

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

State-Level Complaint 2009: 510

Jefferson County District R-1

Decision

INTRODUCTION

This pro-se, state-level complaint (Complaint),¹ dated 10/29/2009, was filed on 10/30/2009.

The Complainant is the mother of a child with a disability. Hereafter, the Complainant is referred to as “Parent” and the child is referred to as “Student.”

The undersigned State Complaints Officer (SCO) conducted a face-to-face interview with Parent on 11/02/2009. As a result of that interview, the SCO determined that the Complaint alleged five allegations subject to the jurisdiction of the state-level complaints process under the federal Individuals with Disabilities Education Act (IDEA) and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.

The overriding issue, and therefore, the scope of the investigation identified by the SCO, between the dates of 10/30/2008 and 10/30/2009, is:

Whether the District committed violations of IDEA, 20 U.S.C. § 1400 *et seq.* and its implementing regulations, 34 CFR Part 300.1, *et seq.*, which denied [Student] a free appropriate public education (FAPE).

The SCO notified the Jefferson County District R-1 (District) of the Parent’s allegations in a letter dated 11/02/2009. The letter to the District included a copy of the Complaint and all supporting documentation.² On 11/12/2009, the SCO also enumerated several inquiries that the District was directed to answer in conjunction with any response (Response).

The District’s Response, through legal counsel Alyssa C. Burghardt, consisting of a 13 page cover letter, (including answers to each of the SCO’s inquiries), as well as exhibits A-N, was timely received on 11/19/2009.

¹ [Parent] initially filed five separate complaints which were consolidated into one complaint containing five allegations.

² Appendix A, attached and incorporated by reference, details the entire record (Record), including all documentation which accompanied the initial Complaint.

In a letter dated 11/19/2009, [Parent] was supplied with a complete copy of the District's Response, and was advised that any reply (Reply) was due within ten days of receipt of the Response. The Parent's Reply, through legal counsel Margaret Pflueger, consisting of a 12 page cover letter and three exhibits, was timely received on 11/30/2009.³ The SCO sent a copy to the District by certified mail the same date.

Due to the sharp conflict between [Parent's] initial Complaint and the District's Response, the SCO arranged to conduct face-to-face interviews with eight District staff. On 12/03/2009, the SCO conducted face-to-face interviews with the: 2008-2009 Paraprofessional (Paraprofessional #1); 2009 Paraprofessional (Paraprofessional #2); Speech-Language Pathologist (SLP); 2009 School Psychologist (School Psychologist); General Education Teacher (Gen. Ed. Teacher); Area Coordinator (AC); Director of Special Education (Sp. Ed. Director); and Special Ed. Teacher (Sp. Ed. Teacher). District's legal counsel, Ms. Burghardt, was present during all of these interviews.

On 12/08/2009, the SCO requested and District supplied copies of the participant sign-in sheets from the 09/11/2009 and 10/17/2009 IEP meetings.

On 12/08/2009, the SCO closed the record.

THE PARENT'S COMPLAINT ALLEGATIONS

The Parent's Complaint, in relevant part, is renumbered and summarized as follows:

Allegation #1: Parent did not waive timely notice of the IEP meeting scheduled for 10/15/2009 contrary to the presence of her typed name in the District form entitled "Waiver of Timely Notice of IEP Program Meeting."

Allegation #2: On 08/21/2009, a Problem Solving Team (PST) without authority to amend or change the services listed in the 10/17/2008 IEP, improperly stopped Student's paraprofessional support services.

Allegation #3: Based on data collected for four weeks (beginning 09/14/2009) by a paraprofessional, a person unqualified to conduct this type of data collection, the IEP Team improperly determined that Student was no longer in need of a paraprofessional.

Allegation #4: Contrary to the 10/09/2009 and 10/12/2009 progress reports, [Student] failed to master three [short-term objectives]⁴ contained in the 10/17/2008 IEP and therefore, these [short-term objectives] should have been included in the 10/15/2009 IEP.

Allegation #5: Between 09/23/2009 and 10/15/2009, the IEP Team improperly refused to conduct a Functional Behavioral Assessment (FBA) and to prepare a Behavioral

³ Ms. Pflueger's 11/24/2009 request for an extension of time in which to file the Reply was denied by the SCO.

⁴ Although [Parent's] Complaint and Reply identify these items as "goals," in fact, according to the 10/17/2008 IEP, these were short term objectives and not goals.

Intervention Plan (BIP) to address extreme behavioral problems Student is exhibiting due to low self esteem.

THE DISTRICT' RESPONSE

In response, the District denied each of Parent's allegations, which are summarized as follows:

Allegation #1: The 10/15/2009 IEP meeting (which was a continuation of the 10/12/2009 IEP meeting), was scheduled according to Parent's availability, the District supplied her with sufficient notice, Parent attended and participated in the meeting. Although the notice was consistent with 34 CFR § 300.322(a)(1), the District has removed the Waiver of Timely Notice document from [Student's] educational records in order to resolve the matter.

Allegation #2: Subsequent to 10/2008 IEP Team meetings and consistent with the 10/17/2008 IEP, Student's paraprofessional services, delivered by the 2008-2009 Paraprofessional [Paraprofessional #1], were phased-out between 10/20/2008 and 01/2009. [Student] was functioning independently in the classroom by the end of the 2008-2009 school year. Contrary to [Parent's] allegation, the 10/17/2008 IEP did not require one-to-one paraprofessional support at the outset of the 2009-2010 school year. The 08/21/2009 PST meeting was held in order to strategize on how Student would make a smooth transition into the 2009-2010 school year and continue to work independently.

Allegation #3: Following the 08/21/2009 PST meeting, at [Parent's] request, the IEP Team reconvened on 09/11/2009 to reconsider whether Student needed one-to-one paraprofessional supports during the 2009-2010 school year. Although various [unidentified] members disagreed as to the need for further paraprofessional services, the IEP Team agreed to place a paraprofessional in [Student's] classroom for two hours a day over a four-week time period in order to monitor and tally [Student's] need for continued paraprofessional support. The IEP Team determined that, during the ensuing time period, the paraprofessional [Paraprofessional #2] would only provide direct support when [Student] needed more assistance than was available to all students. Data was recorded by [Gen. Ed. Teacher], tallying the number of times each day that [Student] needed paraprofessional support. During the relevant time period, [Student] only required paraprofessional support on one occasion, 09/18/2009. The data was shared with [Parent] during an informal meeting on 10/09/2009 as well as the 10/12/2009 and 10/15/2009 IEP meetings. All of this information was detailed in writing by [AC] on 11/04/2009 at [Parent's] request. Based on the collected data and IEP Team discussions, it was determined that [Student] did not require paraprofessional support to be reinstated during the 2009-2010 school year. Consequently, no paraprofessional supports are listed in [Student's] 10/15/2009 IEP.

Allegation #4: The IEP Team appropriately relied on the observations of [Student's] [Gen. Ed. Teacher] and related service providers to conclude that, by 10/12/2009, [Student] had mastered the three disputed objectives and therefore it was appropriate to target other areas and set new goals and objectives for [Student].

Allegation #5: While [Student] has low self-esteem, the IEP Team determined after discussion that this did not interfere with [Student's] learning or the learning of others. This was detailed to [Parent], at her request, in a 10/16/2009 letter from [Sp. Ed. Director]. Consequently, consistent with 34 CFR § 300.324(a)(2)(i), the IEP Team did not conduct an FBA or develop a BIP. Instead, the IEP Team included goals and objectives to address and improve [Student's] self esteem issues.

THE PARENT'S REPLY

[Parent's] reply to the District's Response, through legal counsel, is summarized below:

Allegation #1: [Parent] reiterated her claim and, for the first time, asserted that the Waiver of Timely Notice of IEP Meeting (i.e., Complaint Exhibit #1, B, pg. 4) constituted a prior written notice (PWN) violation of 34 CFR § 300.503. [Parent] also claimed in her Reply that the District had added new documents to [Student's] [10/15/2009] IEP (i.e., referring to the 09/11/2009 Special Meeting IEP cover page, Meeting Participants, Sign in Sheet, Additional Information Sheet and Notice of Meeting) and that these documents constituted unilateral changes to the IEP to which [Parent] never consented.

Proposed remedy: Although acknowledging that the District had, pursuant to [Parent's] proposed remedy in the initial Complaint, removed the Waiver of Timely Notice of IEP Meeting document from [Student's] IEP, in her Reply [Parent] requested that [Sped. Director] acknowledge in writing the District's alleged inappropriate conduct and provide assurances that the alleged violation would not recur in the future.

Allegation #2: [Parent] alleged that [Student] consistently utilized paraprofessional services throughout the 2008-2009 school year and, therefore, the services were not phased out as the District contends. [Parent] noted that although the District attempted to phase out the paraprofessional services, [Student] continued to rely heavily on paraprofessional support (i.e., citing Paraprofessional #1's support of [Student]: after [Gen. Ed. Teacher] was injured in April 2009; during a field trip in May 2009; and on the final day of school, 2009). [Parent] again variously characterized the 08/21/2009 meeting as an "PST" or "RTI" meeting. [Parent] again asserted that the decision to remove paraprofessional services during the 2009-2010 school year was not made by the [10/17/2008] IEP Team but by the PST team during the 08/21/2009 meeting. [Parent] also argued that the 10/17/2008 IEP was never amended to remove paraprofessional support and, therefore, the District had violated the PWN provisions of 34 CFR § 300.503.

Proposed remedy: (i) The District not conduct anymore RTI meetings for [Student]; and (ii) [Sp. Ed. Director] submit a statement acknowledging the District's alleged inappropriate removal of [Student's] paraprofessional services and provide assurances that the alleged violation would not recur.

Allegation #3: [Parent] asserts (without citation) that neither [Gen. Ed. Teacher] nor [Paraprofessional #2] were qualified nor impartial persons suitable for collecting data

concerning [Student's] need for continued paraprofessional services. [Parent] reiterated her disbelief that a paraprofessional was ever present during the four week data collection time period subsequent to the 09/11/2009 IEP meeting. In her Reply, [Parent] argued that the District's data collection violated 34 CFR § 300.502(a)(3)(i), the IDEA regulation regulating independent educational evaluations (IEEs). [Parent] also argued that the "informal" 10/09/2009 meeting was not comprised of the proper IEP Team members and [Parent] did not receive the required PWN that an IEP meeting was intended.

Proposed remedy: An IEE, paid for by the District, be conducted by a neutral third party to determine whether or not [Student] should continue to receive paraprofessional services.

Allegation #4: [Parent] reiterated the claim that [objectives] (i) and (ii) were not mastered and therefore improperly removed from [Student's] 10/15/2009 IEP. Having reviewed the SLP's notes concerning [objective] (iii), [Parent] noted that she was now satisfied that Response documentation supported the District's position that [objective] (iii) had been mastered.

Proposed remedy: [Parent] requested that [objectives] (i) and (ii) be included in [Student's] 10/15/2009 IEP.

Allegation #5: [Parent] reiterated that, given [Student's] documented low self esteem, "it is to be expected and highly probable that [this] interferes with [Student's] learning."

Proposed remedy: District conduct an FBA using a neutral third party and, consistent with the FBA results, a BIP be prepared for [Student].

FINDINGS OF FACT

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

Background:

- 1) [Student] is a [Age] student residing within the boundaries of the District and eligible for special education and related services on the basis of an autism disability.
- 2) During the time period relevant to the Complaint, [Student] was enrolled in and attended [Elementary School] within the boundaries of [District].
- 3) During both the 2008-2009 and 2009-2010 school years, [Student's] teachers and providers included [Gen. Ed. Teacher], [SLP] and [Sp. Ed. Teacher]. The IEP Teams for both the 10/17/2008 and 10/15/2009 IEPs included these three persons as well as [Parent] and [School Principal]. Additionally, [School Psychologist] was a member of the 10/15/2009 IEP Team. Consequently, at least three of the IEP Team members *in both school years* were teachers and

providers having extensive knowledge of [Student's] academic, developmental and functional needs.

The 10/17/2008 IEP:

4) The relevant portion of [Student's] 10/17/2008 IEP concerning paraprofessional (para) services is as follows:

It is recommended that the IEP team evaluates and discusses [Student's] practical goals and needs moving into the rest of [the school year] and how the hours of the para will be shortening in length. *Beginning October 20th*, per the IEP team's discussion, it is recommended that [Student's] para shorten her time with [Student] to 3.5 hours a day as discussed in previous meetings. *The para will continue to be available as needed, but will not continue in the classroom as she has been up to this point.* The date offered (October 20th) allows for some flexibility as that is a shortened week due to fall break. This will allow the staff involved to see what time and needs must truly be accommodated for. Further discussion may be necessary.

Visual aides will be implemented in place of the para to help [Student] gain independence by 12/1/08.

10/17/2008 IEP, pg. 7 (emphasis added).

5) Consistent with the 10/17/2008 IEP, the credible evidence contained in the Record concerning para services to [Student] is as follows:

- The 10/17/2008 IEP Team discussed and decided that it was appropriate to wean [Student] from one-to-one para supports and to eventually terminate all para support.
- To that end, the team agreed that one-to-one para supports would stop on 10/19/2008 and, commencing on 10/20/2008, be reduced to 3.5 hours per day with a projected termination in 12/2008.
- During the 10/2008 to 12/08 time period, [Paraprofessional #1] circulated in the classroom approximately 3.0 hours per day and her duties were limited to redirecting or "keeping [Student] on track" only if needed. Typically [Paraprofessional #1] provided intervention only if [Student] placed [Student's] head on [Student's] desk.
- Because of the long Christmas break, the District opted to voluntarily continue to make [Paraprofessional #1] present and available to [Student] in the classroom on an "as needed basis" but not on a one-to-one basis.
- In April, 2009, [Gen. Ed. Teacher] broke her ankle and was on medical leave until the end of the school year. This necessitated use of a substitute teacher [Substitute Teacher]. Because of [Gen. Ed. Teacher's] extended medical absence, the District voluntarily continued to make [Paraprofessional #1] available in the classroom for the dual purposes of redirecting [Student] as needed and to provide general assistance to [Substitute Teacher].

- The District voluntarily supplied [Student] with para services ranging from 30 minutes per week to zero minutes per week during the second semester of the 2008-2009 school year, depending on [Elementary School] functions or schedule disruptions.
- In either late 04/2009 or early 05/2009, [Parent] and [Sp. Ed. Teacher] discussed the fact that, given [Student's] progress, no para services would be supplied at all in conjunction with the 2009-2010 school year.
- By the end of the 2008-2009 school year, [Paraprofessional #1] was not providing [Student] with any interventions whatsoever due to [Student's] demonstrated independence.

6) The SCO specifically finds that the 10/17/2008 IEP supplied [Parent] with prior written notice consistent with 34 CFR § 300.503 that para supports would be weaned and eventually terminated. Furthermore, the credible evidence is that para services to [Student] were completely terminated by the end of the 2008-2009 school year consistent with the 10/17/2008 IEP.

7) The three [short term objectives] contained in the 10/17/2008 IEP that [Parent] objected to having removed from [Student's] 10/15/2009 IEP, as well as [Student's] documented progress as to each [objective], are as follows:

(i) [Student] will accept changes in an established routine by complying with staff requests in a timely and respectful manner. The baseline was that [Student] was inconsistent in accepting changes to an established routine. The criteria set for mastery of the objective was 75% of the time. Progress reports: 11/2008- not introduced; 02/2009 - progress; 05/2009 - progress; and 10/12/2009 - mastered.

(ii) [Student] will transition to a new task when necessary, even if [Student] has not completed [Student's] current task, without difficulty. The baseline was that [Student] was inconsistent in transitioning to a new task, even if [Student] had not completed [Student's] current task. The criteria set for mastery of the objective was 75% of the time. Progress reports: 11/2008 - not introduced; 02/2009 - progress; 05/2009 - progress; and 10/12/2009 - mastered.

(iii)[Student] will understand the nonverbal cues expressed by [Student's] communication partners across three consecutive sessions. The baseline was that [Student] continued to do an activity after non verbal cues. The criteria set for mastery of the objective was 75% of the time. Progress reports: 11/2008- progress; 02/2009 - progress; 05/2009 - progress; and 10/12/2009 - mastered.

Progress reports for the 10/17/2008 IEP were dated: 11/2008; 01/2009; 05/2009; 10/09/2009 and 10/12/2009. The first two short-term objectives were put in place to address the goal of [Student] improving [Student's] emotional regulation, coping and problem solving skills. The third short-term objective was put in place to address the goal of [Student] increasing [Student's] social pragmatic language skills.

8) Given the documentation in the Record⁵ the credible evidence is that by 10/12/2009, [Student] had mastered all three of the [objectives] raised in [Parent's] Complaint. It was therefore appropriate for the IEP Team to remove these three [objectives] and select new goals and objectives for the 10/15/2009 IEP.

Meeting of 08/21/2009 by PST Team:

9) In a 07/27/2009 e-mail, [Parent] was invited by [Sp. Ed. Teacher] to attend a Problem Solving Team (PST)⁶ meeting on 08/21/2009. The purpose of this meeting was to discuss [Student's] transition into the next grade level during the 2009-2010 school year. The PST meeting was attended by [Parent], [Sp. Ed. Teacher], [School Principal], [Gen. Ed. Teacher] and three other [Elementary School] staff.

10) The 08/21/2009 meeting notes indicate that, although [Student] had done well with weaning off of the one-to-one para during the prior school year, [Parent] disagreed with this conclusion. The PST team concluded that during the ensuing month, the team would work on [Student's] independence by: providing [Student] with a study buddy; providing additional adult support in the classroom; varying support so that [Student] was not dependent on one person; giving [Student] jobs to feel empowered; and making familiar adults and peers available during the school day. The team was to reconvene at the end of 09/2009.

11) The SCO specifically finds that:

- The 08/21/2009 PST meeting was not an IEP meeting and was never characterized to [Parent] as an IEP Team meeting;
- The PST did not terminate [Student's] Para services but rather, based on a *10/17/2008 IEP Team decision*, para services were reduced and then terminated by the end of the 2008-2009 school year; and
- [Parent] was aware that these services had terminated and would not be offered during the 2009-2010 school year.

12) The 2009-2010 school year began on 08/24/2009. Between 08/24/2009 and 09/13/2009, consistent with the 10/17/2008 IEP, [Student] was not supplied para support services.

Meeting of 09/11/2009:

13) On 09/11/2009, at [Parent's] request, the IEP Team was convened to discuss [Parent's] desire to have para supports reinstated. The 09/11/2009 meeting was attended by: [Parent], [AC], [Gen. Ed. Teacher], [School Principal] and [Sp. Ed. Teacher]. During this meeting, various team members expressed the opinion that [Student] had no need of any para supports.

⁵ [Student's] progress reports, grade reports and interviews with [Gen. Ed. Teacher], [Sp. Ed. Teacher] [School Psychologist] and [SLP].

⁶ Previously, this team was identified as the Student Study Team (SST). The name was changed to the Problem Solving Team (PST) at the start of the 2009-2010 school year but the team's function remained the same. The purpose of the PST is to review data collected to provide informed instruction. Under the RTI system, data collection and review is an ongoing process conducted by school teams for all students.

Nevertheless, the team agreed to make limited para services available to [Student] over a period of four weeks, for a maximum of two hours per day during reading, writing and math classes. The purpose of the limited para services was to tally the number of times [Student] actually required para assistance in order for the IEP Team to making a final determination as to whether para services should be resumed during the 2009-2010 school year. This tallying did not constitute an evaluation.

14) As a result of that meeting, [Paraprofessional #2] was assigned to [Student] and was specifically directed to circulate in the classroom and only provide [Student] with para services when and if the need arose. The credible evidence in the Record is that between 09/14/2009 and 10/08/2009, a period of 19 school days, [Paraprofessional #2] was consistently available to [Student] for two hours per day, but [Student] only required para assistance on one occasion, 09/18/2009.

15) The data concerning [Student's] para needs was collected by [Gen. Ed. Teacher] based on that teacher's observations as well as reporting by [Paraprofessional #2]. The SCO specifically finds that this was a proper and wholly appropriate method for collecting data in order for the IEP Team to assess whether [Student] needed to have para assistance reinstated.

16) On 10/09/2009, an *informal meeting* was held with [Parent] in order to review and discuss data that had been collected between 09/14/2009 to 10/08/2009. During the meeting, all of the tally results were reviewed with [Parent]. The SCO specifically finds that this meeting was not a formal IEP meeting but rather an *informal meeting* to review the tally results.

17) In an e-mail dated 10/06/2009, [School Psychologist] reported her professional opinions, based on both a 30 minute observation of [Student] in the classroom as well as the provision of psychological services to [Student] during the 2009-2010 school year. [School Psychologist] noted that "[Student] was able to follow directions by [him\herself] most of the time" and "on the rare occasion that [Student] was off task, [the] teacher was able to redirect [Student]." The [School Psychologist] concluded stating "I believe having a para may be a crutch for [Student]. [Student] may learn better if [Student] has to model other students' behaviors instead of relying on an adult. There are plenty of adults around [Elementary School] if [Student] needs some adult time." E-mail of 10/06/2009 from [School Psychologist] to [AC], [Principal] and [Sp. Ed. Teacher].

18) During a 12/03/2009 face-to-face interview with SCO, [School Psychologist] noted that, based on her observations and interactions, [Student] was easily redirected by [Gen. Ed. Teacher] and that [Student] interacted appropriately with other students.

19) Additionally, during 12/03/2009 face-to-face interviews, [Gen. Ed. Teacher] opined that [Student] is more than capable of reaching academic grades and independence to a level such that [Student] does not need a para. "I'm definitely able to manage keeping [Student] on task this year without a para." The [Gen. Ed. Teacher] noted that, during the 2009-2010 school year, "[Student] has shown a lot of growth, improvement and independence." [Student] is in [Gen. Ed. Teacher's] classroom approximately six hours each day.

IEP of 10/15/2009:

- 20) Two IEP Team meetings were conducted in conjunction with the 10/15/2009 IEP.
- 21) The first meeting occurred on 10/12/2009 and included the following IEP Team members: [Parent], [AC], [Gen. Ed. Teacher], [School Principal], [Sp. Ed. Teacher]; [SLP]; and [School Psychologist]. The IEP Team discussed the collected data and concluded that [Student] did not require one-to-one para support since [Student] was able to be easily redirected by [Gen. Ed. Teacher] as well as other [Elementary School] staff without further intervention. Therefore, the team declined to reinstitute para services in [Student's] 10/15/2009 IEP.
- 22) At the conclusion of this meeting, [Parent] requested that [AC] supply a letter documenting the persons collecting the data, those persons' qualifications and also a complete summary of the tallied results. (This information was supplied to [Parent] by [AC] on 11/04/2009 in a document entitled "Official Notification to Parents Regarding Data Collection.") The SCO specifically finds that this letter was not prepared as a result of [Parent's] Complaint but, rather, in response to [Parent's] specific request.
- 23) [Student's] final progress reports for the 10/17/2008 IEP were recorded by [School Psychologist] during the 10/12/2009 IEP meeting as a result of discussions held during the meeting with the relevant IEP Team members that had taught or supplied [Student] with services during the new school year. These IEP Team members were responsible for the various goals and objectives and had worked with [Student] throughout both the 2008-2009 and 2009-2010 school years. The SCO finds that [Student] mastered the three objectives (as detailed in Finding of Fact #7, above), and therefore the IEP Team properly determined that it was appropriate to focus on new goals and objectives in the 10/15/2009 IEP, including [Student's] poor self esteem.
- 24) Because the IEP could not be completed, a second meeting had to be scheduled. Parent was asked if she would waive the requirement that the IEP be completed within 365 days of the prior (10/17/2008) IEP but [Parent] refused. Consequently, the IEP meeting was *continued* to 10/15/2009. The SCO specifically finds that [Parent]: agreed to the rescheduled meeting date, received reasonable and proper notice of the rescheduled meeting date, and, in fact, attended the 10/15/2009 meeting. Furthermore, as noted in the District's Answers to SCO Inquiries, [Sp. Ed. Teacher] typed the Waiver of Timely Notice of IEP Meeting form, including [Parent's] typed name with reference to e-mails confirming [Parent's] agreement concerning the second IEP meeting. It is a *District practice* to supply parents with ten days notice of such meetings. The SCO notes that [Parent] cited no regulation or rule in support of her claim that she was entitled to ten days notice.
- 25) The following persons attended the 10/15/2009 IEP Team meeting: [Parent], [Sp. Ed. Director], [Gen. Ed. Teacher], [School Principal], [School Psychologist], [AC], [Sp. Ed. Teacher] and [SLP].⁷ During this meeting, the team discussed [Parent's] request for an FBA and BIP. The credible evidence in the Record is that at the conclusion of the meeting, the team

⁷ Because the team had completed all matters concerning [SLP] responsibilities during the 10/12/2009 meeting, [SLP] was released from the 10/15/2009 meeting immediately after the meeting convened.

determined, based on discussion of their observations of [Student], that [Student] did not exhibit any behaviors that impeded the learning of [Student] or others. Additionally, although the team agreed that [Student] exhibited low self esteem, it was concluded that it was appropriate to address these issues in new goals and objectives. At [Parent's] request, [Sp. Ed. Director] supplied a letter dated 10/16/2009, which detailed the basis for the IEP Team's decision not to provide a BIP. The reasoning detailed in that letter was consistent with 34 CFR § 300.324(a)(2)(i).

26) [Parent's] Complaint included several pieces of documentation characterized as supporting her argument that a BIP should be instituted for [Student]: [Hospital 02/12/09 Evaluation Summary] (only the first page of the three page report was initially supplied); an undated article on 'Self Esteem' by an unknown author; and a 10/12/09 Behavior Self Evaluation completed by [Student]. The SCO notes that neither the [Hospital Evaluation] nor the Self Esteem article provide relevant or convincing evidence in support of [Parent's] position. Therefore, this documentation was not considered by the SCO. Furthermore, [Parent] selected *one* Behavior Self Evaluation dated 10/12/2009 that [Student] had completed which notes, in part "i'm (sic) not happy." In fact, the credible evidence in the Record supports the conclusion that self evaluations were collected on a daily basis between 08/24/2009 and at least 11/19/2009 for the explicit purpose of having [Student] self evaluate [Student's] accomplishments in order to address self-esteem issues. The SCO specifically finds that the overwhelming majority of the self evaluations completed by [Student] are positive and upbeat.

27) During a face-to-face interview with SCO on 12/03/2009, [School Psychologist] stated that she had "never noticed any behavior which interfered with or impeded [Student's] learning such that [Student] needs a BIP." [School Psychologist] expressed no concerns that [Student] might injure [herself/himself] or others and noted that no [Elementary School] staff had ever raised concerns with her about [Student] exhibiting any inappropriate behaviors.

28) Furthermore, during a 12/03/2009 interview, [Sp. Ed. Teacher] was specifically asked if she had ever observed [Student] to harm [him/herself] or others. [Sp. Ed. Teacher] denied having observed any such actions by [Student]. Upon further questioning, [Sp. Ed. Teacher] did recall that, on two occasions during the current school year, she has observed [Student] to "tap [Student's] forehead with [Student's] hand in frustration" but denied that this had in anyway injured [Student] or had even left any mark on [Student's] forehead.

29) The SCO notes that during a face-to-face-interview on 11/02/2009, [Parent]:

- Described [Student's] behavior that necessitated a BIP as "low self esteem" and then noted that, during the past weekend, [Student] had commented that [Student] wanted to stab [him/herself] and that this has caused [Parent] great concern. [Parent] then added that she doubted that [Student] knew what this meant. When asked if [Parent] had reported this incident or her concerns to [Student's] pediatrician, [Parent] replied that she had not.

- Noted that the video included in the Complaint was filmed by [Parent] as documentary evidence of [Parent's] claim that [Student's] was unable to remain focused and on task without constant one-to-one para support.
- Admitted she had never requested, either verbally or in writing, that the District supply an IEE. Rather, her IEE request was raised for the first time in the instant Complaint.
- Stated that District had "forged her name" by typing her name in the signature line of the Waiver of Timely Notice of IEP Program Meeting form.
- Stated that the District was required "by law" to provide ten days notice of IEP meetings.

30) During interviews conducted on 12/03/2009, not one of the teachers or providers having direct contact with [Student] felt that it was appropriate or necessary to institute a BIP for [Student]. All of the teachers and providers articulated a clear understanding of the types of behaviors which, consistent with 34 CFR 300.324(a)(2), would dictate implementation of a BIP.

31) All eight of the District staff members interviewed were specifically requested to review the video in advance of the 12/03/2009 interviews. Seven of the eight District staff had viewed all or a sizeable portion of the video prior to the interviews. Virtually all of these seven District staff opined that [Student's] actions were very typical of a [Age] student who was required to sit for well over an hour doing an unappealing task. Many of the District staff commented that [Student's] actions were very typical of a child without a disability, let alone a child with autism. Having personally reviewed the entire video, the SCO specifically finds that:

- The video, and [Student's] work on homework, occurred over a period of 114 minutes.
- Requiring *any child of [Student's] age* to remain on task, without breaks, for 114 minutes, with or without adult assistance, is unrealistic and unreasonable.
- [Student's] attention to the homework task was better at the beginning of the tape and, ironically, during those times when [Parent] was in the adjoining room talking to another adult.
- Despite the fact that during the taping: another sibling was allowed leave the work area and play nearby; [Student's] work product was compared to the sibling's; [Parent] took a telephone call in the midst of tutoring; and [Student's] father came home, [Student] remained on task for a remarkable period of time during the taping.

CONCLUSIONS OF LAW

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

1) Under IDEA and the corresponding Colorado law, the Exceptional Children's Educational Act (ECEA), students with disabilities have the right to a free and appropriate public

education (FAPE). (20 U.S.C. 1400 *et seq.*; ECEA Rule 2220-R-1.00 *et seq.*)⁸ The relevant IDEA regulation defines a FAPE to mean special education and related services that are provided to a student at no cost to the parents, meet the standards of the State Educational Agency (i.e., Colorado Department of Education), and are provided in conformity with the student’s IEP. (34 CFR § 300.17; ECEA Rule 2.19).

2) The term “special education” is defined, in relevant part, as *instruction specially designed to meet the unique needs of a child with a disability*, including – instruction conducted in the classroom . . . and in other settings.” 34 CFR § 300.39; ECEA Rule 2.43 (emphasis added). The term “related services” means “transportation, and such developmental, corrective, and *other supportive services* [including para services] as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology, . . . [and] . . . occupational therapy.” 34 CFR § 300.34(a); ECEA Rule 2.37(1) (emphasis added). The list of related services detailed in 34 CFR § 300.34 is not exhaustive and may include other developmental, corrective or supportive services, if they are *required* to assist a child with a disability to benefit from special education. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46569 (August 14, 2006) (emphasis added).

3) The United States Supreme Court, in *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), examined the level of instruction and services that must be provided to a student with disabilities in order to satisfy the requirement of FAPE under the IDEA. Under *Rowley*, the standard for determining whether a school district’s provision of services constitutes a FAPE involves four factors: (1) the services must be designed to meet the student’s unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide these services to the student in the least restrictive environment. *Id.*, at 203. Although a school District is not required to maximize the potential of a child with a disability, it is required to provide a “basic floor of opportunity” that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. *Id.*, at 201-202.

4) Reviewing the adequacy of an IEP is a two step process: first, whether the District complied with IDEA procedures, including whether the IEP conformed with the requirements of the Act; and secondly, whether the IEP was reasonably calculated to enable [Student] to receive educational benefits. *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996).⁹

Allegation #1 concerning: timeliness of notice to [Parent] of the 10/15/2009 IEP meeting.

⁸ Hereafter, only the IDEA regulation and corresponding ECEA rule will be cited.

⁹ Contrary to the claims of Ms. Pflueger, [Parent’s] legal counsel, it was entirely appropriate for Ms. Burghardt, District’s legal counsel, to cite *Urban v. Jefferson County Sch. Dist. R-1*, 870 F.Supp. 1588 (D. Colo. 1994) as well as other case law in the Response. The SCO notes that State Level Complaints and Due Process Complaints are held to the same legal standards (i.e., IDEA regulations, ECEA rules and case law interpreting those regulations and rules).

5) In order to ensure parent participation at IEP meetings, the relevant regulation requires that a District provide parents notification “*early enough to ensure that they will have an opportunity to attend*” and that meetings be scheduled “*at a mutually agreed on time and place.*” 34 CFR § 300.322(a)(1)-(2) (emphasis added). To that end, the notice must: indicate the purpose, time, and location of the meeting and who will be in attendance; and inform the parents of their right to have other individuals on the IEP team who have knowledge or special expertise about the child. 34 CFR § 300.322(b)(i)-(ii).

6) The Record confirms that [Parent] was supplied with proper notice of the 2009 IEP annual review meetings consistent with 34 CFR § 300.322(a) and (b). On 08/27/2009, [Parent] was supplied with initial notice of an annual IEP meeting to be held on 10/05/2009. A revised notice dated 09/15/2009, advised [Parent] of the new time and date of the annual IEP meeting for 10/12/2009. Because the IEP could not be completed at the 10/12/2009 meeting, another IEP meeting was scheduled for 10/15/2009. [Parent] agreed to the date, time and location of the second IEP meeting and, in fact, attended the meeting. Therefore, on 10/13/2009, [Parent] received reasonable and proper notice of the 10/15/2009 meeting, consistent with 34 CFR § 300.322(a) and (b).

7) Contrary to [Parent’s] bare assertion, neither the IDEA regulations nor Colorado’s rules contained in the Exceptional Children’s Educational Act (ECEA), 1 CCR 301-8, 2220-R-1.00 (2009) *et seq.*, require that a district supply parents ten days notice in advance of an IEP meeting. Instead, it is merely the District’s practice to attempt to supply parents with notice ten days prior to an IEP meetings.

8) Furthermore, [Parent’s] counsel is mistaken in her assertion that the District was required to supply PWN *in advance* of the 2009 IEP meetings. She confuses the regulation concerning PWN (i.e., 34 CFR § 300.503) with the requirements governing IEP Team meetings (i.e., 34 CFR § 300.322). Section 300.503(a) requires that PWN be given whenever a public agency proposes to initiate or change (or refuses to initiate or change) the identification, evaluation, or educational placement of a child, or the provision of FAPE to a child. The purpose of the meetings was for an annual review of [Student’s] IEP and clearly not for any of the purposes detailed in 34 CFR § 300.503.

9) [Sp. Ed. Teacher] typed the information contained in the Waiver of Timely Notice of IEP Meeting form (Waiver). The Waiver form is an internal District form and is not required by any IDEA regulation or ECEA rule. As previously noted, [Parent] agreed to the date and time of the 10/15/2009 IEP meeting and, indeed, attended that meeting. Consequently, a reasonable person could conclude that [Parent] had, by her actions, waived the District’s timely notice.

10) Although denying violation of any rule or regulation, the District has removed the Waiver form from [Student’s] records. Because no rule or regulation was violated, [Parent] is not entitled to any of the relief requested in her Reply.

Allegation #’s 2 and 3 concerning: termination of [Student’s] para services and the basis for determining para services should not be reinstated.

11) The decision to terminate [Student's] para services was made by the 10/17/2008 IEP Team after extensive discussions. [Parent] participated in these IEP meetings and received a copy of the 10/17/2008 IEP, including the para determinations detailed in Finding of Fact #4, above. In order to wean [Student's] dependence on one-to-one para support and to eventually terminate all para support, consistent with the 10/17/2008 IEP, between 10/20/2008 and 12/2008, [Student] received reduced para services of 3.0 hours per day only on an "as needed" basis. Although the District elected to continue to supply [Student] with some reduced para services on an as needed basis after 12/2008, this was done on a voluntary basis and was not required by the 10/17/2008 IEP. By the end of the 2008-2009 school year, [Student] was not receiving any para services and, consistent with the 10/17/2008 IEP, was not entitled to any para services. Furthermore, when the 2008-2009 school year ended, [Parent] knew that [Student] would receive no para services in the 2009-2010 school year. The SCO therefore concludes that the District provided [Student] with para services which comported with the 10/17/2008 IEP. *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) (a school district must provide special education services that comport with a student's IEP as one element of a free appropriate public education).

12) The 10/17/2008 IEP constituted PWN to [Parent] that [Student's] para services would terminate in 12/2008. *See* Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46691 (August 14, 2006) (there is nothing in the IDEA regulations that prohibits a district from using the IEP as part of the prior written notice so long as the document(s) the parent receives meet all of the requirements of 34 CFR § 300.503).

13) Contrary to [Parent's] claims, the PST did not make any decisions concerning the decision to terminate para services to [Student's]. Rather, this team met on 08/21/2009 in order to strategize about various supports that could be supplied to enhance [Student's] independence during the first month of the new school year.

14) At [Parent's] request, between 09/14/2009 and 10/08/2009, data was collected to tally the number of times that [Student] required para assistance in order to evaluate whether it was appropriate to reinstitute para services in conjunction with the 10/15/2009 IEP. The credible evidence is that the data was properly collected and provided sufficient information for the IEP Team to make an informed determination.

15) [Parent], as the complaining party, has the burden of proof on all allegations and has not met her burden in demonstrating that the IEP Team reached an inappropriate determination concerning reactivation of para services. *Schaffer v. Weast*, 546 U.S. 49 (2005) (parent, bore the burden of proving a seventh-grader's IEP was inadequate). Consequently, [Parent] is not entitled to any remedy, including the requested remedy of an IEE. If [Parent] wishes, she has the option of formally requesting that the District supply an IEE at public expense or she can obtain an IEE at private expense pursuant to 34 CFR 300.502(b) or (c).

Allegation #4 concerning the appropriateness of the IEP Team decision to not include in the 10/15/2009 IEP two [short-term objectives] contained in [Student's] 10/17/2008 IEP.

16) A properly formulated IEP is a written statement for a child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 CFR §§ 300.320 through 300.324 and that includes:

...

A statement of measurable annual goals, including academic and functional goals designed to

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability.

...

34 CFR § 300.320(a)(2). At the annual review, the IEP Team determines whether the annual goals for a student are being achieved and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals described in § 300.320(a)(2). 34 CFR § 300.324(b).

17) The credible evidence in the Record (i.e., [Student'] progress reports, grade reports and District interviews) is that [Student] mastered the [short-term objectives] raised in [Parent's] Complaint. Consequently, it was proper for the IEP Team, consistent with 34 CFR § 300.324(b), to replace these [short-term objectives] with new goals and objectives.

Allegation #5 concerning the appropriateness of the 10/15/2009 IEP Team decision to decline to conduct a FBA in order to prepare a BIP to address [Student's] low self esteem.

18) In reviewing the adequacy of [Student's] IEP, it is instructive to consider the factors to be considered by the IEP Team. Development of a child's IEP requires consideration of both general factors and special factors of the individual child:

(1) General. In developing each child's IEP, the IEP Team must consider-

(i) The strengths of the child;

(ii) The *concerns of the parents* for enhancing the education of their child;

(iii) The *results of the initial or most recent evaluation* of the child; and

(iv) *The academic, developmental, and functional needs of the child.*

(2) Consideration of special factors. The IEP Team must-

(i) *In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior; . . .*

34 CFR § 300.324(a) (emphasis added).

19) Three of the IEP Team members *in both school years* were teachers and providers having extensive knowledge of [Student's] academic, developmental and functional needs. Additionally, in formulating [Student's] 10/15/2009 IEP, the IEP Team properly considered general and special factors of [Student]. After discussing [Parent's] expressed concerns regarding [Student's] low self esteem, the IEP Team specifically incorporated goals and objectives designed to enhance and improve [Student's] low self esteem. However, given the overwhelming and credible evidence in the Record, the SCO concludes that [Student] exhibited

absolutely no behaviors which impeded the learning of either [Student] or others and therefore it was proper for the IEP Team to decline to conduct an FBA.

20) Because the IEP Team declined to conduct an FBA, consistent with 34 CFR § 300.503, [Parent] was entitled to formal PWN including:

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards . . .
- (5) Sources for parents to contact to obtain assistance in understanding the provisions. . .
- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (7) A description of other factors relevant to the agency's proposal or refusal.

34 CFR § 300.503(b)(1)-(7). The 10/15/2009 IEP in conjunction with the 10/16/2009 letter from [Sp. Ed. Director] to [Parent] constituted proper PWN consistent with 34 CFR § 300.503(b)(1)-(7) of the IEP Team's decision not to initiate an FBA.

21) The SCO concludes that the District committed no procedural violations. Additionally, both the 10/17/2008 and 10/15/2009 IEP's were: designed to meet [Student's] unique needs; reasonably calculated to enable [Student] to receive educational benefits; conformed with the written IEPs; and were offered in the least restrictive environment. *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Consequently, between 11/30/2008 and 10/30/2009, [Student] received a FAPE.

22) The SCO notes that one of the policies of the IDEA is to encourage parental involvement and advocacy. However, decisions concerning the *content of a student's IEP is a team decision*. Parental preferences must not take precedence over the purpose of the IDEA, to provide a FAPE in the least restrictive environment. In short, a parent does not have veto power over IEP provisions viewed by other team members as necessary or unnecessary for a FAPE. See, *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988) (parents, no matter how well-motivated, do not have a right under the IDEA to compel a district to provide a specific program).

REMEDIES

Having concluded the District committed no violations of the IDEA regulations, 34 CFR Part 300.1, *et seq.*, which denied [Student] a FAPE, all of [Parent's] requested remedies are denied.

The Decision of the SCO is final and not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint provided that the aggrieved party has the right to file a due process complaint on the issue with which the party disagrees. *See*, 34

CFR § 300.507(a); Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46607 (August 14, 2006).

CONCLUSION

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

Dated this 28th day of December, 2009.

Jeanine M. Pow, J.D.
State Complaints Officer

Appendix A

2009:510 Record

Documentation:

- [Parent's] 10/30/2009 Complaint;
- [District's] 11/19/2009 Response and Answers to SCO inquiries;
- [Parent's] 11/30/2009 Reply;
- Notices of Meetings dated 08/27/09, 09/15/09, and 10/13/09;
- Waiver of Timely Notice of IEP Program Meeting dated 10/13/09;
- 10/15/09 IEP;
- Memo detailing [Parent's] requested documentation subsequent to 10/16/09 IEP meeting;
- Video, 114 minutes in length, which filmed [Student] doing homework;
- 10/17/2008 IEP (including sign in sheet);
- 10/17/2008 IEP Progress reports dated: 11/2008; 01/2009; 05/2009; 10/09/2009 and 10/12/2009 (including sign in sheet);
- 10/15/2009 IEP Progress reports dated: 11/2009;
- [Hospital 02/12/09 Evaluation Summary], pgs. 1-3(only pg. 1 was initially supplied);
- 10/16/09 letter from [Sp. Ed. Director] to [Parent];
- Undated 'Self Esteem' article;
- 10/12/09 Behavior Self Evaluation;
- 09/11/2009 "Special Meeting" IEP cover page, Meeting Participants, Sign in Sheet, Additional Information Sheet and Notice of Meeting;
- Multiple e-mails:
 - 04/21/2009 from [Gen. Ed. Teacher] to [Parent], etc.;
 - 04/22/2009 from [Parent] to [Sp. Ed. Teacher];
 - 06/03/2009 from [Sp. Ed. Teacher] to [Parent];
 - 07/27/09 from [Sp. Ed. Teacher] to [Parent], etc.;
 - 07/27/2009 from [Parent] to [Sp. Ed. Teacher], etc.;
 - 08/14/2009 from [Parent] to [Sp. Ed. Teacher];
 - 08/14/2009 from [Sp. Ed. Teacher] to [Parent];
 - 09/15/2009 from [Sp. Ed. Teacher] to [Parent];
 - 09/15/2009 from [Parent] to [Sp. Ed. Teacher];
 - 09/23/2009 from [Parent] to [Sp. Ed. Teacher];
 - 10/06/2009 from [School Psychologist] to [AC], etc.;
 - 10/09/2009 from [Parent] to [Sp. Ed. Teacher];
 - 10/12/2009 from [Parent] to [AC];
 - 10/13/2009 from [Parent] to [AC], etc.;
 - 10/13/2009 from [AC] to [Parent], etc.;
 - 10/14/2009 from [Sp. Ed. Teacher] to [Parent];
 - 10/14/2009 from [Parent] to [Sp. Ed. Director];
 - 10/19/2009 from [Parent] to [Sp. Ed. Dir], etc.;
 - 10/20/2009 from [Parent] to [Sp. Ed. Dir];
 - 10/20/2009 from [Sp. Ed. Dir] to [Parent];
 - 10/23/09 from [Parent] to [Sp. Ed. Teacher];
 - 10/14/2009 from [Sp. Ed. Director] to [Parent], etc.;
 - 10/14/2009 from [Parent] to [Sp. Ed. Teacher];

- 08/21/2009 PST Meeting Notes;
- 08/19/2009 SST Parent Questionnaire;
- Official Notification to Parents Regarding Data Collection by [AC];
- SLP Notes;
- [Student's] "Six Favorite Hand Reports," dated 08/24/2009 to 10/08/2009;
- [Student's] Behavior Self-Evaluations, dated 08/31/2009 to 11/09/2009;
- [Student's] 2009-2010 Grade Report, First Period; and
- [Student's] 1008-2009 Grade Reports, First thru Third Periods.

Face-to-Face Interviews Conducted by SCO:

- [Parent] on 11/02/2009;
- [Paraprofessional #1] on 12/03/2009;
- [Paraprofessional #2] on 12/03/2009;
- [SLP] on 12/03/2009;
- [School Psychologist] on 12/03/2009;
- [Gen. Ed. Teacher] on 12/03/2009;
- [AC] on 12/03/2009;
- [Sp. Ed. Director] on 12/03/2009; and
- [Sp. Ed. Teacher] on 12/03/2009.