

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

**State-Level Complaint 2023:518
Delta School District 50J**

DECISION

INTRODUCTION

On February 21, 2023, the parent (“Parent”) of a student (“Student”) not currently identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Delta School District 50J (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified three 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. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. § 300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged 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 February 21, 2022 through the present for the purpose of determining if a violation of 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 the District denied Student a Free Appropriate Public Education (“FAPE”) because the District:

1. Failed to conduct a comprehensive evaluation of Student during the 2022-2023 school year, by failing to properly evaluate Student in all areas of suspected disability, in violation of 34 C.F.R. § 300.304(c)(4).

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.* The Exceptional Children’s Education Act (“ECEA”) governs IDEA implementation in Colorado.

2. Failed to properly determine Student’s eligibility for special education and related services during the 2022-2023 school year, in violation of 34 C.F.R. §§ 300.304-305.
3. Failed to protect the confidentiality of Student’s personally identifiable information (“PII”) and disclosed Student’s PII to other parties without Parent’s consent, in violation of 34 C.F.R. §§ 300.622-623, specifically by:
 - a. Allowing unnecessary individuals in the room during Student’s eligibility meeting on or around December 19, 2022.

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,² the SCO makes the following FINDINGS of FACT:

A. Background

1. Student attends fourth grade at a District elementary school (“School”). *Interview with Parent*. Though Student received special education and related services earlier in elementary school, she is not currently eligible. *Id.* Student has medical diagnoses of selective mutism and generalized anxiety disorder. *Exhibit C*, pp. 1-2.
2. Selective mutism refers to a “persistent failure to speak in specific social situations (e.g., school, with playmates) where speaking is expected, despite speaking in other situations.” *CDE Exhibit 1*, p. 1.

Children with selective mutism often engage, interact, and communicate verbally within comfortable surroundings, such as at home or with trusted peers. These children are capable of speaking and understand their native language. However, when placed in structured social settings such as school, they are mute and socially withdrawn.

Id. Selective mutism is categorized as an anxiety disorder, not a speech or language disorder. *Id.* at p. 2; *Interviews with CDE Consultant #1 and CDE Consultant #2*. Current research shows that children with selective mutism respond best to behavioral therapy that treats the underlying anxiety, not speech therapy. *Id.*; *CDE Exhibit 1*, pp. 3-7; *see CDE Exhibit #2*.

3. Student is a cheerful, funny young lady who struggles with selective mutism. *Interview with Parent*. She enjoys free time with her peers at School. *Interview with Fourth Grade Teacher*. Student advocates for herself when she has difficulty understanding a concept, especially in math. *Id.*

² The appendix, attached and incorporated by reference, details the entire Record.

4. At home, Student speaks freely with her immediate family. *Interview with Parent*. However, Student will not speak at home if other individuals—even extended family—are present. *Interviews with Aunt and Parent*. In the classroom, Student communicates through nonverbal gestures, facial expressions, and a Boogie Board. *Interview with Fourth Grade Teacher*. The Boogie Board is an electronic notepad that allows Student to communicate in writing with her peers and teachers. *Id.* Student writes notes on the Boogie Board and shows them to others, before erasing the Boogie Board and writing another note. *Id.* Student demonstrates her knowledge of the curriculum through written work and by answering questions on her Boogie Board. *Id.* Student often has Fourth Grade Teacher or classmates read her answers to questions and other written work aloud on her behalf. *Id.*
5. Over the course of fourth grade, Student started whispering to three of her classmates. *Id.* At times, Student’s whispers were disruptive to the class because they occurred during instructional time. *Id.*

B. Student’s Prior Eligibility

6. The District initially found Student eligible for special education and related services under the Developmental Delay disability category when she was in preschool. *Response*, p. 1; *Interviews with Parent and Speech Language Pathologist (“SLP”)*; *Exhibit K*, p.1. SLP participated in Student’s initial evaluation and recalled Student being “incredibly stiff” and standing off to the side, away from her peers. *Interview with SLP*.
7. At the beginning of kindergarten, Student’s IEP specified that she receive 60 minutes per week of direct specialized instruction and 60 minutes per week of direct speech/language services. *Id.* at p. 12. Both were delivered outside the general education classroom. *Id.* A few months into the school year, the IEP Team amended Student’s IEP to move the specialized instruction and speech services to inside the general education classroom. *Id.* at pp. 19, 22.
8. During the 2019-2020 school year, Student’s IEP required 150 minutes of direct specialized instruction outside of the general education classroom to target her social/emotional wellness goal. *Id.* at p. 32. Student also received 10 minutes per quarter of indirect speech/language services through a consultation between her general education teacher and an SLP. *Id.*
9. In the 2020-2021 school year, Student’s IEP indicated she would receive 75 minutes per week of direct specialized instruction outside the general education classroom to work on her social/emotional wellness goal. *Id.* at pp. 43-44. In addition, she received 15 minutes per quarter of indirect speech/language services. *Id.* Student’s social/emotional wellness goal—which was the sole annual goal in her IEP—stated: “Within the length of this IEP, [Student] will mouth words (without sound) to a preferred adult to communicate needs and/or respond to a prompt, in 4 out of 5 observations.” *Id.* at p. 40. Student met this goal early in the 2020-2021 school year. *Id.* at p. 47.

10. In Spring 2021, the District completed Student’s triennial reevaluation. The reevaluation noted that:

[Student] has participated in school for almost three years without direct speech-language services. Through available nonverbal test measures, it appears that [Student’s] language skills are developing typically . . . There are no reported concerns regarding articulation skills from those who she does use her voice to communicate with. When [Student] does not communicate verbally, she will communicate nonverbally through expressions, body language, gestures, and written communication. This communication system is effective and easy for [Student] and has been observed to be a natural part of both classroom interactions with peers and teachers as well as in other 1:1 settings.

Id. at p. 66.

11. Based on that reevaluation, a multi-disciplinary team determined in April 2021 that Student could receive reasonable benefit from general education alone and, as a result, was no longer eligible for special education and related services. *Id.* at p. 62. At the same time, the District developed a 504 plan to provide Student support for her selective mutism. *Response*, p. 3.
12. Student’s 504 plan remained in place throughout the 2021-2022 school year when Student was in third grade. *Id.*

C. Parent’s Request for an Evaluation

13. On May 6, 2022—near the end of Student’s third-grade year—Parent requested that the District evaluate Student for an IEP. *Interview with Parent; Exhibit H*, pp. 6-7. Parent made this request because Student “was not getting any help and nothing was happening.” *Interview with Parent*.
14. District staff met with Parent on May 16 to discuss her request for an evaluation. *Exhibit H*, p. 16. Given that the last day of school was May 27, the attendees at the meeting agreed to wait to evaluate Student until a few weeks into the 2022-2023 school year. *Interview with School Psychologist; Exhibit L*, p. 1. During this investigation, Parent asserted that she was not given a choice in the meeting; however, no documents in the Record support this perspective. Parent did not send any emails after the meeting demanding that Student be evaluated, asking about the consent to evaluate paperwork, or inquiring about the status of the evaluation. *See Exhibit H*, pp. 1-284.
15. Student began fourth grade on August 15, 2022. *Exhibit L*, p. 2. That same day, School Psychologist emailed Parent to ask whether Parent still wanted to proceed with an evaluation. *Exhibit H*, pp. 20, 22, 23.

16. On August 23, 2022, District staff met with Parent to review Parent’s concerns and identify the appropriate areas for evaluation. *Id.* at pp. 39-40. Following the meeting, the District prepared a consent to evaluate form, proposing to evaluate Student in the areas of communicative status, academic performance, and social-emotional status. *Exhibit A*, pp. 49-51. Parent provided consent to evaluate on August 24, 2022. *Id.*

D. Student’s Evaluation

17. During September and October, the District evaluated Student. *Id.* at pp. 18-48. SLP assessed Student’s communicative status using observations, trials of augmentative and alternative communication devices, and the Peabody Picture Vocabulary Test-Fifth Edition (“PPVT”). *Id.* at pp. 22-26.
18. SLP observed Student in the classroom on four separate occasions. *Id.* at pp. 23-24. During the first observation, Student worked with a classmate on a math packet and math centers. *Id.* Student used facial expressions and body language to communicate with the classmate, including holding up fingers, tapping on the classmate’s shoulder, using a variety of facial expressions, and saying “hmmm.” *Id.* Student was “very animated in her interactions with her partner during this observation.” *Id.* On the second day, SLP observed Student when a substitute was teaching. *Id.* That day, Student was working on a math coloring sheet. *Id.* She was “less animated but was still observed showing a classmate a stuffed animal and smiling.” *Id.*
19. During the third observation, the class transitioned to reading intervention. *Id.* Many of Student’s classmates left and other students came into the classroom. *Id.* With unfamiliar peers, SLP noted that Student had “notably fewer facial expressions, more mechanical type movements, and more of a flat affect.” *Id.* The fourth observation occurred during a transition time. *Id.* Student wrote a note on her Boogie Board asking if she could have a snack and showed the note to Fourth Grade Teacher. *Id.* Fourth Grade Teacher spoke to Student and then Student went to get a snack from her backpack. *Id.*
20. At the August meeting, Parent expressed interest in finding an augmentative and alternative communication device (“AAC device”) to give Student her own voice in the classroom. *Interview with SLP.* This prompted SLP to trial AAC devices with Student during the evaluation. *Id.* SLP introduced Student to a text-to-speech app on an iPad and trialed the iPad with Student on several occasions, even bringing in a peer to use it with Student. *Id.*; *Exhibit A*, pp. 24-25.
21. For one trial, Parent and Student were left in SLP’s office with a virtual meeting open on a computer so SLP, School Psychologist and Special Education Teacher could observe Student’s communication with Parent. *Interview with SLP; Exhibit A*, p. 25. Though Student initially used the iPad, she eventually set it aside and started talking to Parent, with her voice growing

louder as time passed. *Interview with SLP; Exhibit A*, p. 25. District staff did not observe any articulation or other speech concerns. *Interview with SLP; Exhibit A*, p. 25. Though Student was adept with the iPad, she indicated she did not want to use it in the classroom. *Interview with SLP*.

22. The PPVT assesses a student's receptive language. *Exhibit A*, p. 25; *Interview with SLP*. Since the PPVT only evaluated receptive language, SLP thought this assessment would not put any pressure on Student to speak or cause her to become frustrated. *Interview with SLP*. Additionally, Student had completed the PPVT twice before, which would permit comparison of her scores over time. *Id.*
23. On the PPVT, Student's standard score was 93, within the average range for same-age peers. *Exhibit A*, p. 26. On prior administrations in preschool and second grade, Student scored a 91 and 96, respectively. *Id.* at pp. 19, 21.
24. The evaluation noted that there were "no reported concerns regarding articulation skills" from those to whom Student actually spoke. *Id.* at p. 2.
25. Special Education Teacher administered the Weschler Individual Achievement Test, Fourth Edition ("WIAT-4") to evaluate Student's academic performance. *Id.* at pp. 29-30. Student received a low average score in reading comprehension, an average score on math problem solving, and high average scores on essay composition and numerical operations. *Id.* Student scored "extremely high" on sentence composition. *Id.*
26. To assess Student's social-emotional status, School Psychologist used the Behavior Assessment System for Children, Third Edition ("BASC-3"). *Id.* at p. 31. Parent, Student's father ("Father"), and Fourth Grade Teacher completed the ratings scales. *Id.* at pp. 31-41. Parent's ratings fell within the average range in all areas except for anxiety, functional communication, adaptability, and leadership skills which were at risk. *Id.* Parent's score for social skills fell within the clinically significant range. *Id.* Most of Father's ratings were within the average range; social skills and emotional self-control were at risk. *Id.* Finally, all of Fourth Grade Teacher's ratings fell within the average range. *Id.*
27. The District completed Student's evaluation on October 25, 2022, 61 days after Parent provided consent to evaluate. *Response*, p. 5. District staff were scheduled to observe Student's interaction with Parent on October 24; however, Student was absent that day. *Exhibit H*, pp. 98, 101.
28. On November 3, a multidisciplinary team ("MDT") met to review Student's evaluation and determine her eligibility for special education and related services. *Interview with School Psychologist; Response*, p. 5. This meeting was initially scheduled for October 25 but rescheduled due to an emergency in a District staff member's family. *Interview with School Psychologist*.

29. Parent and Advocate attended the MDT meeting. *Interviews with Parent, School Psychologist and Special Education Director ("Director")*. Advocate previously worked as a school psychologist and has knowledge regarding selective mutism. *Interviews with Director and Parent*. After reviewing the evaluation, Advocate suggested additional assessments that she believed the District should have completed. *Interviews with Director and SLP*. Specifically, Advocate suggested the District assess Student's expressive language and conduct the Test of Narrative Language. *Interview with SLP*. For the expressive language piece, Advocate recommended the Clinical Expression of Language Fundamentals, Fifth Edition ("CELF-5"). *Id.*
30. The District agreed to conduct additional assessments and, as a result, did not determine Student's eligibility at the November 3 meeting. *Id.*

E. Additional Assessments

31. The District completed these additional assessments in November. *Interview with School Psychologist*. As suggested by Advocate, SLP administered the CELF-5 to measure Student's expressive language skills. *Interview with SLP*. The CELF-5 "compares a child's language skills to that of age-matched peers." *Exhibit A*, p. 26.
32. Prior to the assessment (and, indeed, throughout the evaluation process), Parent informed SLP that Student should not be given any accommodations during the testing. *Interview with SLP*. That is, Parent did not want Student to answer questions using her Boogie Board or iPad; instead, Parent wanted Student to respond verbally or not at all. *Interviews with Parent and SLP*.
33. The second subtest of the CELF-5 required Student to listen to four words and then verbalize the two that go together. *Exhibit A*, p. 26. Student did not respond to the first question in this subtest. *Id.* Per the assessment protocol, SLP repeated the question and waited for Student to respond. *Id.* When Student did not respond, SLP proceeded to the next question. *Id.* Student started crying. *Id.* SLP told Student she could try to answer the question. *Id.* When Student continued crying, SLP gave Student the iPad to communicate; Student typed out multiple messages, including "Nooo", "I don't talk", and "I can't." *Id.* at p. 27. SLP then discontinued administration of the CELF-5. *Interview with SLP*.
34. SLP also used the Pragmatics Checklist and the School Speech Questionnaire ("SSQ") to evaluate Student's communicative status. *Exhibit A*, p. 27. SLP selected the Pragmatics Checklist to compare the differences in Student's speech at home and at School. *Id.* "The checklist was developed for children who are deaf and hard of hearing, but it was chosen for use in [Student's] case because of the 4 ratings areas: Not Present, Uses NO Words (gestures only), Uses 1-3 words, Uses Complex Language." *Id.*

35. The Pragmatics Checklist failed to highlight the differences in Student’s speech at home and at School, because it was not completed as SLP intended. *Interview with SLP; Exhibit A*, p. 27. Specifically, Parent’s checklist identified the pragmatics skills Student demonstrated when she used no words, even though Student speaks freely at home with her family. *Interviews with Parent and SLP*. Regardless, the checklists from Parent and Fourth Grade Teacher indicated that Student demonstrated 80% of the skills on the checklist. *Exhibit A*, p. 27.
36. The SSQ asks teachers to “rate how frequently a target student engaged in various speaking behaviors and other forms of communication in the classroom setting over the previous month, using a four-point scale (always, often, seldom, never).” *Id.* at p. 28. A higher score is representative of more speech, while a lower score is representative of “less speaking and potentially more severe selective mutism.” *Id.*
37. Fourth Grade Teacher, a P.E. teacher, a music teacher, and the school librarian completed the questionnaire. *Id.* Two of the teachers indicated that Student “often” talked to selected peers at School. *Id.* Specifically, these teachers stated that, at times, she needed redirection because she was “engaging with peers in quiet interactions” and not paying attention to the teacher. *Id.* All four teachers confirmed that Student did not verbally answer questions, speak to teachers, or speak in front of the class. *Id.* However, the teachers clarified that she answers questions in writing and has her peers or teachers share her work in front of the class. *Id.* Two of the teachers indicated Student asked questions when appropriate, and these teachers seemed to have a system for Student to ask questions (such as a designated notebook). *Id.*; *Interview with SLP*. All four agreed that Student participated non-verbally in class. *Exhibit A*, p. 29. Overall, the teachers felt that non-talking only slightly interfered with School. *Id.*
38. SLP also considered Student’s assessment results under the Colorado Communications Ratings Scales. *Id.* These scales help IEP Teams identify the severity of a student’s disability and determine the need for speech services. *Interview with SLP*. Here, Student’s assessments demonstrated that her selective mutism did not warrant speech services. *Id.*; *Exhibit A*, p. 29.
39. In November, School Psychologist administered the BASC-3 self-rating scale and the Screen for Child Anxiety Related Disorders (“SCARED”). *Exhibit A*, pp. 41-45. Student’s ratings on the BASC-3 fell within the average range. *Id.* Notably, Student’s score for anxiety was in the 4th percentile, indicating that Student reported less anxiety-based feelings than 96 percent of same-aged peers. *Id.* at p. 43; *Interview with School Psychologist*.
40. The SCARED is a “self-report screening questionnaire for anxiety disorders” for children and parents *Exhibit A*, p. 45. Scores of 25 or higher may indicate the presence of an anxiety disorder. *Id.* Student’s ratings resulted in a score of 20 and suggested she may have a social anxiety disorder. *Id.* Separately, Parent’s ratings resulted in a score of 28 and were indicative of potential social anxiety disorder and generalized anxiety disorder. *Id.*

41. Finally, Special Education Teacher administered the Kaufman Test of Educational Achievement, Third Edition (“KTEA-3”) to evaluate Student’s reading comprehension. *Id.* at p. 30. Student scored in the average range. *Id.*
42. Both CDE Consultant #1 and CDE Consultant #2 reviewed Student’s evaluation and determined that it was sufficiently comprehensive to identify Student’s disability-related needs. *Interviews with CDE Consultant #1 and CDE Consultant #2.* Indeed, both consultants felt the evaluation was “more than sufficient.” *Id.*

F. Eligibility Determination

43. On December 15, an MDT met in person to determine Student’s eligibility in light of the evaluation and the additional assessments. *Exhibit D*, p. 2; *Exhibit B.1*. Parent and Aunt attended the meeting. *Interviews with Aunt and Parent.* The MDT ran out of time on December 15 and reconvened on December 19 via telephone. *Interview with Director; Exhibit B.2.* The District provided partial audio-recording of both meetings. *See Exhibits B.1 and B.2.*
44. The MDT discussed Student’s evaluation (including the additional assessments), as well as her prior evaluations from 2018 and 2021, her attendance, her grades, teacher observations, and information provided by Parent. *Interview with Director; Exhibit B.1.* At the time, Student’s grades for the 2022-2023 school year were all A’s and B’s. *Exhibit F*, p. 4. No one raised any concerns about the comprehensiveness of the evaluation. *Interview with Director.* The MDT did not doubt that Student had selective mutism; the question was whether Student needed specialized instruction to access general education. *Id.*
45. Ultimately, the MDT concluded that Student was not eligible for special education and related services. *Id.; Exhibit B*, pp. 1-3. District staff agreed that the data demonstrated that Student could obtain reasonable benefit from general education alone. *Interviews with Director, Fourth Grade Teacher, and SLP.*
46. Parent and Aunt disagreed. *Interviews with Aunt and Parent.* In particular, Parent indicated that her disagreement was based on research on selective mutism: “All the research and her doctor and her therapist say that speech-language therapy is the goal for her to make progress.” *Interview with Parent.*
47. Following the eligibility determination, Parent provided the District a copy of Student’s medical diagnoses and supporting letters to prove that Student qualified for an IEP under Serious Emotional Disability (“SED”). *Exhibit 1*, p. 7. Parent included, in part, a note from Student’s family physician “recommending [an] IEP for [Student] for speech and language services” and a letter from a parent of a child with selective mutism indicating that speech services helped her child “learn[] to pronounce sounds correctly and . . . get more confident and start talking with her teachers and peers.” *Id.* at p. 6.

48. During this investigation, Parent acknowledged that, academically speaking, Student was performing at grade-level. *Interview with Parent*. However, Parent suggested that, if Student communicated verbally, she would be identified as gifted. *Id.* Additionally, Aunt questioned Student's reliance on peers and worried about the long-term effects of that on her peer relationships. *Interview with Aunt*.
49. Aunt and Parent also expressed concern about the administration of the BASC-3. *Interviews with Aunt and Parent*. Specifically, they asserted that the BASC-3 was not properly administered because Student was allowed to provide non-verbal answers. *Id.* However, the BASC-3 manual indicates that the assessment can be "completed by students in grades 3-12, and that responses can be given verbally, in writing, or through nonverbal means such as pointing." *Interview with CDE Consultant #1*.

G. Disclosure of Student's PII

50. The December 15 meeting was held in SLP's office space. *Interview with SLP*. SLP and Occupational Therapist ("OT") share a classroom, and a partition separates their spaces. *Interview with SLP; Response*, p. 7. OT was in the shared space for a portion of the December 15 meeting. *Interview with Director*.
51. Though the meeting was scheduled from 2:00-3:00 p.m., Parent did not arrive until 2:30 p.m. *Interviews with Director and Fourth Grade Teacher*. Parent wanted to continue the meeting past the scheduled end time; however, Fourth Grade Teacher needed to pick up her niece from School's preschool class. *Interview with Fourth Grade Teacher*. Fourth Grade Teacher picked up her niece and brought her to the meeting. *Id.* The child had a snack and colored for approximately ten minutes while the meeting finished. *Id.* Parent did not say anything about the niece's presence during the meeting. *Id.*
52. The District acknowledged that the niece's presence at the MDT meeting violated the IDEA. *Response*, pp. 10-11. In response to Parent's Complaint and to address this violation, all District staff members at the MDT meeting completed the U.S. Department of Education's FERPA 101 Training for Local Education Agencies. *Interview with Director; Exhibit K*, pp. 76-82. The District has provided certificates of completion for the training. *Exhibit K*, pp. 76-82.
53. School's special education staff and related service providers, including OT, attend regular Professional Learning Community meetings. *Interview with School Psychologist*. At the meetings, staff discuss students' needs, ongoing evaluations, and other issues. *Id.* All attendees participate in the discussion, even though the student might not be on their caseload, but understand that the information shared is private. *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: The District conducted a comprehensive evaluation of Student, consistent with 34 C.F.R. § 300.304(c)(4). However, the District failed to complete the evaluation within 60 days, resulting in a violation of 34 C.F.R. § 300.301(c). The violation did not result in a denial of FAPE.

In her first allegation, Parent contends the District failed to comprehensively evaluate Student. Specifically, Parent alleges the assessments used by the District were not appropriate for a Student with selective mutism.

Eligibility for special education and related services under the IDEA requires that a child have one of thirteen qualifying impairments, and “by reason thereof, need[] special education and related services.” 34 C.F.R. § 300.8(a)(1); ECEA Rule 2.08. Thus, even if a child has one of the thirteen qualifying disabilities, he or she must also require “specially designed instruction . . . to meet the unique needs of a child with a disability” 34 C.F.R. § 300.39(a)(1).

The IDEA requires school districts to conduct an initial evaluation before determining a student’s eligibility for special education and related services. *Id.* § 300.301(a). The initial evaluation must be completed within 60 days of the date of parent’s consent to evaluation. *Id.* § 300.301(c)(1). Evaluations must be sufficiently comprehensive to identify all of the child’s special education needs, whether or not commonly linked to the disability category with which the child has been identified. *Id.* § 300.304(c)(6). The evaluation also must gather all relevant information that may assist in determining “the content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum.” *Id.* § 300.304(b)(1)(ii).

Here, the District evaluated Student in all three areas identified in the consent to evaluate: academic performance, communicative status, and social-emotional status. (FF #s 17-26, 31-41.) Special Education Teacher used the WIAT-4 to broadly assess Student’s academic performance and—upon Advocate’s request—used the KTEA-3 to evaluate Student’s reading comprehension. (FF #s 25, 41.) To evaluate Student’s communicative status, SLP observed Student, trialed an AAC device, and used five assessments or tools. (FF #s 18-24, 31-38.) School Psychologist relied on the BASC-3 and the SCARED to assess Student’s social-emotional status. (FF #s 26, 39-40.) When appropriate, School Psychologist and SLP sought input from a number of District staff members and both of Student’s parents. (FF #s 17-26, 31-41.) Despite Parent and Aunt’s contentions otherwise, nothing in the Findings of Facts suggests that the District improperly administered the assessments. (FF #s 17-26, 31-41, 49.)

Even though the District may not have used every assessment available for students with selective mutism, the District’s evaluation was adequate to identify Student’s needs. (FF # 42.)

For these reasons, the SCO finds and concludes that the District’s Fall 2022 evaluation of Student was sufficiently comprehensive under the IDEA.

However, the District completed Student’s evaluation in 61 days, one day beyond the required 60-day timeline in the IDEA. (FF # 27.) For this reason, the SCO finds and concludes that the District failed to comply with 34 C.F.R. § 300.301(c)(1). This resulted in a procedural violation of the IDEA.

The United States Supreme Court has stressed the importance of complying with the IDEA’s procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation (1) impeded the child’s right to a FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent’s opportunity to participate in the IEP process).

Here, there is no indication that the District’s one-day delay had any impact on Student’s right to a FAPE, educational benefit, or Parent’s opportunity to participate in the decision-making process. Indeed, the one-day delay allowed District staff to observe Student’s communication with Parent and undoubtedly enhanced her overall evaluation. (FF #s 21, 27.) The Record indicates that, but for Student’s absence on October 24, the District would have timely completed Student’s evaluation. (FF # 27.) For these reasons, the SCO finds and concludes that the violation did not result in a denial of FAPE. The SCO finds no remedy necessary for this violation.

Conclusion to Allegation No. 2: The District determined Student’s eligibility for special education and related services consistent with 34 C.F.R. §§ 300.304-305. No violation of the IDEA occurred.

With her second allegation, Parent asserts that the District failed to properly determine Student’s eligibility for special education and related services in December 2022.

The IDEA requires that an MDT determine “whether the child is a child with a disability.” 34 C.F.R. § 300.306(a)(1). An analysis of the appropriateness of an eligibility determination involves two steps. First, the SCO examines whether the school district followed relevant standards and procedures in making the determination. *See Questions and Answers on IDEA Part B Dispute Resolution Procedures*, Question B-6 (OSERS 2013). Under the second step, the SCO determines whether the eligibility decision was consistent with the data in the record. *Id.*

A. Adherence to Standards and Procedures

Accordingly, the SCO begins by examining whether the District adhered to applicable IDEA procedures regarding evaluations and eligibility determinations. The IDEA has specific and

extensive procedural requirements governing how school districts evaluate students and determine eligibility. See 34 C.F.R. §§ 300.304-306. The procedures detailing the scope of an evaluation are relevant here.

As part of an evaluation, an MDT must:

- (1) Review existing evaluation data on the child, including—
 - (i) Evaluations and information provided by the parents of the child;
 - (ii) Current classroom-based, local, or state assessments, and classroom-based observations; and
 - (iii) Observations by teachers and related service providers.

Id. § 300.305(a)(1).

Here, the MDT determined Student’s eligibility over the course of two separate meetings. (FF # 43.) The MDT considered Student’s evaluations (both past and present), her grades, her attendance, observations from teachers, and information provided by Parent and Aunt. (FF # 44.) The audio-recordings of the meetings make clear that the MDT considered all available information. (FF #s 43-44.)

Parent has alleged that the District ignored Student’s medical diagnoses. (FF # 47.) However, members of the MDT agreed that Student had been diagnosed with selective mutism and generalized anxiety disorder. (FF # 44.) No one questioned Student’s disabilities; instead, the question was whether those disabilities required Student to receive specialized instruction. (*Id.*) Indeed, a medical diagnosis does not automatically qualify a student for special education and related services. See *Consideration of Clinical Diagnoses in the Educational Identification of Disabilities in Accordance with IDEA* (CDE Dec. 2015), available at https://www.cde.state.co.us/cdesped/ta_clinicaldiagnoses.

For these reasons, the SCO finds and concludes that the District adhered to the IDEA’s standards and procedures in its evaluation and determination of Student’s eligibility.

B. Consistent with Student-Specific Data

The SCO next considers whether the eligibility determination was consistent with the data in the record.

Student’s evaluation acknowledged her anxiety and her lack of verbal communication. (FF # 17-26, 31-41.) As noted above, no one on the MDT questioned Student’s selective mutism. (FF # 44.) However, the data in the Record showed that Student could reasonably access the general education curriculum, even in spite of her selective mutism. (FF # 17-26, 31-41, 45.) Academically, Student excelled at School; she earned all A’s and B’s and made expected progress in the general education curriculum. (FF #s 44, 45.) Parent even acknowledged Student’s ability to access the

general education curriculum, suggesting that Student might be identified as gifted if she spoke at School. (FF # 48.) Socially, Student has grown significantly. (FF #s 5, 6.) In 2018, Student presented as the “stiff” preschooler who stood apart from her peers. (FF # 6.) Now, Student whispers to three friends at School, laughs audibly, and has animated facial expressions. (FF #s 4, 5.)

Aunt and Parent repeatedly expressed concerns about Student’s future. (FF # 49.) Understandably, they worry about the impact Student’s selective mutism will have on her and her peer relationships. However, the evaluation and eligibility determination are based on Student’s needs at this time. An IEP cannot be developed based on a student’s projected future needs. If Student’s needs change as she grows, she can be evaluated again at that time.

For these reasons, the SCO finds and concludes that Student’s eligibility determination was consistent with the data in the Record. Thus, the District’s eligibility determination complied with the IDEA.

Conclusion to Allegation No. 3: The District failed to protect the confidentiality of Student’s PII and disclosed Student’s PII without Parent’s consent, in violation of 34 C.F.R. §§ 300.622-623.

The third allegation in Parent’s Complaint relates to the disclosure of Student’s PII during the MDT meeting on December 15, 2022. Specifically, Parent contends the District improperly disclosed Student’s PII by allowing OT and the niece into the meeting room without her consent.

The IDEA requires a public agency to protect the confidentiality of any personally identifiable data, information and records it collects or maintains. 34 C.F.R. §§ 300.610-627. “PII” refers to information that contains:

- (a) The name of the child, the child’s parent, or other family member;
- (b) The address of the child;
- (c) A personal identifier, such as the child’s social security number or student number;
or
- (d) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

Id. § 300.32. Under 34 C.F.R. § 300.622(a), “[p]arental consent must be obtained before [PII] is disclosed to parties, other than officials of participating agencies in accordance with paragraph (b)(1) of this section, unless the information is contained in education records, and the disclosure is authorized without parental consent under [the Family Education Rights and Privacy Act (“FERPA”).” See also *CDE Parent and Child Rights in Special Education: Procedural Safeguards Notice*, p. 9. 34 C.F.R. § 300.622(a), thus, incorporates FERPA’s exceptions to the consent requirement. FERPA permits disclosure of PII without parental consent:

- (a) To school officials with legitimate educational interests,

- (b) To officials of another school where student seeks or intends to enroll or is already enrolled,
- (c) To government officials for audit or evaluation purposes,
- (d) In connection with a student's financial aid,
- (e) To state and local authorities within the juvenile justice system pursuant to state law,
- (f) To organizations conducting students on behalf of the school,
- (g) To organizations conducting studies on behalf of the school,
- (h) To accrediting organizations,
- (i) To comply with a judicial order or lawfully issued subpoena,
- (j) In connection with a health or safety emergency,
- (k) As directory information,
- (l) To the parent or the student,
- (m) To the victim of an alleged perpetrator of a crime of violence or non-forcible sex offense,
- (n) In connection with a disciplinary proceeding at an institution of postsecondary education,
- (o) To a parent of a student at an institution of postsecondary education regarding the student's violation of any law or rule governing the use or possession of alcohol or a controlled substance, or
- (p) Where the disclosure concerns registration of sex offenders and other individuals.

34 C.F.R. § 99.31. Additionally, each school district must "protect the confidentiality of [PII] at collection, storage, disclosure, and destruction stages." *Id.* at § 300.623(a).

Here, the District acknowledged that it disclosed Student's PII without Parent's consent by allowing the niece into the meeting room. (FF # 52.) The SCO agrees. The MDT was discussing Student's selective mutism and her evaluation results; this information indisputably constitutes PII within the meaning of 34 C.F.R. § 300.32. And the niece did not fall within any of the exceptions listed in 34 C.F.R. § 99.31, as she had no legitimate educational interest in the meeting. For this reason, the SCO finds and concludes that the District disclosed Student's PII without parental consent and failed to protect the confidentiality of Student's PII, in violation of 34 C.F.R. §§ 300.622(a) and 300.623(a). This resulted in a procedural violation of the IDEA.

Unlike the niece, the OT is a member of School's staff and routinely participates in School's Professional Learning Community team meetings. (FF # 53.) At these meetings, special education staff and related service providers discuss students' needs, ongoing evaluations, and other issues. (*Id.*) All attendees participate in the discussion, even though the student might not be on their caseload. (*Id.*) As a result, the information OT might have overheard during the December 15 meeting was no different than what might have been shared during a Professional Learning Community Meeting, where OT would have a legitimate educational interest in the information. As a result, the SCO finds and concludes that OT's presence did not result in a violation of the IDEA.

That said—as noted above—a procedural violation of the IDEA only amounts to a denial of FAPE where the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001).

Here, the niece was only a preschool student. (FF # 51.) As a result of the niece's age, she was unlikely to understand any PII overheard during the meeting or share that information with anyone outside of the meeting. The niece's presence did not impact Student's right to a FAPE or deprive her of any educational benefit, nor did it impact Parent's opportunity to participate in the meeting. Indeed, Parent did not comment on the niece's presence during the meeting but only later in her Complaint. (*Id.*) For these reasons, the SCO finds and concludes that the procedural violation did not result in a denial of FAPE.

In recognition of its error, the District directed all District staff members who attended the December 15 meeting to attend a FERPA training regarding the confidentiality and protection of PII. (FF # 52.) Those staff members completed the training, and their certificates of attendance were provided during this investigation. (*Id.*) Under the circumstances, the SCO finds no further remedies necessary.

REMEDIES

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

- a. Failing to complete an initial evaluation within 60 days of receiving parental consent, in violation of 34 C.F.R. § 300.301(c); and
- b. Disclosing Student's PII without obtaining parental consent, in violation of 34 C.F.R. §§ 300.622-623.

For the reasons outlined in the legal conclusions, the SCO has not ordered any remedies to correct these violations.

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶ 13. If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶ 13; *see also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 22nd day of April, 2023.

Ashley Schubert

Ashley E. Schubert
State Complaints Officer

APPENDIX

Complaint, pages 1-14

- Exhibit 1: Email correspondence
- Exhibit 2: Medical paperwork
- Exhibit 3: Eligibility determination

Response, pages 1-12

- Exhibit A: Evaluation
- Exhibit B: Eligibility determination
- Exhibit B.1: Partial audio-recording of 12/15/22 meeting
- Exhibit B.2: Audio-recording of 12/19/22 meeting
- Exhibit C: Diagnoses from private providers
- Exhibit D: Notices of meeting
- Exhibit E: PWNs
- Exhibit F: Grades and attendance
- Exhibit G: Policies and procedures
- Exhibit H: Correspondence
- Exhibit H.1: Video
- Exhibit I: List of persons with information
- Exhibit J: Verification of delivery to Parent
- Exhibit K: Additional information
- Exhibit L: District calendars

Reply, pages 1-4

- Exhibit 4: Notes on Common Core Standards
- Exhibit 5: Email correspondence
- Exhibit 6: Selective mutism graphic

Telephone Interviews

- Aunt: April 11, 2023
- CDE Consultant #1: April 6 and 13, 2023
- CDE Consultant #2: April 7 and 14, 2023
- Fourth Grade Teacher: April 11, 2023
- Parent: April 11, 2023
- School Psychologist: April 11, 2023
- Special Education Director: April 11, 2023
- Speech Language Pathologist: April 11, 2023