

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

State-Level Complaint 2019:537
Logan RE-1 Valley School District

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on May 16, 2019, by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

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

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 May 16, 2018 through May 16, 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.

SUMMARY OF COMPLAINT ALLEGATIONS

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

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., § 300.000, Section 300.000 or Rule 1.00).

1. Failing to conduct a reevaluation of Student after being alerted in the fall of 2018 that Student was the victim of bullying, consistent with 34 C.F.R. §§ 300.303 through 300.305.

FINDINGS OF FACT

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

1. Student is a twelve-year-old child currently eligible for special education and related services under the disability category of Specific Learning Disability (SLD). Student transferred to School, which is located within the District, in the fall of 2018 to begin her fifth grade year. *Exhibit A*, p. 26.
2. Student is described as a very social, outgoing, and easygoing person. *Interviews with Parent and Classroom Teacher*. Student enjoys playing sports and spending time with her family. *Exhibit A*, p. 30.
3. Student's disability "hinders her from learning at the same rate or in the same way as her [same age] peers. She needs additional practice of skills to ensure long term retention of information." *Exhibit A*, p. 32. Classroom Teacher explained that Student works hard in class, and actively participates, but struggles and is below grade level in most subjects. *Interview with Classroom Teacher*.
4. This complaint concerns claims by Student that she was the victim of bullying beginning in late October or early November 2018. Around that time, Student, Student 2, and others from their class attended a sleepover. At the sleepover, Student 2 accused Student of stealing her cellular phone. The phone was found two days later, but the two students, formerly friends, began to engage in a conflict that lasted until January 2019. Parent believes Student was bullied by Student 2 and suffered emotional harm as a result. Parent's belief that the District should have proposed to reevaluate Student after learning of the alleged bullying was the impetus for filing this state complaint.

October 12, 2018 reevaluation and revised IEP

5. On September 19, 2018, soon after Student transferred to School, Special Education Teacher sent Parents a Prior Written Notice (PWN) and consent for reevaluation of Student. Special Education Teacher believed that the services on Student's transfer IEP were insufficient for her needs, and requested that a reevaluation be conducted in the areas of cognitive and academic functioning, language, and social and emotional functioning. *Exhibit A*, p. 44.

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

6. Pertinent to this decision, the evaluation noted no behavioral or social emotional concerns: “no significant concerns were noted on the BASC-2. [Student] benefits from social emotional learning activities as well as opportunities to build self-esteem and self-efficacy.” *Exhibit 9*, p. 15. The Behavior Assessment System for Children (BASC-2) is a reliable and comprehensive assessment used to “aid in the differential diagnosis and classification of a variety of emotional and behavioral disorders of adolescence and childhood.” *Exhibit 9*, pp. 57-58.
7. On October 12, 2018, a properly constituted IEP team convened and updated Student’s IEP based on the results of the reevaluation. Student’s direct service minutes were increased from 30 minutes a day in both reading and math, to 90 minutes of daily reading intervention, 90 minutes of math intervention, and 30 minutes of small group writing instruction. *Exhibit A*, p. 39.
8. Though the reevaluation did not note social emotional concerns, the IEP Team determined that Student would benefit from participating in a “friendship group.” The IEP Team felt that the friendship group could help Student “develop social skills, and could be an appropriate way to monitor [Student’s] social functioning and progress.” *Response*, p. 5. The District contracts with Counselor to provide counseling and social emotional services for its students. Friendship groups are open to all students, and provide help and support for social emotional issues, anxiety, problems students are facing at home, and any other issues students may need support with. Referrals can come from Counselor, general education teachers, IEP teams, or anyone else that feels a student could benefit from the extra support. Student participated in this group from October 2018 until the end of the school year in May 2019. *Interview with Counselor*.

Alleged bullying and District’s response

9. Parent explained that in October 2018 Student began complaining that another student in class was being mean to her. After a while, Parent stated that Student’s description of the harassment went from simply being mean to being physically accosted by Student 2. *Interview with Parent*. Student’s description in a May 2019 evaluation report is consistent with Parent’s account: “[Student] reported that, at the beginning of the school year, another student in her class regularly engaged in unkind physical behaviors (e.g., poking her in her back, kicking her legs/heals, pulling her hair) and verbal behaviors (e.g., put-downs, excluding remarks, verbal threats).” *Exhibit 9*, p. 60.
10. On November 18, 2018, Student reported to Parent that another student in class had told her that Student 2 had said “somedays I just want to kill Student.” Parent was concerned and called School and spoke to Principal. Principal explained that he was aware of the situation and that he had spoken to the three students involved. Principal determined that Student 2 made the statement, however it was unclear whether she made it as a joke, and Principal ultimately did not believe the statement was a threat.

Interview with Parent; Exhibit A, p. 59; Response, p. 6. According to Parent, Principal suggested that Student attempt to “kill her with kindness” in an attempt to defuse the situation. *Interview with Parent; Exhibit A, p. 59.*

11. During November and December 2018 Student continued to report harassment by Student 2 to Parent and School staff. However, staff did not see bullying behavior, but rather a mutual conflict between two socially immature students. *Interviews with Classroom Teacher and Special Education Teacher.*
12. On December 18, 2018, at Parent’s request, a meeting was held to discuss the situation with Classroom Teacher, Special Education Teacher, and Principal. School staff explained to Parent that while the two students were not getting along, they had not witnessed any physical harassment between Student and Student 2, and neither student had received an office referral for any disciplinary issues. It was their belief that the dispute was typical of conflict between fifth graders, and not bullying. *Interviews with Classroom Teacher, Special Education Teacher, Parent.* However, with three days until the winter break, School staff agreed to take measures to keep Student and Student 2 separated.
13. On January 8, 2019, following the winter break, another meeting was convened to discuss the alleged bullying. In attendance were Parent, Principal, Classroom Teacher, Special Education Teacher, School Psychologist, and Special Education Director. At this meeting School staff reiterated their position that the conflict between Student and Student 2 was simply two fifth graders who could not get along, and did not constitute bullying. *Interview with Parent.* Despite this belief, the District offered to make arrangements to alleviate Parent’s concerns.
14. First, a check-in/check-out system was put in place where Special Education Teacher would speak to Student twice a day to make sure everything was okay. If Student reported issues with Student 2, Special Education Teacher would investigate the concerns. An email would be sent home nightly to keep Parents apprised of the situation and allow them to easily communicate any issues Student reported to School staff. Second, Special Education Director explained that the District was going to conduct an independent investigation into the bullying allegations. The District asked Elementary School Dean, the dean of students at another school within the District, to conduct the investigation. *Interviews with Parent and Special Education Director.* However, as detailed below, before this meeting Parent had retained legal counsel and had already decided to apply for a Temporary Protection Order (TPO) on Student’s behalf against Student 2. *Interview with Parent.*

Temporary Protection Order and Parent's revocation of consent for IDEA services

15. On January 22, 2019, Parent applied for and was granted a TPO on Student's behalf against Student 2. The TPO prohibits Student 2 from having any contact with Student, except for incidental contact at School. However, the TPO specifies that Student 2 may not speak, make gestures, or make eye contact with Student. Additionally, Student 2 must keep a distance of at least 100 yards from Student. *Exhibit 9*, pp. 16-19.
16. On January 23, 2019, Legal Counsel for the District sent a letter to Parent's Counsel outlining the District's response to the TPO. The letter explained that in order to comply with the TPO, the District planned to ensure a staff person would be with Student 2 for the entirety of each school day to ensure there would be no contact between the two students. Additionally, the District reiterated its decision to conduct an independent investigation of the alleged bullying. *Exhibit 9*, pp. 20-21.
17. Parent stated that after the TPO was in place, the bullying stopped immediately, and Student bounced back to her "normal, bubbly self." *Interview with Parent; Exhibit 9*, p. 39. Parent recently returned to court and renewed the TPO for an additional 6 months. *Interviews with Parent and Special Education Director*.
18. Ensuring that the TPO is not violated has caused the District to expend considerable resources. A staff member must remain with Student 2 throughout the entire school day to ensure she does not make any contact with Student. *Interview with Special Education Director*. Additionally, Special Education Teacher stated that at times Student will follow Student 2 around the playground in order to make Student 2 move to a different area. *Interview with Special Education Teacher*. Another staff member reported that Student threw a ball at Student 2 the day the TPO was put into place. *Exhibit 9*, p. 24.
19. Also on January 23, 2019, Student told Parent that Special Education Teacher had reprimanded her for being late to class, and as punishment made her sit in an isolated corner of the classroom to do her work. Student told Parent she no longer felt safe in Special Education Teacher's class. Parent then demanded School bring in another special education teacher, which School refused to do. *Interview with Parent*. During the subsequent independent investigation, Elementary School Dean noted: "[f]urther investigation found she was in the corner because she was doing a test for 10 minutes on a computer that was in the corner, the class was spread out, and after she finished, all kids were gathered around the table." *Exhibit 9*, p. 23.
20. On January 24, 2019, Parent requested that Student no longer attend class in Special Education Teacher's classroom. Staff explained that Special Education Teacher was the sole special education provider at School. Therefore, as long as Student received special education and related services pursuant to her IEP, she had to remain in Special

Education Teacher's classroom. *Interview with Parent*. Based on this, Parent executed a hand-written document stating: "Temporary as of Jan. 24th please remove [Student] from IEP classes!" *Exhibit 9*, p. 22.

21. Parent disputes that Student was withdrawn from special education, instead stating that he took steps to remove her from an unsafe classroom. *Interview with Parent*. However, regardless of Parent's motivation, the SCO finds that Parent's hand-written request to remove Student from Special Education Teacher's classroom constituted a revocation of consent to provide special education and related services. The District provided Parents with PWN on February 13, 2019 and subsequently discontinued Student's special education and related services. *Exhibit 4*, p. 2.

Educational and Social Emotional impact

22. Parent explained that during the period of alleged bullying, Student went from being the "life of the party" to being withdrawn and introverted, and that her grades "plummeted." However, neither of these claims is supported by the record. Student's report card from fall 2018 shows Student's grades remained identical from the first quarter to the second, with the exception of her science grade, which improved. Student earned "2s" in all academic subjects, denoting her performance "approached" standards. As noted above, her grade in science improved from a "2" to a "3" indicating her performance "met" standards. *Exhibit 6*, p. 3. Additionally, none of School's teachers or staff reported seeing any change in Student's social and emotional state during this period.
23. When asked if she believed Student's academic or social emotional needs changed during this time, Special Education Teacher replied "absolutely not, [Student] was making good academic gains, and her progress reports showed she was doing well." *Interview with Special Education Teacher*. Student's January 15, 2019 IEP Progress Report documented Student's progress on her IEP goals from the date they were created on October 12, 2018 through the end of the second quarter of the school year. That Progress Report shows that Student made progress on all three of her annual IEP goals during the period of alleged bullying. For instance, as a measure of Student's progress on her reading goal, her score on the Phonological Awareness Literacy Screening (PALS) assessment improved from a 30/62 in the fall to a 33/62 in the winter. *Exhibit 10*. Special Education Teacher further explained that there are monthly team meetings at School to discuss students' progress. If team members believe a particular student is not making progress or his or her needs have changed, immediate action is taken, including requesting consent for reevaluation if necessary. *Id.*
24. Classroom Teacher similarly reported no change in Student's demeanor during the period of alleged bullying. *Interview with Classroom Teacher*. This is consistent with her

statement made in May 2019 as part of the Independent Educational Evaluation (IEE) the District provided to Parents:

[Student's] parents reported to [Classroom Teacher] that [Student] was fearful and stressed at school when faced with social stressors in the fall; however, [Classroom Teacher] did not observe any differences in [Student's] behavior or mood. She remained 'bubbly' and, in [Classroom Teacher's] observation, there have been no changes in [Student's] presentation over [the] course of the 2018-2019 school year.

Exhibit 9, p. 39. Additionally, a BASC-3 was completed as part of Student's May 2019 IEE. Based in part on this assessment, the evaluator noted "[Student's] social and emotional functioning does not currently represent an area of clinical concern." *Exhibit 9*, p. 65.

25. Classroom Teacher was concerned that Student's special education and related services were stopped because she believes Student needs more one-on-one instruction than Classroom Teacher can provide in the general education setting. *Interview with Classroom Teacher*. In the IEE, Classroom Teacher spoke to Student's academic functioning and behavior at School: "[Student] needs a lot more academic support than what a general education teacher is able to provide. Academic instruction in a large group format is typically not effective for her." And "with respect to academic skills, [Student] is at least two grade levels behind in all academic areas. Over the course of the school year, she has met her 'growth goals;' however she is still well below grade level." *Exhibit 9*, p. 41.
26. Counselor also did not recall any change in Student's demeanor during the course of the school year, and reported that she remained outgoing, talkative, and bubbly. Significantly, Counselor recommended Student 2 join the friendship group after hearing Student mention her repeatedly. Based on that referral, Student 2 briefly attended the friendship group so she could work on conflict resolution skills with Student and the other members. Student 2 participated in the group for 2-4 weeks before School decided to separate Student and Student 2. Counselor also explained that if she feels a student in one of her groups is displaying concerning behavior or changing needs, she contacts the school psychologist or classroom teacher to get more information. Counselor never saw a change in Student's behavior or demeanor, and therefore never inquired further. *Interview with Counselor*.

Bullying Investigation

27. On January 25 and 29, 2019, Elementary School Dean conducted an independent investigation into Student's bullying claims. Elementary School Dean spoke to Student,

Student 2, as well as five staff members and seven other students at School. The consensus opinion of the staff and other students interviewed was that Student and Student 2 had both been unkind to each other over the previous few months, mostly to include name calling and dirty looks. These parties all agreed, however, that the conflict was mutual, and no one reported seeing any physical fighting or aggression between them. *Exhibit 9*, pp. 23-28. Based on this, Elementary School Dean wrote, in part:

After talking with staff and students who interact with [Student] and [Student 2] on a regular basis, both girls seem to have been at fault for some unkind behavior over the last few months. This behavior on both sides does not constitute bullying. Rather, this behavior is conflict arising from misunderstandings /miscommunications and making judgments about the other that have caused feelings of mistrust or dislike.

Id. p. 27.

Elementary School Dean further stated: "It is my opinion that these two girls are engaging in immature emotional response to conflict and have not been able to bring it to a resolution in a healthy manner." *Id.*

28. Elementary School Dean also noted that she could not "do follow-up questions with [Student] on the second day, as [Parent] requested I not talk to her unless their lawyer was present." *Id.* p. 28.
29. Special Education Teacher's opinion of the situation aligns with Elementary School Dean's conclusion in her report. Special Education Teacher explained that both Student and Student 2 are similar academically and in their social development. According to Special Education Teacher, both students function two to three years behind their peers academically and socially. Accordingly, the interaction between the two was "more like 3rd graders." *Interview with Special Education Teacher.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation 1: The District was not obligated to conduct a reevaluation in this circumstance because there was no indication Student's educational or social and emotional needs had changed or were not being met.

The IDEA requires a district to conduct a reevaluation under two circumstances: "(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation." 34 C.F.R. § 300.303(a). Additionally,

reevaluations “[m]ay occur not more than once a year, unless the parent and the [district] agree otherwise.” 34 C.F.R. § 300.303(b)(1).

The bullying of a student receiving special education and related services may trigger a district’s obligation to reevaluate the student. *See, e.g., Southmoreland Sch. Dist.*, 111 LRP 50995 (SEA PA 6/18/11) (finding district responded properly to alleged bullying by investigating, disciplining, and separating students, and that, even with a decline in grades, there was insufficient evidence to show student’s educational programming was adversely impacted as a result of alleged bullying).

As part of an appropriate response to bullying, a district should “convene the IEP Team to determine whether, as a result of the effects of the bullying, the student’s needs have changed such that the IEP is no longer designed to provide meaningful educational benefit.” *Dear Colleague Letter*, 61 IDELR 263 (OSEP 2013). “[A]ny bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied.” *Id.*; *see also T.K. v. New York City Dept. of Educ.*, 810 F.3d 869 (2nd Cir 2016). However, not every incident of student to student conflict amounts to bullying. *Jenison Pub. Sch. Dist.*, 47 IDELR 81 (OCR 2006) (on-going feud between former friends did not constitute bullying); *see also El Paso Ctny. Sch. Dist. 3, Widefield*, 60 IDELR 117 (SEA CO 11/1/12) (bullying may constitute denial of FAPE if it negatively impacts student’s ability to learn).

The SCO first notes that the timeframe during which a reevaluation may have been required is narrow due to Parent’s revocation of consent for special education and related services on January 24, 2019. After the District provided Parents with PWN on February 13, 2019, it was obligated to discontinue Student’s special education services. 34 C.F.R. § 300.300(b)(4)(i). Additionally, following Parent’s written revocation of consent, the District cannot be “in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services.” 34 C.F.R. § 300.300(b)(4)(iii). For these reasons, the SCO’s analysis is confined to the period between late-October 2018 and February 13, 2019.

For the following reasons, the SCO concludes that the District’s obligation to reevaluate Student was not triggered by reports of alleged bullying between October 2018 and February 13, 2019.

First, though a district may be liable for a denial of FAPE if it is deliberately indifferent to allegations of bullying, that was not the case here. *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 651 (9th Cir. 2005). The District, as in *Southmoreland School District*, took proper steps to address the situation by attempting to separate the two students, collaborating with Parents by way of the check-in/check-out protocol, and commissioning an investigation by a neutral party. That investigation subsequently confirmed what School staff already believed based on their own observations and inquiries into the allegations, namely that the conflict between the two students was mutual and neither student was being bullied.

Second, contrary to Parent's claim that Student's grades suffered during the period of time before the restraining order was issued, Student's grades remained virtually identical from the first quarter of the fall 2018 semester to the second quarter. Even if had Student's grades had declined, that would not necessarily indicate a denial of FAPE. *See Southmoreland School District*, 111 LRP 50995 (SEA PA 6/18/11). However, Student earned "2s" in all of her academic subjects in the first and second quarter of the 2018-19 school year, with the exception of her grade in science, which improved, as shown at FF 22. Student's consistent grades support the proposition that any alleged bullying did not adversely impact her educational programming. Additionally, Student's January 23, 2019 progress report indicated that Student made progress on all of her annual IEP goals during the period in question, as noted at FF 23.

Third, as detailed in FF 23-26, none of the teachers or staff working with Student saw any change in her behavior or social emotional status during this time. School staff did not observe Student to be quiet, withdrawn, or introverted during this period. Rather, Student remained outgoing, talkative, and "bubbly" throughout the entire school year. Additionally, the BASC-2 administered in October 2018 and the BASC-3 administered in May 2019 did not show significant social emotional concerns.

Finally, as confirmed by Elementary School Dean's investigation report, School staff did not perceive the conflict between Student and Student 2 as bullying. Elementary School Dean interviewed five staff members and seven students, all of whom had knowledge of the conflict between Student and Student 2. Every person interviewed reported the two students were unkind to each other, however no one interviewed believed that the conflict constituted bullying. Student and Student 2 would exchange dirty looks and talk behind each other's backs, however all agreed the conflict was mutual, and no one perceived an imbalance in power. "Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time." *Dear Colleague Letter*, 61 IDELR 263 (OSEP 2013). Elementary School Dean's conclusion that the conflict did not constitute bullying is consistent with witness accounts that neither student had more power than the other, and that both were acting as aggressors. Rather than bullying, the concerning conduct was properly considered a conflict between two former friends. *See Jenison Pub. Sch. Dist.*, 47 IDELR 81 (OCR 2006) (on-going feud between former friends did not constitute bullying).

For these reasons, the SCO concludes that the District's obligation to reevaluate Student was not triggered between October 2018 and February 13, 2019, and therefore finds no violation of IDEA.

REMEDIES

Concluding that the District has not violated IDEA, no remedy is 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 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46607 (August 14, 2006).

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

Dated this 15th day of July, 2019.

Thomas Treinen
State Complaints Officer

Appendix

Complaint, pages 1-20

Exhibit A: IEP; evaluation; email correspondence; protection order; FERPA release

Response, pages 1-12

- Exhibit 1: CDE IEP procedural guidance manual
- Exhibit 2: 4/16/18 IEP; 8/24/18 IEP and meeting notes; 10/12/18 IEP
- Exhibit 3: refer to exhibit 2 & 6
- Exhibit 4: 9/19/18 PWN; 2/13/19 PWN
- Exhibit 5: 8/16/18 Notice of Meeting; 9/28/18 Notice of Meeting
- Exhibit 6: grade and progress reports
- Exhibit 7: letters and email correspondence
- Exhibit 8: District and School staff with knowledge of complaint allegations
- Exhibit 9: Various documents
- Exhibit 10: IEP progress reports

Interviews with:

Parent
Classroom Teacher
Special Education Teacher
Special Education Director
Counselor