

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

State-Level Complaint 2019:574
Boulder Valley School District

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on December 27, 2019 by the parents (Parents) of children (Student A and Student B) identified as children with disabilities under the Individuals with Disabilities Education Act (IDEA).¹

Based on the written Complaint, the SCO determined that the Complaint identified allegations 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.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate allegations of violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from December 27, 2018 through December 27, 2019 for the purpose of determining if a violation of the IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

Whether Student A and Student B have been denied a Free Appropriate Public Education (FAPE) because the Boulder Valley School District (District):

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).

1. Failed to provide Student A with special education and related services at public expense, without charge, during the 2019-2020 academic year, in violation of 34 C.F.R. §§ 300.17(a) and 300.101(a)-(b);
2. Failed to provide Student B with special education and related services at public expense, without charge, from December 27, 2018 through the end of the 2018-2019 academic year, in violation of 34 C.F.R. §§ 300.17(a) and 300.101(a)-(b).

FINDINGS OF FACT

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

A. Background

1. Student A is a four-year-old eligible for special education and related services under the disability categories of Developmental Delay and Speech or Language Impairment. *Exhibit A*, p. 60. Student A attends preschool at a focus school (Focus School) located within District. *Interviews with Father and Executive Director of Special Education; Exhibit A*, p. 60.
2. Student B is a six-year old eligible for special education and related services under the disability categories of Developmental Delay and Speech or Language Impairment. *Exhibit A*, p. 24. Student B is in the first grade at Focus School. *Interviews with Father and Executive Director of Special Education; Exhibit A*, p. 24.
3. Student A and Student B are siblings who began attending Focus School for preschool at age three after being accepted through open enrollment. *Interviews with Father, Child Find Coordinator, and Executive Director of Special Education*.
4. Following their initial eligibility determinations, Student A and Student B were offered special education and related services at no cost at one of the District's integrated preschools (Integrated Preschool). *Interviews with Father, Executive Director of Early Childhood Education, Executive Director of Special Education, Child Find Coordinator, and Early Childhood Special Education Teacher*. Parents declined these offers of FAPE and requested that both students attend Focus School, despite being informed that tuition would be charged for both students as it is for all preschoolers at Focus School. *Id.*
5. This dispute arose in August of 2019, after Student A was found IDEA-eligible. *Interview with Father; Exhibit E*, pp. 1-9. Parents objected to being charged tuition for Student A

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

and Student B because both students are IDEA-eligible. *Id.* Father requested recovery of tuition paid for both students and ultimately filed the instant Complaint. *Id.*

B. District Preschools and Focus School Structure and Funding

6. District offers preschool services in 19 elementary schools, including Focus School, and at one child development center. *Interview with Executive Director of Early Childhood Education; Exhibit D*, p. 5. District preschools are generally integrated preschools, meaning that one third of students pay tuition, one third receive free services from the Colorado Preschool Program, and one third receive free services through special education. *Id.* The integrated preschools employ staff who have dual licensure for early childhood education (ECE) and early childhood special education (ECSE). *Interviews with Child Find Coordinator and Executive Director of ECE.*
7. Focus School is a public [] school operated by District that serves preschool through fifth grade. *Interviews with Father, Executive Director of ECE, and Child Find Coordinator; Exhibit H*, pp. 6-7. Focus School meets District standards but may have a different curriculum or philosophy than other District schools. *Exhibit D*, p. 3; *Exhibit H*, p. 6. In addition, Focus School is a choice school, which means that all students who attend must apply through open enrollment. *Interviews with Child Find Coordinator, Executive Director of ECE, and Executive Director of Special Education.*
8. Students may attend their District-designated neighborhood school, which is based on home address, or application may be made for open enrollment to another neighborhood school, a focus school, or a charter school in District. *Exhibit D*, p. 3. When a student has been enrolled in any school under the open enrollment policy, that school becomes the “school of attendance.” *Id.*
9. Focus School offers preschool, but it is not an integrated preschool. *Interviews with Child Find Coordinator, Executive Director of ECE, and Executive Director of Special Education.* Instead, all preschoolers at Focus School pay tuition. *Id.*; *Exhibit H*, p. 2. As of the 2019-2020 academic year, Kindergarten through fifth grade students at Focus School are not charged tuition. *Id.*
10. Preschool students are charged tuition because Focus School does not receive any public funds for three and four-year-old students, and thus tuition comprises the bulk of the preschool’s funding. *Interviews with Child Find Coordinator and Executive Director of ECE.* This is because Focus School utilizes a [] instructional model, [Instructional Model]. *Id.*; *Exhibit H*, p. 7. The primary level is for ages three through kindergarten. *Exhibit H*, p. 7.
11. Because of its group size, Focus School’s preschool is not eligible for funding through the Colorado Preschool Program, which requires that the group size not exceed 16 students. *Interviews with CDE Preschool Consultant, Child Find Coordinator, and Executive Director of ECE.*

12. Unlike the District's integrated preschools, Focus School's preschool does not staff any full-time ECSE teachers. *Interviews with Child Find Coordinator and Executive Director of ECE*. Instead, if a preschool student is identified as IDEA-eligible, the student is served by an itinerant ECSE teacher, provided that the student does not require more than 90 minutes of direct ECSE services per week. *Id.*; *Exhibit I*, p. 15.
13. The location for implementation of special education and related services for a preschool student is determined by the District Location Committee, which considers multiple factors, including the proximity of a preschool to the child's home or childcare, transportation costs, the child's needs and disability, parental input, and whether the child's neighborhood school has a preschool. *Interviews with Child Find Coordinator and Executive Director of ECE; Exhibit I*, p. 14. Because of Focus School's structure, funding, and resources, District does not directly place any special education students at Focus School. *Id.*

C. Eligibility Determination and Offer of FAPE for Student A

14. Student A started preschool at Focus School—through the open enrollment process—in August of 2018. *Interviews with Father and Child Find Coordinator*. In July of 2019, District evaluated Student A and found him to be IDEA-eligible. *Interviews with Father, Executive Director of ECE, and Child Find Coordinator; Exhibit A*, p. 60.
15. On July 30, 2019 and August 13, 2019, the District convened a properly constituted IEP Team for an initial eligibility meeting and development of Student A's initial IEP. *Exhibit A*, p. 60.
16. The IEP Team recommended 200 minutes per week of direct services from an ECSE, which the District explained exceeded the services that could be provided by the itinerant ECSE at Focus School. *Interview with ECSE Teacher; Exhibit A*, p. 83.
17. The District made an offer of FAPE with the location at Integrated Preschool because Student A's neighborhood school does not provide preschool. *Interviews with Father, ECSE Teacher, and Executive Director of Special Education*. Also, Integrated Preschool is the next closest school, and all of its preschool teachers have dual licensure in ECE and ECSE. *Interviews with Executive Director of ECE, Child Find Coordinator, and ECSE Teacher*.
18. The District explained to Parents that Integrated Preschool would provide preschool and special education at no cost. *Interviews with Father, ECSE Teacher, and Executive Director of Special Education*. The District offered services at Integrated Preschool to be implemented upon receipt of parental consent. *Interviews with Child Find Coordinator and ECSE Teacher; Exhibit A*, p. 83.
19. Parents requested that Student A remain at Focus School because they preferred the [] curriculum model and did not want to move Student A away from the teachers and

classmates with whom he had spent the past academic year. *Interviews with Father and ECSE Teacher*. The prior written notice documents that Parents “choiced-in” to Focus School for the 2018-2019 academic year and wanted Student A to continue at Focus School. *Exhibit A*, p. 83.

20. Parents did not accept the District’s offer of FAPE or sign consent for services. *Interview with ECSE Teacher; Exhibit A*, p. 83. Father requested a continuation of the July 30, 2019 IEP meeting, and he requested that the IEP Team consider modifying Student A’s IEP so that special education services could be provided at Focus School. *Interview with Child Find Coordinator; Exhibit A*, p. 83; *Exhibit J*, p. 5.
21. The IEP Team reconvened on August 13, 2019, with additional staff from Focus School present for the meeting. *Interview with ECSE Teacher; Exhibit A*, pp. 62, 83. The IEP Team discussed that Focus School is a choice school, and Focus School would have to agree that it could meet Student A’s goals and provide the services outlined in the IEP with the resources it had. *Exhibit A*, p. 83.
22. Focus School Principal and General Education Teacher shared information regarding their work with Student A over the past academic year, and the IEP Team determined that they were comfortable reducing Student A’s service minutes to 180 minutes per week, given the level of Student A’s independence described by Focus School staff. *Interview with ECSE Teacher; Exhibit A*, pp. 83-84.
23. The IEP Team discussed maintaining the level of support outlined in the IEP, but they shifted the minutes to different providers so that services would be provided in a trans-disciplinary model. *Id.* Focus School staff expressed that Student A’s needs could be met in their program and accepted the continuation of Student A’s enrollment, but they also agreed that they would monitor Student A’s progress and communicate with the family regarding their ability to provide the services in Student A’s IEP. *Id.*
24. The District explained that Parents would continue to be charged tuition if Student A attended Focus School, whereas Integrated Preschool would be provided at no cost to Parents, and Parents understood this. *Interviews with Father and ECSE Teacher*. Despite the tuition, Parents requested that Student A remain at Focus School, and they provided Consent for Initial Provision of Services on August 14, 2019. *Id.*
25. Throughout the 2019-2020 academic year, Parents have been charged the published tuition paid by the parents of every preschool student at Focus School. *Interviews with Father, Executive Director of ECE, and Executive Director of Special Education; Exhibit 3*, pp. 1-2; *Exhibit C*, pp. 1-2.

D. Eligibility Determination and Offer of FAPE for Student B

26. Student B started preschool at Focus School—through the open enrollment process—in August of 2016. *Interview with Father*. Prior to enrollment, in April of 2016, District evaluated Student B and found him to be IDEA-eligible. *Interviews with Father and Child Find Coordinator; Exhibit 5*, pp. 3-7.
27. On May 5, 2016, the District convened a properly constituted IEP Team for an initial eligibility meeting and development of Student B’s initial IEP, and District made an offer of FAPE at Integrated Preschool. *Interviews with Father, Speech Language Pathologist, and Executive Director of Special Education; Exhibit A*, p. 1.
28. Integrated Preschool was selected as the location to implement Student B’s IEP due to its proximity to Parents’ residence and its staff qualifications. *Interviews with Executive Director of ECE, Child Find Coordinator, and Speech Language Pathologist*. District explained that preschool and special education services would be provided at no cost at Integrated Preschool. *Interviews with Father, Speech Language Pathologist, and Executive Director of Special Education*. The District offered these services to be implemented upon receipt of parental consent. *Interview with Speech Language Pathologist; Exhibit 5*, p. 12.
29. Parents declined the District’s offer of FAPE at Integrated Preschool because Parents preferred the [] curriculum model and believed that the Integrated Preschool model would not be a good fit for Student B. *Interview with Father*. District staff explained that Parents would be charged tuition if Student B attended Focus School, and Parents understood this. *Id.* Despite the tuition, Parents chose to defer preschool enrollment until the fall of 2016, when Student B would start at Focus School. *Interview with Speech and Language Pathologist; Exhibit 5*, p. 12. The prior written notice in the May 5, 2016 IEP documents that Parents chose to enroll Student B at Focus School. *Exhibit 5*, pp. 11-12.
30. Because Student B’s needs as identified in the IEP required speech and language services, those needs could be met at Focus School, and Focus School accepted Student B for enrollment. *Interview with Child Find Coordinator*. Parents paid the published tuition for Student B to attend the preschool at Focus School. *Interview with Father*.
31. During the 2018-2019 academic year, the time period relevant to the instant Complaint, Student B started his kindergarten year at Focus School. *Exhibit A*, p. 27. Parents were not offered and did not request an alternate school setting for services following their initial selection of Focus School, but placement at Focus School was not necessary for Student B to receive a FAPE in the District during his kindergarten year. *Interviews with Father, Principal, and Executive Director of ECE*. For example, Student B’s neighborhood

elementary school employed special education staff capable of implementing Student B's IEPs. *Interview with Executive Director of ECE.*

32. Student B attended full-day kindergarten at Focus School, but his IEPs for the 2018-2019 academic year did not require full-day kindergarten for implementation. *Interviews with Father, Executive Director of ECE, and Executive Director of Special Education; Exhibit A*, pp. 21-22. Student B's service minutes did not exceed a half day, and his IEPs document placement in a regular early childhood program for at least 10 hours per week. *Exhibit A*, pp. 22, 37.
33. Unlike the preschool program, Focus School's kindergarten program receives public funding. *Interviews with Executive Director of ECE and Principal.* During the 2018-2019 academic year, Focus School received public funding for its students to attend half-day kindergarten. *Id.* Focus School presented its kindergarten program as a full-day program, and tuition was charged for one half of the day. *Id.* Parents paid tuition for Student B to attend the full-day program. *Interviews with Father; Exhibit C*, pp. 1-2.
34. With the exclusion of Title I Schools, all of District's kindergarten programs during the 2018-2019 academic year received public funding for a half day. *Interview with Executive Director of ECE.* Parents in the District's other kindergarten programs had the option to pay tuition for an extended day enrichment program operated by a community school. *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegations No. 1: The District offered Student A special education and related services at public expense, without charge, during the 2019-2020 academic year, consistent 34 C.F.R. §§ 300.17(a) and 300.101(a)-(b).

A preschool child with a disability is entitled to all of the rights and protections guaranteed by the IDEA. *Letter to Wessels*, 19 IDELR 584 (OSEP 1992). In fact, school districts have an obligation under the IDEA to provide a FAPE to all children with disabilities between the ages of 3 and 21. 34 C.F.R. § 300.101.

FAPE means special education and related services that are (a) provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the state educational agency; (c) include an appropriate preschool, elementary school, or secondary school education; and (d) are provided in conformity with an IEP that meets the requirements of 34 C.F.R. §§ 300.320 through 300.324. 34 C.F.R. § 300.17.

Special education is defined as specially designed instruction, provided at no cost to the parents, to meet the unique needs of a child with a disability. 34 C.F.R. § 300.39(a)(1). All specially designed instruction must be provided without charge, but this does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program. 34 C.F.R. § 300.39(b)(1).

If a district places a child in a private preschool program for the purpose of receiving a FAPE, the program must be provided at no cost to parents. *Letter to Wessels*, 19 IDELR 584 (OSEP 1992). However, a district is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the district made FAPE available to the child and the parents elected to place the child in a private school or facility. 34 C.F.R. § 300.148(a).

Here, Parents assert that District failed to provide Student A with special education and related services at public expense and without charge. However, the totality of the evidence does not support their assertion. On the contrary, FF #17-18 and 24 show that when Student A was initially identified as eligible under the IDEA, the District made an offer of FAPE at an integrated preschool closest to the Parents' residence, where services would be provided at no cost. Integrated Preschool was selected in part because it had the staff necessary to provide services consistent with Student A's IEP. When presented with this offer of FAPE, Parents declined and requested that services be provided at Focus School. (FF #19-20, 24).

While Focus School is operated by District, its preschool does not receive any public funds, and it is funded primarily by student tuition, much like a private school. (FF #7, 9-11). As shown in FF #17-18, 19, and 24, Parents requested that Student A receive services at Focus School based on their preference, but placement at Focus School was not necessary to provide Student A with a FAPE. In fact, the evidence shows that Student A was offered a FAPE at Integrated Preschool, which employed licensed staff capable of providing services beyond the resources available at Focus School. (FF #16-18, 24).

The law is clear that all children with disabilities are entitled to special education and related services provided at public expense, under public supervision and direction, and without charge. However, the law does not require that children with disabilities receive special education and related services provided without charge at any location selected by parents.

Although the IDEA requires parental participation in "educational placement" decisions, it does not prohibit a district from making the administrative decision about the location for services. *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003). "Educational placement", as used in the IDEA, means educational program—not the particular institution where that program is implemented." *Id.* See also ECEA Rule 4.03(8)(a) ("Decisions regarding the location in which a child's IEP will be implemented and the assignment of special education staff responsibilities shall be made by the Director of Special Education or designee").

Accordingly, the District here was not required to comply with Parents' request regarding the location of preschool services. However, the District agreed to provide special education and related services at Focus School with the understanding that Parents would pay the same published tuition charged for every student who attends Focus School. (FF #21-25). Indeed, Parents have only been charged the tuition that is charged for every student who attends Focus School and nothing more. (FF #25).

In the context of providing transportation as a related service, courts have held that where a student with a disability chooses—based on personal preference and not on a disability-related education need—to attend another school in the district other than his neighborhood school, the district is not obligated to provide transportation to that school. *See, e.g., Fick v. Sioux Falls Sch. Dist.*, 337 F.3d 968 (8th Cir. 2003) (holding that a district may apply a facially neutral transportation policy to a disabled child without violating the law when the request for deviation from policy is not based on the child's educational needs, but on parental preference); *see also Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999); *CO State-Level Complaint Decision 2019:569*.

Ultimately, Parents here chose for Student A to attend Focus School based on personal preference, not a disability-related need, and District has applied a facially neutral tuition policy to all students who apply to Focus School through open enrollment. (FF #9-10, 19, 24-25).

Based on the evidence, the SCO finds and concludes that District offered Student A special education and related services at public expense, without charge, consistent 34 C.F.R. §§ 300.17(a) and 300.101(a)-(b).

Conclusion to Allegations No. 2: The District offered Student B special education and related services at public expense, without charge, from December 27, 2018 through the end of the 2018-2019 academic year, consistent 34 C.F.R. §§ 300.17(a) and 300.101(a)-(b).

The legal framework outlined in Part I.A applies equally to Student B regarding District's offer of FAPE and Parents' preference for Focus School. Parents assert that District failed to provide Student B with special education and related services at public expense and without charge.

However, FF #27-31 show that when Student B was initially identified as IDEA-eligible in 2016, the District made an offer of FAPE at Integrated Preschool, where services would be provided at no cost. Integrated Preschool was selected not only based on proximity to Parents' residence, but also because its staff were qualified to implement the IEP and meet Student B's needs. When presented with this offer of FAPE, Parents declined and requested that services be provided at Focus School. This request was made based on parental preference. While Focus School was able to meet Student B's speech and language needs, placement at Focus School was not necessary to provide Student B with a FAPE.

During the period relevant to this investigation, Student B was a kindergarten student at Focus School. (FF #31). His continued attendance at Focus School was based on parental preference, not educational need. When Student B entered kindergarten during the 2018-2019 academic year, District received public funding for half-day kindergarten. (FF #33). The SCO now considers the impact of this funding on the District's provision of a FAPE to Student B.

FAPE means special education and related services that are (a) provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the state educational agency; (c) include an appropriate preschool, elementary school, or secondary school education; and (d) are *provided in conformity with an IEP* that meets the requirements of 34 C.F.R. §§ 300.320 through 300.324. 34 C.F.R. § 300.17 (emphasis added).

A school district is only responsible for paying the costs associated with implementing a child's IEP. *Madison Metro. Sch. Dist. v. P.R. ex rel. Teresa R.*, 598 F. Supp. 2d 938, 953 (W.D. Wis. 2009) (finding that because nothing in the student's IEP suggested that the student needed to attend preschool full-time to receive an appropriate education, the district was only responsible for the cost of part-time enrollment). The Office of Special Education Programs offered the following guidance regarding a district's financial responsibilities under the IDEA:

If the placement team determines that part-time placement in a private preschool is the most appropriate placement in which to implement a child's IEP and the parent wants the child to remain in the private preschool for longer than what is required in the IEP, the parent is responsible for any costs associated with the portion of the program not necessary to implement the child's IEP. However, the public agency remains responsible for all tuition costs associated with the part-time placement required to implement the child's IEP.

Letter to Wessels, 19 IDELR 584 (OSEP 1992).

In this case, as discussed in FF# 31-33, Focus School received public funding for half-day kindergarten during the 2018-2019 academic year, and Student B was provided with half-day kindergarten at no cost to Parents. Full-day kindergarten was not required to implement Student B's IEP, and his service minutes did not exceed a half day. The evidence shows that District provided funding sufficient to implement Student B's IEP and provide him with a FAPE.

Accordingly, the SCO finds and concludes that the District offered Student B special education and related services at public expense, without charge, from December 27, 2018 through the end of the 2018-2019 academic year, consistent 34 C.F.R. §§ 300.17(a) and 300.101(a)-(b).

REMEDIES

The SCO finds and concludes that the District did not violate any requirements of the IDEA. Accordingly, there are no remedies ordered pursuant to the IDEA and my authority as an SCO.

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 C.F.R. § 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 26th day of February, 2020.

Lindsey Watson
State Complaints Officer

Appendix

Complaint, pages 1-4

- Exhibit 1: Email correspondence
- Exhibit 2: IEPs for Student A and Student B, from March 16, 2018-December 6, 2019
- Exhibit 3: Documentation of Focus School tuition rates

Response, pages 1-4

- Exhibit A: IEPs for Student A and Student B, from March 16, 2018-December 6, 2019
- Exhibit B: Service logs
- Exhibit C: Documentation of tuition payments
- Exhibit D: District policies and procedures relevant to the Complaint allegations
- Exhibit E: Email correspondence
- Exhibit F: Contact information for District staff
- Exhibit G: Verification of delivery of the District's Response to Parents
- Exhibit H: Information regarding Focus School
- Exhibit I: Supplementary documents, including preschool registration and location determination materials
- Exhibit J: Additional email correspondence
- Exhibit K: Tuition agreements and information regarding District kindergarten programs
- Exhibit L: Focus School Handbook

Reply, pages 1-2

- Exhibit 4: Information regarding District preschool tuition
- Exhibit 5: IEP for Student B from May 5, 2016

Telephonic Interviews with:

- Father: February 6, 2020 and February 17, 2020
- Executive Director of ECE: February 10, 2020, February 12, 2020, and February 19, 2020
- Executive Director of Special Education: February 10, 2020
- Child Find Coordinator: February 10, 2020
- ECSE Teacher: February 12, 2020
- Speech Language Pathologist: February 12, 2020
- Principal: February 19, 2020