

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

State-Level Complaint 2019:509
St. Vrain Valley School District RE-1J

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on February 20, 2019 by Parent, through her attorney, of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹ Upon the Parties' request and agreement, the 60 day investigation timeline was extended to engage in mediation. The investigation resumed upon notification that mediation had resulted in impasse.

Based on the written Complaint, the SCO determined that the Complaint identified an 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 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

The Colorado Department of Education ("CDE") has the authority to investigate alleged violations of the IDEA that occurred not more than one year from the date the original complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, this investigation will be limited to events that transpired no earlier than February 20, 2018 to determine whether or not a violation of the IDEA occurred. *Id.* Additional information beyond this time period may be considered to fully investigate the allegation accepted in this matter. Findings of noncompliance, if any, shall be limited to one year prior to the date the complaint was filed.

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

² 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).

COMPLAINT ALLEGATION

Whether Student was denied a free appropriate public education (FAPE) when District failed to provide Parent with access to Student's educational records upon Parent's request made on or about August 8, 2018 consistent with 34 C.F.R. § 300.613.

FINDINGS OF FACT

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

Background

1. At all times relevant to the Complaint, Student resided within District boundaries. Student is identified as a student with a disability eligible for special education and related services.
2. During the 2017-2018 school year, Student began the school year at Elementary School. On February 9, 2018, Student's placement was temporarily changed to Separate School due to her escalating behaviors. *Response*, p. 3. Separate School provides services to students with emotional disabilities and their families who need a structured therapeutic educational setting.
3. District convened an IEP annual review meeting on March 19, 2018, and a reevaluation IEP meeting on April 9, 2018. The IEP team determined that Student would continue attending Separate School through the end of the school year but would transition to Middle School at the start of the 2018-2019 school year. *Id.*
4. As planned, Student began the 2018-2019 school year at Middle School. On August 27, 2018, due to Student's escalated behaviors, District convened an IEP meeting. The IEP team changed Student's placement to Separate School. *Id.* As of the date of this decision, Student attends Separate School.
5. In order to better consider appropriate placements, Mother requested records to determine the severity of Student's behavioral issues. Specifically, Mother wanted documentation regarding the number of times the police had been called on Student, how many times Student had been suspended, and how many times Student had been sent home due to behaviors. Mother asserts that District failed to timely provide Student's entire educational record, specifically those documents pertaining to police referrals and other disciplinary incidences. *Complaint*, p. 5; *Parent's response to questionnaire*, pp. 1-2. While District provided conflicting information regarding the production of records in its *Response*, District acknowledged providing additional documents upon being notified that records were

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

missing from the initial production of records. *Response*, p. 4. District, however, denies that Student was denied FAPE as a result of not providing complete records. *Response*, p. 3.

Records Request

6. The St. Vrain school board policies that apply to student's records and the process for reviewing those records are contained in JRA/JRC (last revised 6/2015) and JRA/JRC-R (last revised 6/2015). *District Response*, p. 3.

7. Policy JRA/JRC defines student records as follows:

Student education records in all formats and media, including photographic and electronic, are those records that relate directly to a student. Student education records may contain, but will not necessarily be limited to, the following information: identifying data; academic work completed; level of achievement (grades, standardized achievement test scores); interest inventory results; health and medical information; family background information; teacher or counselor ratings and observations; reports of serious or recurrent behavior patterns and any Individualized Education Program (IEP).

8. Policy JRA/JRC-R provides that parents/guardians and students over 18 years of age have "[t]he right to inspect and review the student's education records within a reasonable time period after the request is made (not to exceed 45 days)." To start the process, the policy specifies that a parent/guardian or eligible student must make a written request to the school principal or appropriate school official identifying the records they wish to inspect. *See JRA/JRC-R*.

9. On August 8, 2018, Mother, through her attorney, sent an e-mail to District's counsel requesting education records pursuant to the Family Educational Rights and Privacy Act of 1974 (FERPA). *Exhibit C*, p. 1. Specifically, Mother requested "all education records from August 15, 2015 to the present related to and pertaining to and/or mentioning [Student] including all emails, written correspondence, taped correspondence and other records." *Exhibit 4*, p. 2. District confirmed receipt of the request on August 9, 2018. *Exhibit C*, p. 3.

10. The SCO finds that Mother made an appropriate request for education records by providing the FERPA request to District's attorney on August 8, 2018.

11. On September 20, 2018, District provided records electronically to Parent's Attorney. *Response*, p.4. While this was within the 45 day time period required by board policy and 34 C.F.R. §300.613, the records provided were incomplete, as described more fully in FF #s 13 & 14.

12. On January 25, 2019, Parent's Attorney informed District that its production of records appeared incomplete. Specifically, Parent's Attorney informed District that some of Student's IEP documents, e-mail communications, attendance records, grades and behavior incident reports were not provided. *Exhibit 2*, pp. 2-3. District acknowledged there was "some oversight in the response... The additional information will be provided as quickly as it can be." *Exhibit 1*, p. 2. On February 21, 2019, District provided additional documentation. The additional documents provided included, but are not limited to, discipline referrals, attendance, grades, excel spreadsheet with data, and additional e-mail communications. *Response*, p. 4.

13. On March 11, 2019, Mother, through her attorney, made another request for copies of all restraint documents, attendance for 3 ½ years, and all incident reports. In response, District re-sent documents previously provided to an attorney formerly representing Parent. *Response*, pp. 3-4.

14. As of the filing of this complaint, Parent's Attorney asserts that District has not provided documents pertaining to all the referrals made to the police department, all the reports regarding restraints, and a complete set of attendance records. Upon a review of all the records provided by Parent's Attorney up to this point, the SCO finds credible evidence to support that there continue to be missing records. Specifically, the SCO notes that the following documents appear to be missing from the production of records: Functional Behavioral Assessment and Behavior Support Plans dated 9/15/2016, 12/15/2016 and 4/20/17 referenced in the February 12, 2018 FBA and Behavior Support Plan (SVVSD 439); and documentation regarding suspension referenced in e-mail dated 2/9/2018 (SVVSD 0921).

15. Based on the above facts, the SCO finds that District did not timely provide complete records in response to Mother's request for educational records.

16. On March 12, 2019, in an effort to resolve this state complaint, District submitted a proposed FERPA checklist to help ensure compliance with FERPA and IDEA. The checklist is divided into 5 sections. The first section gathers information about the requestor, student, date of request, the date the response is due, which is noted as 45 days from request, and the district staff person responsible. The second section identifies records that may apply to all students. The third section identifies records that correspond to students with 504 plans. The fourth section identifies records that correspond to students with IEPs. Lastly, the fifth section addresses other records/situations, i.e., other schools, transfer student, day treatment placement, home school, and e-mails. The latter four sections are divided into three columns. The first column identifies the record to search for, the second column identifies the date someone checked for it, and the third column identifies when it was provided to the responsible person.

17. While the checklist provides useful guidance to ensure a thorough search for records, the form does not inquire about any of the events that may obligate the District to provide records before the 45 day timeline runs. For example, in the event the request is for an IDEA

eligible student, a school district is required to comply with additional obligations imposed by the IDEA, consistent with 34 C.F.R. § 300.613. Specifically, the District must provide access to records before any IEP meeting, due process hearing, or resolution meeting, if these events occur prior to the 45-day timeline. Because the proposed checklist does not inquire as to these events, it is insufficient to ensure compliance with 34 C.F.R § 300.613.

18. As of the date of this Decision, Parent has a pending due process complaint alleging a denial of FAPE due to a denial of services and the phone calls to law enforcement. *Complaint*, p. 3.

CONCLUSIONS OF LAW

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

As a threshold matter, the SCO first addresses the burden of proof. In its Response, the District asserts that “the burden of proof in an IDEA challenge rests with the party claiming a deficiency in the school district’s efforts.” *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008). Although the burden of proof asserted by the District applies in due process hearings, it does not apply in state complaint investigations. In *Letter to Reilly*, OSEP stated:

Unlike due process hearings, State complaints are investigative in nature, rather than adversarial, and do not include the same procedural rights accorded to parties in an impartial due process hearing. Therefore, the Department believes that it is not consistent with the IDEA regulation for an SEA to treat a State complaint like a due process complaint and assign the burden of proof to either party. Under 34 C.F.R. § 300.152, once a State complaint is properly filed, it is solely the SEA's duty to investigate the complaint, gather evidence, and make a determination as to whether a public agency violated the IDEA. It is not the burden of the complainant -- or any other party -- to produce sufficient evidence to persuade the SEA to make a determination one way or another. *Letter to Reilly*, 64 IDELR 219 (OSEP 2014).

Consistent with OSEP guidance and previous State complaint decisions, the CDE will apply the preponderance of the evidence standard in making a determination as to whether a violation of IDEA occurred and will not assign the burden of proof to either party. *Adams Cty. Sch. Dist. 50, Westminster*, 115 LRP 33569 (CO SEA 5/26/2015).

Conclusion: The District failed to provide Student’s education record upon Parent’s request, consistent with 34 C.F.R. § 300.613. Specifically, while District provided records within the 45-days consistent with board policies and 34 C.F.R. §300.613, the records provided were incomplete, resulting in a procedural violation of the IDEA.

IDEA provides a number of procedural safeguards for parents. One of these safeguards is the parent's right to inspect and review education records relating to their child that are collected, maintained, or used by the District under Part B of the IDEA. 34 C.F.R. § 300.613. Under IDEA, school districts must comply with such a request without unnecessary delay and before any meeting regarding an IEP, due process hearing, or resolution meeting, and in no case more than 45 days after the request has been made. *Id.*

District argues that Parent was not seeking education records under 34 C.F.R. § 300.613 but was instead requesting records pursuant to FERPA release. Indeed, the only clear mechanism to request education records, per board policy, is referred to as its FERPA policy. Although the IDEA incorporates FERPA's definition of education record, it places additional obligations on the District in providing access to education records. 34 C.F.R. § 300.613. Referring to a request for records as a FERPA request does not excuse the District from complying with the additional obligations set forth in IDEA when the request for records concerns an IDEA eligible student.

Because timely access to education records is integral to a parent's right to meaningfully participate in the development of their child's IEP, District is required to ensure that any request for education records contemplates these additional obligations. In fact, OSEP has opined that the additional rights afforded by IDEA also apply to students who have not yet been determined IDEA eligible. *See Letter to Kashyap (OSEP 09/23/16)*. Consequently, the SCO concludes that Parent's FERPA request obligated the District to comply with 34 C.F.R. § 300.613(a).

Moreover, the SCO concludes that the policies governing access to education records described in FF #6-8 are not consistent with IDEA because they do not take into account the additional obligations required by 34 C.F.R. § 300.613(a). Board policy JRA/JRC-R identifies a 45-day time frame to respond to a request for education records. It does not identify any circumstances in which a District must produce records before the 45 day timeline. For an IDEA eligible student, those circumstances would include an IEP meeting, a due process hearing, or a resolution meeting. Similarly, the proposed checklist fails to address the additional obligations imposed by IDEA for eligible students. For example, the "Response due" date only references the 45-day from the date of the request. There is no inquiry regarding pending IEP meetings, due process hearings, or resolution meetings.

Relevant to the specific facts of this case, the SCO concludes that the District did not provide Parent with the right to inspect and review Student's education records consistent with 34 C.F.R. § 300.613(a) because the records provided on September 20, 2019 were incomplete. The request for education records was made on August 8, 2018. Specifically, Parent's Attorney requested all education records from August 15, 2015 to the present related to student. On September 20, 2018, District provided Student's education records. On January 25, 2019, Parent's Attorney notified District's counsel that the District had not provided all of Student's

education records. He specified that District had not turned over all of Student's IEP documents, attendance reports, grade reports and behavior incidents as logged in Infinite Campus/Schoology. On February 21, 2019, District provided additional records which included attendance reports, grade reports and discipline referrals. While District was responsive to Mother's concern regarding the missing records, the failure to timely provide a complete copy of Student's educational records is a procedural violation. Furthermore, there is credible evidence to support that there continues to be outstanding documents as described in FF # 14. Although the District did not timely provide complete records in this case, the evidence does not support a conclusion that this is a systemic issue.

The SCO next considers whether the procedural violation resulted in a denial of FAPE. Parent alleges that the delay in receiving Student's records resulted in a denial of FAPE because she was not able to determine proper placements for Student without it. When determining whether a procedural error is 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).

Parent does not specifically allege that the procedural violation impeded Student's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE or caused a deprivation of educational benefit. Rather, Mother alleges that the documentation regarding the number of times the police were called, the number of times Student was restrained and how often she was suspended would help her to better understand Student's behavioral needs. While this may be true, there is insufficient evidence to support a conclusion that the procedural violation impeded Student's right to FAPE. Despite District's failure to provide Student's complete educational record, Mother had in her possession the majority of documents relating to restraints and police contact on September 20, 2018. Furthermore, the fact Parent's attorney took four months before notifying District regarding possible missing documents undermines Parent's argument that District's delay resulted in a denial of FAPE. Although the procedural violation did not result in substantive harm, the District will be required to produce the records identified below because there is a pending due process hearing.

REMEDIES

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

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

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

- 1) By May 31, 2019, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violation noted in this Decision.
- 2) By May 17, 2019, or prior to any IEP meeting, due process hearing or resolution session, District is to produce the records identified below, and in FF #14, or provide a reason why it cannot comply. If the District asserts that the specific documentation identified here does not exist, the District must provide a detailed explanation including documentation regarding how it searched for and concluded that the specific document does not exist. CDE will, in its sole discretion, determine whether any such explanation is sufficient. The documents identified as missing are described as follows:
 - a) Functional Behavioral Assessment and Behavior Support Plans dated 9/15/2016, 12/15/2016 and 4/20/17, referenced in the February 12, 2018 FBA and Behavior Support Plan (SVVSD 439);
 - b) Documentation regarding suspension referenced in e-mail dated 2/9/2018 (SVVSD 0921).
- 3) By August 1, 2019, the District must submit a revised checklist to include the events identified in 34 C.F.R. § 300.613 that may require access to records earlier than the 45 day timeline set forth in FERPA, i.e., before an IEP meeting, due process hearing, or resolution meeting. CDE will approve or require revision to the checklist.
- 4) By September 30, 2019, the District must conduct training for District staff involved with responding to requests for education records in the use of this checklist. This may be conducted in-person, or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.
 - a) Evidence that such training has occurred must be documented (i.e. training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-n sheets, with roles noted) and provided to CDE no later than October 14, 2019.

The Department will approve or request revisions that support compliance with 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.: Michael Ramirez
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. 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).

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

Dated this 1st day of May 2019,

Jacqueline Esquibel
State Complaints Officer

Appendix

Complaint

Exhibit 1	E-mail Correspondence
Exhibit 2	E-mail Correspondence
Exhibit 3	E-mail Correspondence
Exhibit 4	FERPA Release

Parent Response to Written Questionnaire

Exhibit 5	CDE Summary of Disciplinary Actions
Exhibit 6	Police Reports
Exhibit 7	Incident Log
Exhibit 8	Behavior Form
Exhibit 9	Grades and Attendance
Exhibit 10	CDE Summary of Disciplinary Actions

District Response

Exhibit A	IEPs in effect for the 2018-2019 school year
Exhibit B	All notices of IEP meetings issued for the 2018-2019 school year to present
Exhibit C	Requests for Student records dated on or about August 8, 2018
Exhibit D	Correspondence
Exhibit E	List of District and School staff

District's Response to Written Questionnaire

Exhibit A Supplemental	Records Request Table
Exhibit B Supplemental	Disability Law Colorado Request for Information
Exhibit C Supplemental	FERPA Request
Exhibit D Supplemental	E-mail Correspondence
Exhibit E Supplemental	District Policy and Procedures
Exhibit F Supplemental	Proposed Checklist