

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

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**State-Level Complaint 2008:509**

Douglas County School District RE-1

**Decision**

**I. INTRODUCTION**

The Complainant submitted five (5) state-level complaints between the dates of 10/14/08 and 10/29/08. By letter dated 10/31/08, the then State-level Complaints Officer, Mr. Keith Kirchubel, consolidated the Complaints into one complaint (hereafter referred to as “Complaint”), expanded the scope of the complaint investigation and extended the decision due date to 12/28/08. The Complainant and the Douglas County School District RE-1 (District) were notified of the consolidation, the expanded scope of the investigation, and the resetting of relevant timelines by letter dated 10/31/08. The 10/31/08 letter identified the scope of the complaint investigation as follows:

- 1) Whether proper notice was given of an Individualized Education Program (IEP) team meeting on 11/8/2007;
- 2) Whether prior written notice was provided (if necessary) for meetings listed in the Complaint on 11/08/07, 12/5/07, 02/28/08, and 03/20/08;
- 3) Whether the District obtained informed written consent for evaluations allegedly conducted in March and May, 2008;
- 4) Whether services were provided to the student in accordance with the service delivery plan in the student’s 05/09/08 IEP document from that date to 10/29/08; and
- 5) Whether the District provided access to educational records requested by the parents in the period February, 2008, to 10/29/08.

On 10/31/08, the Complainant filed a due process complaint with the District. The due process complaint alleged, in part, an allegation identical to Allegation #4, above. Consistent with 34 CFR § 300.152(c), Allegation #4 of this Complaint was set aside pending resolution of the due process complaint.

The District’s Response (Response) to the allegations (excepting Allegation #4) was submitted on or about 11/15/08. The Complainant’s Reply was submitted on 12/5/08.

On or about 12/12/08, the parties notified Mr. Kirchubel that they wished to suspend this complaint investigation because they were engaged in mediation and needed additional time to permit further settlement negotiations. By letter date 12/17/08, Mr. Kirchubel notified the parties that this complaint investigation was suspended until 01/12/09, by which time the parties were to

communicate with Mr. Kirchubel regarding the status of the mediation/settlement negotiations. For that reason and per the 12/17/08 letter, the decision date herein was extended until 01/29/09 consistent with 34 CFR § 300.152(b)(ii).

By 01/12/09, both parties had confirmed in writing to the Acting State Complaints Office Laura Freppel,<sup>1</sup> (hereafter “SCO”) that settlement negotiations had failed and that the Complainant had withdrawn the due process complaint. The District was given until end of day on 01/26/09 to respond to Allegation #4, which had previously been set aside pending the resolution of the due process complaint. The District did not submit a response to Allegation #4.

On 01/27/09, the SCO closed the record.

The Complainant is the parent of student who has been identified as being a child with a disability. Hereafter, the Complainant is referred to as the “Parent” and the student is referred to as the “Student”.

## **II. ALLEGATION # 1**

### **A. Allegation**

The Complaint, in relevant part, alleges that the District’s Notice of Meeting for an IEP meeting, scheduled for 11/08/07, did not identify all individuals who would be in attendance. The Complaint alleges that two staff members, an Occupational Therapist and a School Social Worker, who were not identified on the Notice of Meeting, attended the IEP meeting on 11/08/07.

### **B. The District’s Response**

“The Notice of Meeting indicated the purpose, time, location and who would be in attendance. The fact that two of the meeting attendees were not included on the Notice of Meeting, but contributed to the team’s efforts in helping to provide input and support in the programming for the Student is not a violation of the IDEA.”

### **C. Findings of Fact**

- 1) The Student has been identified as a child with a disability. The Student is a resident of the District. At all times relevant to the Complaint, the Student attended school within the District.
- 2) On 10/17/07, the Complainant emailed the District indicating that the following people would be in attendance at the 11/08/07 IEP meeting: both parents; the parents’ education inclusion consultant; and two individuals from Assistive Technology Partners (ATP).

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<sup>1</sup> Mr. Kirchubel left the Department effective 12/31/08 to take a position with the Colorado Office of the Attorney General.

The Complainant also requested that the District SWAAAC team be in attendance as well as the Student's paraprofessional.

- 3) The District provided the Complainant with a Notice of Meeting dated 10/18/07 for an Additional Miscellaneous Informational Meeting scheduled for 11/08/07.<sup>2</sup>
- 4) The check boxes on the 10/18/07 Notice of Meeting indicated that the following individuals may be in attendance at the meeting: (a) special education teacher; (b) regular education teacher or counselor; (c) the principal of the school or designee; (d) speech language specialist; (e) the Director of Instructional Support Services or designee; and (f) "Other" which listed the individuals "Dist [Director of Intensive Services][District SWAAC Representative] Private: [Parents' Education Inclusion Consultant] & Reps ATP." The check boxes on the Notice of Meeting for Occupational and/or Physical Therapist and School Social Worker were unmarked.
- 5) The participants in the IEP Meeting on 11/08/07 indicated participation by placing their initials by their name or signing the "Participants in Meeting" form. Based on the initials and signatures, participants in the meeting included (i) both of the Student's parents, (ii) General Education Teacher, (iii) Speech Language Pathologist, (iv) Special Education Director/Designee, (v) Building Principal/Designee, (vi) *Occupational Therapist*, (vii) *Social Worker*, (viii) [Assistive Technology/SWAAAC representative], [ATP Representative M.M.], [ATP Representative J.S.], [Director of Intensive Services], and [Education Inclusion Consultant].
- 6) The District concedes that two additional staff members attended the IEP meeting on 11/08/07 who were not indicated on the related Notice of Meeting provided to the Complainant. The SCO finds that such was the case.

#### D. Conclusions of Law

With regard to the requirements for Parental Notification of IEP meetings, the Individuals with Disabilities Education Act (IDEA)<sup>3</sup> and its implementing regulations<sup>4</sup> charge each public agency (such as the District) with the following responsibilities:

#### **34 CFR § 300.322 Parent Participation**

- (a) Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate including –
  - (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend...
- (b) The notice required under paragraph (a)(1) of this section must –

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<sup>2</sup> Complaint and District Response, Exhibit B.

<sup>3</sup> 20 U.S.C. § 1400 *et seq.*

<sup>4</sup> 34 CFR Part 300

(2) indicate the purpose, time, and location of the meeting and *who will be in attendance*.

The purpose of the notice requirement is to inform parents about the IEP team meeting and provide them with relevant information (e.g., the purpose, time, and place of the meeting and *who will be in attendance*).<sup>5</sup> [Emphasis added]

The District concedes that two additional staff members attended the IEP meeting on 11/08/07 who were not indicated on the related Notice of Meeting provided to the Complainant. The Notice of Meeting provided to the Complainant was deficient. Therefore, the District violated 34 CFR § 300.322(b). The SCO concludes that such violation was procedural in nature and did not deny the Student a free appropriate public education (FAPE).

### **III. ALLEGATION #2**

#### **A. Allegation**

In relevant part, the Complaint alleges that the District “has [failed to provide] parent with Prior Written Notice which ‘provides a clear record for the student, parent, and school of the decisions that have been made; the basis for the decisions; and the actions that will or will not be taken’ ...Parent never received Prior Written Notice following any of the IEP meetings and subsequent meetings (majority of which were digitally recorded) regarding [Student] listed below:<sup>6</sup>

- ...
5. November 8, 2007—IEP meeting to review Independent Educational Evaluation conducted by Assistive Technology Partners
  6. December 5, 2007—Planning meeting held to develop [Student] Daily Schedule of Activities, Accommodations and Support (never implemented)
  7. February 28, 2008—Annual IEP review
  8. March 20, 2008—Meeting intended for core team members to collaboratively write [Student’s] present educational levels for review when team reconvenes at scheduled April 14, 2008 meeting.

...During each of the listed meetings, there was lengthy discussion regarding parent input and concerns, disagreements between parent and school, and decisions/next steps that were made.”

#### **B. The District’s Response**

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<sup>5</sup> Fed. Reg. Vol. 71, No 156, August 14, 2006 (hereinafter “Preamble”) at p. 46678

<sup>6</sup> The first four of the meetings identified in the Complaint occurred more than one (1) year prior to 10/14/08, the date that the Complaint was received. For that reason, those meeting dates are outside the jurisdiction of this complaint investigation. *See*, 34 CFR §300.153(c).

“Regarding the second allegation of Prior Written Notice not being provided to [Parent] following meetings held on November 8, 2007, December 5, 2007, February 28, 2008 and March 20, 2008. By law, Prior Written Notice is provided to parents when an action is considered regarding the initiation or change of the identification, evaluation, or educational placement of a student. Regarding the November 8, 2007 meeting, there were no changes made in the identification, evaluation or educational placement of [Student] on each of the following IEPs:...August 9, 2007...and November 8, 2007. You will find, that the services [pages]from each of these...IEP Meetings indicate that services were not changed in any way, hence, not requiring the LEA to provide a Prior Written Notice to the parent. The meeting held on December 5, 2007 was *not* an IEP meeting, but a meeting to share student progress and classroom data with the [Parent]...February 28, 2008, again, was *not* an IEP meeting, but a meeting requested by [Parent] to discuss her ‘concern’ with regard to [Student’s] programming and how the team at [School] would address those concerns. At this meeting, [Parent] brought her educational consultant...from Chicago to provide input regarding [Student’s] programming needs...the March 20, 2008, meeting was *not* an IEP meeting, but again, a meeting to discuss [Student’s] upcoming IEP Meeting with regard to goals and services that [Parent] wanted the team at [School] to address in the IEP...”

### C. Findings of Fact

- 1) Concerning the 11/8/07 IEP, the parent does not dispute the District’s contention that there was no change to the services or educational placement of the student. Having carefully reviewed the 11/08/07 IEP as compared to the 08/09/07 IEP, the SCO finds such to be the case. Nor does the record reflect that, during the meeting, the District refused a request by the Parent to change the services or educational placement of the Student. The sole decision made at the 11/08/07 IEP (as documented on the IEP) was: “[The] team agreed to meet at another time to address [Student’s] daily schedule to include [Student’s] technology needs.”
- 2) The 12/05/07 meeting was a planning meeting, not an IEP Team meeting. The 11/08/07 IEP stated that the purpose of that meeting was “to address [Student’s] daily schedule to include [Student’s] technology needs.” During the 12/05/07 meeting, a draft copy of Student’s daily schedule was developed; no final decisions regarding the Student’s daily schedule was made. Based on the record, at the end of that meeting, the District made no proposal to change Student’s educational placement or special education services from those specified in the 11/08/07 IEP, nor did the District refuse a request by the Parent to initiate or change Student’s educational placement or special education services from those specified in the 11/08/07 IEP.
- 3) The District contends that the 02/28/08 meeting was not an IEP Team meeting. The SCO finds otherwise as evidenced by the District’s own documents including: the Notices of Meetings prepared by the District;<sup>7</sup> multiple emails authored by school

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<sup>7</sup> The meeting notices were submitted by the Parent.

staff referencing the 02/28/08 IEP Team meeting<sup>8</sup>; and the end notes in the 05/09/08 IEP. A draft IEP was sent home to the Parent on 02/22/08<sup>9</sup> and was discussed at the 02/28/08 IEP Team meeting as evidenced by the detailed notes submitted by the Parent to District personnel.<sup>10</sup> Student's IEP was not finalized on 02/28/08. Student's IEP was finalized on 05/09/08. However, the 05/09/08 IEP is not the subject of this Allegation.

At the end of the 02/28/08 IEP Team meeting, the District made no proposal to change Student's educational placement or special education services from those specified in the 11/08/07 IEP, nor did the District refuse a request by the Parent to initiate or change Student's educational placement or special education services from those specified in the 11/08/07 IEP. Student's IEP was not finalized until 05/09/08.

- 4) The 03/20/08 meeting was a planning meeting with the school staff and Parent<sup>11</sup> to address Student's present levels of academic performance and to address Student's goals and objectives prior to a then scheduled IEP team meeting on 04/10/08, which was continued from 02/28/08 by the IEP Team, including the Parent. During the 03/20/08 meeting, the District made no proposal to change Student's educational placement or special education services from those specified in the 11/08/07 IEP, nor did the District refuse a request by the Parent to initiate or change Student's educational placement or special education services from those specified in the 11/08/07 IEP. Student's IEP was not finalized until 05/09/08.

#### D. Conclusions

With regard to the requirements for prior written notice, the IDEA charges each public agency (such as the District) with the following responsibilities:

##### **34 CFR § 300.503** (Prior notice by the public agency)

- (a) *Notice.* Written notice...must be given to the parents of a child with a disability a reasonable period of time before the public agency—
  - (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
  - (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child

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<sup>8</sup> See, District's Response, Exhibit F.

<sup>9</sup> See, 02/22/08 email from M. F. to Parent. Neither party submitted a copy of the draft IEP to the SCO, and such is not part of the record.

<sup>10</sup> See, 03/06/08 email from Parent to M. F.

<sup>11</sup> See, District's Response, Exhibit P, 03/18/08 email from P. M. to D. B.

With regard to this allegation, which is limited in scope by the Complaint to the meeting dates of 11/08/07, 12/05/07, 02/28/08 and 03/20/08, the District made no such proposals or refusals. Therefore, the District did not violate 34 CFR § 300.503.

#### **IV. ALLEGATION #3**

##### **A. Allegation**

The Complaint, in relevant part, alleges as follows:

- 1) The District failed to obtain parental consent to administer the Comprehensive Inventory of Basic Skills to the Student on March 28 and May 1, 2008.
- 2) The District failed to obtain parental consent to administer the Johns Basic Reading Inventory to the Student on March 28, 2008.
- 3) The District administered Sivaroli Classroom Reading Inventory, Criterion Referenced Assessments and Curriculum Based Measurements to the Student without Complainant's knowledge.

##### **B. The District's Response**

“The staff at [School], did in fact, seek input from [Parent] regarding various assessments that she requested for [Student]. These informal assessments included subtests from the Brigance Comprehensive Inventory of Basic Skills, the Johns Basic Reading Inventory, the Sivaroli Classroom Reading Inventory, Criterion Referenced Assessments and Curriculum Based Measurements, for the sole purpose of obtaining good measurable baseline data in the areas of reading, spelling and math. While these assessments provide good data which help inform a staff about a student's reading, spelling and math level, the assessments were *used* to make informed decisions regarding intervention strategies to better meet the academic needs of the student. These assessments were *not* used for purposes of eligibility or a change in special education identification, were *not* “formal,” and did *not* require parent permission.”

##### **C. Findings of Fact**

- 1) During the relevant time period (i.e., March – May 2008), the Student had two IEPs in effect: one was dated 11/08/07 and the second dated 05/09/08.
- 2) The District acknowledges that, during the relevant time period, it administered the following assessments to the Student: Subtests of the Brigance Comprehensive Inventory of Basic Skills; Johns Basic Reading Inventory; Sivaroli Classroom Reading Inventory; Criterion Referenced Assessments; and Curriculum Based Measurements. The SCO finds such to be

the case. The District also acknowledges that it did not obtain parental consent from Complainant to administer the above assessments.<sup>12</sup> The SCO finds such to be the case.

- 3) A 03/20/08 planning meeting was attended by school staff and the Parent. The purpose of the 03/20/08 meeting was to address Student's present levels of academic performance and Student's goals and objectives in order to finalize a revision of the Student's 11/08/07 IEP.
- 4) Following the 03/20/08 meeting, District staff emailed the Parent information about the above identified tests/assessments: "As you requested at our meeting on the 20<sup>th</sup> of March, here is the list of some of the informal tests [we – (i.e., two of the Special Education Teachers)] like to use as diagnostic tools for students to get some good measurable baseline data in the areas of reading...." The email explains that Criterion Referenced Assessments are "teacher created and focus on very specific skills at specific grade levels for math and reading."<sup>13</sup>
- 5) Summaries of the evaluations/assessments in question follow:
  - The *Brigance Comprehensive Inventory of Basic Skills* (hereafter, "Brigance") is both a criterion referenced assessment and a standardized assessment. That assessment is used for many purposes including: identifying present levels of performance; connecting assessment with instruction; monitoring and reporting progress for IEPs; identifying students' strengths and weaknesses; and obtaining data to support referrals.<sup>14</sup>
  - The *Basic Reading Inventory by Jerry Johns (Johns Basic Reading Inventory)* is an individually administered informal reading assessment used to assess, interpret, and develop responsive reading instruction for students. The assessment is used by classroom teachers, reading specialists, Title I teachers, learning disability teachers, tutors, teachers aides and school psychologists.<sup>15</sup>
  - The *Classroom Reading Inventory by Sivaroli* is an informal reading inventory test specially prepared for in-service and pre-service teachers to help identify students' reading problems.<sup>16</sup>
  - *Curriculum Based Measurements* are used as a universal screening tool for all students to determine student baseline performance and to design instruction to meet the individual needs of each student.<sup>17</sup>

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<sup>12</sup> Complaint, District Response

<sup>13</sup> Supporting Information supplied in Complaint and District Response Exhibit Q.

<sup>14</sup> Summary information available at [www.curriculumassociates.com](http://www.curriculumassociates.com)

<sup>15</sup> Summary information available at [www.kendallhunt.com](http://www.kendallhunt.com)

<sup>16</sup> Summary information available at [doi.contentdirections.com](http://doi.contentdirections.com)

<sup>17</sup> DCSD: RtI Guide available at

[www.dcsdk12.org/portal/page/portal/DCSD/learning\\_services/Instructional\\_Support\\_Services/response\\_to\\_intervention\\_\(RtI\)](http://www.dcsdk12.org/portal/page/portal/DCSD/learning_services/Instructional_Support_Services/response_to_intervention_(RtI)).



- *Criterion Referenced* assessments and measurements come in a variety of forms such as the Curriculum Based Measurements<sup>18</sup> and the Developmental Reading Assessment (DRA),<sup>19</sup> and are administered to *all* students. A criterion referenced assessment measures what a student understands, knows, or can accomplish in relation to specific performance objectives. It is used to identify a student's specific strengths and weaknesses in relation to skills defined as the goals of the instruction, but it does not compare students to other students.<sup>20</sup>
- 6) Per the 05/09/08 IEP,<sup>21</sup> the Student was given the following evaluations/assessments by one of the special education teachers:
- The *DRA* on 02/28/08 and 04/01/08;
  - On 03/28/08 and 05/01/08, reading comprehension tests from the *Brigance*;
  - On 03/28/08, the *Johns Basic Reading Inventory* at the Primer level;
  - Although dates are unclear in the 05/09/08 IEP, the Student was also given a subtest of the *Brigance*: to assess sentence writing; to measure the Student's understanding of capital letter placement in a sentence; and to evaluate values for coin groupings;
  - The District states that the Student was given the *Sivaroli Classroom Reading Inventory* and the *Curriculum Based Measurements* during the March-May 2008 timeframe. However, other than the District's Response letter, the SCO was unable to locate any documentation in the record to that effect.
- 7) Per the 05/09/08 IEP, the *Brigance* was given specifically to the Student to identify the Student's present levels of academic performance and to develop baselines for the objectives of Goal 1 (reading comprehension) of the Student's 05/09/08 IEP. Specifically, the baselines "<= 60 percent" identified in two of the three objectives for Goal 1 of the 05/09/08 IEP correlate well to the results of the *Brigance* reported in that IEP.
- 8) It is not evident from the progress reports included in the 11/08/07 IEP and the 05/09/08 IEP that the *Brigance* was used for progress monitoring in the March-May 2008 time frame. None of the IEP goals specified in the 11/08/07 IEP or the 05/09/08 IEP identify what progress monitoring tools would be used; nor do such progress reports identify any progress monitoring tools.<sup>22</sup> Other than the District's bare contention in the Response, there is also no evidence in the record suggesting that the *Brigance* was given to all students in the class or that its results were used for developing instruction for the Student. For these reasons, the SCO finds that, in this case, the *Brigance* was specific to the Student to assist in the development of Student's then pending IEP – for the purpose of establishing the present levels of performance and baselines for some goals in the Student 05/09/08 IEP.

<sup>18</sup> The Colorado Department of Education's (CDE) RtI Guide available at [www.cde.state.co.us/RtI/downloads/pdf/RtIguide.pdf](http://www.cde.state.co.us/RtI/downloads/pdf/RtIguide.pdf).

<sup>19</sup> The CDE's DRA 2 Presentation available at [http://www.cde.state.co.us/action/CBLA/Updated\\_DRA2\\_EOY\\_Reporting.ppt#316,4,What is the DRA2?](http://www.cde.state.co.us/action/CBLA/Updated_DRA2_EOY_Reporting.ppt#316,4,What is the DRA2?)

<sup>20</sup> RtI Action Network available at [http://www.rtinetwork.org/component/option,com\\_glossary/Itemid,1/](http://www.rtinetwork.org/component/option,com_glossary/Itemid,1/)

<sup>21</sup> See, 05/09/08 IEP, Section entitled "Documentation of Evaluation Data, Present Levels of Education and Functional Performance, and Educational Needs"

<sup>22</sup> District Response Exhibits C, D, and E.

- 9) On 03/31/08, the Complainant emailed the District asking that the District postpone any assessments. The Complainant requested that a comprehensive assessment plan be developed that was individualized to ascertain and monitor the Student's reading levels and associated goals and objectives.<sup>23</sup>

#### D. Conclusions of Law

The IDEA legal principles central to the resolution of this allegation are as follows:

##### **34 CFR §300.15 Evaluation**

Evaluation means procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.

Once a child has been fully evaluated for the first time in a State and is found eligible under the IDEA, any subsequent evaluation of a child to determine whether the child is a child with a disability and *the nature and extent of special education and related services that the child needs* constitutes a reevaluation. See, *Letter to Sarzynski* (OSEP 09/05/07). [Emphasis added]

##### **34 CFR §300.300 Parent Consent**

- (c) Parental consent for reevaluations.
  - (1) Subject to paragraph (c)(2) of this section, each public agency –
    - (i) must obtain informed parental consent prior to conducting any reevaluation of a child with a disability.
- (d) Other consent requirements
  - (1) Parental consent is not required before –
    - (i) reviewing existing data as part of an evaluation or reevaluation;  
or
    - (ii) administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

The U.S. Department of Education, Office of Special Education Programs (OSEP) has addressed the question of whether a parent's written consent is required for all evaluations that are not standardized tests administered to all students:

A public agency is not required to obtain parental consent before...administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of all parents of all children...In addition, the screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for

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<sup>23</sup> Supporting Information supplied in Complaint

eligibility for special education and related services, and therefore could occur without obtaining informed parental consent for the screening...Evaluations of student progress occur as a regular part of instruction for all students in all schools. If such evaluations are designed to assess whether the child has mastered the information in, for example, chapter 10 of the social studies text, and are the same or similar to such evaluations for all children studying chapter 10 of the social studies text, parental consent would not be required for such an evaluation. *If, however, the evaluation is specific to an individual child and is...[crucial] 'to determining a child's continuing eligibility for services or changes in those services,'* OSEP believes such evaluations fall under the provisions of 34 CFR § 300.15 and require parental consent under 34 CFR § 300.300 (a) and (c). [Emphasis added].

See, *Letter to Sarzynski* (OSEP 09/05/07)

### **34 CFR §300.305 Additional Requirements for Evaluations and Reevaluations**

- (a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP team and other qualified professionals, as appropriate must –
  - (1) review existing evaluation data on the child, including -
    - (i) current classroom-based, local, or State assessments, and classroom-based observations.
  - (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine –
    - (ii) the present levels of academic achievement and related developmental needs of the child.

Based on the unique facts of this particular case, the SCO concludes that the District violated 34 CFR §300.300 (c) because it failed to obtain written informed consent from the Parent before giving the *Brigance* prior to assessing the Student in the March-May 2008 timeframe. Such violation did not result in a denial of FAPE to the Student.

The District was not required to obtain prior written consent for the *Johns Basic Reading Inventory*—the primary purpose of that assessment is to develop responsive reading instruction for all students. Nor was the District required to obtain prior written consent for the DRA because, again, that is an assessment that is administered to all students.

The District contends that, within a strong Response to Intervention model, there are many ways to monitor progress and assess student performance without triggering the parent consent requirement. In general, the SCO agrees. However, when a special education student is involved, the District must be ever mindful of all procedural safeguards available to that student and carefully consider what the purpose is for the assessment and whether the context is such that the assessment is specific to the special education student rather than applicable to all students.

## V. ALLEGATION #4

### A. Allegation

“There are no direct services outside the general education classroom listed in [Student’s] IEP...[The evidence] will show that [Student] is being pulled out of the general education classroom on a frequent basis for lengthy periods of time.”

### B. The District’s Response

The District did not submit a Response to this Allegation other than to refer to the 05/09/08 IEP.

### C. Findings of Fact

- 1) The Student’s 05/09/08 individualized education program (IEP) specifies that the Student is to receive all integrated special education services in the general classroom. There is a section of the 05/09/08 IEP for identifying direct services that the Student would receive outside the general classroom – that section is blank.
- 2) The District does not contest this Allegation. Accordingly, such allegation is deemed admitted by the District to the effect that, during the time frame relevant to this Allegation, the Student was pulled out of the general education classroom on a frequent basis for lengthy periods of time. An “Activities” log completed by District staff between 08/06/08 and 10/11/08<sup>24</sup> documents the multiple dates between 08/06/08 and 10/11/08 when the Student received instruction in the hallway, rather than in the general classroom.
- 3) Based on the record before the SCO, the Student did receive all the services to which Student was entitled per the 05/09/08 IEP, although not in the least restrictive environment.

### D. Conclusion of Law

As a result of the District’s failure to ensure that the Student received all of the Student’s services in the general classroom, as specified in the Student’s IEP, the District has violated the LRE requirements as set forth in 34 CFR §§ 300.114 -300.117 and 300.200-300.201. This violation did not result in a denial of FAPE to the Student.

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<sup>24</sup> The “Activities” log was submitted by the Parent.

## **VI. ALLEGATION #5**

### **A. Allegation**

“The [District has failed] to comply with repeated **parental requests for copies of educational records** on [Student], and **failed to provide full access to inspect and review** all educational records of [Student].

### **B. The District’s Response**

The District contends that “all accessible records were made available by the staff at [School], and the team at [School] was making every effort to provide [Parent] with any additional information she was demanding.”

### **C. Findings of Fact**

- 1) Between the dates of 02/27/08 and 10/31/08, the Parent made multiple written requests for copies of or access to Student’s education records as evidenced by emails to District staff, including emails dated 02/27/08, 03/14/08, 09/09/08, 09/16/08 and 10/02/08.
- 2) The District is an agency that collects, maintains, or uses personally identifiable information, from which information is obtained, under Part B of the IDEA.
- 3) On 02/27/08 at 10:30 AM, the Parent sent an email to the Student’s case manager regarding the Student’s annual IEP review meeting scheduled for the following day (02/28/08) at 8:00 AM. The email requested stated: “There are other items I would like to have on hand at the meeting that will be valuable for the team to review and help guide us in making appropriate decisions for [Student].” The email identified the following items: Student’s work samples from 3<sup>rd</sup> and 4<sup>th</sup> grades, samples of accommodations created for Student, materials related to [Student’s] reading program, books that Student had been reading and samples of “comprehension quickies.” At the 02/28/08 meeting, school staff provided progress charts for the Student.
- 4) At the 02/28/08 IEP meeting, the Parent requested Student’s data records. As of 3/11/08, school staff were still collecting, and had not yet made available to the Parent, the requested data records.<sup>25</sup>
- 5) On 03/14/08, the Parent sent an email to the District containing a comprehensive request for all of the Student’s educational records under both the Family Education Rights and Privacy Act (FERPA) and the IDEA. The Parent specifically requested a “copy of all of [Student’s] records accumulated since [Student’s] enrollment at [School] on January 2, 2007...Please include all of

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<sup>25</sup> See, 03/11/08 email from M.F., case manager to the Parent.

[Student's] records (dating from January 2, 2007 to the present), which include but are not limited to: [Student's] cumulative file and [Student's] compliance file. This request includes all reports written as a result of the school's evaluations; reports of independent evaluations; medical records; summary reports of the evaluation team and eligibility committee meetings; IEP's; any correspondence retained between myself and the school officials; any correspondence written between school personnel regarding my [Student]; any records maintained by the school nurse, [Student's] teachers, and any member of the IEP team; notes or letters written in connection with any planning or discussions, or any other matters in connection with [Student]. Please include any personally identifiable information."

- 6) On 04/09/08, the Parent received from the District, via postal mail, copies of the Student's education records. Neither the Parent nor the District have identified in their written submissions or exhibits what education records of the Student were provided by the District to the Parent at that time. The Parent has characterized the records provided as being "limited." The District does not dispute the Parent's characterization, and the SCO finds such to be the case.
- 7) On 08/23/08 (Thursday), the Parent emailed the Significant Support Needs (SSN) Coordinator stating: "It would really be helpful for me to have the whole picture, e.g. assignments that have been modified, materials that are being made, updates on outstanding items, etc. Could we get together in the early part of the week so that you can share this with me...say Tuesday or Wednesday?" The SNN Coordinator replied that he was unable to meet until the week of September 1, 2008. In this email, the Parent did not request all of the Student's education records.
- 8) Between 08/23/08 and 09/09/08, the Parent and certain District staff met and communicated by email regarding the Student's program, progress and records access. After working through scheduling conflicts, District staff and the Parent agreed to a meeting on 09/12/08.
- 9) In a 09/09/08 email to District staff, the Parent stated that "some of the items I am expecting to see on [09/12/08] -- All data collection sheets...All staff consult logs...Examples of 5<sup>th</sup> grade class assignments & materials in all subject areas and associated adapted materials made for [Student]...Instructional materials made for [Student]; 5<sup>th</sup> grade quizzes/tests with correlating ones taken by [Student]...Social stories written for [Student]....Support Schedule for [Student]...I am also anticipating that we will review what has been implemented on the Daily Schedule and receive updates on the to-do list." This was a broader records access request than the one made by the Parent on 08/23/08.
- 10) On 09/12/08, the District was unable to produce most of the education records requested by the Parent in the 09/09/08 email because staff were "off track", i.e., staff were not scheduled on-site due to the District's year-round scheduling.

Progress data sheets were provided but not in the format that the Parent was requesting, i.e., actual work product/samples.

- 11) In an email dated 10/02/08 to District staff, the Parent requested access to all of the Student's education records and unilaterally identified 10/03/08 as the date for the records review at the Student's school. This was a comprehensive request for records, one that was broader than both the 08/23/08 or 09/09/08 records requests. On 10/02/08, the school principal stated in an email to the Parent that the [Student's] team was "working on getting everything together for you. [Special Education Teacher] is coming in today and will be back on Monday. [Special Education Teacher], can you touch base with [Parent] when the documents may be available." As of 10/02/08, the District had not yet provided the Parent with access to all the education records requested on 08/23/08 or 09/09/08. The SCO finds the District was too slow in responding to such requests.
- 12) On 10/03/08, the Parent notified District staff by email that she intended to review [Student's] records that afternoon and reiterated that she expected "to be given full access to inspect and review all of [Student's] educational records onsite at [School]. I understand that [Principal] won't be in the building, however, that is not a condition or requirement for my right to review files."
- 13) To the extent that the 10/02/08 request was broader than the 08/23/08 or 09/09/08 records requests, the SCO finds that it was unreasonable for the Parent to unilaterally demand that the District provide access to all of the Student's records on 10/03/08.
- 14) On 10/03/08, the Parent went to the school to review [Student's] records and was given access by the Assistant Principal to the then available records of Student, which were not all of the [Student's] records, including records requested by the Parent on 08/23/08 and 09/09/08.
- 15) By email dated 10/16/2008, District staff notified the Parent that "[the] records to which you refer (the ones which do exist) which were not included in [Student's] cumulative school or sped folders have been assembled by the school team. Please contact [Assistant Principal] to set a time when you may examine them."
- 16) On 10/22/08, the Parent went back to the school to examine the [Student's] education records. A book maintained by the Student's paraprofessional (including a Contact Log/Anecdotal Notes and Activity Logs) was produced to the Parent. The book, which was familiar to the Parent, did not contain the same information as it had on 10/03/08 when the Parent first saw it. According to the Parent, the condition of the book on 10/22/08 was "gutted" in that the Contact Log/Anecdotal Notes and Activity Logs had been removed.<sup>26</sup>

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<sup>26</sup> 11/04/09 email from the Parent to K. Kirchubel

- 17) Not until the District submitted its Response did the Parent have access to certain education records of the Student, including email communications between District staff regarding Parent during the relevant time frame,<sup>27</sup> nor did the Parent see the OT services delivery log (for services provided between the dates of 07/11/08 and 09/30/08).<sup>28</sup>
- 18) When the above facts are viewed as a whole, the District did not at all times timely respond to the Parent's multiple requests for access to records nor did the District provide access to all of Student's education records.

#### D. Conclusions of Law

Under the IDEA, a "participating public agency" must permit parents to inspect and review any education records relating to their children that are collected, maintained or used by the agency under the IDEA Part B regulations. A "participating agency" means "any agency that collects, maintains or uses personally identifiable information, or from which personally identifiable information is obtained, under Part B of the IDEA. 34 CFR § 300.611(b). The District is a "participating agency."

At all times relevant to this Complaint, the term "education records" means those records directly related to the student and maintained by the educational agency or institution. 34 CFR §300.611(b); 34 CFR §99.3.<sup>29</sup> The term "record" means "any information recorded in any way, including but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." 34 CFR §99.3. "Personally Identifiable information" "includes, but is not limited to (a) the student's name, (b) The name of the student's parent..." 34 CFR § 99.3. Education records do not include "[records] of instructional, supervisory, and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record." 34 CFR §99.3.

Generally, the participating public agency must comply with a parent's request for records without unnecessary delay and in no case more than 45 calendar days after the request has been made. 34 CFR § 300.613(a). However, if an IEP meeting, a due process hearing or a resolution session is scheduled, the requested records must be produced before the IEP meeting, due process hearing or resolution session. 34 CFR § 300.613(a).

With regard to this allegation, which is limited to the time period of February 1, 2008 to October 31, 2008, the SCO has found the District's did not at all times timely respond to the Parent's multiple requests for access to records nor did the District provide access to all of Student's education records. The SCO concludes that the District failed to comply with 34 CFR § 300.613 (a). Such violation did not result in a denial of FAPE to the Student.

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<sup>27</sup> 01/25/08 telephone interview with Parent. See, for example, District's Response, Exhibits F an M

<sup>28</sup> Parent Reply at page 1

<sup>29</sup> Amended FERPA regulations went into effect 01/08/09



## **VII. REMEDY**

The State Complaints Officer has determined that the District violated the IDEA in the following respects:

- 1) Failure to comply with the IEP meeting notice requirement as specified in 34 CFR § 300.322 (b);
- 2) Failure to comply with the parent consent requirement regarding reevaluations as specified in 34 CFR § 300.300(c);
- 3) Failure to provide services to the Student in the least restrictive environment as specified in 34 CFR §§ 300.114 – 300.117 and 200.201; and
- 4) Failure to comply with the records access requirements as specified in 34 CFR § 300.613(a).

The District must correct the cited noncompliance as soon as possible but, in any event, no later than **June 1, 2009**. Failure to timely correct the cited noncompliance will subject the District to enforcement action by the Department. Consequently, on or before **March 1, 2009**, the District must submit to the Department a proposed Corrective Action Plan (CAP) that effectively addresses how the District will ensure that the cited noncompliance will be corrected so as not to recur. Please submit the CAP to the Department to the attention of the undersigned Acting SCO. The Department will review and then either approve or request revisions to the CAP. The enclosed sample templates provide suggested formats for the CAP and include sections for “improvement activities” and “evidence of implementation and change.”

## **IX. CONCLUSION**

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

Dated this 29<sup>th</sup> day of January, 2009.

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Laura L. Freppel, Esq.  
Acting State Complaints Officer