

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

State-Level Complaint 2014: 511
El Paso County School District 8, Fountain

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on June 4, 2014, by parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹ The Decision date, initially August 1, 2014, was extended to August 15, 2014, on the basis of exceptional circumstances.

Based on the written Complaint, the State Complaints Officer (SCO) determined that the Complaint identified seven allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

COMPLAINT ALLEGATIONS

Parents' Complaint raised seven allegations, summarized as follows:

1. Student was improperly denied extended school year (ESY) services during the summer of 2013.
2. The services and placement identified on Student's April 2013 IEP were not appropriate to meet Student's unique needs during the 2013-2014 school year.
3. Student's IEP was not properly implemented during the 2013-2014 school year.
4. The District failed to develop and implement a behavior intervention plan during the 2013-2014 school year, despite evidence that Student's behavior was impeding his education.

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

² Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

5. Student's placement was predetermined at IEP meetings held in September and November of 2013, resulting in a violation of Parent's right to meaningfully participate in the development of Student's educational program.
6. The services and placement identified on Student's November 2013 IEP were not appropriate to meet Student's unique needs during the 2013-2014 school year.
7. The District failed to provide a complete copy of Student's educational records pursuant to parental request on November 5, 2013.

FINDINGS OF FACT

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

Background and Jurisdiction under State Complaint Procedures to Investigate Allegations concerning ESY services and the April 2013 IEP:

1. Student is [age] years old and eligible for special education and related services as a child with an autism spectrum disorder.⁴ At all times relevant to the Complaint, Parents resided within the boundaries of the District.
2. In general, Parents have alleged that the District failed to develop or implement an appropriate IEP for Student during the 2012-13 and 2013-14 school years. As a result of the District's alleged failure to appropriately serve Student during the 2013-14 school year, Parents decided to obtain services from a private autism treatment center and are now requesting that the District reimburse them for services obtained and to place Student there for the coming school year.
3. The first two specific allegations raised by Parents in this Complaint, concerning ESY services and the April 2013 IEP, raise questions about jurisdiction under the state complaint procedure because they implicate events that occurred more than one year prior to the filing of this Complaint.
4. First, Parents alleged that the District improperly denied Student ESY services during the summer of 2013.⁵ In its Response, the District argued that this allegation is "untimely and improper for review" because the determination regarding eligibility for ESY was made at an IEP meeting on April 10, 2013, which is more than one year prior to the filing of this Complaint on June 4, 2014. In Reply, Parents argued that this allegation is timely because the consequences of the alleged violation occurred within the one year statute of limitations. For example,

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

⁴ Exhibit 1.

⁵ Exhibit 1, p. 14.

Parents asserted that the alleged violation occurred on the date Student would have received ESY services had it not been for the improper denial. In making this argument, however, Parents primarily rely on facts that occurred on or before April 10, 2013, including the initial evaluation and the IEP meeting where eligibility for ESY was determined.⁶ At this meeting, Parents had received a copy of the procedural safeguards notice informing them of their right to appeal a decision regarding services.⁷

5. The SCO finds that the alleged violation regarding ESY services occurred on April 10, 2013, the date that the District determined Student was not eligible for ESY services. Because the alleged violations occurred more than one year prior to the filing of this Complaint, the SCO does not have jurisdiction to investigate this allegation.

6. Second, Parents alleged that the April 2013 IEP was not appropriate to meet Student's needs during the 2013-14 school year. Due to unilateral decisions made by Parents in the summer and fall of 2013, however, the April 2013 IEP was not implemented during the 2013-14 school year. On July 1, 2013, Parents enrolled Student in Private Center for full-day services, i.e., seven hours a day, based on the recommendation of Student's private psychiatrist to address an increase in challenging behavior.⁸ Private Center is a licensed, day treatment center that provides one-to-one individualized therapy using the principles of applied behavior analysis (ABA) in a center-based program setting. While at Private Center, Student is in a classroom with other students with disabilities aged two through seven and does not have access to typical peers.⁹

7. Sometime in August of 2013, Mother notified the District that Student was attending Private Center on a full-day schedule and would continue to do so until funding through the family's insurance provider was exhausted on September 30, 2013. Mother also requested a meeting to discuss Student's progress at Private Center and concerns about Student's progress at Preschool during the previous school year, including the possibility of changing the services and placement identified on Student's April 2013 IEP.¹⁰

8. To learn more about Mother's concerns, the District scheduled a meeting for August 22, 2013.¹¹ At this meeting, Mother expressed concerns that Student had regressed during the last five weeks of the 2012-13 school year. Mother also stated that Student's private psychiatrist had recommended that Student receive services in a program that utilized applied behavior analysis (ABA). Because Private Center provided instruction based on the principles of ABA and Student was making progress there, Mother informed the District that she had decided Student would remain at Private Center for full-day programming until changes to insurance coverage

⁶ Reply.

⁷ Exhibit 1, p. 8.

⁸ Complaint; Interview with Parent.

⁹ Interview with Private Center Clinical Director.

¹⁰ Complaint.

¹¹ Exhibit 12, pp. 1-2.

went into effect on September 30, 2013. Mother also requested that Student be allowed to remain at Private Center on a full-time basis after September 30, 2013.¹²

9. In response to Mother's request that Student continue to attend Private Center after September 30, Special Education Coordinator explained that the District did not typically place students at Private Center because it was a day treatment program, not an approved facility school, and therefore, the District could not ensure that the individuals working with Student were highly qualified teachers. Mother asked about the District's Early Intervention Autism Program and was invited to tour the program in advance of an IEP meeting that would be convened in the fall to further discuss services and placement.¹³ The meeting concluded with the understanding that the discussion about placement at Private Center would be continued to provide Parents with an opportunity to visit the District's Early Intervention Autism Program before scheduling an IEP meeting to determine placement sometime in the fall.¹⁴

10. In a letter to Mother dated August 23, 2013, Special Education Director further clarified that, although it is the District's "practice to ensure that all IEP services are provided by highly qualified educational staff," all placement decisions "are made by an IEP team to support the individual needs of students."¹⁵ The letter from Special Education Director dated August 23, 2013, also included information about two of the District's preschool programs, including the Early Intervention Autism Program.¹⁶

11. Parents did not tour the Early Intervention Autism Program or otherwise contact the District about changing services on Student's IEP until mid-September of 2013, just before insurance coverage for full-day programming at Private Center was to expire.¹⁷ During this time, Student continued to attend Private Center on a full-time basis, and would do so until September 30, 2014.

12. Consequently, Student never received services under the April 2013 IEP during the 2013-14 school year. Because the development and implementation of this IEP occurred more than one year prior to the filing of the Complaint, the SCO does not have jurisdiction to investigate the appropriateness of the April 2013 IEP. Determining that allegations one and two are beyond the jurisdiction of the state complaint procedure, the SCO now addresses Parents allegations concerning the development and implementation of the IEP dated September 23, 2013.

¹² Complaint, p. 4; Exhibit 12, pp. 1-2; Interview with Mother.

¹³ Exhibit 12, p. 1; Complaint; Interview with Mother and Special Education Director.

¹⁴ Complaint, p. 5; Interviews with Special Education Director and Mother.

¹⁵ Exhibit 12, p. 2.

¹⁶ Exhibit 12, p. 2.

¹⁷ Complaint, p. 5; Response, p. 3; Exhibit 12; pp. 1-2; Interviews with Special Education Director and Mother.

Development and Implementation of the September 2013 IEP.

13. On September 23, 2013, the District convened a properly constituted IEP team to further discuss Mother's concerns with the April 2013 IEP and placement. At Mother's request, Private Center Clinical Director also attended this meeting and submitted progress reports for the team to consider because Student had been attending her program since July of 2013.¹⁸

14. Parents have alleged that the IEP developed at this meeting did not meet Student's needs and that the District predetermined placement by refusing to consider placement at Private Center. With the exception of predetermination, Parents do not allege any procedural violations with regard to the development of the September 2013 IEP. For the reasons described below, the SCO finds that the District afforded Mother a meaningful opportunity to participate in the development of the IEP and did not predetermine placement. The SCO further finds that the IEP was designed to meet Student's identified needs and allow him to receive educational benefit.

15. According to the present level of educational performance summary, Student continued to demonstrate significant delays in early play, receptive/expressive language, and social interaction skills. In addition, the IEP team noted that Student continued to demonstrate "significant delays in his ability to adapt to changes in his environment" and had difficulty sustaining attention to non-preferred tasks. Behaviorally, the IEP team noted that Student engaged in a "high level of sensory seeking behavior" and may respond to non-preferred tasks by hitting, kicking, or biting. In describing Student's present levels, the IEP specifically referenced progress reports provided by Private Center. The SCO finds that the description of Student's present levels clearly evidences that the input provided by Private Center and Mother was meaningfully considered by the IEP team.

16. Consistent with Student's identified needs, the IEP team added annual goals in the areas of behavior, communication and basic language skills, early academic skills, and social interaction skills. In the area of social interaction, Student had two different annual goals, one goal designed to improve peer interaction and one designed to improve Student's ability to successfully transition from one classroom routine or activity to another.¹⁹ During this meeting, several IEP goals were added in the areas of early academic skills and speech language to further continuity between the two programs, as Student would be attending Private Center on a half-day schedule beginning September 30, 2013.²⁰ For example, the IEP team added a goal designed to improve Student's ability to receptively identify basic colors and shapes based on reports from Private Center that Student was working on these skills.²¹ Notably, Private Center Clinical Director recalled that the IEP team added a goal for social interaction, added a receptive

¹⁸ Complaint; Response; Exhibit 3; Exhibit 6; Interviews with Mother, Special Education Director, Special Education Teacher, Speech Language Pathologist, and Private Clinical Director.

¹⁹ Exhibit 3, pp. 3-8.

²⁰ Interviews with Special Education Director, Special Education Teacher, and Speech Language Pathologist.

²¹ Comparing Exhibit 1 with Exhibit 3; Interviews with Special Education Director and Special Education Teacher.

target for IEP goals related to identification of colors and shapes, and added a speech language goal related to articulation, all based on input she provided at the meeting about Student's progress at Private Center.²² The addition of these goals provides credible evidence that the input offered by Private Center and Mother was meaningfully considered by the IEP team.

17. To achieve these annual goals, the IEP team determined that Student would receive eleven hours of direct specialized instruction per week from an early childhood special educator and two hours of direct instruction in speech/language per month. Student would receive these services within the Early Intervention Autism Program because it offered a highly structured program and higher staff to student ratio. The increase in specialized instruction and speech language services from Student's April 2013 IEP to the September 2013 IEP is significant. Relevant to the allegations raised by Parents, the increase in services is based largely on input from Mother that Student needed more direct specialized instruction, providing further evidence that Mother's input was meaningfully considered by the IEP team.²³

18. In consideration of placement in the least restrictive environment, Student's IEP team discussed keeping Student in the regular preschool program, the educational setting identified in the April 2013 IEP, but determined that Student would benefit from being in the highly structured Early Intervention Autism Program "to support his specific social, communication, and early learning needs."²⁴ The IEP team based its decision on Student's previous experience in Regular Preschool, observations, and parent input, including Mother's preference that Student be placed at Private Center.²⁵ Along the continuum of placements, Private Center is considered a separate school, a more restrictive placement than the Early Intervention Autism Program, as there is no access to typical peers in this educational setting. So while the IEP team considered Mother's preferred placement, it ultimately determined that Student's IEP could be implemented in a less restrictive environment than the one offered by Private Center.

19. On October 1, 2013, Student began attending the Early Intervention Autism Program to access the programming and services identified on the September 2013 IEP. Student attended the Early Intervention Autism Program during the morning session, Tuesday through Friday, and attended Private Center during the afternoons.²⁶

20. Parents have alleged that the September 2013 IEP was not properly implemented at Early Intervention Autism Program during the 2013-2014 school year.²⁷ In describing how Student's IEP was implemented, Special Education Teacher primarily referred to Student's

²² Exhibit 3; Interview with Private Center Clinical Director.

²³ Exhibit 3, pp. 3-11. Interviews with Special Education Director, Special Education Teacher, Private Center Clinical Director, and Mother.

²⁴ Exhibit 3, p. 11.

²⁵ Exhibit 3, p. 12.

²⁶ Response; Exhibit 10; Exhibit 12; Interviews with Parents, Special Education Teacher and Special Education Director.

²⁷ Because Student only attended the District's program from October 1 through November 22, 2013, the only IEP relevant to this allegation is the IEP dated September 2013.

schedule and data collection sheets to illustrate when and how Student was working towards his IEP goals. Student's school day at the Early Intervention Autism Program was structured as follows:²⁸

- arrival/tablework time;
- 1:1 teacher time/workstation;
- sensory gym;
- circle time;
- structured peer play time;
- 1:1 teacher time/workstation;
- Structured snack-time;
- Peer play time with typical peers from another class;
- 1:1 teacher time/workstation;
- Recess;
- Lunch; and
- Quiet time.

21. In accordance with his IEP, Student worked towards his specific IEP goals during circle time, workstations (1:1 teacher time), peer play, and when transitioning from one activity to another.²⁹ Special Education Teacher credibly described Student's IEP and how it was being implemented throughout the day. For example, Special Education Teacher reported that Student worked toward IEP goals related to early academic skills during workstations, e.g., receptively identifying shapes and colors, while he worked on IEP goals related to social skills during circle time and peer play, e.g., spontaneously respond to "good morning". Throughout the day, Student worked on transitioning from one activity to another with the help of a visual schedule and prompts.³⁰

²⁸ Exhibit 12, p. 19; Interviews with Special Education Director, Special Education Teacher, and Paraprofessional.

²⁹ Exhibit 3, pp. 6-8; Exhibit 10, pp. 12-16; Exhibit 12, pp. 12-24; Interviews with Special Education Teacher, Special Education Director, and Paraprofessional.

³⁰ Exhibit 3; Exhibit pp. 2-24; Exhibit 10, pp. 12-16; Interviews with Special Education Director, Special Education Teacher, and Paraprofessional.

22. As further evidence that Student's IEP was being implemented, the District submitted documentation showing that data on Student's goals and objectives was being recorded by educators on a daily basis.³¹ In addition, Special Education Teacher sent home a "Preschool Communication Log" each day that, among other things, indicated what Student had worked on during school.³² While the communication log included general information about Student's day, many of the items marked on the communication log were in areas related to Student's IEP goals and objectives and included notations from educators on how well he had performed that day. For example, the communication log for October 29, 2013, indicates that Student correctly labeled the shape of a triangle during circle time, an activity that corresponds with his IEP objective for identifying shapes and further matches the data recorded on the data sheet for that activity and date.³³ The SCO finds that this documentation, combined with interviews with Special Education Teacher and Paraprofessional, provides credible evidence that Student's IEP was being properly implemented.³⁴

23. As evidence that the District failed to implement Student's IEP, Parents offer Mother's observations of Student at the Early Intervention Autism Program on October 22 through 25, and November 8, and one observation of Student by a Private Center Director on November 13, 2013. During these observations, Mother claims that she never witnessed Special Education Teacher or other educators taking notes or otherwise recording data. In addition, Private Center Director claimed that the staff working with Student missed opportunities to facilitate social interactions between Student and other peers and did not appear to be recording observations or taking data. Parents essentially argue that because they did not observe educators taking notes during the times they observed Student's class, Student's IEP was not being implemented.

24. The SCO finds that Parents' observations fail to establish that Student's IEP was not properly implemented. First, the fact that Mother did not observe Special Education Teacher and Paraprofessionals with clip boards and clickers, as is the practice at Private Center, does not mean that Student's IEP was not being implemented or that reliable data was not being recorded. Special Education Teacher and Paraprofessional reported that Student's performance on IEP goals was recorded contemporaneously when possible, but that data must sometimes be recorded later due to changing demands in the classroom. Consequently, the fact that Mother did not witness data being taken while she was observing does not mean that Student's IEP was not being implemented--especially when considering that Mother's presence created additional demands in the classroom. For example, Mother, Special Education Teacher,

³¹ Exhibit 10, pp. 12-16,

³² Exhibit 12, pp. 12-24.

³³ Exhibit 3, p. 7; Exhibit 10, p. 14; and Exhibit 12, p. 22.

³⁴ Exhibit 3; Exhibit pp. 2-24; Exhibit 10, pp. 12-16; Interviews with Special Education Director, Special Education Teacher, and Paraprofessional.

and Paraprofessional all stated that Student demonstrated challenging behaviors during these observations as he repeatedly sought Mother's attention.³⁵

25. In assessing the credibility of the observations, the SCO further notes that Mother and Private Center Clinical Director were not impartial observers. Rather, their observations were motivated by a strong belief that Student would be better served at Private Center. In fact, Student had only been attending the Early Intervention Autism Program for five days when Mother contacted Special Education Director to complain that the program was not working and request placement at Private Center. In response, Special Education Director informed Mother that a proposed change in placement would have to be determined by an IEP team and offered to schedule another IEP meeting to discuss Mother's concerns.³⁶

26. Based on the credible evidence in the record, as described above, the SCO finds that the September 2013 IEP was substantively appropriate and was properly implemented. The SCO now addresses Parents' allegations that that the November 2013 IEP was not appropriate to meet Student's needs and that placement was predetermined.

Development of the November 2013 IEP:

27. On November 18, 2013, the District convened a properly constituted IEP meeting.³⁷ Parents attended this meeting and invited Private Center Clinical Director to provide input as to Student's progress at Private Center. With the exception of parental participation, Parents do not allege that the District failed to comply with any procedural requirements in developing the November IEP.

28. In determining Student's present level of educational performance, Student's IEP team presented comprehensive and detailed information concerning Student's performance in the Early Intervention Autism Program that addressed social skills, speech and language skills, early academic skills, and behavior.³⁸ For example, the Speech Language Pathologist shared detailed information from classroom observations describing Student's strengths, e.g., ability to express wants and needs and request preferred items during play, and Student's challenges, e.g., difficulty responding to "what" and "where" questions.³⁹ During the discussion on present levels, Mother actively questioned some of the behavioral data provided by the District prior to

³⁵ Although Mother attempted to hide from Student's view during subsequent observations, the SCO notes that this may have also interfered with her view of Special Education Teacher.

³⁶ Response; Interviews with Special Education Director and Mother.

³⁷ Exhibits 4 and 6. In scheduling this IEP meeting, Mother requested that the District wait until November 1, 2013, so that Father could be present. Due to scheduling constraints, Parents were not available to meet until November 18, 2013. Interviews with Parents and Special Education Director.

³⁸ Exhibit 4, p. 3.

³⁹ Exhibit 4, p. 3.

the meeting because she did not believe it was accurate.⁴⁰ In response, the District offered to have their autism team conduct further evaluations of Student.⁴¹

29. In identifying Student's needs, the IEP team identified delays in the following areas: receptive/expressive language skills; social interaction skills; the ability to adapt to changes within his environment; and, the ability to demonstrate progress in groups larger than three. In addition, Student engages in a "high level of sensory seeking behaviors" and responds to non-preferred or "less motivating" tasks by engaging in inappropriate behavior, e.g., hitting, kicking, and biting. To meet these needs, the IEP team developed annual goals in the areas of expressive and receptive language skills, social (transition) skills, early academic skills, and two goals designed to improve social interaction with peers.⁴² Throughout this discussion, Parents expressed their concerns that Student required additional supports and services to meet his behavioral needs, including a BIP, more one-on-one instruction, and an extended school day.⁴³

30. In order to help Student achieve his annual goals and in response to Parents' concerns, the IEP team decided to substantially increase Student's special education and related services. To begin, the amount of direct specialized instruction Student was to receive increased from eleven hours per week to twenty-five hours per week. In addition, direct instruction by a speech language pathologist was increased from two hours each month to three hours and thirty minutes each month. Finally, the IEP team developed a BIP to address Parents continuing concerns that Student's behaviors impeded his ability to learn. The SCO finds that the substantial changes made to Student's IEP clearly demonstrate that the IEP team provided Parents with a meaningful opportunity to participate in the development of Student's IEP. Further, the IEP appropriately addresses each of Student's identified needs and is consistent with the student-specific data provided.

31. The SCO now address the allegation that the District failed to develop and implement a BIP for Student during the 2013-14 school year. Because the District was aware that Student exhibited challenging behaviors, it began collecting behavioral data on October 1, 2013, Student's first day at Early Intervention Autism Program.⁴⁴ The District chose to collect behavioral data, rather than develop a BIP at the IEP meeting in September, because Student had not been in a District program or classroom since the Spring of 2013 and the District

⁴⁰ Complaint; Interviews with Mother, Father, Special Education Director, Special Education Teacher, and Speech Language Pathologist. For example, Mother claimed that Special Education Teacher previously denied Student had aggressive behaviors at school and now the District was presenting behavioral data showing Student was behaving aggressively. The SCO notes that the Preschool Communication Log sent home with Student each day documented incidents of aggression. Exhibit 12, p. 14 (indicating Student tried to bite and scratch teachers).

⁴¹ Exhibits 4 and 5; Interviews with Parents, Special Education Director, Special Education Teacher, and Speech Language Pathologist.

⁴² Exhibit 4, pp. 7-9.

⁴³ Complaint; Interviews with Mother, Father, Special Education Director, Special Education Teacher, and Speech Language Pathologist.

⁴⁴ Response; Exhibit 12, pp. 1-18.

wanted to first assess Student's behavior in the classroom, an approach that is consistent with best practices for developing an appropriate BIP.

32. The data collected by the District included identifying target behaviors, antecedents, consequences, and a functional hypothesis. In addition to collecting data on Student's behavior, Special Education Teacher read progress reports from Private Center and requested an opportunity to observe Student at Private Center to learn more about Student's programming and performance at Private Center. In connection with her visit to Private Center, Special Education Teacher specifically requested to review Student's BIP to consider continuity in developing a plan and strategies.⁴⁵ Although Special Education Teacher did observe Student at Private Center, she was not provided with the requested copy of Student's BIP because Parents had not authorized Private Center to share it with the District.⁴⁶ Finally, when Parents questioned the behavioral data and plan at the November IEP meeting, the District offered to conduct further evaluation in this area.

33. In support of the allegation concerning the timely development of a BIP, Parents offer Mother and Private Center Director's observations. Mother claims she observed Student exhibiting physical aggression, i.e., hitting, kicking, head-butting, towards paraprofessional and teacher when presented with a non-preferred task; screaming that he had to use the bathroom; throwing himself on the floor; and spending time alone with the paraprofessional instead of interacting with peers. In response to these behaviors, Mother claims that Special Education Teacher and paraprofessionals working with Student had no "plan" to deal with the behaviors and at various times either ignored Student, allowing him to continue demonstrating the inappropriate behavior, or used physical guidance and restraint.⁴⁷ As further support of their allegation, Private Center Clinical Director stated that she observed multiple occasions where Student was not redirected when engaging in target behavior, and was not given "consequences" for refusing to follow instructions or was allowed access to preferred activities and reinforcers even when he failed to comply with directives, resulting in the reinforcement of inappropriate behavior.

34. As discussed in FF 24 above, Mother's presence in the classroom created an atypical environment as Student attempted to gain her attention. In addition, Student had only been in the program for less than two weeks when Mother began observing him in the classroom. During this time, Student was adjusting to a completely new environment, an adjustment that one would reasonably expect to be quite challenging for Student based on his difficulty with transitions. Further, the SCO notes that Private Center Clinical Director did not meet with Special Education Teacher before or after the observation to learn what Student was specifically working on during the exchanges she concluded were not constructive. It is possible

⁴⁵ Exhibit 12, p. 8; Interviews with Special Education Director and Special Education Teacher.

⁴⁶ Interviews with Special Education Teacher, Private Center Clinical Director, and Parents. Mother explained that she did not authorize sharing Private Center's BIP because she wanted to see what kind of plan Special Education Director would develop on her own.

⁴⁷ Complaint; Interview with Parents.

that the behaviors or skills that Private Center Clinical Director thought were being inappropriately reinforced were not the ones Special Education Teacher was specifically targeting in that moment. For these reasons, the SCO does not find that the observations offered by Parents establish that the District failed to timely develop a BIP.

35. Finding that the District did not inappropriately delay the development of a BIP, the SCO now addresses Parents allegation that the District predetermined Student's placement at the November 2013 IEP meeting. In considering how Student's disability impacted his ability to learn, the IEP team determined that Student needed a structured program to support his inability to sustain attention to non-preferred tasks, and direct intervention to support delayed social, communication, and early learning skills.⁴⁸ In addition, the IEP team determined that Student would benefit from access to typical peers to serve as language and social role models.⁴⁹

36. In considering placement in the least restrictive environment, the IEP team rejected the general education setting, with supports and services, because it was determined insufficient to meet Student's unique needs. In considering a more restrictive environment, i.e., Private Center, a separate school, the IEP team determined that such a setting was overly restrictive and in violation of Student's right to be educated in the least restrictive environment because he could be appropriately served in the Early Intervention Autism Program, a separate class. Parents clearly expressed their preference that Student be placed at Private Center during and before the IEP meeting. In response, the IEP team considered Parents' preference, but ultimately determined that Student could be appropriately served in a less restrictive environment. Because the IEP team determined a placement that was appropriate to serve Student's needs in the least restrictive environment and Parents were provided with a meaningful opportunity to participate in the discussion, the SCO finds that placement was not predetermined.

37. Although the SCO finds that the District developed an IEP that offered Student a free appropriate public education, the SCO also agrees with the District that Parents forfeited their right to complain about the substantive appropriateness of the November 2013 IEP when they refused to provide consent to evaluate Student. In Response, Parents argued that they requested additional information concerning the nature and purpose of any proposed evaluation, but did not refuse to provide their consent. Based on the following credible evidence, the SCO finds that Parents refused to provide consent for the evaluation:

- At the IEP meeting, Special Education Director requested parental consent for the District's autism team to conduct another evaluation of Student based on Parents' continuing concerns about how Student's behavior was being addressed at Early

⁴⁸ Exhibit 4, p. 3.

⁴⁹ Exhibit 4, p. 13.

Intervention Autism Program. Parents indicated that they would like more information about why the District proposed further evaluation and what tests would be conducted.

- The purpose for the evaluation and the areas to be evaluated were described on the prior notice and consent to evaluate form. The form informed Parents that the District wanted to conduct an evaluation to determine if Student “would benefit from additional supports, services, and strategies” and to “address service delivery and provide feedback for extended day programming.” Parents were informed that this additional information was being requested because Student “may benefit from specific supports/strategies in order to be successful in his early intervention program and to gain more access to typical peers.”⁵⁰
- In addition, the District provided prior written notice in a letter to Parents dated November 19, 2013, that informed Parents that the proposed evaluation would include a formal Autism Diagnostic Observation Scale (ADOS) and informal observations that would be used to “make decisions about Student’s education needs and special education and related services to meet those needs.”⁵¹
- If they had further questions or concerns after receiving this information, Parents should have contacted the Special Education Director. Instead, Parents failed to contact the District or provide consent for the District to conduct the proposed evaluation.

38. Student’s last day at Early Intervention Autism Program was November 22, 2013.⁵² Student started attending Private Center on a full-time basis, at Parents’ expense, on December 1, 2013.

39. On December 11, 2013, Mother called the secretary of Early Intervention Autism Program to notify the District that Parents were rejecting the placement proposed in the November 2013 IEP and that Student would be attending Private Center while they explored legal options.⁵³

Record Request:

40. On or around November 5, 2013, Mother requested a copy of Student’s records by sending a note to Special Education Teacher.⁵⁴ Special Education Teacher forwarded the request to the school principal and assistant principal. That afternoon, the District sent home records in response to the request that included copies of Student’s IEPs. On or around

⁵⁰ Exhibit 8, p. 5.

⁵¹ Exhibit 5, pp. 3-4.

⁵² Complaint; Exhibit 11.

⁵³ Complaint, p. 11)

⁵⁴ Complaint; Exhibit 12, p. 11; Interview with Special Education Teacher and Mother.

November 12, 2013, the District sent a draft IEP and behavior data report dated November 8, 2013.⁵⁵

41. Parents alleged that the District did not provide them with a complete copy of Student's records. Specifically, Parents alleged that information about Student attendance and behavior, submitted by the District with its Response as Exhibits 10 and 11, was not included in the documentation sent home with Student following the initial record request.⁵⁶ Aside from questioning the authenticity of the data collected by the District, Parents fail to describe how the allegedly missing information impeded their ability to meaningfully participate in the development of Student's education program.

42. The SCO finds that the Parents have identified as not being provided in response to the record request, attendance and behavioral data, was already available or provided in advance of the IEP meeting on November 18, 2013. First, documentation regarding Student's attendance was available to Parents at any time on Infinite Campus, the District's software system. Second, information regarding Student's behavior, i.e., the behavior data report and the draft BIP were provided to Parents in advance of the IEP meeting on November 18, 2013. In addition, Parents were provided with information about Student, including behavioral incidents, on a daily basis through the preschool communication log.⁵⁷

CONCLUSIONS OF LAW

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

Allegations One and Two: The allegations regarding ESY services and the April 2013 IEP are barred from investigation by the one year statute of limitations for state complaint investigations under federal regulation and Colorado state-level complaint procedures.

1. Parents alleged that the District improperly determined that Student was not eligible for ESY services, resulting in a denial of these services during the summer of 2013. The SCO does not have jurisdiction to investigate this allegation because the alleged violation and its underlying facts occurred more than one year prior to the filing of this Complaint. Under federal regulation and Colorado's state-level complaint procedures, a complaint "must allege a violation that occurred not more than one year prior to the date that the complaint is received." 34 CFR § 300.153(c); State-Level Complaint Procedures, ¶ 3 (f). This restriction applies even if the alleged violation is continuing or the complainant is requesting compensatory services. *Questions and Answers on IDEA Part B Dispute Resolution Procedures* (OSERS 2013); 71 Fed. Reg. 46606 (Comments to the 2006 federal IDEA regulations). Although commentators have requested that the U.S. Department of Education (ED) extend the statute

⁵⁵ Exhibit 10, pp. 1-6; Interviews with Special Education Director, Special Education Teacher, and Mother.

⁵⁶ Reply, pp. 3-4.

⁵⁷ Complaint; Response; Reply; Interviews with Parents, Special Education Teacher, Special Education Director, and Speech Language Pathologist.

of limitations because Parents may not fully understand how the violation affects their child's education, the ED has refused to do so, explaining that "longer time limits are not generally effective and beneficial to the child because the issues in a State complaint become so stale that they are unlikely to be resolved," and the SEA would not be able to reasonably "recommend an appropriate corrective action." 71 Fed. Reg. 46606 (Comments to the 2006 federal IDEA regulations). Limiting the complaint to a one year look-back period helps "ensure that problems are raised and addressed promptly so that children receive FAPE." *Id.*

2. In this case, the District's determination regarding Student's eligibility for ESY services was made on April 10, 2013, more than one year prior to the filing of this Complaint on June 4, 2014. Parents argue that the allegation that Student was improperly denied ESY services is still timely because the violation occurred on the date that the District's ESY program started, in June of 2013, not on the date the District denied eligibility for ESY services. Parents further argue that the allegation is timely because they were not aware that the District's determination may have been improper. In making this argument, however, Parents rely primarily on facts occurring on or around April 10, 2013, including Student's initial evaluation and IEP meeting. Parents' position is more properly characterized as a request to treat the violation as one that continued from the date Student was determined ineligible for ESY services through the summer of 2013 for the purpose of extending the statute of limitations. And although Parents claim they were not aware that the District's determination may have been improper, Parents were provided with the procedural safeguards notice. Because there are no exceptions to the statute of limitations for continuing violations or a lack of understanding about how the violation may impact a student's education, the SCO concludes that this allegation is untimely. This conclusion is consistent with the ED's concern that longer time limits are not effective and beneficial to the child.

3. Like allegation one, the appropriateness of the April 2013 IEP is barred from investigation because Student never received services under this IEP during the one-year statute of limitations. Although Parents alleged that Student's April 2013 IEP was not appropriately tailored to meet his needs during the 2013-2014 school year, Student never received services under this IEP during this school year. In August of 2013, Mother informed the District that Student would be attending Private Center on a full time basis until insurance coverage expired on September 30, 2013. On September 23, 2013, the District convened an IEP meeting to review and revise Student's IEP prior to his return on October 1, 2013. Based on Parents' unilateral decision to enroll Student at Private Center rather than have him access his IEP at a District program, Student's April 2013 IEP was not implemented at any time during the 2013-14 school year. Because the SCO cannot investigate alleged violations occurring more than one year prior to the filing of this Complaint, this allegation is untimely and not subject to investigation.

Allegation Three: The District properly implemented Student's IEP during the 2013-14 school year.

4. Under IDEA, local education agencies are required to provide eligible students with disabilities a free appropriate public education (FAPE) by providing special education and related services individually tailored to meet the student's unique needs and provided in conformity with an individualized education program developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. A public agency, here the District, must implement a student's IEP in its entirety. 34 CFR § 300.323(c). To satisfy this obligation, the District must ensure that each teacher and service provider responsible for implementing a student's IEP is informed of "his or her specific responsibilities related to implementing the child's IEP" and "the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP." 34 CFR § 300.323(d)(2).

5. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to implement an IEP can result in a denial of FAPE. *Id.* Not every deviation from an IEP's requirements, however, results in a denial of FAPE. *E.g., L.C. and K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005)(minor deviations from IEP's requirements which did not impact student's ability to benefit from special education program did not amount to a "clear failure" of the IEP); *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. 2007)(failure to implement IEP must be material to incur liability under IDEA, and minor discrepancies between the services provided and the services called for do not give rise to an IDEA violation); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003)(failure to implement "essential" element of IEP denies FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000)(*de minimis* failure to implement IEP does not deny FAPE).

6. In this case, the District demonstrated that it was properly implementing Student's IEP. First, Special Education Teacher and Paraprofessional credibly described Student's needs, IEP goals, and the supports and services Student was receiving in the classroom to make progress toward his goals. In addition, the District provided documentation, such as data collection charts and preschool communication logs, to demonstrate that Student consistently worked toward his IEP goals and was receiving the services identified on his IEP. Because the descriptions provided by Special Education Teacher concerning how Student's IEP was implemented on a daily basis was consistent with the IEP itself, the data collection sheets, and information provided in the daily preschool communication log, the SCO considered this credible evidence that Student's IEP was being properly implemented. The evidence provided by Parents through observation was not sufficient to establish a failure to implement the IEP.

Allegations Four, Five, and Six: The September and November 2013 IEPs were appropriately designed to meet Student’s identified needs and reasonably calculated to provide educational benefit. Further, Parents were afforded a meaningful opportunity to participate in the development of Student’s educational program at both IEP meetings.

7. Any analysis of the appropriateness of an IEP must begin with the standard established by the United States Supreme Court in *Rowley v. Board of Education*, 458 U.S. 176 (1982), in which the Court set out a two-pronged analysis for determining whether an IEP has offered a FAPE. The first part of the analysis looks to whether the IEP development process complied with the IDEA’s procedures; the second looks to whether the resulting IEP was reasonably calculated to confer some educational benefit upon the child. *Id.* at 207; *see also Thompson R2-J School Dist. V. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008). If those two questions are satisfied in the affirmative, then the IEP is appropriate under the law.

8. Under the first “prong” of *Rowley*, the analysis looks to whether the IEP was developed according to the IDEA’s procedures. When a student’s IEP is developed in compliance with the IDEA’s procedural requirements, *Rowley* holds that a certain degree of deference is to be given to the resulting IEP. “We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” *Rowley*, 458 U.S. at 206.

9. Aside from the allegation that Parents were not afforded the opportunity for meaningful participation at the September 2013 and November 2013 IEP meetings because placement was predetermined, Parents have not alleged that the District violated any of these other procedural requirements when developing Student’s IEP. Further, there is no evidence that the District failed to follow any of these procedural requirements when developing Student’s IEP or that Student’s IEP lacked the required content.

10. So, before addressing the substantive appropriateness of Student’s September IEP, the SCO considers the alleged procedural violation that Parents were denied a meaningful opportunity to participate in the development of Student’s education program, i.e., that placement was predetermined. The IDEA’s procedural requirements for developing a student’s IEP are designed to provide a collaborative process that “places special emphasis on parental involvement.” *Sytsema v. Academy School District No. 20*, 538 F.3d 1306, page, (10th Cir. 2008). Courts have found that parents have been afforded an opportunity for meaningful participation when an educational agency considers their suggestions and requests, and to the extent appropriate, incorporates them into their child’s IEP. *O’Toole v. Olathe Dist. Schools*, 144 F.3d 692, 107 (10th Cir. 1998). Consideration does not mean simply agreeing to whatever parents have suggested or requested. Rather, meaningful consideration happens when the educational agency listens to parental concerns with an open mind, such as when the educational agency answers parents’ questions, discusses privately obtained evaluations, preferred methodologies,

and placement options, and incorporates some suggestions or requests into the IEP. *Id*; *See, Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109 (6th Cir. 2004), *cert denied*, 546 U.S. 936 (2005).

11. In this case, Parents attended and actively participated in both the September and November IEP meetings. Regarding the September 2013 IEP meeting, Mother and Private Center Clinical Director provided input regarding Student's progress at Private Center, what Student had been working on at Private Center, and their concerns about Student's need for increased support and intervention in the area of behavior. In response to the information provided by Mother and Private Center Clinical Director, the District added IEP goals to promote continuity between the two programs, increased the amount of services for direct specialized instruction and speech language skills, and placed Student in an educational setting, the Early Intervention Autism Program, that provided a more structured environment, more one-on-one instruction, and a higher staff-student ratio. The changes made to the September 2013 IEP clearly evidence that Mother was provided with an opportunity to participate in the development and that the IEP team meaningfully considered her input.

12. Parents were also provided with a meaningful opportunity to participate in the development of the November 2013 IEP. During this meeting, Parents actively participated by asking questions about the comprehensiveness and accuracy of behavioral data presented by the District and clearly stated their preference that Student be placed at Private Center because they believed Private Center could better serve Student's behavioral needs. In response to Parents concern about behavioral data and programming, the District offered to have the autism team conduct further evaluations of Student and requested parental consent to evaluate at the meeting itself. In addition, the IEP team developed a BIP, discussed more fully below, and substantially increased Student's hours of direct specialized instruction from 11 to 25 hours each week. Further, the IEP team substantially increased the amount of direct instruction Student was receiving from a speech language pathologist. The substantial changes made to Student's IEP, based largely on parental concern, clearly evidence that Parents were provided with an opportunity to participate in the development of Student's IEP and that their input was meaningfully considered by the IEP team.

13. Finally, the IEP team considered Parents request that Student be placed at Private Center. The IDEA requires that students with disabilities receive their education in the general education environment with typical peers to the maximum extent appropriate, and attend the school they would attend if not disabled. 34 CFR §§ 300.114 and 116. Before considering more restrictive placements, the IEP team must consider educating the student in the general education classroom, with supplemental aids and services. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004); *Letter to Cohen*, 25 IDELR 516 (OSEP 1996). In this case, the District considered Parents request that Student be educated at Private Center, a separate school, but ultimately determined that Student could be appropriately educated in a less restrictive environment, i.e., the Early Intervention Autism Program. The fact that the District

considered Parents' preference for a more restrictive placement is evidenced in the IEP and the prior written notice provided to Parents following the IEP meeting.

14. Parents also allege that Student's September and November IEPs are not substantively appropriate. When, as here, a student's IEP is developed in compliance with the IDEA's procedural requirements, *Rowley* holds that a certain degree of deference is to be given to the resulting IEP. "We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206. Thus, as long as the IEP is procedurally compliant, the specialized knowledge and expertise of the professional educators can reasonably be relied on in determining that the resulting IEP is substantively appropriate. *Sytsema v. Academy School District No. 20*, 538 F.3d 1306, 1318 (10th Cir. 2008)(relying on *Rowley v. Board of Education*, 458 U.S. 176 (1982)).

15. The SCO first addresses the substantive appropriateness of the September 2013 IEP. Consistent with his identified needs, Student had annual goals in early academics, behavior, speech language, and social interaction. Because Student's September IEP was developed in accordance with the IDEA's procedural requirements and the annual goals and services described in the IEP match Student's identified needs, the SCO concludes that the September IEP was substantively appropriate, i.e. reasonably calculated to confer educational benefit.

16. In challenging the substantive appropriateness of Student's IEPs, Parents also allege that the District failed to timely develop a behavior intervention plan (BIP). For a child whose behavior impedes his ability to learn, IDEA requires that the IEP team consider the use of positive behavioral interventions and supports to address the behavior. 34 CFR §300.324(a)(2)(i). While IDEA does not mandate the development of a BIP outside the context of a disciplinary change of placement, the failure to develop a BIP can amount to a denial of FAPE when the student's behavior significantly interferes with learning. *Neosho R-V. Sch. Dist. V. Clark*, 38 IDELR 61 (8th Cir. 2003). In this case, the District chose to collect data on Student's behavior to determine the need for a BIP rather than propose a BIP at the September 2013 IEP meeting because Student had not been in the classroom since the Spring of 2013. The District began collecting and analyzing behavioral data the day Student started in the Early Intervention Program, observed Student at Private Center for the purpose of developing a BIP, prepared a behavioral data report based on classroom observation, and presented a draft BIP at the November 2013 IEP meeting. Based on these facts, the District had no obligation under IDEA to develop a BIP at the September 2013 IEP meeting. Notably, the approach demonstrated by the District in this case is not only consistent IDEA but with best practices.

17. The SCO now addresses Parents allegation that the November 2013 IEP was not substantively appropriate. Like the September 2013 IEP, the November 2013 IEP was developed in accordance with the IDEA's procedural requirements and is treated with deference to the educators in determining whether it is substantively appropriate. Here, the

annual goals, services, and placement described in the IEP match Student's unique and identified needs. Accordingly, the IEP is reasonably calculated to provide educational benefit, i.e., offers Student a free appropriate public education.

18. Even if the SCO had concluded that the November IEP failed to offer a free appropriate public education, Parents forfeited their right to complain when they refused to consent to the District's proposed evaluation. Federal courts analyzing this question have consistently and unequivocally held that when the parents of a child with a disability refuse to allow a school district to conduct comprehensive evaluations by evaluators of its choosing, the parents lose any right to demand special education services or to complain about a denial of FAPE. See *M.T.V. v. DeKalb County School District*, 446 F.3d 1153 (11th Cir. 2006)(where parents refuse to allow school district to conduct evaluations by evaluators of its choosing, parents/student lose entitlement to special education services); *Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450 (5th Cir. 2006)(student who desires special education services under IDEA must consent to evaluations); *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176, 178-79 (5th Cir. 1995)("if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation"); *Johnson by Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir. 1996); *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1315 (9th Cir. 1987); *M.S. v. Mullica Township Bd. Of Educ.*, 485 F. Supp. 2d 555 (D.N.J. 2007). The Department has followed and enforced this rule in its State Complaint decisions, and will continue to do so here. See, *In re: Douglas County Sch. Dist.*, Case No. 2012:514, 61 IDELR 119 (CO SEA 2013).

Allegation Seven: The District provided Parents with a copy of Student's education records, in accordance with IDEA.

19. Parents alleged that the District failed to provide them with a complete copy of Student's education records in response to their request. Parents specifically allege that the District failed to provide them with records related to Student's attendance and behavioral data.

20. One of the procedural safeguards afforded to parents under the IDEA is the right to inspect and review their child's education records. 34 CFR §300.613 (a). A school district must comply with a request from a parent to review their child's education records "without unnecessary delay and before any meeting regarding an IEP." *Id.* The IDEA, incorporating the definition in FERPA, defines "education records" as a record that is "directly related to a student and "maintained by an educational agency or institution or by a party acting for the agency or institution." 34 CFR §300.611 (b); 34 CFR § 99.3.

21. In this case, the District provided Parents with Student's education records in accordance with IDEA by providing the requested information fewer than 10 days after the request and prior to an IEP meeting. Parents requested a copy of Student's education records on November 5, 2013. That same day, the District provided Parents with education records,

including copies of Student's IEPs. On or around, November 12, 2013, the District provided Parents with a draft IEP and a behavioral data report prepared in advance of the IEP meeting scheduled for November 18, 2013. The attendance data that Parents identified as missing from the records provided by the District was available online and Parents failed to describe or establish how not having this information impeded their right to participate in the development of Student's educational program. Accordingly, the SCO concludes that the District has not violated IDEA in response to Parents request to review Student's education records.

REMEDIES

Parents failed to establish that the District violated IDEA, as alleged in their Complaint. Accordingly, Parents are not entitled to relief.

CONCLUSION

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

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

Dated this 6th day of August, 2014.

Candace Hawkins

Candace Hawkins, Esq.
State Complaints Officer

Appendix

Complaint, pages 1-16.

Exhibit A: Medical summary.
Exhibit B: IEP dated April 2013.
Exhibit C: District meeting notes.
Exhibit D: Letter to Parents dated August 2013.
Exhibit E: Monthly clinical service reviews.
Exhibit F: IEP dated September 2013.
Exhibit G: Monthly clinical service reviews.
Exhibit H: Letter to Parents dated October 2014.
Exhibit I: Affidavit of BCBA.
Exhibit J: Classroom behavior data report and draft BIP.
Exhibit K: IEP dated November 2013.
Exhibit L: Letter to Parents dated November 2013.
Exhibit M: Monthly clinical service reviews.

Reply, pages 1-7.

Response, pages 1-11.

Exhibit 1: IEP dated April 2013.
Exhibit 2: Documentation for ESY.
Exhibit 3: IEP dated September 2013.
Exhibit 4: IEP dated November 2013
Exhibit 5: Prior written notices.
Exhibit 6: Notices of meeting.
Exhibit 7: Assessments for 2012-13 school year.
Exhibit 8: Assessments for 2013-14 school year.
Exhibit 9: No responsive documents.
Exhibit 10: Documentation of behavior incidents for 2013-14 school year.
Exhibit 11: Attendance records.
Exhibit 12: Correspondence.
Exhibit 13: Contact information for relevant school and District staff.

Interviews with:

- Parents (Mother and Father)
- Special Education Director
- Special Education Teacher
- Paraprofessional
- Speech Language Pathologist

- Private Center Clinical Director
- CDE Autism Consultant