

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

State-Level Complaint 2018:524
Denver Public Schools

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on July 30, 2018, by the parent of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).

The State Complaints Officer (SCO) determined that the Complaint identified one allegation 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. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. § 300.153(c), the Colorado Department of Education (CDE) has the authority to investigate alleged violations of IDEA that occurred not more than one year from the date the Complaint was filed. Accordingly, this investigation will be limited to the period of time from July 30, 2017 through July 30, 2018 to determine whether or not a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations accepted for investigation. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

SUMMARY OF COMPLAINT ALLEGATION

Whether Student was denied a free appropriate public education on or around June 28, 2018, when the District did not provide Parents with access to Student's educational records within 45 days of their request and/or prior to a scheduled individualized education program (IEP) meeting, consistent with 34 C.F.R. § 300.613.

FINDINGS OF FACT

After an analysis of the record detailed in the appendix, the SCO makes the following findings:

Background:

1. At all times relevant to the Complaint, Student was [age] years old and eligible for special education and related services as a child with a developmental delay and a speech language impairment. (2018 IEP, Ex. A at 48.)
2. Although Student attended school in the District for the 2016-17 school year, Parents made the decision to homeschool Student for the 2017-18 school year.
3. In March of 2018, Parents reenrolled Student in the District for the 2018-19 school year. To discuss Student's needs and placement for the coming school year, the District convened an IEP meeting.
4. On May 2, 2018, a properly constituted IEP team recommended placement in a center-based affective needs program where Student would be participating in the general education classroom less than 40% of the time. As a rationale for this option, the IEP stated that:

[T]he IEP team felt that [Student] requires a significant level of support in order to meet his social emotional needs. The data indicate the frequency, intensity, and duration of aggressive episodes is negatively impacting him as well as the learning environment of his peers. [Student's] current level of need includes a 1:1 aide throughout the school day across all school settings.

(May 2018 IEP, Exhibit A at 38.)

5. Parents did not agree with the proposed placement in a center-based program and requested that the District reevaluate Student. Upon parental request and consent, the District began the reevaluation process following the May 2018 IEP meeting.

Records Request:

6. At the beginning of each school year, parents are notified of their right to access student education records through the District's Handbook for Families and Students and Annual Family Notification of Rights. Current District Policy JRA/JRC-R, the provision governing student records and release of student information, provides that parents "shall submit a written request to the principal of the school attended by the student, asking to review the student's education records." District policy further provides that "[u]pon receipt of the written request, the principal or designee shall set a date and time for inspection and review of the records within a reasonable time period not to exceed 45 days." (JRA/JRC-R, last revised June 19, 2017.) The

District's Handbook, Annual Notification of Rights, and Board Policies are also available on its website.

7. On May 14, 2018, Parents, through their attorney, requested Student's education records by emailing the District's Former Deputy General Counsel a "FERPA waiver and request." As noted above, Student was not attending school in the District at the time of the request. In his email, Parents' Attorney indicated that Student had an IEP and reminded the District that the request would start the "45-day clock." (Exhibit 1.) In submitting the record request, Parents' Attorney did not utilize the online portal that is specifically designated for responding to requests from attorneys, available at <https://denverco.scriborder.com/applicationLegal>.

8. On July 23, 2018, Parents' Attorney notified acting Deputy General Counsel that he had not yet received the education records he had requested on May 14, 2018 and that he had been "left with no choice" but to file the instant state complaint to address what he believed had become a recurring problem. In addition, Parents' Attorney stated that an IEP meeting was scheduled for July 27, 2018, and he would need to review the records to adequately represent Student's interests at that meeting. Finally, Parents' Attorney warned that he would view any failure to immediately provide the records requested as retaliation and evidence of predetermination. (Email Correspondence, Exhibit E2 at 15.)

9. New Deputy General Counsel immediately responded to the renewed request for records, in relevant part, as follows:

I understand your frustration and I am disappointed that this is the first time I am hearing about this from you regarding this situation given our recent communications. Given the changes within the department and my complete lack of knowledge regarding this issue, it would be impossible for me or the District to be acting in any of the ways you described in the email. Now that I have knowledge of your concerns, I am working to address them and investigate this matter fully to provide a complete response.

(Exhibit E2 at 14.)

10. On July 24, 2018, Interim Deputy General Counsel also responded to Parents' Attorney to take responsibility and apologize for the delay, as well as to provide assurances that the records requested would be provided that same day. (Exhibit E2 at 13.)

11. Consistent with the assurances from New and Interim Deputy Counsel, the District sent the records to Parents' Attorney by 2 PM on July 24, 2018, one day following the renewed request and three days before the scheduled IEP meeting. (Exhibit E at 15.)

12. Acknowledging that it did not provide Student's education records within 45 days of the initial request, the District explained that the request inadvertently fell through the cracks amidst personnel changes within its legal department that occurred over the summer. Indeed, the District experienced significant transition within its legal department, having had three different individuals serve as acting Deputy General Counsel *for special education matters* between the date Parents' Attorney requested Student's education records and the date on which the records were provided. The various individuals who served as acting Deputy General Counsel, as well as their involvement relevant to the Complaint allegation, are as follows:

- Former Deputy General Counsel received the initial request for records in May of 2018.
- Interim Deputy General Counsel corresponded with Parents' Attorney in May and June of 2018 for the primary purpose of scheduling the reevaluation and an IEP meeting.
- New Deputy General Counsel began corresponding with Parents' Attorney in July of 2018 for the primary purpose of scheduling an IEP meeting to discuss the reevaluation.

13. Notably, Parents' Attorney had been corresponding with Interim Deputy General Counsel and New Deputy General Counsel in June and July to schedule an IEP meeting, yet he did not mention the records request until four days prior to the IEP meeting. Although it is clearly the District's obligation to comply with IDEA requirements concerning access to records, the allegations of retaliation and predetermination raised by Parents' Attorney here are meritless, given the Parties ongoing communication.

14. Parents' Attorney did, however, provide documentation evidencing improper delays in receiving educational records for two other District-enrolled students that he had represented. (Reply and Exhibit 3.) Based on this information, the SCO finds that the District's process for handling record requests from attorneys has led to improper delays in more than the instant case, indicating a systemic issue.

Corrective Action Proposed by the District to Remedy the Delay in Providing Records:

15. In response to this Complaint, the District has taken the actions described below to ensure that it timely responds to requests for records consistent with 34 C.F.R. § 300.613(a).

- A) The District proposed the revision of JRA/JRC-R to explicitly reference access to education records for IDEA-eligible students by adding the following language to current board policy:

In the case of a request for a student's special education records, the principal or designee shall ensure that parents have an opportunity to inspect and review the requested records without unnecessary delay and prior to any upcoming IEP meeting or due process hearing in accordance with 34 C.F.R. § 300.613(a).

- B) To ensure that all District staff responsible for receiving/responding to records requests are aware of the requirements for IDEA-eligible students, the District has proposed to:
- i. Circulate a written notice that will include the specific requirements of 34 § C.F.R. 300.613(a) and revision of JRA/JRC-R to all school principals, along with a request that they review these requirements with any staff to whom they have delegated inspection and review of education records. This notice will include the process for handling requests from individuals other than the student's parents, e.g., attorneys.
 - ii. The same written notice will be provided to the Director and Senior Managers in the Special Education Department and the Student Records Office, as well as the Office of the General Counsel, to ensure that they are familiar with the specific requirements of 34 C.F.R. § 300.613(a), revisions to JRA/JRC-R, and the process for handling requests from individuals other than the student's parent.
- C) Relevant to the specific facts of this case, New Deputy General Counsel has also conferred with his colleagues in the Office of General Counsel and the Student Records Office to clarify the process in the event that records are requested by an attorney. Clarification included the following:
- i. All record requests received from attorneys will be directed to a web-based system (<https://denverco.sriborder.com>) designed to process requests within five to ten business days to ensure compliance with the 45-day timeline.
 - ii. If the Office of General Counsel receives a record request from an attorney, the requesting attorney will receive a response directing them to submit their request via the web-based system.
 - iii. If the requesting attorney indicates that the records are needed in advance of an IEP meeting or due process hearing, the attorney will be directed to make the request via the web-based system. In the event that the IEP meeting or due process hearing is scheduled to occur in less than five to ten business days, the Office of General Counsel will work with the Student Records Office to ensure that records are provided in an expedited manner. In the event that records cannot be provided on such short notice, the Office of General Counsel will work with the requesting attorney to identify and provide specific special education records prior to the IEP meeting or reschedule the meeting, as appropriate.

Parent Participation during the July 2018 IEP Meeting

16. On July 27, 2018, the District convened an IEP meeting to discuss the reevaluation and review the IEP proposed in May of 2018.

17. Although parents attended the IEP meeting with their Attorney, they alleged that the delay in receiving the records requested in May resulted in a denial of FAPE by impeding their ability to participate in the development of Student's educational program. Specifically, Parents stated that they would have considered "other placement decisions" based on new information provided in the evaluation report, and that they consequently missed "school of choice" application deadlines. Relevant to this allegation, the SCO first notes that the evaluation report was not completed until July 24, 2018. Consequently, the report was not an education record in existence at the time of the initial May 14 record request. And even if it had been part of the initial record request, Parents do not describe any difference in the special education and related services or programming that they would have considered or requested had this information been provided sooner.

18. More importantly, Parents did not raise concerns with the programming and/or specialized instruction and related services offered in the July 2018 IEP. For example, Parents reference email correspondence related to enrollment at a particular school as evidence of predetermination regarding placement, without indicating what special education services or programming they believe would have been available at this particular school and not the one at which the District proposed to implement the IEP. Because Parents do not specifically challenge the special education and related services offered in the July IEP, the SCO characterizes this dispute as one about location rather than educational placement. In other words, Parents only complaint is with the particular School where the District chose to implement the IEP rather than with the IEP itself.

19. Despite their disapproval, the evidence supports a finding that Parents meaningfully participated in the development of the IEP by effectively advocating for a less restrictive educational setting than what was previously proposed. Indeed, the changes in special education services and recommended placement in the LRE between the May IEP and the July IEP evidence meaningful parent participation. Where the May IEP proposed placement in a center-based program, with less than 40% of time in the general education class, the July IEP proposed placement in the general education class between 40% and 79% of the time, a less restrictive setting. (*Comparing* Exhibit A at 59 *with* Exhibit A at 38-39.) Specifically, Student's time *outside* of the general education classroom for specialized instruction in literacy and math was reduced from 780 to 375 minutes per week.

20. Further reflecting that the change in proposed placement was based on parent input and the recent reevaluation, the July 2018 IEP stated:

Based on current evaluation data which reflects social and emotional gains while home-schooled, the team decided to try a less restrictive approach that targets [Student's] communication, reading, writing, math, and motor skills.

(Exhibit A at 59.)

21. Finally, as detailed in the prior written notice issued after the July IEP meeting, the District explained that the Special Education Director/Designee had chosen to implement the IEP at New School based on the expertise of the specific staff available at this location. To begin, the staff at New School included those with the qualifications and expertise to support Student's social-emotional needs due to the presence of the affective needs program on the same campus. In addition, the special education team at New School was more experienced, primarily consisting of returning, rather than new, providers. Based on Student's unique needs and the resources available at various locations, the District determined that Student would be best served at New School. (Exhibit B at 5-8.)

CONCLUSIONS OF LAW

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

Although the District failed to provide Parents with access to educational records consistent with 34 C.F.R. § 300.613, the delay did not result in a denial of FAPE.

One of the procedural safeguards afforded to parents under the IDEA is the right to inspect and review their child's education records. 34 C.F.R. § 300.613(a). To that end, a school district must comply with a request from a parent to review their child's education records "without unnecessary delay and before any meeting regarding an IEP," and in no case more than 45 days after the request. *Id.*

In this case, the District admitted that it failed to provide access to Student's records within 45 days of the request, as required. As explained more fully in Findings of Fact (FF) ## 8-14, the inadvertent delay at issue in this case was primarily due to transitions within its legal department during the summer of 2018. Notably, New Deputy General Counsel and Interim Deputy Counsel responded immediately when Parents' Attorney notified him that he had not received the requested records within 45 days of his initial request. Most importantly, the District provided the records within a day of the renewed request and prior to the IEP meeting.

Although the District immediately remedied the delay with respect to Student upon notice from Parents' Attorney, there is credible evidence to support a finding that this was not an isolated incident. To reduce the likelihood that such delays will reoccur, New Deputy General Counsel clarified the process with his colleagues in the Office of General Counsel and the Student Records Office. Further, the District proposed revising its Board Policy governing record

requests and reminding those in a position to receive such requests of their obligations under 34 C.F.R. § 300.613(a). The actions proposed by the District, as detailed in FF # 15, offer a system-based solution, rendering it less likely that a records request will rest solely with an email sent to a member of the District's Legal Department. Consequently, the CDE accepts the actions proposed by the District as adequate to ensure that improper delays with regard to record requests are not likely to reoccur.

Additionally, Parents alleged that the delay in receiving Student's records resulted in a denial of FAPE. When determining whether a procedural error resulted in a denial of FAPE, the SCO must determine whether the procedural inadequacy: 1) impeded the child's right to FAPE, 2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child, or 3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). Because Parents do not dispute the substantive appropriateness of Student's IEP or allege that Student has suffered any educational harm, the SCO considers whether Parents' ability to participate in the July IEP meeting was significantly impeded by the delay in receiving Student's education records.

The requirement that education records be provided before any IEP meeting illustrates the fundamental relationship between a parent's right to information and the ability to meaningfully participate in the development of their child's IEP. *See* 34 C.F.R. § 300.613(a). Accordingly, an improper delay in providing access to education records may significantly impede a parent's right to participate in the IEP meeting. In this case, however, the IEP itself evidences that Parents meaningfully participated in the placement discussion by successfully advocating for a less restrictive setting than the one proposed in the May IEP. As explained more fully in Findings of Fact ## 16-19, the May IEP proposed placement in a center-based affective needs program where Student would spend 40% or less time in the general education environment. Based on the results of the reevaluation and parental input, the July IEP proposed placement in the general education classroom between 40% and 70%, representing a significant increase in the amount of time that Student would be spending inside the general education environment.

The fact that Parents have not expressed concerns or disagreement with the particular special education and related services or educational programming proposed in the July 2018 IEP demonstrates that their disagreement is about location, i.e., the particular school that the District proposed to implement the IEP, not educational placement. Generally, a student's "placement" means the provision of special education and related services provided in the student's IEP, not the physical location in which the IEP is implemented and the services are provided. ECEA Rule 4.03(8)(a). "The determination of placement must be based on the child's IEP and made by the IEP team." *Id.*

In contrast, a decision concerning the location, i.e., the specific school, classroom, or teacher, where a student's IEP will be implemented is not an element of "placement." *Id.* Instead, it is an

administrative determination made at the sole discretion of the District. For this reason, it is not a decision made by the IEP team. *Id.* Because the District may unilaterally determine location, its decision to implement the IEP at a particular school does not support a conclusion that Parents did not have a meaningful opportunity to participate in the development of the IEP. Consequently, the SCO concludes that the failure to provide education records consistent with 34 C.F.R. § 300.613(a) was a procedural violation that did not result in a denial of FAPE.

REMEDIES

The SCO concludes that the District has violated the following IDEA requirements:

- a) Access rights, 34 C.F.R. § 300.613(a).

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

- 1) By October 15, 2018, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violation noted in this Decision.
- 2) By November 16, 2018, the District must submit the revised policy concerning access to education records as described in FF # 15 (A).
- 3) By November 16, 2018, the District must submit the notice as described in FF # 15 (B), as well as documentation that the notice has been sent to all District staff serving in the roles specifically identified within FF # 15 (B)(i) and (ii).

The Department will approve or request revisions to the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance.

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

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

CONCLUSION

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

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

Dated this 28th day of September, 2018.

Candace Hawkins, Esq.
State Complaints Officer

Appendix

Complaint, pages 1-4

Exhibit 1: Email correspondence

Exhibit 2: Request for records and release of information

Response, pages 1-5

Exhibit A: May and July 2018 IEPs

Exhibit B: Prior written notice

Exhibit C: Grade reports and IEP progress reports

Exhibits D-E: Correspondence

Reply, pages 1 -2

Parent response to written questionnaire

District response to written questionnaire