

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

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**State-Level Complaint 2019:514  
El Paso County School District 49**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on March 7, 2019, by the parent of a child not currently identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA). On March 25, 2019, the parties agreed to try and resolve the Complaint allegations through mediation, and to toll all applicable timelines. On April 3, 2019, Parent withdrew her mediation request, and the investigation and all applicable timelines were reinstated.

Based on the written Complaint, the SCO determined that the Complaint identified allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. § 300.153(c), CDE has the authority to investigate allegations of violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from March 7, 2018 through March 7, 2019 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

**SUMMARY OF COMPLAINT ALLEGATIONS**

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

1. Unnecessarily delaying approval of an Independent Educational Evaluation (IEE) after Parent's request for an IEE on February 12, 2019, consistent with 34 C.F.R. § 300.502(b)(2);

2. Refusing to provide an IEE in the area of Autism Spectrum Disorder, consistent with 34 C.F.R. § 300.502(b)(1);
3. Convening a Due Process Resolution Meeting on January 10, 2019, beyond the 15-day timeline, consistent with 34 C.F.R. § 300.510(a)(1).

### **FINDINGS OF FACT**

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

1. Student is [age] years old, and has continuously resided within the District's boundaries during the period of the allegations in this complaint. Student is not currently identified as eligible for special education and related services as a child with a disability under the IDEA. (Ex. 6 at 22.)
2. Parent's complaint in this matter alleged numerous violations of IDEA, the majority of which directly focused on disagreement with the findings and conclusions in a prior state complaint decision issued on November 30, 2018. IDEA does not provide an appeal process for parties who disagree with state complaint decisions. Although a state may provide for an appeal or reconsideration process, it is not required to do so. The CDE has not adopted an appeal process, and state complaint decisions are considered final. *CDE State-Level Complaint Procedures* specifically provide the following:

The Decision of the SCO shall constitute the final action of the CDE and is not subject to appeal. Both parties shall be notified of such action by certified or overnight mail, return receipt requested. If either party disagrees with the 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); Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46607 (August 14, 2006).*

Consistent with the *CDE's State-Level Complaint Procedures*, allegations concerning the provision of comparable services from the out-of-state IEP, and the 2018 evaluation and eligibility determination were not accepted for investigation because they had been addressed in the previous state complaint decision.

3. A discussion of Student's background and educational history is unnecessary to resolve the allegations in the current complaint. The allegations here consist of legal issues which require an analysis of facts largely captured in written correspondence between the parties.

4. Parent intends to transfer Student to a different school district at the end of this school year, which is May 24, 2019. Once enrolled in the new school district, Parent intends to request special education evaluations and request a new eligibility determination for Student. (Interview with Parent.)

#### **Due Process resolution meeting**

5. On December 20, 2018, Parent filed a Due Process complaint against the District. The Due Process complaint addressed the same subject matter as State Complaint 2018:530, namely it contested the District's evaluation and eligibility determination of Student in the fall of 2018. (Interview with Parent; Response at 2.)
6. On December 21, 2018, Special Education Director emailed Parent and attempted to schedule a resolution meeting for January 2, 2019. On December 23, 2018, Parent replied with her availability. (Ex. F at 7.)
7. On December 29, 2018, during an email exchange with Special Education Director, Parent inquired who the District was proposing to include in the resolution meeting. (Ex. F at 8.)
8. The SCO finds that Parent's inquiry on December 29<sup>th</sup> was the first mention of possible participants in the resolution meeting by either party.
9. On December 31, 2018, Special Education Director replied to Parent that she and Special Education Coordinator would be present for the resolution meeting. (Ex. F at 9.) Special Education Director did not ask Parent who she wanted to attend the resolution meeting.
10. The same day Parent replied, stating she wanted the following five people to attend the resolution meeting: School Nurse, School Psychologist, Superintendent, Executive Director of Special Education, and Principal. (Id.)
11. Special Education Director replied asking if Parent was requesting another eligibility meeting, and suggested that the parties could discuss this at the January 2<sup>nd</sup> resolution meeting and schedule an eligibility meeting at a date after school staff returned from the winter break. Special Education Director also noted that the resolution meeting needed to be held by January 4, 2019. (Ex. F at 10.)
12. Parent replied that it was her belief that the entire IEP team had to participate in the resolution meeting: "that is my understanding of why the IEP team is supposed to attend the resolution meeting. Not having all the IEP team members attend the resolution meeting does not help discuss how to appropriately resolve the complaint." (Ex. F at 10-11.) The SCO notes that IDEA does not require the entire IEP team to be present for a resolution meeting, nor does it intend the resolution meeting to be an IEP team meeting. Parents and school districts must decide which *relevant* members of an

IEP team should attend the resolution meeting. 34 C.F.R. § 300.510(a)(4); *see also Foxborough Reg'l Charter Sch.*, 106 LRP 34379 (SEA MA 5/30/06). Additionally, the individuals Parent requested would not have constituted an IEP team. 34 C.F.R. § 300.321.

13. In an email exchange on the morning of the scheduled resolution meeting, Parent asked whether the whole IEP team would be present. Special Education Director replied that the individuals Parent requested did not return to work until January 7, 2019. Special Education Director then asked whether Parent was “willing to sign that we are moving forward with a resolution and then determine a date for the Eligibility Determination meeting for the evaluation team to consider the information you gave to me on October 1, 2018?” (Ex. F at 13.)
14. Special Education Director explained to the SCO that Executive Director of Special Education and Principal were both available January 2, 2019, to attend the resolution meeting. However, School Psychologist and School Nurse were both out of town. She could not remember for certain, but believed that Superintendent was also out of town. (Interview with Special Education Director.) However, Special Education Director did not convey this information to Parent.
15. In the same exchange, Parent replied, stating her position that the entire IEP team needed to be present for a resolution meeting. She went on to state: “I am not willing to sign any resolution documents or agreements without the IEP team attending the resolution meeting. Please let me know if you can have the IEP team attend a resolution meeting January 3<sup>rd</sup> or 4<sup>th</sup>.” (Ex. F at 13.)
16. Later that day, Special Education Director replied that she was attempting to schedule a resolution meeting on January 10<sup>th</sup>, with all the individuals that Parent requested. Parent then asked to confirm whether the meeting was to be scheduled outside of the 15 day timeline, and Special Education Director replied “we are making reasonable efforts to find a time for all of the people you requested to be in attendance.” (Ex. F at 13-14.)
17. On January 3, 2019, Parent emailed the Administrative Law Judge (ALJ) assigned to the Due Process complaint, requesting a status conference and asking how to proceed since the resolution meeting would not be held within the 15 day timeline. Parent also stated that a clerk had informed her that a status conference had been scheduled for January 19, 2019. (Ex. F at 16).
18. When asked by the SCO, Parent stated her intent in contacting the ALJ was to ask for assistance to ensure the resolution meeting was convened. (Interview with Parent.)
19. On January 2, Special Education Director emailed CDE’s Dispute Resolution Supervisor stating that she did not believe Parent would meet for a resolution meeting, and also

that Parent refused to sign the agreement waiving the resolution meeting. Special Education Director then asked how she could “fulfill the requirement to send in the Resolution Process Verification Form without the parent’s signature.” (Ex. F at 18.) Dispute Resolution Supervisor first explained the requirement that both school district and parent must decide which relevant members of an IEP team will attend a resolution meeting. Dispute Resolution Supervisor then explained that if the resolution meeting is held outside the 15-day timeframe, to attach an explanation to the Resolution Process Verification form. Additionally, Dispute Resolution Supervisor stated that if Parent refused to sign the form or participate in the resolution meeting, Special Education Director should document the District’s efforts to schedule the meeting and include this documentation with the completed Resolution Process Verification form. (Ex. F at 17.)

20. On January 9<sup>th</sup>, Special Education Director emailed Parent, and attached a Prior Written Notice (PWN) that largely summarized the parties’ email exchanges regarding scheduling the resolution meeting. Special Education Director explained that the resolution meeting was being held outside of the 15-day time frame because “several of the staff were unavailable due to the holiday break.” (Ex. 6 at 23.)
21. Parent replied to this email the same day, stating in part: “you failed to invite the IEP team and relevant staff members. I did not attend the meeting because the IEP team and relevant staff members were not able to attend the resolution meeting which is my right to have present.” Parent also explained her decision to attend the resolution meeting: “IDEA requirements state when a school district misses the resolution meeting deadline the administrative law judge is to step in. I understand the 30 day deadline is approaching and the ALJ has not contacted us, so I will attend your resolution meeting.” (Ex. F at 21.)
22. When asked by the SCO whether she felt that she had agreed to hold the resolution meeting beyond the 15 day period, Parent stated that she felt that she didn’t have a choice in the matter. Parent stated that she had received no guidance from the ALJ or from CDE about how to proceed since the District failed to hold the meeting within the prescribed timeframe, and that she was concerned she would be penalized for not attending the resolution meeting. (Interview with Parent.)
23. Parent’s assertion that she received no guidance from CDE is contradicted by the written record. Dispute Resolution Supervisor emailed Parent and Special Education Director on January 7, 2019. That email explained, among other things, that the parties could agree to hold the resolution meeting after the 15-day deadline but before the end of the 30-day resolution period, that the parties could agree to participate in mediation in lieu of holding the resolution meeting, or the parties could agree to waive the resolution meeting and request the Due Process hearing proceed. Dispute Resolution Supervisor also directed the parties to contact the assigned ALJ regarding any issues with the Due Process complaint, including whether and when a Due Process hearing

should be scheduled. (Ex. F at 15.) Indeed, Parent responded on January 8<sup>th</sup> stating she had already communicated with the ALJ's office, and a clerk instructed her she would receive guidance on how to proceed. *Id.* Also, as previously noted in Finding of Fact #17, Parent had already emailed the ALJ. Finally, Parent confirmed to the SCO that she received a letter from CDE directly after she filed her Due Process complaint. (Interview with Parent.) That letter contained various enclosures, one of which is ECEA Rule 6.02(7.5), Colorado's regulation pertaining to Due Process complaints. That regulation governs all aspects of resolution meetings in Due Process complaints.

24. The SCO finds that though Parent agreed to attend the January 10<sup>th</sup> resolution meeting, she did not agree to hold the meeting outside of the 15-day timeline.
25. On January 10, 2019, the resolution meeting was held at High School. All the individuals whom Parent requested in FF# 10 were present. (Interview with Parent.) The meeting did not result in a resolution of Parent's Due Process complaint. The District issued PWN the same day, which summarized the resolution meeting. On January 14, 2019, District's Legal Counsel filed a "Motion for Status Conference" with the Office of Administrative Courts (OAC), requesting that the Due Process hearing proceed. (Ex. F at 1-6.)
26. Based on the prior written notice and interviews with Parent and Special Education Director, the SCO finds that the resolution meeting on January 10<sup>th</sup> complied with the IDEA's requirements. At that meeting, Parent had the opportunity to discuss her Due Process complaint and attempt to resolve the issues therein. Additionally, the District ensured that all individuals that Parent requested were present, including the District's Superintendent.
27. On January 11, 2019, Parent emailed Superintendent and thanked her for attending the resolution meeting. The email explains in detail Parent's various objections to the processes and outcome of the resolution meeting. Two statements made at the end of this email are significant to this decision. The first is: "I wanted to reach out to you and inform you that even with the signed documents yesterday the district has until January 19, 2019 to try and resolve the issues before going to a due process hearing. It is quite expensive for the district to hire a lawyer for a due process hearing and federal court could last up to 2 years . . . ." The second statement is Parent's closing remark: "[T]his is my last attempt to try to resolve my due process complaint before the resolution period deadline of January 19, 2019." (Ex. 5 at 13.)
28. On January 16, 2019, Parent filed a motion to dismiss the Due Process complaint. Parent's motion included a letter explaining her decision: "I am requesting to withdraw my due process complaint without prejudice in order for my son, [Student] to attend his pending medical intervention i.e. cardiology appointment, allergy appointment, and food challenge test. I have contacted the school district and requested documentation

for an independent educational evaluation; I would like to have the time to properly have him assessed. Please let me know if you have any questions.” On January 18, 2019, the ALJ granted Parent’s request and dismissed the complaint. (Copy of correspondence from Parent to OAC sent to CDE by Parent; OAC order of dismissal.)

29. Parent explained to the SCO that the real reason she withdrew her Due Process complaint was because she had not heard from anyone at the OAC and could not obtain any information from CDE on how the Due Process hearing should proceed. This explanation is contradicted by several items in the record. First, Parent’s letter attached to her motion to dismiss directly contradicts her later explanation to the SCO. When asked about this discrepancy, Parent stated she felt that no one was listening to her, so she did not explain her reasoning. This does not explain why she would present a completely different reason for dismissing the complaint in the letter attached to her motion to dismiss. Second, on December 20, 2018, upon receipt of Parent’s Due Process complaint, CDE mailed Parent a letter explaining the processes and procedures for Due Process complaints. Among the enclosures in this letter, was a printed copy of ECEA Rule 6.02(7.5), which is a complete description of a parties’ rights pertaining to a Due Process hearing, including the resolution meeting. Third, Parent told the SCO that she had previously been through both the State complaint and Due Process complaint processes previously in another state, thus illustrating her familiarity with how these systems work. For the above stated reasons, the SCO finds that Parent’s subsequent explanation for why she chose to withdraw her complaint is not supported by the record.

#### **IEE request**

30. In September 2018, the District conducted an IDEA evaluation of Student, ultimately determining that Student is not eligible for special education and related services. (Ex. 6 at 22.)
31. Parent disagreed with the District’s evaluation and eligibility determination, and filed State Complaint 2018:530 to seek CDE’s review of these and other issues. That decision concluded, among other things, that the District’s evaluation and eligibility determination were conducted in accordance with IDEA’s requirements. (SC 2018:530.)
32. On January 12, 2019, Parent emailed Special Education Director stating her disagreement that Student no longer qualified for special education and related services, and requested an IEE at public expense. Specifically, Parent requested an IEE in the following areas: “Mental health to examine anxiety, depression and adjustment disorder. Other Health Impairment to examine how cholinergic uricarial (sic) is triggered by stress.” (Ex. A at 3.)

33. Two days later, on January 14, 2019, Special Education Director replied to Parent, and included the District's "IEE Request Form" as an attachment. (Ex. A at 3.)
34. The District's IEE Request Form contains the District's policies and procedures relating to IEEs:
- "The Director of Special Education will contact the preferred provider(s) to review the credentials of the provider, the assessment areas and arrange payment, no later than 10 business days after confirmation from parent(s).
  - The maximum allowable charges shall not exceed \$800.00.
  - After the cost of the evaluation has been determined and if the charge exceeds the maximum amount the parents must notify the District before moving forward with the assessment. The District will determine if the excess cost will be approved and will be notify the parent(s) in writing, consistent with the requirements of 34 C.F.R. 300.503.
  - If the District believes that the child's circumstances do not justify exceeding the maximum allowable charges, it will notify the parent(s) in writing, consistent with the requirements of 34 C.F.R. 300.503, and additionally file a due process complaint, consistent with the requirements of 34 C.F.R. 300.508." (Ex. A at 2.)
35. The SCO finds that the District's policies and procedures, as written, comport with IDEA's requirements for IEEs, found at 34 C.F.R. § 300.502.
36. Later that day, Parent emailed Special Education Director requesting a list of approved IEE providers. The next day on January 15<sup>th</sup>, Special Education Director replied, stating she was in the process of compiling a list of psychologists in the area, and that she would send the list as soon as she was finished. (Ex. A at 5.)
37. On January 17, 2019, Special Education Director emailed Parent with names and contact information of two local psychologists. Special Education Director instructed Parent to complete and return the IEE request form after she had decided which provider to use. Special Education Director would then arrange payment, after which an appointment for an evaluation could be made. (Ex. 3 at 2.)
38. On February 12, 2019, Parent emailed Special Education Director and attached the completed IEE Request Form, listing Child Psychologist as the provider she wished to complete the IEE. Child Psychologist was not one of the psychologists on the list given to Parent by Special Education Director on January 17<sup>th</sup>. Parent researched and found Child Psychologist on her own. (Ex. B at 1-2.)
39. Parent now listed "Serious Emotional Disturbance, Other Health Impairment and Autism Spectrum Disorder" under suspected disability on the IEE request form. She further stated: "I disagree with all of [District's] evaluations, assessments, processes and

procedures that led to my child being denied special education services because they focused only on his intellect. [District] concentrated on a learning disability under “multiple disabilities” rather than child’s disabilities; serious emotional disturbance and other health impairment.” She further stated “Due to the child’s difficulties with social communication and interaction he should be evaluated for autism spectrum disorder as well.” (Ex. A at 1.)

40. On February 12, 2019, Special Education Director replied stating she would need to contact Child Psychologist to obtain his credentials and his fee for the evaluations, consistent with policies outlined in the District’s IEE Request Form. (Ex. B at 1.)

41. On February 21, 2019, Child Psychologist emailed Special Education Director. Pertinent to this decision, he wrote, in part:

I believe the district needs to determine whether it is going to authorize the IEE. Once authorized, then I will review my notes from my call with [Student’s] parents, as well as any IEP documentation you (or [Student’s] parents) send me, and send everyone a proposed scope of work, including tests to be administered and costs. It would help to know what tests have already been administered and when, so I can select alternate versions, if relevant. Once the district has approved the scope of work and a contract has been signed on both ends, then we can proceed with scheduling the appointments.

Child Psychologist ended his email by stating he would wait until the IEE was approved before scheduling his evaluations and determining the scope of work. (Ex. C at 1.)

42. On February 22, 2019, Special Education Director replied, stating her position that the IEE could not include an Autism evaluation because the evaluation Parent was disagreeing with did not evaluate for Autism. Referencing the IDEA, Special Education Director stated:

[S]ince the law states the parent can only disagree with an evaluation obtained by the public agency no new evaluations may be done, only evaluations in the same areas performed by the public agency. [Parent] has requested an addition of Autism assessment which was not previously performed by [District] so that may not be added in an IEE.

Special Education Director ended by saying that the IEE was approved on February 12<sup>th</sup> when Parent made her request, and repeating her request for Child Psychologist’s credentials and costs for a psychological and educational assessment. Special Education

Director stated she would provide the list of assessments the District previously performed after receiving Child Psychologist's credentials. (Ex. C at 2.)

43. On February 25, Child Psychologist emailed Special Education Director his curriculum vitae and a copy of his professional license. The next day on February 26<sup>th</sup>, Special Education Director replied with the list of assessments previously performed by the District. (Ex. C at 3-4.)

44. Also on February 25<sup>th</sup>, Parent emailed Special Education Director a list of 9 questions. Significant to this investigation is the exchange on question #4. There, Parent asked:

On 2/12/2019 I requested an IEE to perform an education evaluation, psychological evaluation, medical assessment for other health impairment, and autism spectrum disorder due to social and emotional (attached document). When did you plan on telling me directly that you were not going to approve the medical assessment for other health impairment and assessment for autism spectrum disorder (social/emotional)? Can you explain why these are being denied? (Ex. C at 10-12.)

45. The next day Special Education Director responded:

Every communication I have sent you, plus the section of the law clearly states an IEE is for assessments that you disagree with, not for further evaluation. Schools do not preform (sic) medical assessments. The district reported a summary of the medical assessments you had reported to our school nurse which was contained in the evaluation report we discussed during the eligibility meeting on September 26, 2018. (Ex. C at 10-12.)

46. Based on the above email exchange, the SCO finds that on February 26, 2019, Special Education Director denied Parent's request for an IEE in the areas of ASD and OHI.

47. On February 26, Parent replied stating "I have asked [Child Psychologist] to wait to send you his proposed assessments and costs until we can agree what will be evaluated." Parent also stated her position that an IEE does not have to be limited to the original assessments performed. (Ex. D at 1.)

48. On March 1, 2019, Parent emailed Special Education Director. Significant to this decision, she wrote: "If you could respond to this email as soon as possible so we can try come up with an agreement on what evaluations will be performed in order to get the IEE approved (submitted request on 2/12/2019)." (Ex. D at 2-3.) Special Education Director did not reply to this email. Parent filed this state complaint 6 days later. (Complaint at 1.)

49. When asked by the SCO why she did not reply to Parent’s March 1<sup>st</sup> email, Special Education Director explained that she believed she and Parent were at an impasse regarding the IEE. She also stated she had been in discussions with the District’s Legal Counsel regarding filing a Due Process complaint. (Interview with Special Education Director.)

### CONCLUSIONS OF LAW

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

**Conclusion to Allegations 1 & 2: The District improperly refused Parent’s request for an IEE, resulting in a substantive violation.**

Parents have a right to seek an Independent Educational Evaluation (IEE) at public expense if they disagree with an evaluation conducted by the district. 34 C.F.R. § 300.502(b)(1). An IEE is an “evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” 34 C.F.R. § 300.502(a)(3)(i). After a parent requests an IEE at public expense, the district “must without unnecessary delay, either – (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.” 34 C.F.R. § 300.502(b)(2).

Here, Parent stated her disagreement with the District’s fall 2018 evaluation and made an initial IEE request on January 12<sup>th</sup>. Special Education Director then provided a list of approved providers on January 17<sup>th</sup>. Parent sent the completed IEE form back via email on February 12<sup>th</sup>. Any delay up to this point is attributable to Parent, due to the fact she researched and chose Child Psychologist to complete the IEE, who was not on the list of providers given to her by Special Education Director.

While Special Education Director exchanged information with Child Psychologist to finalize approval of the IEE, the central disagreement on this issue emerged. Special Education Director repeatedly stated her position that an IEE can only include evaluations that a school district had already performed, and not evaluations in new areas. Parent disagreed and requested Child Psychologist to wait to send any more information until the parties could decide which areas the IEE would be approved in, effectively stopping the process.

“When an evaluation is conducted in accordance with 34 C.F.R. §§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.” *Letter to Baus*, 115 LRP 8855 (OSEP 2015). OSEP also explains that a parent’s right to obtain an IEE at public expense applies “even if the reason for

the parent's disagreement is that the [district's] evaluation did not assess the child in all areas related to the suspected disability." *Letter to Carroll*, 116 LRP 46076 (OSEP 2016).

Here, Parent requested an IEE because she did not agree with the evaluation conducted in the fall of 2018. This evaluation did not specifically test for ASD, and Parent stated her objection to this on the IEE request form. (FF# 39.) Because Parent disagreed with the reevaluation from the Fall of 2018 on the basis that Student was not evaluated in all areas of suspected disability, specifically ASD, the SCO concludes that Parent is entitled to a publicly funded IEE in that area.

The District initially agreed to provide Parent with a publicly funded IEE, and followed the District's policies and procedures for determining whether the provider chosen by Parent met the District's criteria. However, Special Education Director's refusal to include an ASD evaluation amounted to a refusal to provide the IEE. At that point, the District was required to request a Due Process hearing to show its prior evaluation was appropriate. 34 C.F.R. § 300.502(b)(2). Instead, Special Education Director stopped replying to Parent's emails, and Parent filed this complaint less than a week later.

The SCO concludes that Parent's actions were reasonable under the circumstances. There is no question Parent did not agree with the findings in State Complaint 2018:530. She initially filed a Due Process complaint to seek review of the decision, before withdrawing the complaint and requesting an IEE. Her stated intent in seeking an IEE was to have another IEP eligibility meeting to contest the District's decision removing Student's special education and related services. Her concern was that the IEP team did not properly consider Student in the category of ASD, which was not evaluated in the fall 2018 evaluation. Had she not opposed Special Education Director, Parent would have obtained an incomplete IEE to address her concerns.

The SCO also concludes that the District is responsible for funding an IEE for Other Health Impairment. On the IEE request form, Parent requested that the District fund an evaluation for OHI. As stated in Finding of Fact #44-5, Parent requested that the District fund a medical assessment of Student for that purpose, and Special Education Director stated that schools do not perform medical evaluations. Because Parent disagreed with the District's eligibility determination and requested an evaluation for OHI in her IEE request, the SCO concludes she is entitled to an IEE in this area as well.

However, contrary to Parent's belief, the District is not obligated to conduct a medical examination for this purpose. Per CDE guidance, an evaluation for OHI does not require a medical assessment, but rather a review of a student's medical and educational history. See *Guidance for Determining Eligibility for Special Education Students with Other Health Impairment* (found at: [https://www.cde.state.co.us/cdesped/guidance\\_determiningeligibility\\_sped\\_students\\_ohi](https://www.cde.state.co.us/cdesped/guidance_determiningeligibility_sped_students_ohi)).

Having concluded that the failure to approve an IEE for ASD and OHI resulted in a procedural violation, the SCO must determine if the violation resulted in a denial of FAPE. A procedural violation results in a denial of FAPE if it “(1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (3) caused a deprivation of educational benefit.” 34 C.F.R. § 300.513(a)(2).

A parent’s ability to request an IEE is a powerful procedural safeguard provided by IDEA. When a parent disagrees with an evaluation conducted by a school district, the ability to request an IEE helps ensure parents “are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.” *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 61 (2005)(citing *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)). This is precisely what Parent was trying to accomplish here. She disagreed with the District’s eligibility determination and attempted to have Student evaluated by a specialist outside of the District to challenge the District’s decision to discontinue Student’s special education and related services. The District’s refusal to conduct an IEE and subsequent failure to defend its prior evaluation in a Due Process hearing caused an unnecessary delay in the process. Parent filed a state complaint to remedy the issue, and as of this writing, an IEE has not been conducted. Parent has been prevented from challenging the District’s determination that Student is no longer eligible for special education and related services because the requested IEE has not been completed. Accordingly, the SCO concludes that this procedural violation significantly impeded Parent’s opportunity to participate in the decision making process, entitling Parent to relief.

The issue of equitable relief in this case is complicated by Parent’s decision to withdraw Student from the District at the end of this school year. There is authority to support a conclusion that a school district is not responsible for funding an IEE after a student transfers to another district: “[District] is not responsible for financing an independent evaluation of an assessment for services [student] will no longer be using.” See *Bd. of Educ. of Ewing Township*, 113 LRP 4793 (SEA NJ 1/15/13). There is also authority to support a contrary conclusion, i.e., that a school district is responsible for providing an IEE even after the student has left the school district: “[T]he District’s obligation to provide the IEE was based on the evaluation it conducted while the Student was enrolled in the District. Disagreement with the evaluation triggers the right to an IEE whether or not the Student remains enrolled in the District.” *St. Paul Independent Sch. Dist. #625*, 114 LRP 10005 (SEA MN 12/24/13).

The SCO concludes that the better approach in this case would be to place Parent in the same position she would have been in if not for the procedural violation, thus entitling her to some form of equitable relief. The United States District Court for the Central District of California’s decision in *Los Angeles Unified School District v. D.L.*, is instructive. 548 F.Supp.2d 815, 822 (C.D. CA 2008). There, parent requested a special education evaluation and district 1 refused. Parent subsequently enrolled student in district 2. District 2 immediately commenced

evaluations, and parent filed a Due Process complaint, alleging district 1 should have evaluated student. The Due Process complaint was appealed to the District Court. The District Court ruled that district 1 failed to properly evaluate student, and ordered district 1 to pay for the evaluations that district 2 conducted, since those evaluations should have been conducted by district 1 originally. The District Court reasoned district 1 should be responsible for funding the IEE based on equitable concerns, explaining that based on the evidence it appeared that “[district 1] should have performed an assessment of [student] while he was still a student within [district 1’s] jurisdiction.” *Id.* at 822-23.

Here, having concluded that the District should have funded an IEE for ASD and OHI while Student was enrolled in the District, the SCO further concludes that the District continues to be responsible to fund an IEE for Student, despite Student’s impending enrollment in a different school district. Parent’s decision to transfer Student to a new school district was based in part on the allegations in this complaint, including the District’s refusal to provide an IEE in the areas Parent requested. The appropriate relief here is to ensure Parent is provided with an IEE that the District should have approved when Student was enrolled, in order to place Parent in the same position had the procedural violation not occurred.

**Conclusion to Allegation 3: The failure to hold the resolution meeting within 15 days is attributable to the District; however this procedural violation did not result in substantive harm.**

“Within 15 days of receiving notice of the parent’s due process complaint, and prior to the initiation of a due process hearing under § 300.511, the [District] must convene a meeting with the parent and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the due process complaint . . . .” 34 C.F.R. § 300.510(a)(1). The 15 day time period includes days that schools are closed for breaks and holidays. *Letter to Anderson*, 110 LRP 70096 (OSEP 11/10/10). “The parent and the [district] determine the relevant members of the IEP Team to attend the meeting.” 34 C.F.R. § 300.510(a)(4).

Here, Parent and Special Education Director did not initially communicate effectively, which contributed to the resolution meeting being held outside of the 15-day time period. “The core of the [IDEA] . . . is the cooperative process that it establishes between parents and schools.” *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005)(citing *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)). Indeed, even after a Due Process complaint has been filed, the IDEA requires that “the parent and the district determine the relevant members of the IEP Team to attend the meeting.” 34 C.F.R. § 300.510(a)(4). Parents and school districts are encouraged to “act cooperatively in determining who will attend the resolution meeting, as a resolution meeting is unlikely to result in any resolution of the dispute if the parties cannot even agree on who should attend.” 71 Fed. Reg. 46701 (August 14, 2006).

The parties here exchanged several emails in anticipation of the resolution meeting; however, the first mention of who would attend the meeting did not occur until December 29<sup>th</sup>. On that date, Parent referenced the specific IDEA provision and asked Special Education Director who she was planning to invite to the resolution meeting. Notably, Parent still did not state who she would like to be present for the meeting. Special Education Director then replied on December 31, 2018, stating that she and Special Education Coordinator would be at the meeting. Again, Special Education Director did not ask Parent who she wanted present at the meeting, but rather told Parent who would be in attendance from the District. Parent replied that day with her list of 5 people from the District she wished to be present, as well as the other participants she intended to bring. Parent and Special Education Director continued to correspond until the morning of the meeting, when Parent asked whether the entire IEP team would be present at the meeting. Special Education Director told Parent staff would not return from the winter break until January 7<sup>th</sup>, at which point Parent replied: "I am not willing to sign any resolution documents or agreements without the IEP team attending the resolution meeting. Please let me know if you can have the IEP team attend a resolution meeting on January 3<sup>rd</sup> or 4<sup>th</sup>."

In this instance, both Parties share the blame for the delay in holding the resolution meeting. Parent waited until 2 days before the meeting to request the presence of 5 District employees. Parent cited to the specific section of the IDEA which requires both district and parent to decide which members of the IEP team are relevant and who should be included in the resolution meeting, which indicates her familiarity with IDEA's requirements. However, Parent also repeatedly stated that the entire IEP team must be present at a resolution meeting. Parent's assertion regarding participants in a resolution meeting is not consistent with IDEA. The IDEA specifically requires the parties to collaborate and decide which *relevant* members of the IEP team should be included. 34 C.F.R. § 300.510(a)(4). "Although certain Team members who have specific knowledge of the facts identified in the [Hearing Request] are required to be present during the informal resolution session, IDEA 2004 makes clear that the informal resolution session is not intended to be nor may it take the place of an IEP team meeting." *Foxborough Reg'l Charter Sch.*, 106 LRP 34379 (SEA MA 5/30/06).

On the other hand, Special Education Director never asked Parent who she wanted at the resolution meeting, and simply told Parent who the District intended to include only after Parent asked. Additionally, two of the five district members Parent requested were available to meet during the 15-day time period, but Special Education Director never communicated this to Parent. Nor did she explain to Parent that the other three staff members were out of town visiting family. CDE has "an affirmative obligation to ensure its LEAs' compliance with the resolution process timelines, consistent with its general supervisory and monitoring responsibilities." *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B)*, 61 IDELR 232 (OSEP 2013). As stated above, both sides made errors that contributed to the delay. Ultimately, however, it is the District's responsibility to convene a resolution meeting within 15 days. Accordingly, the SCO concludes that the failure to do so resulted in a procedural violation of the IDEA.

Having concluded that the failure to hold the resolution meeting within 15 days resulted in a procedural violation, the SCO must determine if the violation resulted in a denial of FAPE. A procedural violation results in a denial of FAPE if it: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

For the reasons explained below, the SCO concludes that this procedural violation did not result in substantive harm. The purpose of the resolution meeting "is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [district] has the opportunity to resolve the dispute that is the basis for the due process complaint." 34 C.F.R. § 300.510(a)(2). First, the District held the resolution meeting with all of the individuals parent requested on January 10, 2019. Though Parent contests the validity of the resolution meeting, the SCO found above that the parties discussed the facts surrounding the Due Process complaint and Parent's proposed resolution. Thus, though it was held late, the District convened a proper resolution meeting soon after the 15 day timeline and within the 30 day resolution period. Second, Parent's email to Superintendent on January 11<sup>th</sup>, in which she continued to attempt to resolve her Due Process complaint, shows that the meeting being held outside of the 15-day time period did not prevent her from continuing to participate in the process. Accordingly, Parent's participation was not impeded. Third, a parent's recourse when a district fails to convene a resolution meeting within 15 days is to contact the ALJ and ask that the Due Process decision timeline begin. 34 C.F.R. § 300.510(b)(5). Parent did contact the ALJ and ask for his intervention, however her stated intent was that the ALJ ensure that the resolution meeting was conducted. As stated above, the meeting was held shortly thereafter. Finally, Parent withdrew her Due Process complaint on January 16, 2019. Since the purpose of the resolution meeting is to attempt to resolve the complaint, after Parent withdrew the complaint, there was nothing to resolve, thus making any claim that this procedural violation caused substantive harm moot. For these reasons, the SCO concludes that the procedural violation was not material and did not result in substantive harm.

### **REMEDIES**

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

- a) Unnecessarily delaying approval of an Independent Educational Evaluation (IEE), consistent with 34 C.F.R. § 300.502(b)(2);
- b) Refusing to provide an IEE in the area of ASD and OHI, consistent with 34 C.F.R. § 300.502(b)(1);
- c) Convening a Due Process Resolution Meeting beyond the 15-day timeline, consistent with 34 C.F.R. § 300.510.

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

- 1) By June 1, 2019, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violations 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 District is responsible. The CAP must, at a minimum, provide for the following:
  - a. Special Education Director is to review the requirements for IEEs found at 34 C.F.R. § 300.502, as well as *Letter to Baus*, 115 LRP 8855 (OSEP 2015) and *Letter to Carroll*, 116 LRP 46076 (OSEP 2016). Special Education Director must also ensure that any District personnel responsible for approving IEE requests review the same information, as well as this Decision. This review must occur no later than June 14, 2019. Signed assurances that the above materials have been reviewed must be completed and provided to CDE no later than July 1, 2019.
  - b. Additionally, Special Education Director must review the requirements for Due Process resolution meetings, found at 34 C.F.R. § 300.510. This review must occur no later than June 14, 2019. Signed assurances that the above materials have been reviewed must be completed and provided to CDE no later than July 1, 2019.
- 2) Within 14 days of receipt of this Decision, the District must provide Parent the opportunity to obtain an IEE at public expense, consistent with 34 C.F.R. § 300.502 and the District's criteria for IEEs. Consistent with this Decision, the IEE must include evaluations in the areas previously evaluated by the District (educational and psychological assessments), as well as assessments for ASD and OHI. The assessment for OHI will consist of an independent review of Student's educational and medical history performed by a school nurse or other qualified individual who is not employed by the District. This report from a neutral party employed outside the District will serve as an IEE for OHI. The Parties may contact Sarah Blumenthal, CDE's State Nurse Consultant, for assistance in identifying an appropriate individual to conduct this evaluation.
- 3) If the Parties are unable to agree on an evaluator or the scope of the proposed IEE, they must notify CDE, through Michael Ramirez, no later than June 3, 2019. Whether or not a proposed evaluation is consistent with the scope of this Decision will be determined solely by CDE, should the Parties dispute the scope of the IEE. If the Parties are unable to agree on an evaluator, CDE will choose an evaluator. In the event that CDE must choose the evaluator and/or determine the scope of the evaluation, and Parent does not agree with the evaluator and scope of the proposed evaluation, as determined by CDE, the District shall be excused from providing the IEE at public expense.

- 4) The District must provide written documentation to CDE that it has provided the IEE at public expense by August 1, 2019, or why it should be excused from providing the IEE, in accordance with the conditions set forth in paragraph 3 above.

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. See 34 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46607 (August 14, 2006).

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

Dated this 15 day of May, 2019.

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Thomas Treinen  
State Complaints Officer

## **Appendix**

### **Complaint, pages 1-53**

- Ex. 1 Out-of-state IEP and IEE
- Ex. 2 D49 504 emails
- Ex. 3 D49 IEE emails
- Ex. 4 D49 policies
- Ex. 5 D49 resolution emails
- Ex. 6 D49 educational records

### **Response, pages 1-2**

- Ex. A IEE request form; IEE emails from 1/12/19 to 1/15/19
- Ex. B IEE emails from 2/12/19 to 2/20/19
- Ex. C IEE emails from 2/21/19 to 2/26/19
- Ex. D IEE emails from 2/26/19 to 2/28/19
- Ex. E Student's 2018 out-of-state IEE
- Ex. F Resolution meeting documentation

### **Reply, pages 1-11**

#### **Interviews with:**

Parent  
Special Education Director