

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

State-Level Complaint 2017:518
Jefferson County School District

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on September 22, 2017, by mother (Parent or Mother) of a student (Student) who is a resident of Jefferson County School District (School District). Student is currently being home-schooled. Student is identified as a child with a disability under the Individuals with Disabilities Education Act.¹

Based on the written Complaint, the State Complaints Officer (SCO) determined that the Complaint identified a number of 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 300.153.²

COMPLAINT ALLEGATIONS

Whether the School District violated the IDEA and denied Student a free appropriate education (FAPE):

1. By failing to implement Student's Individualized Education Plan (IEP) since September 22, 2016, specifically as it pertains to Student's occupational therapy and health plan;
2. By failing to develop Student's IEP according to his individualized needs, including:
 - a. Failing to provide Mother meaningful input into the development of Student's IEP since October 2016; including
 - i. Failing to consider an Independent Educational Evaluations (IEEs or private evaluations) and input from outside providers;

¹ 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.*

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).

- ii. Failing to provide a copy of the finalized IEP in a timely manner after the August 2017 IEP meeting;
 - b. Failing to develop the health plan according to Student's needs;
 - c. Failing to conduct evaluations in all areas of Student's suspected disability;
 - d. Amending related services at the October 2016 meeting;
 - e. Failing to provide Prior Written Notices (PWNs) in response to Mother's request for evaluations and services, specifically Functional Behavioral Assessments (FBA), Sensory Diet Options and Visual/Spatial Evaluations;
 - f. Failing to determine Student's eligibility for Extended School Year (ESY) services since October 2016;
 - g. Failing to develop measurable functional and academic goals that meet Student's needs resulting from his disability;
3. Failing to appropriately determine Student's eligibility.

FINDINGS OF FACT

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

Background Information/Summary

1. Student is a [age]-year-old boy and has lived with Parents within the boundaries of the School District at all times relevant to the Complaint. Student was initially identified as a child with a disability on October 9, 2015 with a primary disability of Autism Spectrum Disorders and a secondary disability of Developmental Delays.⁴
2. The Needs and Impact of Disability statement in Student's initial IEP (2015 IEP) provides "[Student] demonstrates a delay in social/emotional development. [Student's] delay in social/emotional development will negatively affect his ability to interact socially with others, engage in play with peers and fully participate in a variety of preschool activities." The IEP contained three goals: two social/emotional wellness goals and one communication goal.⁵
3. The 2015 IEP service delivery statement provided the following:
 - (1) 180 minutes per month of direct special education services inside the classroom;
 - (2) 30 minutes per month of indirect special education services inside the classroom;

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

⁴ Complaint; Exhibit A.

⁵ Exhibit A.

- (3) 150 minutes per month of direct Speech/Language Therapy (SLP) services inside the classroom;
- (4) 15 minutes per month of indirectly SLP inside the classroom;
- (5) 60 minutes per month of direct mental health services inside the classroom;
- (6) 15 minutes per month of indirect mental health services outside the classroom;
- (7) 9 hours per year of indirect occupational therapy (OT) outside the classroom;⁶

4. The 2015 IEP also notes that Student requires a Health Care Plan and that the school nurse would develop it. The Health Assessment's section in the evaluation report notes that "[Student] has asthma which requires nebulizer treatments with colds or as needed for flare ups and he is allergic to Tylenol."⁷

5. By Mother's account, Student was fairly successful during the 2015/2016 school year. Mother states that the school responded to her concerns and addressed Student's needs.⁸

6. Student started the 2016-2017 school year as a kindergartener at School #1.⁹ He attended this school from August 18, 2016 through September 6, 2016. Due to concerns regarding Student's health and safety, Parents removed Student from School #1 and enrolled him in their home school (School #2). Student's annual IEP was due October 5, 2016, less than a month after Student enrolled in School #2.¹⁰

Implementation of OT Services

7. Prior to the 2016 IEP meeting, Parent alleges that School failed to implement OT services as outlined in Student's 2015 IEP. The 2015 IEP required 9 hours/year of indirect OT time outside the general education classroom or approximately 60 minutes a month.¹¹ School #2 OT's notes indicate that she provided 40 minutes of indirect OT time inside the classroom for the month of September. While she reported being in the classroom two times a week for approximately 30 minutes a week, the time documented to address

⁶ *Id.* The 2015 IEP was changed during a transition meeting convened on May 4, 2016 which removed OT services. OT services were reinstated in a May 5, 2016 IEP amendment to provide 9 hours yearly of indirect outside class time.

⁷ *Id.*

⁸ Interview with Mother.

⁹ This was the school Student attended for Preschool.

¹⁰ Interview with Parent. Complaint and Exhibit A.

¹¹ In this particular situation, it seems likely services would be front-loaded as the initial transition is where he struggles most as confirmed by both school staff, Parents and private providers.

Student's needs is only 40 minutes.¹² While it appears that School #2 OT did not fully implement Student's IEP as it relates to OT services, the SCO finds no violation for failure to implement given that Student did not begin attending School #2 until September 8, 2016 and missed 7 school days during that same month.

October 5, 2016 IEP (2016 IEP)

Removal of OT Services

8. School #2 conducted Student's annual IEP on October 5, 2016 (2016 IEP). Present at the meeting were Mother, Father, School #2 Special Education Teacher, School #2 General Education Teacher, Asst. Special Education Director, School #2 Mental Health Provider, School #2 OT, School #2 SLP, Advocate, School #2 Principal and Private SLP.¹³

9. The 2016 IEP's Needs and Impact of Disability Statement provides "[Student's] reluctance to enter the classroom, refusing to work, and demonstration of emotional break down are interfering with his ability to fully access the general education curriculum. These factors are interfering with his time in whole group and small group time. Although other students try to engage [Student], his limited and inconsistent response is hampering his ability to form relationships which is a vital component to an academic setting." This IEP contained three goals including one for social/emotional wellness, one for communication and one for reading.¹⁴

10. The final service delivery statement provided the following:

- i) 66 minutes per month of direct mental health services insider the classroom;
- ii) 30 minutes per month of indirect special education instruction inside the classroom;
- iii) 120 minutes per month of direct outside speech language services;
- iv) 20 minutes per month of indirect outside speech language services.¹⁵

11. Based on School #2 OT's recommendation, OT was removed as a related service. According to School #2 OT, she did not conduct an evaluation necessitating consent because she believed she had observed Student sufficiently to justify removing Student's OT services due to the fact that she was in the classroom two times a week and was able to observe him in the classroom environment. Additionally she reported that she discussed Student's needs with School #2 Teacher and other School #2 providers who agreed that he did not demonstrate a need for OT services. School #2 OT states that even though OT services were discontinued, she continued to observe Student and provide consult services. According to Parents, School #2 staff did not review the private evaluations that Parents provided during the meeting or consider the Parents' or private providers' input. Additionally, Parents assert School #2 OT did not conduct all of the observations herself

¹² Interview Parents and School #2 OT.Exhibit A.

¹³ Exhibit A.

¹⁴ *Id.*

¹⁵ *Id.*

and that these observations were not an evaluation justifying the removal of Student's occupational services. Mother states that the draft IEP was submitted to them on September 23, 2016.¹⁶ The draft contained the exact information as the finalized IEP. The SCO notes that at the time the draft was provided to Parents, School #2 OT had only documented two interactions and/or observations with Student lasting a total of 20 minutes.¹⁷ With Student having only attended approximately 13 days by the time the 2016 IEP was held, the SCO finds that it was premature to make such a determination. The SCO finds that School removed OT as a related service without a sufficient body of evidence to support her determination and without "consideration of a reevaluation."¹⁸

Consideration of Mother's input, input from outside provider and IEEs (also referred to as privately obtained evaluations)

12. Mother alleges that School did not consider her input or the privately obtained evaluations she brought to the October 2016 IEP Meeting. Mother states that the reports "were left on the table untouched." The Prior Written Notice documents that School considered "an evaluation report from Sensory Pathways 4 Kids, a discharge report from Sensory Pathways 4 Kids and the previous year's IEP."¹⁹ Additionally, a number of School #2 staff report reviewing the 2015 IEP and the other evaluations. As for Mother's input, Mother, her advocate and Private SLP actively participated in the 2016 IEP. The IEP includes Parents' concerns in the Parent Input section. The accommodations section was updated from the previous year and includes providing a fidget item that was specifically mentioned by Mother. Accordingly, the SCO finds that School District considered Mother's input and the privately obtained evaluations at the 2016 IEP.

13. The SCO finds School #2 considered input from outside providers during the October 2016 IEP meeting. A few examples include the following:

- (1) The draft IEP did not include SLP services but based on communications between School #2 SLP and the Private SLP, services were added back into the service grid;
- (2) Communications occurred between School #2 OT and Private OT.

November 2016 Amendment Meeting

14. Over the course of the month of October, Parents began having concerns regarding Student's physical and emotional well-being. Specifically, Mother reports that in the first part of October she began noticing Student was "not eating a single bite" of his lunch and

¹⁶ This is corroborated by the date on the draft IEP noted when procedural safeguards were provided. Exhibit 31.

¹⁷ Interview Parents, School #2 OT, School #2 Teacher and School #2 SLP. Exhibit A.

¹⁸ SCO notes that removal of a related service without an evaluation is contrary to School District's own policy regarding this practice. Their policy requires a reevaluation prior to deletion of a related service. Exhibit E-2, page 24. Additionally, SCO acknowledges that School OT continued to provide some indirect services to Student. Exhibit A.

¹⁹ Exhibit A.

this continued for approximately two weeks without School #2 noticing. Additionally, Mother was concerned because Student was refusing to use the bathroom causing him to have accidents and resulting in abnormal kidney levels.²⁰ Towards the second-half of October, Mother reports that over the course of a ten-day period, on five occasions, when she picked up Student, he was having difficulty breathing requiring two nebulizer treatments at home each time.²¹ To address these concerns a meeting was held October 14, 2016 and an IEP Amendment Meeting was held on November 14, 2016 (November 2016 Amendment meeting).²²

15. In attendance at the November 2016 Amendment Meeting were School #2 Nurse, School #2 Social Worker, District Asst Special Education Director, Mother, School #2 Special Education Teacher, School #2 Principal, School #2 OT, Father, School #2 General Education Teacher, School #2 SLP, Private SLP, Private BCBA, #1, Private BCBA #2 and Advocate. According to one witness, the tone of this meeting was hostile. The set-up of the meeting had Parents, private providers and Advocate on one side of a table and School #2 staff on the other side. According to the witness, it was an “us” vs. “them” atmosphere. Another witness stated that in her opinion, School staff were “cold” and “distant” during the meeting and that it appeared that School #2 staff believed that Mother was embellishing Student’s needs. This same witness stated that School #2 was minimizing Student’s needs. According to Mother “the disdain was palpable.” Mother alleges that they did not feel they were a part of the IEP team and everything they recommended was disregarded. A number of School staff agreed that the set-up had Parents and Student’s private providers on one side and School #2 staff on the other side. One School #2 staff member reported that she felt attacked by Parents. School #2 staff members deny that Parents were disrespected but agree that the environment was tense.²³

16. The SCO does not doubt Parents and private providers’ impression of the meeting, which unfortunately appears to have laid the groundwork for the ongoing tension between School #2 and family. It is clear that Mother and her “team” felt devalued. Nevertheless, based on the documentation and what was actually proposed, the SCO finds that School considered parents’ concerns. The meeting notes provide a fairly detailed outline of Parents’ concerns and School #2’s responses. A few examples include:

- (1) Parents requested visuals to help communicate his wants and needs with adults. While School did not see this as a need, they agreed to create visuals.
- (2) Parents voiced concerns regarding Student not using the restroom. School agreed that School #2 teacher will prompt student to use bathroom at each break and track it.

²⁰ The SCO notes that no documentation was provided to School nurse at the time.

²¹ Interview with Parent. Complaint, Exhibit A and F.

²² Interview with Parents, Advocate, Private SLP, Asst Special Education Director, School #2 Teacher, School #2 Special Education Teacher. Exhibit A.

²³ Interview with Parents, Advocate, Private SLP, School #2 Teacher, School #2 SLP, School #2 OT, Asst. Special Education Teacher. Complaint.

- (3) Parents wanted more communication to help support Student when he got home. School agreed that Parents can e-mail or talk to School #2 teacher every day about anything.
- (4) Parents were concerned about Student not having adult support at recess. School responded that they had adult support initially but when Student appeared to no longer need it, they decreased that support. School agreed to have visuals available at recess that Student could use in high anxiety times.
- (5) The one area that was not addressed was lunch. Parents voiced concern regarding lunch and Student not eating enough. School communicated that he is not eating because he is interacting with peers. However no solution or rejection of a proposal was documented.²⁴

17. The final November 2016 Amendment documented the proposed changes, which included in summary 1) visual cards, 2) prompting Student to use bathroom during designated breaks, 3) incorporating sensory rotations within the classroom, and 4) sharing writing paper. The 2016 Amendment also documented other options considered and the rationale for rejecting those options, which included the following:

- (1) Parents requested for a staff member to be at recess to facilitate peer interaction and social communication. The School rejected this request because, based on their observations, Student was communicating. They did agree to provide Student with visuals.
- (2) Parents requested a behavior plan as recommended by outside providers. School rejected this request because School does not see the same behaviors that are seen at home.
- (3) Parents requested a sensory diet. This request was rejected because School does not see that Student demonstrated this need. However, they did provide sensory rotations in the classroom.²⁵

18. Mother alleges that PWNs were not issued regarding her requests for behavioral supports (FBA) and sensory diet. While the 2016 Amendment provides much of the required information of a PWN, it fails to include 1) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refused action, 2) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part, and 3) sources for parents to contact to obtain assistance in understanding the provisions of this part. Accordingly, the SCO finds that School did not issue a Prior Written Notice regarding Parents' request for an FBA (behavioral support) and a sensory diet for Student.

Consideration of privately obtained evaluations

²⁴ Exhibit A.

²⁵ *Id.*

19. Mother alleges that she provided School #2 part of a privately obtained evaluation from Children's Hospital on October 10, 2016 and the entire evaluation at the November 2016 Amendment meeting²⁶ and school did not consider it. Based on the interviews and a thorough review of the evidence, the SCO finds there is insufficient evidence to determine if a private evaluation was presented at the meeting. The Advocate recalls Parent referencing the evaluation but does not remember if it was provided to School #2 at that time. Only one School #2 staff member vaguely recalls an evaluation but was not really sure when it may have been provided. Other than that, there is no reference in the meeting documentation. Additionally, on November 17, 2017, Mother e-mailed Asst. Special Education Director and informed her that she was sending her a copy of the private evaluation from Children's.²⁷ Her reference in this e-mail makes it seem like this is the first time she is providing this document. Accordingly, the SCO finds insufficient evidence to make a finding regarding a failure to consider the private evaluation at the November 2016 Amendment meeting.

20. The SCO finds School #2 considered input from outside providers at the November 2016 amendment meeting. Mother's private providers consisted of an SLP, an ABA and a BCBA. The meeting notes document the following:

- (1) "Outside Providers have recommended a behavior plan." The team reviewed the paperwork to determine whether to do a behavior plan and decided not to based on the descriptors.

Based on input from the private providers, School reviewed the necessary paperwork to determine whether a behavior plan was warranted. While School #2 staff did not agree with the providers, it is clear they considered their recommendation. Furthermore, while there is not a specific reference to the Private SLP, the notes make it clear that School staff considered how to assist Student in communicating his needs in times of heightened anxiety.

Development and Implementation of Health Plan

21. During this same time period, Mother alleges that School #2 did not implement Student's Health Plan and as a result put his health and safety at risk. The Asthma Action Plan in effect at the time was signed by Doctor, School #2 School Nurse and Parent in August of 2016. The Asthma Action Plan was divided into three sections. The green zone denotes there are no symptom and provides that Student receives pretreatment as needed when there are weather, viral or illness factors. The yellow zone requires that Student receive the inhaler with spacer when staff sees Student having trouble breathing, is wheezing, has a frequent cough, complains of chest tightness and/or is not able to do activities but still talking in complete sentences. The red zone, which is an emergency situation, when severe asthma symptoms are exhibited, requires, among other things,

²⁶ Mother reports that she provided the school with part of the report prior to that meeting.

²⁷ Interview with Parents, Private SLP, Advocate, Asst. Special Education Director, School #2 SLP, School #2 Teacher. Complaint, Exhibit A and Exhibit 28.

that Student receives a nebulizer treatment if Student is observed coughing constantly, struggling to breathe and/or having trouble talking.²⁸

22. Mother cites two examples where the plan was not implemented. The first example that Mother provided occurred on October 14, 2016 when School #2 SLP reported to her that Student had difficulty breathing and was coughing during one of the recesses and she had him sit down. Mother states that School #2 SLP did not act according to the Asthma Action Plan, which required sending him to the nurse for treatment. Regarding the first example, School #2 SLP states that she did not tell Mother that Student had difficulty breathing but reached out to Mother to “celebrate” with her that Student was running and playing with peers. She states that based on her experience, she did not believe he was having an asthma attack because he communicated at least two complete sentences. The second example that Mother provided occurred during the latter half of October 2016. Mother described five occasions out of a 10-day period that Student was struggling to breathe when Mother picked him up. As for the second example, School #2 SLP, School #2 Teacher and School #2 Nurse report that they did not observe the issues or concerns voiced by Mother nor did they know about Mother’s concern at the time.²⁹

23. The issue with implementation of the Asthma Action Plan is not an easy one to determine. The SCO finds both Mother and School #2 SLP credible. However, the SCO notes that School #2 SLP’s reliance on Student being able to talk in complete sentences to justify Student not needing treatment is erroneous. The Asthma Action Plan specifically states “not able to do activities but still talking in complete sentences.” The issue then turns on whether Student needing to “sit” meant he could not do activities. School #2 SLP states that when she communicated with Mother regarding what happened on the playground, it was in an attempt to share something she felt was positive for Student: Student running around and playing with peers. Furthermore, she stated that Student was able to walk around, but because he was hot, she had him sit down to cool off. While School #2 SLP did not appear to completely understand the Asthma Action Plan, especially as it pertained to Student’s individual needs, the SCO finds that in this situation there was not a failure to implement.³⁰ As for the other situation, the SCO does not discount Mother’s concerns as they pertain to Student. Despite this, the SCO finds that there is not enough evidence to find a violation and as such, does not make a finding against School District for failure to implement Asthma Action Plan. School #2 staff report they did not observe Student having any breathing issues as reported in Mother’s complaint, there were no documented calls to Student’s asthma Dr. regarding these issues and there were no reported e-mails or calls documenting this concern to the School.³¹

Post 2016 Amendment Meeting/Evaluations

²⁸ Interview with Parents. Complaint and Exhibit F.

²⁹ Interview with Parents, School #2 SLP, School #2 Teacher and School #2 Nurse. Exhibit A, Exhibit C and Exhibit F.

³⁰ SCO notes that School District should ensure that school staff should have a better understanding of Student’s needs as it pertains to recognizing the various zones in the Asthma Action Plan.

³¹ The SCO notes that given the gravity of the concerns voiced by Mother, the School #2 nurse log seems sparse and incomplete based on the communications that were occurring.

24. Three days after the November 2016 Amendment meeting, Mother e-mailed Asst Special Education Director her frustration with the process, her ongoing concern regarding Student's needs for "intensive speech and OT." Additionally, she provided a copy of the Children's Evaluation in support of her position.³² The SCO finds that there is no indication that School District responded to Mother in any way, reviewed the document or even considered whether it met the School District's criteria for an IEE.

25. Following the November 2016 Amendment meeting, Parents withdrew Student from School #2 based on their concerns regarding Student's health and safety. They notified School #2 of their intent to home school Student.³³

26. To address their concern, Parents wrote a letter to the School District Superintendent outlining their concerns. In response to the letter, Special Education Director scheduled a meeting for December 8, 2016. Among other things, Mother requested School consider the Student's private evaluations. Mother reports that School made her believe that the only way they could consider Mother's private evaluations was if School District first did their own. If School District believed this to be the case, they are mistaken, as there is no requirement for School to do their own evaluation prior to considering a Parent's already obtained private evaluation. Nevertheless, according to Mother, she formally requested an evaluation on December 15, 2016 based on this misperception. Specifically she requested to have "formal evaluations including but not limited to Occupational Therapy, Writing, Behavior, Social/Emotional, Self-Care, Speech, and Executive Functioning."³⁴ School District did not attempt to obtain Mother's consent until January 30, 2017 when the parties engaged in mediation. Special Education Director states that at the time she received the request, she proposed to Mother that they wait to discuss evaluations at the mediation. However, the SCO finds there is no documentation to support either that assertion or Mother's agreement to "table" her request for evaluations pending mediation. The SCO finds that School District failed to promptly obtain Mother's consent to begin conducting evaluations or in the alternative, to issue a PWN to state why School District was refusing to take prompt action.

27. On January 30, 2017, School District and Parents engaged in mediation. While many of the terms of mediation are unknown to the SCO, both parties acknowledge that one of the terms of the agreement was to conduct evaluations. School District obtained Mother's consent to evaluate that same day and referred the request to the Child Find Team responsible for children who are homeschooled. Mother was under the impression that the evaluations and corresponding IEP meeting were going to be completed by Spring Break so that Student could be enrolled at that time. According to Special Education Director, that was not her understanding. Ultimately, the Evaluation Report was delivered to Parents on April 14, 2017.

³² Interview with Parents, Asst Special Education Director and Special Education Director. Exhibit 28. The SCO notes that there are numerous communications missing from School District's Response.

³³ Interviews with Parents, Special Education Director and Asst Special Education Director. Complaint, Exhibit A and C.

³⁴ *Id.* Exhibit 11.

April 2017 Evaluation Report and May 2017 IEP

28. Mother alleges that school failed to conduct evaluations in all areas of Student's suspected disability, specifically a Functional Behavioral Assessment and visual/spatial assessments. Additionally Mother alleges that School failed to appropriately determine Student's eligibility.³⁵

29. The SCO finds that School completed a comprehensive evaluation as outlined below. The April 2017 Evaluation was completed by a multidisciplinary team consisting of Child Find School Psychologist, Child Find SLP, Child Find OT, Child Find Special Education Teacher and Child Find BCBA. The team used a variety of assessment tools and strategies and gathered relevant information from a variety of sources.

30. The Evaluation Report included the following:
- i) The General Intelligence Assessments consisted of a review of an evaluation completed by Children's Hospital of Colorado completed in October 2016.
 - (1) The Review of Records was evaluated by Child Find School Psychologist which consisted of reviewing the following:
 - (a) Letter from LCSW diagnosing Student with Autism from September 2015;
 - (b) Evaluation from Children's Hospital of Colorado completed in October 2016 which included standardized assessment of Adaptive and Cognitive functioning and an Autism Specific Assessment (ADOS-2), Differential Ability Scales 2nd Edition (DAS-II).
 - ii) Communicative Status Assessment
 - (1) The Evaluation consisted of a play based assessment; the Dyssemia Rating Scale completed by parent and teacher and a review of record evaluated by the Child Find SLP which included the following:
 - (2) The Review of Record consisted of the 2015 Child Find Assessment;
 - (3) Child Find SLP discussed Student with the private SLP.
 - iii) Academic Performance Assessments were evaluated by Child Find Special Education Specialist.
 - (1) The evaluation consisted of record review, parent and teacher report, informal Dynamic Indicators of Basic Early Literacy Skills (Dibels), formal assessment Kaufman Test of Educational Achievement, Third Edition (KTEA-3);
 - (2) The Review of Record included a review of report card and past (Dibels) scores;
 - (3) Child Find Special Education Specialist conducted KTEA-3 over two sessions, another DIBELS reading assessment as well as a review of a story that was read at first session and a writing prompt.
 - iv) Social and Emotional Assessments were evaluated by Child Find School Psychologist

³⁵ Interviews with Parents.Complaint and Exhibit C.

- (1) The Evaluation consisted of Review of records, BASC-3, BRIEF2, SRS-II, GARS-3, CARS-2.³⁶
- (2) Child Find School Psychologist also conducted interviews with Student's private individual therapist and Student's private ABA.
- v) Autism Spectrum Disorder School Observation Guide was evaluated by Child Find BCBA.
- vi) Health Assessments
 - (1) The Comprehensive Student Health History was evaluated by School District Director of Health Services.
 - (2) The information evaluated consisted of health information obtained and collected from Comprehensive Student Health History form which included Peak Pediatrics Health Form completed on November 11, 2016, Asthma State Health Plans from Asthma Dr. from August 2016-November 2016 and questionnaires completed by Mother dated February 17, 2017 and March 6, 2017.
- vii) Motor Assessments
 - (1) This evaluation consisted of record review, skilled observation, Educational Assessment of School Youth for Occupational Therapy (EASY-OT); Observation of hand manipulation and play skills evaluated by Child Find OT.
 - (2) The record review included The Visual Motor Integration (VMI) completed in December 12, 2016.³⁷

31. The 2017 Evaluation Summary provides the following:

- (1) Cognitive: The DAS-11 reflects "[Student's] nonverbal reasoning capabilities are in the High Average range (NRC 116). [Student's] general ability to learn and use verbal information is at least in the Average range. [Student's] performance on tasks that measure his spatial reasoning was impacted by attention and anxiety per the report of the examiner."
- (2) Communication summary provided that based on the informal assessment, information from professionals working with [Student] and previous testing revealed [Student's] receptive and expressive language appeared to be developing within age-level expectations. His social communication skills continue to be an area of concern.... Given his anxiety, he would continue to benefit from support to address the areas of social communication."
- (3) Academic summary provided that "Student's academic skills are developing within age/grade expectation Student was noted to make significant progress when attending kindergarten in the public school. Although [Student's] current skills have slightly regressed since withdrawing from kindergarten, his current academic skills are not noted to be significantly delayed. At times, during the informal and formal assessment Student's anxiety impacted his ability to demonstrate his skills, especially his writing skills."

³⁶ Interviews with Child Find School Psychologist, Child Find OT, Child Find Special Education Teacher, Child Find SLP. Exhibit A.

³⁷Exhibit A.

- (4) Social and Emotional summary notes “[t]he results of the multiple assessments used document that [Student] is seen to display many more behaviors of possible concern in the home setting vs. a school or counseling/therapeutic setting. Results in the home setting document multiple areas of social emotional concern to include some behaviors that would be considered consistent with [Student’s] medical diagnosis of ASD. The results from both settings that are outside of the home are not generally consistent with symptoms that are expected to be seen with children who have been diagnosed with ASD. The results from both the BASC3 and one area measured by the CARS2 document that [Student] does exhibit concerns in multiple setting in the area of anxiety. The results suggest that [Student]’s difficulties in the area of anxiety are at a level well beyond what would be typical for a child his age. The BRIEF2 results document that Student struggles at both home and school to a significant level with being able to respond to situations /changes in a flexible manner and his ability to independently modulate his own emotions also an area of deficit in both settings.
- (5) Health summary acknowledges that “[Student] is currently dealing with four areas of health concerns: Asthma, Generalized Anxiety Disorder, Sleep disturbances, and Gastrointestinal distress.”
- (6) Motor summary provides that Student does not need specialized instruction at this time in the area of fine and visual motor skills.³⁸

32. School District convened an IEP meeting on May 19, 2017 to review the evaluation. The IEP team reviewed the Determination of Eligibility for Autism Spectrum Disorder (ASD) and Other Health Impairment. Mother states that School District first addressed the ASD eligibility form. Mother and Mother’s attorney report that School District completed the form by checking “no” in each box without Mother and private provider’s input.³⁹ Mother’s attorney wrote that it was a tense point in the meeting and recommended that the discussion be “tabled” to which the group agreed. The IEP team then completed the Eligibility Determination checklist for Other Health Impairment. There is no disagreement regarding the appropriateness of Student’s eligibility under this category.⁴⁰ While Mother preferred Student be found eligible as a Student with a disability under the category of Autism, the OHI classification meets the most pressing needs exhibited by his Generalized Anxiety Disorder. After a thorough review of the evaluation, interviews with witnesses, the SCO finds that School District appropriately determined that Student’s eligibility at that time under the OHI category. Furthermore, the SCO finds that the change in classification did not reduce the amount of educational services Student was to receive but actually provided additional support as requested by Mother. Additionally, given Mother’s concerns regarding Student’s needs, School District agreed to revisit the determination upon Student’s enrollment in school when they would be able to observe

³⁸ Exhibit A.

³⁹ The SCO notes that, while the OHI category meets Student’s needs, it is concerning that Child Find Team did not find Student met any of the ASD criteria, especially since social communication is one of his areas of need.

⁴⁰ Interview Parents, Private SLP, Child Find Team and Special Education Director. Complaint, Exhibit A, Exhibit C.

him in the school setting. A follow-up IEP meeting was scheduled for October 27, 2017 to review and revisit, among other things, whether Student's ASD is preventing him from receiving reasonable educational benefit from general education.

33. The May 2017 IEP Student Needs and Impact of Disability provides that "[Student's] challenges with social communication and anxiety impact his ability to participate in the general education curriculum especially when it comes to demonstrating his writing skills. [Student] will benefit from special education, speech language and school-based mental health support to develop self-advocacy, emotional regulation and social communication skills. [Student] will also benefit from accommodations (e.g. extra time, breaks) and consultative occupational therapy support to address his emotional regulation, fine motor and executive functioning needs."⁴¹

34. Three goals were developed. The goals provide as follows:

i) Goal 1- Self - Determination:

The Unit of Measurement: "Work Completion and Student Observations.
Measurable Goal: In his regular classroom, [Student] will improve his self-advocacy skills by seeking assistance from school staff when he is feeling anxious or is unsure of how to complete assigned tasks as measured in 80% of opportunities as observed by school staff over each trimester period."

ii) Goal 2- Social/Emotional Wellness

The Unit of Measurement: Data collection via observation in structured and unstructured settings.
Measurable Goal: "[Student] will improve his emotional regulation skills by working with the school mental health provider to learn coping strategies and then using one of these strategies with prompting from adult staff in 80% of opportunities as measured by staff observations in each trimester period."

iii) Goal 3-Communication

Unit of Measurement: Ask a question or make a comment.
Measurable Goal: "[Student] will initiate asking a question or making a comment to a peer at least 3 times in a small group structured settings in a 30 minute period with no adult prompts as measured by data collection over 3 consecutive sessions."⁴²

35. The Service Delivery Statement provides among other things, that Student will receive targeted consultative services from an OT to provide activities to classroom teacher, provide strategies for supporting Student's participation in classroom activities as well as strategies for self-regulation, emotional support, task completion and engagement in the classroom. Student will receive mental health support in the classroom, lunch/recess time and other school settings to aid in applying learned skills in multiple

⁴¹ Exhibit A.

⁴² *Id.*

school settings. Student will also receive speech/language services and special education support as outlined in the service grid.⁴³

36. Mother alleges that the goals developed at the 2017 IEP meeting are not appropriate, are too vague and are not measurable. The SCO agrees that Goal 1 is not measurable, is vague and confusing. The unit of measurement is “work completion and student observation” but the advocacy skill to be worked on is to seek assistance from school staff. There appears to be no alignment between the two. Additionally, it is unclear how School staff will know whether Student is feeling “anxious or is unsure of how to complete assigned tasks.” Lastly, the measurement of 80% of opportunities is unrealistic because no one staff member will be aware of all the opportunities. An example of a more meaningful measurement is to document 4 out of 5 times observed or a similarly defined method of charting progress. As it is written, it is difficult to determine how this goal would be effectively monitored. Accordingly, the SCO finds that Goal 1 drafted by School District is not a measurable goal that meets Student’s needs.

37. Mother also alleges that additional goals should have been included such as goals around emotional regulation, executive functioning and fine motor needs. The SCO disagrees. While Student’s main challenges are in the area of social communication and anxiety, School District identified that he needs support to develop self-advocacy, emotional regulation and social communication skills. According to the Child Find Team, the goals that were drafted address those needs. As for fine motor and executive functioning, School District included consultative OT and accommodations to support these needs.⁴⁴ While it is clear the goals could be drafted more precisely, they address the needs identified in Student’s needs statement. In other words, there is a linkage between the needs and the goal.⁴⁵ Additionally, School District has agreed to conduct additional assessments and observations in order to determine whether Student needs additional support or whether the 2017 IEP as drafted, is meeting his needs in the school environment.⁴⁶

38. The IEP team also determined that Student was not eligible for extended school year services (ESY). While the evaluation report indicated Student’s skills have regressed in some areas between the time he left School #2 and participated in the evaluation, School notes that his skills are not significantly delayed necessitating ESY. However, there is no documentation regarding the IEP team’s consideration of predictive factors, except to say it considered them. While there is some evidence in the body of the IEP regarding the consideration of regression and recoupment, there is no evidence the IEP team considered predictive factors in this context.⁴⁷ Accordingly, the SCO finds that School District failed to appropriately determine eligibility for ESY services.

⁴³ Exhibit A.

⁴⁴ Interviews with Parents, Private SLP, Private OT, Special Education Director and Child Find Team. Exhibit A and C.

⁴⁵ SCO notes that School District determined that Student’s fine motor skills are within age range.

⁴⁶ Interview with Special Education Director and Child Find Team. Exhibit A.

⁴⁷ Interview with Parents, Special Education Director, Child Find Team and Summer School Teacher. Exhibit A and C.

39. The 2017 IEP provided that the Health Care Plan is located electronically on Infinite Campus. It identified that School #3 was identified as the school Student would attend for the 2017-2018 school year. Lastly, that the 2017 IEP documented that a plan would be put in place at the beginning of the school year to detail specifics about who will help him to facilitate transitions in morning lunch and recess.⁴⁸

Summer Program

40. During the summer of 2017, Student was enrolled in the summer program at School #3 in order to prepare him for the upcoming school year and to familiarize him with the school. Student was accompanied by a Private ABA therapist. Mother reports that Student needed this level of support in order to function in the program. Mother reports that even with that support, Student struggled. Summer School Teacher paints a different picture. She reports that initially Student required a high level of support. She stated that once Student got comfortable with the program, he interacted well with the other kids and was able to ask for breaks when he needed them. Furthermore, she stated that by the 5th week of the 6-week program, Student was sharing his work with the entire group. Summer School Teacher reports that in her assessment, Student's writing would place him in the middle to end of kindergarten in terms of skill level.⁴⁹ Summer School Teacher's observations of Student's demeanor are supported by Private OT. Private OT reports that she had the opportunity to observe Student for approximately 45 minutes while he was at summer school. She states that based on her observations he looked happy, excited to be there, was able to finish one task and move to another and seemed fairly independent. She states that no other private provider was present during her observation.⁵⁰

August 2017

41. Mother alleges that School District failed to develop a health plan according to Student's needs. Specifically, she alleges that the Health Care Plan referenced in the May 2017 IEP did not exist. The documentation shows that School #3 nurse did not initially locate a Health Care Plan upon Mother's request for a copy. She states that there was some confusion and when she spoke to Mother she was not in a position to look at Student's records. District Nurse reports that School #3 nurse was new to the school and did not realize the Asthma Action Plan was considered a Health Care Plan. The SCO disagrees with that assertion. While it is reasonable to assume the Asthma Action Plan was the Health Care Plan referenced in the 2015 IEP and the 2016 IEP, it is not reasonable to assume that the Asthma Action Plan addressed the needs identified in the May 2017 IEP. Specifically, the health section of the IEP notes "[Student] is currently dealing with four areas of health concerns: Asthma, Generalized Anxiety Disorder, sleep disturbances and Gastrointestinal distress. He is currently being managed under physicians' care for these

⁴⁸ Exhibit A.

⁴⁹ While Student received "progressing towards standards" in the use of writing process and applying effective writing techniques, Summer School Teacher was grading Student on first grade standards. Interview with Summer School Teacher. Exhibit 19.

⁵⁰ Interview with Parents, Private OT and Summer School Teacher. Exhibit A, C and Exhibit 19.

concerns...With a Health plan in place addressing these four concerns, [Student's] health needs can be managed at school with some training and delegation from the district RN to appropriate staff." District's counsel indicated that School Nurse #3 "would be in touch with parents to write a new health care plan" to address these issues. Mother received a draft health care plan on August 24, 2017. There was a lot of back and forth communication between Mother and School #3 school nurse as the Health Care Plan went through a number of drafts. Upon review of the most recent plan, it appears it addressed the concerns raised by Mother's attorney in an e-mail dated September 11, 2017. The only concern not addressed is the pretreatment of asthma when weather is below 40 degrees, which School District Nurse reported will be addressed once they receive confirmation from Student's doctor. The SCO finds that School District did not draft a Health Care Plan according to the needs identified in the May 2017 IEP. It was not drafted until August 15, 2017 after Mother made the School #3 aware of its absence. A draft plan was not provided to Mother until August 24, 2017. The SCO finds that, had Mother not been diligent in her follow-through, Student would have started school without a Health Care Plan. Due to Mother being proactive, a fully developed Health Care Plan is in place and ready to address Student's needs. Accordingly, the SCO finds there was no educational harm.⁵¹

42. School District convened a meeting on August 28, 2017 (2017 Meeting). The SCO notes that School District initially scheduled a meeting for August 16, 2017 where Parents and their team could attend but due to a failure to confirm School #3 Teacher's attendance, School District had to reschedule the meeting. This delay was unnecessary and caused additional stress on the Parents. Nevertheless, a meeting was convened. Among the participants were with Parents, School #3 Teacher, Child Find Special Education Teacher, Special Education Director, School District BCBA, Child Find School Psychologist, Parent's Attorney, School District's Attorney, Private SLP, Private OT, Asst Special Education Director, Private BCBA #2, District Nurse, Child Find SLP, District BCBA and School #3 Principal⁵². Parents' attorney and School District's attorney agreed to memorialize agreements in the Meeting Notes dated August 28, 2017. Among other things, School District agreed to provide the following:

- 1) Dedicated adult support at the beginning of each day until group time;
- 2) Paraprofessional assistance during the lunch/recess hour;
- 3) BCBA to be available during the first couple of weeks to provide additional support;
- 4) Conduct an FBA;
- 5) School District OT to assess Student's visual/spatial and sensory needs;
- 6) Add scheduled bathroom and sensory breaks to visual schedule.⁵³

⁵¹ Interview with Parents, School #2 Nurse, School #3 Nurse, District Nurse and Special Education Director. Exhibit A, C and F.

⁵² Interview with Parents, Special Education Director, Private SLP, Asst Special Education Director, Child Find Team. Exhibit A and C.

⁵³ *Id.*

43. School District provided Mother's attorney a copy of the 2017 Meeting notes on September 1, 2017. Mother requested a copy of the 2017 IEP, including the meeting minutes on September 5, 2017. In response to Mother's inquiry, Special Education Director provided Mother with a copy of the meeting notes that same day. Mother's attorney, Mother, Special Education Director and School District's attorney exchanged numerous e-mail communications addressing a number of outstanding issues and concerns. Among one of the e-mails, Mother again requested a copy of the 2017 IEP. Special Education Director provided a copy of the IEP on September 11, 2017. School District provided the notes from the meeting two days after the meeting and provided a copy of the 2017 IEP 6 days after Parent's request.⁵⁴ Accordingly, the SCO finds that School District provided Mother with a copy of the 2017 IEP upon request in a timely manner.

CONCLUSIONS OF LAW

Allegation One: Whether School District violated the IDEA and denied Student a free appropriate education (FAPE) by failing to implement Student's IEP since September 22, 2016, specifically as it pertains to Occupational therapy and Student's health plan.

Under IDEA, local education agencies are required to provide eligible students with disabilities 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. A public agency, here the School District, must implement a student's IEP in its entirety. 34 CFR § 300.323 (c). The School District must ensure that each teacher and service provider responsible for implementing a student's IEP is informed of "his or her specific responsibilities related to implementing the child's IEP" and "the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP." 34 CFR §300.323 (d)(2). Not every deviation from an IEP's requirements, however, results in a denial of FAPE. E.G., L.C. and K.C. v. Utah State Bd. of Educ. Et al., 43 IDELR 20 (10th Cir. 2005).

In this case, School #2 OT was familiar with its requirement. School #2 OT provided 40 minutes of indirect OT services. The IEP in effect at the time required approximately 60 minutes a month of indirect service time. In this situation, while School #2 OT failed to provide 60 minutes of OT services, the SCO found no violation as Student did not begin attending School #2 until September 7, 2016 and missed 7 of the 20 days in question.

As for the Health Plan, the SCO made no findings that School #2 failed to implement the health plan.

⁵⁴ Interview with Parents, Special Education Director, Private SLP, Asst Special Education Director, Child Find Team. Exhibit A and C.

Allegation 2: Whether School District failed to develop Student’s IEP according to his individualized needs.

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.

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 ... demonstrates [s] the legislative conviction that adequate compliance with the procedures prescribed would in 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)

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 the 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)(i)-(iii) (“In matters alleging a procedural violation, a hearing officer may find that the child did not receive a FAPE only if the procedural inadequacies (i) [i]mpeded the child’s right to a FAPE;(ii) [s]ignificantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child; or (iii) [c]aused a deprivation of educational benefit”).

Rowley sets forth a two-prong analysis in order to determine whether the procedural violation resulted is a denial of FAPE. *Rowley, supra* at 206-207. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and they can require no more. *Rowley*, 205.

In this particular situation there are two time periods that the SCO will address.

Fall of 2016

First, Mother alleges that during Student's 2016 IEP, School District failed to develop an IEP according to Student's individualized needs by failing to provide Mother meaningful input, failing to consider input from outside providers and a private evaluation Mother provided. As previously discussed (FF#12), the IEP included Parents' concern in the Parent input section, it added SLP service time back into the IEP as recommended by Mother and service providers and included a fidget item in the accommodations sections. As for Parents' private evaluation, the 2016 IEP references two evaluations that were taken into consideration. Accordingly, the SCO found that School District considered Mother and private providers input into the development of the IEP.

As for the removal of the OT services, the ECEA defines the removal of a related service as a significant change of placement that shall be made upon consideration of a reevaluation See ECEA §4.03(8)(b)(ii)(B). In this situation, no reevaluation was conducted, there is ample evidence that parents were not in agreement with the removal of the OT services and the body of evidence was sparse at best. By the time the 2016 IEP meeting was held, School #2 staff had less than 2 weeks to observe him and collect data. Accordingly, the SCO concludes that School District removed OT as a related service without a sufficient body of evidence to support her determination and without "consideration of a reevaluation."⁵⁵ Despite the improper removal of this related service, School District continued to provide some OT consultative services and then Parents withdrew Student. Notwithstanding this violation, because Student was withdrawn from the public school environment prior to the actual removal of services, there is no data to support's Mother's allegation that School District's actions resulted in Student being denied a Free Appropriate Public Education.

As for the meeting on November 14, 2016, by all accounts it was tense and both sides felt attacked and disrespected. Nevertheless, as it pertained to Mother's meaningful input, including the input of private providers and the IEE, the SCO makes no findings against School District. Mother created a proposed agenda to address her concerns. School #2 addressed those concerns in a systematic manner. Each item was discussed and for the most part, School

⁵⁵ As noted in FN 18, removal of a related service without an evaluation is contrary to School District's own policy regarding this practice. Their policy requires a reevaluation prior to deletion of a related service. Exhibit E-2, page 24. Additionally, SCO acknowledges that School OT continued to provide some indirect services to Student. Exhibit A.

drafted a plan to address the concern. As for the IEE, the SCO finds there was insufficient evidence to make a finding that it was not considered at this meeting.

However, there is documentation that Mother e-mailed a privately obtained evaluation to Asst Special Education Director on November 17, 2016. The Act provides that “[i]f a parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation—(1) [m]ust be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; ...” See, e.g., 34 C.F.R. 300.502 (c). There is no indication that School District reviewed the document, determined whether it met the criteria for an IEE to be considered or was refusing to consider it. There is not documentation of any communication or follow-up. Parents withdrew Student a few weeks later. The SCO finds Parents withdrawal of Student premature. Based on the report of witnesses and the record, there was evidence that Student was making progress socially and academically. Accordingly, while School District committed a procedural violation, this violation did not result in a denial of FAPE.

Mother’s next allegation during this time period involves School #2 failing to provide PWN’s in response to her request for a Functional Behavioral Assessment and Sensory Diet. The IDEA requires the School District to provide a PWN to the parents including:

- a. A description of the action proposed or refused by the agency;
- b. An explanation of why the agency proposes or refuses to take the action;
- c. A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- d. A statement that the parents of a child with a disability have protection under the procedural safeguards of this part...;
- e. Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- f. A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- g. A description of other factors that are relevant to the agency’s proposal or refusal.

34 C.F.R. Sec. 300.503(b)

In this case, for the November 14, 2016 meeting, School #2 did not issue a PWN. As discussed in paragraph 17, while the Amendment To the Individualized Education Program dated November 14, 2016 provided much of the required information, it failed to provide 1) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refused action, 2) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part, 3) sources for parents to contact to obtain assistance in understanding the provision of this part. Accordingly, School District committed a procedural violation in failing to issue PWN at the November 14, 2016 Amendment Meeting.

December 2016 through August 2017

First, Parents requested “formal evaluations including but not limited to Occupational Therapy, Writing, Behavior, Social/Emotional, Self-Care, Speech, and Executive Functioning.” School District did not attempt to obtain Mother’s consent until January 30, 2017 when the parties engaged in mediation. Special Education Director states that at the time she received the request, she proposed to Mother that they wait to discuss evaluations at the mediation. However, the SCO finds there is no documentation to support either that assertion or Mother’s agreement to “table” her request for evaluations pending mediation. The SCO finds that School District failed to promptly obtain Mother’s consent to begin conducting evaluations or in the alternative, to issue a PWN to state why School District was refusing to take prompt action.

The question is whether this failure to initiate the reevaluation and to seek parental consent resulted in a substantive harm to Student, i.e., impeded [Student’s] right to FAPE or caused a deprivation of educational benefit. The definition of a free appropriate public education is special education and related services that “are provided in accordance with an [IEP].” 300.CFR §300.17 and 300.101. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, failure to conduct a reevaluation upon Parent’s request or issue a PWN outlining the reasons why District won’t conduct the reevaluation impeded Student’s right to FAPE. Accordingly, the SCO concludes this procedural violation resulted in a substantive harm to Student and entitles Student to compensatory education services.

Compensatory education is an equitable remedy intended to place a student in the same position they would have been, if not for the violation. *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2015). There was approximately 45 days from the date of Mother’s request to the time School District obtained consent. Providing a reasonable time period to obtain consent of two weeks, the SCO awards Student 30 days of compensatory services.

Mother asserts that School District failed to conduct comprehensive evaluations in all areas of Student’s suspected disability. The procedural requirements of the IDEA specify how school districts are to evaluate students to determine whether they are eligible students with disabilities. Specifically, the school district must:

- Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether the child is a child with a disability;
- Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability;
- Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to the physical or developmental factors;

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

34 C.F.R. §§ 300.304 - 300.306.

The evaluation was conducted by a multidisciplinary team consisting of Child Find School Psychologist, Child Find SLP, Child Find OT, Child Find Special Education Teacher and Child Find BCBA. The team used a variety of assessment tools and strategies and gathered relevant information from a variety of sources, including Student's private providers. The Child Find team obtained information from Student's private providers and evaluators through interviews and review of their evaluations. The Team evaluated Student in the areas of Cognitive, Communication, Academic, Social and Emotional, Health and Motor. Mother's primary concern is that School District failed to conduct an evaluation in the area of Visual/Spatial and an FBA. While Student's visual/spatial scores are in the low average range, the evaluator opined that Student's scores did not warrant further evaluation because the score was impacted by Student's anxiety and the score, while low, was still within an acceptable range. Moreover, School District agreed to conduct a visual/spatial evaluation upon Student's enrollment in school to address any needs identified. As for the FBA, School District agreed to complete the evaluation once Student started school and the School District BCBA could observe him in the school environment. Accordingly, the SCO makes no findings as to Mother's allegation that School District failed to conduct a comprehensive evaluation.

The SCO now moves to Mother's allegation that School District failed to determine Student was eligible for ESY services. With regard to the development of the ESY services, state educational agencies have consistently concluded that school districts are required to make individualized determinations of ESY services by using the IEP process as provided in 34 C.F.R. § 300.106(a)(3). State educational agency decisions have directed that school districts may not unilaterally determine services, but rather, must conduct IEP meetings and develop the students' IEPs to reflect their educational needs when developing ESY programming without consulting with parents. Consistent with all special education and related services, ESY services are not intended or required to maximize a student's educational benefit. *Cordrey v. Euckert* 17 IDELR 104 (6th Cir. 1990), cert denied, 499 U.S. 938 (1991). Rather, ESY services are appropriate when the body of evidence demonstrates that the student will experience a severe loss of skills or knowledge that will significantly jeopardize the educational benefit gained during the regular school year. *Johnson v. Indep. Sch. Distr. No. 4 of Bixby, Tulsa Cty.*, 921 F.2d 1022 (10th Cir. 1990); Colorado Springs Dist. 11, 110 LRP 22639 (SEA CO 2010). The IEP team determined that Student was not eligible for extended school year services (ESY). While the evaluation report indicated Student's skills have slightly regressed in some areas, School District notes the regression is not significant. While this may be accurate, regression and recoupment are not the only factors School District needs to consider. School District needs to review the predictive factors as well. In this situation there is no indication

that School District considered predictive factors except in the standard language in the IEP.⁵⁶ The SCO finds that School District did not consider all the necessary factors, namely predictive factors, when it determined Student was not eligible for ESY services and as a result committed a procedural violation.

As for the goals drafted, Mother alleges that the goals School District developed were vague and immeasurable. The Act requires that each IEP developed must include "A statement of measurable annual goals, including academic and functional goals designed to (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (B) [m]eet each of the child's other educational needs that result from the child's disability." 34 CFR 300.320(2)(i). In this case, School District created three goals as discussed in paragraph 28. The SCO found that Goal 1 was immeasurable, vague and confusing. Goal #1 provides "[Student] will improve his self-advocacy skills by seeking assistance from school staff when he is feeling anxious or is unsure..." The unit of measurement is work completion and student observations. The goal is for Student to seek assistance but the unit of measurement is work completion. The goal and the unit of measurement do not match. Additionally, it is unclear how a Staff member is supposed to measure this goal with any fidelity and how staff will determine whether he is feeling anxious or unsure. Accordingly, the SCO finds that Goal #1 was not a measurable goal. While this goal is immeasurable, as Student has yet to attend School #3 and School District has front loaded supports and services, the SCO cannot find that at this time this violation resulted in substantive harm denying Student FAPE.

Next the SCO discusses the Student's Health Plan. "At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP as defined in 300.320." 34 C.F.R. § 300.323. Student's Health Plan was a part of the 2017 IEP and was to address Asthma, Generalized Anxiety Disorder, Sleep Disturbances and Gastrointestinal Distress. Mother requested to see a copy on August 8, 2017. School #3 Nurse informed her that there was no Health Care Plan. School District indicated that the Asthma Action Plan was the Health Care Plan and it was a miscommunication. As previously discussed, the SCO does not find that argument persuasive. Nevertheless, School District promptly responded. After numerous e-mail communications, Student's Health Plan was finalized on or about September 11, 2017. Given the issues to be addressed and the history with Student, it is concerning that a plan would not have been in place but for Mother's inquiry. Accordingly, SCO finds that School District failed to have Student's Health Care Plan in place at the beginning of the school year resulting in a denial of FAPE. However, SCO finds that School District quickly resolved this issue and created a Health Plan that addresses Student's needs.

Lastly, Mother alleges that School District failed to provide a copy of the 2017 IEP in a timely manner. "The public agency must give the parent a copy of the child's IEP at no cost to the parent." 34 CFR § 300.322 (f). School District provided Mother a copy of the 2017 IEP within a week of the request. Accordingly, there are no findings as to this allegation.

⁵⁶ Predictive factors include but are not limited to student's rate of progress, type and severity of disability, ability to interact with peers without disabilities, etc.

Allegation 3 Whether School District violated IDEA and denied Student a free appropriate educational (FAPE) by failing to appropriately determine Student's eligibility.

The SCO will now consider Mother's allegation that School District failed to appropriately determine Student's eligibility under the disability of autism. To be eligible for educational services under IDEA, a child must have one of the 13 qualifying impairments, and, "by reason thereof, needs special education and related services." 34 C.F.R. § 300.8; ECEA Rule 2.08. Thus, it is not enough that a child has one of the qualifying disabilities-the child must also require "specially designed instruction ... to meet the unique needs of the child" as a result of that disability. *Id. see also*, 34 C.F.R. § 300.39. 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. Questions and Answers on IDEA Part B Dispute Resolution Procedures, Question B-6 (OSERS 2013).

As previously discussed, School District conducted a comprehensive evaluation. At the May 2017 meeting, Student was determined eligible under the category of Other Health Impairment (OHI). There is no dispute regarding Student meeting the eligibility requirements under this category. "OHI means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in unlimited alertness with respect to the educational environment that (i) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) adversely affects a child's educational performance." 34 C.F.R. 300.8(c)(9). In this case, the evaluation described Student's pervasive anxiety as outlined in paragraph 6 of the Findings of Fact section. The needs identified in the evaluation and as described by Mother are addressed in the 2017 IEP. Even though the eligibility category is not under the disability of autism, in this situation there is no obvious impact on the services Student will receive. Additionally, while there is disagreement regarding what happened as it pertains to the determination of autism at the May 2017 meeting, School District agreed to review the eligibility determination once Student is enrolled in school and there is an opportunity to observe how Student's ASD impacts his education. In fact, an IEP was scheduled for approximately 60 days out from the beginning of school to discuss Student's needs and any evaluations and assessments. Accordingly, the SCO does not make a finding against School District for failure to determine eligibility according to Student's individualized needs.

Parents request School District pay for private school due to its failure to provide FAPE beginning last school year 2016-1017 through to the present. While there were findings of violations, these violations do not warrant such a remedy in this case. School District has devised an individualized educational program to address Student's needs and support him in his educational setting. Additionally, School District has agreed to Parents' requests to revisit Student's eligibility as it pertains to autism, conduct an FBA and conduct an evaluation to assess Student's visual/spatial needs. Lastly, School District has added additional supports and services upon Student's attendance. These efforts address Parents concerns. At this time,

there is no indication that School District cannot provide FAPE to Student upon his reenrollment.

REMEDIES

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

1. Failure to consider privately obtained Independent Educational Evaluation. (34 C.F.R. § 300.502(c)(1));
2. Failure to develop, review and revise Student's IEP according to Student's individualized needs, specifically the Health Care Plan and Occupational Therapy (34 C.F.R. §§300.320, 300.324; ECEA Rule 4.03 and 4.03(2));
3. Failure to Reevaluate (removal of OT). (34 C.F.R. 300.305 and ECEA Rule 4.03(8)(b)(ii)(B).
4. Failure to determine eligibility for ESY. (34 C.F.R. § 300.106).
5. Failure to provide prior written notice describing and explaining the basis for the school district's action (34 C.F.R. § 300.503); and
6. Failure to draft measurable annual goals (34 C.F.R. § 300.320 (a) (2)(i).

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

1. By no later than December 18, 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 January 30, 2018.
 - b. Effective training concerning relevant policies and procedures to address the cited violations must be conducted for School administrators, special education case managers, and School District evaluators. 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 February 9, 2017.

2. School District shall provide Student with one month of compensatory services. The Parties shall cooperate in determining how the compensatory education services will be provided. Within 10 days of Student's reenrollment, School District shall convene a meeting with Parent to determine a schedule for delivering the compensatory services. The District must provide a copy of the schedule for compensatory services within 10 days of this meeting to the Department or provide documentation as to its inability to comply with this timeline. These services must be completed within 90 days of the development of the schedule. The compensatory services shall be according to the 2017 IEP. To document compliance, School District must record the compensatory education provided on service logs that include the following information: the name and title of the provider, the date and duration of service, a brief description of the service, and an indication of whether the services were compensatory or services required by the IEP. The District should also use this log to document whether Parent cancelled or Student failed to attend any scheduled services. School District is only obligated to provide these services during the 2017-2018 school year.

3. The School District shall conduct an IEP as previously planned within 45 days of Student's enrollment. It is recommended the parties consider having the IEP conducted with the assistance of neutral facilitator. The IEP team must include the evaluators conducting the BCBA and visual/spatial assessments.

4. A complete copy of any new IEP developed for Student, including prior written notice, as well as the School District's consents to reevaluate Student, shall be provided to the Department within five days after the IEP meeting occurs or consent form is provided.

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

Dated this 21th day of November, 2017.

Jacqueline Esquibel, Esq.
State Complaints Officer

APPENDIX

Complaint

| | |
|------------|---|
| Exhibit 1 | Table of Contents |
| Exhibit 2 | Draft IEP dated October 5, 2016, pages 1 - 4 Final IEP dated October 5, 2016, pages 5 - 16 |
| Exhibit 3 | IEP Amendment dated November 14, 2016 pages 1-7 |
| Exhibit 4 | IEP dated May 19, 2017, pages 1 of 16 |
| Exhibit 5 | Determination of Eligibility dated May 19, 2017, pages 1 of 4 |
| Exhibit 6 | Letter from Parents' attorney dated July 5, 2017, pages 1 of 3 |
| Exhibit 7 | Mother's communication notes to Special Education Director, pages 1 of 2 |
| Exhibit 8 | Mother's letter dated November 2016 |
| Exhibit 9 | Parents letter to Mediation Judge dated January 18, 2017 |
| Exhibit 10 | Email Correspondence |
| Exhibit 11 | Mother's notes regarding concerns about August 2017 Health Plan |
| Exhibit 12 | Health Plan dated August 15, 2017, reviewed August 30, 2017 |
| Exhibit 13 | Letter to Nurse |
| Exhibit 14 | Health Plan dated August 15, 2017, reviewed August 24, 2017 |
| Exhibit 15 | Notes regarding Mother's Issues with Current Health Plan |
| Exhibit 16 | Health Plan dated August 15, 2017 and reviewed August 30, 2017 |
| Exhibit 17 | Asthma Action Plan dated October 26, 2016 |

- Exhibit 18 Asthma Action Plan dated August 29, 2017
- Exhibit 19 Report Card from School #2/Report Card from Summer School
- Exhibit 20 Child Find Assessment 2017
- Exhibit 21 Children's Developmental Pediatrics Report
- Exhibit 22 Children's Occupational Therapy Assessment
- Exhibit 23 Children's Speech Assessment
- Exhibit 24 Handwriting Report from private OT

Response

- Exhibit A All special education documentation for Student, including eligibility determinations, evaluation reports, service provider logs, progress monitoring data, verification of accommodations and modifications provided to Student, assessment data, meeting notes and audio recordings, if any;
- Exhibit B All notices of meetings and prior written notices issued (Included in Exhibit A)
- Exhibit C All correspondence by School District staff that pertains to Student
- Exhibit D The complete name, title and contact information for each School District staff member who has knowledge of the facts underlying the Complaint allegations.
- Exhibit E All policies and procedures maintained by the School District relating to the provision of special education services, development and implementation of health care plans and parental participation.
- Exhibit F Relevant health records
- Exhibit G Mother's Statement of Intent to Education through a Home-Based Educational Program

Reply

- Exhibit 25 E-mail correspondence
- Exhibit 26 E-mail correspondence regarding Request for Transfer
- Exhibit 27 October 5, 2016 Draft, page 8 of 9
- Exhibit 28 E-mail Correspondence
- Exhibit 29 Call Asthma Nurse Documentation Log, page 3
- Exhibit 30 Role of the Autism Diagnostic Observation Schedule in the Assessment of Autism Spectrum Disorders in School and Community Settings.
- Exhibit 31 October 5, 2016 IEP Draft, page 1 of 9
- Exhibit 32 Parent's attorney in support of Mother's complaint
- Exhibit 33 Private OT's Assessment

Interviews

Mother

Father
Special Education Director
Asst Special Education Director
School #2 Teacher
School #2 OT
School #2 Special Education Teacher
Mental Health Provider
School #3 Teacher
Child Find Psychologist
Child Find SLP
Child Find OT
Child Find Special Education Teacher
Child Find BCBA
School District BCBA
Private SLP
Supervisor for Private BCBA #1, Private BCBA #2 and Private ABA
Advocate
Asthma Nurse