

Colorado Department of Education
Decision of the State Complaints Officer (“SCO”)
Under the Individuals with Disabilities Education Act (“IDEA”)¹

**State-Level Complaint 2016:526
Arapahoe County School District 5**

DECISION

INTRODUCTION

This state-level complaint (“Complaint”) was properly filed on October 25, 2016 against Arapahoe County School District 5 (“School District”) by attorney, [Attorney], on behalf of a child (“Student”) and Student’s mother (“Mother”).

Based on the written Complaint, dated October 21, 2016, an SCO determined that the Complaint identified four issues subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

COMPLAINT ALLEGATIONS

Mother’s Complaint raised the following issues, in summary:

Whether the School District has violated Mother’s rights and denied Student a free appropriate public education (“FAPE”):

1. by failing to evaluate Student to determine eligibility for special education related services upon Mother’s request since April 29, 2016;
2. by failing to identify Student as a child in need of special education and related services and evaluate him for eligibility prior to Mother’s written request;
3. by failing to provide Mother with a prior written notice (“PWN”); and
4. by predetermining that Student would be determined ineligible for special education and related services.

Summary of Proposed Remedies. To resolve the Complaint, Mother proposed, in summary, that School District:

- immediately evaluate Student for an IEP;

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

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

- reimburse family for the cost of all therapy Student has received for a period of 365 days preceding this Complaint and for a period of 365 days from the filing of this Complaint;
- reimburse family for the cost of sending Student to the Private Learning Center and continue to cover costs for a period of 365 days from the filing of this Complaint;
- reimburse family for the cost incurred in paying for Student’s wrist injury from April 25, 2016; and
- comply with corrective actions, such as training by an outside professional for School District and School administration/staff in the general areas of IDEA, the identification of special education students, and proper procedures for obtaining consent of students.

FINDINGS OF FACT

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

1. At all times relevant to the Complaint, Student has lived with Mother within the boundaries of the School District. Student attended School from the beginning of the 2013-14 school year until May 9, 2016 and is currently being educated at home through an online public school.³
2. During the 2013-14 school year, Student was identified as a student with Tourette syndrome and began receiving various accommodations at School through a Section 504 plan. Based on his school performance, medical information, and feedback from teachers, parents, and a specialist, Student’s 504 team rated his Tourette syndrome as a substantial limitation on his learning, reading, sleeping, and speaking.⁴
3. Student’s March 2015 Section 504 plan (in effect from March 15, 2015 through March 15, 2016) provided for the following classroom accommodations:
 - Preferential seating (near teacher, near front, etc.);
 - Provide time-out area and/or frequent breaks; and

³ Response; Interviews with Mother, Student, and Principal

⁴ Response; Exhibit C; Interviews with Principal, Mother, and Student

- Target essential areas when assigning homework and allow Student one to two minutes before bell rings to prepare for his next transition.

The meeting notes and discussion of progress sections in the March 2015 Section 504 plan show that the team discussed that “[a]nxiety was effecting [sic] his progress in all areas social, academic and emotional.” The recommendation of the Section 504 team at that time was for a class period to be added to Student’s schedule in order to provide him with built in daily access to Counselor and extra time to complete schoolwork.⁵

4. Although School District noted in its Response that Student had an overall C average during the 2015-16 school year, the report card School District provided shows that throughout the four grading periods Student received multiple Ds and Fs in four out of his five core subject classes (i.e., math, reading, science and social studies). Student’s teachers believed that he was capable of earning good grades and that his grades in their classes did not reflect his capabilities. They explained that Student used his accommodations, that he scored very high on exams and quizzes, appeared to be engaged in class when he was there, and was even described as a leader by one of his teachers, but that he lacked discipline, exhibited poor planning and organization, failed to turn in work, and was often absent from classes. Student had been in advanced math classes until sometime during the 2015-16 school year when he was switched to a grade level math class because he had fallen behind due to excessive absences. Student’s attendance and report card from the 2015-16 school year show that Student was absent from each of his classes between 29 and 42 times. Teachers also explained that all students in their classes, including Student, were offered targeted assistance from the teachers several times a week either before or after school hours, but that Student rarely took advantage of their offered assistance. SCO also notes that Student’s report card from the 2014-15 school year reveals much the same in terms of his grades and attendance in that Student failed two classes all year (i.e., writing and math), received multiple Ds and Fs in other core subject classes (i.e., science, reading, and social studies), and was absent from each of his classes between 19 and 35 times).⁶

5. Student explained that he felt so anxious about his safety during passing periods, that he could not focus while in class and would sometimes text message Mother from School and ask her to pick him up early, which she sometimes did. Principal confirmed that Student frequently reported that he was concerned about being bullied. Counselor

⁵ SCO notes that Student was scheduled as a “Student Assistant” in the counseling office for the second half of the 2014-15 school year, but was not for the 2015-16 school year. Exhibit C; Interview with Counselor

⁶ Interviews with Teachers (Reading Teacher, Social Studies Teacher, Science Teacher, and Drama); Exhibit B

also confirmed that Student perceived that he was being bullied and explained that, together with Mother, they had repeatedly encouraged Student to advocate for himself and report incidents to the Dean's office, which Student did intermittently. Both Student and Parents (Mother and father) had been reporting incidents of bullying to School administrators since the beginning of the 2013-14 school year, but Student felt that things became worse when he did, so he was uncomfortable reporting issues to the Dean's office. Principal and Dean explained that Student had a pattern of complaints about "normal peer conflict" and "low level bullying", stated that incidents that Student reported were oftentimes unsubstantiated and untruthful, and described Student as a "provocative victim" and even a bully himself in some instances. Principal explained that Student was given a "pressure pass" to allow him to take a break from classrooms and go to the bathroom or get a drink of water when he felt stressed.⁷

6. At the March 15, 2016 Section 504 meeting, Mother talked about the bullying she believed Student had continued to be subjected to at School and complained that School administrators had done nothing about it. The team discussed Student's problems with turning in homework, which School team members believed was a parenting issue rather than a school issue. The March 2016 Section 504 plan (in effect from March 15, 2016 through March 15, 2017) revealed that the team recommended the continuation of the 504 plan and a note to "encourage [Student] to complete homework and class work." The March 2016 504 plan also provided for the following classroom accommodations:

- Preferential seating (near teacher, near front, etc.);
- Access to Counselor/Dean upon request;
- Targeting essential areas when assigning homework due to fatigue; and
- Allow [Student] to prepare for next transition (one to two minutes before bell rings).⁸

7. On April 25, 2016, Student reported that he had been pushed down the stairs by another student during a passing period, resulting in an injury. Mother and Student reported the incident to School administration. It is unclear whether it was before or after the April 25th incident, but at some point around this time, Student was allowed an

⁷ Interviews with Mother, Student, Principal, Dean, and Counselor; Exhibit E

⁸ Interviews with Teachers (Reading, Science, Social Studies, and Drama), Mother, 504 Coordinator, Counselor, and Student; Exhibits C and E

alternate passing period⁹ to avoid problems with other students in the hallways during passing periods.¹⁰

8. In an email to Principal on April 28, 2016, Mother wrote:

“I don’t believe that [Student’s] 504 plan is enough to address his needs. I’d like the school to evaluate him for an IEP. Please let me know what you need from me to start the process.”

Principal responded by email the next day:

“[School] will not have enough time to conduct an IEP evaluation before school is out. I can put in a call to the Principal at [High School] ask that [Student] be placed as a priority for an IEP Evaluation in the Fall. Would you like me to do this?”

Assistant Principal was responsible for special education requests in Student’s grade level and, although Principal copied Assistant Principal on her emailed response to Mother’s request, Assistant Principal did not recall knowing about Mother’s request at all at that time and explained that it was understood that Principal would handle all issues with Mother. SCO notes that several different weekly meetings were also held at School for staff and administration to discuss specific concerns about students, including whether a student might require an evaluation for special education, but that Student never came up in the conversations.¹¹

9. Shortly after the April 29th email, Principal went on an extended personal leave, leaving Assistant Principal in charge of School in her absence, however, Principal never discussed Mother’s request with Assistant Principal. Mother also never responded to Principal’s email and never contacted School or School District regarding her request to evaluate Student for an IEP until the filing of this Complaint. Assistant Principal stated that if he had been aware of Mother’s request at the time, he would have followed up with Mother and followed the School District’s procedures related to special education evaluations. Student attended School for only a few more days following the April 25th incident and, shortly after receiving Principal’s April 29th email, Mother withdrew Student from School and initiated public online schooling. SCO notes that the last day of

⁹ SCO notes that Principal indicated that approximately 20 other students at School also have alternate passing periods.

¹⁰ Interviews with Mother, Student, Counselor, Dean, and Principal; Exhibit E

¹¹ Exhibits 1 and 2; Interviews with Principal, Assistant Principal, Counselor, and 504 Coordinator

class for Student's grade level at School was May 26, 2016.¹²

10. Immediately upon receipt of this Complaint, School District agreed to evaluate Student. Parents have consented to the evaluation and a High School team began evaluating Student in December.¹³

CONCLUSIONS OF LAW

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

Allegations One and Three: School District failed to evaluate Student upon Mother's request on April 28, 2016 and failed to provide Mother with prior written notice ("PWN").

1. A parent of a child may initiate a special education referral by requesting an evaluation. 34 C.F.R. § 300.301 (b); ECEA Rule 4.02 (3)(a)(ii). Once a special education referral has been initiated, the administrative unit, here the School District, must complete the initial evaluation within 60 days. 34 C.F.R. § 300.301 (c); ECEA Rule 4.02(3)(c). The special education referral process is initiated, and the 60-day clock starts, when the district has received a request for an initial evaluation from the parent and the parent has provided written consent for the initial evaluation. 34 C.F.R. § 300.301 (b); ECEA Rule 4.02 (3)(c)(ii). Before a parent can provide consent for an initial evaluation, the district must request it. Although IDEA does not specify how long a district may take to seek parental consent for an evaluation, it would not be acceptable for a district to wait several months to seek parental consent when the district suspects that the child may have a disability. 71 Fed. Reg. 46637; *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011)("[I]t has been the Department's longstanding policy that the LEA must seek parental consent within a reasonable period of time after the referral is made, if the LEA agrees that an initial evaluation is needed.").

2. The IDEA further provides that a district must supply parents with PWN a reasonable time before the district refuses to initiate an evaluation. 34 C.F.R. § 300.503(a)(2). The PWN must include:

- A description of the action (i.e., evaluation) that the district is refusing to do;

¹² Response; Interviews with Mother, Student, Principal, and Assistant Principal; May 2016 calendar on School website

¹³ Response; Interviews with Mother and Special Education Director; Exhibit D

- An explanation of why the district refuses to conduct an evaluation;
- A description of each report the district used as a basis for refusing an evaluation;
- A copy of the procedural safeguards;
- Sources for parents to contact to obtain assistance in understanding the PWN;
- A description of other options considered and why those options were rejected; and
- A description of other factors relevant to the district's refusal.

34 C.F.R. § 300.503(b)(1)-(7).

3. In this case, there is no dispute that Mother requested that Student be evaluated for special education eligibility on April 28th. School District contends that Principal's response stating that it was too late in the school year to begin the evaluation process at School was not a refusal, but rather, the initiation of a conversation to start the evaluation process through High School once the next school year started and that Mother's non-response to Principal's email, together with her withdrawal of Student from School, essentially voided the request. SCO concludes otherwise.

4. Although it is plausible that Principal was initially awaiting Mother's response to her email to determine the next steps, there was never any follow up at all from Principal. Mother's understanding of Principal's email, based in large part on the plain language in the email itself, was that School would not be evaluating Student, which Mother understood to be a refusal. SCO further notes that there is no excusal of a district's responsibility to conduct evaluations at the end of a school year and, moreover, that when Mother requested the evaluation there was almost one full month left in the 2015-16 school year. Although Principal delegated responsibilities to Assistant Principal in her absence and had copied Assistant Principal on her April 29th email to Mother, it was also clear that Principal was to deal with all matters pertaining to Mother's requests. As a result, Assistant Principal was never made aware of the request, which he indicated would have prompted him to follow up with a consent or PWN and Principal assumed that Mother had essentially withdrawn the request when she withdrew Student from School. This does nothing to discharge School District's responsibility to respond to Mother's request with either a request for consent to evaluate Student or PWN. Accordingly, SCO finds that the School District's failure to provide Mother with either a consent form to conduct the requested evaluation or PWN with an explanation of School District's response to the request results in violations of

the procedural requirements of the IDEA.

Allegation Two: School District failed to evaluate Student for eligibility prior to Mother’s written request.

5. Even if a parent has not requested an evaluation, a district has child find duties that are triggered when the district has reason to suspect that a student has a disability (under 34 C.F.R. § 300.8) and is in need of special education and related services. 34 C.F.R. §300.111(a)(1)(i) and ECEEA Rule 4.02(1)(a). A district has an affirmative duty under the IDEA to locate, evaluate, and identify all students who need or may need special education and related services due to a disability and may not take a passive approach and wait for others to refer the student for special education services. *Compton Unified Sch. Dist. V. Addison*, 54 IDELR 71 (9th Cir. 2010), cert. denied, 112 LRP 1321, 132 S.Ct. 996 (2012). Thus, when a district has a reason to believe that a student has a disability, it must evaluate the student within a reasonable time. Part of seeking out potentially eligible students means watching for red flags among its students and referring students who may have a disability and need special education. See, e.g., *Cincinnati City Schs.*, 115 LRP 26069, 12 ECLPR 111 (SEA OH 05/07/15).

6. Based on the entirety of the credible record, SCO concludes that Student presented with a number of red flags that, particularly when considered altogether, should have alerted School District that he may need special education and related services.

7. Among the most obvious of red flags is that Student had already been identified as having Tourette syndrome, one of the 13 qualifying conditions under the IDEA. In 2006, Tourette syndrome was added to the definition of “Other health impairment” or “OHI” in the IDEA in a specific effort to help correct the misperception that Tourette syndrome is a behavioral or emotional condition, rather than a neurological condition and *to prevent the misdiagnosis of the needs of students with Tourette syndrome*. 71 Fed. Reg. 46550 (2006)(emphasis added). While Tourette syndrome is a neurological disorder characterized by repetitive, stereotyped, involuntary movements and vocalizations called tics, individuals with Tourette syndrome oftentimes experience neurobehavioral problems that cause more impairment than the tics themselves, i.e., neurobehavioral inattention, hyperactivity and impulsivity (“ADHD”), problems with reading, writing, and arithmetic; and obsessive-compulsive symptoms such as intrusive thoughts/worries and repetitive behaviors, which can interfere significantly with

academic performance or social adjustment. See National Institute of Health, National Institute of Neurological Disorders and Stroke. (Last Modified April 16, 2014). NINDS Tourette Syndrome Information Page: Tourette Syndrome Fact Sheet. Retrieved from <http://www.ninds.nih.gov/disorders/tourette/tourette.thm>.

8. In addition to the fact that Student had already been identified with one of the 13 qualifying conditions, it is also clear in the record that School 504 team members were also aware as early as March 2015 that Student's anxiety was impacting him socially, emotionally, and academically. Despite Student's obvious strengths in terms of test taking and participation when present in class, as well as general education interventions and Section 504 accommodations, Student consistently received D's and F's in his core subject classes in both the 2014-15 and 2015-16 school years. While districts can attempt to use general education interventions before referring a student for a special education evaluation, once it becomes clear that the interventions are not working the district must evaluate the student's special education needs. See *El Paso Independent School District v. Richard R.*, 567 F. Supp. 2d 918 (Western District of Texas, 2008)(Unsuccessful interventions trigger district's duty to evaluate student for special education services); *Toledo City Schs.*, 115 LRP 26071 (SEA OH 06/03/15)(Inconsistent grades, including below average and failing grades, and attendance issues should have given the district reason to refer student for an evaluation).

9. SCO makes no findings whatsoever with regard to allegations that Student was bullied due to his disability, that School and School District discriminated against Student based on their failure to take adequate steps to protect him, or any alleged violations of Section 504, as all such allegations are outside of the jurisdiction of SCO. SCO's findings in this Decision with regard to bullying are limited exclusively to School District's awareness of Student's social/emotional state and educational impact. The credible record demonstrates that School administration had ample knowledge about Student's anxiety about bullying which also resulted in a significant number of absences. While lack of attendance, on its own, does not qualify a student for special education, it may help to establish that the student has an impairment that results in a need for special education and related services. *Board of Educ. of the Syracuse City Sch. Dist.*, 37 IDELR 232 (SEA NY 07/18/02). Moreover, although the bullying itself is not an issue for consideration in this case, incidents of bullying can also raise a "red flag" that either the student being bullied or the student perpetrating the bullying might be a student with a disability and in need of special education, triggering child find duties. See *Rose Tree Media Sch. Dist.*, 111 LRP 6194 (SEA PA 12/05/10)(District that knew the student had

been prescribed ADHD medications, had significant anxiety and social skills deficits and often complained of being taunted by peers violated its child find obligations when it determined that student was ineligible for special education). The United States Department of Education has also explained that, “[s]tudents who are targets of bullying behavior are more likely to experience lower academic achievement and aspirations, higher truancy rates, feelings of alienation from school, poor relationships with peers, loneliness, or depression. ...[t]he consequences may result in students changing their patterns of school participation.” *Dear Colleague Letter*, 61 IDELR 263 (Aug. 20, 2013). These consequences of bullying interfere with a disabled student’s educational opportunities and indicate the need to consider modifications to the student’s IEP. *Id.*

10. Accordingly, SCO finds that Student’s Tourette syndrome, in conjunction with all of the other factors discussed above, should have prompted School District to evaluate Student’s need for special education prior to Mother’s April 28th request.

Allegation Four: School District did not predetermine that Student would be ineligible for special education.

11. With regard to Mother’s allegation that School District predetermined that Student would be determined ineligible for special education and related services, SCO concludes otherwise.

12. The IDEA requires districts to ensure that the parents of each child with a disability are members of any group that makes decisions about their child’s educational placement. 34 C.F.R. §§ 300.327 and 300.501(c)(1). Predetermination occurs when members of an IEP team decide a student’s placement in advance of an IEP meeting without the parents’ participation or input.

13. In this case, there has been no meeting or determination about which School District could have made a predetermined decision. The entire basis of Mother’s complaint is that School District has failed to evaluate Student to determine whether he needs special education, either as a result of her request or as a result of their child find obligation. Because the evaluation has not yet been completed and, as such, there has been no decision with regard to Student’s eligibility, there can be no predetermination.

14. Accordingly, SCO finds that School District did not predetermine that Student would be determined ineligible for special education and related services.

REMEDIES

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

- a. Failure to evaluate Student upon parental request, in violation of 34 C.F.R. § 300.301 and ECEA Rule 4.02;
- b. Failure to provide parent with prior written notice, in violation of 34 C.F.R. § 300.503; and
- c. Failure to evaluate a student who is suspected of being a child with a disability (under 34 C.F.R. § 300.8) and in need of special education, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)(a).

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

1. By January 20, 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 Student 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 violation, no later than February 17, 2017.
 - b. Effective training must be conducted for all School administrators and special education case managers, and School District coordinators concerning the policies and procedures, to be provided no later than March 17, 2017.
 - c. 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, 2017.
 - d. A complete copy of the evaluation being conducted of Student shall be provided to the Department within ten days after the evaluation is completed.

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: Gail Lott
1560 Broadway, Suite 1100
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 21st day of December, 2016.

Lisa A. Weiss, Esq.
State Complaints Officer

APPENDIX

Complaint, dated October 21, 2016, pages 1-5

- Exhibit 1: Email correspondence (4/28/16)
- Exhibit 2: Email correspondence (4/29/16)
- Exhibit 3: Email correspondence (5/3/16)

Response, dated November 10, 2016, pages 1-9

- Exhibit A: Email correspondence
- Exhibit B: Report cards (5/13/16 and 6/5/15)
- Exhibit C: Section 504 documentation
- Exhibit D: Prior Notice & Consent for Initial Evaluation (10/31/16); Section 504 meeting documentation
- Exhibit E: Discipline record (8/1/14 – 6/30/16); Incident Reports; School Nurse memos; behavior logs; handwritten notes from a page in a notebook; hospital reports; teacher statement; Counselor statement (3/27/15); Behavior Management Referral; Arapahoe County Sherriff's Office Offense Report¹⁴ (5/20/16)
- Exhibit H1: School District Board policies: AC, Nondiscrimination/Equal Opportunity Interpersonal/Human Relations, AC-E-1, Notice of Nondiscrimination/Equal Opportunity and AC R-7, Nondiscrimination on the Basis of Handicap/Disability
- Exhibit H2: Colorado Association of Legal Services Program Special Education Practitioner's Manual – Placement/Least Restrictive Environment, FAPE, Evaluations and Reevaluations, and Practical Guidelines and Analysis
- Exhibit I: Attendance records (2014-15 and 2015-16 school years); School registrar email; Mother's email to teachers
- Exhibit J: Transcription of Father's voicemail

Interviews with:

Student
Mother
Dean
Counselor
504 Coordinator
Special Education Director
Principal
Assistant Principal
Reading Teacher
Social Studies Teacher
Science Teacher
Drama Teacher

¹⁴ SCO notes that pages 53 through 56 have been removed from the file as the documents provided by School District contained personally identifiable information about other students and were not directly relevant to the Decision.