

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

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**State-Level Complaint 2019:548  
Mesa County Valley School District 51**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on June 26, 2019 by Attorney (Complainant) on behalf of Student and Parents against Mesa County Valley School District 51 (District). After review of the written Complaint, the Colorado Department of Education (CDE) State Complaints Officer (SCO) determined that the Complaint identified six allegations subject to the jurisdiction of the state-level complaint process under IDEA and its implementing regulations at 34 C.F.R. §§300.151 through 300.153. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations. The SCO assigned this Complaint to the undersigned Complaint Investigator for investigation. In compliance with the IDEA, Federal Regulations, and the Colorado Rules for the Administration of the Exceptional Children's Educational Act (ECEA)<sup>1</sup>, and after thorough and careful analysis of the entire record, CDE issues this report containing Findings of Fact, Conclusions, Decision and Order for Corrective Action.

**COMPLAINT ALLEGATIONS**

1. Whether the District provided the Student with a Free Appropriate Public Education (FAPE) consistent with the IDEA and its implementing regulations at 34 C.F.R. §300.17 and §300.101. Specifically,
  - a. Whether the District developed and implemented an IEP reasonably calculated to provide FAPE to address the Student's unique educational and functional needs, to be involved in and make progress in the general education curriculum as required by 34 C.F.R. §300.320 and ECEA Rule 4.03.
  - b. Whether the District failed to consider and/or provide if the Student required extended school year (ESY) services in order to receive a FAPE as required by

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* and its corresponding regulations are found at 34 C.F.R. § 300.1, *et seq.* IDEA implementation in Colorado is governed by the Rules for the Administration of the Exceptional Children's Educational Act ("ECEA"), found at 1 CCR 301-8, 2220-R-1.00, *et seq.*

34 C.F.R. §300.106.

2. Whether the District afforded the Complainants with the procedural protections outlined in the IDEA. Specifically,
  - a. Whether the District conducted a reevaluation of the Student's needs set forth in 34 C.F.R. §§300.303 through 300.305 and ECEA Rule 4.02(5).
  - b. Whether the District unilaterally determined and/or changed the Student's placement, in contravention of 34 C.F.R. §300.116, and ECEA Rule 5.01(2).
  - c. Whether the Parent was denied a meaningful opportunity to participate in the IEP process as required in 34 C.F.R. §§300.327, 300.501, and ECEA Rule 4.03(8).
3. Whether the District complied with the IDEA's requirements regarding confidentiality of special education information in accordance with 34 C.F.R. §§300.610 through 300.627. Specifically, whether the District maintained student records and allowed access to those records according to 34 C.F.R. §300.613, §300.614, §300.616 and ECEA Rule 6.01.

### **INVESTIGATORY PROCESS**

The Investigation included the following components:

- The Investigator reviewed the following Student records:
  - The original Complaint and supporting exhibits filed by the Complainant;
  - The District's response to the allegations raised in the Complaint and supporting exhibits;
  - The Complainants reply and supporting exhibits; and
  - The Student's special education records.
- The Investigator conducted telephonic interviews with the Complainant, Parents, one District staff member, and District's legal counsel.
- The Investigator provided the opportunity for all parties to submit additional information for consideration during the complaint investigation.

### **APPLICABLE STATUTES, REGULATIONS, OR RULES**

34 C.F.R. §§300.17 and 300.101	Free Appropriate Public Education
34 C.F.R. §300.106	Extended School Year Services
34 C.F.R. §300.116	Placement

34 C.F.R. §300.303	Reevaluations
34 C.F.R. §300.305	Additional requirements for evaluations and reevaluations
34 C.F.R. §300.320	Definition of Individualized Education Program
34 C.F.R. §300.327	Educational Placement
34 C.F.R. §300.501	Opportunity to examine records; parent participation in meetings
34 C.F.R. §§300.610-627	Confidentiality of Information

### **RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate allegations of violations that occurred not more than one year from the date the original complaint was received. In light of this limitation, the investigation will be limited to the period of time from June 26, 2018 through June 25, 2019 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

### **FINDINGS OF FACT**

1. The Student is [age] with a complex mental health diagnostic history. She has been in and out of psychiatric hospitals and therapeutic residential schools for years. The Student last attended school in the District in the fall of 2017. (Attachment for State Level Complaint 2, p 1)
2. At all times relevant to this complaint, the Student remained a resident of the District. The Student is identified as eligible for special education in the categories of Serious Emotional Disability, Autism Spectrum Disorder and Speech or Language Impairment. The Student's most recent IEP was developed by the District in May of 2017.
3. On July 13, 2018, an Order was issued in a previous Due Process Complaint filed on behalf of the Student by her Parents. The Administrative Law Judge (ALJ) ordered the District to reimburse Parents for the cost of tuition at the residential facility the Student began attending in October of 2017. The District was ordered to pay tuition costs going forward until and unless the Student's IEP team changed her placement. (Ex 1)
4. Prior to issuance of the final Due Process Complaint Order and at the beginning of the time period relevant to this Complaint, the Student returned to a psychiatric hospital in another state after suffering a psychiatric breakdown. Due to the Student's decline, including active psychosis, suicidal ideation/intent, running away from the program, and behavioral

escalations that required restraint, she was unable to return to the residential facility named in the ALJ's July 13, 2018 Order. (Ex 2)

5. On July 25, 2018, Parents requested an IEP meeting to discuss the possibility of the Student attending the District's therapeutic day program (TDP). (Ex 4, p 2) At this same time, the Parents provided a one-page letter from the previous residential facility the Student was attending indicating it was no longer able to serve the Student and the reasons why it could no longer serve her. (Ex 2) Other documentation provided to the District included a letter from the psychiatric hospital staff in which the Student was hospitalized, which included IEP recommendations based on the Student's current needs. (Ex 3)
6. A Prior Written Notice dated July 27, 2018, proposed to reevaluate the Student based on the review of existing information and indicated no evaluation data were needed to determine eligibility or educational needs. The District explained the IEP team would consider previous assessments completed by the District, and information from the Student's previous placements. Consent was signed by the Parents on July 27, 2018 and additional treatment documentation was provided to the District by the Parents. (Ex B, pgs 3-5)
7. At the same time, the District sought consent for the release of information for assessments or evaluation data from the Student's previous providers. Parents declined to authorize the release of information from the Student's most recent residential placement or psychiatric hospital. (Ex C-1, p 25) Parents instead stated that documentation from previous providers had been provided to the District, and Parents were not required to release all confidential medical records. (Ex 35)
8. An email dated August 3, 2018 indicated the District determined it did not have sufficient information to develop present levels and appropriate special education and related services. Therefore, it requested the IEP meeting scheduled for August 6, 2018 be used to determine what further evaluations and assessments were needed to determine appropriate placement and services. (Ex C-2, p 11)
9. On August 6, 2018, a review of existing data (RED) meeting was held. The purpose of the meeting was to determine what information was needed to move forward with an IEP and make appropriate decisions regarding services and placement, or to determine if additional assessments would be required. The Student's eligibility for special education was not in question. The District indicated it needed more information to determine how to meet the Student's educational needs. During the meeting, the District and the Parents agreed that

assessments were needed in the following areas: Transition, Social Emotional/Behavioral, and Health/Mental Health. A Prior Written Notice was issued proposing to reevaluate the Student in the recommended areas and it was signed by Parents on August 6, 2018. (Ex B, p 7)

10. The District issued a Prior Written Notice on August 15, 2018 providing a proposal to place the Student in a residential facility to monitor, support and provide educational services while the evaluations and assessments were conducted to determine if the Student could transition to a less restrictive environment. The District reviewed information received from the Parents, their Attorney, and the psychiatric hospital which indicated the Student was extremely fragile and there was not data which indicated the Student would do well with a lower level of care. Because of the potential threat to the Student's fragile psychological state, the District proposed to complete the assessments in a residential facility. (Ex B, pgs 13-14)
11. Although there was consideration of the Student's return to the District and potential placement in the District's TDP, the District stated this placement was determined not appropriate given information from the Parents and recent letters from the psychiatric hospital describing the Student's current needs. (Ex B, pgs 9-11)
12. In a letter from Parents' Attorney to the District dated August 14, 2018, the Parents objected to the District's placement proposal. The Parents stated they were not ruling out the proposed residential placement but were concerned with the distance of the selected facility from the Student's current location, the impact on her health and safety, and whether the proposed facility was appropriate to meet the Student's current needs. The Parents encouraged consideration be given to a home placement with mental health/social/emotional supports during the evaluation period. Parents made a request to convene an IEP meeting to discuss an appropriate placement. (Ex 12)
13. In their response on August 22, 2018, the District concluded, based on information from the Student's providers and Parents, it was unable to conduct an evaluation in any public-school setting within the District without significant risk of further decompensation of Student's condition. The District declined to conduct an evaluation in non-residential treatment center settings such as the Parent's home or her therapist's office because the standard protocol for evaluations requires formal and informal observations in a suitable educational setting. (Ex 13)

14. The District explained its continued willingness to complete the evaluation at the placement ordered by the ALJ. However, because that facility was unwilling to permit the Student to return, the District proposed a different residential facility that included comparable services to those ordered by the ALJ. (Ex 13)
15. On September 4, 2018, the District filed an appeal of the ALJ's decision rendered on July 13, 2018. It was the District's position that the placement identified in the ALJ's order remained the operative placement during the appeal process. (Ex 17, p 5)
16. From September 4, 2018 through September 30, 2018 the Student was at home due to ongoing medical issues. On September 30, 2018 the Student was hospitalized and readmitted to the psychiatric hospital where she had previously received treatment.
17. An IEP meeting was held on October 17, 2018. Meeting notes indicated the District and Parents continued to discuss evaluation but were unable to agree on a process for obtaining existing assessments or completing new assessments. Parents explained the District had been provided all educationally relevant assessment information from outside providers. The Parents continued to be reluctant to sign broad requests for additional records. (Ex B, pgs 18-20).
18. Letters from previous placements and current providers of the Student were reviewed. One provider indicated it was his professional opinion that the District's proposed residential facility was not appropriate given his research of the facility, the availability of certain treatment for autistic youth in Denver, knowledge of the Student's current situation and his past experience treating patients. Additionally, the other provider echoed concern regarding the appropriateness of the proposed residential facility due to the lack of specialization in adolescents with Autism Spectrum Disorder, her psychosis and catatonia, and the fact certain treatment would not be able to occur. (Ex 22 & 23)
19. The October 17, 2018, Prior Written Notice indicated, after the consideration and review of information provided by the Parents, the District continued to offer a placement comparable to the one indicated in the ALJ's July 13, 2018 Order. The District expressed it continued to need current evaluative information regarding the Student in order to determine if the Student could be successful in a lesser restrictive environment. (Ex 25)
20. With knowledge the Student was currently hospitalized at a psychiatric hospital in another state, the District indicated it would work to arrange tutoring/educational services during her stay. (Ex 25)

21. In November, District Staff attempted to arrange for educational services for the Student during her admission at the psychiatric hospital. The District contacted three individuals and explored an online option, but was unable to secure any educational services. (Ex B, pgs 79-86)
22. The Student remained at the psychiatric hospital until December 27, 2018. Parents reported the treatment team at the psychiatric hospital concluded the Student would be unsuccessful if discharged without a plan for education and related support services in place. Since the Parents and District continued to disagree on an education plan, the Parents searched for a residential treatment center that was located in the same state as the psychiatric service provider in order to support the Student's treatment plan and provide the care that she needed. (State Level Complaint 2, p 15)
23. After extensive searching, the Parents identified a residential facility that would accept the Student and was in the same state as the psychiatric hospital which allowed for the Student's continued treatment. The Student attended the facility for approximately two months but ultimately the facility determined her issues were too complex to manage. (State Level Complaint 2, p 16)
24. On January 7, 2019, the District received notice of the Student's placement in this new residential facility chosen by the Parents based on recommendations from the Student's current providers at the psychiatric hospital. The Parents, through their Attorney, indicated the new residential facility was substantially similar to the residential placement ordered by the ALJ and asked the District to pay for the placement. Additionally, the Parents indicated they were withdrawing requests for other services, including tutoring, to pursue this option, as it fit within the parameters outlined in the ALJ's original decision. (Ex C-3, pgs 25-27)
25. On February 6, 2019, Parents filed for injunctive relief in the pending federal court action (the District's Appeal). However, Student was unable to maintain placement at the current residential facility and enrollment was terminated by the residential facility on March 29, 2019. The Court denied the Motion and vacated the hearing. The District subsequently dismissed its appeal. (Response of District, p 8)
26. During an interview with the Parents, they reported the Student returned home on March 29, 2019. The Parents hired staff and provided services to the Student in the home. Parents notified the District of the Student's return on April 9, 2019, requested the IEP team reconvene, and requested the attendance of an IEP Facilitator. The District declined the

presence of an IEP Facilitator. The Parents and District agreed to meet on May 24, 2019. The purpose of the meeting was to review current information regarding the Student to determine appropriate placement. (Ex 27 and Ex B, p 26)

27. An Evaluation Report dated May 24, 2019 summarized the records provided by the Parents to the District including additional documents provided in February and April 2019. No additional assessments were conducted by the District. The District accepted eligibility as determined in 2017 and indicated no further assessment for eligibility was required. The Student is due for a triennial evaluation in 2020. (Ex B, p 40)

28. The District summarized the evaluations in part as follows: (Ex B, pgs 40-48):

- a. Throughout Student's history in multiple placements, she consistently struggles with confrontation in the home or with others, extensive medication trials, cognitive rigidity, and the inability to cope with intense emotions. The focus of treatment has been to assist the Student in self-regulation of emotions and intense feelings. Although the Student has shown periodic improvement in behavior and self-regulation, she is unable to consistently maintain this level of behavior. The most recent recommendation from the residential facility the Student attended was residential placement with ongoing psychiatric care.
- b. Academic Performance Assessments. Based on the administration of a reading inventory performed, the Student's overall reading level is 6<sup>th</sup> grade; vocabulary 9<sup>th</sup> grade; comprehension of literature 6<sup>th</sup> grade; and comprehension of informational text at a 4<sup>th</sup> grade level. Math inventory indicated an overall math level of 8<sup>th</sup> grade; algebra and algebraic thinking 8<sup>th</sup> grade, and geometry 7<sup>th</sup> grade.
- c. Functional Behavior Assessment: Assessments were completed on May 30, 2018 and December 26, 2018 in residential facilities the Student was attending. Both assessments identify the existing problem behaviors as yelling, demanding, harm to self and others, noncompliance, and eloping. Triggers include difficult demands, emotional distress, and expectations from adults. The Student struggles when she does not get her way or things do not go as expected, and she demonstrates deficits in coping skills for regulating her emotions.

29. At the May 24, 2019 IEP meeting, Parents requested the District provide extended school year services (ESY) due to the Student's academic deficits and decline as well as her behavioral needs. The District indicated ESY was provided for four to six weeks over the



summer, typically on campus with other Students. District staff explained ESY was for “kids who learn and then when they don’t have education, they regress.” The District was not clear if the Student qualified for ESY. Parents indicated the evaluation information provided indicated the Student had regressed. The District expressed they didn’t believe the ESY program the District offered was appropriate for the Student. (Ex 29, pgs 21-23)

30. The District offered to provide an online program over the summer to assist the Student with getting credits and helping her move toward graduation. The program included embedded teachers and tutors, and could be accessed in the home. Furthermore, at the end of the summer, the IEP team could get back together and use the program as a trial to determine a placement proposal for the Student for the 2019-20 school year. (Ex 29, p 20)
31. Parents expressed concern regarding the Student’s ability to attend to an online program without the support of a “live” person. The Parents further explained the proposed online delivery without physical support for redirecting the Student during lessons would be unsuccessful. The District indicated it was not possible to send someone into the home at this point, and the District did not intend to offer homebound services. (Ex 29, pgs 21-23)
32. The District stated the summer online program was not required as part of the Student’s FAPE. If Parents wanted to take the opportunity to access the online program, the District was willing to provide the Student access, but according to the District it was not obligated to provide services throughout the summer. The District reminded the IEP team that the proposed offer of placement and FAPE was in a residential facility. (Ex 29, pgs 21-23)
33. The Parents expressed disagreement with the summer plan for online services without support. However, the Parents stated the District’s offer of some service was better than no service. They accepted the offer and would access the program and support the Student throughout the summer at home. Parents reported contacting the District regarding the online program but indicated the Student never received access to the online program. (Parent interview)
34. A Prior Written Notice dated May 28, 2019 explained that, based on the information provided at the IEP meeting on May 24, 2019, the District’s offer of FAPE was residential placement. The Notice indicated the Parents agreed to accept an interim plan, which the District specifically noted was not the offer of FAPE, whereby the Student would have access to an online program for the summer and the IEP team would reconvene in August 2019 to revisit placement. Placement in the District’s TDP may be considered during the

August meeting. The District's Notice indicated under other options considered and reasons they were rejected: "Residential placement was considered as it was the District's current offer of FAPE. However, this was rejected in order to provide the Student with an opportunity to remain at home and return to school at TDP in the fall if she is able." (Exhibit B, pgs 49-50)

35. The Student's IEP team has subsequently met after this complaint was filed and agreed on placement for the fall 2019.
36. During an interview with the District's Special Education Administrator and Attorney, they indicated there were no meetings for the Student in which a personal cell phone was used to make a digital recording of the proceedings. The District explained it does have the ability to digitally record meetings. However, it is not the practice to use personal cell phones. Rather, digital recorders can be checked out by Special Education Coordinators if it is necessary to record a meeting. The District also outlined the process the staff used to download the audio recording to a secure folder on the District's system at the end of each meeting. The recordings are then removed from the digital recorder. Files stored by the District can be accessed when requested. (District interview)
37. The District's Special Education Administrator acknowledged on a single occasion, during a meeting she attended, the digital recorder failed and the rest of the meeting was recorded on a staff person's personal cell phone. She indicated at the completion of the meeting the audio file was transferred to the District's secure storage and the recording was removed from the personal cell phone. She described this as an isolated incident and not a standard operating procedure. (District interview)
38. The District indicated there were no procedures specific to digital recordings. However, the District's Attorney indicated she provided annual training to special education staff about the process that should be followed if it is necessary to record meetings and how to respond if a request for records is received. (District interview)

### **CONCLUSIONS OF LAW**

1. The overarching purpose of the IDEA is to ensure that students with a disability have available to them a Free Appropriate Public Education (FAPE), including special education and related services that meet the unique needs of individual students and prepare them for further education, employment and independent living. *34 C.F.R. §300.1.*

2. The IDEA requires that FAPE be provided to each eligible student. *34 C.F.R. §300.101(a)*. FAPE must be individually designed to meet the unique needs of an eligible student, and a school district must offer an IEP that is reasonably calculated to enable a student to make progress appropriate in light of the student's unique circumstances. *Bd. of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 553 IDELR 656 (1982) and *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (2017).
3. The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). The IEP is the means by which special education and related services are "tailored to the unique needs" of a particular child. *Rowley (1982)*.
4. An IEP must offer instruction "specially designed" to meet a child's "unique needs" and be constructed after careful consideration of the child's present levels of achievement, disability, and potential for growth. *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (2017).
5. With respect to the Student, who is the subject of this complaint, there is no dispute she is a child with a disability and eligible for IDEA services. However, there are several aspects regarding the Student's education and placement that are less clear.
6. The beginning point in this analysis is the ALJ's July 2018 decision. That decision determined that the Student's educational needs would be met in a residential setting, and ordered the District to continue to fund a residential placement at an identified facility until and unless the Student's IEP team changed her placement. The ALJ's decision was binding on the parties pursuant to *34 C.F.R. §300.514(a)*. During the pendency of any administrative or judicial proceeding regarding a due process complaint, unless the District and the Parents otherwise agree, the Student must remain in her current educational placement. *34 C.F.R. §300.518(a)*. From July 2018 until some point in the future triggered by the IEP team's determination of a subsequent placement, the District was not free to change the Student's placement away from a residential setting. From the time of the September 4, 2018 appeal until it was withdrawn at the end of March 2019, the District was not free to alter the Student's placement. In this case, the pendency placement was a residential treatment facility.
7. There are several factors that frustrated the District's implementation of the ALJ's decision. First, the residential facility named in the ALJ's decision was unwilling to have the Student return to its program. With the facility named by the ALJ no longer a placement option, the

District was free to offer another residential placement in a different location without running afoul of the hearing officer's decision. The IDEA's stay-put provision only prohibits a district from unilaterally changing a student's educational placement during a dispute. It does not prevent the District from changing the location of the Student's services. *Z.B. v. District of Columbia*, 71 IDELR 164 (D.D.C. 2018). Under the IDEA, a change in the physical location of the Student's instruction will not qualify as a change in placement if there is no substantial or material change to the composition of the Student's educational program and services. *R.M. v. Gilbert Unified Sch. Dist.*, 74 IDELR 92 (9th Cir. 2019). Changing the location of the Student's residential services does not automatically result in a unilateral change of placement.

8. Another factor frustrating implementation of the ALJ's decision was the Student's continued hospitalization and re-hospitalization. Her condition was fragile, and medical professionals were not able to discharge the Student until stabilized. The Student's treating psychiatrist recommended the Student be served in an out of state facility to continue treatment not authorized in Colorado. However, FAPE must meet the standards of the SEA. *34 C.F.R. §300.17*. It would be inconsistent with the IDEA and federal regulations to require the District to provide a residential placement in another state to facilitate the provision of a service that is not authorized in the Student's home state. Therefore, the determination of an appropriate placement could not be made based on the availability of treatment that cannot be provided in Colorado. Until and unless the Parents and District otherwise agreed, the pendency placement continued to be a residential placement. The District offered a residential placement, but the Parents rejected it.
9. With respect to the evaluations and recommendations of treating private professionals, the District is required to consider that information, but is not necessarily obligated to accept private evaluation results or recommendations. *34 C.F.R. §300.502(c)*. There is evidence in the record to support that the District sought information from private providers to assist in developing a plan to meet the Student's educational needs, but the Parents declined to authorize the exchange of information with private providers.
10. The District attempted to gather more evaluative information in order to determine the Student's educational needs to propose a placement reasonably calculated to provide FAPE based on her unique educational needs, as evidenced by PWNs dated August 15, 2018 and October 17, 2018. However, the Student remained hospitalized until late December 2018.

11. Upon release from the hospital, the Parents chose a different residential facility that would accept the Student, located in the same state as her private provider, permitting the Student to continue with certain treatment. The Parents initially sought reimbursement for this residential placement. However, after a brief period of time in January through March 2019, the facility determined the Student's needs were too complex and subsequently discharged the Student. The District continued to offer residential treatment consistent with the ALJ's decision.
12. The District ultimately withdrew its appeal of the ALJ's decision in late March 2019. At the point the appeal concluded, the pendency placement was no longer operative. *34 C.F.R. §300.518*. The Student's IEP team had the obligation to propose FAPE based on the Student's educational needs. The District continued its offer of a residential placement as FAPE for the Student. The Parent remained dissatisfied with the specific location of residential placement offered by the District.
13. The Parents notified the District of the Student's return on April 9, 2019 and requested an IEP team meeting to determine an appropriate placement. Parents further requested the presence of an IEP team facilitator at the meeting, which the District declined.
14. The Colorado Department of Education's website (<https://www.cde.state.co.us/spedlaw/fiep#One>) describes facilitation as a voluntary process, meaning that both parties must agree to the use of a facilitator. Since either the school or a parent has the right to decline this voluntary process, the District's declination cannot be deemed a compliance violation.
15. As of the May 24, 2019 Evaluation Report, the District determined that sufficient information had been reviewed to deem the evaluation complete. Although eligibility was never in question, an appropriate placement, including ESY services, were discussed at the May 24<sup>th</sup> IEP meeting. The District proposed an online program as a substitute for ESY, with a duration of four to six weeks and no direct instruction or supports to meet the Student's other educational needs.
16. The IDEA requires that ESY services be available as necessary to provide FAPE. *34 C.F.R. §300.106*. ESY services cannot be limited to a particular category of disability or unilaterally limited in the type, amount, or duration of those services. *34 C.F.R. §300.106(a)(3)*. The District failed to address whether the Student needed ESY services in order to receive FAPE and instead described the four to six-week online program as "not a required part of

the Student's FAPE." The May 28, 2019 Prior Written Notice stated: "Residential placement was considered as it was the District's current offer of FAPE. However, this was rejected in order to provide the Student with an opportunity to remain at home and return to school at [therapeutic day placement] in the fall if she is able." This position is inconsistent with IDEA. In order to fulfill its obligation on behalf of the Student, the IEP team needed to make a determination regarding the Student's need for special education service beyond the school year.

17. The Tenth Circuit Court of Appeals, a federal court with appellate jurisdiction over Colorado district courts, and CDE's *Extended School Year Services Guidance Manual*, detail factors other than regression and recoupment that must be analyzed in order to determine whether ESY is a necessary component of FAPE. Those factors include:

- a. The degree of regression suffered in the past;
- b. The exact time of past regression;
- c. The ability of parents to provide educational structure at home;
- d. The child's rate of progress;
- e. The child's behavioral and physical problems;
- f. The availability of alternative resources;
- g. The ability of the child to interact with nondisabled children;
- h. The areas of the child's curriculum that need continuous attention;
- i. The child's vocational needs; and
- j. Whether requested services are extraordinary for the child's condition as opposed to an integral part of a program for populations of students with the same disabling condition.

*Johnson v. Indep. Sch. Dist. No. 4 of Bixby, Tulsa County, Okla.*, 17 IDELR 170 (10th Cir. 1990).

18. The District failed to analyze the Student's need for ESY as a component of FAPE. It offered a summer online program without direct instruction or supports to address the Student's mental or emotional needs. The District reiterated its position that it was not obligated to provide ESY, as the Student's offer of placement was in a residential facility.

However, this distinction is not supported by IDEA or the 10th Circuit factors. The District was required to specifically address the above factors, to make a determination regarding Student's need for ESY services, and how to make a plan to meet those needs. The District failed to meet its obligation to address ESY services on behalf of the Student. Because ESY is an integral component of FAPE for students who need extended programming beyond the school year, the failure to address ESY results in a procedural violation.

19. The development of a student's IEP is a collaborative process that "places special emphasis on parental involvement." *Systema v. Academy School District No. 20*, 50 IDELR 213 (10th Cir. 2008). In developing an IEP, school districts are required to consider parental suggestions and requests and, to the extent appropriate, to incorporate them into the IEP. *O'Toole v. Olathe Dist. Schools*, 28 IDELR 177 (10th Cir. 1998). However, parental preferences must not take precedence over the purpose of the IDEA, to provide a FAPE in the least restrictive environment.
20. Team members must enter the IEP team meeting with an open mind and must meaningfully consider the parents' input. See, *R.L. and S.L. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11th Cir. 2014); and *H.B. v. Las Virgenes Unified Sch. Dist.*, 52 IDELR 163 (C.D. Cal. 2008), *aff'd*, 54 IDELR 73 (9th Cir. 2010).
21. Without question, the Parents here have the right to participate in the IEP process. However, the Parents' right to participate does not include the right to decide the specific or residential facility the Student would attend. *Luo v. Baldwin Union Free Sch. Dist.*, 69 IDELR 88 (2d 2017). Throughout the period of time relevant to this Complaint, the Parents and District continued to meet and/or communicate regarding the Student's educational needs. Parents attended meetings with the District, sometimes accompanied by advocates. The District sought information from the Parents' private providers. Information from the Parents' providers is incorporated into the May 24, 2019 Evaluation Report. There is no evidence to support that the Parents were denied meaningful participation in the IEP process.
22. Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure and destruction stages. See 34 C.F.R. §300.623.

23. In order to be an "educational record," the record must be "maintained" by an educational agency, meaning the record must be kept in one location with a single record of access. *Owasso Indep. Sch. Dist. v. Falvo*, 36 IDELR 62 (U.S. 2002). See also *Board of Educ. of the Toledo City Sch. Dist. v. Horen*, 55 IDELR 102 (N.D. Ohio 2010); and *K.C. v. Fulton County Sch. Dist.*, 46 IDELR 39 (N.D. Ga. 2006).
24. As applied to this matter, the District described a process in which it collected, maintained and disclosed student records according to the confidentiality requirements. Although there was one instance where the District described the use of a staff person's personal cell phone as a recording device, it was not the normal practice and the recording was transferred onto the District's secure system for storage and distribution. Allegations regarding maintaining and providing access to student records is not substantiated.

### **DECISION**

1. Whether the District provided the Student with a Free Appropriate Public Education (FAPE) consistent with the IDEA and its implementing regulations at 34 C.F.R. §§100.17 and 300.101. Specifically,
- a. Whether the District developed and implemented an IEP reasonably calculated to provide FAPE to address the Student's unique educational and functional needs, to be involved in and make progress in the general education curriculum as required by 34 C.F.R. §300.320 and ECEA Rule 4.03.

**CDE finds no violation.**

- b. Whether the District failed to consider and/or provide if the Student required extended school year (ESY) services in order to receive a FAPE as required by 34 C.F.R. §300.106.

**CDE finds a violation. The District failed to consider eligibility for services beyond the normal school year that may be necessary in order for the Student to receive FAPE.**

2. Whether the District afforded the Complainants with the procedural protections outlined in the IDEA. Specifically,
- a. Whether the District conducted a reevaluation of the Student's needs set forth in 34 C.F.R. §§300.303 through 300.305 and ECEA Rule 4.02(5).

**CDE finds no violation. The District proposed a reevaluation, but the**



**Parents were unwilling to offer consent for the interim residential placement where the evaluation could be safely conducted or authorize the release of psychiatric information which may have negated the need for additional assessments. The failure to reevaluate cannot be held against the District.**

- b. Whether the District unilaterally determined and/or changed the Student's placement, in contravention of 34 C.F.R. §300.116, and ECEA Rule 5.01(2).

**CDE finds no violation. The District proposed to change the location of services as opposed to the Student's placement.**

- c. Whether the Parent was denied a meaningful opportunity to participate in the IEP process as required in 34 C.F.R. §§300.327, 300.501, and ECEA Rule 4.03(8).

**CDE finds no violation. The Parents meaningfully participated in the IEP process. Disagreement with the District's proposal is not tantamount to denial of the opportunity to participate.**

3. Whether the District complied with the IDEA's requirements regarding confidentiality of special education information in accordance with 34 C.F.R. §§300.610 through 300.627. Specifically, whether the District maintained student records and allowed access to those records according to 34 C.F.R. §300.613, §300.614 and §300.616 and ECEA Rule 6.01.

**CDE finds no violation. The District maintains student records and timely responds to requests for records.**

### **CORRECTIVE ACTION REMEDIES**

To remedy the violation, the District is ORDERED to take the following actions:

1. By **Monday, September 9, 2019**, District shall submit to CDE a proposed corrective action plan ("CAP") that adequately addresses the one (1) 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 District is responsible. The CAP must, at a minimum, provide for the following:

- a. By **Monday, November 4, 2019**, District must conduct a comprehensive training on the requirements of 34 C.F.R. § 300.106(a)(2), in accordance with this Decision and CDE's *Extended School Year Services Guidance Manual*, with a specific focus on the standard (to include the factors set forth in this Decision as outlined in *Johnson v. Indep. Sch. Dist. Nor. 4 of Bixby, Tulsa County, Okla.*, 17 IDELR 170 (10th Cir. 1990)) that school districts must use to determine whether a child needs extended school year services. This training shall be conducted with District's Special Education Administrator, Special Education Coordinators, and any other special education or school staff deemed appropriate by District. 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, with roles noted) and provided to CDE no later than **Monday, November 18, 2019**. These trainings may be conducted in-person, or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast. If the individual(s) identified in this paragraphs are no longer employed by District when the training occurs, District may train staff occupying identical roles in order to demonstrate compliance with this remedy.
- b. By **Friday, October 11, 2019**, District must convene an IEP meeting with Parents, at a mutually convenient time and setting, to determine Student's eligibility for extended school year services on an individual basis, consistent with 34 C.F.R. §300.106, *Johnson v. Indep. Sch. Dist. Nor. 4 of Bixby, Tulsa County, Okla.*, 17 IDELR 170 (10th Cir. 1990), and CDE's *Extended School Year Services Guidance Manual*. The determination of extended school year services eligibility shall be made by the IEP Team in consideration of the Evaluation Report dated May 24, 2019, and any other information deemed appropriate by the IEP Team. If Student is deemed eligible for extended school year services, the IEP Team shall then consider whether an award of compensatory education is necessary to place Student in the same position she would have been if not for the violation. Evidence that this IEP meeting occurred must be documented by providing a copy of the Notice of Meeting, IEP, and Prior Written Notice to CDE no later than ten (10) days following the IEP meeting. The Prior Written Notice shall detail all information considered and decided with respect to the determination of extended school year services eligibility and, if necessary, an award of compensatory education. If

Parents do not respond to District's efforts to convene an IEP meeting by Tuesday, October 1, 2019, CDE will determine compliance with this remedy in accordance with 34 C.F.R. § 300.322.

### **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 26th day of August 2019.



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Stephanie Weaver  
CDE assigned investigator