeting was to determine eligibility and what that meant for services for [Student].”<sup>28</sup>

19. The SCO disagrees. The formal notices provided to the Parents in December 2015 and January 2016 clearly stated that the purpose of the February 10 meeting was to review Student’s reevaluation data to determine whether she continued to be eligible for special education services. The emails from Special Education Teacher did not contradict or cloud this message. Special Education Teacher’s January 3 email referenced that the evaluation sought was to be used in “special education determinations.”<sup>29</sup> Her February 8 email explained that the School District’s special education coordinator was being invited to the February 10 meeting to “go through options and help interpret data in eligibility meetings.”<sup>30</sup> Accordingly, the SCO finds that the formal notices and email provided to Parents in advance of the February 10 meeting put them on notice of the purpose of the meeting, *i.e.*, that Student’s continued eligibility for special education services would be considered.
20. Student’s triennial evaluation was conducted in the areas of general intelligence, academic performance, and health. Based upon her eligibility as a student with a specific learning disability in reading fluency, that area of disability was the focus of the reevaluation.<sup>31</sup>
21. A general intelligence test (the Wechsler Intelligence Scale for Children – Fourth Edition, or “WISC-IV”) had been conducted in 2013, yielding IQ scores in the average range. The team’s review of Student’s existing records led them to believe that the 2013 WISC scores continued to be a valid representation of Student’s overall IQ.<sup>32</sup>
22. To assess Student’s achievement level, the School District administered the Wechsler Individual Achievement Test – Third Edition (WIAT-III). The WIAT is a standardized, individually administered and nationally normed clinical instrument designed to measure the achievement of students in pre-K through 12. The WIAT-III consists of 16 subtests. Student’s subtest scores on the WIAT were all in the average range, though Student did show weakness in math fluency.<sup>33</sup>
23. Because Student’s math fluency scores on the WIAT were below average, Special Education Teacher decided to take a closer look at Student’s functioning in that area by administering math fluency subtests from the Key Math 3, an assessment of mathematical concepts and skills.<sup>34</sup> Student’s scores on these subtests were all in the average range.<sup>35</sup> Because Student’s

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<sup>27</sup> Complaint, p. 1; Interview with Mother and Family Friend.

<sup>28</sup> *Id.*

<sup>29</sup> Ex. 5.

<sup>30</sup> Ex. 7.

<sup>31</sup> Interview with Special Education Teacher; Ex. A, pp. 9-17.

<sup>32</sup> Ex. A, p. 9.

<sup>33</sup> Ex. A, p. 10; Interview with Special Education Teacher. Mother contends that Student’s standard score of 87 in oral fluency should also be considered below average, but this is not accurate. Per the instructions set out in the WIAT test protocols booklet, standard scores between 85 and 115 are considered to be in the average range.

<sup>34</sup> Ex. A, p. 13; Interview with Special Education Teacher.

<sup>35</sup> *Id.*

Key Math scores were in the average range, Special Education Teacher concluded that Student's low math fluency scores on the WIAT were attributable to the fact that the WIAT subtests were timed. Special Education Teacher explained that Student's Key Math scores revealed that Student understood math concepts and was able to do the work, but she worked slowly. Special Education Teacher discounted the timing issue because "it doesn't feed into the question of whether Student has a disability. She works slowly, but it doesn't have educational impact."<sup>36</sup>

24. Next, Special Education Teacher administered the Gray Oral Reading Test - 5 ("GORT-5"), which measures areas of reading including rate, accuracy, fluency and comprehension. Once again, Student's scores were all in the average range.<sup>37</sup>
25. Finally, Student was assessed in general academic progress using the Measures of Academic Progress ("MAPS") test, which covers reading, mathematics, and language usage. Student's scores were in the average range.<sup>38</sup>
26. A meeting was held on February 10, 2016, to review the results of the evaluation. The meeting was attended by School District Representative, Former General Education Teacher (who was Student's reading instructor), Special Education Teacher (who conducted the reevaluation), Mother, and Family Friend.<sup>39</sup>
27. The meeting participants discussed the evaluations, progress monitoring, and Student's classroom performance. In reviewing the body of evidence, the team discussed Mother's concerns relating to Student's low benchmark scores on the DIBELS and her low math fluency scores on the WIAT. Ultimately, the School District staff believed that the body of evidence demonstrated that notwithstanding relative weaknesses in math fluency and reading fluency, Student was able to receive benefit from the general education without special education services, and thus was not an eligible child with a disability as defined by the IDEA.<sup>40</sup>
28. The SCO agrees that the body of evidence supported the School District's determination that Student was no longer an eligible student with a disability, given Student's ability to access the general education curriculum, the minimal specialized instruction she was receiving, her minimal utilization of her IEP accommodations, and her apparent lack of reliance upon that specialized instruction.
29. The School District provided Parents with Prior Written Notice (PWN) explaining the School District's eligibility determination and the basis therefor.<sup>41</sup> The notice included the action proposed (change of special education eligibility), the reason for the action, the evaluation procedures and other information supporting the action, other options considered and rejected, and other factors considered by the team.<sup>42</sup>

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<sup>36</sup> Interview with Special Education Teacher.

<sup>37</sup> Ex. A, p. 12.

<sup>38</sup> *Id.*, p. 14.

<sup>39</sup> *Id.*, p. 8.

<sup>40</sup> Ex. A, pp. 16-17; Ex. C, p. 1.

<sup>41</sup> Ex. C, p. 1.

<sup>42</sup> *Id.*

## The Independent Education Evaluation

30. Following the February meeting, Parents provided the School District with a written statement disagreeing with the eligibility determination, requesting an independent educational evaluation (“IEE”), and requesting “stay put.”<sup>43</sup> In response, Charter School Principal agreed to provide an IEE and to continue to provide “IEP services” based upon Student’s “previous IEP” pending the IEE.<sup>44</sup>
31. After the February 10 meeting, Student no longer received “pull-out” special education services from Special Education Teacher; the only time Student was pulled out of the general classroom was for tests on which she received accommodations.<sup>45</sup> Special Education Teacher was occasionally in Student’s general education classroom and provided her with some support in doing her classwork, but did not provide specialized instruction.
32. Without the specialized instruction, Student continued to progress and perform appropriately in the general education classroom. Student continued to show independence in the classroom, as she had before, and had no trouble accessing the curriculum.<sup>46</sup>
33. On June 27, 2016, the IEE was conducted by evaluators at Children’s Hospital.<sup>47</sup> The evaluation consisted of standardized testing, but did not include observations of Student in the classroom setting, nor does the report indicate that the IEE evaluators consulted with Student’s teachers who were familiar with her.<sup>48</sup>
34. The IEE reported lower scores, overall, than those on the School District’s February reevaluation, including extremely low scores on one subtest of the GORT-5 and on some subtests of the CTOPP (“Comprehensive Test of Phonological Processing”).<sup>49</sup> The evaluation report stated that Student’s “performance on standardized measures of speech-language development and cognitive clustered in the average range with her academic profile reflecting the presence of mild dyslexia.”<sup>50</sup>
35. The IEE report, however, did include information that called into question the reliability of some of the test results. A persistent thread throughout the report was that Student exhibited significant anxiety and attention problems, which were not characteristics that Student demonstrated during her testing with Special Education Teacher.

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<sup>43</sup> Ex. D, p. 37. “Stay put” refers to the IDEA’s mandate that when a party requests an administrative due process hearing relating to the education of a child with a disability, the child must remain in his or her current placement during the pendency of the litigation. 34 C.F.R. § 300.518. Without a due process hearing request, however, there is no “stay put” – disagreeing with an eligibility determination, absent a due process hearing, does not trigger “stay put.”

<sup>44</sup> Ex. D, pp. 36.

<sup>45</sup> Interview with Special Education Teacher.

<sup>46</sup> Interviews with Special Education Teacher, General Education Math Teacher, Former General Education Reading Teacher,

<sup>47</sup> Ex. D, pp. 1-16.

<sup>48</sup> *Id.*

<sup>49</sup> Ex. D, pp. 12-13.

<sup>50</sup> Ex. D, p. 2.

[Student] demonstrated symptoms of inattention and/or anxiety during her both her language and learning evaluations; symptoms suggestive of inattention included lapses in self-monitoring and active listening (often asking for repetitions of questions or performing the incorrect problem or operation after instructions were provided) and as well as difficulty identifying essential information. [Student] frequently “lost set” responding appropriately to questions and then randomly forgetting the instruction and changing her response pattern. It was unclear if her difficulty sorting essential from non-essential information reflected a superimposed weakness, a problem with attention, or both. Across both assessments every effort was made to optimize [Student’s] persistence and reduce the influence of her slower response time and inattention and/or anxiety on testing.<sup>51</sup>

The evaluation report made the rather tepid assurance that “today’s testing was felt to provide an accurate indication of how she is functioning *at least some of the time*.”<sup>52</sup>

36. It bears noting that the IEE involved extensive testing in a hospital setting – over the course of a single day, and in an unfamiliar setting during the summer break, Student was administered a series of assessments comprised of over 40 separate subtests. The School District staff familiar with and trained in administering standardized assessments all remarked that this struck them as an unusually high number of subtests for a student to do in one sitting, and that the extensive amount of testing, in combination with the unfamiliar clinical environment and unfamiliar test administrators, may well have resulted in anxiety, fatigue, and inattention that could have depressed Student’s scores.<sup>53</sup> For example, Student was re-administered the GORT-5 (six months after taking it in January) and scored significantly lower. Yet, with such a fast re-administration of the same test, the expectation would have been her scores would have been higher, based upon familiarity with the test.<sup>54</sup>
37. By contrast, Student’s testing by Special Education Teacher in January 2016 occurred over the course of several weeks, during the school year, in a familiar setting, and with an evaluator who was Student’s teacher and case manager.<sup>55</sup> Under those conditions, Student’s test scores were higher.
38. This is not to disparage the evaluators who conducted the IEE, or to call into question their ability to conduct high quality assessments. Rather, it is to put the IEE report in context. It is axiomatic that standardized assessments are a snapshot of a person’s abilities, and that snapshot reflects only how the person performed on a specific day and under specific conditions.<sup>56</sup> As a result, a person can never “overperform” on standardized tests, *i.e.*, a person will not achieve scores that overestimate his or her abilities, but a person can always underperform and achieve scores that may be lower than their true potential because of fatigue, hunger, lack of sleep, anxiety, distractibility, or any number of other factors.

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<sup>51</sup> Ex. D, pp. 3-4.

<sup>52</sup> *Id.*, p. 4 (emphasis added).

<sup>53</sup> Interviews with Special Education Teacher, Speech Language Pathologist, and Special Education Coordinator.

<sup>54</sup> *Id.*

<sup>55</sup> Interview with Special Education Teacher.

<sup>56</sup> Jerome Sattler, *Assessment of Children: Cognitive Applications* 4-9 (4<sup>th</sup> Ed. 2001).

39. The resulting IEE evaluation report was provided to Charter School on August 4, and Special Education Director contacted Parent to schedule a meeting to consider the information in the evaluation."<sup>57</sup> After coordinating with Parent, the team agreed to meet on August 22, 2016, to discuss the results of the IEE.<sup>58</sup> The meeting was not intended to be an IEP meeting and no notice was sent to parents indicating that it would be.<sup>59</sup> Rather, the communications relating to the August 22 meeting characterize it a "meeting to discuss [Student's IEE]..."<sup>60</sup>

### The August 22 Meeting

40. On August 22, the School District convened a meeting to discuss the results of the IEE. In attendance were, *inter alia*, Mother, Family Friend, Special Education Teacher, Special Education Coordinator, Charter School Principal, Charter School 504 Coordinator, Charter School Interventions Coordinator, and Speech Language Pathologist.<sup>61</sup>
41. Mother and Family Friend claim that at the August 22 meeting, the IEE was not discussed in any detail and that the IEE report was summarily disregarded by the School District staff who were in attendance. Based upon interviews with a number of the participants - all of whom were interviewed separately but who provided consistent and credible accounts of the way the meeting proceeded - and upon contemporaneous minutes taken during the meeting, the SCO does not agree. At the meeting, the IEE was discussed in great detail, as were Student's progress monitoring data and beginning of year benchmark data, which showed Student to be performing on grade level. The participants also discussed the IEE evaluators' notes regarding anxiety and inattention; the school staff had not observed Student to demonstrate anxiety with test-taking, but agreed to take a closer look at that issue.<sup>62</sup>
42. The meeting participants then undertook an extensive discussion of the various accommodations and interventions recommended by the IEE report and sought by Mother and Family Friend.<sup>63</sup> The gist of the discussion was how to provide Student with the interventions and accommodations she might need to be successful, whether via Charter School's Multi-Tier Support Systems ("MTSS"), a Section 504 plan, or an IEP. In describing the discussion, the team members credibly reported that what Mother and Family Friend sought for Student was general education accommodations and supports, rather than specially designed instruction. Charter School Principal and Charter School Section 504 Coordinator explained to Mother and Family Friend that Student could receive such accommodations via an MTSS plan or a Section 504 plan.<sup>64</sup>

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<sup>57</sup> Ex. B, p. 3.

<sup>58</sup> Ex. B, p. 7.

<sup>59</sup> Ex. B, pp. 6-7.

<sup>60</sup> Ex. B, p. 6.

<sup>61</sup> Ex. D, p. 17; Interviews with Mother, Family Friend, Special Education Teacher, Special Education Coordinator, Charter School Principal, and Speech Language Pathologist.

<sup>62</sup> Interviews with Charter School Principal, Charter School Section 504 Coordinator, Special Education Teacher and Special Education Coordinator; Ex. D, pp. 18-19.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

43. Mother indicated that she wanted to use the IEE to determine Student's eligibility for special education and related services. Accordingly, the School District staff agreed to refer Student for an evaluation to determine eligibility for services under the IDEA. The School District provided Mother with PWN and Consent for Initial Evaluation. Mother signed the consent on August 24, 2016.<sup>65</sup>
44. During the month of September, the School District's staff observed Student in multiple general education classes on multiple dates, in order to look at how she was functioning in the classroom, including:
- a) obtaining a language sample and observation of Student's expressive language skills (in response to the statement in the IEE report that Student struggled with expressive language);
  - b) observing Student's academic performance and participation in math;
  - c) conducting a student interview to understand how Student perceives her own performance at school, including assessing strengths and weaknesses, her likes and dislikes, and her personal goals; and
  - d) observation of Student's level of social and emotional functioning; and
  - e) reports from Student's current classroom teachers.<sup>66</sup>
45. The classroom observations all demonstrated that, without specialized instruction, Student is an independent, confident, successful student who actively participates in class, demonstrates comprehension of curricular content.<sup>67</sup> Student herself demonstrated self-awareness about her learning strengths and weaknesses, and expressed confidence in her ability to self-advocate. With respect to reading, Student stated that "reading is hard and that she reads differently than others," but that she does not think she has dyslexia, but rather reads differently than other peers.<sup>68</sup>

#### The September 27 Eligibility Meeting

46. On September 27, 2016, the School District convened the eligibility meeting to determine if Student qualifies as a child with a disability who is entitled to special education and related services. In attendance were Parents, Family Friend, Special Education Teacher, Speech Language Pathologist, Charter School Principal, Special Education Coordinator, General Education Math Teacher, and Section 504 Coordinator.<sup>69</sup>
47. The eligibility team reviewed the IEE report, the February 2016 evaluation report, progress monitoring data discussed at the August 22, 2016 meeting, the recent classroom observation information, information from norm-referenced school-based assessments, and Mother's input that she did not want Student pulled out of the general education classroom.<sup>70</sup> The IEP team considered eligibility under four different categories: Other Health Impairment (regarding

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<sup>65</sup> Ex. D, p. 25.

<sup>66</sup> Ex. L.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*, p. 4.

<sup>69</sup> Ex. D, p. 31.

<sup>70</sup> Interviews with Special Education Teacher and Special Education Coordinator; Ex. D, p. 32-33.

attention concerns); Serious Emotional Disability (related to anxiety); Specific Learning Disability; and Speech or Language Impairment.<sup>71</sup>

48. Based upon the body of evidence, particularly Student's continued success in school without receiving special education services, the eligibility team determined that Student does not require special education and related services in order to access to the general education curriculum, and thus is not eligible as a child with a disability under the IDEA.<sup>72</sup>
49. The SCO finds that the determination of the eligibility team is supported by the evidence in the record; while Student has areas of relative weakness in the area of reading, those weaknesses do not result in a need for special education. Student is performing on grade level and making reasonable progress through supports that exist in the general education setting.<sup>73</sup>

### CONCLUSIONS OF LAW

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

#### The February 2016 Reevaluation Complied With the IDEA

1. Under the IDEA, local education agencies such as the School District are required to provide eligible students with disabilities with a free appropriate public education ("FAPE") by providing special education and related services individually tailored to meet the student's unique needs and provided in conformity with an individualized education program developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. FAPE is defined as special education and related services that are provided free of charge, meet State standards, include an appropriate preschool, elementary school, or secondary school education, and are provided in conformity with a properly developed IEP. 20 USC § 1401(a)(9); 34 C.F.R. § 300.17; ECEA Rule 2.19.
2. In order to be eligible for special education and related services under the IDEA and ECEA, a child must be an eligible child with a disability. A child is eligible when she has been evaluated in accordance with the IDEA's requirements as having one of the disabling conditions under the law and, by reason of that disability, "needs special education and related services." 34 C.F.R. § 300.8(a); ECEA Rule 2.08.
3. The IDEA requires that evaluations include a variety of assessment tools and strategies to provide relevant functional, developmental and academic information about the child, in order to determine with the child is a child with a disability, and if so, what special education and related services would be appropriate. 34 C.F.R. § 300.304(b). The evaluation may not rely upon "any single measure or assessment as the sole criterion for determining" eligibility, must use assessments and evaluation materials that are reliable, are administered by trained professional in accordance with the test instructions, and must be tailored to assess specific

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<sup>71</sup> Ex. D, pp. 26-33.

<sup>72</sup> *Id.*

<sup>73</sup> Interviews with General Education Math Teacher and General Education Reading Teacher.

areas of educational need. 34 C.F.R. § 300.304(c). A child must be assessed in all areas related to the suspected disability. *Id.*

4. In this case, the February 2016 reevaluation complied with the IDEA's requirements relating to the conduct of evaluations. Student was reevaluated to determine whether she continued to be eligible as a student with a specific learning disability in reading fluency, such that it was appropriate and reasonable to focus on that area of disability. See 34 C.F.R. § 300.304(c)(4). The School District's evaluation consisted of a "variety of assessment tools and strategies to gather relevant" information, including reviewing Student's progress monitoring data, conferring with Student's teachers, taking into account Student's performance in the classroom, and conducting formal assessments. When Student's subtest scores on general achievement testing revealed areas of relative weakness (in reading and math fluency), additional testing was performed in those areas. There is no allegation that the assessments chosen were not valid or reliable, that they were administered by untrained personnel, or that they were administered in a manner inconsistent with the test instructions or protocols.
5. Accordingly, the SCO concludes that the School District's February 2016 reevaluation complied with the requirements of IDEA.

#### **The February 10 Meeting Complied with IDEA**

6. The SCO further concludes that there were no violations of IDEA in the February 10, 2016 meeting at which the reevaluation and Student's continued eligibility were considered. First, there is no merit to the contention that the parents were not provided with proper notice that Student's reevaluation would be considered as part of a determination of whether Student continued to be eligible for special education as a child with a disability. On three separate occasions, the School District provided Parents with written notice informing them that Student was being reevaluated to determine her continued eligibility for special education services.
7. Next, the School District did not violate the law with respect to the participants in the February 10 meeting, particularly with respect to the inclusion of a general education teacher. First, the law requires that "a group of qualified professionals and the parent of the child" determine whether a student is an eligible child with a disability. 34 C.F.R. § 300.306(a)(1). Additionally, in determining whether a child is eligible under the specific learning disability category, the team of qualified professionals must include the child's "regular teacher." 34 C.F.R. § 300.308(a)(1). In this case, Former General Education Teacher, who was Student's regular teacher, participated in the February 10 meeting, such that the requirement was met.
8. Further, the School District did not violate the IDEA in determining that Student no longer qualified as a child with a disability. In making eligibility determinations, the IDEA requires that a group of qualified professionals and the parent of the child "review and interpret the evaluation data" and "draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations." 34 C.F.R. § 300.306. In this case, the School District convened a meeting of "qualified professionals" and Mother (who participated with the assistance of Family Friend). There is no evidence that the school professionals were not "qualified professionals" who could interpret the results of the assessment data and other information. The team considered information from a variety of

sources, including the assessment data, progress monitoring information, teacher input, and Student's performance in the classroom, as well as parent input, in making the eligibility determination. Finally, the information considered and reviewed by the eligibility team supported the determination that Student was no longer an eligible child with a disability.

9. Finally, the School District provided the parents with Prior Written Notice (PWN) informing the parents of the eligibility determination. The IDEA requires that PWN be provided to parents before proposing or refusing to initiate or change the identification, evaluation, placement, or provision of FAPE to the child. 34 C.F.R. § 300.503. The notice must include a description of the action proposed or refused; an explanation of why the action is being proposed or refused; a description of the evaluation procedures or other information used as a basis for the proposal or refusal; information related to procedural safeguards; sources for parent assistance; a description of other options considered and why they were rejected; and a description of other relevant factors. *Id.*
10. In this case, the School District provided Parents with PWN within a few days of the February 10 meeting. The PWN document included all of the required information. Accordingly, the SCO concludes that the School District complied with the PWN requirement.

#### **The August 22 Meeting Complied with IDEA**

11. Mother contends that the August 22 meeting violated her rights because the School District failed to provide them with proper notice of the meeting. The SCO disagrees. The purpose of the meeting was to review the IEE evaluation, and the communications with the parents setting up that meeting were clear in that regard. Though the law requires formal notice to be provided to parents in advance of IEP meetings and meetings to determine eligibility, see 34 C.F.R. § 300.322, there is no formal notice requirement for informal meetings to review evaluation reports. Because the August 22 meeting was neither an IEP meeting nor an eligibility meeting, no formal notice was required.
12. Mother also contends that at the August 22 meeting, the School District failed to give appropriate consideration to the IEE. Again, the SCO disagrees. As noted above, the entire purpose of the August 22 meeting was to consider the IEE report and its ramifications for Student, and the participants at the meeting fulfilled that purpose. The IEE report and its various findings were discussed in detail, including an intensive discussion of how some of the instructional recommendations included in the report could be provided to Student.
13. As soon as Mother indicated that she wanted to use the IEE to consider Student's eligibility for special education and related services, the School District initiated the referral process and scheduled an eligibility meeting. Accordingly, there is no basis for concluding that the School District failed to consider the IEE at the August 22 meeting.

#### **The September 27 Meeting Complied with IDEA**

14. Based upon the evidence in the record, the SCO concludes that in the meeting on September 27, the School District complied with the requirements for considering IEE results and for

making eligibility determinations, and appropriately determined that Student is not an eligible child with a disability.

15. The IDEA requires that a school district consider the results of an IEE “in any decision made with respect to the provision of FAPE to the child.” 34 C.F.R. § 300.502(c)(2). In this case, the evidence in the record supports a finding that the School District complied with this requirement, both in the August 22 meeting and in the September 27 meeting at which Student’s eligibility was considered. As noted above, both meetings included an extensive discussion of the IEE report, and during the September 27 meeting, the team included the IEE results as part of its consideration of the entire body of evidence related to Student’s eligibility determination. The requirement that an eligibility team consider an independent evaluation does not, however, require the eligibility team to adopt all of its findings. In this case, there was reason to believe that Student’s IEE scores were negatively impacted by her anxiety and inattention on the day she was tested, such that the reported test scores were of questionable reliability.
16. Further, the overall eligibility determination was made in accordance with the law’s procedural requirements and is supported by the evidence in the record. As with the eligibility determination in February 2016, the decision was made by a group of “qualified professionals” and included Mother and Student’s regular teacher. The team reviewed and interpreted the evaluation data and drew upon information from a variety of sources, including the February 2016 reevaluation, the IEE, progress monitoring data, the classroom observations from September 2016, teacher reports, Student’s grades and performance in the classroom, and the input of Mother and Family Friend. The team considered Student’s eligibility under four different eligibility categories, and thus considered Student’s eligibility in all potential suspected areas of disability. And in light of the body of evidence demonstrating that Student was able to function in the general classroom and access the general curriculum without special education, the team was entitled to consider the relative weaknesses reported in the IEE but to ultimately conclude that notwithstanding those weaknesses, Student does not require special education and related services in order to access the general curriculum, and thus does not qualify as an eligible child with a disability.

**The School District Was Not Required to implement Student 2015-2016 IEP after Student was no longer eligible for special education**

17. Finally, the SCO concludes that the School District was not required to implement Student’s IEP from February 12, 2016 through September 27, 2016. The requirement to provide a student with special education and related services hinges on that student being deemed an eligible student with a disability. 20 U.S.C. § 1412(a)(1)(A). After February 12, 2016, Student was no longer an eligible student with a disability and thus not entitled to the special education and related services contained in her previous IEP. Further, the IDEA’s “stay put” requirement does not apply to the state complaint process, such that there was no requirement to continue to implement Student’s IEP pursuant to the “stay put” rule. 34 C.F.R. § 300.518.

**REMEDIES**

The SCO has found no violations of IDEA, such that no remedy is ordered.

## CONCLUSION

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

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

Signed this 20<sup>th</sup> day of December, 2016.

A handwritten signature in blue ink that reads "Wendy Jacobs". The signature is written in a cursive style with a long, sweeping tail on the letter "s".

Wendy Jacobs, Esq.  
State Complaints Officer

## APPENDIX

### Complaint (pp. 1-12)

- Exhibit 1 - February 2016 reevaluation (pp. 1-16)
- Exhibit 2 - Children's Hospital evaluation (pp. 1-17)
- Exhibit 3 - 2013 initial referral (pp.1-8)
- Exhibit 4 - email regarding literacy support (p. 1)
- Exhibit 5 - January 3 email regarding consent to reevaluate (p. 1)
- Exhibit 6 - February 8 email regarding reevaluation report (p. 1)
- Exhibit 7 - February 8 email regarding participants in eligibility meeting (p. 1)
- Exhibit 8 - February 11 parental statement (p. 1-2)
- Exhibit 9 - February 12 email from Charter School Principal (p. 1)
- Exhibit 10 - February 22 email regarding IEE (p. 1)
- Exhibit 11 - February 11 PWN (pp. 1-11)
- Exhibit 12 - April 6 email regarding IEE (p. 1)
- Exhibit 13 - August 4 email attaching IEE report (p. 1)
- Exhibit 14 - August 23 email regarding referral for special education eligibility (p. 1)
- Exhibit 15 - August 22 parent statement (p. 1)
- Exhibit 16 - August 24 email regarding initial eligibility (p. 1)
- Exhibit 17 - notes from August 22 meeting (pp. 1-3)
- Exhibit 18 - eligibility checklist (pp. 1-3)
- Exhibit 19 - February 11 PWN (pp. 1-3)
- Exhibit 20 - September 27 email regarding IEE and eligibility determination (p. 1)
- Exhibit 21 - September 23 email regarding eligibility meeting (p. 1)
- Exhibit 22 - September 23 email regarding upcoming meeting (p. 1)
- Exhibit 23 - September 7 email regarding upcoming eligibility meeting (pp. 1-6)
- Exhibits 24 and 25 - September emails regarding IEP/upcoming meeting (p. 1)
- Exhibit 26 - September emails regarding assessments and eligibility determination (p. 1)
- Exhibit 27 - September 27 eligibility checklists (pp. 1-5)
- Exhibit 28 - School District's September observations (pp. 1-5)
- Exhibit 29 - February 2016 reevaluation report (pp. 1-7)
- Exhibit 30 - September 28 email from Mother disagreeing with eligibility (p. 1)
- Exhibit 31 - definition of FAPE (p. 1)
- Exhibit 32 - CDE "Fast Facts" regarding dyslexia (pp. 1-2)
- Exhibit 33 - "Testing for Dyslexia" (pp. 1-3)
- Exhibit 34 - Topic Brief: Dyslexia and SLD (pp. 1-3)
- Exhibit 35 - Topic Brief: Evaluation and Eligibility (pp. 1-8)
- Exhibit 36 - OSEP "Dear Colleague" letter (pp. 1-4)

### School District's Response (pp. 1-14)

- Exhibit A - February 16 reevaluation, including notices of meeting, consent forms, eligibility checklist (pp. 1-20)
- Exhibit B - January 8 notice of meeting; notice of meeting for September 27 meeting; related emails (pp. 1-20)

- Exhibit C - February 11 PWN (pp. 1-4)
- Exhibit D - Children's Hospital evaluation report; August 22 meeting notes; consent to evaluate forms; September 27 eligibility checklists; September 27 meeting notes; parental statement; emails regarding IEE (pp. 1-123)
- Exhibit E - list of individuals with knowledge (p. 1)
- Exhibit F - February 2015 IEP and progress monitoring data (pp. 1-44)
- Exhibit G - 2013 progress information (p. 1-2)
- Exhibit H - 2014 progress information (pp. 1-2)
- Exhibit I - 2015 progress information (p. 1)
- Exhibit J - iReady data (2015-2016 school year) (p. 1-15)
- Exhibit K - iReady data (2016-2017 school year) (p. 1-15)
- Exhibit L - September classroom observation reports (pp 1-5)
- Exhibit M - initial 2013 eligibility/IEP (pp. 1-10)
- Exhibit N - initial consent for special education placement (p. 1)
- Exhibit O - initial eligibility checklist (p. 1)
- Exhibit P - 2013 evaluation (pp. 1-8)

Parent's Reply (pp. 1-27)