

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

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**State-Level Complaint 2014:516  
Harrison School District Two**

**DECISION**

**INTRODUCTION**

The Complainants are the parents/legal guardians (collectively, “Parents”) of four children (Paula, Nicholas, Barbara and Stanley, or collectively, “Students”)<sup>1</sup> who are identified as children with disabilities under the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Parents are jointly represented by counsel and included the claims of all four children in a single State Complaint because the allegations of wrongdoing by the School District are essentially the same.

The Complaint was properly filed on August 5, 2014, such that the deadline for issuing a decision was October 4, 2014. Because of exceptional circumstances, the State Complaint Officer (“SCO”) extended the decision deadline to October 9, 2014.

The SCO determined that the Complaint identified five 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.<sup>3</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**PARENTS’ COMPLAINT ALLEGATIONS**

The SCO determined that Parents’ Complaint articulated allegations subject to the jurisdiction of the state-level complaints process under the Individuals with Disabilities Education Act (IDEA). Specifically, the SCO investigated whether the Students were denied a free appropriate public education (FAPE) under the IDEA because:

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<sup>1</sup> Federal privacy laws prohibit the publication of personally identifiable information related to students, including students with disabilities. Accordingly, in state complaint decisions, students, parents, teachers, and other relevant individuals are typically referred to by their role, *e.g.*, “Student,” “Mother,” “Special Education Director,” and references to the child’s gender are removed. Because there are four students in this case, the SCO will refer to the students by randomly chosen proper names and randomly chosen genders, for ease of reading.

<sup>2</sup> 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.*

<sup>3</sup> 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).

1. With respect to Barbara, Paula and Nicholas, on April 23, 2014, the School District developed IEPs for which it had predetermined Students' placements by refusing to consider or discuss continued placement at Private Autism Center, in violation of the Students' right to educational programming based upon their individual needs and abilities, and of their guardians'/parents' right to meaningful participation in the IEP process.
2. With respect to Barbara, Paula and Nicholas, on April 23, 2014, the School District failed to develop IEPs that were based upon the children's individual needs and abilities and that were not reasonably calculated to provide the children with meaningful educational benefit.
3. With respect to Stanley, the School District developed an IEP that provided for continued placement at Private Autism Center, but then refused to implement that placement and unilaterally changed Stanley's placement outside of the IEP process, evidencing predetermination of Stanley's placement and denying his parents' right to meaningful participation in the IEP process.
4. The School District failed to provide proper prior written notice ("PWN") to the Students' Parents regarding the School District's decision to discontinue Students' placement at Private Autism Center.
5. The School District violated Paula's procedural rights under the IDEA by failing to include a general education teacher in her April 23, 2014 IEP meeting.

### **SCHOOL DISTRICT'S RESPONSE**

The School District did not specifically respond to the allegation that it had impermissibly predetermined the Students' placements prior to the IEP meeting. Rather, the School District argued that the Students' IEPs were based upon their individual needs, and that Private Autism Center is not a "school providing educational services based on IEP needs," does not employ "highly qualified special education teachers" or related service providers, and is a highly restrictive setting that only serves students with disabilities. According to the School District, Private Autism Center "provides behavior therapy with some educational components and does not follow the IEP with appropriate accommodations or modifications." Parents were encouraged to "check out" two of the programs at a separate school operated by BOCES ("BOCES School"), because "[t]hese are the two programs [School District] has to offer students with Autism." With respect to Stanley's placement, the School District denied that it ever agreed to continue his placement at Private Autism Center.

The School District did not deny that it did not provide prior written notice ("PWN") to Students or their Parents regarding the decision to discontinue services at Private Autism Center. The School District argues that PWN was not required because the School District was not proposing a change of placement, but rather was simply choosing a different location in which to implement the IEP.

The School District denied that it was required to include a general education teacher in Paula's IEP meeting because her "IEP at the time did not warrant a general education teacher present since a determination of a placement change had not been discussed during the IEP team meeting. Upon completion of the IEP the determination made by the team would place [Paula] in a setting of <40% general education."

The School District also argued that its contract with Private Autism Center violated the Colorado Constitution. Because the contract included a clause indemnifying Private Autism Center from liability for failing to provide a free appropriate public education, the School District contends the contract violated Article XI, Section 1 of the Colorado Constitution, which prohibits school districts from becoming responsible for any liability incurred by a third party.

### **PARENTS' REPLY**

The Parents' Reply notes that the requirement that children with disabilities be educated by "highly qualified" personnel does not apply to children placed in a private facility by a public agency, and that there is no "accreditation" requirement that would prohibit a public agency from placing children with disabilities in a private facility such as Private Autism Center.

The Parents discount the School District's LRE argument as both inaccurate and inapplicable. Contrary to the School District's contention, children at Private Autism Center do have opportunities to interact with typically developing peers, and in any event, the School District's proposed placement would not offer the Students any more exposure to peers without disabilities than Private Autism Center.

With respect to the School District's constitutional objection to Private Autism Center's contract, the Parents note that Private Autism Center indicated its willingness to remove the offending language as soon as it was notified of the School District's objection, and that, in any event, Private Autism Center and the School District have used the same contract for years, without any objection from the School District until now.

Finally, Parents argue that the change from Private Autism Center to the BOCES program was not simply a change of location, but rather a change of placement that required adherence to the IDEA's procedural requirements, including PWN, evaluations, and meaningful parental participation in the decision-making process.

## FINDINGS OF FACT

Based upon a through and comprehensive review of the evidence in the record, the SCO finds as follows:

### I. The Students

#### A. Barbara

1. Barbara is a school-aged student who resides within the boundaries of Harrison School District Two (“School District”) and who is identified by the School District as a child with a disability. Barbara is identified as a student with Autism Spectrum Disorder (“ASD”).<sup>4</sup> Barbara’s legal guardians are her grandparents (“Grandparents”).<sup>5</sup>
2. Barbara has been enrolled in public school for four years and has changed schools every year.<sup>6</sup> Prior to attending Private Autism Center, she was having behavioral problems at school, including being suspended from school a number of times. Barbara started in a public school setting and then was moved to a school for individuals with developmental delays, and then, at the recommendation of the School District, to Private Autism Center on July 1, 2013.<sup>7</sup> Private Autism Center is a licensed day treatment and therapy center that provides educational and behavioral services and supports to children and adults with autism. Private Autism Center uses research-based educational and behavioral interventions, including individualized 1:1 teaching supervised by an on-site board-certified behavior analyst (“BCBA”), using principles of applied behavioral analysis (“ABA”).<sup>8</sup>
3. There is no dispute that since she started receiving special education and related services at Private Autism Center, Barbara has made excellent progress on her IEP goals and responds particularly well to the intensive ABA-based instruction provided there. Prior to receiving services at Private Autism Center, Barbara was nonverbal and exhibited extensive behavioral problems – hitting, scratching, spitting, aggression – but now rarely engages in those behaviors.<sup>9</sup> She is now learning new skills such as counting, tracing and drawing, singing, and is now able to participate in dramatic play. She now has much less difficulty transitioning from one setting to another, is happy to go to school in the morning, and is able to generalize learned skills and behaviors across settings. Her improvement in behaviors has allowed her to participate in other interventions such as speech therapy,

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<sup>4</sup> Ex. C; Interview with Grandparents.

<sup>5</sup> Interview with Grandparents.

<sup>6</sup> Interview with Grandparents.

<sup>7</sup> *Id.*

<sup>8</sup> Exhibit H.

<sup>9</sup> Interview with Grandparents.

allowing her to increase her verbal capabilities. As Grandmother stated, at Private Autism Center Barbara has “flourished.”<sup>10</sup>

4. Nonetheless, Barbara continues to require intensive supervision and intervention, with 1:1 instruction 95% of the time, direct instruction, and a modified curriculum in all content areas. Barbara’s behaviors are improving, but continue to require significant support.<sup>11</sup>
5. Since Barbara’s placement at Private Autism Center, the School District has had virtually no communication with Grandparents, either about Barbara’s progress or to articulate any concerns. During the 2013-2014 school year, the School District did not seek to evaluate Barbara, send staff to observe Barbara specifically or the Private Autism Center’s program generally, or in any way express any concerns (or even interest) regarding Barbara or her educational program. Indeed, when Grandparents were notified that the School District had scheduled an IEP meeting to occur on April 23, 2014, they were notified by the staff at Private Autism Center, rather than by anyone from the School District.<sup>12</sup>

#### **B. Stanley**

6. Stanley is a school-aged student who resides within the boundaries of the School District and who is identified by the School District as a child with a disability. Stanley is identified as a student with Autism Spectrum Disorder (“ASD”).
7. In the summer of 2013, the School District placed Stanley at Private Autism Center at public expense to receive special education and related services set out in Stanley’s IEP. Prior to being placed at Private Autism Center, Stanley changed schools every year and had little to no success at any of them. He experienced significant behavior problems, including numerous suspensions, was not learning anything, and had almost no verbal skills. He also received medication for a number of conditions, including ADHD and a sleep disorder.<sup>13</sup>
8. Since attending school at Private Autism Center, Stanley’s behaviors have improved dramatically, he has seen huge advances in his verbal skills, and he no longer requires medication to control his behaviors. Academically, Private Autism Center provided Stanley with educational instruction including math, reading, and written expression. Stanley has made extensive progress in academics since attending Private Autism Center.

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<sup>10</sup> Id.; see also Ex. C, pp. 2-4.

<sup>11</sup> Ex. C. For example, at the time of the April 23 IEP meeting, Barbara engaged in self-stimulatory behaviors approximately 33 times per day, self-injurious behaviors 21 times per day, and an average of 13 elopements per day. (Ex. C, p. 6.)

<sup>12</sup> Some of the lack of communication may have been because School District has the wrong address for Grandparents on file, notwithstanding the fact that Grandparents have provided the correct address and asked School District staff to update their files at least four or five times. (Interview with Grandparents.)

<sup>13</sup> Interview with Stanley’s Mother.

9. Stanley's progress on behavior and academics is emerging, but he continues to require "significant support in order to access his education," including "one-on-one supervision, direct and explicit instruction for modified goals, and opportunities for sensory breaks."<sup>14</sup>

### **C. Nicholas**

10. Nicholas is a school-aged student who resides within the boundaries of the School District and who is identified by the School District as a child with a disability. Nicholas is identified as a student with ASD.
11. Nicholas was enrolled by his parents in Private Autism Center as a preschooler, after public preschool proved unsuccessful for him. Nicholas attended Private Autism Center on a part-time basis while in preschool.<sup>15</sup>
12. In 2012, Nicholas's Parents and the School District explored some public school options for kindergarten, but Nicholas's IEP team agreed that Private Autism Center continued to be appropriate for him. For kindergarten, Nicholas began attending Private Autism Center on a full-time basis. In 2013, the IEP team agreed that Nicholas's progress at Private Autism Center was outstanding, and continued his placement there for the 2013-2014 school year.
13. Since attending Private Autism Center on a full-time basis, Nicholas's progress has been outstanding. When he attended Private Autism Center on a half-time basis, his language was extremely limited and his speech was akin to that of a toddler's. After starting full-time attendance, his parents noted an "explosion" in his language, including a rapidly expanding vocabulary and greatly improved articulation.
14. Further, prior to attending Private Autism Center, Nicholas had significant behavior problems, including destruction of property, tantrums, and difficulty functioning in public settings (such as a playground with typical peers) for more than a few minutes. Since attending Private Autism Center, Nicholas's behaviors have drastically improved. Whereas in the past, Nicholas's behaviors got in the way of his ability to derive benefit from other therapies (such as occupational therapy), he is now able to participate and be more productive. He has also shown dramatic growth in academics.<sup>16</sup> Notwithstanding this progress, however, Nicholas continues to require intensive (mostly 1:1) adult intervention in order to continue to improve with controlling his behaviors and make academic progress.<sup>17</sup>

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<sup>14</sup> Ex. E, p. 4.

<sup>15</sup> Interview with Nicholas's Parents.

<sup>16</sup> Interview with Nicholas's Parents.

<sup>17</sup> For example, Nicholas continues to have difficulty with being compliant and has trouble with even small changes in his routine; he "requires significant support in order to access his education ... and may benefit from one-on-one adult supervision, direct and explicit instruction for modified goals, and opportunities for sensory breaks." (Ex. D, p. 3.)

#### D. Paula

15. Paula is a school-aged child who resides in the School District and who is identified by the School District as a child with a disability. Paula is identified as a student with ASD.
16. Paula moved into the School District in September 2013, after her family transferred to Colorado from Pennsylvania. Paula's Pennsylvania IEP, which required that she receive "small group instruction in a highly structured environment with a low/student teacher (*sic*) ratio and structured schedule," as well as extensive 1:1 support for fine and gross motor skills, was accepted by the School District.<sup>18</sup> Initially, the School District told Paula's Mother that her IEP would be implemented "in-district," but after viewing a number of the proposed options, Paula's Mother expressed her concerns that the in-district placements lacked the intense structure that Paula required in order to be successful at school. When one of the School District's intended placements did not work out because one of the key teachers had left, the School District agreed to implement Paula's IEP at Private Autism Center; she began attending there in December 2013. Since her enrollment in Private Autism Center, Paula has made excellent progress and is thriving.<sup>19</sup>
17. Paula's Pennsylvania IEP, which was being implemented by the School District, called for her to receive both speech therapy and occupational therapy ("OT"). Since enrolling Paula, the School District has failed to provide either service. Prior to placing Paula at Private Autism Center, School District staff told Paula's Mother that the School District would send a speech therapist and an occupational therapist to consult with the staff at Private Autism Center regarding Paula's educational program, but that consultation was never provided. Paula's Mother made numerous attempts to contact staff at the School District to determine the status of these services, but her phone calls and emails went unanswered. Indeed, since Paula began attending Private Autism Center, the School District had no contact with Paula's Mother until the IEP meeting of April 23.<sup>20</sup>
18. In fact, the School District scheduled the April 23 IEP meeting without consulting or conferring with Paula's Mother at all – Paula's Mother found out about the meeting from

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<sup>18</sup> Interview with Paula's Mother; Ex. T, p. 70, 83 (Pennsylvania IEP).

<sup>19</sup> Interview with Paula's Mother; Ex. F.

<sup>20</sup> Paula's Mother described her experiences with the School District as intensely frustrating, with the School District essentially refusing to communicate with her unless she happened to catch them on the phone (without having to leave a message). Paula's Mother received no prior written notices from the School District with respect to its adoption of the Pennsylvania IEP or any other aspect of Paula's placement at Private Autism Center. Even in enrolling Paula at Private Autism Center, all communication and information about Paula that was provided to Private Autism Center was provided by Paula's Mother, including the Pennsylvania IEP itself. Nothing was provided to Private Autism Center by the School District. Since moving to Colorado from Pennsylvania, Paula's Mother has felt that the School District "has no idea who [she is or who her daughter] is." Indeed, upon starting the April 23 IEP meeting, one of the School District staff asked, "now, which one is Paula again?" (Interview with Paula's Mother.)

the staff at Private Autism Center. Paula's Mother contacted the School District to inform them that April 23 was not a good day for a meeting because Paula (for whom she lacked child care and thus would have to bring to the meeting) was having orthodontic surgery that day, but was told that April 23 was the only day the School District could convene the meeting. Fearing that the School District would proceed in her absence, Paula's Mother felt that she had no choice but to agree to meet on April 23; she planned to ask the doctor for extra pain medication so that Paula would be able to attend the meeting.<sup>21</sup>

19. For Nicholas and Stanley, though the School District placed them at Private Autism Center at public expense, even while the School District was paying for tuition and transportation, the School District was only paying part of the expense. The Nicholas's and Stanley's Parents have insurance that paid a portion of the tuition, even before the School District cut off funding for their placements.<sup>22</sup>

## **II. The April 23, 2014 IEP meetings.**

20. The School District convened the annual review IEP meetings for all four Students on April 23, 2014. Based upon the credible evidence in the record, including recordings of Nicholas's IEP meetings, the SCO finds that all four meetings were remarkably similar, and shared the following characteristics/events:

- a. Prior to the April 23 IEP meetings, the School District did not conduct or request consent to conduct any assessments or observations of the Students, to either determine their updated levels of functioning, to determine how they were functioning at Private Autism Center, or to understand the types of structure, interventions, or academic instruction that Private Autism Center was providing (to see what was or was not working, for example).<sup>23</sup>
- b. Prior to the April 23 IEP meetings, the School District never contacted either the staff at Private Autism Center or any of the Parents to express any concerns about Private Autism Center or the Students' ability to be appropriately educated and receive FAPE there.<sup>24</sup>
- c. At each meeting, the information necessary to develop the Students' new IEP goals was provided by Private Autism Center Clinical Director.<sup>25</sup>

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<sup>21</sup> Interview with Paula's Mother.

<sup>22</sup> Interview with Private Autism Center Clinical Director.

<sup>23</sup> Interviews with Parents; Interview with Special Education Director.

<sup>24</sup> Interviews with Parents; Interview with Special Education Director.

<sup>25</sup> Interviews with Parents; Ex. I; Ex. U.



- d. None of the meetings was attended by any representative from any of the District's proposed placements.<sup>26</sup>
- e. At each meeting, the School District staff attempted to reduce the number of IEP goals, over the objections and stated concerns of the Parents. In response to the concerns expressed by the Parents, the School District staff, particularly School Psychologist, stated that "just because the goals were being reduced, that doesn't mean that we can't work on other stuff," and that the IEP simply represented the "legal bare minimum" of what the School District was required to do, but that the School District could always "do more" or increase services beyond what was written in the IEP. The School District staff refused to provide any explanation of why the number of goals was being reduced, except to say that they did not want to write "too many" goals in the IEP. School Psychologist stated, "we can always add goals later if we need to."<sup>27</sup>
- f. At each meeting, the School District staff did not dispute that the Students were making good progress and achieving their IEP goals at Private Autism Center.<sup>28</sup>
- g. At each meeting, Special Education Director sat at the end of the table without interacting with the Parents until placement was discussed. Prior to that, she sat with her head down, playing on her phone, with no papers in front of her.<sup>29</sup>
- h. The topic of conversation turned to placement before the IEP team had finished writing goals or determining appropriate services (such that the placement discussion was premature). At that point, Special Education Director lifted her head from her phone and stated that the School District would be "going in a different direction" with respect to placement, and that the Students would be placed in-district.<sup>30</sup>
- i. In each meeting, the School District was unable to identify the specific placement it was proposing, or to answer specific questions about why the proposed placements would be appropriate to meet the individual needs of the Students. For Barbara, Nicholas and Stanley, the School District suggested that the parents/grandparents "check out" the BOCES school (which contains two separate programs that serve, *inter alia*, students with autism), but could not answer questions about which specific program the Students might be

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<sup>26</sup> Interviews with Parents; Interview with Special Education Director.

<sup>27</sup> Interviews with Parents; Exhibit CC.

<sup>28</sup> Interviews with Parents; Ex. I; Ex. CC; Interview with Special Education Director.

<sup>29</sup> Interviews with Parents.

<sup>30</sup> Interviews with Parents; Exhibit CC. The SCO notes that the Parents/Grandparents of each student were all interviewed separately, and all provided the same description of Special Education Director's demeanor independent of one another, without any inquiry from the SCO.

attending, what the difference is between the two programs, the types of assessments or instructional strategies that would be used, or how the Students' individual needs might be met. Special Education Director did state, however, that as compared to Private Autism Center, BOCES School "is a different setting" because it is a "more school-like setting."<sup>31</sup>

- j. For Paula, no placement was proposed at all; rather, Special Education Director stated that someone would be in touch with Paula's Mother to let her know which placement she should tour.<sup>32</sup> Further, there was no general education teacher present at Paula's IEP meeting.<sup>33</sup>
- k. In all four meetings, there was no discussion of continuing the Students' current placements at Private Autism Center, and the Parents were told that continuing at Private Autism Center was not an option. Placement in one of the School District's proposed "in district" settings was presented as a "take it or leave it" proposition. Though the School District staff, including Special Education Director, did not dispute that Students had been making excellent progress in all their IEP goals at Private Autism Center, Special Education Director told the Parents that Private Autism Center could not provide the Students with FAPE because it is not an "approved facility school" with "highly qualified teachers."<sup>34</sup>

21. With respect to Stanley, his Mother pointed out that he was finally making progress at Private Autism Center and that it was the only place he had ever had educational benefit or success since starting school. Stanley's Mother pleaded with Special Education Director for him to be allowed to remain at Private Autism Center. Special Education Director relented, stated that she "would make an exception" for Stanley, and specifically told Stanley's Mother that "Stanley can stay at Private Autism Center."<sup>35</sup>

22. The IEP meetings for Barbara, Nicholas and Paula concluded without any finalized IEP or a specific offer of placement (except that Private Autism Center was definitively ruled out as an option). Paula's IEP stated that she would be educated in the regular education classroom less than 40% of the time, though there had been no discussion at the April 23 IEP meeting about changing Paula's placement from a separate school to a general education setting. Barbara's and Nicholas's IEPs stated that they would continue attending a "separate school," but no greater specificity about the type of placement was provided.

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<sup>31</sup> Ex. CC.

<sup>32</sup> Interview with Parents; Exhibit CC.

<sup>33</sup> *Id.*; School District's Response.

<sup>34</sup> Interviews with Parents; Exhibit CC.

<sup>35</sup> Interview with Stanley's Mother.

23. Stanley's Mother left her April 23 IEP meeting with the understanding that Stanley would continue his placement at Private Autism Center. In fact, Stanley's IEP states:

[Stanley's] level of functioning in the center-based program demonstrated that he required an environment which was more supportive in order to address his strengths and challenges. Therefore, a separate school to provide the necessary supports were recommended. ***This separate placement*** has been successful. Based on his progress in ***this setting***, the team recommends continuing ***this placement***.<sup>36</sup>

24. Though Special Education Director later denied that she told Stanley's Mother that he could continue at Private Autism Center (*see infra*), the SCO does not find Special Education Director credible on this point, particularly given the plain language of the IEP. Though the IEP does not mention Private Autism Center by name, the references to "this separate placement," "this setting" and "this placement," as well as Special Education Director's unequivocal statement to Stanley's Mother that Stanley would remain at Private Autism Center, lead the SCO to find that the placement identified in Stanley's April 23, 2014 IEP is Private Autism Center.

### III. Tours of in-district placements and follow-up IEP meetings.

25. On May 9, 2014, Special Education Director sent identical letters to all the Parents informing them of her "many concerns centered around the educational placement" of the Students at Private Autism Center.<sup>37</sup> The letters stated:

Though the center is focused on ABA, the center does not provide the Least Restrictive Environment as stated through IDEA or ECEA. There is a clause in the contract that releases "indemnification" of the center providing appropriate educational benefit and any responsibility of [Private Autism Center] to provide an environment that would be conducive to the education of your [child] through [the] IEP. [Private Autism Center] is a private therapy agency and is not a State Approved Facility School or state accredited requiring Highly Qualified Special Education Teachers. [School District] has the capability to provide a Free Appropriate Public Education for your [child] either through the district or through a State Approved Facility School. In order for our district to be compliant with educational requirements of a Free Appropriate Public Education, [your child] will need to attend either a district school or a State Approved Facility School.

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<sup>36</sup> Ex. E, p. 14 (emphasis added).

<sup>37</sup> Ex. S, p. 6; Ex. T, p. 3; Ex. U, p. 1; and Ex. V, p. 4.

As a result, we will be scheduling an additional IEP meeting to complete a **change of placement** for your [child].<sup>38</sup>

26. That same day, Special Education Director wrote to the director of Private Autism Center regarding the indemnification clause in its contract with the School District, suggesting that the indemnification clause violates the Colorado Constitution.<sup>39</sup> The letter concluded with the statement that “[the School District] will be **changing the placement of all students currently attending [Private Autism Center]** to a state approved facility school or to a district programs as the contracts expire.”<sup>40</sup>
27. On May 13, 2014, the director of Private Autism Center responded to Special Education Director’s May 9 letter by agreeing to remove the offending indemnification language from the contract.<sup>41</sup> Nonetheless, Special Education Director continues to cite the indemnification clause as a basis for unilaterally determining that Students cannot be educated at Private Autism Center.<sup>42</sup>

#### A. Barbara

28. In the meantime, the Parents toured the placements suggested by Special Education Director. Barbara’s Grandparents toured the BOCES School in May 2014, with a follow-up IEP scheduled for later in the month. During the tour, the BOCES School Principal did not know anything about Barbara and could not answer specific questions about the type of programming at the BOCES School that might be appropriate for her. Indeed, nobody from the School District had ever contacted her to discuss the possible placement of children from the School District in the BOCES School. In an email dated May 6, BOCES School Principal complained to Special Education Director and Special Education Coordinator that she had:

been receiving calls and ‘drop-in’ from at least 3 parents of students reporting that they have been told that their child is going to be transferred into one of our programs from [Private Autism Center].

***I have not received notification from you about these students prior to parental contact.***<sup>43</sup>

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<sup>38</sup> *Id.* (emphasis added).

<sup>39</sup> Ex. G. The School District raised this objection to the contract for the first time, though it had been placing students in Private Autism Center for at least 8 years without any concern for the indemnity clause. Further, as will be explained *infra*, the School District’s position regarding the indemnity clause is legally incorrect.

<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> Ex. H.

<sup>42</sup> School District Response, p. 1.

<sup>43</sup> Ex. K, p. 1 (emphasis added).

29. After speaking with Grandparents, BOCES School Principal opined that Barbara “might be” suited to Program A.<sup>44</sup> Principal also stated that staffing ratios at BOCES School are 1:1.5 or 2.<sup>45</sup> Barbara’s April 23, 2014 IEP calls for her to receive 1:1 instruction 95% of the time, so it is unclear how the BOCES School would be able to implement her IEP.<sup>46</sup> Also, Grandparents observed the environment at Program A to be extremely “clinical” and ill-suited to a student with Barbara’s behavioral issues.<sup>47</sup>
30. A follow-up meeting was held for Barbara on May 15, 2014. Because the School District had never corrected Grandparents’ address in their records, Grandparents had not received the May 9 letter. During the May 15 meeting, the team continued to develop goals for Barbara’s IEP. Toward the end of the meeting, the Grandparents’ advocate asked about Barbara’s placement. Special Education Director stated that Private Autism Center was not an option because it is not an “approved facility” and does not employ “highly qualified teachers.” Special Education Director stated that Barbara could be served in-district at the BOCES School.<sup>48</sup>
31. The Grandparents rejected the School District’s position and indicated that they would keep Barbara at Private Autism Center. At that point, Special Education Director became hostile toward Grandparents. When Grandparents requested copies of the paperwork that had been developed thus far, including a copy of the IEP, Special Education Director refused to provide it. Even a few days later, Grandparents again asked for a copy of the IEP, and Special Education Director refused.<sup>49</sup>
32. For reasons that are unclear to the SCO, however, Special Education Director agreed that the School District would continue to pay for Barbara’s tuition at Private Autism Center, and continued to provide her with transportation. Though the School District’s contract for Barbara’s attendance at Private Autism Center expired at the end of May 2014, the School District continued to fund Barbara’s placement there until the end of September 2014. Barbara now attends Private Autism Center at Grandparents’ expense.

## **B. Nicholas**

33. Nicholas’s Parents toured the BOCES School in May 2014, with a follow-up IEP scheduled for later in the month. During the tour, the BOCES School Principal showed Nicholas’s parents around the different programs, but did not know anything about Nicholas and could not answer specific questions about how Nicholas might be appropriately serve, or

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<sup>44</sup> The BOCES School includes Program A and Program B, both of which can serve students with autism. The programs are not the same, however, as they provide different levels of instruction and intervention.

<sup>45</sup> Interview with Grandparents.

<sup>46</sup> Ex. C, p. 13.

<sup>47</sup> Interview with Grandparents.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

even which program he might be placed in. Nicholas's Parents were concerned that BOCES School would not be appropriate for Nicholas, because the BOCES School curriculum appeared to be driven by one particular language assessment that was normed for children much younger than Nicholas, and that was below Nicholas's language abilities. Accordingly, Nicholas's Parents believed that the instruction at BOCES School would not be appropriate or individually tailored to meet Nicholas's needs and abilities.

34. A follow-up IEP meeting was held for Nicholas on May 21, 2014.<sup>50</sup> No general education teacher attended the meeting.<sup>51</sup> At that meeting, Nicholas's Mother expressed her concerns that the IEP lacked a number of essential goals for him, particularly in the areas of cognitive or executive function. School Psychologist stated that the School District did not want to put "too many" goals in the IEP. He explained that while Private Autism Center can work on numerous IEP goals, the School District "wanted to write goals more feasible to an in-district setting." BOCES School Principal further explained that when he came to BOCES School, Nicholas would undergo an "evaluation period of thirty to sixty days" so that BOCES School staff could "get to know him;" at that point, the IEP would be updated again. The School District staff stated that they wrote IEPs for BOCES School differently, and that an IEP represents the "legal bare minimum" of what the School District is required to do, but that it is not a "rule of thumb." Rather, according to the School District staff, an IEP simply serves to document a student's needs so that the School District can "get a sense of how to develop" their educational programming.<sup>52</sup>
35. Nicholas's Mother correctly observed that "we're supposed to determine placement based upon the IEP, not the other way around."
36. Though the School District staff did not dispute that they were pleased with Nicholas's progress at Private Autism Center, continuing his placement there was not an option because it was not the least restrictive environment, is not a "state accredited school" or an "approved facility school" and does not employ "highly qualified licensed staff." Special Education Director stated that "Nicholas does not need to be in day treatment," and that "the federal and state government" precluded the School District from continuing Nicholas's placement at Private Autism Center.<sup>53</sup>
37. Nicholas's Mother again correctly pointed out that the law relating to "approved facility schools" is simply a mechanism for allowing certain schools to receive reimbursement from the State, but does not have anything to do with the type or quality of services provided there.<sup>54</sup> Nicholas's Mother also questioned why least restrictive environment was an issue,

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<sup>50</sup> Exhibit CC is an audio recording of both the April 23 and May 21 IEP meetings for Nicholas. Accordingly, the SCO has included direct quotes from those meetings.

<sup>51</sup> Interview with Paula's Mother.

<sup>52</sup> Ex. CC.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*; see also ECEA Rule 2.18.

given that neither Private Autism Center nor BOCES School enrolls students who are not disabled. Special Education Director refused to specifically answer Nicholas's Mother's questions, except to say that "[Nicholas] is ready [to leave Private Autism Center] and we have a program."<sup>55</sup>

38. Special Education Director concluded the meeting by stating that "we have made this decision [to place Nicholas at BOCES School]" and reiterated that the only options on the table were for either for Program A or Program B. Special Education Director never made a specific offer of placement to Nicholas's parents, but rather left it for them to choose between Program A or Program B.
39. Nicholas's Parents rejected the School District's proposal and indicated their intention to keep Nicholas at Private Autism Center. The School District continued to pay for Nicholas's placement at Private Autism Center through September 30, 2014. Since October 1, Nicholas has attended Private Autism Center at his parents' expense.

### **C. Paula**

40. On April 29, 2014, Special Education Coordinator sent an email to Paula's Mother stating, "We are proposing our Significant Support Needs program at [Elementary School]," and provided the name and phone number of the principal so that Paula's Mother could "go to the school and talk with staff."<sup>56</sup>
41. Given that the April 23 IEP meeting had ended without any offer of placement, the SCO finds that decision to place Paula at Elementary School was made unilaterally by the School District, outside of the IEP process and without any input from Paula's parents. Furthermore, the decision to place Paula at Elementary School was made without any consideration for Paula's individual needs, including any determination of whether Elementary School could serve her. Indeed, when Paula's Mother visited Elementary School on May 7 and May 9, the teachers and staff knew nothing about Paula and had never seen her IEP. The Elementary School staff explained that their special education services were set up to provide support to students with intensive medical needs, not students with autism. Upon reviewing the IEP that Paula's Mother provided, the teacher stated that she had never seen goals like those in Paula's IEP and that she did not know how to implement them or structure her classroom as required by the IEP.<sup>57</sup>
42. A follow-up IEP meeting was held for Paula on May 14, 2014. The team continued with the drafting of goals, but significantly reduced and limited the number of goals in the IEP. Paula's Mother expressed her concerns, because the goals targeted skills that Paula had

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<sup>55</sup> *Id.*

<sup>56</sup> Ex. R, p. 12.

<sup>57</sup> Interview with Paula's Mother.

already learned; Paula's Mother felt that the goals were not helpful or appropriate for Paula because she would quickly master the goals and then the IEP team would need to reconvene. In response, School Psychologist stated that the School District could "always add more goals," and that "just because goals aren't in the IEP it doesn't mean we can't work on them."<sup>58</sup>

43. At the end of the May 14 meeting, Paula's Mother asked about keeping Paula at Private Autism Center. She described her tour of Elementary School, including the fact that the environment was not appropriate for Paula and that the staff at Elementary School unequivocally stated that they did not know how to implement Paula's IEP. Paula's Mother reiterated that Paula was making excellent progress at Private Autism Center. In response, Special Education Director stated that Paula's progress at Private Autism Center was "not in dispute," but that Private Autism Center was not an option. Special Education Director referenced her May 9 letter, but Paula's Mother had not received it and thus was not familiar with its contents. Rather than simply explain herself, Special Education Director refused to describe the contents of the letter, and repeatedly said to Paula's Mother, "it's in the letter." When Paula's Mother repeatedly asked for explanations of how Paula would be appropriately served at Elementary School (or anywhere else in the School District), Special Education Director refused to directly answer her questions or provide any specific information about what was being proposed for Paula. Instead, she simply kept vaguely repeating that the School District could serve Paula in-district and could provide her with FAPE.<sup>59</sup>
44. The meeting ended without the School District ever making a specific offer of placement for Paula, except to state that it would not be Private Autism Center. Paula's Mother rejected the School District's removal of Paula from Private Autism Center.
45. The School District stopped paying Paula's tuition at Private Autism Center at the end of June 2014. Since then, Paula has continued to attend Private Autism Center at her parents' expense.

#### **D. Stanley**

46. Upon receiving word from Special Education Director that School District would no longer enter into contracts with Private Autism Center, the Private Autism Center staff notified Stanley's Mother (who never received the letter from Special Education Director). Stanley's Mother then called Special Education Director and asked why Special Education Director told her that Stanley could stay at Private Autism Center on April 23, but was now rescinding that position. Special Education Director responded that the School District could not sign a contract with Private Autism Center because the contract "is illegal."

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<sup>58</sup> Interview with Paula's Mother.

<sup>59</sup> Interview with Paula's Mother.



Special Education Director told Stanley's Mother that Stanley would go to the BOCES School. Special Education Director did not identify the specific program within BOCES School that was being proposed, nor did Stanley's Mother ever receive any formal notice of this change.<sup>60</sup>

47. Given that Stanley's IEP provided that his placement would be at Private Autism Center, the SCO finds that Special Education Director unilaterally changed Stanley's placement outside of the IEP process, without any input from Stanley's parents.
48. A follow-up meeting was held for Stanley on May 28. Stanley's Mother attended, as did Special Education Director and BOCES School Principal. Stanley's Mother explained her concerns, including that Stanley was finally making educational and behavioral progress for the first time at Private Autism Center, and that continuing to change Stanley's placement every year was detrimental to him as a child with autism. Special Education Director and BOCES School Principal did not address or respond to Stanley's Mother's concerns. They did not specifically discuss Stanley or his needs at all, except to vaguely assure Stanley's Mother that the BOCES placement would provide him with FAPE. The May 28 meeting ended with Special Education Director suggesting that Stanley's Mother tour the BOCES School. At the May meeting, the placement at the BOCES was presented as a "take it or leave it" proposition. There was no discussion of continuing Stanley's placement at Private Autism Center.<sup>61</sup>
49. The School District ceased paying for Stanley's placement at Private Autism Center after May 30, 2014.<sup>62</sup> Stanley continues to attend Private Autism Center at his parents' expense (through their insurance), but the insurance only covers three hours per day. The total amount paid by the insurance since May 2014 is \$16,021.60.<sup>63</sup> Since ceasing payment for Stanley's program at Private Autism Center, the School District has not had any communication with Stanley's Mother, whether to modify his IEP, to provide a date for him to start school at BOCES School, or for any other reason.
50. On June 11, 2014, Stanley's Mother went to tour the BOCES School, to get a better sense of what was being proposed for Stanley.<sup>64</sup> BOCES School Principal was not there, so BOCES School Assistant Principal led the tour. She did not know anything about Stanley or his educational program and did not know which program within the BOCES School Stanley would be attending. Stanley's Mother did not feel that BOCES School would be appropriate for Stanley, based upon her observations.

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<sup>60</sup> Interview with Stanley's Mother.

<sup>61</sup> Interview with Stanley's Mother; Interview with Private Autism Center Clinical Director.

<sup>62</sup> *Id.*; Interview with Special Education Director.

<sup>63</sup> Interview with Private Autism Center Clinical Director; Ex. DD.

<sup>64</sup> The School District's Response states that Stanley's Mother did not show up for her appointment, but that statement is false.

51. Another follow-up meeting had been scheduled to discuss Stanley's IEP in late June, but having been told by Special Education Director that placement at the BOCES School was her only option, Stanley's Mother cancelled the meeting.<sup>65</sup>

#### **IV. The School District's descriptions and determinations of Students' placements.**

52. Special Education Director does not dispute that she went into the IEP meetings for Barbara, Nicholas, Paula and Stanley having already made the decision to change the Students' placements from Private Autism Center to schools within either the School District or the BOCES.<sup>66</sup> In fact, Special Education Director admits that she had been thinking about removing School District students from Private Autism Center since July 2013.<sup>67</sup> After receiving information from BOCES School about their programs in February 2014, Special Education Director decided that School District students with autism would be placed at the BOCES School.<sup>68</sup>

53. Special Education Director claims that she was dissatisfied with the level of "educational benefit" being provided at Private Autism Center, but the SCO does not find her to be credible on this point. Special Education Director was unable to identify any specific reason for her dissatisfaction; she stated that she felt the Students were making educational progress "to some degree" at Private Autism Center, but she could not provide any further clarification. Special Education Director visited Private Autism Center in or around September or October of 2013, and claims that, in her opinion, there was not much academic instruction being provided, but she admits that she never articulated any concerns with anyone in the School District or at Private Autism Center, and she never took any steps (such as convening IEP meetings) to address those concerns. Special Education Director claims that she "didn't trust the data" regularly provided by Private Autism Center showing that the Students were making progress, but she admits that she never raised any concerns about the Students' educational progress with either the Parents or Private Autism Center.<sup>69</sup>

54. If Special Education Director were truly concerned with the Students' educational progress or whether they received a FAPE, Special Education Director would have taken steps to address those concerns in some way, whether by further observing the Students at Private Autism Center, discussing those concerns with the Private Autism Center staff, evaluating the Students, or convening IEP meetings for the Students, *i.e.*, she would have used the appropriate procedures and tools provided by the IDEA to determine the Students' individual needs and whether those needs were being met. She did none of these things,

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<sup>65</sup> Interview with Stanley's Mother.

<sup>66</sup> Interview with Special Education Director.

<sup>67</sup> *Id.*

<sup>68</sup> Interview with Special Education Director.

<sup>69</sup> *Id.*

however, leading the SCO to conclude that these alleged “concerns” are simply pretexts for Special Education Director’s unilateral decision to change the Students’ placements outside of the IEP process and without allowing the Parents any meaningful input into that decision.

55. Special Education Director argues that moving Barbara, Nicholas, and Stanley from Private Autism Center to the BOCES School is not a “change of placement” that needed to be made by the IEP team, because the School District was simply moving the Students from one “separate school” to another, such that the change was simply a change of location subject to the School District’s discretion. According to Special Education Director, an IEP need only identify the setting, for purposes of the LRE requirement, where a student’s IEP will be implemented, and that if the IEP states “separate school,” then a school district is free to select any school that qualifies as a separate school, even if it offers an entirely different environment, educational programming, therapy options or behavioral interventions.<sup>70</sup>

56. As will be discussed below, Special Education Director’s argument is legally baseless, but even from a factual perspective, this argument cannot be taken seriously. Within the IEP meetings themselves, as noted above, School District staff consistently describe the BOCES School as a “different setting” from Private Autism Center because BOCES School is a “school-like setting” whereas Private Autism Center is a day treatment therapy center. Further, the School District’s own prior written notices refusing to continue the Students’ placements at Private Autism Center (which were not provided to the parents until well after the decision to remove the Students from Private Autism Center)<sup>71</sup> go to great lengths to describe the differences between Private Autism Center and a school setting (into which the School District was proposing to move the Students):

[Private Autism Center] is a therapy center is not defined as a school. (*sic*)  
[Private Autism Center] provides behavior therapy as the primary focus with some educational components. It is not a student centered educational focus (*sic*) with behavior therapy included.<sup>72</sup>

57. Thus, the SCO finds that Private Autism Center provide different services, with different staff ratios and different environments from those provided by either program in the BOCES School. To her credit, Special Education Director has never suggested that moving Paula from Private Autism Center and Elementary School was not a change of placement, and the SCO finds that as compared to Private Autism Center, Elementary School

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<sup>70</sup> Interview with Special Education Director.

<sup>71</sup> The SCO notes that the PWNs for Paula, Barbara and Nicholas were not provided until August 25, 2014, four months after the April 23 IEP meetings and well after the School District stopped paying for Paula’s and Barbara’s placements at Private Autism Center. (Ex. T, p. 1; Ex. U, p. 3; Ex. V, p. 1.)

<sup>72</sup> Ex. T, p. 1; Ex. U, p. 3; Ex. V, p. 1.

represents a different point on the LRE continuum, a different environment, different staff ratios and different services.

**V. Failure to fully fund Nicholas’s and Stanley’s placements during the 2013-2014 school year.**

58. During the course of investigating this complaint, the SCO discovered that during the 2013-2014 school year, before it ceased funding the placements for Nicholas and Stanley, the School District did not fully fund the cost of their programming at Private Autism Center. The entire time that Nicholas and Stanley have attended Private Autism Center, their Parents’ have paid a portion of the tuition, via their private insurance and co-pays.<sup>73</sup>
59. From August 2013 through September 2014, Nicholas’s Parents have paid, through their private insurance and co-pays, \$36,117.75 to Private Autism Center.<sup>74</sup>
60. From August 2013 through May 2014, Stanley’s Parents have paid, through their private insurance, \$27,203.20.

**CONCLUSIONS OF LAW**

1. Under the Individuals with Disabilities Education Act, public school districts are required to provide children with disabilities with a “free appropriate public education,” 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 (IEP) developed according to the Act’s procedures. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. The Act contains extensive procedural requirements relating to the development of the IEP, including requirements that the IEP be a written document, reviewed at annually, that it be developed by a team of individuals with knowledge about the child, including the child’s parents, and that it be based upon the input of the IEP meeting participants as well as evaluative data derived from valid, scientifically based assessments conducted in accordance with the Act’s requirements. *See, e.g.*, 34 C.F.R. §§ 300.301-300.304; 300.320 – 300.324.
2. In the seminal case of *Board of Education v. Rowley*, the United States Supreme Court highlighted the importance of compliance with the IDEA’s procedural requirements, particularly given the paucity of specificity provided by the Act with respect to the substantive requirements for FAPE.

When the elaborate and highly specific procedural safeguards embodied in [20 U.S.C.] § 1415 are contrasted with the general and somewhat imprecise

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<sup>73</sup> Interview with Private Autism Center Clinical Director.

<sup>74</sup> *Id.*; Ex. DD.

substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard. 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.

*Board of Education v. Rowley*, 458 U.S. 176, 205 (1982).

3. Accordingly, *Rowley* developed the “two pronged” analysis for IEPs that continues to be applied by courts to this day:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

*Id.*

**I. The School District denied Students a FAPE by predetermining their placements, denying their Parents meaningful participation in the IEP process, and failing to develop IEPs based upon the Students' individual needs.**

4. Among the procedural requirements for the development of IEPs is the requirement that school districts consider parental suggestions and requests and to the extent appropriate, to incorporate them into the IEP. 34 C.F.R. § 300.501(b); *O'Toole v. Olathe Dist. Schools*, 144 F.3d 692, 107 (10th Cir. 1998). A school district is said to have impermissibly “predetermined” a child's placement if it makes its determination prior to the IEP meeting, including when the agency presents one placement option at the IEP meeting and is unwilling to consider others. *R.L. v. Miami-Dade County Sch. Bd.*, 757 F.3d 1173 (11<sup>th</sup> Cir. 2014)(school district personnel cannot come into an IEP meeting with closed minds, having already decided material aspects of the child's educational program without parental input); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6<sup>th</sup> Cir. 2004)(where school district had decided in advance of the IEP meeting not to offer a particular program that the parents sought, regardless of the student's individual needs and the effectiveness of his private program, placement was predetermined and denied FAPE); *Ms. S. ex. rel. G. v. Vashon Island School Dist.*, 337 F.3d 1115, 1131 (9th Cir.

2003)(“A district may not enter an IEP meeting with a “take it or leave it” position)(*superseded on other grounds*, 341 F.3d 1052(9<sup>th</sup> Cir. 2003)). Predetermination of placement deprives the child’s parents of meaningful participation in the IEP process, and amounts to a *per se* denial of FAPE. *Deal, supra.*<sup>75</sup>

5. Moreover, the law is unequivocal in requiring that a school district develop an IEP based upon each child’s individual needs, and that it make a formal, written offer of a specific placement. *Sytsema, supra*, 538 F.3d at 1315-16, *citing with approval, Union School Dist. v. Smith*, 15 F.3d 1519 (9<sup>th</sup> Cir. 1994)(formal, written offer of placement must be included in the IEP); *see also, Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6<sup>th</sup> Cir. 2001); *J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672 (4<sup>th</sup> Cir. 2007)(school district violated IDEA by offering an IEP that did not specify a placement for the student). Further, “a school district cannot abdicate its responsibility to make a specific offer [by] allowing parents to choose from among several programs ... After discussing the advantages and disadvantages of various programs that might serve the needs of a particular child, the school district must take the final step and clearly identify an appropriate placement from the range of possibilities.” *Glendale Unified Sch. Dist. v. Almasi*, 122 F.Supp.2d 1093, 1108 (C.D. Cal. 2000), *citing Union, supra*.
6. In describing a student’s placement, while the IEP need not necessarily identify the specific school or location in which the child’s IEP will be implemented, the description must be specific enough to put the parents on notice of the nature of the placement, the environment, and the types of services that student will receive. *J.K. v. Alexandria City School Bd., supra at 682* (IEP’s proposal to place student in an unspecified private day school did not provide sufficient information for the parents to evaluate whether the placement was appropriate); *Mill Valley Elem. Sch. Dist. v. Eastin*, 32 IDELR 140 (N.D. Cal. 1999)(IEP denied FAPE where it provided “skeletal” outline of placement and committed to nothing more specific than a “modified regular education” setting). The failure to make a specific, written offer of placement in the IEP is a denial of FAPE. *Id.*
7. The SCO concludes that the School District predetermined the placements of all four Students, thereby denying them a FAPE. Indeed, there is no question that the School District went into the April 23 and subsequent May follow-up IEP meetings having already predetermined the placements for all four Students – Special Education Director admits as much. In spite of knowing virtually nothing about the Students, their program at Private Autism Center, or whether any in-district options were appropriate for them - and having undertaken no effort to obtain any of that information - the School District

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<sup>75</sup> Usually, procedural violations of IDEA will only result in a denial of FAPE if those violations resulted in a denial of educational benefit or resulted in an IEP that was not reasonably calculated to allow the child to receive educational benefit. *See Rowley, supra*. Some procedural violations, however, are so egregious that no examination of resulting harm is required; resulting harm is presumed, such that the procedural violation is deemed a “per se” denial of FAPE. Predetermination is such an procedural violation, as is the failure to make a specific offer of placement.

nonetheless was committed to removing them from Private Autism Center and placing them “in-district.” No consideration was given to the Parents’ requests that continued placement at Private Autism Center be considered; Special Education Director declared that Private Autism Center was not an option. Additionally, the Students’ IEPs were written to remove numerous goals; these revisions were not based upon the Students’ individual needs, but to make them easier for an in-district placement to implement.

8. Equally egregious is that the School District predetermined that Private Autism Center would not be an option for Students without making any specific offer of placement as an alternative. For Nicholas, Barbara and Stanley, Special Education Director recommended that their parents/grandparents tour the programs at the BOCES School, but did not specify which program the children would be placed in, and did not identify a specific program in any of the Student’s IEP, even after the May follow-up meetings. In fact, Special Education Director made these recommendations without being able to articulate the difference between Program A and Program B and without knowing anything about how either program could appropriately implement the Students’ IEPs. In the end, each Student’s IEP simply described each student’s placement as “separate school,” without providing the parents with any information about which separate school or the types of programming or services being offered. The lack of a formal, written offer was the result of the School District’s lack of any consideration of the individual needs of each student, and deprived the Students of a FAPE.
9. With respect to Stanley, the SCO found that, notwithstanding the School District’s initial predetermination of its decision to remove him from Private Autism Center, the School District ultimately agreed to, and the IEP specifically provides for, Stanley’s continued placement at Private Autism Center. By reversing its position the following month and sending Stanley’s Mother to the BOCES School to “check out” the programming there, the School District refused to implement the IEP that it had agreed to for Stanley, and then changed Stanley’s IEP outside of an IEP meeting, without allowing his mother any meaningful input in the process and without formally offering an alternative placement. Either way, the School District denied Stanley a FAPE.<sup>76</sup>
10. With respect to Paula, after predetermining that her IEP would no longer be implemented at Private Autism Center, the School District made no offer of placement at the April 23 IEP meeting. (FF 20(j).) Instead, Paula’s Mother was informed via email that the School District was proposing to implement Paula’s IEP at the Significant Support Needs program at Elementary School. While the placement offer is at least specific, it was obviously made outside of the IEP process and with no parental input or

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<sup>76</sup> It is unclear whether Special Education Director lied to Stanley’s Mother and had no intention of honoring her agreement, or was truthful in committing to allow Stanley to remain at Private Autism Center, and then later predetermined Stanley’s placement by unilaterally backing out of that commitment. The result is the same, in any event.

involvement in the decision. It was also made without anyone from the School District knowing that Elementary School was unable to implement Paula's IEP. As such, the placement offer was predetermined, not included in the IEP, and made without any consideration (or knowledge) of Paula's individual needs. For all of these reasons, the School District denied Paula a FAPE.

11. The School District makes a number of arguments in defense of its actions, none of which have any legal merit, and which betray an alarming lack of understanding of some of the most fundamental requirements of IDEA. First, the School District argues that the change from Private Autism Center to the BOCES School (for Barbara, Nicholas and Paula) was not a true change of placement, but rather simply a change of location that was subject to the discretion of the School District.
12. As noted above, that contention is factually wrong and in contradiction with the School District's position as articulated in both the IEP meetings and in its PWNs. The settings were unquestionably different, with different services, different environments, different curricula, and different interventions. BOCES School Principal unequivocally stated that BOCES School is a different setting from Private Autism Center because it is more "school like." The PWNs to the Parents emphasized that Private Autism Center "is a therapy center," not a school. Thus, the suggestion that there was no difference between Private Autism Center and BOCES School except that they were different locations or buildings – or even that the School District *believed* there was no difference between the two – is baseless.
13. Further, Special Education Director appears to be under the mistaken impression that there is no difference between education setting for LRE purposes and placement, and that location is *never* a relevant aspect of placement. According to Special Education Director, the IEP need not provide any more specificity in identifying placement than "separate school," or "general education classroom less than 40% of the time," and that the choice of separate school or classroom is entirely at the discretion of the school district, even where different "separate schools" offer drastically distinct programming and services.<sup>77</sup>
14. The law is clear, however, that while school districts have discretion to implement an IEP at one location or another, that discretion is dependent upon the two locations offering the same services and being essentially identical for purposes of the child's educational program. Though the federal law and regulations do not provide a clear definition of what constitutes "placement," the Colorado rules, in describing what constitutes a change of placement, provide some guidance. On one hand, the Rules provide as follows:

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<sup>77</sup> Interview with Special Education Director.



The terms “placement” or “educational placement” are used interchangeably and mean the provision of special education and related services and do not mean a specific place, such as a specific classroom or specific school.

ECEA Rule 4.03(8). On the other hand, the Rules also describe a change of placement as a “change in the amount of a given service,” a change from a public school setting to a private school or approved facility school, or a change of setting for LRE purposes. ECEA Rule 4.03(8)(b)(i) and (ii). Finally, with respect to a change of building or location, the Rules go on to state that:

A change in building or location ***that is not a change in placement***, as described in Section 4.03(8)(b), may be accomplished without convening the child’s IEP team or conducting a reevaluation. Decisions changing location or building should be made ***with due consideration for the impact on the child’s total education program***. A location or building decision ***that does not constitute a change in placement*** does not require prior written notice or an IEP Team meeting.

ECEA Rule 4.03(8)(b)(iii)(emphasis added).

15. Thus, it is clear that while it is possible that a change in building or location might not constitute a change of placement, the Rules explicitly contemplate that a change in building or location can constitute a change of placement. *Id.* Further, “placement” is not simply the LRE setting in which the child will be educated – it is comprised of the special education and related services AND the LRE setting AND potentially the building or location. *Id.* Furthermore, at least one federal court has held that for a child with autism, for whom extreme difficulty with transitions is characteristic of his or her disability, a change from one school building to another can constitute a change of placement. *See, P.V. v. School Dist. of Pennsylvania*, 2013 WL 618540 (E.D. Pa. 2013).
16. As noted above, courts have held that while IEPs do not necessarily need to identify a specific school in which a child will be educated, the child’s placement must be described with enough specificity to put the parents on notice of the services and setting being offered, so that the parents may effectively exercise their procedural safeguards. *Sytsema, supra; Union School Dist. v. Smith, supra; Knable v. Bexley City Sch. Dist., supra; J.K. v. Alexandria City Sch. Bd., supra.*
17. Accordingly, transferring Barbara, Nicholas and Stanley from Private Autism Center was clearly more than just a change of location – it was a significant change in the Students’ placements, both as a matter of fact and law.
18. The School District next argues that the contracts proposed by Private Autism Center for the Students’ placement there violated the Colorado Constitution because the contracts

included a clause indemnifying Private Autism Center from liability for failing to provide the Students with a FAPE. According to the School District, this clause violates the Colorado Constitution's prohibition against a government entity becoming responsible for any liability incurred by a third party. *See*, Colo. Const. art. XI, § 1.

19. First, as noted above, as soon as the School District raised this objection with Private Autism Center, Private Autism Center agreed to remove the offending language, such that School District's constitutional argument is moot. Second, as a matter of law, the Colorado Constitution's anti-indemnification provision is inapplicable to this scenario, because Private Autism Center could never be liable for providing FAPE given that the Students were placed there by the School District. When a school district implements a student's IEP in a private school at public expense, the obligation to provide FAPE, and thus any liability for failing to do so, remains on the school district. 34 C.F.R. § 300.101 *et seq.* The Students were placed by the School District in Private Autism Center to have their IEPs implemented there at public expense. Accordingly, the liability for providing FAPE was always with the School District.
20. Finally, the School District argues that it could not continue the Students' placement at Private Autism Center because Private Autism Center is not authorized or formally approved by the Colorado Department of Education (CDE) and does not employ highly qualified special education teachers. Both arguments are meritless. First, there is no requirement that a private school at which a school district implements an IEP be "authorized" or "approved" by the CDE. Second, private schools are explicitly exempted from the IDEA's "highly qualified special education teacher" requirement. *See* 34 C.F.R. § 300.138.

**II. The School District violated the Students' right to Prior Written Notice regarding the decision to discontinue Students' placement at Private Autism Center.**

21. The IDEA requires that a "reasonable time" before a school district proposes or refuses "to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child," the school district must provide written notice to the parents 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 of this part ...;

- 5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- 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 that are relevant to the agency's proposal or refusal.

34 C.F.R. § 300.503(b).

22. In this case, the PWNs provided to the Parents regarding the School District's decision to discontinue funding the Students' placement at Private Autism Center violated the Parents' rights under the IDEA. First, only Nicholas's parents were provided with a PWN document on April 23, 2014,<sup>78</sup> but that document contained none of the information required by 34 C.F.R. 300.503(b). All four Parents were later provided with PWNs on August 25, 2014, but those notices were woefully untimely, coming four months after the School District's decision to discontinue funding for the Students at Private Autism Center, and for two of the students (Stanley and Paula), well after the funding had already been cut off.
23. Under *Rowley*, where a school district violates the IDEA's procedural requirements, the analysis includes whether that procedural violation denied the student a FAPE. *Rowley, supra*. Here, the SCO has already concluded that all four Students were denied FAPE, such that there is no need to examine the impact of the School District's failure to provide PWN.

**III. The School District violated the IDEA's procedural requirements by failing to include a general education teacher in Paula's IEP meetings.**

24. The IDEA requires that a school district ensure that a child's IEP team includes a general education teacher if "the child is, *or may be*, participating in the regular education environment." 34 C.F.R. § 300.321(a)(2) (emphasis added). In this case, though Paula's IEP called for her to be educated in the general education setting part of the time, the School District failed to include a general education teacher at either of her IEP meetings. Accordingly, the School District violated the IDEA's procedural requirements in developing Paula's IEP.
25. As with the violation of the PWN procedures, the SCO has already concluded that all four Students were denied FAPE, such that there is no need to examine the impact of the School District's failure to include a general education teacher in Paula's IEP.

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<sup>78</sup> Ex. S, p. 3.

**IV. The School District violated the IDEA’s requirement to provide a FAPE to Nicholas and Stanley to the extent that it did not fully fund their placements at Private Autism Center during the 2013-2014 school year.**

26. The IDEA defines a “free appropriate public education” as “special education and related services that are provided at public expense, under public supervision and direction, and without charge.” 34 C.F.R. § 300.17(a). In addition to its other violations of the IDEA, the School District violated Stanley’s and Nicholas’s right to FAPE because to the extent that their Parents contributed to the cost of their placement during the time period that the School District placed the Students at Private Autism Center, the placement was not at public expense or without charge to the Parents.

**V. The School District violated the ECEA by significantly changing the Students’ placement without considering reevaluation.**

27. The Colorado Rules provide that “a significant change in placement shall be made upon consideration of reevaluation.” ECEA Rule 4.03(8)(b)(ii)(B). The School District’s proposed changes of placement for the Students’ were all significant changes of placement, as they involved changes to the Students’ IEP goals, levels of service, intensity of instruction, and setting. The School District did not conduct reevaluations or give any consideration to reevaluation prior to changing the Students’ placements. Accordingly, the School District violated the Students’ rights under the IDEA, and as noted above, deprived them of a FAPE.

**REMEDIES**

The SCO has concluded that the School District committed the following violations of IDEA:

- a) Failure to develop an IEP according to the unique needs of a child with a disability, and predetermination of placement (34 C.F.R. §§ 300.320, 300.324 and 300.501(b));
- b) Significantly changing a child’s placement without reevaluation (ECEA Rule 4.03(8)(b)(ii)(B));
- c) Failure to develop an IEP in accordance with the procedural requirements of the IDEA, including:
  - a. providing meaningful participation to the child’s parents (34 C.F.R. § 300.320 and 300.324);
  - b. including a sufficient description of the child’s placement (34 C.F.R. § 300.320);

- c. including a general education teacher in the IEP meeting, where the student may be participating in general education (34 C.F.R. § 300.321(a)(2));
  - d. providing sufficient and timely prior written notice (34 C.F.R. § 300.503).
- d) Failure to provide special education and related services at public expense and at no charge to the parents (34 C.F.R. § 300.17).

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

- 1) By no later than November 14, 2014, the School District must submit to the Department a proposed corrective action plan (CAP) that addresses each and every violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Students and all other students with disabilities for whom the School District is responsible. The CAP must, at a minimum, provide for the following:
  - a. Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violations, no later than January 16, 2015.
  - b. Effective training concerning these policies and procedures, which include effectively developing and implementing an Individualized Education Program, must be conducted for Special Education Director and all intended designees (which may include case managers, special education teachers, building administrators, district administrators, disability specific service providers, and general education teachers). Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department no later than March 27, 2015.
- 2) By no later than October 31, 2014, the School District shall reimburse the Parents for the costs they have incurred (or which have been incurred on their behalf, via insurance)<sup>79</sup> for services provided by Private Autism Center, through and including the date of this Decision, as follows:
  - a. To Barbara's Grandparents: \$1971.00 (for the first 9 days of October);

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<sup>79</sup> Parents receiving reimbursement for amounts paid by insurance may be required to reimburse their insurance companies.

- b. To Nicholas's Parents: \$37,117.75 (the amount the Parents paid from August 2013 through September 2014, plus the first 9 days of October 2014);
  - c. To Stanley's Parents: \$44,205.80 (the amount the Parents paid from August 2013 through September 2014, plus the first 9 days of October 2014);
  - d. To Paula's Parents: \$17,028.05.
- 3) The School District shall immediately (i.e., on October 10, 2014) resume public funding for the full costs of Students' tuition at Private Autism Center, including providing transportation to the Center. The Parents shall not be required to pay any part of these tuition or transportation costs, whether through private insurance or otherwise;
- 4) The School District shall be prohibited from changing the Students' placement until all training and other corrective action ordered herein has been completed. Thereafter, the School District shall be prohibited from changing the Students' placement until:
- a. The School District conducts comprehensive evaluations of the Students, in accordance with the requirements of IDEA;
  - b. Staff members from any new placement proposed by the School District, which staff would have responsibility for providing special education and related services to the Students, have observed the Students in their at Private Autism Center to understand the nature of Students' educational and behavioral functioning;
  - c. The School District convenes an IEP meeting, facilitated by a neutral facilitator (not employed by the School District), for each Student that complies with all procedural requirements of IDEA, particularly all of the provisions that the SCO has found the School District to have violated, and develops an IEP that includes a description of placement sufficient to allow the Parents to understand what is being proposed.

A complete copy of any new IEP developed for any of the Students, including prior written notice, shall be provided to the Department within five days after the IEP meeting occurs.

The Department will approve or request revisions of the CAP. Subsequent to the approval of the CAP, the Department will arrange to conduct verification activities to verify the School District's timely compliance with this Decision.

Please submit the documentation detailed above to the Department as follows:

Colorado Department of Education  
Exceptional Student Services Unit  
Attn: Joyce Thiessen-Barrett  
1560 Broadway, Suite 1175  
Denver, CO 80202-5149


Failure by the School District to meet the timelines set forth above will adversely affect the School District's annual determination under the IDEA and will subject the School District to enforcement action by the Department.

**CONCLUSION**

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) 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.

This 9<sup>th</sup> day of October, 2014.

  
Wendy J. Armstrong

Wendy J. Armstrong, Esq.  
State Complaints Officer

## APPENDIX

### **Complaint, dated August 6, 2014, pp. 1-26**

- Ex. A – School District emails
- Ex. B - School District emails
- Ex. C – IEP (Barbara)
- Ex. D – IEP (Nicholas)
- Ex. E – IEP (Stanley)
- Ex. F – IEP (Paula)
- Ex. G – May 9 correspondence from School District to Private Autism Center
- Ex. H – May 13 correspondence from Private Autism Center to School District
- Ex. I – Affidavit of Private Autism Center Clinical Director
- Ex. J – October 2013 letter from Pennsylvania BCBA
- Ex. K – School District emails
- Ex. L – January 29, 2014 doctor’s letter
- Ex. M – BOCES Out of District Placement Expectations
- Ex. N – June 11, 2014 correspondence from Parents’ counsel
- Ex. O – May 23, 2014 correspondence from Nicholas’s Mother

### **School District Response, dated August 28, 2014, pp. 1-4**

- Ex. P – May 9 correspondence from School District to Private Autism Center (see Ex. G)
- Ex. Q – May 14, 2014 contract between Private Autism Center and School District
- Ex. R – School District policies and emails
- Ex. S – educational records related to Nicholas
- Ex. T – educational records related to Paula
- Ex. U – educational records related to Stanley
- Ex. V – educational records related to Barbara

### **Parents’ Reply, dated September 8, 2014, pp. 1-9**

- Ex. W – legal authority regarding highly qualified teachers
- Ex. X – CDE Autism Program Quality Indicators
- Ex. Y – progress reports for Students
- Ex. Z – May 9 correspondence from Special Education Director to Parents
- Ex. AA – Concerns re Stanley’s placements in School District
- Ex. BB – P.V. v. School District of Philadelphia (case law)
- Ex. CC – recording of IEP meetings for Nicholas (April 23 and May 21)
- Ex. DD – Insurance totals for Students