

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

**State-Level Complaint 2018:543
Douglas County School District**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on December 26, 2018, by the parents of a child not yet identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA). On January 15, 2019, the Parties agreed to try and resolve the Complaint through mediation and further agreed to extend the 60-day timeline. 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 allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

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 filed. Accordingly, this investigation will be limited to the period of time from December 26, 2017, through December 26, 2018, 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.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failing to conduct an initial evaluation to determine if Student qualifies as a child with a disability under the IDEA, pursuant to 34 C.F.R. § 300.301, after Parent's request for an evaluation on November 28, 2018.
2. Failing to provide Prior Written Notice (PWN) of its refusal to conduct an initial evaluation, consistent with 34 C.F.R. § 300.503, after Parent's request for an evaluation on November 28, 2018.

FINDINGS OF FACT

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

1. Student is identified as a student with a disability pursuant to Section 504 of the Rehabilitation Act of 1973, based on auditory processing speed delays and sensory integration processing delays. To address Student's disability related needs, his 504 Plan provides the following accommodations: preferential seating in the classroom, time and a half to complete quizzes and tests, access to teacher's notes, individual help from teachers with organization and reviewing tests, use of a computer to type and print assignments, and "mini-breaks" during class. (Ex. 2.) Student has not been identified as IDEA eligible, and it is Parent's belief that Student should have been evaluated for such eligibility following the concerns she expressed.
2. In October of 2018, Parent became concerned when she learned Student had a failing grade in English class. Parent emailed English Teacher on October 16, 2018, to ask how she could better support Student's learning at home. Parent ended this email by saying: "His 504 meeting is coming up, do we need to look at more accommodations, or an IEP? I wanted to get your thoughts on all of this and make sure that [Student] will succeed in your class." English Teacher and Parent then exchanged their thoughts and suggestions in a series of emails about Student's tendency to value "speed over accuracy" when completing homework. (Ex. 3 at 4-5.) The subject of an IEP was not mentioned by either party again during this exchange. The SCO finds that this email did not constitute a formal request for an IEP, but rather Parent asking for English Teacher's opinion on possible supports and accommodations for Student.

Parent's November 28 email constituted a request for an evaluation

3. The SCO finds that Parent's email on November 28, 2018, constituted a formal request for an IEP evaluation based on Findings of Fact ## 5-9 below.

4. By late November, Student was still failing English class. In anticipation of Student's 504 meeting scheduled for the next day, Parent sent English Teacher an email on November 28, 2018, with the subject line: "I need your support to ask for an IEP for English for [Student]." Pertinent to this Complaint, Parent wrote "the absolute last step I ever wanted to take for [Student's] education was the implementation of an IEP, but I feel that I have no choice. If he is getting this much support from a teacher he has a fantastic relationship with, and the 504 accommodations are being followed, yet he is failing, I see no other option. I am in desperate need of your support with this at the 504 meeting tomorrow." (Ex. 3 at 1.)

5. English Teacher replied to Parent explaining his role as a general education teacher in the IEP process and his thoughts on Student's recent performance in class. English Teacher wrote, in part: "first and foremost, I want to say that diagnosing and providing IEPs is not in my control." He then explained that Student had been utilizing some of the 504 Plan accommodations available, and that he was still catching up on some grading. English Teacher further explained his hope that updated grades would help the team know if Student was receiving the appropriate amount of support. (Ex. F at 33-34.) English Teacher also copied School Counselor on this reply.

6. Parent wrote back and reiterated her request to have English Teacher present at the 504 Plan meeting to explain why Student was failing English class despite the current 504 Plan accommodations. She replied, in part: "I know it is not within your power to grant an IEP (that is why I asked for support from you, not implementation [sic]). It is within your power to provide evidence of how you have followed [Student's] current 504 in the classroom, what has worked and hasn't and why he is not passing." (Ex. F at 33.)

7. Unlike Parent's October email seeking options for additional accommodations, Parent's email on November 28 clearly requested help in asking for an IEP in the subject line of the email. In addition, Parent clearly stated her concern that the accommodations in place were not working, and requested an IEP in place of a 504. Although the SCO did not find the October email detailed enough to constitute a request for evaluation, it is relevant that this is the second time in six weeks that Parent had referenced an IEP when discussing concerns about Student's academic performance.

8. Notably, English Teacher included School Counselor on this email exchange in order to involve another member of Student's team in the discussion and to "have another set of eyes" on this issue. English Teacher also felt that School Counselor would "have a better idea if the team needed to move on an IEP or put it on hold." (Interview with English Teacher.)

9. Indeed, School Counselor is a very involved member of Student's support team at High School, and very knowledgeable regarding Student's history and academic needs. School Counselor met Student in 8th grade, and has worked with Student since freshman year. He has been involved in developing Student's 504 plan since Student entered high school. Importantly, he also maintains diligent contact between Student's teachers and Parents. In this way, School

Counselor functions as a hub of communication between Parent and school staff, and the SCO finds that it was appropriate for English Teacher to bring Parent's request for an IEP to School Counselor's attention. (Interview with School Counselor.)

The District rejected Parent's request for an evaluation on November 29, 2018

10. Based on the facts described below, the SCO finds that the District refused Parent's request for an evaluation on November 29, 2018, during Student's 504 meeting.

11. School Counselor and Parent's account of the discussion that occurred during the 504 meeting differs. First, School Counselor does not recall anyone, including Parent, discussing an IEP at the 504 Plan meeting. Although School Counselor recalls discussing the November 28 email with Parent, he maintains that an IEP for Student was not discussed. Further, School Counselor stated that he did not view Parent's email as a request for an evaluation, but rather as an inquiry about available interventions and resources. For example, School Counselor believed Parent's primary concern was getting Student additional help in English class. To that end, the 504 team modified Student's plan to add time-and-a-half for assignments in English class, in addition to the extra time Student already received for tests and quizzes. School Counselor also stated Parent was "engaged and asking questions" during this meeting, and that she was always an active participant in Student's 504 Plan meetings. (Ex. 2 at 3; Interview with School Counselor.) Finally, School Counselor stated that the School Psychologist had previously "looked at Student" and did not believe Student would qualify for special education and related services. (Interview with School Counselor.)

12. According to Parent, she and School Counselor had a short discussion before the 504 meeting started. During this discussion, School Counselor said "I heard you wanted us to look at an IEP." When Parent replied that she did, School Counselor explained that the Response to Intervention (RtI) team had looked at Student's information the day before, and determined that Student would not qualify for an IEP. Specifically, Parent remembers School Counselor saying that the RtI team had reviewed Student's grades, and since they were generally improving, the team decided Student would not be eligible for an IEP. The team then proceeded with the meeting and added the accommodations described above. (Interview with Parent.)

13. When the SCO asked both English Teacher and School Counselor what steps they took when they suspected a student may need special education but did not have an IEP, both described the RtI program as implemented at High School. RtI generally consists of a tiered system of supports and interventions used to respond to individual student's needs. (see Colorado Multi-Tiered System of Supports (CO-MTSS), Response to Intervention (RtI), and Positive Behavioral Interventions and Supports (PBIS) Crosswalk, found at: <https://www.cde.state.co.us/mtss/mtss-rti-pbis-crosswalk>.) School Counselor explained that the RtI team at High School meets every two weeks. At these meetings the team looks at all available information and talks to both teachers and parents. The team then decides what

interventions to put in place, and monitors the student's progress. If the initial interventions are not successful, then the team would go "up the ladder" to more intensive interventions. If a student still continued to struggle, the team would then consider conducting evaluations and testing. (Interviews with School Counselor and English Teacher.)

14. The SCO considers Parent's account of the 504 meeting credible, and finds it more likely than not that Parent and School Counselor discussed her request for an IEP at Student's 504 meeting. It is unlikely that Parent would express her desire for an IEP evaluation the day before this meeting and then fail to mention it at all during the actual meeting, especially given School Counselor's description of Parent as an active participant at the meetings. Also, it is undisputed that these two parties discussed Parent's email at the meeting. Considering the subject line of and contents of the email, it would be unlikely that a discussion about the email would fail to include Parent's request for an IEP. Additionally, both English Teacher and School Counselor described High School's RtI process when asked about how special education referrals are handled. Part of this process is discussing student's progress on different levels of intervention and deciding if an evaluation is necessary. Though School Counselor did not say the RtI team discussed Student's need for an IEP evaluation the previous day, Parent's recollection of what School Counselor told her regarding the RtI team and Student is consistent with the RtI process described to the SCO by both School Counselor and English Teacher. Also, School Counselor's statement that the School Psychologist had previously looked at Student and did not believe he would be eligible for special education is consistent with Parent's account that High School informally considered Student for an IEP and determined that he would not be eligible.

15. The District admitted in its Response that no PWN was issued after this meeting. This concession is based on the District's belief that Parent's email on November 28 did not constitute a request for an evaluation, so therefore PWN was not required. (Response at 5.)

Subsequent evaluation and determination that Student is not IDEA eligible

16. On December 20, 2018, Parent filed this state complaint against the District. The same day, Parent's Counsel emailed Deputy Legal Counsel for the District stating "at this time we are requesting that [Student] undergo an immediate evaluation for an expedited IEP." (Ex. C at 8.) The District contends that this was the first request for an IDEA evaluation made by Parent. (Response at 3.)

17. On January 8, 2019, the District provided Parent with a combined PWN and Consent for Initial Evaluation. Parent signed and returned the consent form on January 10, 2019. (Ex. C at 4-6).

18. The District conducted an initial evaluation of Student in February 2019. (Ex. H.)

19. An eligibility meeting was held on March 7, 2019. At that meeting, the IEP team determined that Student is not eligible for special education and related services. Parent participated in this discussion and did not contest the determination. (Ex. J.)

CONCLUSIONS OF LAW

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

Conclusion to Allegations One and Two: Although the District did conduct an initial evaluation of Student following Parent’s request on December 20, 2018, the failure to request consent or issue prior written notice following Parent’s request for an evaluation on November 28, 2018, constituted a procedural violation of IDEA.

Either a parent or a School District may request an initial evaluation to determine if a child is eligible for special education and related services. 34 C.F.R. § 300.301(b); ECEA Rule 4.02(3)(a). After a Parent requests an initial evaluation, the School District has two options: (1) request parental consent to conduct the evaluation, or (2) refuse to conduct an evaluation and provide parents with Prior Written Notice. 34 C.F.R. § 300.503.

Here, the question is whether Parent requested a special education evaluation on November 28, 2018, as alleged. For the reasons explained below, the SCO concludes that Parent’s November 28th email constituted a request for an evaluation. The IDEA “does not require parents to use specific language when requesting an evaluation.” *Renaissance Acad.*, 115 LRP 9496 (SEA OH 2/11/15). Accordingly, the fact that Parent did not specifically state “I am requesting a special education evaluation” is not dispositive. Correspondingly, school districts should not be expected to recognize and respond to any parental request for assistance or concern about academic performance as a request for a special education evaluation. *El Paso County Sch. Dist. 3, Widefield*, 60 IDELR 117(CO SEA 11/1/12).

In concluding that the November 28 email was sufficiently detailed to constitute a request for evaluation, the SCO considered the following facts to be persuasive. First, the subject line and content of the email itself made clear that Parent believed Student needed an IEP to meet his needs because the 504 plan was not providing enough support. For example, Parent stated in the subject line of her email that she wanted English Teacher’s support at Student’s 504 meeting to ask for an IEP. In the body of the email Parent further expressed her frustration and concern that Student continued to struggle in English class, despite his 504 Plan accommodations being implemented. Second, Student had already been identified as having a disability under 504 and continued to struggle academically. Moreover, this was the second time in six weeks that Parent had referenced an IEP, as well as Student’s disability, when expressing her concerns about Student’s academic performance.

Finally, the actions taken by School Counselor following the November 28 email support a conclusion that he considered the email a request for an evaluation. According to Parent’s account of the 504 meeting, School Counselor took that request to the Rtl team, who concluded Student would not qualify. Although Parent and School Counselor’s account of the meeting differ, the SCO found Parent’s explanation more credible, as more fully described in FF #15.

A school district is not obligated to conduct an evaluation whenever a parent requests one, and the District here may have been defensible in its refusal to conduct an evaluation on November 28, 2018. The IDEA does require, however, that a school district provide Prior Written Notice to parents within a reasonable time whenever it proposes or refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of FAPE to a child. 34 C.F.R. § 300.503(a). If the District refuses to conduct an initial evaluation, it must provide prior written notice, explaining the District's reasons for not completing the evaluation, as well as a copy of the IDEA Part B procedural safeguards. 34 C.F.R. § 300.503(b).

Relevant here, an Rtl team's conclusion that a student is not eligible for special education does not excuse the District from its obligation to issue prior written notice when presented with a parental request for evaluation. In *Memorandum to State Directors of Special Education*, the Office of Special Education Programs issued clear direction on this issue:

The regulations at 34 C.F.R. § 300.301(b) allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. The use of Rtl strategies cannot be used to delay or deny the provision of a full and individual evaluation... If, however, the LEA does not suspect that the child has a disability, and denies the request for an initial evaluation, the LEA must provide written notice to parents explaining why the public agency refuses to conduct an initial evaluation and the information that was used as the basis for this decision.

Memorandum to: State Dir. of Special Educ., 56 IDELR 50 (OSEP 2011).

Consequently, the SCO concludes that the District did not provide timely PWN to Parent when it refused to evaluate Student following Parent's request on November 28, 2018. Although the IDEA does not specify an exact time during which PWN must be issued, school districts must provide it within a reasonable time. Timely PWN is important because it "provides parents, in the case of a proposal or refusal to take action, a reasonable time to fully consider the change and respond to the action before it is implemented." *Letter to Chandler*, 59 IDELR 110 (OSEP 2012). Here, the District diligently responded to Parent's December 20th request for evaluation, and provided PWN and a consent for an initial evaluation on January 10, 2019. Had this actually been Parent's first request for an evaluation, the SCO would not find a violation. However, Parent requested an evaluation on November 28th, and the District issued PWN 44 days later, and only after Parent had filed a State Complaint. For these reasons, the SCO concludes the District did not provide timely PWN, which resulted in a procedural violation of the IDEA.

Having concluded that the failure to issue PWN resulted in a procedural violation, the SCO must now consider whether the procedural violation resulted in a denial of FAPE. A procedural violation results in a denial of FAPE if it "seriously impair[s] the parents' opportunity to participate in the IEP formulation process, result[s] in the loss of educational opportunity for

the child, or cause[s] a deprivation of the child’s educational benefits. See 34 C.F.R. § 300.513(a)(2).

Here, the procedural violation did not cause substantive harm. First, Student was evaluated and determined not eligible for special education and related services on March 7, 2019. Parent participated in this eligibility determination and did not contest either the results of the evaluation or the determination that Student is not eligible. Because Student is not eligible for special education, the procedural failure did not result in a loss of educational opportunity, or deprive Student of any educational benefit. “A child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place.” *R.B., ex rel. F.B. v. Napa Valley Unified School Dist.*, 496 F.3d 932, 942 (9th Cir. 2007).

Second, the failure to issue PWN did not significantly impede Parent’s participation. The primary purpose of prior written notice is to “ensure parents are aware of the decision so that they may pursue procedural remedies.” *M.B. ex rel. Berns v. Hamilton Southeastern Schools*, 668 F.3d 851, 861 (7th Cir. 2011). Here, Parent sent a copy of the State Complaint to the District via email on December 20, 2018 (CDE received the complaint in the mail December 26th), 23 days after Student’s 504 Plan meeting. The fact that Parent utilized the State Complaint process such a short time after the District’s refusal to evaluate shows that she knew how to, and did, pursue procedural remedies. Because the lack of timely PWN did not impede Parent’s ability to utilize the procedural safeguards, there is no substantive violation. Accordingly, the remedies ordered below do not include individualized relief for Student.

REMEDIES

The SCO concludes that the District has violated the following IDEA requirements:

1. Failing to provide Prior Written Notice (PWN) of its refusal to conduct an initial evaluation, consistent with 34 C.F.R. § 300.503

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

1. By May 10, 2019, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violations 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) Training that addresses special education referrals and PWN, in accordance with this Decision, must be provided to High School’s school counselors, any other faculty members at High School that lead the RtI process, High School staff responsible for initiating special education referrals, and any other High School or District staff deemed appropriate by the District, no later than May 28, 2019.

- b) Evidence that such training has occurred must be documented (i.e. training schedule, agenda, materials, and legible attendee sign-in sheets, with roles noted) and provided to CDE no later than June 4, 2019. Additionally, the District may use alternate methods to provide this training, including an online presentation.

CDE will approve or request revisions to the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance.

Please submit the documentation detailed above to the Department as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Beth Nelson
1560 Broadway, Suite 1100
Denver, CO 80202-5149

NOTE: Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the Department.

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 C.F.R. § 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 9th day of April, 2019.

Thomas Treinen
State Complaints Officer

Appendix

Complaint, pages 1-9

Exhibit 1: 2017 Section 504 Eligibility Determination and Plan

Exhibit 2: 2018 Section 504 Eligibility Determination and Plan

Exhibit 3: Email correspondence December 2018

Response, pages 1-6

Exhibit A: *504 plans submitted with Complaint as Exhibits 1 and 2*

Exhibit B: Excel spreadsheet documenting Student's Section 504 accommodations

Exhibit C: PWN and Consent for Initial Evaluation dated January 8, 2019

Exhibit D: Notice of Meeting dated February 20, 2019

Exhibit E: Student's grade reports

Exhibit F: email correspondence

Exhibit G: list of individuals with knowledge of complaint allegations

Reply, pages 1-8

Interviews with:

English Teacher

School Counselor

Parent