

Colorado Department of Education
Decision of the State Complaints Officer (“SCO”)
Under the Individuals with Disabilities Education Act (“IDEA”)¹

**State-Level Complaint 2017:503
El Paso County School District 11**

DECISION

INTRODUCTION

This pro-se, state-level complaint (“Complaint”) was properly filed on February 23, 2017 by the mother (“Mother”) of a child (“Student”) identified as a child with a disability under the IDEA. Mother brings this Complaint against El Paso County School District 11 (“District”).

The SCO determined that the Complaint raised issues subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

COMPLAINT ALLEGATIONS

Mother’s Complaint raised the following issues, in summary:

1. Whether the District failed to develop, review, or revise an IEP based upon Student’s individual needs since October 14, 2016;
2. Whether the District failed to assemble an appropriate IEP team on October 14, 2016 and December 15, 2016;
3. Whether the District failed to evaluate Student upon Mother’s request;
4. Whether the District denied Parent meaningful participation in the development of Student’s IEP since October 14, 2016; and
5. Whether the District predetermined Student’s eligibility on December 15, 2016.

Summary of Proposed Remedies. To resolve the Complaint, Mother has proposed that District provide compensatory services for lack of speech, occupational therapy, and mental health services.

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

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

FINDINGS OF FACT

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

Background

1. At all times relevant to the Complaint Student has attended kindergarten at School and has lived with Mother inside the District's boundaries. Student is eligible as a child with a disability in need of special education and related services and has a medical diagnosis of autism.³

2. Based on his March 4, 2016 IEP ("Preschool IEP"), Student's case manager/special education teacher ("Special Education Teacher") was aware that Student may need additional support as a "higher impact" student entering kindergarten. In terms of Student's needs and the impact of his disability, Preschool IEP indicates that "[Student] is exhibiting developmental delays which are impacting his ability to independently participate and make reasonable progress in the general curriculum. His receptive/expressive language delays and speech sound production errors impact his ability to effectively communicate his knowledge to his teachers and interact with his peers." Preschool IEP does specify that in kindergarten "[Student] will receive grade-level instruction in the general education classroom" with "Adult support throughout his day" and the following accommodations: wait time to process information; routine; structure; repetition; alternate preferred and non preferred activities; support safety awareness; warnings before transitions; access to a comfort item to assist with transitions as needed; tasks broken down into smaller steps; shortened directions; and access to picture communication symbols as necessary to supplement verbal language (ie. picture schedules, choice boards, core vocabulary board, etc)."⁴

3. Student was assigned to general education teacher's ("Teacher") kindergarten class who recalled being aware that he would be in her class, but was not feel prepared to properly support Student. In the first few months of the school year the School's special education team provided as much support in Teacher's classroom as they could, despite being understaffed.⁵ During this time, Teacher explained she was "completely overwhelmed" with the assistance of only a part time aide and no assistance at all at the beginning and end of the day and described Student's behavior as extremely distracting for the whole class as he screamed, cursed, and cried loudly. Special Education Teacher explained that Preschool IEP did not address his needs as they related to kindergarten in terms of academic goals or adult support for "behavior and attention." Teacher explained that she was also very concerned about the safety of other students as Student pushed, punched, and spit at them and shared that other students had begun to mimic his behaviors and laugh at him. Teacher reached out

³ Complaint

⁴ Exhibit H

⁵ The special education team became fully staffed with aides by November 2016.

to Mother a few times about Student's behavior and twice submitted disciplinary referrals; once when he threw one of his toys at a classmate's face and a second time when he spit in a classmate's face. Special Education Teacher and Teacher also both consulted with the School's counselor ("School Counselor) about Student's behavior. Roughly one month prior to the October 14th meeting, Mother requested the meeting to discuss Student's behavior, both at home⁶ and at school, and asked that a District staff member with specific expertise in behavior attend the meeting.⁷

October 14, 2016 IEP meeting⁸

4. The IEP team that met on October 14th included Special Education Teacher, Student's speech language pathologist ("SLP"), School principal ("Principal"), a District designee ("Coordinator"), Mother, Mother's sister and two friends, Student's occupational therapist ("OT"), and Teacher.⁹ Based on a thorough review of the credible record, SCO concludes that District did not include a staff member who specializes in behavior in the meeting.¹⁰

5. Student's October 2016 IEP noted all of the following in terms of his present levels: a significant reading deficiency; needs several prompts in order to complete an academic task; is unable to name letters or letter sounds without a visual or physical prompt; needs hand over hand for tracing and cutting; unable to rote count without prompting and does not know his numbers; needs a high level of support in order to access the general education environment; requires direct instruction in math and reading; has large meltdowns in the school environment, i.e., screaming, crying, spitting, throwing items, hitting, kicking, cursing; requires access to a calm down area; needs "constant adult supervision for safety"; has significant difficulty with auditory processing of multi-step directions; needs consistent verbal prompts to look to his peers for a model; needs multiple cues if asked to complete directions independently; is 80 to 90% intelligible when speaking in three word utterances; and needs direct instruction in differentiating the various types of "wh" questions and how to answer them appropriately. SCO concludes, based on a thorough review of the credible record that Mother offered the team private evaluation reports related to Student's autism, but that they were neither discussed nor referenced in the documentation.¹¹

⁶ The Parent Input section of the October 2016 IEP noted that Mother has seen an increase in Student's negative behavior, which she has addressed through increased outside therapies, including occupational therapy, play therapy, speech therapy, and physical therapy. It was also noted that Student is on a waitlist for ABA services outside of school and will begin seeing a psychiatrist outside of school.

⁷ Interviews with Special Education Teacher, Teacher, and Behavior Interventionist

⁸ SCO notes that the date on the October 2016 IEP was inadvertently left as October 7th, but that the meeting was actually held on October 14th.

⁹ SCO notes that Coordinator, SLP, and Teacher all left the meeting early, but only SLP requested an early excusal from Mother.

¹⁰ Exhibits 4, A, D, and E

¹¹ Exhibits 4 and A; Interviews with Mother, Special Education Teacher, and Coordinator

6. The IEP team discussed Student's behavior and Mother requested a behavior intervention plan ("BIP"). Coordinator advised Mother that the District would need to conduct a functional behavioral assessment ("FBA") before developing a BIP and that it is also District's policy is to conduct a full educational evaluation when doing an FBA. Since Student's reevaluation for eligibility was expected to take place in the spring, District suggested and Mother agreed at the meeting that District would conduct a full education evaluation. In the meantime, the team agreed to address Student's behavior by increasing adult support for Student and implementing several behavior strategies.¹²

7. Based on a thorough review of the credible record, SCO concludes that the October 2016 IEP, which was in effect until February 10, 2017, contained no goals related to behavior and made no reference to strategies to address Student's behavior. SCO also notes that the IEP specifies that no modifications are necessary for Student to access the general curriculum.

8. The Student Needs and Impact of Disability section of the October 2016 IEP noted that "[Student's] language delay affects his ability to use age appropriate language, answer questions, and follow oral language directives in the general education classroom. [Student's] delay significantly impacts his ability to access the general education environment. He requires direct, small group and 1-1 instruction in the area of reading, and math. [Student] also needs additional assistance in the classroom."¹³

9. The October 2016 IEP provides Student with four hours per month of speech language services; two hours per week of special education instruction in both math and reading; one hour of occupational therapy per month; and "constant adult supervision due to safety and level of academic impact." The IEP provides for the following accommodations: wait time to process information; gain attention and eye contact; routine; consistent structure and boundaries; hand over hand when needed; preferential seating; sensory supports; area to calm down with supports; opportunities for movement breaks; shortened directions and assignments; tasks broken down into smaller steps; choices; first/ then statements; repetition; small group instruction; extended time on assignments and tests; flexible scheduling and breaks; manipulatives for math; oral presentation for tests and directions; and positive peer partnerships.¹⁴

10. Mother emailed Coordinator and Director a few days after the meeting with concerns, specifically, that several people left the meeting early; that there was no one at the meeting to address behavioral issues; that the academic goals were too high; that Student needed constant adult supervision, which was not actually being provided; and that Student's autism diagnosis and documentation Mother had provided about the diagnosis was not noted in the IEP. Mother also explained that she felt excluded from the decisions about what assessments

¹² Response; Interviews with Coordinator, Special Education Teacher, and Mother; Exhibits D and G

¹³ Exhibit A

¹⁴ Exhibit A; SCO notes that the placement section also appears to have been mistakenly carried over from Preschool IEP.

needed to be conducted in the reevaluation process. Special Education Teacher had discussed the reevaluation with Mother and Advocate, who requested assessments in all areas, including assistive technology, vision, audiology, cognitive, autism, and an FBA. The Notice and Consent for Evaluation, dated October 21st and signed by Mother on October 25th, indicates that the areas to be evaluated were: Academic; Fine Motor/Visual Motor; Intellectual Capacity; Vision; Assistive Technology; Communication; Behavioral; and Social/Emotional.¹⁵

Reevaluation

11. The District's reevaluation included an FBA; observations; a health assessment; an assistive technology assessment; an academic assessment; an occupational assessment; a cognitive assessment; an adaptive behavior assessment; a functional vision assessment; and a speech-language assessment. Based on a thorough review of the credible record, SCO concludes that the District evaluation failed to appropriately assess Student in the areas of autism and behavior and did not provide sufficient information regarding Student's present cognitive or academic levels.¹⁶

12. Based on their shared observations, Behavior Interventionist and Special Education Teacher¹⁷ declined to formally assess Student for autism because of their shared belief that he did not exhibit any characteristics of autism at School. Behavior Interventionist observed Student twice, once on the playground and once in the lunch room, with the target behavior identified as engagement in a social interaction as compared to same age peers. Special Education Teacher observed Student in multiple settings to determine Student's ability to adapt to changes in routine, which she opined was appropriate with minimal verbal prompts or with the use of a timer.¹⁸

13. In consultation with Behavior Interventionist, School Counselor conducted the FBA and hypothesized that the function for Student's physical aggression is to gain or maintain access to a preferred item or activity. Mother was not included in the FBA and School Counselor interviewed only Special Education Teacher and Teacher.¹⁹

14. In terms of academics, the KTEA-3 assessment was attempted. The examiner noted that Student has limited language skills, difficulty following directions, and has a limited ability to stay focused on a task. As a result of these issues, the examiner assessed that Student did not have the pre-requisite skills necessary to complete a formal assessment of his academic abilities. Teacher shared that DIBELS assessments show that he received a composite score of

¹⁵ Exhibits D and E; Interviews with Special Education Teacher and Mother;

¹⁶ Response; Exhibit C

¹⁷ Special Education Teacher previously worked in a self-contained autism program in a neighboring school district.

¹⁸ Exhibit C; Response; Interviews with Behavior Interventionist and Special Education Teacher

¹⁹ Exhibit C; Interviews with Mother, Teacher, Special Education Teacher, and Behavior Interventionist

zero and that he is identified as a student with a significant reading deficiency.²⁰

15. School Psychologist administered the Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition (WPPSI-IV), but was unable to calculate scores due to Student’s inability to accurately complete sample items on most of the subtests. School Psychologist also assessed his personal and social sufficiency skills utilizing the Adaptive Behavior Assessment System-Third Edition (ABAS-3), which was completed by Special Education Teacher and Mother. The results indicated that the social area was a relative strength for Student, but his overall adaptive behavior was characterized as lower functioning than that of almost all same age peers.²¹

16. SLP evaluated Student’s expressive and receptive communication using the Clinical Evaluation of Language Fundamentals (CELF-5). SLP was unable to complete the subtest necessary to assess his scores in following directions, however, his receptive language subtests all scored in the low to very low range and his expressive language score fell within the very low/severe range. SLP also evaluated Student’s articulation, intelligibility, and voice and fluency skills using the Goldman Fristoe Test of Articulation-3 (GFTA-3), which revealed that Student’s language and articulation skills were below normal limits when compared to his peers.²²

17. OT also observed Student for fine motor, self-care, and visual motor integration skills and assessed him using the School Function Assessment (SFA) with input from one of his classroom aides, Special Education Teacher, and SLP. OT shared that Student demonstrates significant delays in the areas of fine motor coordination, visual motor integration, and self-care skills.²³

18. The District’s reevaluation also included a health screening, in which it was noted that Student’s diagnosis of autism and absence seizures could negatively impact his progress in the general education curriculum. Student also was assessed for assistive technology through observation, document review, and staff interviews. A functional vision assessment was also conducted in which the evaluator noted that Student was unable to identify the names of colors and needed to be verbally prompted to look at something and to focus on the task at hand.²⁴

December 15, 2016 Meeting

19. The team that assembled on December 15, 2016 to discuss the reevaluation and

²⁰ Exhibit C; Interview with Teacher and Special Education Teacher

²¹ Exhibit C; Interviews with Mother, Teacher, Special Education Teacher, and School Psychologist

²² Exhibit C

²³ Exhibit C; Interviews with Special Education Teacher and Teacher

²⁴ Exhibit C

determine eligibility included Mother, Mother's friend, Coordinator, Teacher²⁵, Special Education Teacher, Teacher of the Visually Impaired, School Counselor, OT, SLP, School Psychologist, and Behavior Interventionist. They reviewed the evaluation report and agreed that there had been noticeable improvement in Student's behaviors, communication, academics, focus, and self-regulation needs since the last meeting. The team remained uncertain about Student's cognitive and academic levels due to the lack of assessment data. Mother questioned whether other assessments could be done to get more information and also brought private evaluation reports to help inform the team's discussion of eligibility, but they were not discussed or referenced in the documentation and no new assessments were discussed.²⁶

19. With regard to behavior, Mother again requested a BIP, which was rejected due to results of the FBA. Behavior Interventionist explained that a BIP is for potentially injurious behavior or elopement and that due to the decrease in Student's negative behaviors and his observation that Student's behaviors were similar to all kindergarteners, his opinion was that a BIP was not warranted and instead began creating a "tip sheet" for Student, which he commonly creates instead of a BIP. Behavior Interventionist explained that the tip sheet is a list of reminders that is continually updated and modified by the mental health providers and special education team and is then provided to all School staff who work with Student in order to encourages them to "think functionally." Based on the totality of the credible evidence, SCO concludes that the tip sheet was not shared at the meeting nor was it incorporated into the IEP in any way at this time.²⁷

20. The team moved on to discuss Student's eligibility, at which time Mother insisted that they determine whether Student qualified under the autism spectrum disorder ("ASD") category. Despite the fact that the District representatives on the IEP team did not believe, based on their observations and informal assessment of Student, that he would be eligible under the ASD category, the team completed the "Determination of Eligibility: Autism Spectrum Disorder" checklist ("ASD Checklist") and determined that he did not qualify under that category. Mother disagreed and asked that the meeting be reconvened at a later time so that Advocate could attend. As a result, Student's IEP was not discussed at this time and his eligibility was also not determined at that time.²⁸

February 10, 2017 Meeting

21. The team reconvened on February 10th to continue the eligibility meeting. Advocate attended, in addition to all of the participants in the December 2016 meeting. No new data was shared at the meeting regarding Student's behavior. As a result of Mother's insistence, the

²⁵ SCO notes that Teacher also left this meeting early without appropriate excusal and without advising anyone else on the team.

²⁶ Interviews with Mother, Teacher, Special Education Teacher, and Behavior Interventionist; Exhibits 4 and C

²⁷ Response; Exhibits A and C; Interviews with Mother, Special Education Teacher, Coordinator, and Teacher

²⁸ Response; Exhibits A and C; Interviews with Coordinator, Special Education Teacher, Behavior Interventionist, and Mother

team revisited the ASD Checklist and again determined that Student did not qualify under the ASD category. The team then completed the Developmental Delay checklist and determined Student did qualify for eligibility under that category.²⁹

22. Mother disagreed. The PWN section of the February 2017 IEP indicates that Mother requested additional assessments that were not conducted (cognitive, ADOS, and sensory), that the FBA indicated that a formal BIP was not necessary, but that a tip sheet would be implemented for consistency across all environments. The Parent Input section notes Mother's belief that Student's behaviors related to autism affect his education and that a BIP is necessary to ensure consistency for Student across all settings, including safety. It also notes Mother's concerns that Student's behaviors are impacted by transitions and sensory regulation and that the adaptive assessment did not capture the whole picture. Mother also felt that the private evaluation reports she provided should be included in the body of evidence.³⁰

23. The IEP that resulted from the February 2017 meeting ("February 2017 IEP") placed Student in the general education classroom at least 80% of the time. A review of the IEP reveals slight changes in the Present Levels section from the October 2016 IEP, but included a note that "The team has a plan and have discussed what happens when behaviors occur across all environments so that there is consistency across settings and staff." The Student Needs and Impact of Disability Section also remained essentially the same as it was in the October 2016 IEP.³¹

24. The February 2017 IEP goals also remained essentially the same but adds goals related to communication skills and behavior. It also added to the list of accommodations "visual schedules" and "collaboration between special education and general education for grading and report cards." The service delivery section added 1.5 hours of direct support and .5 hours of indirect support with a counselor, social worker, or psychologist and .15 hours per month of indirect services with an SLP. The IEP notes that Student will be provided with constant adult supervision due to safety and level of academic impact, as well as "Instruction and a consistent plan for pro social behaviors that is consistent across all settings." The IEP again specifies no instructional modifications.³²

Independent Educational Evaluation ("IEE")

25. On February 14th, Mother emailed Director a letter in which she disagreed with the District's reevaluation and its refusal to conduct autism assessments and requested an IEE due to the reevaluation not providing enough information to determine appropriate programming

²⁹ Response; Exhibits A, C, and D; Interview with Mother

³⁰ Exhibits 4 and A; Interviews with Mother, Special Education Teacher, Coordinator, and Behavior Interventionist; SCO notes that the only references to autism are in the parent input and PWN sections of the IEP.

³¹ Exhibit A

³² Ibid.

for Student. Initially, Director denied Mother’s IEE request on the basis that District had not evaluated Student in the area of autism and explained that the District was willing to evaluate for autism, offering to use a District Board Certified Behavioral Analyst (“BCBA”) who was neither affiliated with School nor involved in the District’s previous evaluation. Director informed Mother that once the evaluation was complete, she could then request an IEE. Mother never consented to the District’s evaluation and instead filed this Complaint. On March 10th Director agreed to Mother’s IEE request, which is currently in process.³³

26. Due to the safety concerns, as well as the significant gaps in his academic abilities, focus, attention, and behavior, Student currently receives significant modifications, frequent breaks, a separate desk in the back of the classroom where Student has different fidgets, puzzles, and legos available, and is provided with “bell to bell” coverage by special education aides. Teacher explained that she has minimal contact with Student and that he “does not do any of the work the general population does in kindergarten.” Teacher also explained that Special Education Teacher is tracking his progress because “academics mostly happen during special ed.” Teacher denied knowing anything about the tip sheet, but explained that she is no longer worried about Student being violent because he is being watched by special education aides at all times and that she is not involved.³⁴

CONCLUSIONS OF LAW

Based on the Findings of Facts 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” (or FAPE) 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 (or IEP) that is developed according to the IDEA’s procedures. 20 U.S.C. § 1401(9); 23 C.F.R. § 300.17; ECEA Rule 2.19. The IDEA’s extensive procedural requirements relate to the development of the IEP, including the requirements that it be developed by a team of individuals with knowledge about the child 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 IDEA’s requirements. *See, e.g.,* 34 C.F.R. §§ 300.301-300.304 and 300.320-300.324.

2. In the formative case of *Board of Education v. Rowley*, the United States Supreme Court stressed the importance of compliance with the IDEA’s procedural requirements.

“[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

³³ Exhibit E; Response; Interviews with Mother and Director

³⁴ Interviews with Teacher and Special Education Teacher; Response

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.”

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

3. With the intention of developing an IEP that is tailored to the unique needs of the child, the IDEA places particular emphasis on collaboration among parents and school districts, requiring that parents be afforded the opportunity to participate and that their participation be meaningful, including giving careful consideration to their concerns about their child. 34 C.F.R. §§ 300.321 (a)(1), 300.322, and 300.324(a)(ii). It is well-established 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.I. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11TH Cir. 2014); *Deal v. Hamilton County Bd. Of Educ.*, 392 F.2d 840 (6th 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...”).

4. SCO’s first consideration is of Mother’s allegations regarding the team the District assembled for the October 2016 and December 2016 meetings.

5. The IDEA requires a school district to ensure that an IEP team for a child with a disability includes:

- The parents of the child.
- No less than one general education teacher of the child (if the child is or may be participating in the general education environment).
- No less than one special education teacher of the child or, where appropriate, no less than one special education provider of the child.
- A district representative who: i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; ii) is knowledgeable about the general education curriculum; and iii) is knowledgeable about the availability of district resources.
- An individual who can interpret the instructional implications of evaluation results.
- At the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate.
- Whenever appropriate, the child.³⁵

³⁵ 34 C.F.R. §300.321(a)

The IDEA also have specific requirements for the excusal of team members, providing that a mandatory member of the IEP team is not required to attend an IEP team meeting, in whole or in part, if the parent and the district agree, in writing, that the member's attendance is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.³⁶ Excusal in whole or in part from the IEP team meeting is also possible for a designated IEP team member whose area of the curriculum or related services is being modified or discussed if:

1. The parent, in writing, and the public agency consent to the excusal; and
2. The team member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting.³⁷

6. Here, Mother requested a meeting to discuss Student's negative and aggressive behavior that were increasing at home, causing significant disruption in Teacher's class, and resulting in disciplinary referrals. Because the pressing concern was behavior, she requested that someone from the District who specializes in behavior attend the meeting, however, SCO concludes that District failed to include any such person in the October 2016 meeting. With regard to the remaining mandatory IEP meeting participants, there is no dispute that Student's general education teacher left both the October 14th and December 15th meetings early without the appropriate excusals.³⁸

7. Accordingly, SCO finds that District failed to assemble an appropriate IEP team on October 14th and December 15th, in violation of the procedural requirements of the IDEA.

8. SCO next considers Mother's allegation that she was denied meaningful participation in the development of Student's IEP, specifically, that her input and private evaluation reports she provided to the IEP team related to Student's diagnosis of autism and his behavior, were disregarded by District team members throughout the entire process. She alleges that the result is that the District failed to appropriately evaluate Student and predetermined Student's eligibility under the category of Developmental Delay, which then led to the failure of the IEP team to develop Student's IEP based upon his individual needs. Based on a thorough review of the credible record, SCO agrees.

9. An evaluation under the IDEA has two primary purposes: 1) to determine whether the child has a disability, and because of the disability needs special education and related services, and 2) to assist the IEP team in determining the child's specific needs.³⁹ When evaluating

³⁶ 34 C.F.R. §300.321(e)(1)

³⁷ 34 C.F.R. §300.321(e)(2)

³⁸ SCO also notes that documentation provided by the District also reveals that Coordinator, who was acting as the District's designee, also left the October 14th meeting before its conclusion, a violation of the IDEA and District's own policy which provides that "The AU does not allow for the excusal of the Special Education Director of the AU or designee at any IEP meeting." See Exhibit G.

³⁹ 34 C.F.R. §300.304(b)(1)(i)-(ii); see also 71 Fed. Reg. 46548.

students for eligibility, the school district must:

- Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability;
- Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability;
- Use technically sound instruments that may assess the relative contribution of cognitive behavioral factors, in addition to physical or developmental factors;
- Ensure that assessments and other evaluation materials are selected and administered without racial or cultural bias, are provided in the child's native language, are valid and reliable, and are administered by trained and knowledgeable personnel;
- Select assessments relevant to specific areas of educational need;
- Assess the child in all areas of suspected disability;
- Make an eligibility determination by a group of qualified professionals and the child's parents.⁴⁰

10. SCO concludes in this case that the District conducted a variety of assessments in its reevaluation, but also did not obtain all of the information necessary to appropriately plan for Student's needs. Specifically, the District admitted that Student's cognitive abilities and academic levels were undetermined.⁴¹ Several of the examiners noted Student's inability to stay on task as problematic during their assessments. Despite these red flags and Mother's insistence at the December 2016 and February 2017 meetings, the District never considered further assessments, nor did they include the private evaluations.

11. SCO also finds the FBA deficient. FBAs are rooted in the theory that behavior is functional (meaning it has a purpose), predictable, and changeable. The assessment should provide the team with the following information:

- What the challenging behavior is in observable and measurable terms, and where, when, and with whom the behavior occurs;
- What the antecedents are;
- What consequences reinforce or maintain the behavior;
- What interventions and strategies have been tried previously and their effects; and
- What the setting events are.

⁴⁰ 34 C.F.R. §§300.304-300.306

⁴¹ Notable is the conclusion by some examiners that Student was not testable in certain areas, i.e. cognition, yet, other examiners were able to conduct full assessments in other areas, i.e., language assessments.

District's own policy specifies that all members of the IEP team⁴² are responsible for insuring that the assessment is completed, including parents. Parents are crucial in the evaluation process and, in terms of assessing behavior, parents can provide information to the school team about where, when, and with whom the behaviors occur. A parent may also know which intervention strategies have been tried before (either at home or at school) and which strategies have been effective. Here, Mother was not included in the FBA at all. Rather, the FBA included only Special Education Teacher and Teacher, who admits that she barely has any contact with Student in her class. SCO wonders whether Mother's inclusion in the FBA process would have yielded far different results and, moreover, whether the information would assist Teacher in feeling more confident about her ability to work with Student. Moreover, the results of the FBA led to the decision not to develop a BIP and, as a result, Student's behavioral needs were never addressed in his IEP until February.⁴³

12. The recent *Andrew F.* decision has implications beyond academics for every IEP team, including this team. The failure to appropriately assess the function of Student's behavior and amend IEP goals to address behavior issues results in a denial of FAPE. Indeed, according to the Supreme Court's finding in the recent *Andrew F.* case, school districts must "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas county School District RE-1*, 69 IDELR 174 (2017).

13. SCO next addresses the issues related to Student's autism.

14. Autism is a "spectrum disorder," meaning that it affects each individual person in different ways. Under the IDEA, autism "means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance. Other characteristics often associated with autism are engaging in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term autism does not apply if the child's educational performance is adversely affected primarily because the child has an emotional disturbance. A child who shows the characteristics of autism after age 3 could be diagnosed as having autism if the criteria above are satisfied."⁴⁴

15. In this case, Mother first shared Student's autism diagnosis with the District in 2014 when he transferred into the District from another school district. She also discussed how his autism affects him at every meeting and in every communication relevant to this Complaint. In addition to Mother's input about Student in terms of how his autism affected him, she advocated for the team to include private evaluations she had obtained on her own in his October 2016 IEP and specifically requested that autism assessments be included in the

⁴² See also Exhibit G

⁴³ SCO also notes that District policy provides that if a student has constant adult supervision, as Student does in this case, the team is required to write a goal to address independence. See Exhibit G.

⁴⁴ 34 C.F.R. §300.8(c)(1)(i)

District's eligibility determination. Despite Mother's insistence, District refused to conduct formal autism assessments as result of its own conclusion, based on informal observations by staff members who had no previous experience with Student, that Student's autism was not educationally significant.⁴⁵ District also declined to include or to consider the private evaluation reports Mother provided in the evaluation report and eligibility determination.⁴⁶

16. To be eligible for educational services under the IDEA, a child must have one of the 13 qualifying impairments, and, "by reason thereof, needs special education and related services."⁴⁷ To resolve a state complaint that challenges a school district's eligibility determination, the SCO must first determine whether the school district followed the relevant procedures and standards required for making the determination and if so, whether the resulting determination is consistent with and supported by child-specific facts, i.e., evaluation data and other data in the record.⁴⁸

17. It is clear to SCO that in this case Student's autism was disregarded simply because he did not register to District team members as a "typical" child with autism, however, there is no typical child with autism. Particularly noteworthy is the agreement of everyone on the IEP team, including Mother, that Student is very social. Despite this, the decision not to formally assess Student's autism was based, in part, on Behavior Interventionist's observations, which targeted only his social interactions on the playground and at lunch. Although some people with autism share some similar symptoms, such as problems with social interaction, there are also significant differences, meaning that the overall presentation of autism will vary from child to child. Student's autism diagnosis was barely discernable to SCO in the documentation, but for the notations of Mother's disagreements.

18. This case is virtually indistinguishable from the precedent setting 9th Circuit case in which the court criticized the district's argument that a psychologist's informal observation, during which the child purportedly exhibited no symptoms of autism, validated its decision that it did not need to conduct a formal autism assessment. *Timothy O. and Amy O. v. Paso Robles Unified School District*, 67 IDELR 227 (9th Cir. 2016), *cert. denied*, 117 LRP 15003 (4/17/17). The 9th Circuit court concluded that the district's argument "[is] directly contrary to the provisions of the IDEA . . . which establish that if a school district is on notice that a child may have a particular disorder, it must assess that child for that disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment." The court noted that the lack of formal assessment was a procedural error that resulted in the child going without autism services, a substantive denial of FAPE.

⁴⁵ SCO notes that Special Education Teacher has only worked with Student since the beginning of this school year.

⁴⁶ The IDEA provides that before a school district proposes or refuses to initiate or change the identification, evaluation or educational placement of a child with a disability, the school district must provide the parents with PWN describing and explaining the basis for the school district's action. 34 C.F.R. § 300.503.

⁴⁷ 34 C.F.R. §300.8; ECEA Rule 2.8

⁴⁸ *Questions and Answers on IDEA Part B Dispute Resolution Procedures*, Question B-6 (OSERS 2013).

19. Finally, with regard to the District's eligibility determination. District makes no assertion that any other category was considered except ASD and Developmental Delay and, moreover, that the ASD checklist was completed only upon Mother's insistence. With regard to eligibility determinations under the Developmental Delay category, the ECEA rules require, in relevant part, that "A child shall be determined to be eligible under the Developmental Delay category only in those situations in which a clear determination cannot be made under any other category as measured by developmentally appropriate diagnostic instruments and procedures."⁴⁹

20. Accordingly, SCO concludes that District's procedural violations, including its failure to consider Mother's input and documentation throughout the IEP process, resulted in a denial of FAPE.

REMEDIES

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

1. Failure to develop an IEP according to the procedural requirements and the unique needs of a child with a disability, including:
 - a. Providing parent with an opportunity for meaningful participation (34 C.F.R. §§300.321(a)(1); 300.324);
 - b. Assembling an appropriate IEP team (34 C.F.R. 300.321(e));
 - c. Providing parent with prior written notice a reasonable time before it refuses to conduct an evaluation (34 C.F.R. §300.503);
 - d. Conduct a reevaluation in accordance with requirements of 34 C.F.R. §§300.303; and
 - e. Determine eligibility in accordance with the requirements of 34 C.F.R. §§300.304-300.306, 300.8 and ECEA Rule 2.08(13)(a).

To remedy these violations, the district is ordered to take the following actions:

1. By May 26, 2017, the 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:

⁴⁹ ECEA Rule 2.08(13)(a); *see also* Exhibit G

- a. Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violation, no later than June 30, 2017.
 - b. Effective training must be conducted for all special education case managers, and District coordinators concerning the policies and procedures, to be provided no later than August 11, 2017.
1. 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 August 21, 2017.
 2. Within 7 school days after receiving this Decision, District must conduct an IEP team meeting in order to develop all areas of Student's IEP that complies with all procedural requirements of the IDEA, particularly all of the provisions that the SCO has found the District to have violated. The IEP team meeting must include all professionals who currently provide services to Student and must also include a behavioral specialist. A complete copy of any new IEP developed for Student and prior written notice shall be provided to the Department within five days after the IEP meeting occurs.
 3. Once the IEE is complete, the IEP team will reconvene within two weeks to review and revise Student's IEP, as necessary. The IEP team must also discuss a plan for compensatory services to address any deficiencies that is consistent with its consideration of Student's present levels and needs related to any absence of special education services from December 15, 2016 until the date of this Decision.

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. The parties shall cooperate in determining how the compensatory education services will be provided, with special consideration to Student's needs, stamina, cooperation, and schedule.

A complete copy of any new IEP developed for Student, including a plan for compensatory services, and prior written notice, as well as the IEE reports shall be provided to the Department within five days after the IEP meeting occurs.

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 24th day of April, 2017.

Lisa A. Weiss, Esq.
State Complaints Officer

APPENDIX

Complaint, dated February 12, 2017, pages 1-4

- Exhibit 1: Correspondence
- Exhibit 2: Eligibility Report (12/15/16); Determination of Eligibility (12/15/16); IEP (12/15/16); Teacher Tip Sheet
- Exhibit 3: IEP (10/7/16) with handwritten notes
- Exhibit 4: Private Autism Spectrum Evaluation (1/5/15); Private speech and language evaluation (9/29/16); Private Occupational Therapy evaluation (10/10/16); Private Physical Therapy evaluation (9/27/16); Private physician referral (11/3/16)
- Exhibit 5: Report card (10/19/16)

Reply, pages 1-11

Response, dated March 20, 2017, pages 1-11

- Exhibit A: IEP (10/7/16); IEP (12/15/16); PWN (12/15/16); Determination of Eligibility documents (12/15/16)
- Exhibit B: Teacher Tip Sheet
- Exhibit C: FBA 16-17; Eligibility Report (12/15/16); Exhibit 4 documents provided with Complaint
- Exhibit D: Prior Notice of Special Education Action (9/30/16); Notices of Meetings (9/30/16; 91-96 12/1/16; 1/27/17; 2/8/17); Prior Notice and Consent for Evaluation (10/21/16)
- Exhibit E: Email correspondence
- Exhibit F: List of School and School District Staff members having Knowledge of the Facts of the [Student] Case
- Exhibit G: The Green Book 2016-17 (Special Education Handbook)
- Exhibit H: Documentation from 2013-2015; IEP (3/4/16); Progress Monitoring Report

Documents provide upon SCO request

- Exhibit 6: Communication sheets (provided by Mother)
- Exhibit I: Calendar page; event log; and email correspondence

Interviews with:

- Mother
- Director
- Behavior Interventionist
- Coordinator
- Teacher
- Special Education Teacher
- School Psychologist