

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

**State-Level Complaint 2017:508
Academy District 20**

DECISION

INTRODUCTION

This pro-se, state-level complaint (“Complaint”) was properly filed on February 23, 2017 by the parents (“Parents” or “Mother” and “Father”, respectively) of two children (“Students” or “Sam” and “Taylor”)¹ identified as children with disabilities under the IDEA. Parents bring this Complaint against Academy District 20 (“School District”).

Based on the written Complaint, the State Complaints Office (SCO) determined that the Complaint allegations raised issues 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 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

COMPLAINT

Whether the School District has violated Parents’ rights and denied Students a free appropriate public education (FAPE) in violation of the IDEA and ECEA rules since May 17, 2016 by:

1. denying Parents meaningful participation in the development, review, and revision of Students’ Individualized Education Programs (IEP);
2. failing to conduct full and individual evaluations of Students, including failing to conduct evaluations requested by Parents;
3. failing to comply with or implement Students’ IEPs; and
4. failing to provide Parents with prior written notice (PWN) or Notice of Meetings.

¹ The students’ names have been changed to protect their identities.

² 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).

Summary of Proposed Remedies. To resolve the Complaint, Parents propose, in summary, that:

- School District determine appropriate placements for Students
- School District consider private evaluations
- School District conduct an FBA of Sam and develop a BIP
- Training be provided for School District staff related to evaluations, IEP development, parent communication, autism spectrum disorder (“ASD”), and behavior
- Training be provided in School District policies
- Reimbursement for expenses incurred by Parents, including tuition at Private School
- Compensatory education be provided to Students for missed instruction
- School District provide a written apology to parents
- Creation of new School District policies
- School District hiring of a BCBA

FINDINGS OF FACT

After a thorough and careful analysis of the credible record,³ the SCO makes the following FINDINGS:

BACKGROUND

1. Students are biological siblings who were adopted by Parents []. Students share a history of trauma and neglect and experience difficulties in all areas of their lives. Both Students have been diagnosed with ASD⁴ and Sam has additional diagnoses, including ADHD, sensory processing disorder, and a visual perceptual disorder. Students live with Parents within the boundaries of the School District.⁵
2. Students were both previously evaluated by the School District’s child find team, resulting in determinations that neither student was eligible for special education.⁶ Parents disagreed with the child find evaluations and the February 19, 2016 determinations and emailed Director on April 26, 2016 to request an Independent Educational Evaluation (“IEE”) for Taylor. At that time, Parents informed Director both Students were enrolled at School for the 2016-17 school year and that Taylor was in the process of being screened for autism spectrum disorder

³ The appendix, attached and incorporated by reference, details the entire record.

⁴ SCO notes that Mother shared Taylor’s diagnoses with School District verbally, but has never provided documentation in support of the diagnosis.

⁵ Complaint; Interviews with School District staff members and Parents; Exhibit A

⁶ SCO notes that School District’s child find team evaluated Taylor on February 19, 2016 and Sam on February 19, 2016.

("ASD"). Parents did not request an IEE for Sam at that time as they believed that once Sam started school in the fall, School would quickly realize that Sam needed special education, however, they did inform Director that Sam had recently been diagnosed with ASD. Director responded to Parents' request by email and discussed the child find evaluations with Parents. Director agreed the evaluations were problematic, but rather than providing the IEE they had requested, Parents and Director agreed that School District would conduct further evaluation of both Students, including observations in their current educational environment, Private Preschool.⁷

Taylor's Evaluation/Eligibility

3. Based on the following, SCO concludes that the School District's May 31, 2017 evaluation was sufficiently comprehensive to assess Parents' concerns about Taylor, including ASD.

4. The Prior Notice & Consent for Evaluation dated May 25, 2016, indicated that the evaluation would include assessments of speech/language, autism, social/emotional, and a "review of health report."⁸ The May 31, 2016 Evaluation Report indicated that the areas of concern were speech language, social/emotional, and sensory processing.⁹

5. The Evaluation Report included a file review of the previous child find evaluation where they had found mild receptive and expressive language delays and noted that behavioral rigidity had been reported at home (i.e., a primal response to taking a bath) as well as "meltdowns" at school every day since returning from a family vacation. The child find evaluation also indicated the need for further evaluation in the areas of personal/social, communication skills, and fine motor.¹⁰

6. The BASC-III was used to assess Taylor's behavior and emotional functioning. The overall results of the BASC-III suggested that Taylor's problem behaviors across the home and preschool settings, specifically, externalizing types of behavior (i.e., hyperactivity and aggression) were clinically significant, which indicates a high level of maladaptive behaviors or absence of adaptive behaviors that may require support or intervention.¹¹

7. The GARS-2 assessment, a screener used to provide an overall indicator of behaviors related to ASD, was completed by Parents and Taylor's teacher from Private

⁷ Exhibit D and 7; Interviews with School District staff, Parents, and Advocate #1. SCO notes that documentation provided by School District in this Complaint did not include any PWN of the IEE request nor any Consent documentation to conduct Sam's evaluations. 34 C.F.R. §§ 300.300 and 300.503

⁸ P. 202

⁹ Exhibit A

¹⁰ *Ibid.*

¹¹ *Ibid.*

Preschool. The overall results placed Taylor in the range of “very likely to exhibit behaviors consistent with ASD” across both home and school settings.” The Evaluation Report noted that the GARS-2 results indicated that Taylor experiences the most difficulty with regulating emotional responses throughout the day at home and “remaining fixated on areas of interest at school.”¹²

8. The ADOS-2 is a standardized, semi-structured direct play/interview assessment used when there is a suspicion of ASD. During this assessment Taylor demonstrated difficulties with communication and reciprocal social interactions. The evaluators noted that Taylor did not use many gestures, that reciprocal communication and pretend play were limited, and had difficulty letting go of a toy.¹³

9. The DAYC-2 assessments resulted in Taylor’s adaptive behavior falling in the 13th percentile and social emotional scores in the 3rd percentile. Taylor’s language and communication skills were assessed using the CELF-2, revealing that Taylor’s receptive language fell in the 8th percentile and expressive language in the 4th percentile. The examiner also noted that Taylor tended to follow only one part of a two-step direction and appeared to not understand many concepts. The CELF Preschool 2 Descriptive Pragmatic Profile was completed by Mother. Mother reported that Taylor demonstrates difficulty with reciprocal conversations on topics that are not of high interest and has limited use of nonverbal gestures. As determined by the Colorado Severity Rating Scale, Taylor’s assessments resulted in a moderate receptive and expressive language delay, a mild articulation delay, and a mild pragmatic delay.¹⁴

10. Parents also provided a Private OT evaluation report¹⁵ that identified sensory processing and fine motor difficulties, which were noted in the Evaluation Report. Utilizing the Peabody Developmental Motor Scales and the Dunn Sensory Profile, the Private OT concluded that Taylor exhibited poor visual motor integration, difficulty with self-regulation, transitions, change, self-care, dressing, eating/feeding, and social skills.¹⁶

11. Mother attended the eligibility meeting and was accompanied by Advocate #1. With regard to the team’s discussion of ASD, they discussed that Taylor does not yet have a diagnosis and that the ADOS-2 scores were below the cutoff for ASD, noting a 0 in the area of restrictive interests and repetitive behaviors. They also discussed that

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ SCO notes that School District did not conduct the OT assessment for inclusion in the May 31, 2017 evaluation and Mother agreed that it would be conducted within eight weeks after the beginning of the 2016-17 school year in order to assess Taylor in the classroom environment. SCO notes that the documentation School District provided in this Complaint investigation did include notice of the agreement to conduct the OT assessment in that it was noted in the needs section of Taylor’s IEP.

¹⁶ Exhibit A

the ADOS-2 examiners observed that Taylor pointed, was engaged, excited, shared enjoyment, was aware of others' needs, and had great social overtures. Mother expressed her disagreement with the ADOS-2 results, which she stated were not reflective of Taylor's, particularly with regard to tendencies to "perseverate" and have repetitive behaviors at home.¹⁷

12. Based on the entirety of the record, SCO concludes that the team could have determined Taylor's eligibility under the ASD category, but that instead they considered qualifying Taylor under the category of Speech Language Impairment ("SLI") and then agreed that Taylor was eligible under the category of Developmental Delay ("DD") because Taylor "showed more than one area of concern."¹⁸

Taylor's May 31, 2016 IEP

13. Following the eligibility determination, the same team moved on to develop Taylor's IEP, which Father also joined by phone. The IEP noted that Mother expressed her concerns that the ADOS-2 assessment did not reflect Taylor's behavior at home or at Private Preschool.¹⁹

14. The IEP team identified the following needs:

- needs to increase receptive, expressive, articulation and pragmatic language skills to effectively communicate needs and ideas clearly with adults and peers
- OT evaluation to be completed within eight weeks of the beginning of school²⁰
- Needs to improve social-emotional, play, and peer interaction skills
- Needs to increase attention to non-preferred tasks
- Needs to continue to develop pre-academic skills within the play based program

Notable is the absence of any reference to needs related to ASD, behavior or adaptive skills, yet the service delivery statement indicates that Taylor would receive "mental health services to address social-emotional and behavior needs." SCO notes that the Parent Input section indicates that Mother requested that a social goal be written, otherwise the goals and accommodations appear to address the needs identified in the Needs and Impact of Disability section of the IEP document.²¹

¹⁷ Exhibit A; Interviews with School District staff, Mother, and Advocate #1

¹⁸ May 31, 2016 Prior Notice & Consent for Initial Provision of Special Education Action and Related Services

¹⁹ Exhibit A; Interviews with School District staff, Parents, and Advocate #1

²⁰ SCO notes that this is not one of Student's needs to be addressed in the IEP and should have been placed in the PWN section.

²¹ Exhibit A; SCO notes that the documentation provided by School District does not include PWN regarding Mother's request for a social goal.

15. Parents also provided written input by email the next day, which was incorporated into the IEP document. The IEP team also met on August 16th to discuss Parents' email and agreed on 15 minutes per month of indirect services with an autism specialist, a goal to be written in self-advocacy that was requested by Mother, and the accommodations section would reflect frequent communication between home and school. These were never added to the IEP, nor did School District provide PWN to Parents.²²

16. OT evaluated Taylor after school started in the fall. The OT evaluation report noted Mother's reports that Taylor is "always moving", would benefit from sensory breaks, and that transitions could be difficult. Preschool Teacher noted no sensory concerns initially, but later shared with OT some possible sensory difficulties that may be affecting Taylor's routine, balance/movement, coordination, auditory, attention/behavior, and emotions. OT recommended indirect services for a minimum of 5 minutes per month to monitor sensory needs that may arise. Mother agreed to amend the IEP per these recommendations.²³

Sam's Evaluation/Eligibility²⁴

17. Based on the following, SCO concludes that the School District's May 31, 2016 evaluation was sufficiently comprehensive to assess Parents' concerns about Sam, including ASD, and enable the IEP team to determine eligibility.

18. The Evaluation Report noted Parents' concerns with sensory processing, language skills, visual difficulties, and behavior. Sam's diagnoses of ASD, ADHD, and sensory processing disorder were also noted in the Evaluation Report. SCO finds it particularly notable that nothing else was included from the Private ASD report that Parents provided to School District. The previous child find evaluation noted reports of temper tantrums, difficulties with attention, and turn taking that were referred to in the Evaluation Report. Mother also shared that Sam licks/smells non-food items and has shown verbal and physical aggression toward peers at Private Preschool.²⁵

19. The evaluation included a file review revealing a visual perceptual disorder diagnosis, difficulties with spatial relationships, and a private speech evaluation that resulted in below average auditory processing skills affecting Sam's ability to maintain conversations, follow directions, and recall facts and details. It also revealed that Sam received private OT for sensory processing disorder and that Mother reported sensory issues and light sensitivity. The record also showed that Mother shared that

²² Exhibit A; Interviews with School District staff, Parents, and Advocate #1; SCO notes that no Notice of Meeting was provided for this meeting in violation of 34 C.F.R. § 300.321(a)(1).

²³ Exhibit A; Interviews with Preschool Teacher and Parents

²⁴ SCO notes that there was no Prior Notice & Consent for Evaluation or Prior Notice & Consent for Initial Provision of Special Education Action and Related Services documentation provided by School District. 34 C.F.R. §§ 300.300 and 300.503.

²⁵ Exhibit A

Sam seems unable to control behaviors and is remorseful afterward and that transitions have been particularly difficult in the past. Private OT report²⁶ found frequent fluctuations in attention to task, cooperation, motivation, self-regulation, visual perception, and auditory processing skills.²⁷

20. Members of the evaluation team who observed Sam at Private Preschool noted behaviors that are indicators of autism, i.e., task avoidance, seeking out adult attention, frequent verbal redirection by adults without follow-through for work completion, parallel play in lieu of reciprocal play, which they suggested a need for further assessment of the behaviors.²⁸

21. The evaluation included results of the BASC-III, which was used for an overall assessment of Sam's typical behavior. The results revealed that Sam's behaviors across both home and preschool settings fell within the clinically significant range, signifying a high level of maladaptive behavior or absence of adaptive behavior which may require support or intervention. Sam's greater difficulties at Private Preschool were in externalizing types of behavior, i.e., hyperactivity and aggression. Additionally, adaptability, functional communication and activities of daily living all fell within the at-risk range, meaning that Sam has difficulty adapting to changing situations and takes longer to recover from difficult situations than most others his age, indicators of ASD.²⁹

22. Sam's speech and language was assessed using the CELF Preschool 2, demonstrating delays in sentence and syllable segmentation, as well as rhyming and social pragmatics. The Colorado Severity Rating Scale indicated a mild delay for receptive/expressive language and a mild-moderate delay in pragmatics. The examiners noted Mother's reports that Sam often needs to be asked repeatedly to stop an undesirable behavior.³⁰

23. The ADOS-2, which was the only autism specific measure School District used its evaluation, showed that Sam has qualitative impairments in the areas of social affect (communication and reciprocal social interactions), but did not in the area of restricted interests and repetitive behaviors. The combined total score on the ADOS-2 placed Sam on the borderline for ASD.³¹

24. SCO concludes that had the School District given meaningful consideration to the information provided by Parents in its evaluation process, including the ASD diagnosis, the team could have determined that Sam was eligible under the ASD

²⁶ SCO notes that School District's OT assessment was agreed to be performed within eight weeks after the beginning of the 2016-17 school year in order to assess Sam in the classroom environment.

²⁷ *Ibid.*

²⁸ Exhibit A; Interviews with School District staff

²⁹ *Ibid.*

³⁰ Exhibit A

³¹ Exhibit A; Interviews with School District staff

category. Instead, the team agreed that Sam qualified for special education under the category of Other Health Impairment (“OHI”).³² SCO also notes that, based on a thorough review of the documentation provided by Parents and School District, School District never obtained Parents’ consent for the initial provision of special education and related services.³³

Sam’s May 31, 2016 IEP

25. Following the eligibility determination, the team moved into development of Sam’s IEP. Father did not attend the meeting. Parents shared input by email the following day, which was synthesized and incorporated into the parent input section of the document.³⁴

26. The IEP team identified the following needs:

- needs to comply with classroom routines and adult directives regarding safety; and follow one step directions
- needs to develop respect for persons in authority in the school setting
- needs to develop stamina with work/task completion for non-preferred activities and academics
- needs to improve social skills, and practice approaching peers and making friends
- needs to develop age appropriate emotional regulation strategies
- needs sensory needs evaluated by an occupational therapist so any sensory needs can be addressed³⁵
- needs to learn self-regulation strategies for sensory concerns
- needs to self advocate during conflicts with others
- needs to increase expressive language and improve phonological awareness skills³⁶

27. SCO concludes, based the entirety of the record, that Student’s IEP does not include sensory breaks or a behavior plan. The IEP team developed goals that addressed work completion, social communication, and sequencing and expressive language. In the accommodations section, the team included that “5 Questions of Structure”³⁷ would be embedded into the class environment across all settings, including transitions. Supports addressing behavior, transitions, sensory needs, self-

³² SCO notes that the eligibility documentation provided by School District is dated May 25, 2016, rather than May 31, 2016.

³³ Exhibits A and C; Interviews with School District staff, Parents, and Advocate #1

³⁴ Exhibits A and D; Interviews with School District staff, Parents, and Advocate #1

³⁵ SCO notes that this is not one of Student’s needs to be addressed in the IEP and should be placed in the PWN section. Moreover, information from the private OT report was not included in the IEP.

³⁶ Exhibit A

³⁷ A strategy used to provide visual structure and social/environmental cues in supporting students with ASD.

advocacy, social skills, and communication were also provided for in the accommodations section. The services section included:

- mental health services to address emotional and behavioral needs³⁸
- autism specialists and tutors to consult “to develop and support interventions that address the core challenges of Autism Spectrum Disorder”
- occupational therapy evaluation to be completed within 8 weeks of beginning school
- speech/language therapy
- special Education Resource Teacher services to support academics (30 minutes a week/direct and 5 minutes a week/indirect)³⁹

28. The IEP team met again on August 16th to discuss Parents’ email. The team discussed Sam’s sensory needs, transitions, Parents’ concerns that Sam make friends, backward reading/writing, and Parents’ concerns that Sam’s behavior would result in disciplinary removals from class. School District agreed that Sam would be tracked for progress throughout the fall by the autism team and that the School District was open to considering autism as a disability in the future. At that time the team also agreed to develop a self-advocacy goal, to develop and include a defined system of communication to be added to the accommodations section, and on the need to assess Sam’s behavior with an FBA. SCO concludes that none of these were added to the IEP, that an FBA was never conducted, and Parents were never provided with PWN.⁴⁰

29. OT also evaluated Sam after school started in the fall. The OT’s evaluation report noted Mother’s concerns with visual tracking and sensory issues and Mother’s report that Student can “become overwhelmed and overstimulated with sensory input and have meltdowns.” Assessments revealed that Sam’s visual motor integration score was below average, which the OT attributed to “impulsive/rushing behaviors”. OT recognized a definite difference between home and main classroom in that Parents noted definite dysfunction in auditory processing, touch processing, body awareness/kinesthesia, balance and motion/kinesthesia, and resulting definite dysfunction in social participation. Teacher, who had only known Sam for a short period of time, had not noticed any sensory related behavior, but noted that Sam was provided with 2-3 sensory breaks a day to prevent overstimulation. OT concluded that Sam demonstrated no significant delays in fine motor or visual motor, but may continue to benefit from sensory breaks throughout the school day. OT recommended consultative OT services for a minimum of 5 minutes/month to monitor for sensory

³⁹ Exhibit A

⁴⁰ Exhibits A and C; Interviews with Parents, School District staff, and Advocate #1

needs in the classroom. Mother agreed to amend the IEP per these recommendations. SCO again notes that sensory breaks were not added to Sam's IEP.⁴¹

Both Students: 2016-17 school year

30. Both Students began attending School in the beginning of the 2016-17 school year. Based on a thorough review of the credible record, which includes numerous interviews with credible witnesses, SCO concludes that Taylor's IEP was implemented in the preschool setting with structures and supports that were naturally embedded into the preschool classroom and that Taylor did not have any problems at School. SCO also concludes that Sam's IEP was implemented and complied with while at School.⁴²

31. Sam also started the school year with relatively little difficulty, experiencing a "honeymoon" period and, while exhibiting some negative behaviors (i.e., kicking Teacher), Teacher, Resource Teacher, and an autism tutor were able to provide support and were implementing the 5 questions of structure, which they had been trained by the autism team to provide. Sam was also receiving SLP services, social skills supports, and direct services by Resource Teacher or an autism tutor (under Resource Teacher's direction). Moreover, Resource Teacher was observing Student in the classroom with regularity, as was the autism team, in order to collect data on self advocacy and social interactions. Sam was also being provided with scheduled sensory breaks in a separate room and being provided with a variety of sensory supports in the classroom.⁴³

32. Sometime in the middle of September Student's negative behaviors began escalating and occurring more frequently and Student would become "dysregulated" (i.e., pushing students, crawling around on the floor, biting the clothing of students and Teacher). Student had days that were good when Teacher was easily able to use the supports, including those she has learned from the autism team and Resource Teacher in order to support Sam's behavior. There were some days, however, when Sam arrived at school and it was clear to Teacher that Sam was "off", meaning unable to control behaviors. On these days, it was more difficult to provide the supports, but Teacher continued to consult with Resource Teacher and autism team.⁴⁴

33. Based on the entirety of the record, including interviews with credible witnesses, SCO concludes that School District failed to appropriately assess the function of Student's behavior or develop a behavior plan, resulting in Student's removal from the classroom.

⁴¹ Exhibits A, B and C; Interviews with Parents, Advocates #1 and #2, and School District staff

⁴² Exhibits A and B; Interviews with School District staff, Parents, Advocate #1, and Advocate #2

⁴³ *Ibid.*

⁴⁴ *Ibid.*

34. Specials classes and substitute teachers were especially difficult for Sam. In response to incidents, Parents continued to advocate for specific accommodations, including requesting breaks during specials, advance notice of substitutes, and a paraprofessional in specials classes. Between September 21st and November 1st, Sam received three disciplinary referrals after becoming dysregulated in special classes. After each referral, Parents immediately raised concerns about the function of the behaviors and what supports were provided before the referrals. School District policy also provides that development of a behavior plan is mandatory after a second removal and is optional after a first removal. Moreover, the IEP team met several times and discussed Parents' concerns about Student's behavior.⁴⁵

35. Finally, on November 16th the team agreed that an FBA was warranted and assured Parents that Student would not be subject to disciplinary referrals. Director, who attended the meeting, specifically directed the team to ensure that they were considering Sam's behaviors through the lens of autism. Instead, after the November 16th meeting Director began working with Parents and School in an attempt to rebuild trust and repair the relationship between School and Parents that had become strained since the beginning of the school year and directed staff to hold off on the FBA.⁴⁶

36. Despite Director's intervention, the relationship continued to be strained and a conflict arose between Mother and Teacher a few days before winter break. School asked Director to speak with Parents about the conflict as he had become Parents' sole contact about all issues related to Sam's IEP. Director spoke with Mother on the day Students returned to School from winter break. Mother became upset and never returned Students to School.⁴⁷

37. IEP meetings were never scheduled after Parents refused to return to School, rather, Director continued with his efforts to address Parents' concerns and return Students to School. Parents requested tutoring in the home and other school choices. SCO notes that there were large time lapses between conversations and that, ultimately, there were other schools offered and attempts to return Students to other school within the District, without much success.⁴⁸ Parents eventually enrolled both

⁴⁵ Exhibits 3, D, I, 5, F, G, H, and I; Interviews with School District staff, Parents, and Advocates #1 and #2

⁴⁶ *Ibid.* SCO does note that Resource Teacher began collecting ABC data regarding Student's behavior beginning on October 26th and that Teacher and Resource Teacher regularly consulted with autism staff. SCO again notes that PWN regarding the agreement to conduct an FBA was never provided. 34 C.F.R. §300.503

⁴⁷ Exhibits 4, D; Interviews with School District staff, Parents, and Advocate #2

⁴⁸ SCO notes that Taylor attended Preschool for three weeks beginning on March 1, 2017 and that Sam began attending Neighborhood School on a part-time basis beginning on May 3, 2017.

Students in Private Preschool on sometime in the spring and Sam has attended Neighborhood School part-time.⁴⁹

38. On April 18th, both Students were administratively dropped from School District. In May, Parents enrolled both Students in Neighborhood School (another school in School District) for the upcoming 2017-18 school year. IEP meetings were scheduled to be held in May for both Students.

CONCLUSIONS OF LAW

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

Issues 1 and 2: Whether School District denied Parents meaningful participation in the development of Students' IEPs and failed to conduct full and comprehensive evaluations of Students, including failing to conduct evaluations requested by Parents.

1. Under the IDEA, public school districts are required to provide children with disabilities with a "free appropriate public education" (or 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 (or IEP) that is developed according to the IDEA's procedures. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. The IDEA's extensive procedural requirements relate to the development of the IEP, including the requirements that it be developed by a team of individuals with knowledge about the child and that it be based upon the input of the IEP meeting participants as well as evaluative data derived from valid, scientifically based assessments conducted in accordance with the IDEA's requirements. *See, e.g.*, 34 C.F.R. §§ 300.301-300.304 and 300.320-300.324.

2. In the formative case of *Board of Education v. Rowley*, the United States Supreme Court stressed the importance of compliance with the IDEA's procedural requirements.

"[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, *see, e.g.* 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrate[s] the legislative conviction that adequate compliance with the procedures prescribed would in

⁴⁹ Exhibit 7, D, I; Interviews with Director, Parents, and Advocate #2

most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.”

Board of Education v. Rowley, 458 U.S. 176, 205-206 (1982).

3. With the intention of developing an IEP that is tailored to the unique needs of the child, the IDEA places particular emphasis on collaboration among parents and school districts, requiring that parents be afforded the opportunity to participate and that their participation be meaningful, including giving careful consideration to their concerns about their child. 34 C.F.R. §§ 300.321 (a)(1), 300.322, and 300.324(a)(ii). It is well-established that where the procedural inadequacies seriously infringe upon the parents’ opportunity to meaningfully participate in the IEP process, the result is a “per se” denial of FAPE. *See, e.g., O.I. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11TH Cir. 2014); *Deal v. Hamilton County Bd. Of Educ.*, 392 F.2d 840 (6th Cir. 2004); *see also*, 34 C.F.R. §300.513(A)(2)(II) (“In matters alleging a procedural violation, a hearing officer may find that the child did not receive a FAPE only if the procedural inadequacies ... [s]ignificantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child...”).

4. The crux of the dispute in this case is that Parents believe that School District does not have a clear understanding of Students’ needs nor has it given meaningful consideration to Parents’ input. Specifically, Parents contend that School District did not consider private evaluations and parent input in the evaluation and eligibility process resulting in inadequately developed IEPs for both Students. SCO agrees.

5. Evaluations under the IDEA have two primary purposes: 1) to determine whether the child has a disability, and because of the disability needs special education and related services, and 2) to assist the IEP team in determining the child’s specific needs.⁵⁰ Therefore, it is imperative that when evaluating students for eligibility, the school district must:

- a. Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parents⁵¹, that may assist in determining whether the child is a child with a disability;
- b. Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability;
- c. Use technically sound instruments that may assess the relative contribution of cognitive behavioral factors, in addition to physical or developmental factors;
- d. Ensure that assessments and other evaluation materials are selected and administered without racial or cultural bias, are provided in the child’s native language, are valid and reliable, and are administered by trained and knowledgeable personnel;

⁵⁰ 34 C.F.R. §300.304(b)(1)(i)-(ii); *see also* 71 Fed. Reg. 46548.

⁵¹ SCO notes that parent input includes private evaluations.

- e. Select assessments relevant to specific areas of educational need;
- f. Assess the child in all areas of suspected disability;
- g. Make an eligibility determination by a group of qualified professionals and the child's parents.⁵²

6. To be eligible for educational services under the IDEA, a child must have one of the 13 qualifying impairments, and, "by reason thereof, needs special education and related services."⁵³ To resolve a state complaint that challenges a school district's eligibility determination, the SCO must first determine whether the school district followed the relevant procedures and standards required for making the determination and if so, whether the resulting determination is consistent with and supported by child-specific facts, i.e., evaluation data and other data in the record.⁵⁴ In this case, Parents requested that both Students be evaluated for concerns that were related to ASD and the function of their behaviors, including sensory concerns.

7. In order to be eligible as a child with ASD, there must be evidence of "A developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance. Other characteristics often associated with autism are engaging in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." The child must also be unable to receive reasonable educational benefit from general education as evidenced by all of the following criteria:

- Significant difficulties or differences in interacting with or understanding people and events (i.e., engagement in repetitive activities and stereotyped movements, resistance to environmental changes or changes in daily routines, and unusual responses to sensory experiences);
- Significant difficulties or differences in social communication, both receptively and expressively (i.e., typical integrated use of body language is lacking, difficulty in engaging in imaginative play and developing and maintaining friendships); and
- Seeking consistency in environmental events to the point of exhibiting significant rigidity in routines and displays marked distress over changes in the routine and/or has a significantly persistent preoccupation with or attachment to objects or topics.⁵⁵

8. With regard to the School District's evaluations of Students' for concerns related to ASD, it is clear to SCO that, if School District had given careful

⁵² 34 C.F.R. §§300.304-300.306

⁵³ 34 C.F.R. §300.8; ECEA Rule 2.8

⁵⁴ *Questions and Answers on IDEA Part B Dispute Resolution Procedures*, Question B-6 (OSERS 2013).

⁵⁵ 34 C.F.R. §300.8(c)(1)(i); ECEA 2.08(1)

consideration of its own evaluations, and in the case of Sam, conducted further assessments of ASD or considered the private ASD report provided by Parents⁵⁶, the School District could have determined that both Students were eligible under the ASD category. As such, SCO concludes that School District's evaluations in that regard were sufficiently comprehensive, however, its failure to consider Parents' input and documentation resulted in a denial of Students' right to FAPE. By appropriately identifying Students with ASD, specific measures related to autism are more likely to be implemented and included in the IEP.⁵⁷

9. Moreover, the record is clear that with regard to Sam's behavior, not only did Parents' request that behavior be evaluated since the beginning of the school year, but School District's own policy requires behavioral assessment after two disciplinary referrals. Moreover, the IEP team agreed on November 16th that they needed to conduct an FBA. Nonetheless, School District never conducted an FBA.

10. The recent *Andrew F.* decision has implications beyond academics for every IEP team, including these teams. According to the Supreme Court's finding, school districts must "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas county School District RE-1*, 137 S.Ct. 988 (March 22, 2017).

11. Accordingly, SCO concludes that the failure to appropriately assess the function of Sam's behavior and develop an IEP to address those behavior issues results in a denial of FAPE.

Issue 4: Whether School District failed to provide Parents with prior written notice (PWN) and Notice of Meetings.

12. The IDEA provides that a district must supply parents with PWN a reasonable time before the district refuses to initiate an evaluation. 34 C.F.R. § 300.503(a)(2). The PWN must include:

- A description of the action (i.e., evaluation) that the district is refusing to do;
- An explanation of why the district refuses to conduct an evaluation;
- A description of each report the district used as a basis for refusing an evaluation;

⁵⁶ 34 C.F.R. 300.305

⁵⁷ SCO also notes that with regard to the determination of Taylor' eligibility, the ECEA rules require that a child shall only be determined eligible under the Developmental Delay category "in those situations in which a clear determination cannot be made under any other category as measured by developmentally appropriate diagnostic instruments and procedures. ECEA Rule 2.08(13)(a)

- A copy of the procedural safeguards;
- Sources for parents to contact to obtain assistance in understanding the PWN;
- A description of other options considered and why those options were rejected; and
- A description of other factors relevant to the district's refusal.

34 C.F.R. § 300.503(b)(1)-(7).

13. As previously discussed, there were a number of instances in this case where assessments were requested and even agreed upon, but never conducted, most notably an FBA. There were also a number of goals, supports, and services that were discussed and agreed upon, but never included in Students' IEPs nor explained to Parents through a PWN. Furthermore, there were IEP meetings held without any Notice of Meeting to Parents. Accordingly, SCO concludes that School District failed to provide Parents with PWN and Notice of Meetings, in addition to other procedural violations noted in the Findings of Facts and included in the Remedies section of this Decision.⁵⁸

Issue 3: Whether School District failed to fully implement or comply with Students' IEPs.

14. SCO previously addressed issues related to the School District's failure to develop Students' IEPs relative to their unique and individual needs that resulted from the errors in School District's evaluation and eligibility process. With regard to Students' attendance at School from the beginning of the 2016-17 school year through January 4, 2017, School District contends and SCO concludes that Students' IEPs were implemented and complied with during that time. Moreover, it is evident that there was a great deal of discussion and communication regarding Sam's sensory needs and behavior and that supports and strategies recommended by Parents, as well as regular consultation with the autism team, were being implemented by Teacher and Resource Teacher. What remained problematic, however, was the School District's failure to assess and understand the function of Sam's behavior and determine a plan to provide support. Therefore, the issues of implementation that SCO considers here involve the time period after which Parents refused to send Students back to School, January 5, 2017 through the end of the 2017-18 school year.

⁵⁸ SCO also noted a number of additional procedural violations in the Finding of Facts herein, which are added to the Remedies section.

15. School District argues that Parents unilaterally removed Students and enrolled them in Private Preschool due to issues unrelated to School's ability to implement Students' IEPs. Parents' position is that they felt unsure of Students' safety at School. Their position is rooted in what SCO has already concluded, which is that School District did not understand Students' needs, resulting in a failure to develop Students' IEPs according to their unique, individual needs, violating FAPE.

16. It is well settled that when parents believe that a public educational placement is denying their child FAPE, the parent may choose to remove the child to a private placement, but do so at "their own financial risk." *W.G. v. Board of Trustees of Target Range Sch. Dis. No. 23*, 18 IDELR 1019 (9th Cir. 1992). See also *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993). Indeed, private school tuition reimbursement is available as a remedy under the IDEA where the child's public placement violated the IDEA and the subsequent private placement was proper.⁵⁹ Here, there is no argument that Private School was improper. Moreover, compensatory education is an equitable remedy intended to place a student in the same position they would have been, but for the violation. *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.D. Cir.2005).

17. Accordingly, Students are awarded compensatory education as specified in the remedies section of this Decision and Sam is awarded reimbursement for tuition at Private School from the date of Sam's enrollment in the spring of 2017 through the end of the 2016-17 school year.

REMEDIES

The SCO has concluded that the School District committed the following violations of the regulations:

1. Failure to develop an IEP according to the unique needs of a child with a disability and predetermination of placement (34 C.F.R. §§300.320, 300.324 and 300.501(b)).
2. Failure to develop an IEP according to the procedural requirements of the IDEA and ECEA rules, including:
 - a. failure to provide meaningful participation to the child's parents (34 C.F.R. §§300.321(a)(1); 300.324);
 - b. failure to evaluate students in accordance with the requirements of 34 C.F.R. §§300.304-300.306, 300.8 and ECEA Rule 2.08(13)(a);

⁵⁹ 34 C.F.R. § 300.148

- c. failure to obtain parental consent in accordance with 34 C.F.R. 300.300; and
 - d. failure to provide prior written notice in accordance with 34 C.F.R. § 300.503.
3. Failure to provide student with the special education and related services in conformity with an IEP, resulting in a denial of FAPE (34 C.F.R. §300.17(b)).

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

1. By August 11, 2017, the School District must submit to the Department a proposed corrective action plan (CAP) that addresses each and every violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the School District is responsible. 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 cited violation, no later than September 8, 2017.
 - b. Effective training must be conducted for all special education case managers and coordinators concerning the policies and procedures, to be provided no later than October 13, 2017.
 - 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 than October 23, 2017.
2. School District shall reimburse Parents for the cost they incurred for Private School for Sam from the date of enrollment after January 5, 2017 through the end of the 2016-17 school year. Parents will provide School District with statements detailing the amounts paid.
3. School District will conduct an FBA for Students as soon as possible and to begin no later than the beginning of the 2017-18 school year that follows the Department's quality indicators for the FBA process. The evaluator chosen must be a BCBA from outside of School District. The FBA will lead to a positive behavior plan, including proactive and behavioral support strategies, to include teaching of replacement strategies and a plan for parental support and training. The FBA must be submitted to Department for efficacy and to ensure it follows evidence-based practices for

students with ASD, including the identification of specific behavioral challenges and identification of the function of those behavioral challenges.

4. No later than July 28, 2017, School District must hold IEP team meetings in order to discuss whether they are able to determine whether each student is eligible under the ASD category based on the School District's evaluations, including the OT evaluation, and private reports. The IEP teams must include the aforementioned BCBA, a consultant ("ASD consultant") who is not employed by the School District and who has experience evaluating, knowledge, and strategies specific to ASD, a member of the School District's autism team. Upon request, the Department is able to provide the School District with a list of qualified consultants. Prior to choosing the ASD Consultant, School District must provide Parents and Department with a list of no fewer than three proposed consultants for Department's review and approval.

- a. If either IEP teams determines that either Student is eligible under the ASD category, it must review and update all areas of student's IEP that complies with all procedural requirements of the IDEA, particularly all of the provisions that the SCO has found the School District to have violated. The IEP team must discuss a plan to obtain further information in any areas of concern or need.
- b. If the team does not have enough information to determine whether Students are eligible under the ASD category, the IEP team must reach consensus in determining all areas of concern and what information they need and obtain Parents' consent for evaluations.
- c. Once any new evaluations are complete, the IEP team will reconvene to discuss eligibility and develop all areas of Students' IEPs that comply with all procedural requirements of the IDEA, particularly all of the provisions that the SCO has found the School District to have violated. The IEP team meetings must include all professionals who are expected to provide services to Student in School District, as well as the aforementioned required IEP team members. A complete copy of any new IEP developed for Students and prior written notice shall be provided to the Department within five days after the IEP meetings occur.
 - i. With regard to Students' IEPs until one year from the date of this Decision, they must include:
 - A. plans for communication with Parents, to include the method of daily communication and weekly communication and the topics to be addressed in each (i.e., behavior concerns and supports provided, social interactions).

- B. plans for regularly scheduled meetings (i.e., every six weeks) with Parents to discuss Students' progress and address concerns.
- C. Identification of any of Students' sensory, behavioral, and social/emotional needs and development of goals and services or accommodations, to support those identified needs.
- D. a plan for compensatory services to address any deficiencies that are consistent with its consideration of Students' present levels and needs related to any absence of special education services from January 6, 2017 through the date of this Decision.

These compensatory services shall be in addition to any services Students currently receive, or will receive, that are designed to advance Students toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory education services will be provided, with special consideration to Students' needs, stamina, cooperation, and schedule.

- ii. A complete copy of any new IEPs developed for Students, including plans for compensatory services, and prior written notice, as well as any evaluation reports shall be provided to the Department within five days after the IEPs meetings occur.
- iii. With regard to all IEP meetings until one year from the date of this Decision:
 - A. School District and Parents must exchange any reports (including private evaluations), assessments, and any draft IEP prepared no more than three days prior to the meeting.
 - B. All IEP meetings must be facilitated by a School District staff member approved by Parents or a neutral facilitator (not employed by the School District).
 - C. All IEP meetings must include the aforementioned IEP team members.

The Department will approve or request revisions of the CAP. Subsequent to the approval of the CAP, the Department will arrange to conduct verification activities to verify the School District's timely compliance with this Decision. Please submit the documentation detailed above to the Department as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn: Gail Lott
1560 Broadway, Suite 1100
Denver, CO 80202-5149

Failure of the School District to meet the timelines set forth above will adversely affect the School District's annual determination under the IDEA and will subject the School District to enforcement action by the Department.

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.

This 14th day of July, 2017.

Lisa A. Weiss, Esq.
State Complaints Officer

APPENDIX

Complaint, dated May 16, 2017, pages 1-37 (including Table of Exhibits)

- Exhibit 1: Taylor: Notice of Meeting (2/19/16); Prior Notice & Consent for Evaluation (2/19/16); Evaluation Report (2/19/16); Determination of Eligibility (2/19/19); Prior Written Notice of Special Education Action (2/19/16); IEP Amendments & Prior Written Notices (8/31/16); OT Evaluation (8/31/16); ADOS-2 Report (5/26/16); IEP (5/31/16)
- Exhibit 2: Sam: Notice of Meeting (2/19/16); Prior Notice & Consent for Evaluation (2/19/16); Evaluation Report (2/19/16); Determination of Eligibility (2/19/16); Prior Written Notice of Special Education Action (undated); OT Evaluation (8/31/16); ADOS-2 (5/18/16); Notices of Meetings (8/16/16; 9/19/16; 11/16/16); IEP Amendment & Prior Written Notice (8/31/16); Report Card 2016-17; IEP (5/31/16)
- Exhibit 3: Special Education Meeting Notes (8/16/16; 10/19/16); Urgent Care record (11/3/16); School Office Referral Forms (10/11/16; 11/1/16); Memo (11/1/16); Memo written by Father
- Exhibit 4: Email correspondence
- Exhibit 5: Administrative policy: Supervision of Students

Reply, dated June 15, 2017, pages 1-15

- Exhibit 6: IEP (5/24/17) marked "DRAFT" and "Parent copy"

Documents provided by Parents upon SCO request

- Exhibit 7: Email correspondence

Response, dated May 22, 2017, pages 1-5

- Exhibit A: Copies of special education files since the beginning of the 2015-16 school year, including amendments and meeting notes (Sam, pages 1-164) (Taylor, pages 165-318)
- Exhibit C: Copies of all progress reports regarding Students from the beginning of the 2015-16 school year (Sam, pages 321-494)(Taylor, pages 495-515)
- Exhibit D: All correspondence between School, School District staff, and Parents concerning the Complaint allegations (pages 516-659)
- Exhibit E: School and School District staff members with knowledge of the facts underlying the Complaint allegations (page 660)
- Exhibit F: School District policies
- Exhibit G: School District policies

Documents provided by School District upon SCO request

Exhibit H: Correspondence

Exhibit I: Enrollment History; Attendance Detail; Report card; Behavior Detail Report;
Student Test Scores Detail

Exhibit J: Sam's New School orientation picture booklet

Interviews with:

Mother

Father

Advocate #1

Advocate #2

Director

Principal

School District Autism Specialist

Preschool Autism Specialist

Resource Teacher

Preschool Teacher

School Psychologist

SLP

Teacher