

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

**State-Level Complaint 2015:515  
Harrison School District Two**

**DECISION**

**INTRODUCTION**

Complainant is the mother (Mother) of student (Student), who is identified as a child with a disability under the IDEA. Mother is represented by counsel. The Complaint was properly filed on September 4, 2015. The SCO determined that the Complaint identified four issues subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**COMPLAINT ALLEGATIONS**

The SCO determined that the Complaint articulated allegations subject to the jurisdiction of the state-level complaints process under the IDEA. Specifically, the SCO investigated, in summary:

1. Whether Harrison School District Two (“School District”) violated Student’s right to a free appropriate public education (“FAPE”) by failing to develop an IEP that was based upon the Student’s individual needs and abilities and was reasonably calculated to provide the Student with meaningful educational benefit from May 7, 2015 to present;
2. Whether the School District violated Mother’s right to meaningful participation in the IEP process from May 7, 2015 to present by refusing to consider or discuss placement options; and
3. Whether the School District failed to implement and comply with Student’s October 7, 2014 IEP and May 7, 2015 IEP; and
4. Whether the School District refused to convene an IEP meeting upon Mother’s request on June 24, 2015 without providing prior written notice.

To resolve the Complaint, Mother proposed the following, in summary:

1. Student to be placed in an educational setting that will provide research-based 1:1 intensive behavioral and educational interventions with staff trained in the principles of ABA and supervised by a BCBA;

2. Preparation, oversight, and monitoring of an FBA and BSP by a BCBA to address Student's maladaptive behaviors including inappropriate comments, yelling, scripting, aggressive behaviors toward others, and self-injurious behaviors with the goal to decrease the likelihood of these behaviors so that Student can be successfully transitioned back to a less restrictive special education setting;
3. Implementation of the BSP by staff trained in the principles of ABA;
4. Inclusion of parent training and support services in Student's IEP to provide Mother with the tools to appropriately implement the BSP so as to provide consistency across all domains;
5. Inclusion of orientation and mobility services in Student's IEP to enable Student to attain systematic orientation to and safe movement within the school, home, and community; and
6. Inclusion of an appropriate transition plan to effectively and successfully transition Student back to a less restrictive environment when determined appropriate by the IEP team.

### **SCHOOL DISTRICT'S RESPONSE**

The School District did not specifically admit or deny any of the allegations. With regard to the first allegation, School District argued that Mother requested a change of placement from out of district to within School District, that School District conducted a "comprehensive evaluation" and determined that Student continues to be eligible for special education as multiply disabled. School District also argued that IEP meetings were held on May 7, 2015 and May 22, 2015 resulting in additional evaluations, that the "May 7, 2015 Annual Review was finalized", and that a copy of the IEP was provided to Mother on May 22<sup>nd</sup>.

With regard to the second allegation, School District argued that the "IEP team agreed that [Student] would complete ESY in a familiar environment and then move into a different placement within the [School District]." School District further argued that the IEP team agreed that a neighborhood school would be best for Student, that Mother disagreed, but that Mother was directed to visit two different neighborhood schools and to choose one of the schools for Student. School District asserts that Mother "failed to contact [Director Special Programs or Coordinator of Special Programs]" and, accordingly, School District placed Student in School.

With regard to the third allegation, School District asserted that the October 7, 2014 IEP was implemented while Student was at Treatment Center, with the exception of "O & M consultation services" that were unavailable to be provided by School District, and that School District made no attempt to change the IEP without a comprehensive evaluation. School District also argued that because Mother did not make a final decision to enroll Student at School until August 14<sup>th</sup>, School District was not prepared to provide the necessary 1:1 para educator support for Student on the first day of school.

With regard to the fourth allegation, School District argued that Coordinator of Special Programs received Mother's IEP meeting request after returning from summer break on July 1<sup>st</sup>, that a meeting was scheduled for July 17<sup>th</sup>, that there was no general education teacher available, and that a "conference meeting" was held to discuss a plan to transition Student into School.

### **FINDINGS OF FACT**

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

1. Student is school-aged, resides with Mother within the boundaries of School District, and is identified by School District as a child with multiple disabilities, eligible for special education and related services under the IDEA and ECEA.
  
2. Student has a history of self-harm that can quickly turn into physical aggression toward peers or staff members and behavior escalations that create a high-risk of injury to self and others. Student requires a highly structured program and one-on-one ("1:1") arms-length supervision due to aggressive behaviors. Student was placed in a diagnostic school and day treatment center ("Treatment Center") in September 2014 by Student's previous school district. Treatment Center, a public separate school, remained Student's placement on an October 7, 2014 IEP developed by Student's previous school district.<sup>1</sup>
  
3. In February 2015, Mother and Student relocated to a residence within the boundaries of School District. Student remained at Treatment Center at that time. School District continued to implement Student's October 7, 2014 IEP. Mother, however, had concerns about Student's overwhelming behavior problems and resulting lack of progress and regression while at Treatment Center. On March 11<sup>th</sup> a conference was held to discuss Mother's concerns and her desire for Student to be in a program that would better address Student's maladaptive behaviors. At that time, it was decided that a comprehensive evaluation was needed in order to make any determinations regarding Student's programming.<sup>2</sup> Mother and Mother's Advocate ("Advocate") were told at that time that School District was developing an autism program in-district. Mother was also told to go look at a program in a neighboring BOCES, as well as significant support needs ("SSN") classrooms in two of School District's neighborhood schools ("School" and "School #2").<sup>3</sup> Mother signed a consent form to reevaluate Student for eligibility for special education services. The consent form specified that Student would be evaluated in the areas of "Academic performance,

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<sup>1</sup> See Exhibit C.

<sup>2</sup> Exhibit 1, pages 13-14.

<sup>3</sup> Exhibit N, Interviews with Mother, Director Special Programs, and Coordinator of Special Programs.

social and emotional status, review of records, autism.”<sup>4</sup>

4. In the meantime, Mother and Advocate visited the BOCES program and contacted School and School #2 by phone.<sup>5</sup>

5. The School District conducted no evaluations of Student with the exception of a Psycho-Educational Report completed by School District’s Psychologist and Social Worker<sup>6</sup>. The report indicates that historically Student has been successful when placed with a teacher who specializes in applied behavioral analysis (“ABA”) therapy. The report also indicates that Student has difficulty coping in a noisy environment and that Student has 2:1 and sometimes 3:1 support at Therapy Center to assist with Student’s goals. The report also indicates that “despite current interventions, supports, and services [at Therapy Center], Student continues to struggle academically and behaviorally.” Student scored “Extremely Low” on adaptive skills across all domains, with ratings on behavior that fell in the “clinically significant” range for externalizing problems, hyperactivity, school problems, learning problems, attentional problems, behavioral symptoms index, atypicality, adaptive skills, adaptability, social skills, study skills, and functional communication, indicative of a high level of maladjustment. The report also noted that Student has shown little growth, and at times regression, toward IEP goals and objectives.<sup>7</sup>

6. The IEP team convened on April 22<sup>nd</sup> in order to determine Student’s continued eligibility for special education and to develop Student’s IEP. The team found Student to be eligible for special education as a child with Multiple Disabilities, specifically Intellectual Disability, Visual Impairment, Speech or Language Impairment, Autism Spectrum Disorder (“ASD”), and Other Health Impairment. Representatives from Therapy Center agreed that Student’s primary challenges were the various aggressive and self-injurious behaviors that were preventing academic progress. Mother and Advocate discussed their concerns about the BOCES program and informed the IEP team that contacts at School and School #2 referred them directly to the School District’s new autism program.<sup>8</sup>

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<sup>4</sup> Exhibit 1, page 14.

<sup>5</sup> Exhibit N and Interview with Mother.

<sup>6</sup> Exhibit F. The report was based on a record review, social history, medical history, and adaptive behavior and behavior assessments (ABAS-2 AND BASC-2) completed by Mother and Treatment Center Teacher #2 and reported by School District Social Worker.

<sup>7</sup> Exhibit F.

<sup>8</sup> Exhibit 1, pages 15, 21-23, Exhibit N, and Interviews with Mother, Treatment Center Teacher, and Coordinator of Special Programs.

7. The IEP team reconvened on May 7<sup>th</sup> for an “annual review” of Student’s IEP. Treatment Center Teacher was responsible for managing the meeting and generating the IEP document.<sup>9</sup> The IEP team discussed Student’s overall regression and lack of progress on the academic goals and discussed slight modifications to the academic goals. The IEP team also discussed the need to address Student’s behavior and how to transition Student from Treatment Center to another program if the team decided to move Student from Treatment Center. However, there was never any discussion of behavior goals, conducting an FBA or any behavior assessments, or developing a plan to address Student’s behavior. Despite the team’s agreement that a comprehensive evaluation had not been conducted and that occupational therapy, physical therapy, speech, vision, and orientation and mobility assessments were needed in order to determine present levels, such that the team did not have sufficient information to develop an appropriate IEP, a discussion of placement was brought up by Coordinator of Special Programs.<sup>10</sup> Advocate and Mother discussed the need for Student to be in a program supervised by a board-certified behavior analyst (“BCBA”) who provides focused behavior interventions using ABA therapy. Mother and Advocate also specifically talked about Private Autism Center as being a possible program that could provide the appropriate behavioral interventions for Student in order to allow Student to progress to the point where Student could return to a traditional school setting.<sup>11</sup> Coordinator of Special Programs stated that Student should be in a less restrictive environment, encouraging Mother to visit School District’s autism program “where all of Student’s needs could be met.” Director Special Programs stated, “We believe we can meet [Student’s] needs in this district.” Director Special Programs also stated that “[Therapy Center] is writing the IEP, [School District] will adopt, but there may need to be changes once [Student] gets in [School District].” The meeting was adjourned in order to complete the additional assessments. Another meeting was scheduled for May 22<sup>nd</sup> to continue developing the IEP.<sup>12</sup>

8. Mother and Advocate visited School District’s autism program, where staff stated that they were not confident that Student could be kept safe at their school.<sup>13</sup>

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<sup>9</sup> Interviews with Treatment Center Teacher and Coordinator of Special Programs.

<sup>10</sup> Exhibit M and Interviews with Coordinator of Special Programs and Mother.

<sup>11</sup> Exhibit M and Interview with Mother. See CO SEA 2014:516. Private Autism Center is a licensed day treatment and therapy center that provides educational and behavioral services and supports to children and adults with autism. Private Autism Center uses research-based educational and behavioral interventions, including individualized 1:1 teaching supervised by an on-site BCBA, using principles of ABA.

<sup>12</sup> Exhibits M Exhibit 1, page 35 and Interview with Mother.

<sup>13</sup> Interview with Mother and Exhibit M.

9. The IEP team reconvened on May 22<sup>nd</sup>. Treatment Center Teacher was again responsible for managing the meeting and generating the IEP document. The team discussed speech goals and functional goals, as well as a recommendation for a SWAAC referral for assistive technology. Student had been assessed or records had been reviewed by a physical therapist, an occupational therapist, a speech and language pathologist, and a vision specialist. No assessment of Student's orientation or mobility needs had been completed.<sup>14</sup>

10. The IEP team agreed that the BOCES program and the School District's autism program were both inappropriate for Student's needs.<sup>15</sup> There was again no discussion of behavior goals, conducting an FBA, or a plan to address Student's behavior. Treatment Center Teacher stated and the May 7, 2015 IEP document notes that the "[Treatment Center's] structure and its internal escalation and cycle management plan will stand in the place of a traditional BIP."<sup>16</sup> Mother and Advocate again advocated for Student to be placed at a program that provides focused behavior interventions using ABA therapy, supervised by a BCBA, and again specifically talked about Private Autism Center as being an appropriate program to provide the behavioral interventions for Student.<sup>17</sup>

11. Coordinator of Special Programs stated that Private Autism Center was inappropriate due to Student having "more confounding areas than autism" and dismissed it as an option, accusing Mother and Advocate of coming to all meetings with the School District with a "hidden agenda" of sending Student to Private Autism Center without trying any of the School District's programs and noting that behavior was not addressed at all in Student's IEP. Coordinator of Special Programs instructed Mother to visit the two SSN programs at School and School #2 and stated that the School District's decision is that Student could be supported within the SSN programs at School and School #2, the autism program or in the BOCES program, and that if Mother chose to send Student to Private Autism Center, it was a unilateral decision by Mother and her financial responsibility. The meeting eventually ended with much confusion and no understanding by Mother that an offer of placement had been made by School District.<sup>18</sup>

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<sup>14</sup> Exhibit M.

<sup>15</sup> Response and Exhibit M.

<sup>16</sup> Exhibit 1, page 48. Treatment Center Teacher explained that the structure and management plan referred to is used with all students placed at Treatment Center and is not applicable to environments other than Treatment Center.

<sup>17</sup> Exhibit M.

<sup>18</sup> Exhibit M and Interview with Mother.

12. The May 7, 2015 IEP document generated sometime after the May 22<sup>nd</sup> meeting indicates that Student’s placement would be “N/A Harrison”.<sup>19</sup> Director Special Programs, Coordinator of Special Programs, Coordinator of Special Programs #2, and Treatment Center Teacher all stated that they understood at the end of the meeting that Mother was to choose between one of the two SSN programs in School District.<sup>20</sup>

13. On June 24<sup>th</sup> Mother hand delivered a letter addressed to Director Special Programs and Coordinator of Special Programs requesting that an IEP meeting be held before July 10<sup>th</sup> to determine Student’s placement.<sup>21</sup> Director Special Programs and Coordinator of Special Programs were on summer break until July 1<sup>st</sup>.<sup>22</sup> A meeting was scheduled for July 17<sup>th</sup> at School; however, the meeting was held as a “conference” instead of an IEP meeting because there was no general education teacher available to participate. Coordinator of Special Programs stated that the purpose of the conference was to discuss needs and develop goals.<sup>23</sup>

14. On June 26<sup>th</sup> Mother took Student to Private Autism Center for an FBA that was completed on July 8<sup>th</sup>. The FBA hypothesized that if Student were to receive services from a facility that provides intense 1:1 services that utilize ABA therapy and supervised by a BCBA, appropriate oversight of Student’s behavior would occur. It also recommended that a BSP be written and overseen by a BCBA and carried out by staff trained in the principles of ABA to address Student’s concerning behaviors. Mother hand delivered a copy of the FBA to School District prior to the July 17<sup>th</sup> conference.<sup>24</sup>

15. At the July 17<sup>th</sup> conference, it was evident that Mother and Advocate were surprised that the meeting was not an IEP meeting to discuss placement; they also did not understand that an offer of placement had been made on May 22<sup>nd</sup>. Further, Mother had not been provided with a copy of the May 7<sup>th</sup> IEP. Coordinator of Special Programs admitted that he did not see the finalized May 7, 2015 IEP document until sometime just before July 17<sup>th</sup>, and that Mother saw the document for the first time at the conference on July 17<sup>th</sup>. The team discussed Student’s attendance at School. Special Education Teacher, who would be Student’s teacher at School, was present to discuss the classroom

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<sup>19</sup> Exhibit J.

<sup>20</sup> Interviews with Director Special Programs, Coordinator of Special Programs, Coordinator of Special Programs #2, and Treatment Center Teacher.

<sup>21</sup> Exhibit H.

<sup>22</sup> Interview with Director Special Programs.

<sup>23</sup> Exhibits M and 4, Response, and Interviews with Coordinator of Special Programs, Coordinator of Special Programs #2, Director Special Programs, and Mother.

<sup>24</sup> Exhibit I and Interview with Mother.

and support. Mother expressed her concern that Student would be a danger to herself and others in the SSN classroom at School. Student's behaviors were discussed at great length. Mother and Advocate advocated for Student to be placed at Private Autism Center. Coordinator of Special Programs stated that because Director Special Programs was not at the conference, School District could not make a final decision on placement and that Director Special Programs would be consulted and would contact Mother regarding a final placement decision.<sup>25</sup>

16. Director Special Programs never contacted Mother after the July 17<sup>th</sup> meeting. Director Special Programs stated that School District had planned to hold an IEP meeting before the school year began, but never did. An IEP meeting has never been convened, nor has any Prior Written Notice ("PWN") been provided in response to Mother's June 24<sup>th</sup> IEP meeting request.<sup>26</sup>

17. Sometime in mid-August 2015, Mother attempted to enroll Student first at Therapy Center and then at School, but neither place had received an enrollment request from School District. Mother then went to Director Special Programs' office on August 14<sup>th</sup> to ascertain where Mother should enroll Student. After assuring Mother that Student would have 1:1 support at School as required by the Student's IEP, Mother agreed to enroll Student for a one week trial period. Director Special Programs instructed Mother to enroll Student at School. Assistant Principal, who was in charge of the special education department at School, stated that she was never informed that Student would be attending School. Assistant Principal and Coordinator of Special Programs #2 also explained that Director Special Programs is responsible for allocating paraprofessional positions to schools in School District.<sup>27</sup>

18. On August 16<sup>th</sup>, Student arrived for the first day at School to an SSN classroom with five other students, Special Education Teacher, and no paraprofessional. Special Education Teacher told Director Special Programs that she needed assistance, but was told a paraprofessional had not yet been hired and that Special Education Teacher could handle it by herself. Student did not have the 1:1 support called for in the IEP throughout the day. Another student in the classroom also was without required 1:1 support. Paraprofessional was eventually placed in the classroom to provide general classroom support, but was not assigned to any particular student. Mother was very nervous about Student's safety and the safety of other students in the classroom and took Student

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<sup>25</sup> Interviews with Mother, Coordinator of Special Programs, Coordinator of Special Programs #2, Director Special Programs, Treatment Center Teacher, Exhibits M and 4.

<sup>26</sup> Interviews with Director Special Programs and Mother.

<sup>27</sup> Interviews with Assistant Principal, Director Special Programs and Mother.



home before the school day ended.<sup>28</sup> Student has not returned to School. School District has not held an IEP meeting or provided any services to Student since August 16<sup>th</sup>.<sup>29</sup>

19. Based on numerous interviews with credible witnesses and a comprehensive and thorough review of the documentation provided, SCO concludes that the School District failed to develop an IEP based on Student's individual needs, predetermined placement, failed to make a formal offer of placement, and failed to implement Student's IEP.

20. The SCO notes that in just over a two-year period, three State Complaint Decisions involving School District – all during Director Special Programs' tenure -- have found similar violations that resulted in a denial of FAPE.

a. In an August 15, 2013 decision, the SCO found that School District failed to provide notice of meeting or PWN, failed to develop an IEP or make an offer of placement, despite the team's recognition that Student needed a new placement, and predetermined and developed the IEP without parents' input, in violation of parents' right to meaningful participation.<sup>30</sup>

b. Another decision was issued on October 9, 2014 in which the SCO found that four separate students were denied FAPE when School District predetermined placement by refusing to consider parents' request to keep children at Private Autism Center where they were all doing extremely well. School District then compounded the error by proposing placements that were not based upon the students' individual needs and by failing to make offers of FAPE, instead telling parents to visit a number of placements and indicate which they preferred.<sup>31</sup>

c. Finally, in a May 15, 2015 decision, the SCO found that the School District denied a student FAPE due to its failure to develop an IEP based on student's individual needs, failure to provide parents with notices of meetings and PWN, failure to comply with or implement an IEP, and, in what appears to be a continuing School District practice, rather than develop an IEP and put an offer of FAPE on the table, School District again instructed parents to visit a

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<sup>28</sup> SCO notes that Mother observed a student walking around holding a wooden swing on metal chains. Special Education Teacher told Mother that the student always walked around with the swing as a calming item.

<sup>29</sup> Response and Interviews with Mother, Paraprofessional, Special Education Teacher, Coordinator of Special Programs #2, and Assistant Principal.

<sup>30</sup> See CO SEA 2013:502

<sup>31</sup> See CO SEA 2014:516

number of different placement options and indicate which one they preferred, a clear violation of IDEA.<sup>32</sup>

### **CONCLUSIONS OF LAW**

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

1. Under the IDEA, public school districts are required to provide children with disabilities with a “free appropriate public education ” by providing special education and related services individually tailored to meet the student’s unique needs, and provided in conformity with an individualized education program developed according to the Act’s procedures. 20 U.S.C. § 1401(9); 23 C.F.R. § 300.17; ECEA Rule 2.19. The Act contains extensive procedural requirements relating to the development of the IEP, including requirements that the IEP be a written document, reviewed at least annually, and that it be developed by a team of individuals with knowledge about the child, including the child’s parents, and that it be based upon the input of the IEP meeting participants as well as evaluative data derived from valid, scientifically based assessments conducted in accordance with the Act’s requirements. *See, e.g.*, 34 C.F.R. §§ 300.301-300.304; 300.320-300.324.

2. In the seminal case of *Board of Education v. Rowley*, the United States Supreme Court highlighted the importance of compliance with the IDEA’s procedural requirements, particularly given the lack of specificity provided by the Act with respect to the substantive requirements for FAPE.

[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g.1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrate[s] the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

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<sup>32</sup> See CO SEA 2015:502

*Board of Education v. Rowley*, 458 U.S. 176, 205-206 (1982).

3. Typically, contemplation of the two prong analysis set forth in *Rowley* is necessary to determine whether the procedural violation resulted in a denial of FAPE. *Rowley, supra* at 206-207. “First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?” *Id.* It is well-established, however, that where the procedural inadequacies seriously infringe upon the parents’ opportunity to meaningfully participate in the IEP process, the result is a “per se” denial of FAPE. *See, e.g., O.L. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11<sup>th</sup> Cir. 2014); *Deal v. Hamilton County Bd. Of Educ.*, 392 F.2d 840 (6<sup>th</sup> Cir. 2004); *see also*, 34 C.F.R. § 300.513(a)(2)(ii) (“In matters alleging a procedural violation, a hearing officer may find that the child did not receive a FAPE only if the procedural inadequacies ... [s]ignificantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the parent’s child...”).

I. **The School District violated Mother’s procedural rights under the IDEA and ECEA resulting in a denial of FAPE.**

a. **School District failed to develop an IEP based upon the Student’s individual needs, predetermined placement, and denied Mother meaningful participation in the IEP process. (Allegations 1 and 2)**

4. Among the procedural requirements for the development of an IEP is the requirement that school districts consider parental suggestions and requests and, to the extent appropriate, incorporate them into the IEP. 34 C.F.R. § 300.501(b); *O’Toole v. Olathe Dist. Schools*, 144 F.3d 692, 107 (10<sup>th</sup> Cir. 1998). A school district is said to have impermissibly “predetermined” a child’s placement if it makes its determination prior to the IEP meeting, including when the agency presents one placement option at the IEP meeting and is unwilling to consider others. *R.L. v. Miami-Dade County Sch. Bd.*, 757 F.3d 1173 (11<sup>th</sup> Cir. 2014)(school district personnel cannot come into an IEP meeting with closed minds, having already decided material aspects of the child’s educational program without parental input); *Deal v. Hamilton County Bd. Of Educ.*, 392 F.3d 840 (6<sup>th</sup> Cir. 2004)(where school district had decided in advance of the IEP meeting not to offer a particular program that the parents sought, regardless of the student’s individual needs and the effectiveness of his private program, placement was predetermined and denied FAPE); *Ms. S. ex. Rel. G. v. Vashon Island School Dist.*, 337 F.3d 1115, 1131 (9<sup>th</sup> Cir. 2003)(“A district may not enter an IEP meeting with a “take it or leave it” position)(*superseded on other grounds*, 341 F.3d 1052(9<sup>th</sup> Cir. 2003)).

Predetermination of placement deprives the child's parents of meaningful participation in the IEP process, and amounts to a *per se* denial of FAPE. *Deal, supra*.<sup>33</sup>

5. Moreover, the law is unequivocal in requiring that a school district develop an IEP based upon each child's individual needs and that it make a formal, written offer of a specific placement. *Systema, supra*, 538 F.3d at 1315-16, *citing with approval, Union School Dist. v. Smith*, 15 F.3d 1519 (9<sup>th</sup> Cir. 1994)(formal, written offer of placement must be included in the IEP); *see also, Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6<sup>th</sup> Cir. 2001); *J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672 (4<sup>th</sup> Cir. 2007)(school District violated IDEA by offering an IEP that did not specify a placement for the student). Further, "a school district cannot abdicate its responsibility to make a specific offer [by] allowing parents to choose from among several programs ... After discussing the advantages and disadvantages of various programs that might serve the needs of a particular child, the school district must take the final step and clearly identify an appropriate placement from the range of possibilities." *Glendale Unified Sch. Dis. V. Almasi*, 122 F. Supp. 2d 1093, 1108 (C.D. Cal. 2000), *citing Union, supra*.

6. In describing a student's placement, while the IEP need not necessarily identify the specific school or location in which the child's IEP will be implemented, the description must be specific enough to put the parents on notice of the nature of the placement, the environment, and the types of services that student will receive. *J.K.v. Alexandria City School Bd., supra at 682* (IEP's proposal to place student in an unspecific private day school did not provide sufficient information for the parents to evaluate whether the placement was appropriate); *Mill Valley Elem, Sch. Dist. v. Eastin*, 32 IDELR 140 (N.D. Cal. 1999)(IEP denied FAPE where it provided "skeletal" outline of placement and committed to nothing more specific than a modified regular education "setting".) The failure to make a specific, written offer of placement in the IEP is a denial of FAPE. *Id.* The IDEA provides that in the development of an IEP, parents must be afforded the opportunity to attend and participate, and that the parents' participation must be meaningful, including giving consideration to their concerns about their child. 34 C.F.R. §§ 300.321 (a)(1) and 300.324(a)(ii). This includes providing all members of the IEP team, including parents, with a copy of the IEP. 34 C.F.R. § 300.322(f).

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<sup>33</sup> Normally procedural violations of IDEA will only result in a denial of FAPE if those violations resulted in a denial of educational benefit or resulted in an IEP that was not reasonably calculated to allow the child to receive educational benefit. *See Rowley, supra*. Some procedural violations, however, are so egregious that no examination of resulting harm is required; resulting harm is presumed, such that the procedural violation is deemed a "per se" denial of FAPE. Predetermination is such a procedural violation, as is the failure to make a specific offer of placement.

7. The SCO concludes that the School District predetermined Student's placement, thereby denying Student a FAPE. There is no question that, beginning with the placement discussion that began prematurely at the April 22<sup>nd</sup> eligibility meeting, the School District has once again demonstrated that their practice is to predetermine placement and fail to develop an IEP or make an offer of placement. School District shamelessly attempts to shift the blame of predetermination to Mother (and Advocate) in this case, leaving SCO to wonder whether School District either fails again to recognize that the onus is on School District, not parents, to make an offer of placement, or whether School District chooses to willfully disregard it. Regardless, it is a clear violation of the IDEA. Despite knowing virtually nothing about Student, no consideration was given to Mother's requests that a facility that provides intensive ABA services or that Private Autism Center be considered; Director Special Programs, Coordinator of Special Programs, Coordinator of Special Programs #2, and Treatment Center Teacher all admitted that Private Autism Center was not considered as an option. Moreover, there is no evidence to suggest that any other intensive program was considered nor any effort to ascertain whether any in-district option was appropriate. SCO makes particular note of Coordinator of Special Programs' statement that Student could be served in the BOCES and autism programs even after the IEP team had just agreed that both programs were inappropriate. It is abundantly clear that School District was simply determined to place Student "in-district" with complete disregard to Student's needs or the appropriateness of School District's programs.

8. Equally egregious is that the School District predetermined that Private Autism Center would not be an option for Student without making any specific offer of placement as an alternative. Coordinator of Special Programs recommended that Mother tour various schools and programs, but did not specify which program Student would be placed in and did not identify a specific program in Student's IEP. Indeed, Mother left the May 22<sup>nd</sup> IEP meeting with no understanding that School District had offered any placement at all. Indeed, Coordinator of Special Programs admits that he had not seen the May 7<sup>th</sup> IEP document himself until just before July 17<sup>th</sup> and that it was clear that Mother had not seen the IEP document until the July 17<sup>th</sup> conference. Moreover, the July 17<sup>th</sup> conference ended with Coordinator of Special Programs stating that a placement decision must be made in consultation with Director Special Programs who never communicated with Mother at all until Mother showed up at her office two days before school started. Undoubtedly, the lack of a formal, written offer was the result of the School District's complete disregard for Student's needs, thereby depriving Student of a FAPE.

**b. The School District failed to hold an IEP meeting at Mother’s request. (Allegation 4)**

9. On June 24<sup>th</sup> Mother requested an IEP meeting in order to determine Student’s placement. Unquestionably, Mother had no way of understanding where Student was to be enrolled and because School District had failed to make an offer of placement. School District argues that because there was no general education teacher available on July 17<sup>th</sup>, a conference was held instead.<sup>34</sup> School District failed to notify Mother of its decision not to hold an IEP meeting as she had requested, which is evident since Mother arrived on July 17<sup>th</sup> expecting to be attending an IEP meeting. The IDEA does not establish a specific requirement for convening an IEP team meeting at parental request. 34 C.F.R. § 300.345(a)(1). However, if the parents of a child with a disability believe that there is a problem with the child’s current IEP, it would be appropriate for the parents to request an IEP team meeting and the public agency should grant any reasonable request for such a meeting. Moreover, while Director Special Programs stated that School District planned to hold an IEP meeting before Student began the school year and after the July 17<sup>th</sup> conference, no IEP meeting has ever been scheduled, even after Mother removed Student from the unsafe environment in the SSN classroom at School.

**II. The School District failed to implement Student’s October 7, 2014 and May 7, 2015 IEPs, thereby violating Student’s right to receive FAPE (Allegation 3).**

10. The SCO next addresses Mother’s allegations concerning the implementation of Student’s IEP. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a material failure to implement an IEP can result in a denial of FAPE. *Id.*; see also *K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10<sup>th</sup> Cir. 2005); *Van Duyn v. Baker Sch. Dist.* 5J, 481 F.3d 770 (9<sup>th</sup> Cir 2007), *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8<sup>th</sup> Cir. 2003).

11. Because Student’s May 7, 2015 IEP was never completed, the October 7, 2014 IEP was still in effect when Student attended School on a trial basis on August 16<sup>th</sup>. Regardless, either IEP required that Student receive 1:1 support in either environment. School District admits that it did not provide 1:1 support as called for in Student’s IEP when Student attended School on August 16<sup>th</sup>, where Student was placed in an SSN classroom with five other students and a single special education teacher. Director Special Programs was not only aware of the situation but directly responsible for

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<sup>34</sup> SCO notes that School District’s explanation is a poorly designed excuse. While it is true that a general education teacher is a required participant at an IEP meeting (where general education is a consideration), it is clear that was not the case here and has never been since all of the previous IEP meetings were held without a general education teacher in attendance.

assignment of paraprofessionals to School, but apparently so intent on keeping Student in-district that, in her estimation, the 1:1 support required by Student's IEP was a non-issue. Paraprofessional was eventually assigned to the classroom for general classroom assistance, but not the 1:1 support that was required by Student's IEP. Student has not returned to School, nor has School District held an IEP meeting or provided any services to Student since that date. Accordingly, SCO concludes that School District failed to implement Student's IEP, thereby denying Student a FAPE.

### **REMEDIES**

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

- a. Failure to develop an IEP according to the unique needs of a child with a disability and predetermination of placement (34 C.F.R. §§ 300.320, 300.324 and 300.501(b).
- b. Failure to develop an IEP in accordance with the procedural requirements of the IDEA, including:
  - a. providing meaningful participation to the child's parents (34 C.F.R. § 300.320 and 300.324);
  - b. including a sufficient description of the child's placement (34 C.F.R. § 300.320);
  - c. providing sufficient and timely prior written notice (34 C.F.R. § 300.503); and
  - d. providing all members of the IEP team, including parents, with a copy of the IEP. 34 C.F.R. § 300.322(f).
- c. Failure to provide Student with the special education and related services in conformity with the IEP, resulting in a denial of FAPE, in violation of 34 C.F.R. § 300.17(b).

To remedy these violations, the School District is ordered to take the following action to be monitored and reported to Department directly by School Leadership Officer to whom Director Special Programs reports:

1. By no later than December 1, 2015, the School District must submit to the Department a proposed corrective action plan (CAP) that addresses each and every violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the School District is responsible. The CAP must, at a minimum, provide for the following:
  - a. Effective training concerning relevant policies and procedures to address the cited violations must be conducted for all Coordinators of Special Programs. Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department no later than

February 1, 2016.

- b. School District will offer Mother, and all parents in School District who have children with disabilities receiving or requesting special education services, effective training concerning the procedural safeguards provided for in the IDEA in order to provide parents with a basic understanding of how the IEP process works, as well as parents' and students' rights under the IDEA, at least once during the 2015-16 school year and once during the first half of the 2016-17 school year. Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department within fifteen days after trainings occur, but no later than June 13, 2016 and January 6, 2017. Training must be provided by Director Special Programs, an outside organization (upon Department approval), or requested from the Department.
  - c. School District will provide Department with a log of all contact (i.e., emails, phone calls, conversations, letters) made by parents in School District who have children with disabilities receiving or requesting special education services on the second Monday of every month, beginning on December 14, 2015 and continuing until November 14, 2016. The log must include the dates of contact, name person(s) contacted at School District, name of parent and student, method of communication, and date of response, general nature of the issue, and resolution.
  - d. School District will provide all IEPs developed or amended for all students with disabilities to the Department on the second Monday of every month, beginning on December 14, 2015 and continuing through November 14, 2016.
2. School District shall reimburse Mother \$240.00 for the cost she incurred (or which was incurred on her behalf) of obtaining the FBA from Private Autism Center. Reimbursement must be made no later than November 18, 2015.
  3. The School District shall immediately implement Student's May 7, 2015 IEP at Treatment Center (including providing round trip transportation and all special education and related services (i.e., all special education and related services and 1:1 support)).
  4. School District shall complete a full and comprehensive evaluation of Student as soon as possible, but no later than January 4, 2016. All assessments must be conducted by evaluators who are not employed by the School District and who have knowledge and strategies specific to ASD and visual impairment. Upon request, the Department is able to provide the District with a list of qualified evaluators. Prior to choosing each evaluator, School District must provide Mother and Department with a list of no fewer than three proposed evaluators for Department's review and approval. School District must obtain Mother's consent for each evaluation within 5 days of Department's approval.



All evaluations will contemplate inclusion of a plan for parent training (if the evaluator determines it to be beneficial to provide parents with the tools in order to provide consistency across all domains) and training for staff who will be supporting Student. The evaluations must be consistent with the IDEA and this Decision.

The District shall provide the Department with documentation that it has complied with these requirements no later than January 11, 2016. Documentation must include the signed consent for evaluations, documentation showing that all of the evaluations were provided to Mother, and a copy of the evaluation results.

The comprehensive evaluation must include assessment of all identified and suspected areas of disability, including:

- a. An FBA that follows the Department's quality indicators for the FBA process. The evaluator chosen must be a BCBA from outside of School District who also holds a special education teaching license and has experience with evaluation of self-injurious behaviors to address Student's maladaptive behaviors (i.e., inappropriate comments, yelling, scripting, aggressive behaviors toward others, and self-injurious behaviors) with the goal to decrease the likelihood of these behaviors so that Student can be successfully transitioned back to a less restrictive special education setting. The FBA will lead to a positive BSP, including proactive and behavioral support strategies, to include teaching of replacement strategies and consideration and planning for parental support and training. The FBA must be submitted to Department for efficacy and to ensure it follows evidence-based practices for students with ASD and behavioral challenges.
- b. Comprehensive evaluation of Student's present levels to include: cognitive profile, sensory needs, communication needs (including a SWAAC assessment, social/emotional needs, complex support needs (i.e., challenges with communication, adaptive behaviors, academic needs, social skills, student response form).
- c. Orientation and Mobility assessment completed by a CDE licensed school O & M specialist to enable Student to attain systematic orientation to and safe movement within the school, home, and community and address the need for a long cane in both familiar and unfamiliar environments;
- d. Functional vision assessment specifically addressing Student's specific needs for accommodations and modification of instructional materials and specialized devices/equipment/software, as well as particular attention to Student's low vision diagnosis due to optic nerve hypoplasia.

5. The School District shall be prohibited from changing Student's placement until all training and other corrective action ordered herein has been completed. Thereafter, the School District shall be prohibited from changing Student's placement until:
  - a. Staff members from any new placement proposed by the School District, which staff would have responsibility for providing special education and related services to Student, have observed Student in Treatment Center to understand the nature of Student's educational and behavioral functioning;
  - b. The Department has reviewed and approved of the comprehensive evaluation provided by School District.
  - c. School District conducts a full IEP meeting, facilitated by a neutral facilitator (not employed by the School District), immediately after completion of the comprehensive evaluation, but no later than January 15, 2016. The IEP team meeting and the resulting IEP must be consistent with the IDEA, particularly all of the provisions that the SCO has found the School District to have violated, and develop an IEP that includes a description of placement sufficient to allow Mother to understand what is being proposed, and must be generated by School District, whether or not Student will remain at Treatment Center or be placed outside of School District. The resulting IEP must include an appropriate transition plan to effectively and successfully transition Student back to a less restrictive environment when determined appropriate by the IEP team. The IEP team must include all of Student's evaluators. The IEP team must specifically address Student's present levels and address any deficiencies that are found as a result of the evaluations and assessments performed. The IEP team must create a plan for addressing any deficiencies that is consistent and agreed upon by the evaluators or an explanation of why the IEP team has decided to deviate from the recommendations. The School District shall provide the Department with documentation that it has complied with these requirements within five days after the IEP meeting occurs, but no later than February 1, 2016. Documentation must include proof of compliance with the procedural requirements set forth in the IDEA, particularly all of the provisions that the SCO has found the School District to have violated, including notice of meeting and prior written notice, as well as a copy of the resulting IEP document for review and approval by the Department.
6. To ensure appropriate implementation of the development of Student's IEP, including the evaluation process:
  - a. Director Special Programs will monitor implementation of Student's IEP and send copies of relevant documentation and a report to the School District's School Leadership Officer, to include progress monitoring and service logs, who will then provide the documentation to the Department by the second Monday of each month beginning on December 7, 2015 until December 12, 2016.

- b. Mother will be provided with progress reports monthly and a copy of all progress reports must be sent to the Department within 7 days of when Mother is sent or provided such reports.
  - c. The Department will communicate with Mother regularly beginning the day after the issuance of this Decision. The Department will collaborate with Mother to establish a communication schedule to occur bi-weekly until a new IEP is developed and to continue monthly through November 7, 2016.
7. Compensatory Education Services for Failure to Provide Student with FAPE. As previously discussed, the School District must provide Student with services in Student's IEP to specifically address any deficits found by the evaluators. These compensatory services shall be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives, including ESY. The parties shall cooperate in determining how the compensatory education services will be provided, with special consideration to Student's needs, stamina, and family schedule.

The Department will approve or request revisions of the CAP. Subsequent to the approval of the CAP, the Department will arrange to conduct verification activities to verify the School District's timely compliance with this Decision. Please submit the documentation detailed above to the Department as follows:

Colorado Department of Education  
Exceptional Student Services Unit  
Attn: Fran Herbert  
1560 Broadway, Suite 1175  
Denver, CO 80202-5149

Failure by the School District to meet the timelines set forth above will adversely affect the School District's annual determination under the IDEA and will subject the School District to enforcement action by the Department.

### **CONCLUSION**

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

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

This 3<sup>rd</sup> day of November, 2015.

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Lisa A. Weiss, Esq.  
State Complaints Officer

## APPENDIX

### **Complaint, dated September 3, 2015, pages 1-20**

- Exhibit A: photocopy of photographs
- Exhibit B: Clinical Assessment/Social History documentation, dated October 7, 2014
- Exhibit C: Therapeutic Progress Report, dated October 1, 2014
- Exhibit D: Eligibility Report and IEP, dated October 7, 2014
- Exhibit E: Treatment Plan/ Social History, dated October 23, 2014
- Exhibit F: Psycho-Educational Report with handwritten notes, dated April 21, 2015
- Exhibit G: Draft IEP, dated May 7, 2015
- Exhibit H: Correspondence with handwritten notes, dated June 24, 2015
- Exhibit I: Functional Behavior Assessment, dated July 8, 2015
- Exhibit J: IEP, dated May 7, 2015
- Exhibit K: Progress Report, dated March 12, 2015
- Exhibit L: Therapeutic Progress Report, dated March 4, 2015

### **Reply, dated October 5, 2015, pages 1-5**

- Exhibit M: USB drive containing video and audio files
- Exhibit N: Advocate calendar pages 1-5
- Exhibit O: Written explanation of video files contained in Exhibit M

### **Response, dated September 23, 2015**

- Exhibit 1: Email correspondence; partial IEP documentation, dated October 7, 2014; Progress monitoring documentation; 30 Day Assessment Report, dated October 7, 2014; Quarterly Report, dated January 2015; Escalations Cycle Management Plan, dated October 7, 2014; Conference Report, dated March 11, 2015; Prior Written Notice and Consent for Evaluation, dated March 11, 2015; Notice of Meeting, dated April 15, 2015; Psycho-Educational Report, dated April 21, 2015; Determination of Eligibility, dated April 22, 2015; Prior Notice of Special Education Action, dated April 22, 2015; Draft IEP, dated May 7, 2015; Notice of Meeting, dated May 13, 2015; Procedural Safeguards and IEP Participants page of IEP, dated May 22, 2015; Alternate Assessment Worksheet, dated May 7, 2015; IEP, dated May 7, 2015; Occupational Therapy Report, dated May 15, 2015; Learning Media Plan, dated May 22, 2015; Escalations Cycle Management Plan, dated January 7, 2015; Progress Report, dated March 12, 2015; Learning Media Plan, dated May 7, 2015; and Functional Vision Report, dated May 2015
- Exhibit 2: ESY Data Documentation, dated May 7, 2015 and Learning Media Plan, dated May 7, 2015
- Exhibit 3: IEP, dated October 7, 2014
- Exhibit 4: Email correspondence; Notice of Meeting, dated July 14, 2015; Conference Report, dated July 17, 2015; partial IEP documentation, dated July 17, 2015; Documentation from Center received June 17, 2015; Incident Report, dated August 18, 2015; Attendance record; Infinite Campus printout
- Exhibit 5: District Job Report documentation regarding Paraprofessional provide upon request of SCO

**Interviews with:**

Mother

Director Special Programs

Coordinator of Special Programs

Coordinator of Special Programs #2

Special Education Teacher

Paraprofessional

Assistant Principal

Treatment Center Teacher