

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

State-Level Complaint 2017:533
Jefferson County School District RE-1

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on December 11, 2017, by the parents of a child not yet identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹ On December 14, 2017, the Parties agreed to try and resolve the Complaint through mediation and further agreed to extend the 60-day investigation timeline for that purpose. The State Complaints Officer (SCO) resumed this investigation immediately following notification from the Parties that they were unable to resolve their dispute in mediation.

Based on the written Complaint, the SCO determined that the Complaint identified six allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

SUMMARY OF COMPLAINT ALLEGATIONS

Whether the District violated the IDEA and denied Student a free appropriate public education (FAPE) by:

1. Failing to identify Student as a child with a disability from December of 2016 to present, in violation of 34 CFR § 300.111;
2. Failing to conduct a comprehensive evaluation of Student in the spring of 2017, including the failure to assess in all areas of suspected disability, review existing data, and consider information provided by Parents, in violation of 34 CFR §§ 300.304 and 300.305;

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 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., 34 CFR § 300.000 or ECEA Rule 1.00).

3. Failing to properly determine eligibility in the spring of 2017, in violation of 34 CFR § 300.306, and as a result, failing to develop an individualized education program (IEP) to provide Student a free appropriate public education (FAPE) in the least restrictive environment (LRE);
4. Failing to provide Parents with a meaningful opportunity to participate in the development of Student's educational program by limiting the scope of the evaluation and by not considering parental input during the evaluation process and the May 2017 eligibility meeting;
5. Denying Parents an opportunity to examine records and participate in meetings by not providing notes from Student's HBI teacher, a complete copy of a 2016 evaluation, and information related to an anxiety and depression assessment in the spring of 2017, in violation of 34 CFR §§ 300.501 and 300.613.
6. Failing to timely and appropriately respond to parental request for an independent educational evaluation (IEE) in April of 2017, in violation of 34 CFR § 300.502.

FINDINGS OF FACT

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

Background:

1. Student is a high performing and dedicated learner who is gifted in math and possesses exceptional writing skills.⁴
2. Student receives accommodations, support, and services for disability-related needs through a 504 plan. While there is no dispute that Student has a disability, she has not yet been identified as eligible for special education and related services under IDEA. For this reason, Parents filed this Complaint alleging that the District has failed to identify Student as IDEA eligible beginning in December of 2016.⁵
3. Student is living with a chronic, complex, and evolving medical condition that significantly impacts her stamina and social-emotional health. Student has been medically

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

⁴ Complaint, p. 21; Interviews with Parents, Homebound Instructor (HBI), Assistant Special Education Director, and Special Education Director.

⁵ Complaint, pp. 8-10. Although Parents alleged violations that occurred prior to December of 2016, the SCO does not have jurisdiction to investigate allegations that occurred more than one year prior the filing of the Complaint. See 34 CFR § 300.153 (c) and Colorado's State-level Complaint Procedures.

diagnosed with dysautonomia or Postural Orthostatic Tachycardia Syndrome (POTS), gastroparesis (delayed gastric emptying), and small fiber neuropathy.⁶

4. Dysautonomia, a disorder of the autonomic nervous system, impacts bodily functions that occur automatically, including heart rate, blood pressure, digestion, breathing, and temperature.⁷ Because a key function of the autonomic nervous system is to compensate for upright posture, standing or even sitting can result in inadequate blood flow to the brain.⁸ As a result of this condition, Student experiences dizziness, severe fatigue, malaise, weakness, palpitations, difficulty concentrating, nausea, tremulousness, chest pain, eye pain, problems focusing her eyes, headaches, and shortness of breath.⁹ Symptoms may vary significantly from day to day, or within the same day, and can be triggered by normal daily living activities, such as carrying on a conversation, walking, or driving.¹⁰ Similarly, environmental conditions, such as crowded places, bright lights, and noise, may trigger symptoms.¹¹

5. Student has twice been evaluated for IDEA eligibility, first in the summer of 2016, and again in the spring of 2017.¹² Both times, Student was determined ineligible for special education and related services because the eligibility team concluded that she could receive reasonable educational benefit from general education alone.¹³ Because the SCO does not have authority to investigate alleged violations of IDEA that occurred more than one year prior to the filing of the Complaint, the 2016 IDEA evaluation and eligibility determination are beyond the scope of this investigation. Similarly, the SCO does not have authority to investigate concerns with Student's 504 plan. Findings related to the 2016 IDEA evaluation and services provided through Student's 504 plan are provided as context relevant to the allegations concerning Child Find, the comprehensiveness of the 2017 IDEA evaluation, and the District's responsiveness to Student's disability-related needs.

6. The 2016 IDEA evaluation assessed Student in the areas of general intelligence, communication, academic performance, social-emotional functioning, health, and motor functioning. Formal assessments included the Wechsler Intelligence Scale for Children (WISC-V), the Adaptive Behavior Assessment System (ABAS-3), the Behavior Rating Inventory of Executive Functioning (BRIEF), the Clinical Evaluation of Language Fundamentals (CELF), the Kaufman Test of Educational Achievement (KTEA-3), the Behavior Assessment System for Children (BASC-3), the Roll Evaluation Activities of Life (REAL), and Sensory Profile. The assessment also included a review of health information, informal motor assessment/observation, parent interviews, and input from Student's former home bound instructor (HBI).

⁶ Exhibit 1A, pp. 11 and 45; Exhibit 4B, p.2; Exhibit 9B, pp. 3 and 8; Exhibit 11 at page 3; and Exhibit 18.

⁷ Exhibit 18 at page 6 (November 2016 letter from Physician treating Student for dysautonomia).

⁸ *Id.*

⁹ *Id.*; Exhibit 18 at page 9 (December 2016 letter from Pediatric Cardiologist).

¹⁰ *Id.*

¹¹ *Id.*

¹² Exhibit D, pp. 1-21 and 30-36.

¹³ Exhibit D, pp. 22-25; Exhibit E, pp. 1-6.

7. While recognizing that Student's health impacted her stamina, processing speed, and social-emotional well-being, the 2016 eligibility team concluded that Student was not IDEA eligible because she was performing at or above grade-level and could receive reasonable educational benefit from general education alone.¹⁴

8. Student returned to school in the fall of 2016 with a modified schedule but soon began to miss class due to challenges arising from her medical condition.¹⁵ On December 1, 2016, Parent contacted members of Student's 504 team to provide new medical information and to request that Student's placement be changed to homebound instruction. Student's 504 team met on December 17, 2016, to review the new medical information and discuss concerns about absences and a decline in academic performance. During this meeting, Parents reported that Student was experiencing insomnia, anxiety, and depression, conditions that were making it increasingly difficult for Student to attend school and complete coursework. In addition, Parents reported that Student had been noncompliant with her doctor's recommendations for exercise and medication and was seeing a counselor to support her emotional health, though Student had so far been resistant to counseling.¹⁶

9. In response to Parents' concerns and updated medical information, the District adjusted Student's 504 plan to provide an online education program for math and science and two hours each week of homebound instruction in language arts and history and additional support in learning and managing coursework. Although Student's placement had changed to homebound instruction, the plan afforded her the ability to attend school on any day that she felt able to do so. In addition, the District agreed to assess Student's social-emotional functioning to address Parents' concerns about anxiety and depression, and it offered weekly check-ins with a mental health provider or gifted and talented (GT) counselor for emotional support. The District also agreed to assess Student's need for assistive technology (AT) due to declining vision.¹⁷

10. On January 5, 2017, former School Psychologist conducted two affective inventories, the Revised Children's Manifest Anxiety Scale-Second Edition (RCMAS-2) and the Children's Depression Inventory-Second Edition (CDI-2), to assess concerns with anxiety and depression.¹⁸ Results of this assessment indicated clinically significant concerns in the areas of defensiveness, anxiety, emotional problems, and negative mood. Based on these results, School Psychologist concluded that "[Student] was experiencing elevated levels of emotional stress, related to both

¹⁴ Exhibit D, pp. 1-24.

¹⁵ Complaint, pp 7-8; Interviews with Parents and Special Education Director.

¹⁶ Exhibit I, pp. 7-13.

¹⁷ *Id.*; Exhibit I, pp. 7-13.

¹⁸ Exhibit D, p. 26.

anxiety and depression factors.”¹⁹ Parents did not receive a copy of the emotional assessment until February 17, 2017.²⁰

11. On March 14, 2017, Student’s 504 Team met to discuss Student’s difficulty sleeping and newly obtained medical information, including a potential medical treatment that, if approved, would impact Student’s ability to attend school. During this meeting, Student’s mental health and social-emotional functioning were briefly discussed. As a result of this discussion and the affective inventories, the 504 Team agreed to provide 30 minutes of counseling each week to “manage anxiety regarding her education” and that HBI would provide the weekly social emotional lessons that were offered at Middle School as a first step in addressing Student’s social needs.²¹ Parents reported that one counseling session was provided toward the end of the school year. Parent inquired about the social emotional learning lessons in early April and received one lesson in the mail.

Parental Request and Consent for 2017 IDEA Evaluation

12. On March 2, 2017, Parent requested that Student again be evaluated for special education and related services.²² In her six-page referral request, Parent expressed concerns in the areas of cognitive functioning, behavior, social-emotional functioning, sensitivity, vision, and physical health, including insomnia, fatigue, chronic pain, and dizziness.²³ In addition, Parent was specifically concerned with disability-related needs associated with an acquired brain injury (ABI).²⁴

13. In the area of behavior and social-emotional functioning, Parent referenced the results of the affective inventories administered by School Psychologist in January of 2017 and expressed general concerns with social avoidance and withdrawal, defiance, anxiety, and depression. Parent attributed the anxiety and depression to the ongoing pain and fatigue Student experienced as a result of her medical condition.²⁵

14. On March 6, 2017, the District requested consent to evaluate Student for special education and related services in the areas of academic performance and health. The consent form further explained that “academic data is needed to evaluate [Student’s] present levels of

¹⁹ Exhibit D, p. 27. During interviews, Special Education Director, herself a licensed school psychologist, and current School Psychologist questioned former School Psychologist’s conclusion that Student was experiencing clinically significant concerns in the areas of depression and anxiety based on their interpretation of the results. Although the SCO requested an interview with former School Psychologist, the request could not be granted because he has since retired from the District. Similarly, the SCO was not able to interview Mental Health Counselor because she has also retired.

²⁰ Exhibit K, pp. 60-62; Exhibit I, p. 18.

²¹ Exhibit K, pp. 172-73; Exhibit 36D@27:41-37:00.

²² Exhibit K, pp. 70-71.

²³ Exhibit K, pp. 79-84.

²⁴ Exhibit K, pp. 72-78.

²⁵ Exhibit K at page 81.

performance and the educational impact of her disability” and “health information is needed to evaluate an acquired brain injury.”²⁶

15. On March 8, 2017, Parent signed consent and provided additional medical documentation. At this time, Parent did not raise concerns about the scope of the evaluation or identify additional areas of assessment, such as social-emotional or physical education. The District forwarded the additional information provided by Parent to Nurse, the individual conducting the evaluation of Student’s health needs.²⁷

16. On March 29, 2017, Parent requested additional information regarding the assessment for ABI. Specifically, Parent inquired if the District had a team trained in assessing the educational impact of ABI, and if so, what their procedures and recommendations for an evaluation in this area would include. Parent also stated her intent to seek an independent educational evaluation (IEE) if the District did not have a specialized team.²⁸ Notably, the District has not been provided with documentation that Student has ever been medically diagnosed with an ABI.²⁹

17. In response to Parent’s request for additional information about the evaluation, Special Education Coordinator informed Parent that Assistant Special Education Director and Nurse together had the qualifications and current licensure required to conduct the evaluation and would also be able to consult with Special Education Director. Further, Special Education Coordinator stated that Student’s disabilities were well documented and that the purpose of this evaluation was to determine if Student’s disabilities had an “educational impact preventing her from receiving reasonable educational benefit from general education alone.”³⁰ The SCO finds that Assistant Special Education Director and Nurse were qualified to assess educational and functional impact for a suspected ABI.

18. Notably, Parent did not raise a specific concern or ask if Student was being evaluated for social-emotional functioning during the series of correspondence related to the evaluation. Acknowledging that Parents’ request for evaluation was quite detailed and mentioned the need for counseling, Nurse specifically asked if Student was currently receiving counseling or physical therapy. In response, Parent indicated that Student was not currently receiving counseling and

²⁶ Exhibit 22, p. 2.

²⁷ Exhibit K, pp. 78-107. Parent provided the signed consent via email on March 7 after close of business. Consequently, signed consent was not received until March 8, 2017.

²⁸ Exhibit K, p. 118.

²⁹ Review of medical records provided with Complaint and Interviews with Parents, Special Education Director, and Nurse. Based on her interpretation of a Children’s National Medical Center presentation and various medical journal articles, Parent asserts that dysautonomia is an ABI. The SCO does not have the medical expertise to evaluate this assertion and must rely on the medical documentation provided. Notably, Parent has unsuccessfully sought a medical diagnosis of ABI from two physicians, including Student’s treating autoimmunology and dysautonomia specialist and a specialist from Private Clinic.

³⁰ Exhibit K, p. 117.

that Student's most pressing need was to exercise and gain physical strength.³¹ In addition, Parent indicated that Student needed physical therapy to gain the strength she would need to undergo intense medical treatment, if approved. Nothing in Parent's response reasonably indicated that the District should evaluate Student's social-emotional functioning as a suspected area of disability. Rather, it was reasonable for the evaluation team to conclude that Student's anxiety and depression were related to her medical condition, and that it was Student's physical symptoms, not social anxiety or depression, impeding her motivation to attend school. Based on the signed consent form and communication between Parent and members of the evaluation team, the SCO finds that Student was being appropriately evaluated for eligibility under the category of other health impairment (OHI) based on her medical condition.

2017 IDEA Evaluation

19. To assess Student's academic performance, Assistant Special Education Director conducted a formal assessment, reviewed academic records and previous evaluations, including the 2016 IDEA evaluation, and collected input from HBI.³² Assistant Special Education Director reported that her review and knowledge of the 2016 evaluation data informed her approach to the 2017 evaluation, as she had conducted previous assessments and was part of the 2016 eligibility team.³³

20. The Kaufman Test of Educational Achievement (KTEA) was conducted to formally assess Student's reading, writing, and math skills. The KTEA is specifically designed to identify patterns that may indicate a specific learning disability, and it may also be used to assess processing speed.³⁴ Shortly after the assessment began, Student reported that "her eyes hurt and related this to neuropathy that impacts her physical comfort and stamina." Despite the reported discomfort, Assistant Special Education Director observed that Student "worked deliberately and thoughtfully on all tasks and demonstrated strong persistence when she found task demands challenging."³⁵ As an accommodation, Assistant Special Education Director scribed portions of the writing assessment.³⁶

21. When compared with the results of the KTEA performed in 2016, Student demonstrated decreased scores in all areas.³⁷ Although the results of this assessment predict that Student will

³¹ Exhibit K, pp. 165-66.

³² Exhibit D, pp. 30-36; Interview with Assistant Special Education Director. Notably, Assistant Special Education Director has over 41 years of experience in special education that includes delivering specialized instruction, conducting assessments, serving as a special education director, teaching higher education courses in assessment and special education law, and serving in a leadership role at a state education agency.

³³ Interview with Assistant Special Education Director.

³⁴ Interview with Assistant Special Education Director.

³⁵ Exhibit D at page 30; Interview with Assistant Special Education Director.

³⁶ Interview with Assistant Special Education Director.

³⁷ Compare Exhibit D, pp. 9-11 with pp. 30-36. The 2017 evaluation report also documented the differences in standard scores between the 2016 and 2017 KTEA.

be able to perform at or above grade-level in reading, writing, and math, the subtests indicated below-average performance in some discrete areas, including reading words in isolation, silent reading fluency, spelling, and math fluency.³⁸ For example, the results indicated a significant difference in Student's ability to read words in isolation and in passages. As a result, Assistant Special Education Director concluded that Student may benefit from access to vocabulary definitions and will need additional time to reference text "to provide correct responses to questions regarding material she reads."³⁹

22. Summarizing Student's performance on the KTEA overall, Assistant Special Education Director concluded that "it can be expected that [Student] will be a strong student" who may need extra time to complete assignments because her processing speed may be "a little slower than her strong skill may suggest."⁴⁰ Based on a review of Student's records, including the recent and comprehensive 2016 IDEA evaluation and the affective inventories conducted in January of 2017, the results of the KTEA, and input from HBI, Assistant Special Education Director determined that no additional information was necessary to determine eligibility.

23. Consistent with the results of the formal assessment, Student's HBI reported that he instructs Student using above grade-level material and "has at no time needed to modify the content or adapt the level of [Student's] assignments."⁴¹ Moreover, HBI reported that Student is "rarely in need of help with new learning as she is generally able to incorporate new information independently."⁴² Although Student has questioned the purpose or validity of some assignments or test questions, she generally handles corrections positively and is not missing any assignments.⁴³ Finally, HBI reported that Student has an opportunity to interact with other students in the online program and that Parents had informed him that Student has started to create a peer group through this platform.⁴⁴

24. When interviewed by the SCO about how her physical health impacts her education, Student reported that she struggles most with memory and getting the ideas that are in her head down on paper. To address this challenge, Student keeps a detailed notebook to help her remember things she has learned and is able to use her notes when taking tests. Student also reported that she does not typically talk with HBI about how she is feeling or what she needs, preferring to focus on her school work instead.⁴⁵

25. To evaluate Student's health, District Registered Nurse reviewed Student's school health records, including a Student Health Review completed by Parent, conducted an interview with Parent and Student in April of 2017, and reviewed correspondence and reports from Student's

³⁸ Exhibit D, p. 30.

³⁹ Exhibit D, p. 31.

⁴⁰ Exhibit D, p. 32.

⁴¹ Exhibit D, p. 32; Interview with HBI and Special Education Teacher.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Exhibit D, p. 33.

⁴⁵ Interviews with Student and Parents.

health care providers that were submitted by Parents.⁴⁶ Nurse also conducted the health assessment for Student's 2016 IDEA evaluation. The evaluation report describes, in detail, Student's complex medical history, and it provides credible evidence that the evaluation included a review of medical information and input provided by Parents. The health evaluation was summarized as follows:

[Student] is a student with a complicated medical history and range of symptoms that impact her physical and emotional well-being. The symptoms related to POTS,⁴⁷ Dysautonomia, Gastroparesis and Autoimmune Autonomic Neuropathy have had a significant impact on Student's focus, mood, energy, self-confidence, and stamina. [Student] experiences pain, fatigue, insomnia, gastrointestinal issues, headaches, dizziness and other symptoms. She experiences school anxiety and depression and has limited contact with peers. At this time, [Student] rarely leaves her home except for health related appointments.⁴⁸

May 2017 Eligibility Meeting

26. On May 3, 2017, the District convened a multidisciplinary team, including Parents, to review the evaluation report and determine if Student was IDEA eligible. Parents actively participated in the meeting by providing input, asking questions, and expressing disagreement. Parents' Attorney also attended and actively participated in the meeting.

27. After reviewing the evaluation results and gathering input from participants, including Parents, the Eligibility Team concluded that the evaluation was sufficiently comprehensive to identify Student's needs, and determined that Student was not eligible under IDEA because she could receive reasonable educational benefit from general education alone.

28. At this time, Parents expressed their disagreement that the evaluation was sufficiently comprehensive. Specifically, Parents noted that the evaluation did not include assessment in the areas of physical therapy.⁴⁹ In response, Special Education Coordinator stated that the District did not have consent to evaluate in this area.⁵⁰ Parents also found the evaluation insufficient because it did not include ongoing evaluation of Student's ABI symptoms, consistent with a sample form provided in CDE's Brain Injury Manual for Educators.⁵¹ Parents did not raise concerns about assessment for social-emotional functioning during the meeting.

⁴⁶ Exhibit D, pp. 33-36; Interview with Parents and District Registered Nurse.

⁴⁷ POTS stands for Postural Orthostatic Tachycardia Syndrome.

⁴⁸ Exhibit D, p. 7.

⁴⁹ Exhibit E, p. 5.

⁵⁰ Exhibit 36B @ 47:30 (audio recording).

⁵¹ Brain Injury in Children and Youth: A Manual for Educators is available at http://www.cde.state.co.us/cdesped/tbi_manual_braininjury. This form is a sample resource that educators may use as part of a body of evidence when evaluating educational impact.

Instead, Parents concerns about the sufficiency of the evaluation focused on physical therapy, physical education, and ABI.⁵²

29. Parents also did not agree that Student could receive educational benefit from general education alone. To support this claim, Parents asserted that Student was already receiving specialized instruction. Essentially Parents equated homebound instruction with specially designed instruction because the instruction was delivered in the home and not in the general education classroom. Parents appear to base their assertion that homebound instruction is per se specialized instruction on the following factors: 1) lessons are recorded and access to the curriculum is available at any time, allowing Student to work ahead, 2) flexible scheduling is available, allowing Student to attend to physical needs and medical appointments, 3) teachers and learning coaches are available at non-traditional times, accommodating challenges related to Student's insomnia, and 4) delivery of instruction is interactive and pairs auditory and visual modes of instruction, accommodating Student's "dominant learning style."⁵³

30. Members of the Eligibility Team disagreed with this assertion, clarifying that homebound instruction was an educational setting, not specialized instruction. Based on the facts below, the SCO agrees and finds that Student was not receiving specialized instruction in the homebound setting. During interviews, Special Education Director, Assistant Special Education Director, and Special Education Coordinator described specialized instruction as including the following characteristics: modified curriculum/content; significant changes to the delivery of instruction, including amount, frequency, and duration; provision of instruction that is specifically tailored to address disability-related skill deficits; provision of specialized instruction designed to meet specific goals identified on the IEP; provision of evidence-based methodologies to address disability-related skill deficits; and instruction that is delivered by an educator with specialized training, i.e., a special education teacher.

31. Further illustrating the difference between an accommodation and specialized instruction, Assistant Special Education Director explained that a student needing specialized instruction in letter and word recognition (reading words in isolation) may require diacritical spelling, definition paired with visuals, and specialized instruction on what to do when the word is encountered in text and how to apply the definition. By contrast, a vocabulary list is an accommodation that would sufficiently address Student's deficits in this area because she is able to determine when she doesn't know a word, read the definition, and apply it to what she is reading without any further instruction.⁵⁴

32. After the Eligibility Team determined that Student was not eligible, Parents submitted a fifteen page document labeled "Parent Agenda/Input."⁵⁵ Although the eligibility team did not review the entire document at the meeting, Parent summarized it and expressed her concern

⁵² Exhibit 36B.

⁵³ Exhibit 25 at page 13.

⁵⁴ Interview with Assistant Special Education Director.

⁵⁵ Exhibit 25; Exhibit 36B @ 1:05.

that the District did not respond to her request for information on whether it had a specialized brain injury team and had failed to evaluate Student in the area of executive functioning, specifically memory and processing speed, as well as physical therapy and specialized instruction in physical education (PE). Further, Parent expressed concern that the evaluation did not include sufficient data concerning the educational impact of Student's ABI through the use of the brain injury evaluation form, particularly before and after a session with HBI.⁵⁶

33. In response to this input, the Eligibility Team discussed Student's processing speed and whether she could benefit from general education alone. After this discussion, the Eligibility Team reaffirmed its determination that Student was not IDEA eligible. Prior written notice summarized the Team's rationale as follows:

The team discussed the areas for evaluation the team had consent to assess and agreed the evaluation was sufficiently comprehensive to identify [Student's] needs . . . Based on [Student's] present levels of educational performance, she can receive reasonable benefit from general education alone through in-home and online instruction.⁵⁷

Evaluations and Services Provided after the 2017 IDEA Eligibility Meeting:

34. On May 25, 2017, a District physical therapist and an adaptive PE consultant evaluated Student in the area of gross motor function, performing five different assessments. Based on the evaluation results, the evaluators discussed detailed strategies intended to help Student move and exercise more, lose weight, and manage her symptoms, including specific exercise regimen, keeping a journal of the exercises and changes in symptoms, and setting goals in small increments. In addition, they provided a "scaled-down" version of the Levine Exercise Protocol, a program previously used by Student and recommended by one of her medical providers. The evaluators did not recommend participation in adaptive PE or physical therapy.⁵⁸ Parents were provided with the evaluation results prior to the start of the 2017-18 school year.⁵⁹

35. On August 10, 2017, Parents notified the District that Student would be participating in a medical evaluation followed by a pain rehabilitation program at Private Clinic. Pursuant to Parent's request, the District agreed to provide access to Honors English through the online learning platform while Student was receiving medical treatment at Private Clinic. Private Clinic provided curriculum for managing chronic pain, health and wellbeing, healthy relationships, and achieving SMART goals.⁶⁰ Any academic curriculum was provided by the District during this

⁵⁶ Exhibit 36 @ 1:04-11:00.

⁵⁷ Exhibit B.

⁵⁸ Exhibit D, pp. 37-40.

⁵⁹ Exhibit K, pp. 262-63.

⁶⁰ Reply, pp. 61-62; Interview with Parents.

time. On October 2, 2017, Parent informed the District that Student had been discharged prematurely from the rehabilitation program.⁶¹

36. On October 25 and November 15, 2017, Student's 504 team met to update her 504 plan. The team added mental health services with a counselor to address school-based anxiety and social-emotional well-being, with the first 6-8 sessions to be provided in the home, followed by the option to deliver services in a digital format. Student also took Algebra and English through an online platform and began a lifetime health and fitness course.⁶² Student earned an A in each course. Parents assert that Student's grades are inflated because HBI helps her on quizzes and Student is able to use her notes when taking tests. Despite the concern with grade inflation, Student showed growth in reading and math on her fall and winter 2017 MAP, scoring in the 92nd percentile among peers.⁶³

37. In November of 2017, Parents obtained an IEE at public expense. The results of the IEE were not discussed at this meeting because the report was not provided to the District until November 27, 2018. The District did not convene the Eligibility Team to review the IEE and revisit eligibility in light of any additional information. Consequently, Parents filed this Complaint on December 11, 2017. Due to the number of IDEA evaluations and IEEs described in this Complaint, the substance of the November 2017 IEE is discussed in Finding of Fact (FF) 42-45 and the District's response to Parents' request for IEEs are discussed under the heading of IEE Requests, beginning with FF # 46.

38. On January 9, 2018, nearly a month after filing this Complaint, Parent requested another IDEA evaluation. The District agreed to conduct the evaluation and proceeded to identify areas of concern, negotiating the scope of the evaluation with Parents. Based on agreement, the 2018 evaluation would address concerns in the areas of communication, academic performance, health, motor skills, and social-emotional functioning.⁶⁴ The District received signed written consent on January 23, 2018. Consequently, the evaluation must be completed by March 23, 2018.⁶⁵

39. On January 25, 2018, Student's 504 team met to review the independent educational evaluation (IEE) conducted by Private Evaluator, a Developmental Neuropsychologist, in November of 2017.⁶⁶ Private Evaluator administered the WISC-V (alternate subtests), Rey-Osterrieth Figure Drawing, Wisconsin Card Sorting Test, Wide Range Achievement of Memory and Learning, Woodcock-Johnson IV Tests of Achievement (select subtests), WIAT (select

⁶¹ Exhibit K, p. 301.

⁶² Response at page 14.

⁶³ Exhibit H, pp. 4 and 24. Interview with Parents and HBI.

⁶⁴ Exhibit A at page 7.

⁶⁵ Response at page 17,

⁶⁶ Exhibit I at p. 33.

subtest), McCarney Home Rating Scale, Child Behavior Checklist, Sensory-Motor Checklist, and conducted a clinical interview.⁶⁷

40. In summary, the IEE noted concerns in executive functioning and memory, and processing speed was observed as “extremely slow.” In the area of social-emotional functioning, Private Evaluator reported that anxiety was a significant factor increased by illness, pain, fatigue, mental foginess, sensory issues, and prolonged isolation, resulting in school and social phobias. In addition, Private Evaluator noted rigidity concerning peer interactions and coping with fears.⁶⁸

41. While not opining whether Student would be best served through a 504 plan or IEP, Private Evaluator recommended that Student be provided with modified instruction in PE to support stamina, access to counseling to support “social re-entry,” an advanced academic curriculum, and a re-entry plan and support team that “can do some active problem solving with her around social needs, stamina, sensory overload and anxiety—all of which limited her ability to get back to school.”⁶⁹ To specifically support re-entry, Private Evaluator recommended the following:

- Homebound physical therapy to build strength and stamina necessary to attend school in a traditional setting;
- Occupational therapy to refine skills, assignments and tests, to support physical stamina and slower processing;
- Accommodations to support slower processing speed and “mental foginess” that included:
 - i) Shorter tests and assignments;
 - ii) Testing in the morning to avoid fatigue;
 - iii) Extended time;
 - iv) More frequent and shorter HBI sessions, i.e., three visits for one hour each week; and
 - v) Increasing courses from two to four.⁷⁰

42. Based on the results of this evaluation, the team amended the 504 plan to increase the number of courses Student would take, increased HBI from two to six hours per week, and specified that mental health counseling would begin with a 90-minute session to build rapport and continue with one or two 60-minute sessions each month.⁷¹ With the exception of PT and

⁶⁷ Exhibit F, pp. 194-204. Select subtests were performed because Student reported she had recently completed the assessment.

⁶⁸ Exhibit F, pp. 194-204.

⁶⁹ Exhibit F at page 202.

⁷⁰ Exhibit F, pp. 203-204.

⁷¹ Exhibit I, pp. 38-39.

OT, Student is receiving services and accommodations through her current 504 plan consistent with the recommendations in the IEE.

IEE Requests from April 2017 to Present

43. On April 5, 2017, Parent contacted Special Education Director to request “instructions for obtaining an Independent Educational Evaluation of [Student] in the areas of Neurodevelopmental Disability to be included as part of [Student’s] reevaluation.”⁷² On April 7, 2017, Special Education Director responded by sending Parent the District’s criteria, fee schedule, and the procedures for requesting an IEE.⁷³

44. Upon receiving a request for an IEE at public expense, the District’s policy provides that it will, without unnecessary delay, make a determination whether to fund the IEE or request a due process hearing to show that its evaluation is appropriate. If the District agrees to fund an IEE, it will provide a letter as evidence of its commitment to fund the IEE. The IEE and the examiner “must meet or exceed the specifications outlined in [District’s] criteria and work within the District’s IEE Fee Schedule,” unless the parent has “demonstrated unique or extenuating circumstances.” Finally, the District’s procedure provides that parents/guardians are responsible for arranging the time and location of the evaluation.⁷⁴

45. On April 11, 2017, Parent submitted a detailed request for an IEE to Special Education Director. In the IEE request, Parents stated that they disagreed with the June 2016 IDEA evaluation because it was not sufficiently comprehensive to evaluate Student in all suspected areas of disability, including the “impact of dysautonomia as an acquired brain injury” and the “physical and emotional stamina to endure in a general education setting.”⁷⁵

46. On April 17, 2017, Parent identified Private Evaluator as the professional she preferred to conduct the IEE.⁷⁶ With Parent’s signed consent, Special Education Director contacted Private Evaluator to determine if she would be able to meet the requirements of an IEE and what the fee would be.⁷⁷ Private Evaluator’s office informed Special Education Director that she would know more about the proposed evaluation by May 30, 2017, the date of Student’s next appointment, and would contact Special Education Director with the requested information at that time.⁷⁸ On May 3, 2017, Special Education Director updated Parent on what she had learned from Private Evaluator, and Parent did not express disagreement or concern with the status of the IEE.⁷⁹ Private Evaluator did not contact Special Education Director

⁷² Exhibit K, p. 124.

⁷³ Exhibit K, p. 137.

⁷⁴ Exhibit N, pp. 14-15.

⁷⁵ Exhibit K, p. 139.

⁷⁶ Exhibit K, p. 150.

⁷⁷ Exhibit 33, p. 2; Interviews with Special Education Director and Parents.

⁷⁸ *Id.*

⁷⁹ Exhibit 36E @16:

following the May 30 appointment, and Parents did not submit additional paperwork concerning an IEE based on the 2016 IDEA evaluation.

47. On October 16, 2017, Parent sent a second request for an IEE based on disagreement with the 2017 IDEA evaluation.⁸⁰ On October 23, 2017, Parent identified a specific evaluator and provided an estimated cost for the proposed evaluation.⁸¹

48. On October 27, 2017, Special Education Director sent Parent a letter responding to Parent's concerns, updating her on the status of the two IEE requests.⁸² Concerning the IEE based on the 2016 evaluation, Special Education Director informed Parent that she had contacted the preferred evaluator in May of 2017 and did not receive the requested information concerning requirements and fees as expected. Parent was further informed that the District remained willing to fund the requested IEE by the initial preferred evaluator or another evaluator who met the criteria and fee schedule. Concerning the IEE based on the 2017 IDEA evaluation, the District agreed to fully fund this evaluation by the Private Evaluator identified by Parent even though her fee exceeded the rates specified in the District's fee schedule. The letter dated October 27, 2017 is the only letter Parents received as evidence to document the District's commitment to fund the IEEs for both the 2016 and 2017 evaluations.

49. On November 9, 2017, Private Evaluator, a Developmental Neuropsychologist, assessed Student in accordance with Parent's request for an IEE based on disagreement with the 2017 evaluation. The District funded this IEE and received the written report on November 27, 2017. As discussed in FF # 39 above, Student's 504 team met on January 25, 2018, to review the IEE and amended services in Student's 504 plan based on the recommendations provided.

50. In January of 2018, Parents obtained a private evaluation in the area of social-emotional functioning. Parents have requested, and the District has agreed, that this evaluation be treated as the IEE at public expense based on the 2016 IDEA evaluation. Further, the District has agreed to reimburse Parents \$500 for the cost of the evaluation.⁸³ Consequently, the SCO considers this issue remedied.

Records Request

51. On February 16, 2017, Parents requested Student's educational records.⁸⁴ Specifically, Parents requested the following information: all assessment reports conducted as part of Student's 504 and IDEA evaluations in May and June of 2016; HBI notes provided to the 504 and IDEA evaluation teams; attendance records for District's Online Academy; weekly grade

⁸⁰ Exhibit K, pp. 313-23.

⁸¹ Exhibit K, pp. 330-31.

⁸² Exhibit 33.

⁸³ The District confirmed that it has submitted the request for a check, and that Parents should receive the check via U.S. Mail on or around April 3, 2018. Written correspondence with District Legal Counsel and Special Education Director.

⁸⁴ Exhibit 29A, pp. 3 and 5. http://www.cde.state.co.us/cdesped/tbi_manual_braininjury

reports from the District's Online Academy; Online Academy orientation results for math; 2016 Online Academy math placement test results; Student's GT file; and copies of all 504 plans from the fall of 2015 to present.⁸⁵

52. On March 28, 2017, the District provided Student's education records, approximately 40 calendar days following the request and over a month prior to Student's eligibility meeting.⁸⁶ According to Parents, the records provided did not include all of the notes that Parents believed HBI had kept on Student's performance or the evaluations conducted as part of Student's 2016 IDEA evaluation. Parents were interested in the lesson notes kept by former HBI because they believed she had a more accurate understanding of how Student's disability impacted her ability to attend to instruction than current HBI. Thus, they wanted her input to be considered by the May 2017 eligibility team. Because the District provided copies of former HBI's notes to the extent that they existed, it did not fail to provide the requested records.

53. Parents also assert that the District did not provide copies of the actual assessments, i.e., protocols and score sheets, conducted by the District as part of the 2016 evaluation. According to the District, it provided the 2016 evaluation report and did not understand that Parents were seeking the actual assessment data. Because the District is prohibited from releasing the test protocols and score sheets, it does not provide copies of these documents. According to Special Education Coordinator, Parents may contact the District and ask to review the assessments in-person.⁸⁷

54. Finally, Parents assert that they did not timely receive the results of the affective inventories conducted by School Psychologist in January of 2017. Although the results were not provided to Parents in a timely fashion, the results were made available prior to Student's eligibility meeting and were reviewed by the evaluation team as part of the 2017 IDEA evaluation. Consequently, Parents right to participate in the evaluation and eligibility meeting were not impeded as a result of the delay.

CONCLUSIONS OF LAW

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

Conclusion to Allegation One: The District did not violate Child Find by failing to initiate a special education evaluation prior to Parents' request when it did not have reason to suspect that Student may be in need of specialized instruction as a result of her disability.

A public agency must develop and implement procedures for locating, identifying, and evaluating all children who may have a disability and are eligible for special education and related services, even though such children are advancing from grade to grade. 20 U.S.C.

⁸⁵ Exhibit 29A, p. 5.

⁸⁶ Exhibit 29A, p. 2.

⁸⁷ Interviews with Parents, Special Education Director and Special Education Coordinator.

1412(a)(3); ECEA Rule 4.02(1)(a). This affirmative obligation, commonly referred to as “Child Find,” is triggered when a district has reason to suspect that special education services may be needed. In this case, there is no dispute that the District was aware that Student has a disability. Indeed, Student’s disability related needs were already being addressed through a 504 plan in December of 2016. Instead, the question is whether Student may be in need of specialized instruction and related services as a result of her disability. For the reasons explained below, the SCO concludes that the District had no reason to suspect that Student was in need of specialized instruction, and consequently, had no duty to initiate a special education evaluation.

Parents assert that the District should have known Student was in need of specialized instruction in December of 2016, and prior to their request for an IDEA evaluation in the spring of 2017, because Student was already receiving such instruction in the homebound education setting. Essentially, Parents argue that homebound instruction is specialized instruction, as a matter of law, because it occurs in the home. The SCO is not persuaded by this argument, finding no support in IDEA for the assertion that homebound instruction is per se specially designed instruction.

Special education means specially designed instruction to “meet the unique needs of a child with a disability” and includes “instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.” 34 CFR § 300.39(a)(1). Specially designed instruction is further defined to mean adaptations to the content, methodology, or delivery of instruction to address the unique needs of the student that result from the disability and ensure access to the general education curriculum that will allow the student to meet the educational standards set by the school district for all students. 34 CFR § 300.39(a)(3). By definition, instruction in the home is identified as one of the settings across the continuum of placements in which specially designed instruction may occur. For the instruction itself to be considered specially designed, there must be more to it than the fact that it is occurring in a homebound setting.

Concluding that homebound instruction is not, as a matter of law, specialized instruction, the SCO now considers whether Student was receiving specially designed instruction from HBI under the specific facts of this case. Consistent with the regulatory definition, members of the District’s special education team illustrated essential features of specially designed instruction, including: modification of content; changes to the amount, frequency and duration of instruction; and instruction delivered by a special education teacher. Furthermore, specially designed instruction is tailored to address the unique, disability-related skill deficits and includes the provision of methodologies designed to do the same. In this case, Student was provided with accommodations that allowed her to access the online curriculum and instructional coaches at her own pace and outside of traditional hours. These accommodations are not specialized instruction. And although HBI provided one-on-one instruction, he did not adapt or modify content or provide instruction that met any of the features described above. Based on these facts, the SCO concludes that the instruction Student

has been receiving in the homebound setting was not specially designed, and there is no other evidence to suggest that the District should have had reason to suspect that Student was in need of specialized instruction.

Conclusion to Allegations Two and Three: The 2017 evaluation was sufficiently comprehensive to determine whether Student was in need of specialized instruction as a result of her disability, and the District’s determination that Student was not IDEA eligible was consistent with Student-specific data in the record.

Parents have asserted that the 2017 IDEA evaluation was not sufficiently comprehensive because the District did not review existing data, including information provided by Parents, and it failed to evaluate in all areas of suspected disability, specifically an acquired brain injury (ABI), physical therapy, and social-emotional functioning.

To be eligible for educational services under IDEA, a child must have one of the 13 qualifying impairments, and, “by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8; ECEA Rule 2.8. Thus, it is not enough that a child has one of the qualifying disabilities – the child must also require “specially designed instruction ... to meet the unique needs of the child” as a result of that disability. *Id.*; see also, 34 C.F.R. § 300.39. 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. *Questions and Answers on IDEA Part B Dispute Resolution Procedures*, Question B-6 (OSERS 2013). As a matter of policy, the CDE will not declare a student IDEA eligible through a state complaint decision. Eligibility is best determined by a multidisciplinary team, including parents, who know the student best and will be directly involved in the student’s education going forward. If a state complaint investigation were to conclude that a school district made a determination inconsistent with IDEA’s evaluation procedures or that it otherwise improperly determined eligibility, the CDE would instruct the school district to conduct an evaluation that remedies the deficiencies and concerns noted in the Decision, and to then reconsider eligibility consistent with specific guidance provided in the Decision.

To determine whether the District properly determined that Student was not IDEA eligible, the SCO begins by considering whether the District followed IDEA’s procedures for conducting an initial evaluation. An evaluation 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 help the IEP team determine the child’s specific needs. 34 CFR § 300.304(b)(1)(i)-(ii); *see also* 71 Fed. Reg. 46548. The IDEA has specific and extensive procedural requirements governing how school districts are to evaluate students to determine eligibility. 34 C.F.R. §§ 300.304 – 300.306. Relevant to the allegations raised in this Complaint, 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, and assess the child in all areas of suspected disability. 34 C.F.R. §§ 300.304(c).

Because the suspected area of disability was other health impairment (OHI), the District was required to conduct an evaluation that was sufficient to determine whether Student met the criteria for OHI and needed specialized instruction as a result. To qualify as OHI, a student must have a chronic or acute health problem that limits strength, vitality, or alertness, including a heightened alertness to environmental stimuli. ECEA Rule 2.08(7). In this case, there is no dispute that Student has a disability that impacts her stamina and ability to attend school. As a result of her complex medical condition, Student experiences significant physical distress, including dizziness, severe fatigue, nausea, pain, and headaches. These symptoms may vary significantly from day to day and can be triggered by normal living activities and environmental stimulus. As evidenced by the report itself, the 2017 evaluation included a review of medical information provided by Parents. In addition, Nurse asked Parent for additional information about Student's health in response to the request for evaluation and interviewed both Student and Parent concerning the impact Student's physical symptoms had on her stamina. Based on these facts, the SCO concludes that the evaluation was sufficiently comprehensive to determine if Student had a qualifying disability.

To be IDEA eligible, however, it is not enough that Student qualifies as OHI based on her health condition. Rather, Student must also need special education and related services as a result. Specific to OHI, a student must be prevented from receiving reasonable educational benefit as a result of her medical condition, as evidenced by: the inability to perform typical tasks at school; an inability to sustain effort or endure throughout an activity; and/or the inability to manage and maintain attention, organize and attend, or prioritize environmental stimuli that results in limited alertness in the educational environment. ECEA Rule 2.08(7)(a)-(c). Consequently, the evaluation must be sufficiently comprehensive to determine the educational impact of a suspected ABI. Although the District has not received documentation that Student has been medically diagnosed with an ABI, Nurse, Special Education Coordinator, and Assistant Special Education Director, were together qualified to evaluate the educational impact of a suspected ABI.

In this case, the educational assessment conducted by Assistant Special Education Director was sufficiently comprehensive to determine whether Student could receive reasonable educational benefit from general education alone or needed specialized instruction as a result of her health condition. Assistant Special Education Director conducted a formal assessment, reviewed academic records and previous evaluations, including the 2016 IDEA evaluation, and collected input from HBI. Because Assistant Special Education Director had assessed Student as part of the 2016 IDEA evaluation team, her approach to the 2017 evaluation was informed by knowledge of the previous evaluation, which included a comprehensive battery of formal and informal assessments. Assistant Special Education Director chose to conduct the Kaufman Test of Educational Achievement (KTEA) to formally

assess Student's reading, writing, and math skills. The KTEA is specifically designed to identify patterns that may indicate a specific learning disability, and it may also be used to assess processing speed. Based on the results of the KTEA and input from HBI, Assistant Special Education Director determined that additional assessment of Student's academic performance was not warranted because the body of evidence did not indicate a need for specialized instruction.

Parents assert that the District's evaluation was not sufficiently comprehensive because Student was not assessed in the areas of social emotional functioning and physical education. Under IDEA, an evaluation must be "sufficiently comprehensive to identify all of the student's special education and related needs, whether or not they are commonly linked to the disability category in which the child has been classified." 34 CFR § 300.304(c)(6).

Based on the following facts, the SCO concludes that the District did not have reason to suspect that Student might need specialized instruction as a result of an emotional disability. First, Parent signed consent for evaluation that did not identify social-emotional functioning as one of the areas to be evaluated. When asked by Nurse about the concerns noted in her request for evaluation in the areas of social-emotional functioning, Parent reported that Student was not receiving counseling and that Student's most pressing need was to focus on gaining physical strength. Moreover, Parent reported that she did not intend to prioritize counseling over physical therapy. Despite affective inventories that indicated concerns with anxiety and depression, there was no evidence that Student was unable to attend school or maintain appropriate social relationships as a result of these conditions. Consequently, it was reasonable for the evaluation team to conclude that Student's anxiety and depression were related to her medical condition, and that it was Student's physical symptoms, not social anxiety or depression, impeding her motivation to attend school. Similarly, it was reasonable for the District to rely on the consent signed by Parent which clearly indicated that the proposed evaluation would not include assessment of social-emotional functioning. Notably, Parents did not assert that the District failed to assess Student in this area at the eligibility meeting, focusing instead on the failure to assess Student in the area of physical therapy.

Regarding the need for physical education and physical therapy, Parent indicated that Student needed to gain the physical strength required to receive a potential medical treatment. When further asked about Student's needs in this area, Parent reported to Nurse that Student was not currently receiving physical therapy, indicating that it was difficult for Student to focus on school and physical therapy in the same day. At the eligibility meeting, Parents asserted that Student needed specialized instruction in physical education to complete the specific exercise recommended by her physician. Although the evaluation team was aware that Student needed to build physical strength in anticipation of potential medical treatment, there was no reason to suspect that Student was in need of specialized instruction in physical education to access education or to participate in a physical education class. At the time of evaluation, Student was not enrolled in a physical education class. Consequently, the SCO concludes that the evaluation

was sufficiently comprehensive, without evaluating Student in the area of physical education or physical therapy.

Concluding that the District's evaluation was sufficiently comprehensive, the SCO next considers whether the District's eligibility determination was consistent with Student-specific data in the record. Based on the results of the KTEA-3, Student's grades and performance on assessments, and input from HBI, the Eligibility Team concluded that Student could receive reasonable educational benefit from general education alone. As more fully described in FF #21-25, results of the KTEA indicated that while Student possessed strong reading, writing, and math skills, her processing speed and fluency were slower than her skills might indicate. As a result, Assistant Special Education Director reported that Student could benefit from accommodations such as extra time and a vocabulary list. The results, however, did not indicate a need for specialized instruction. Assistant Special Education Director also observed that Student "worked deliberately and thoughtfully on all tasks and demonstrated strong persistence when she found task demands challenging," despite reported physical discomfort. Consistent with the formal assessment and observation by Assistant Special Education Director, HBI reported that Student was performing at above grade-level and that he did not need to modify content as Student was able to incorporate new learning independently. Based on these facts, the SCO concludes that Student-specific data in the record supported a determination that Student was able to receive reasonable educational benefit from general education alone and did not require specialized instruction as a result of her health condition.

Because Student was properly determined ineligible for special education and related services, the District was not obligated to develop an IEP. Consequently, Student has not been denied FAPE under IDEA, and Parents are therefore not eligible for reimbursement for expenses incurred at Private Clinic in 2017. *Jefferson Cty. Sch. Dist. v. Elizabeth E.*, 60 IDELR 91 (10th Cir. 2012). Most importantly, the District has been consistent and diligent in responding to Student's complex and evolving needs. Student is currently receiving services through a 504 plan that provides accommodations for Student's disability-related needs, as well as mental health counseling as a related service. With the exception of physical therapy, the accommodations and services identified on Student's current 504 plan are consistent with the recommendations made by Private Evaluator in November of 2017.

Conclusion to Allegation Four: The District has provided Parents with a meaningful opportunity to participate in Student's evaluation and eligibility determination.

The IDEA's procedural requirements for developing a student's IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Sytsema v. Academy School District No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008). Meaningful consideration happens when the educational agency listens to parental concerns with an open mind, such as when the educational agency answers parent's questions, incorporates some suggestions or requests into the IEP, and discusses privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of the student. *Id*; See

Deal v. Hamilton County Bd. of Educ., 42 IDELR 109 (6th Cir. 2004), *cert denied*, 546 U.S. 936 (2005). Meaningful consideration does not require a school district to simply agree to whatever a parent has suggested or requested.

The SCO concludes that Parents were provided with a meaningful opportunity to participate in the 2017 evaluation and eligibility meeting. This conclusion rests on the consideration of a number of individual factors as well as a general impression formed by the SCO when reviewing correspondence and listening to the 2017 eligibility meeting. First, the District reviewed and considered all of the medical documentation provided by Parents as part of the evaluation, as evidenced by the evaluation report itself. During the eligibility meeting, Parents actively participated by providing input, asking questions, and challenging the conclusions made by other members of the Eligibility Team. In response to input from Parents, the Eligibility Team asked clarifying questions and considered Parents' challenge to both the sufficiency of the evaluation and the determination that Student was not IDEA eligible. The recording of the meeting evidences a genuine dialogue between Parents and other members of the eligibility team. Following the meeting, the District responded to Parents' concerns for assessment in adaptive PE by conducting an evaluation and sharing the results with Parents. The fact that the eligibility team ultimately disagreed with Parents that Student was IDEA eligible does not mean that they were not provided with a meaningful opportunity to participate in the determination.

Conclusion to Allegation Five: The District did not fail to provide HBI notes or copies of test protocols because it was not required to do so. And although the District failed to provide the affective inventories to Parents in a timely fashion, the delay did not violate IDEA.

One of the procedural safeguards afforded to parents under the IDEA is the right to inspect and review their child's education records. 34 CFR §300.613 (a). This right extends to parents of children whose IDEA eligibility has not yet been established and may wish to review assessments and evaluation reports. *Letter to Kashyap*, 116 LRP 44694 (OSEP 2016). A school district must comply with a request from a parent to review their child's education records "without unnecessary delay and before any meeting regarding an IEP." *Id.* The IDEA, incorporating the definition in FERPA, defines "education records" as a record that is "directly related to a student and "maintained by an educational agency or institution or by a party acting for the agency or institution." 34 CFR §300.611 (b); 34 CFR § 99.3.

In this case, Parents alleged that the District failed to provide former HBI notes and testing protocols from the 2016 IDEA evaluation, and did not timely provide the affective inventories conducted in January of 2017. Regarding the notes from former HBI, the SCO finds and concludes that Parents have been provided with HBI notes as they existed at the time of the request.

Regarding the 2016 IDEA evaluation data, the SCO concludes that Parents did not have the right to review and inspect documents that do not contain personally identifiable

information relating to their child, including test instruments, test protocols, and interpretative materials. *Letter to Anonymous*, 111 LRP 18281 (FPCO 2010). Because the District was not required to provide a copy of these records, it did not violate IDEA by failing to do so. A school district is required, however, to respond to a parent's request to inspect or review a test instrument, as well as provide an explanation or interpretation of any answer sheet or other educational records related to a test or assessment taken by the student. *Letter to Anonymous*, 213 IDELR 188 (OSERS 1989). Should Parents contact the District to review such records, the District must respond. If interested, Parents should contact Special Education Coordinator to schedule a time to review these records.

Regarding the affective inventories conducted in January of 2017, the SCO agrees that these results were not provided to Parents in a timely fashion. The delay, however, did not impede Parents ability to participate in the 2017 IDEA evaluation or eligibility determination. First, the inventories were provided to Parents prior to their request for an IDEA evaluation and were reviewed by the evaluation team. Finally, Parents had the inventories prior the eligibility meeting and therefore could have discussed them at the eligibility meeting in May of 2017. Most importantly, the District added mental health supports to Student's 504 plan based on the results of the inventory, and Student is currently receiving such support. Consequently, the SCO concludes that the delay did not violate Parents ability to participate in the eligibility meeting.

Conclusion to Allegation Six: The District did not fail to timely and appropriately respond to Parents' request for an IEE.

Parents have the right to request an IEE at public expense if they disagree with an evaluation conducted by the district. In response to a parent's request for an IEE, the District has two options: 1) provide the IEE at public expense, or 2) request a due process hearing to demonstrate that its evaluation of the student was appropriate. 34 CFR § 300.502. While the regulations do not set a specific time by which school district must respond to the request, the school district must respond without unnecessary delay. Regardless of whether a district's response to a request for a publicly funded IEE is timely, the parent must show that the alleged delay caused substantive harm. *Fullmore v. District of Columbia*, 67 IDELR 144 (D.D.C. 2016).

In this case, Parents alleged that the District failed to timely respond to their request for an IEE based on disagreement with the 2016 evaluation. Based on the facts described in FF# 43-51, the SCO concludes that the District appropriately responded to Parents' request for the IEE in April of 2017. At that time, both Parties understood that the preferred evaluator would be contacting the District at the end of May. When this did not happen, Parents did not inquire or otherwise seek a different evaluator until October of 2017. Upon inquiry, the District reaffirmed its commitment to funding an IEE based on the 2016 evaluation as long as it met the criteria and fee schedule. After this Complaint was filed, Parents obtained an IEE for the 2016 evaluation and have requested the District consider this the IEE based on the 2016 evaluation.

The District has agreed to reimburse Parents \$500 for the cost of this evaluation and a check will issue by April 3, 2018. Based on these facts, the SCO concludes that the District has timely and appropriately responded to both requests for an IEE.

REMEDIES

Because the SCO has concluded that the District did not violate IDEA as alleged in this Complaint, no remedies are ordered.

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *See*, 34 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.

Dated this 22nd day of March, 2018.

Candace Hawkins, Esq.
State Complaints Officer

Appendix

Complaint, pages 1-30.

- Exhibit 1A and 1B: Medical records.
- Exhibit 2: Gifted and talented records.
- Exhibit 3: Medical records.
- Exhibit 4A and 4B: Medical records.
- Exhibit 5: 504 referral.
- Exhibit 6: Medical records.
- Exhibit 7: Medical test results.
- Exhibit 8: Exercise protocol.
- Exhibit 9A-9C: Medical records and test results.
- Exhibit 10: Vital signs report.
- Exhibit 11: Medical report.
- Exhibit 12A-C: Physical, occupational, and biofeedback therapy reports.
- Exhibit 13: Affective inventory assessment.
- Exhibit 14: Correspondence related to cyber bullying.
- Exhibit 15A-B: Correspondence related to counseling and IEE.
- Exhibit 16A-B: Correspondence with 504 Team.
- Exhibit 17: 2016 IDEA evaluation report.
- Exhibit 18: Statements of attending physicians (SOAP).
- Exhibit 19: Evaluation Request.
- Exhibit 20: Email correspondence.
- Exhibit 21: Release of Personal Health Information Form.
- Exhibit 22: Signed prior written notice and consent for evaluation.
- Exhibit 23: Special Education Referral from Parent.
- Exhibit 24: 2017 IDEA evaluation and eligibility determination report.
- Exhibit 25: 2017 eligibility meeting parent agenda and input.
- Exhibit 26: 2017 Parent sample IEP document.
- Exhibit 27: Physical therapy evaluation.
- Exhibit 28: November 2017 IEE
- Exhibit 29A-D: Educational records and request.
- Exhibit 30: Brain injury observation form.
- Exhibit 31: Neurobehavioral symptom inventory.
- Exhibit 32: Email correspondence related to IEE payment.
- Exhibit 33: IEE payment letter from District.
- Exhibit 34A-B: Correspondence related to IEE.
- Exhibit 35: OCR resolution.
- Exhibit 36A: Recording of December 2016 504 meeting.
- Exhibit 36B: Recording of May 2017 IDEA eligibility meeting.
- Exhibit 36C: Video 2017
- Exhibit 36D: Recording of March 2017 504 meeting.

Exhibit 36E: Recording of May 2017 504 meeting.
Exhibit 37A-C: Correspondence related to online program.

Response, pages 1-30.

Exhibit A: Consent to evaluate from December 2016 to present.
Exhibit B: All prior written notices issued from December 2016 to present.
Exhibit C: All notices of meeting issued from December 2016 to present.
Exhibit D: All results/reports for evaluations/assessments conducted from December 2016 to present.
Exhibit E: May 2017 eligibility report.
Exhibit F: Information provided by Parents concerning Student's needs, including evaluations.
Exhibit G: Attendance records.
Exhibit H: Grade reports.
Exhibit I: 504 plans in effect from December 2016 to present.
Exhibit J: District policies and procedures related to identification, evaluation, and eligibility.
Exhibit K: Correspondence.
Exhibit L: Contact information of District witnesses.
Exhibit M: Homebound instruction records.
Exhibit N: IEE documentation.
Exhibit O: Copies of cases cited in Response.
Exhibit P: Tracking for delivery of Response to Parents.

Parent's Reply, pages 1-71.

Exhibit 38: Parent input dated December 2016.
Exhibit 39: Correspondence related to 2016 IDEA evaluation.
Exhibit 40: 504 Plan dated 2015.
Exhibit 41: Correspondence with Nurse.
Exhibit 42: CDE Resource on neuroeducational evaluations.
Exhibits 43 and 44: Correspondence with Special Education Coordinator.
Exhibit 45: Consent to evaluate.
Exhibit 46: Letter from private physician dated August 2017.
Exhibit 47: District IEE criteria.
Exhibit 48: District procedures for obtaining an IEE.
Exhibit 49: Correspondence with Special Education Coordinator.
Exhibit 50: Correspondence with Special Education Director.
Exhibit 51: IEE Release form.
Exhibit 52: IEE Release form.
Exhibit 53: Correspondence with Special Education Director.
Exhibit 54: IEE dated January 2018.
Exhibit 55: Expenses from Private Clinic.
Exhibit 56: WestEd Report 2016.

Exhibit 57: Correspondence from Private Clinic.

Exhibit 58: Information provided by Parent during interview.

Interviews with:

- Parents
- Student
- Special Education Director
- Assistant Special Education Director
- Special Education Coordinator
- HBI
- Registered Nurse
- Middle School Principal
- School Psychologist

Although the SCO requested interviews with Former School Psychologist and Mental Health Counselor, these individuals have retired from the District and were not available for interviews. In addition to the above interviews, the SCO consulted with CDE Specialists in the areas of traumatic brain injury, health and wellness, adaptive physical education, gifted/talented, and SED.