

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 2016:511  
Harrison School District Two**

**DECISION**

**INTRODUCTION**

Complainant is the mother of a child (“Student”) who is identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup> The Complaint was properly filed on May 5, 2016, such that the deadline for issuing a decision is July 1, 2016. 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.

**COMPLAINT ALLEGATIONS**

This case centers on a decision issued on October 9, 2014 by the underlying SCO in Case No. 2014:516. *See Harrison School District Two*, 114 LRP 46713 (hereinafter, “Decision”). That Decision found numerous violations by the School District in its efforts to remove Student from Private Autism Center, where Student has been educated at the School District’s expense, to an “in-district” placement at a school operated by the Pikes Peak BOCES (“BOCES School”). The SCO found, *inter alia*, that the determination to remove Student from Private Autism Center was impermissibly predetermined by the School District and that the proposed placement was not based upon Student’s individual needs.

As a remedy, the SCO prohibited the School District from changing Student’s placement until, *inter alia*:

- 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 Student, have observed the Student in Private Autism Center to understand the nature of Student’s educational and behavioral functioning; and

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<sup>1</sup> The IDEA is codified at 20 USC § 1400 *et seq.* The corresponding IDEA regulations are found at 34 CFR §300.1 *et seq.*

- The School District convenes an IEP meeting, facilitated by a neutral facilitator (not employed by the School District), 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.

Decision, *supra*.

Following the issuance of the Decision, on March 29 and April 5, 2016, the School District developed a new IEP for Student. Student subsequently filed this State Complaint, alleging that the IEP violated the IDEA and the express terms of the Decision.

The SCO accepted for investigation the following issues resulting from IEP meetings held and decisions made regarding Student's educational programming on March 29 and April 5, 2016:

1. Whether the School District violated the express terms of the Colorado Department of Education's (Department) October 9, 2014 Order<sup>2</sup> (hereinafter, "Decision") when it changed Student's placement from Private School;<sup>3</sup>
2. Whether the School District violated the express terms of the Department's October 9, 2014 Order when it failed to use a neutral facilitator to facilitate the IEP meetings;
3. Whether the School District's decision to change Student's placement from Private School was based on Student's individual needs;
4. Whether the School District wrongfully predetermined changing Student's placement from Private School; and
5. Whether School District failed to make a specific offer of placement.

To resolve the Complaint, the following is proposed, in summary:

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<sup>2</sup> The order in question is a state complaint decision issued by the underlying SCO in State Complaint No. 2014:516, *see Harrison School District Two*, 114 LRP 46713 (CO SEA 2014), attached as Exhibit 1 to Student's Complaint in this case. The decision can be found on the Department's website at <http://www.cde.state.co.us/spedlaw/sc2014-516>. References to page numbers in the Decision will be to the Decision as found on the Department's website.

<sup>3</sup> In the body of this Decision, Private School is referred to as "Private Autism Center."

- a. Student to be placed at Private School through the 2016-17 school year, including extended school year and transportation;
- b. an amendment of the Department's October 9, 2014 Order preventing a change of Student's placement to another separate school without Mother's consent;
- c. that any proposed change of placement to a less restrictive environment than Private School be subject to approval by a privately employed BCBA mutually selected by School District and Mother who has observed Student at Private School, has conducted independent evaluations, has observed any proposed placements, has had access to Student's complete educational history, has conducted any interviews deemed necessary, and is a member of Student's IEP team; and
- d. monetary reimbursement to Mother for any costs incurred in providing educational services to Student at Private School.

### **DISTRICT'S RESPONSE**

The School District generally denied all allegations and then provided specific responses to the numbered allegations in the Complaint. At least one of the responses, however, admitted a violation alleged. Specifically, Allegation 2 asserts that the School District failed to use a neutral facilitator to facilitate Student's IEP meetings. The Decision specified that the neutral facilitator may not be an employee of the School District. In the School District's response, however, the facilitator for the IEP meeting is identified as School Psychologist, a School District employee who conducted the evaluation of Student prior to the IEP meeting. Because the identified facilitator is an employee of the School District, the School District has admitted to violating that portion of the Decision, and the SCO so finds.

### **FINDINGS OF FACT**

Based upon a thorough review of the record, including listening to the recording of Student's IEP meetings as well as interviews with witnesses knowledgeable about the facts of the case, the SCO finds as follows:

#### **Student's Services at Private Autism Center**

1. There is no dispute Student is a child residing within the geographic boundaries of the School District. Student is a child with autism and is identified and eligible for special education and related services. Following the issuance of

the Decision in October 2014, Student continued to be educated at Private Autism Center at public expense, pursuant to an IEP.

2. Student is educated at Private Autism Center using the Skills curriculum, a comprehensive curriculum for students with autism. The Skills curriculum incorporates academics, play, adaptive skills, cognition, executive function, language, motor, and social skills in every activity and piece of instruction. Thus, through the Skills curriculum, academics are embedded in everything Student does. Student is learning letters and numbers, the value of numbers, mathematics, skills, community outreach, phonics blends, skip counting, and numerous other skills. Private Autism Teacher explained that Student is challenged academically as a way of working to improve Student's behaviors; academics are demands that could cause negative behaviors, and are used to reinforce to Student that Student is expected to learn, and that engaging in negative behaviors will not diminish that expectation.<sup>4</sup>
3. To help Student improve behaviors, all of the staff at Private Autism Center who work with Student receive intensive training in scientifically-proven behavioral interventions for students with autism, consistent with Student's individualized behavior support plan.<sup>5</sup>
4. Behaviorally, Student has made excellent progress at Private Autism Center, though his behavioral needs remain intensive. Student requires 1:1 support at all times. Student's behaviors include severe self-injurious behaviors such as head banging (on his knees, furniture, the floor, and people), chinning, and body tensing. Student has broken toys, cut himself, broken his iPad, and become so upset that Student needs multiple people to block Student and keep Student safe. Private Autism Teacher explained that Student's behaviors have improved to a marked degree in that his severe behaviors are more infrequent, but the behaviors are never gone, and they tend to fluctuate. Indeed, this past quarter, Student's negative behaviors slightly increased.<sup>6</sup>
5. Private Autism Center reported Student's progress to the School District via detailed monthly progress reports. These reports included information related to Student's behaviors and academic progress.<sup>7</sup>

### **Student's Evaluation and IEP Meeting**

6. In March 2016, the School District conducted a comprehensive evaluation of Student in order to determine his current levels of functioning and educational

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<sup>4</sup> Interviews with Private Autism Teacher and Private Autism Center Director.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; see also Ex. F.

needs. The evaluation report was completed on March 8, 2016. One of the evaluators who evaluated Student was School Psychologist.<sup>8</sup>

7. Following the completion of the evaluation, the School District scheduled an IEP meeting for Student. An IEP draft was prepared by Elementary School Teacher, who leads the autism program at Student's home elementary school (*i.e.*, the school in the School District that Student would attend if Student were not disabled). Elementary School Teacher had never met or observed Student; rather, he prepared draft IEP goals based upon information from the evaluation report.<sup>9</sup>
8. In setting up the IEP meeting, the School District did not invite individuals from Private Autism Center because, according to School Psychologist, it is not the School District's responsibility to invite "outside agencies" to participate in IEP meetings.<sup>10</sup> The SCO disagrees that the School District did not have a responsibility to invite teachers from Private Autism Center to Student's IEP meeting, and disagrees that the Private Autism Center teachers were part of an "outside agency"; Private Autism Center was implementing the School District's IEP, and as his educators, the teachers from Private Autism Center were essential members of the IEP team with indispensable information about Student's educational needs, abilities, and progress. In any event, the staff from Private Autism Center participated in the IEP meeting at Mother's request and invitation.<sup>11</sup>
9. Similarly, the School District did not invite any representatives of the other placements discussed in the IEP meeting, including representatives of the BOCES School, the placement that was ultimately proposed by the IEP team.<sup>12</sup> The BOCES School Assistant Principal expressed surprise that no one from the BOCES School was included in the IEP meeting: "normally, we would expect to be part of that process."<sup>13</sup>
10. The IEP team met to develop Student's IEP on March 29 and April 5, 2016.<sup>14</sup> The draft goals prepared by the School District staff did not accurately reflect Student's progress and abilities, including in academics.<sup>15</sup> Though the goals had been prepared based upon the evaluation report by Home School Teacher (who had never worked with Student), they did not reflect Student's progress and abilities that Private Autism Center had reported to the School District via the

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<sup>8</sup> Interview with School Psychologist; Ex. L.

<sup>9</sup> Interview with School Psychologist; Interview with Private Autism Teacher.

<sup>10</sup> Interview with School Psychologist.

<sup>11</sup> Interviews with Private Autism Teacher and Private Autism Center Director.

<sup>12</sup> Ex. G; Interview with School Psychologist; Interview with BOCES School Assistant Principal.

<sup>13</sup> Interview with BOCES School Assistant Principal.

<sup>14</sup> Ex. D. For ease of reading, the discussion of the IEP development process will not distinguish between discussions held on March 29 and those held on April 5, as the distinction makes no difference for purposes of the SCO's findings or legal analysis.

<sup>15</sup> Ex. G.

progress reports.<sup>16</sup> Accordingly, draft goals had to be significantly revised based upon input from the Private Autism Center staff, as they had been working with Student for years and were intimately familiar with his abilities and needs.<sup>17</sup>

11. With respect to Student's academic abilities, the draft IEP proposed goals that Student had already mastered. With the input of the Private Autism Center, the goals were changed to provide Student with greater challenges and to increase his academic skills and mastery.<sup>18</sup> The resulting IEP included three academic goals (one in reading, one in math, and one in writing).<sup>19</sup>
12. With respect to related services, the IEP team determined that Student requires 60 minutes (the IEP does not specify whether the 60 minutes are per week or per month) of indirect occupational therapy services and 90 minutes per month of direct speech language support, and 15 minutes per month of indirect speech language support.<sup>20</sup>
13. The IEP team also determined that Student requires extended school year services, identical to the services Student receives during the school year.<sup>21</sup>
14. Following the development and revision of the IEP goals, the IEP team discussed the question of the least restrictive environment (LRE). There was no dispute that Student continues to require educational services in a separate school.<sup>22</sup>
15. The IEP team then discussed the appropriate placement for Student. Three potential placements were discussed: Day Treatment Center, a school for children with developmental disabilities, Private Autism Center, and the BOCES School.<sup>23</sup> The SCO notes that the BOCES School contains within it at least five different programs, including two that might be appropriate for educating students with autism.
16. The IEP team quickly ruled out Day Treatment Center. Student had been educated there prior to attending Private Autism Center, but had not received any benefit or made any progress while there.<sup>24</sup> Day Treatment Center does not have sufficient autism supports for Student.<sup>25</sup>

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<sup>16</sup> Interviews with Private Autism Teacher and Private Autism Center Director.

<sup>17</sup> *Id.*; Ex. D; Ex. G.

<sup>18</sup> *Id.*

<sup>19</sup> Ex. C.

<sup>20</sup> Ex. C, p. 29.

<sup>21</sup> *Id.*

<sup>22</sup> Interviews with Private Autism Teacher, Private Autism Center Director, and School Psychologist; see *also*, Exs. C and D.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

17. The IEP team then discussed the relative pros and cons of Private Autism Center and the BOCES School. With respect to Private Autism Center, there was no dispute among the IEP team members that Student has made excellent progress there. Mother reported that since attending Private Autism Center, Student no longer needs medication (for ADHD and a sleep disorder) and his negative behaviors have been significantly reduced, leading to an increased ability to focus on academics and other areas of functioning. Prior to attending Private Autism Center, Student had almost no verbal skill, but is now talking and greatly expanding his verbal skills. Mother reports that at Private Autism Center, Student is happy, safe, eating properly,<sup>26</sup> his receptive communication skills have dramatically improved, and Student is making much better eye contact.<sup>27</sup>
18. Regarding the BOCES School, the School District staff stated that Student's program at Private Autism Center wasn't academically rigorous, and that academics could be "pushed" more at the BOCES School, now that Student's negative behaviors are "in check."<sup>28</sup> School District staff also asserted that a "pro" for the BOCES School is that it is less "restrictive" than Private Autism Center and that at the BOCES School, Student would have the "possibility for progression." School District staff also posited as BOCES School "pros" that the BOCES School had a licensed special education teacher and related service providers on staff.<sup>29</sup>
19. The argument that the BOCES School is preferable because it is a less restrictive than Private Autism Center was also made in the School District's response to the Complaint in this case: "a change to a lesser restrictive environment is required for the Student to move toward post-school as [Student] is entering his 6<sup>th</sup> grade year for 2016-2017 SY."<sup>30</sup>
20. The BOCES School, however, is not a lesser restrictive placement than Private Autism Center - both are separate schools that serve only students with disabilities.<sup>31</sup>
21. Mother and the Private Autism Center staff pointed out that at Private Autism Center, Student receives academic instruction and has made academic progress, and has the same opportunities for "progression" to less intensive services similar to those available at the BOCES School; Private Autism Center does not provide only intensive 1:1 services, but is a "full service" center for individuals at all points on the autism spectrum, such that as Student progresses, the rigor of his program, and his opportunities to learn greater independence, would

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<sup>26</sup> Student has an eating disorder; when Student attended Day Treatment Center, the staff were not able to work with Student to get Student to eat. At Private Autism Center, Student is eating. Ex. G.

<sup>27</sup> Ex. G.

<sup>28</sup> Ex. G.

<sup>29</sup> *Id.*

<sup>30</sup> School District Response, Page 1.

<sup>31</sup> Interview with School Psychologist; Interview with BOCES School Assistant Principal.

progress as well.<sup>32</sup>

22. Mother and Private Autism Center staff also pointed out that Student can receive related services such as OT and speech at Private Autism Center as well. Further, they noted that the presence of a licensed special education teacher and related services providers on-site did not constitute a basis for determining whether the program would be successful for Student; the same “benefits” existed at Day Treatment Center, and yet that placement proved incapable of meeting Student’s needs.<sup>33</sup>
23. Mother and Private Autism Center staff also expressed concerns with the BOCES School based upon their observations of the programming there. They had observed a student exhibiting negative behaviors with no consequences or other efforts to “check” those behaviors by a teacher. The student did what he wanted, with no instruction or other efforts by the teacher to get the situation under control. Mother and Private Autism Center staff expressed concern that the BOCES School programming was not structured enough for Student, and that they observed classrooms in which students were unsupervised. Mother also expressed concern about whether Student would be safe at the BOCES School, given the lack of structure. Concerns were also raised related to the fact that in some situations, the BOCES School staff call the police when a student’s behaviors are out of control; Mother felt that such a strategy would be harmful to Student.
24. After listing the various “pros” and “cons” of Private Autism Center and the BOCES School, School Psychologist (as the IEP team facilitator) put the placement decision to a vote. The School District staff all voted to place Student at the BOCES School. Mother and the Private Autism Center staff voted to keep Student at Private Autism Center. The School District staff outnumbered Mother and the Private Autism Staff, such that School Psychologist declared that via the vote, the IEP team was recommending to place Student at the BOCES School.<sup>34</sup>
25. At least two of the School District staff who voted to place Student at the BOCES School had never met or observed Student.<sup>35</sup>
26. Following the vote, Mother and the Private Autism Center staff asked questions regarding the reasoning of the School District staff’s support for the BOCES School. In particular, based upon the School District staff’s assertions that Student should have “more” academic instruction, which Student could get at the BOCES School, Mother and Private Autism Center asked what was meant by “more” instruction, and what academic instruction Student was lacking. They

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Ex. G.

<sup>35</sup> *Id.*

also asked why, if academics was such a concern that it was driving the placement decision, School District staff did not seek to include additional or more rigorous academic goals in the IEP. The School District staff did not provide any specific answers to these questions, except to reiterate that with his negative behaviors “in check,” Student could focus on “more” academics.<sup>36</sup> Mother also continued to express concerns that the BOCES School was insufficiently structured to meet Student’s needs, and that Student would experience significant regression and lose much of the progress Student has made at Private Autism Center. Mother also pointed out that Student’s IEP was developed by the School District, and that at Private Autism Center, Student has met his IEP goals, including academic goals. Thus, if Student’s academic goals were insufficiently rigorous, perhaps the School District should have written more rigorous goals.<sup>37</sup>

27. When Mother continued to seek an explanation for some of the justifications raised by the School District staff, School Psychologist cut off the discussion and stated that by its vote, the IEP team had determined that the BOCES School would be Student’s placement.<sup>38</sup>

28. For the following reasons, the SCO finds that the placement proposed in Student’s IEP was impermissibly predetermined and not based upon Student’s individual needs:

- a. The School District staff stressed that placement at the BOCES School was appropriate because Student would receive “more” or “more rigorous” academic instruction. Yet, at the IEP meeting the School District staff revealed that they were unfamiliar with the academics Student was receiving at Private Autism Center, including not being familiar with the level of academic progress Student had been making. When pressed to explain the basis for Student’s need for “more” academic instruction, School District staff were unable to articulate any specific reason beyond repeating that Student needed “more.”
- b. The School District staff asserted that the BOCES School was an appropriate placement because Student would be educated pursuant to a “state curriculum,” and that Private Autism Center does not provide instruction based upon any curriculum. This is inaccurate; Private Autism Center uses the Skills curriculum, specifically designed for students with autism, and provides Student with individually tailored instruction, including academics, based upon his needs and abilities. Further, evidence of Student’s academic progress and instruction was provided to the School District via regular, detailed reports, and was also explained to the School District staff in the IEP meeting itself.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

- c. The School District staff stated that the BOCES School was appropriate for Student because Student required instruction by a licensed special education teacher. However, Student had previously attended Day Treatment Center, which also had a licensed special education teacher on staff, and that placement was indisputably unsuccessful for Student. Thus, the School District staff at the IEP meeting knew that the presence of absence of a licensed special education teacher was not necessarily a factor that rendered one placement preferable to another, yet they insisted that that factor rendered the BOCES School an appropriate placement.
  - d. The IEP team’s placement decision was based upon a majority vote, which necessarily rendered Mother’s voice moot (as she was outnumbered, and always would be, given the IDEA’s provisions relating to IEP team meeting participants). There was no true effort among School Psychologist or any of the School District staff to build consensus relating to the placement determination; a list of “pros” and “cons” was made for each placement, and then the decision was put to a vote. When Mother subsequently attempted to express her concerns about the placement determination, and to ask probing questions about the determination, School Psychologist effectively cut her off by stating that the IEP team had voted and placement had been determined. The federal Office of Special Education Programs, which oversees implementation of and monitors compliance with IDEA, has stated that “[i]t is not appropriate to make IEP decisions based on a majority ‘vote.’” *Letter to Richards* 55 IDELR 107, 110 LRP 52287 (OSEP 2010).
  - e. Following the IEP meeting, Special Education Coordinator indicated to BOCES School Assistant Principal that Student needed to be transitioned to BOCES School because, *inter alia*, the School District’s “contract with Private Autism Center expires May 20.” *See*, Finding of Fact 33, *infra*. Thus, Special Education Coordinator went into the IEP meeting already planning to transfer Student out of Private Autism Center for reasons other than his special education needs.
29. At the end of the IEP meeting, School Psychologist stated that it would not be beneficial to Student to have his placement changed prior to the end of the school year, such that Student would remain at Private Autism Center through the end of the year.<sup>39</sup> Beyond saying that Student would remain at Private Autism Center through the “end of the year,” no one from the School District provided Mother with a specific date when Student’s enrollment would cease and enrollment at the BOCES School would begin.<sup>40</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> Ex. G.

30. The SCO notes that the BOCES School is comprised of several different programs, two of which (Program A and Program B) could be appropriate for educating students with autism. Program A and Program B are not the same program; they provide different levels of service and intensity.<sup>41</sup> At no point during the IEP meeting did School Psychologist or any other School District representative specify whether it was Program A or Program B being proposed, nor is that point clarified in the IEP document itself.<sup>42</sup>
31. This lack of specificity regarding the exact placement being offered was not corrected by the Prior Written Notice (“PWN”) that was prepared by School Psychologist and provided to Mother. The PWN identified the proposed placement only as “BOCES School.”<sup>43</sup> The PWN does not state when Student will be enrolled at the BOCES School or otherwise provide Mother with sufficient information about how and when the IEP will be implemented.<sup>44</sup>
32. Accordingly, the SCO finds that, as in Case No. 2014:516, the School District has again offered an IEP that fails to include a description of placement sufficient to allow Mother to understand what is being proposed.<sup>45</sup>
33. On April 6, 2016, Special Education Coordinator (a School District staff member who participated in Student’s IEP meeting) sent an email to BOCES School Assistant Principal stating that the School District wanted to transition Student to the BOCES School:
- I have a 5th grader who I would like to transition to [the BOCES School]. Student is currently at [Private Autism Center] and our contract with them expires May 20. I want to make sure you have room! :) [Student] will need to be in either [Program A or Program B] and [] will also qualify for ESY. I will send you the IEP as soon as it has been finalized.<sup>46</sup>
34. Special Education Coordinator subsequently sent Student’s IEP to the BOCES School in early April. As of the date of this Decision, however, the School District has not enrolled Student in the BOCES School, arranged for ESY, or otherwise coordinated with the BOCES School to transition Student to the BOCES School.<sup>47</sup>

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<sup>41</sup> Interview with School Psychologist; Interview with BOCES School Assistant Principal.

<sup>42</sup> Ex. G; Ex. C.

<sup>43</sup> Ex. D; Interview with School Psychologist.

<sup>44</sup> *Id.*

<sup>45</sup> *See*, Decision.

<sup>46</sup> Interview with BOCES School Assistant Principal.

<sup>47</sup> Interview with BOCES School Assistant Principal.

35. After May 20, 2016, the School District ceased paying for Student's placement at Private Autism Center.<sup>48</sup> Thus, since May 20, 2016, the School District has been providing Student with no special education or related services.
36. Since May 20, 2016, Student has remained at Private Autism Center at Mother's expense. The cost of Student's services at Private Autism Center average \$6000 per month.<sup>49</sup>

### CONCLUSIONS OF LAW

- A. **The School District violated the express terms of the Decision when it changed Student's placement.**
  1. The Decision ordered that Student's placement at Private Autism Center could not be changed unless and until the School District convened an IEP meeting that, among other things, was "facilitated by a neutral facilitator (not employed by the School District)." The facilitator at Student's IEP meeting in this case was not only a School District employee, but she was one of Student's evaluators.
  2. Accordingly, the School District changed Student's placement and removed Student from Private Autism Center in violation of the express terms of the Decision.
- B. **The School District's decision to change Student's placement from Private Autism Center was not based upon Student's individual needs and was predetermined.**
  3. 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 least 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.

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<sup>48</sup> Interview with Private Autism Center Director.

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

4. 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 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).

5. 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.*
6. 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 (11th 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 (6th 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(9th Cir. 2003)). This principle was also reiterated in the Decision in Case No. 2014:516. 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*.

7. 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. *See*, Decision in Case No. 2014:516, *citing Sytsema, supra*, 538 F.3d at 1315-16, citing with approval, *Union School Dist. v. Smith*, 15 F.3d 1519 (9th 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 (6th Cir. 2001); *J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672 (4th Cir. 2007)(school district violated IDEA by offering an IEP that did not specify a placement for the student). The failure to make a specific, written offer of placement in the IEP is a denial of FAPE. *Id.*
8. In this case, the SCO has found that the determination to remove Student from Private Autism Center and place Student at BOCES School was predetermined (by at least one member of the IEP team) and not based upon Student’s individual needs. *See*, Finding of Fact # 28. Accordingly, the April IEP violates the IDEA and denies the Student a FAPE.
9. The April IEP also fails to make a specific offer of placement. As noted above, the IEP only identifies placement in the BOCES School, but the BOCES School contains numerous programs that do not offer the same services. Finding of Fact # 30.
10. Accordingly, the School District has violated the IDEA and denied Student a FAPE by failing to make a placement officer sufficiently specific to put Mother on notice of exactly what is being proposed.<sup>50</sup>

**C. The School District has denied Student a FAPE by failing to provide Student with any special education and related services since May 20, 2016.**

11. There is no dispute that Student is a child with a disability living in the School District and entitled to FAPE, *i.e.*, special education and related services provided pursuant to an IEP. Yet, since May 20, 2016, the School District has provided Student with no special education services whatsoever. Following the development of the April IEP, the School District has not enrolled Student or

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<sup>50</sup> The SCO notes that in Case No. 2014:516, the School District was cited for the exact same infraction. *See*, Decision, p. 23.

otherwise made plans to transition Student to BOCES School, and yet has discontinued paying for his placement at Private Autism Center. Student has continued his education at Private Autism Center at Mother's expense.

12. Accordingly, School District has denied Student a FAPE.

### REMEDIES

The SCO has concluded that the School District has violated the IDEA (and the Decision in Case No. 2014:516) by:

- a) Failing 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) Failure to develop an IEP in accordance with the procedural requirements of 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) 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 August 1, 2016, 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 October 3, 2016.
  - 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 December 9, 2016.

- 2) By no later than July 22, 2016, the School District shall reimburse Mother for all costs she has incurred (or which have been incurred on her behalf, via insurance)<sup>51</sup> for services provided by Private Autism, through and including the date of this Decision. The School District shall obtain from Private Autism Center an accounting of the amounts paid by or on behalf of Mother from May 20, 2016 through the time that the School District resumes funding Student's placement at Private Autism Center, and shall reimburse Mother that amount in full.
- 3) The School District shall immediately resume public funding for the full costs of Student's tuition at Private Autism Center.
- 4) While Student attends Private Autism Center, any related services required by the April IEP, including speech therapy or occupational therapy, shall be provided by the School District, either by arranging for the necessary therapists to provide services at Private Autism Center, or paying for those arranged for by Mother or Private Autism Center.
- 5) The School District shall be prohibited from changing Student's placement until all training and other corrective action ordered herein has been completed.
- 6) Thereafter, the School District shall be prohibited from changing Student's placement until the School District convenes an IEP meeting, facilitated by a neutral facilitator (not employed by the School District), that complies with all procedural requirements of IDEA, particularly those provisions that the School District has violated, and develops an IEP that includes a description of placement sufficient to allow Mother to understand what is being proposed. The School District shall invite and ensure the participation at the IEP meeting at least one of Student's teachers from Private Autism Center, and at least one representative from every placement option discussed or considered, including the BOCES School. The School District shall also ensure that every School District staff member who participates in Student's IEP meeting shall have a copy of both the Decision in Case No. 2014:516 and this Decision.

The School District shall provide a complete copy of any new IEP developed for Student, including prior written notice, as well as documentation demonstrating that

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<sup>51</sup> Reimbursement that Mother receives for amounts paid by insurance may need to be reimbursed to her insurance company.

the appropriate personnel have been included in the IEP, and that the School District IEP members have been provided with copies of the Decisions in this case and Case No. 2014:516, to the Department within 5 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: Fran Herbert  
1560 Broadway, Suite 1100  
Denver, CO 80202

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.

Dates this 30<sup>th</sup> day of June, 2016.



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Wendy Jacobs, Esq.  
State Complaints Officer

## **APPENDIX**

### **Complaint, dated May 4, 2016 (pp. 1-15)**

- Ex. A - Decision in Case No. 2014:516
- Ex. B - 2015-2016 IEP
- Ex. C - 2016-2017 IEP
- Ex. D - Prior Written Notice
- Ex. E - Agreement to Permit Private Services on School Premises
- Ex. F - Student Progress Reports
- Ex. G - Digital recordings of IEP meeting

### **School District Response, dated May 23, 2016 (pp. 1-3)**

- Ex. I - Corrective Action Plan
- Ex. J - 2013 Evaluation report
- Ex. K - April 2016 IEP and related documents
- Ex. L - Eligibility determination documents and evaluation report
- Ex. M - IEP compliance checklist
- Ex. N - Emails
- Ex. O - Student progress reports
- Ex. P - School District policy documents relating to IEP development

### **Mother's Reply, dated June 2, 2016 (pp. 1-3)**