

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

**State-Level Complaint 2018:520
Douglas County School District**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on May 7, 2018, by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

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

SUMMARY OF COMPLAINT ALLEGATIONS

Whether the District violated the IDEA and denied Student a free appropriate public education (FAPE), from August of 2017 to present, by:

1. Failing to provide prior written notice of its refusal of Parents' request to require that a District Nurse be placed in Student's School as an accommodation on Student's IEP, on or around August 8, 2017; and
2. Failing to accurately describe and provide the special education and related services that would enable Student to access the general education curriculum and nonacademic activities by excluding an accommodation for nursing staff, contrary to the IEP team's decision on September 11, 2017, and in violation of 34 CFR § 300.320(a)(4)(ii).

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

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

FINDINGS OF FACT

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

Background:

1. At all times relevant to the Complaint, Student was in [grade] and eligible for special education and related services under the primary disability category of multiple disabilities, with a secondary disability of other health impairment.⁴
2. Student has [a severe form] of epilepsy.⁵ For children with [this form of epilepsy], seizure activity is complex and difficult to control. Status epilepticus, defined as a state of continuous seizure requiring emergency medical care, may occur with both convulsive and non-convulsive seizures. Nonconvulsive status epilepticus (NCSE), a prolonged seizure that manifests primarily as altered mental status and subtle behavioral changes, as opposed to the dramatic convulsions seen in generalized tonic-clonic status epilepticus, may be difficult to recognize.⁶ Because the signs of NCSE are subtle and can be life threatening, Student must be closely monitored by individuals who are familiar with him and trained to recognize and respond to this kind of seizure activity.
3. Student has experienced seizures that require emergency medical care.⁷ Parent's two primary concerns are: 1) that the School will not be able to safely handle a big seizure, i.e., tonic-clonic, and 2) that the School will not be able to recognize NCSE due to its subtle presentation.⁸ Because Student may require emergency treatment for a seizure that occurs during the school day, Parents maintain that a nurse must be present and available in Student's school building to provide the necessary care.⁹
4. From the fall of 2011 through the spring of 2017, Parents arranged for a private duty nurse (Private Nurse) to monitor and support Student's needs related to seizure activity during the school day.¹⁰ Private Nurse left her position in March of 2017, and it was difficult for Parents to find another nurse to replace her. Following Private Nurse's departure, Parent elected to attend school with Student for the remainder of the 2016-17 school year out of concern for Student's safety.

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

⁴ Response, p. 57 (2017 IEP).

⁵ Response, p. 81 (2017 HCP) and p. 74 (2017 IEP).

⁶ Interviews with Parent, Director of Nursing, School Nurse, and EA.

⁷ Interview with Parent.

⁸ Interview with Parent.

⁹ In general, the District assigns one nurse to serve three elementary schools. Interview with Director of Nursing.

¹⁰ Complaint, p. 4.

5. Based on her own observations in the spring of 2017, Parent determined that Student did not need a dedicated nurse in the classroom. Rather, Parent believed that Student's health needs could be adequately met by having a nurse in the school building "who could implement his seizure action plan [SAP] and provide the appropriate and recommended interventions as described in his Health Care Plan [HCP]."¹¹

2017-18 School Year: Health Care and Nursing Services Plan

6. In May of 2017, Parents requested that the District schedule an IEP meeting to discuss the possibility of assigning a nurse to Student's school as an accommodation on Student's IEP.¹² In response, members of the District's nursing staff met with Parent to better understand her concerns about Student's health needs. After three such meetings, Director of Nursing requested to speak with Student's Neurologist to clarify the level of care needed at school.¹³

7. On June 9, 2018, Neurologist, Parent, and Director of Nursing met via telephone to discuss Neurologist's recommendations for managing Student's seizures at school. During this meeting, Director of Nursing requested that Neurologist provide orders and a seizure action plan (SAP) that could be implemented in the school setting.¹⁴

8. On July 16, 2017, Parent provided the District with Neurologist's SAP. In a letter dated July 21, 2017, Neurologist further clarified that Student required "RN-level care to safely attend school."¹⁵

9. Upon review of the SAP, Director of Nursing expressed concern with the lack of clarity in some provisions, particularly with the identification and removal of environmental triggers, and also questioned whether this plan could be implemented in the school setting due to its complexity.¹⁶

10. On July 27, 2017, the District provided Parents with prior written notice (PWN) of its refusal to follow the SAP provided by Neurologist. The PWN informed Parents of the District's determination that the SAP, as written, could not be implemented in the school setting and that even a school nurse would not be able to "fully satisfy the extensive protocols" described

¹¹ Complaint, p. 5.

¹² Complaint, pp. 4-5; Exhibit D.

¹³ Response, p. 2; Interview with Director of Nursing.

¹⁴ Response, p. 2; Interview with Director of Nursing and Parent.

¹⁵ Response, p. 44 (Letter from Neurologist).

¹⁶ Interview with Director of Nursing.

in the orders.¹⁷ Additionally, the PWN stated that the safety precautions listed in the SAP are “unclear, incomplete and not feasible due to their complex nature.”¹⁸

11. Over the next few weeks, Parents and District staff, with the involvement of their respective legal counsel, negotiated what an appropriate health care plan (HCP) for Student would look like in the school setting.¹⁹

12. As a result of these discussions, the District agreed to assign a registered nurse to Student’s school for the 2017-18 school year. On August 11, 2017, the District sent this agreement, referred to as a “nursing services plan,” to Parents.²⁰ The purpose of the nursing services plan was to “ensure a mutual understanding of the current model of health care that will be provided to [Student] by the [District] during the 2017-18 school year.” The nursing services plan clarified that the school nurse would provide consultation and emergency care to Student consistent with the HCP, as well as train and delegate appropriate care to other staff in accordance with the Colorado Nurse Practice Act and CDE guidelines.²¹ In addition, the plan clarified that school nurse would serve all students and not be dedicated as a one-on-one for Student alone. Finally, the plan outlined notification to Parents and coverage for School Nurse in the event of her absence.

13. Between August 11 and August 24, School Nurse and Parent reviewed and clarified the HCP for the coming school year.²² Following a series of email exchanges, Parent signed and returned the HCP on August 24, 2017.

¹⁷ Response, p. 46 (PWN dated July 27, 2017).

¹⁸ Because the July 2017 PWN only concerned the District’s refusal to follow the SAP written by Neurologist, it is not the specific PWN at issue in this Complaint. The PWN relevant to the allegation accepted for investigation, i.e., Parent’s request to assign a school nurse to Student’s school, is discussed in Finding of Fact (FF) # 22.

¹⁹ Exhibit 8, pp. 56-59.

²⁰ Response, p. 50. In her interview, Parent claimed she had not seen this plan. Email correspondence between Parent and her Attorney suggest indicated that she had received the plan and thought it reasonable. Exhibit L, pp. 2-3. Moreover, the District acted in accordance with this plan for the 2017-18 school year.

²¹ Parents alleged that the District violated the Colorado Nurse Practice Act and CDE guidelines in delegating certain tasks to EAs, specifically the administration of emergency medication that is not in prefilled single dose preparations. On April 26, 2017, the implementing rules and regulations for the Colorado Nurse Practice Act were revised to allow a school nurse to delegate the administration of prescribed emergency medications to a trained delegatee without restricting such delegation to prefilled doses. 3 CCR 716-1, Chapter 13: Rules and Regulations regarding the Delegation of Nursing Tasks, Section 7.2 (effective June 14, 2017). Prior to this revision, school nurses were not allowed to delegate the administration of emergency medication if the medication was not packaged in prefilled doses. Consequently, the administration of emergency medication from a multi-dose package by a properly trained EA during the 2017-18 school year would have been consistent with the newly revised regulations regarding delegation.

²² Exhibit 8 (Email correspondence). Because the District develops a health care plan for each condition, a student with multiple conditions may have several HCPs. Here, Student has multiple HCPs. To avoid confusion, the SCO will use HCP to denote the particular plan developed to address seizures and use SAP to denote orders and the plan developed by Neurologist.

14. The HCP in place for the 2017-18 school year identified the action required for specific symptoms and types of seizures, ketogenic diet, and how to monitor Student while sleeping.²³ The purpose of the HCP was to provide instruction to non-nursing staff, i.e., teachers and Educational Assistants (EA), on what to do in the event of seizure activity requiring emergency medical care while they wait for the School Nurse or emergency medical personnel to arrive.²⁴

15. All staff responsible for implementing the HCP have been properly trained. Specifically, Special Education Teacher and all five EAs assigned to work one-on-one with Student have been trained by School Nurse and have ready access to the HCP during the school day.²⁵ To ensure accessibility to the HCP, a laminated copy of the HCP was kept in the backpack Student carries with him and another copy was kept within a crisis folder in the classroom.²⁶ To ensure implementation of the HCP, each EA and teacher responsible for implementing the HCP has received hands-on training from School Nurse that included practice in using the pulse oximeter, administering oxygen, and drawing emergency medication. This training was conducted at the beginning of the 2017-18 school year, with a refresher in November. In addition, School Nurse conducted two mock seizure drills in January and April of 2018.²⁷

16. The nursing services plan and the HCP were in place prior to the IEP meeting in the fall of 2017.

September 2017 IEP Meeting

17. On September 11, 2017, the District convened a properly constituted IEP Team to discuss Student's educational needs. Legal Counsel for Parents and the District also attended the IEP meeting.²⁸

18. The notice of meeting informed Parents that the purpose was "to review and update [Student's] present levels of academic achievement and functional performance, needs, and goals, and to develop a plan to provide special education and related services."²⁹

19. According to Parents, the purpose of the IEP meeting was to discuss their request to add an accommodation to Student's IEP that would require the assignment of a school nurse. Consistent with their expressed understanding of the purpose of the IEP meeting, Parents

²³ Exhibit 2.

²⁴ Interviews with Director of Nursing, School Nurse, and EA.

²⁵ Exhibit 10; Interviews with EA, Special Education Teacher, and School Nurse.

²⁶ Interviews with EA and Special Education Teacher.

²⁷ Interviews with School Nurse, Special Education Teacher, and EA; Exhibit 10 (Medication Training Records).

²⁸ Response, pp. 55 and 58. In all, four attorneys, two for the District and two for Parents, attended this IEP meeting.

²⁹ Response, p. 54 (Notice of Meeting dated August 16, 2017).

asked that the team move quickly through a review of the IEP so that they could discuss their request concerning a school nurse.³⁰

20. Based on consistencies between witness interviews and the specific provisions of the IEP described below, the SCO finds that the IEP team did not agree to the assignment of a nurse as an accommodation because it had already agreed to the request through the nursing services plan and the HCP. Knowing that the District had already agreed to assign a school nurse to Student's school for the 2017-18 school year, Special Education Director instructed the IEP team to discuss Parent's request for a dedicated EA rather than the accommodation related to the assignment of a school nurse. As a result of this discussion, the IEP team agreed that Student required a dedicated EA to monitor health needs for the 2017-18 school year.

21. Relevant to the IEP team's discussion of Student's health-related needs, the September 2017 IEP contained the following provisions:

- Under "present levels of academic achievement and functional performance," the IEP states that Student has emergency anti-seizure medication and oxygen at school and requires assistance with safety monitoring at school. Further, this section of the IEP notes that "[Student's] present health status is not impacting his education at this time."³¹
- Under "consideration of special factors," the IEP states that Student requires a HCP. Further, the IEP identifies where various copies of the HCP are kept.
- Under the "services delivery statement," the IEP states that Student requires direct one-to-one and continuous adult supervision throughout the school day to monitor medical needs, and assess his physical state and readiness to learn.

22. The District used the 2017 IEP to provide PWN regarding decisions made at the IEP meeting. Under the PWN section, the IEP provided the following statement:

[Parents] asked how to avoid having this same discussion next year. District representative indicated that the school team cannot predetermine his needs at this time. If [Student's] needs remaining the same, the plan and supports would also stay the same.³²

The PWN provided no further clarification or information concerning the nature or subject of the discussion referenced above. Based on interviews, the SCO finds that this statement refers

³⁰ Exhibit 1, p. 2 (IEP meeting notes).

³¹ Response, p. 62 (September 2017 IEP).

³² Response, p. 76 (2017 IEP).

to the discussion about Student's health care needs and Parent's request to have a school nurse assigned to the building where Student attends school.³³

23. During the spring of 2018, School Nurse was not present in the building for approximately 12 days. The School Nurse provided Parent with advance notice of her absences and Parent elected to come to school herself or provided a "caregiver."³⁴ Consistent with the Nursing Services Plan, the District provided a substitute Nurse who was available by phone for each absence. There is no evidence that the absence of School Nurse on these dates was inconsistent with Student's IEP, the IHP, or the Nursing Services Plan. Nor is there evidence of educational harm related to the absence of School Nurse on these specific dates.

CONCLUSIONS OF LAW

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

Conclusion to Allegation One: The District failed to provide adequate prior written notice (PWN) of its refusal of Parents' request to require that a District Nurse be placed in Student's School as an accommodation on Student's IEP.

Essential to a parent's ability to participate in the development of her child's educational program is the procedural requirement that the school district provide sufficient notice before it makes substantial changes to the student's educational program. 34 CFR § 300.503(a). Prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report used by the district as a basis for the action; a description of other options the IEP team considered and the reasons why those options were rejected; and a description of any other factors relevant to the district's proposal or refusal. 34 CFR § 300.503(b)(1-3) and (6-7). Prior written notice must also include a statement that the parents of a child with a disability have protections under the procedural safeguards and the means by which to obtain a copy if the notice is not for an initial evaluation, and sources for parents to contact to obtain assistance in understanding the procedural safeguards. 34 CFR § 300.503(b)(4-5).

A school district's obligation to provide PWN is triggered when the proposed change involves identification, evaluation, educational placement, or the provision of FAPE. Germane to the particular facts and concerns underlying this dispute, courts have held that the concept of FAPE includes accommodating the safety of IDEA eligible students who have disabilities that may make them more vulnerable to injury, such as the potential risk of a life-threatening seizure. *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 379 F.3d 77 (2nd Cir. 2005); see also *Oconee County Sch. Dist. v. A.B.*, 114 LRP 37520 (GA SEA 2014), *aff'd* 65 IDELR 297 (M.D. Ga. 2015)(Collecting cases in support of the proposition that FAPE requires accommodation for

³³ Interviews with Parent, Principal, Special Education Teacher, and General Education Teacher.

³⁴ Caregiver was not a licensed nurse.

safety concerns). Consequently, Parent's request that a school nurse be assigned to Student's school based on disability related safety concerns implicated the provision of FAPE and triggered the District's obligation to provide PWN.

Concluding that the District was obligated to provide PWN in this circumstance, the SCO now considers whether the PWN provided was adequate. For the reasons explained below, the SCO concludes that the PWN issued following the September 2017 IEP meeting did not sufficiently describe the action being refused. First, Parents requested that the accommodation to assign a school nurse be added to Student's IEP during the September 2017 IEP meeting. Indeed, it is the very reason Parents wanted to meet. Accordingly, the District had an obligation to respond to Parents' specific request. It did not do so. The PWN section of the IEP only stated that Parents asked "how to avoid having this same discussion next year." The nature or subject of the discussion at issue was not identified.

Adequately identifying the specific action being proposed or refused is essential because the primary purpose of prior written notice is to help parents understand the basis for disagreement and whether to seek resolution of the dispute through the available procedural safeguards. *See Letter to Boswell*, 49 IDELR 196 (OSEP 2007). Recently, the Supreme Court emphasized the importance of prior written notice by stating that "[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

Given that there are different substantive rights and enforcement mechanisms for disputes related to an IEP than there are for disputes related to an "agreement," i.e., the nursing services plan, the failure to sufficiently describe the IEP team's refusal to include the requested accommodation on Student's IEP may have impacted access to the procedural safeguards in such a way that it resulted in substantive harm. In this case, the District actually assigned a nurse to Student's building for the 2017-18 school year. Because the District provided the accommodation requested, there was no substantive harm resulting from the District's failure to provide sufficient PWN. Consequently, this was a procedural violation.

Conclusion to Allegation Two: The IEP accurately described the special education and related services recommended and agreed to by the IEP team on September 11, 2017.

Parents alleged that the District failed to accurately describe and provide the special education and related services by excluding an accommodation for nursing staff, contrary to the IEP team's decision on September 11, 2017. Notably, Parents' specific allegation limits the scope of this investigation to whether the IEP accurately reflected the team's decision regarding the assignment of a school nurse and not whether the IEP was reasonably calculated to enable a child to make progress appropriate in light of his circumstances. For the reasons explained more fully below, the SCO finds and concludes that the IEP accurately described the special

education and related services Student would receive for the 2017-18 school year, in accordance with the September 2017 IEP Team's determination.

A school district must provide related services required to assist a child with a disability to benefit from specially designed instruction. School nurse services are identified as related services and include health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. 34 CFR § 300.34 (c)(13). Accordingly, the IDEA requires that school districts provide nursing or health services if the Student needs such services to receive FAPE. *Oconee County Sch. Dist. v. A.B.*, 114 LRP 37520 (GA SEA 2014), *aff'd* 65 IDELR 297 (M.D. Ga. 2015)(Ordering the school district to amend the IEP to require that a medically trained aide accompany student on the bus in the event of a seizure requiring administration of emergency medication); *see also East Haddam Bd. of Educ.*, 118 LRP 10350 (CT SEA 2017)(Ordering the school district to revise student's IEP to include school health services as a related service to be provided by a dedicated paraprofessional trained by a nurse to monitor student's health needs and administer medication consistent with delegation under state law).

The IEP must include a statement describing the special education and related services, supplementary aids and services, and program modifications or supports for school personnel that the child will receive to enable him to make progress on annual goals and the general education curriculum. 34 CFR § 300.320(a)(4)(ii). This statement, commonly referred to as the service delivery statement, must be sufficiently detailed for parents to understand what specific services and supports the school district is offering to provide. *Tamalpais Union Sch. Dist. v. D.W.*, 70 IDELR 230 (N.D. Cal. 2017)("Parents can't make an informed decision on whether to accept a proposed IEP if the document includes only a vague description of the student's services").

Contrary to Parents' assertion, the IEP Team did not agree to include an accommodation on Student's IEP that would require that a nurse be assigned to Student's school. As documented in a written agreement referred to as the nursing services plan, the District had already agreed to assign School Nurse to Student's building prior to the IEP meeting. Notably, the nursing services plan was negotiated with the direct involvement of legal counsel for Parents and the District. The nursing services plan and the HCP were both in place prior to the 2017 IEP meeting. Because these plans were already in place, Special Education Director instructed the IEP team to focus discussion on Student's need for a dedicated EA to monitor and support his health needs in the classroom.

As a result of this discussion, the September 2017 IEP team determined that Student required a HCP and a dedicated EA to monitor his health needs. As described in Findings of Fact 20-21, the IEP accurately reflected the IEP team's decision regarding the services that would be provided to support Student's health needs, including the provision of a dedicated EA to monitor and support Student's health needs. The service delivery statement, combined with the IEP's reference to the HCP, was sufficiently detailed for Parents to understand the precise

services that the District was offering to support Student's health needs. *Montgomery County Public Schools*, 115 LRP 24190 (MD SEA 2015)(Concluding that the IEP did not need to include accommodations related to health needs where these were listed in student's HCP.) Moreover, the District provided these services in accordance with the IEP for the 2017-18 school year.

REMEDIES

The SCO concludes that the District has violated the following IDEA requirements:

- a) Content of prior written notice, 34 C.F.R. § 300.503.

To remedy this violation, the District is ordered to take the following actions:

- 1) By August 15, 2018, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the 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 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 August 31, 2018.
 - b) Effective training must be conducted for all special education staff responsible for issuing prior written notice, no later than September 28, 2018. Training must address concerns noted in this Decision.
 - 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 CDE no later than October 5, 2018.

CONCLUSION

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

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

Dated this 6th day of July, 2018.

Candace Hawkins, Esq.
State Complaints Officer

Appendix

Complaint, pages 1-3.

Exhibits A-C: Excerpts from and references to various Colorado regulations.

Exhibits D-E: Email correspondence

Exhibit F: Seizure action plan.

Exhibits G-H: Email correspondence.

Exhibit I: Letter from Neurologist dated July of 2017.

Exhibit J: Prior written notice dated July of 2017.

Exhibit K: Email correspondence.

Exhibit L: Nursing services plan dated August 2017.

Exhibit M: Notice of meeting dated August 2017.

Exhibit N: List of attendees for September 2017 IEP meeting.

Exhibit O: September 2017 IEP.

Exhibit P: Health Care Plan for 2017-18 school year.

Exhibits Q-S: Email correspondence.

Response, pages 1-88. Response included exhibits referenced in support of the District's position.

Exhibit 1: Meeting notes from September 2017 IEP.

Exhibit 2: Signed SAP.

Exhibit 3: Prior written notice.

Exhibit 4: Referenced notice of meeting provided in Complaint.

Exhibit 5: Grade reports and IEP progress reports.

Exhibit 6: Information related to Student's health needs.

Exhibit 7: Reference to nursing services plan provided with Complaint and attached in Response.

Exhibit 8: Email correspondence.

Exhibit 9: Contact information for witnesses.

Exhibit 10: Mediation training records for select staff.

Exhibit 11: District policies and procedures related to health care plans.

Exhibit 12: Electronic communication log. At Parents' request, the SCO asked the District to provide a copy of a "back and forth" book that staff and parents used to communicate. The District could not locate this book. In her interview, Parent stated that she had located the book. A copy was not provided to the SCO.

Reply, pages 1-8.

Interviews with:

- Parent
- Director of Health and Wellness

- School Nurse
- Special Education Teacher
- Educational Assistant
- General Education Teacher
- Principal

Although the SCO requested an interview with Special Education Director, she is no longer employed by the District.