
LETTER OF RESOLUTION PROCEDURAL HISTORY

On December 11, 2015, the South Carolina Department of Education (SCDE) received a complaint filed against York County School District Four (District) by xxxxxx, (Complainants), on behalf of their son, xxxxx (Student), a student who attends Sugar Creek Elementary School (SCE). The SCDE received confirmation that the District also received a copy of the complaint on December 11, 2015.

The Complainants alleged that the District violated the rights afforded to the Student under the Individuals with Disabilities Education Act (IDEA), the applicable federal and State Board of Education (SBE) regulations, and SCDE policies and procedures by failing to provide the Student a free appropriate public education (FAPE) due to the District's failure to follow appropriate child find procedures as required by the IDEA. More specifically, the Complainants allege that the District did not properly identify the Student under the child find requirement under the IDEA, intentionally denied the Student a FAPE, did not comprehensively test the Student in all areas related to suspected disabilities, used the Student's placement in the gifted and talented (GT) program to deny special education services, did not comply with the independent educational evaluation (IEE) requirement in 34 C.F.R. § 300.502, required the parents to pay for independent testing to prove the Student has a disability, and misplaced or destroyed records relevant to the Student's disability determination in violation of its own policy and procedure guidelines.

On December 11, 2015, the SCDE forwarded correspondence to Amy Maziarz, EdD, Director of Special Services, requesting a written response to the complaint no later than Monday, December 21, 2015. On December 14, 2015, the District submitted verification that it provided the Complainants the procedural safeguards in response to their complaint in accordance with the IDEA regulation 34 C.F.R. § 300.504.

On December 21, 2015, the District asked for an extension to submit its response. The SCDE granted an extension until December 22, 2015, at the close of business. On December 22, 2015, the District submitted its written response to the complaint and the SCDE provided a copy of the District's written response to the Complainants. On December 30, 2015, the SCDE received the Complainants' reply to the District's written response. The Complainants submitted additional documentation supporting the allegations on January 19, 2016. The SCDE requested additional documentation from the District on January 25, 2016, which the District submitted on January 26, 2016. The Complainants submitted additional information on February 5, 2016. The District submitted additional documentation on February 5, 2016.

The SCDE carefully reviewed all of the information submitted by the District and the Complainants and applied the IDEA, the applicable federal and SBE regulations, and SCDE policies and procedures. After a review of the facts and evidence submitted by the District and the Complainants, the SCDE renders a decision in the following manner.¹

¹See attached Appendix for legal standards.

ISSUES

- 1) Whether the District failed to follow appropriate child find procedures as required by the IDEA;
- 2) Whether the District failed to comply with the IEE requirement in 34 C.F.R. § 300.502; and
- 3) Whether the District failed to provide the Complainants with educational records upon request.

FINDINGS OF FACT

- The District objects to the SCDE's consideration of alleged violations occurring prior to December 11, 2014, based on 34 C.F.R. § 300.153(c) and S.C. Reg. 43-243(II)(K)(3)(c).
 - The District objects to the SCDE's consideration of handwriting samples and videos of the Student writing and explaining his trouble with writing submitted by the Complainants. However, the District admitted that intervention records, observations, writing samples, and District-based progress monitoring assessments related to written expression standards were collected, utilized, and considered in the evaluation process.
 - The Complainants alleged the District intentionally denied the Student a FAPE.
 - The Complainants alleged the District failed to comprehensively evaluate the Student in all areas related to suspected disabilities, and used the Student's placement in the GT program to deny special education services. Further documentation from the Complainants indicated that they believe the Student was not given an appropriate occupational therapy (OT) or executive functioning evaluation.
 - The Complainants asserted that the Student was receiving help academically and continues to receive extra help from his teachers and parents. His educational achievement reflects that help, not his actual abilities. The Complainants provided no evidence, other than emails from the teacher stating another teacher helped the Student, that the Student received more or different help than other students in the classroom.
 - The Complainants asserted that the Student needs help with executive functioning skills, specifically organization.
 - The District responds that the team discussed organization at all relevant meetings. However, conference notes and the evaluation planning guide indicated that it was only discussed in the context of writing.
 - The Complainants asserted that because the Student receives mental health counseling and medication, he qualifies for special education.
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- The Complainants asserted there have been four documented requests for testing.
- The District's response indicated there were only three requests for meetings before a phone request in late January 2015 resulted in an IDEA evaluation. These requests and meetings are described below.
- The Complainants asserted that the Student was diagnosed with attention deficit hyperactivity disorder (ADHD) in 2011, and the District was notified and did no testing or evaluations until 2015. The Student does not have an individualized healthcare plan (IHP).²
- The District responded that it acknowledged that the Complainants advised the District of ADHD concerns in or around August 2011 but that a medical diagnosis or administration of medication is not in and of itself enough to trigger the obligation to refer a child for an IDEA evaluation.
- On August 8, 2011, an email from xxxxx, PowerSchool/Attendance coordinator at SCE, was sent to xxxxx, Assistant Principal, and xxxxx, Principal. The email stated that the mother of the Student called regarding the Student and that she was meeting with xxxxx, Teacher, regarding the Student's ADHD and the possible need for an IEP or accommodation plan under Section 504 of the Rehabilitation Act of 1974 (504 Plan).
- On August 8, 2011, xxxxx sent an email to Ms. xxxx, which stated:

I talked to [the mother] today. I encouraged her to meet with you first and give him a chance to start (and transition into) first grade. I told her that if he gets off to a rocky start, then we would get xxxxx (School Psychologist) involved. She was on board and gave permission for any and all observations."
- The District stated that xxxx understood there was no longer an active request for an evaluation after speaking with mom.
- Emails indicated that the Student began taking medication in October, 2012. On November 9, 2012, xxxxx, School Nurse, sent an email to the mother which stated that the Student was having a hard time remembering to come take his medication.
- On November 19, 2012, the Student's mother sent an email to xxxx, Teacher, which stated: "we need to schedule an IEP meeting for [the Student]. Please let me know when that can be done."
- On November 29, 2012, an email from Ms. Gritz to xxxxx, Ms. Argo, xxxxs (School Nurse), and xxxxx stated: "I just got off the phone with [the Student's] mom and she is requesting a meeting to discuss his ADHD and his academic progress. Let's

² The SCDE notes that because the Student is administered medication by the school nurse, he is required to have an IHP. However, this issue is not addressable under the IDEA complaint procedures.

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meet as a team to go over [the Student] and come up with a plan before we meet with mom and dad."

- On December 3, 2012, xxx sent an email to the Student's mother. The email stated she had spoken with xxxx, xxxx, and xxxx and wanted to set up a meeting to discuss concerns, [the Student's] progress in the classroom, the Student's medications, and possible interventions.
- The Student's mother stated that she requested an evaluation at this meeting.
- A meeting was held on December 17, 2012. However, no documentation exists for this meeting. No prior written notice (PWN), meeting notes, or intervention records were submitted by either party. The District asserted in its response that the team discussed regular education intervention during this meeting.
- Emails between xxxx, xxxxx's substitute, and the Student's mother indicated that the Student failed to bring letters home on more than one occasion and often lost materials.
- In the 2013-14 school year, the Student had behavioral incidents resulting in emails to the Student's mother.
- On August 29, 2013, the Student was threatening to harm himself and the school called his mother. She took him to the emergency room. The notes from xxxxx, MD, state:

This is an 8-year-old-male with ADHD, and severely impulsive behaviors dating back to 3 years old. He's currently under treatment with xxxxx. The last few days the patient has had a flare-up and problem behavior. Yesterday at school he got upset with a peer, and threatened to "Kill it and her." There are several other, more minor incidents during the past week. As a result the patient was grounded for one month by his dad. This upset him and the patient later developed suicidal ideations last night. He states that he tried to "choke himself," but now minimizes this stating it did "not last too long." He also apparently thought about getting a sword and "cutting my head off." Later the patient went to the guidance counselor and told her about this. They were referred to their doctor who directed him here.

- On May 27, 2014, an email from the Student's mother to the District stated:

We are writing to request that our son [the Student], born November 6, 2004, be evaluated for eligibility for special education services under IDEA. We are concerned since he has ADHD and has problem with written communication specifically that there might be a learning disability. We understand that the evaluation is to be provided at no charge to us. Our reasons for requesting this procedure are 1) he has ADHD and 25 to 70 percent of children with ADHD have a learning disability 2) he was unable to do the

written part of PASS testing without help from a teacher or staff member and 3) his ability to comprehend information orally and answer questions orally is far higher than his reading and writing capabilities. We would appreciate meeting with each person who will be doing the evaluation before he/she tests my child so that I might share information about [the Student] with him/her. We will also expect a copy of the written report generated by each evaluator so that we might review it before the IEP meeting.

- An intervention record was initiated on June 3, 2014. The concerns were writing and focus. The interventions included the use of a specific graphic organizer to aid with getting ideas on paper, the choice to use computer/typing for final drafts, preferential seating, and clear view of smart board with no distractors. Additional comments included: "[The Student] is a very bright student with high measure of academic progress (MAP) scores and grades. Diagnosis: ADHD impacting ability to get ideas on paper. The team will meet back after 1st nine weeks. Will meet with teacher at beginning of school year."
 - An additional intervention record, labeled for use in fourth grade, states that the concern was writing. The interventions included typing and assistance with planning. Comments state: "[The Student's] quality of writing has improved since moving to GT class. Typing does increase the amount of work produced."
 - The District responded that a team was convened and met on June 4, 2014. The District is unable to locate minutes for this meeting regarding general education strategies.
 - No documentation exists for this meeting. No PWN or meeting notes were submitted by either party.
 - Emails and the teacher 's instant messaging system during the 2014- 15 school year indicated instances of the Student not doing work, losing books and permission slips, cheating, forgetting multiple items, sleeping in class, talking out in class, crumpling work, crying, and doing nothing in class.
 - The Student was receiving counseling during the 2014- 15 school year from xxxx, a counselor with a community-based mental health agency. According to the District, xxxx is located on school grounds because the mental health agency contracts with the District to maintain space on school grounds for the convenience of the families it serves. She is not, however, associated with the school or the District.
 - The District asserted that the counseling she provided was not educational in nature.
 - The District stated that xxxxxx, Guidance Counselor, provided some support to the Student, as she did to non-disabled students across the school. The type of support that the school counselor provides, and provided in this case, is available to all students.
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- On January 22, 2015, the parent contact log for SCE indicates that someone³ spoke with the Student's mother regarding continued concerns with the Student's writing. The mother requested an evaluation.⁴ A meeting was scheduled for February 4, 2015.
- The District acknowledged that formal testing was not planned until February 4, 2015, but also maintained the District did not have reason to suspect that the Student was a child with a disability in need of specialized instruction prior to this time.
- According to the PWN dated February 4, 2015, the District proposed to complete an evaluation in the areas of education (writing) cognitive ability, social/emotional, medical, developmental history, observations, and fine motor skills.
- The conference record for the meeting indicated the team discussed criteria for a writing disability. It also indicated that the Student may not qualify for special education³ but that the evaluation will be completed.
- The Initial Evaluation Planning Guide, dated February 4, 2015, contained the following information:

Areas of concern

Health – ADHD, seeing more hyperactivity, changing meds today;

Written expression -organization on the page, most recent state testing was exemplary, concerns exist with content/composition, handwriting, fluency;

Intelligence/Cognitive – CogAT scores;

Speech/Language/Communication -nothing checked or written except "Yes;"

Behavioral/Emotional – very lethargic in the classroom, disengaged, acts impulsively, has difficulty working/playing with others, does not complete assignments within specified time;

Fine Motor/Sensory Motor -performs better when typing, awkward/poor pencil grasp, difficulty staying on the line when writing, handwriting is laborious, difficult to read, difficulty copying from workbook/board.

Areas to be assessed

Behavioral/emotional, educational (writing), health, fine motor, observations, psychological (mental ability/processing), speech/language/communication, social development history.

- The Complainants received their procedural safeguards at this meeting. The Student's mother stated that this was the first time she had received the procedural safeguards.

³ There is no name on the records to indicate who spoke with the mother on this date.

⁴ The contact log does not specify what type of evaluation was requested, but the mother asserts that she requested an evaluation under the IDEA procedures.

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- The Student's mother stated a medical report for special education services due to other health impairment (OHi), dated March 27, 2015, was given to the District and states:

ADHD, Anxiety disorder not otherwise specified (NOS), oppositional and defiant disorder, rule out (RIO) learning disability. Onset date -approximately 5 years ago, irreversible condition. Condition causes limited strength, vitality, or alertness that could adversely affect the child's educational performance through inattention, not following directions, not completing tasks in a timely manner. SE appears appropriate from a medical standpoint.

- xxxx, EdS, School Psychologist II, completed a psychoeducational report on the Student on April 6, 2015.⁵ All areas indicated above were assessed.
- In one portion of the report, the Student's mother reported that the Student almost always has trouble fastening buttons.
- The summary section of the report stated the Student was in the GT program. He writes slowly and his handwriting is messy. He has an accommodation to type assignments. He has difficulty organizing his ideas and writing more than a few sentences, but this has improved recently. He performed in the very low range for writing fluency, which measures how quickly he can write. Many of the Student's adaptive skills were in the at-risk range.
- The report included an examination using the Beery-Buktenica Developmental Test of Visual Motor Integration - Sixth Edition. The Student scored in the low average range. The evaluator was qualified to administer this assessment. xxxxx, Occupational Therapist, consulted and reviewed the results of the assessment. Visual Motor Integration, which is the majority of the assessment, was the only component utilized as it relates to the Beery-Buktenica Developmental Test of Visual Motor Integration - Sixth Edition.
- It is common practice to administer the Visual Motor Integration component and not the other components of the evaluation.
- xxxxx provided recommendations for accommodations and did not suggest further testing.
- The report also included the Kaufman Test of Educational Achievement -Third Edition (KTEA-3) assessment of the Student's writing. His written expression skills are within the average range. The writing fluency score was in the very low range.
- The eligibility worksheet for the District for specific learning disability (SLD) mirrors the SCDE Standards for Evaluation and Eligibility Determination (SEED) guidelines in that the District required the same evidence and components as outlined in the SEED document. This

⁵ See attached as Exhibit B.

worksheet was submitted to the SCDE Office of Special Education Services (OSSES) in August, 2015. The SEED document states:

Specific Learning Disability

Criteria:

I) There is evidence that the child does not achieve adequately for his/her age or to meet state approved grade level standards in one or more of the following areas: Basic reading skills, Reading fluency, Reading comprehension, Mathematics calculation, Mathematics problem solving, Written expression, Oral expression, or Listening comprehension; and either

a) does not make sufficient progress to meet age or state-approved grade-level standards when using a process based on the child's response to scientific, research-based intervention

OR

b) exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments.

Where would you find the evidence to meet the disability criteria?

Evidence from multiple sources of data indicates that the student does not achieve adequately for his or her age or to meet state-approved grade level standards. These sources include the following requirements :

Documentation of prereferral, or as part of the referral process, instruction based on scientifically-based instruction in reading and math in general education settings; the interventions must be matched to the referral problem and should include a description of the type, intensity, and duration of the intervention provided.

Documentation of instruction based on state-approved grade level standards in general education settings;

Data-based documentation of severe academic skill deficits when compared to peers gathered from multiple sources including:

- * measures of achievement showing significantly lower performance than peers on measures such as individual, standardized achievement measures, state and district achievement measures, and ;
- * progress monitoring data from curriculum-based and/or criterion-referenced measures showing slow rate of growth in at least one academic domain despite intensive instruction/intervention in the area(s);
- * individual, standardized achievement measures, and
- * state and district achievement assessments.

At least one observation of the child's academic performance in the area(s) of difficulty in his or her learning environment and information concerning how the child's suspected disability impacts his or her performance in this area.

Evidence of one of the following is also required:

- (1) Evidence that the child does not respond to scientific, research-based interventions or
- (2) Evidence that the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade level standards, or intellectual development that is relevant to the identification of a specific learning disability.

If the team is using a process based on the child's response to scientific, research-based interventions, (requirement 1) then there must be evidence that the child does not make sufficient progress to meet age or state-approved grade-level standards when using a process based on the child's response to scientific, research-based intervention. This includes the following requirements from multiple sources:

Data-based documentation of a lack of sufficient progress as evidenced by the results of repeated formal assessments administered over reasonable intervals; best practice would dictate this to typically be weekly data points gathered over an intervention period of at least six weeks; rate of progress Documentation may come from the following sources:

- * progress monitoring data from curriculum-based measures showing slow rate of growth compared to peers;
- * individual, standardized achievement measures showing significantly sub-average performance when compared to peers,
- * a comparison of the child's rate of progress to peers.

Documentation that the results of the repeated formal assessments were shared with the child's parents.

If the team is using a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade level standards, or intellectual development that is relevant to the identification of a specific disability (requirement 2), the following evidence is required :

Severe discrepancy between ability and achievement as evidenced through standardized, individually administered measures of intellectual ability and academic achievement;

Corroborating evidence of significantly low academic performance as evidenced through progress monitoring data from curriculum-based and/or criterion-referenced measures, through a documented history of poor performance, and through state and district achievement assessments;

Measures of academic achievement showing average or above average performance in some domains and significantly low performance in others.

- The District did not submit a completed SLD District worksheet for the Student, but submitted a District worksheet for charting strengths and weaknesses.
 - The eligibility worksheet for the District for OHi mirrors the South Carolina SEED document in that the District required the same evidence and components as outlined in the
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SEED document. This worksheet was submitted to the SCDE OSES in August, 2015. The South Carolina SEED document criteria for OHi is:

Criteria:

- 1) There is evidence that the child has a chronic or acute health problem.
- 2) There is evidence that the diagnosed chronic or acute health problem results in limited alertness to the educational environment due to limited strength, limited vitality, limited or heightened alertness to the surrounding environment.
- 3) The adverse effects of the other health impairment on the child's educational performance require specialized instruction and/or related services.

Where would you find the evidence to meet the disability criteria?

Evidence of a chronic or acute health problem may be found in the following required evaluation component:

A comprehensive written report from a licensed physician documenting a diagnosis of the chronic or acute health problem;

In the case of a child with ADHD, the diagnosis may be made by a licensed physician, a certified school psychologist, licensed psychologist, or a licensed psycho-educational specialist. A term ADHD includes several subtypes. One of those subtypes is "predominantly inattentive type," formerly described as Attention Deficit Disorder (ADD).

* In the case of a child with ADHD, the student is rated within the highest level of significance on a valid and reliable problem behavior rating scale in areas related to the diagnosis of ADHD by both his classroom teacher and parent.

* Documentation that the student's observable school and/or classroom problem behaviors related to ADHD are occurring at a significantly different rate, intensity, or duration than the substantial majority of typical school peers. The medical diagnosis may not be used as the sole criterion for determining eligibility.

There must be evidence that the OHi adversely affects the child's educational performance.

- The District did not submit a completed District worksheet for the Student for OHi eligibility.
 - The District responded that the records establish [the Student] continued to improve in any areas of weakness using classroom-based interventions, but has not provided any intervention records to support this assertion.
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- The Enrich determination document dated April 6, 2015, stated:

DETERMINATION FOR OTHER HEALTH IMPAIRMENT

Based on information from a variety of sources that have been documented and carefully considered, the team has determined:

- [The Student] does not meet the criteria for Other Health Impairment.
- This disability does not have an adverse effect on [the Student]'s educational performance.
- As a result of this disability, [the Student] does not require specially designed instruction.

DETERMINATION FOR SPECIFIC LEARNING DISABILITY

Based on information from a variety of sources that have been documented and carefully considered, the team has determined:

- [The Student] does not meet the criteria for Specific Learning Disability.
- This disability does not have an adverse effect on [the Student]'s educational performance.
- As a result of this disability, [the Student] does not require specially designed instruction.

ADDITIONAL CONSIDERATIONS

The team has also concluded:

- The determination for eligibility for [the Student] is not the result of lack of appropriate instruction in reading, including the essential components of reading instruction. The term "essential components of reading instruction" means explicit and systematic instruction in: phonemic awareness, phonics, vocabulary development, reading fluency (including oral reading skills), and reading comprehension strategies.
- The determination is not the result of lack of appropriate instruction in math.
- The determination is not the result of Limited English proficiency of the student.

CONCLUSION

[The Student] is not eligible as a student with a disability.

- The PWN dated April 6, 2015 stated that the Student did not meet eligibility for OHi or SLD, proposes eligibility under 504 due to his diagnosis of ADHD.

This determination is recommended because while [the Student's] symptoms related to ADHD impact, specifically, his writing fluency, there is no evidence of significant behavioral impact within the classroom. [The Student's] overall written expression is considered to be in the average range based upon the KTEA-3 scores and AIMSweb scores while his fluency is in the very low range. There is also no evidence indicating that [the Student] requires specially designed instruction to access the curriculum. He is performing well in his GT class in writing.

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Used as a basis: academic assessment, attendance record, classroom interventions, classroom observation(s), current classroom grades, discipline records, health and developmental history, intellectual/cognitive assessment, medical report, parent report, social /emotional assessment, speech/language screening or evaluation, state and district testing, teacher report, vision/hearing screenings, visual-motor assessment.

The team discussed and determined that while [the Student] does not require specially designed instruction, he does require accommodations in order to perform in the classroom environment. A 504 plan was recommended.

- An OT evaluation, dated December 7, 2015, by therapist **Kim Cope**, gave the following information:

Medications: tenex, Adderall, anti-anxiety meds

Below average on fine motor precision and fine motor integration, well below average on fine manual control and manual dexterity.

Patient with decreased fine motor strength and control. Fine manual control within 2nd percentile. Patient noted to rush through some tasks and needed encouragement to complete non-preferred tasks Decreased fine motor strength and control on writing tool, immature grasping pattern with quadruped grasp and collapsed web space. Patient may fatigue easily due to grasping pattern Caregiver reports patient unable to tie his shoes

Decreased bilateral coordination and control. Patient able to transfer objects between hands and manipulate small objects in fingertips independently. Decreased coordination during cutting tasks with snipping pattern, patient also noted to rush through cutting task Decreased fine motor strength and control. Patient with quadruped grasp with minimal to no web space, decreased dynamic finger movements during writing tasks. Immature letter formation, line orientation, page layout and spacing during writing samples. Patient rushed through writing and copying tasks. Decreased control and fluidity of strokes Decreased visual motor skills Patient presents with decreased fine motor strength and control during writing and cutting tasks. Per sensory profile, patient has decreased sensory processing skills and self-regulation skills to participate in age appropriate ADLs (activities of daily living) independently. It is recommended that the patient receives skilled OT one to two times per week.

- At the time of the evaluation and at least five years prior, there was a writing fluency standard for South Carolina students that did not include handwriting as a component.

GRADES AND OTHER RECORDS

- The Complainants asserted report cards show significant issues from kindergarten forward regarding work, peer interaction, executive functions, and writing.
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- The Student's report cards contain the following information:

Kindergarten report card -sometimes meets standard: follows classroom rules and routines, holds pencil correctly (RRS), seeks adult help and begins to use strategies to resolve conflicts (RSS), student states address, student states phone number (XRS), listens while others speak, uses letters and words to convey meaning (RSS), prints last name (XXS), prints top to bottom (XSS), uses correct letter formation
Comments -We are still working on behavior in transitions.

1st grade report card -sometimes meets standard: follows classroom rules and routines, shows eagerness and curiosity as a learner, sustains attention to work over a period of time, interacts easily with peers, interacts easily with adults, cooperatively participates in the group life of the class, shows empathy and cares for others, effort level, keeps personal space and materials organized (RSS), begins and completes work on time, focuses attention on speaker, listens for meaning in conversations and discussions, follows multi-step directions, reads text fluently, uses basic conventions of print and spelling, writes in complete sentences, uses detail when writing, prints legibly
Comments -We are continuing to work on helping him use appropriate strategies when confronting classmates. We are working on helping him add more details in his writing. He still needs to work on controlling his blurting out. Please continue to practice the handwriting.

2nd grade report card -needs improvement in: follows classroom rules and routines, moves smoothly from one routine to another, completes assigned tasks on time, respects peers, keeps personal space and materials organized.
Comments -xxxx is making progress in academic areas. We are still working on following directions and citizenship. He still needs help at times completing his work on time and giving 100 percent.

Grades in third grade for year: 95, 94, 100, 97, S, E, S, S, S, S
Comment -Handwriting needs improvement.

- According to the nursing records since 2011, the Student did not visit the school nurse frequently for problems. He did see the nurse almost daily for the administration of medication beginning in August 2013.
- According to the discipline records, the Student received one disciplinary referral in kindergarten for throwing rocks at a student.
- The Complainants asserted that the Student was receiving help academically and continues to receive extra help from his teachers and parents, and that his educational achievement reflects that help and not his actual abilities.

- The District responded:

The District evaluation in its entirety took any such concerns into consideration. As previously noted, a parent interview was conducted as part of the evaluation, while data-based and anecdotal parent and teacher input were considered during the evaluation and eligibility review.

For example, as part of the evaluation, Parent completed a social developmental history, which is included in the District's initial response. In that form, signed by Parent, there are no references or concerns regarding additional support or assistance she or others provides above and beyond that which would be expected of any parent or teacher. Rather, she states that her son is "smart," "doesn't need to try very hard," and that her primary concern is that "his writing is below his ability in everything else." Tyler has received individual psychotherapy and participated in family therapy in the past. There is a history of attention problems as well as anxiety in the family.

- The social development history does not contain questions regarding any additional support or assistance with academics. It does contain questions regarding current or past treatment for medical and psychological conditions.
- Standardized test scores available at the time of determination for the Student include:
 - 2015 AIMSweb assessment in writing: 33-34 percent CWS (correct writing sequence), 24-25 percent TWW (total words written)
 - 2013-15 MAP: average to above average in reading and math.
- The Complainants contend that the school withheld these test scores from the parents, because AIMSweb scores were not mentioned in the psychoeducational evaluation or in the conference record. They were later referred to in the PWN dated April 6, 2015, as "average."
- In its response, the District stated:

The District recognizes that [the Student] produced a particularly low rating on the writing fluency subtest of the KTEA-3, which Mother believes should have triggered additional assessment, however, progress monitoring assessments, such as the TWW AIMSweb scores (low average) and third grade writing PASS test (exemplary range), further established that the KTEA-3 writing fluency subtest may be an outlier and further provide support for the team's position that individualized instruction was not needed and that [the Student's] relative writing weakness can be addressed through accommodations.

- The Complainants submitted an email from the school to the Student's mother, dated March 18, 2014, which confirmed that the Student had "a little trouble getting started this morning on his writing prompt. xxxxxx came to get him and he worked on his prompt with xxxxx

- The District responded:

Following review of all available records, however, the District acknowledges that it failed to sufficiently and fully document the entirety of those decisions and the team's rationale for same using IDEA's procedural guidelines. Therefore, the District is reviewing, revising, and updating its training and procedures to continue to reiterate to school personnel that the District's IDEA child find obligations also include documentation, such as a written notice of decisions related to evaluation denials.

- The District additionally objects to the SCDE's consideration of information not available to the District at the time of the evaluation meeting on April 6, 2015. The District responded: "a review of the District's actions and decisions must be based only on information known to the District at the time of the decision or action." This includes, but is not limited to, the following information:
 - a. OT report and sensory profile on December 11, 2015
 - b. December 30, 2015 email notification from parent of medical diagnoses and forthcoming evaluation report
 - c. Child and Family evaluation report dated December 7, 2015 and received by the District January 11, 2015
 - d. Additional documents added to the Complainants' Google drive throughout December and January
 - e. Randolph Report (signed by William Hartnagel, MD)
 - f. Writing Samples
 - g. Video recordings
 - h. 2014-2015 End of Year State Testing -received after eligibility determination
 1. 2014-2015 Final Report Card - received after eligibility determination
 - J. 2015-2016 Map Scores -received after eligibility determination
- The SCDE is aware that the District did not have the information available for items a, b, c, h, i, and j at the time of the evaluation .
- The SCDE is not aware of any additional facts not already known to the District that were added to the Complainants' Google drive document (item d). According to our records, the only additional information added was an email sent to a District employee by the mother dated November 7, 2015; a copy of the neuropsychological evaluation conducted December 7, 2015; two teacher reports; research done by the Complainants which does not contain factual information; and the Complainants' reply to the District's supplemental response.
- The Randolph report, dated August 29, 2013 (item e), was the result of the Student threatening to hurt himself. The Student went to the school guidance counselor. The school called the mother to come and pick up the Student. Therefore, the District was aware of this incident. In addition, Dr. xxxxe! indicated no new diagnoses for the Student. Rather, the Student was to continue on the medication already prescribed and being administered by the

parents and the school. The mother stated that she had to provide the school with this documentation before the Student could return to school. Also, the mother referred to this report in the social developmental history, which is included in the District's initial response.

- As stated above, the District had ample access to handwriting samples and visuals (items f and g) of the Student's handwriting. Handwriting samples were included in the original complaint. The District did not provide the SCDE with any samples.
- The SCDE has viewed the video (item g) of the Student speaking about his difficulties, and finds that the facts he asserted are contained elsewhere in documentation and evidence submitted by the Complainants and the District.
- Items h, i, and j contain the following information:⁶
 - 2015 Act Aspire: writing was exemplary based on content, organization, voice, conventions; exceeds in English and reading, ready in math, close in writing
 - 2015 Palmetto Assessment of State Standards (PASS): exemplary in science and social studies
 - Grades in fourth grade for year: 90, 89, 92, 90, 95, 96, S, S, S, S, S
Comment -Handwriting is satisfactory.
 - Current grades for fifth grade: 94, 95, 95, 98, S, S, S, S, S

Also, an email on June 4, 2015, from the Complainants to school personnel stated:

It is my understanding that xxxxx will be teaching fifth grade next year. If at all possible we would prefer that [the Student] stay in her class as long as he can remain in GT as well. Under her guidance [the Student] has made great progress, his behavior and grades are greatly improved as well as his test scores.

- The Complainants requested education documents in an email to the District on October 15, 2015. The email stated:

I request a copy of all education records in the School District's possession that pertain to [the Student]. I make this request under the Family Educational Records and Privacy Act (FERPA), 34 C.F.R. Part 99, the Individuals with Disabilities Education Improvement Act (IDEA 2004), and its regulations, 34 C.F.R. Sections 300.501 and 300.610-627.

This request encompasses the identified education records no matter where they may be located, whether in the Central Administration Office, the Special Education Office, or any other department or office within the School District. As authorized by Section 300.616 of the IDEA 2004 regulations, kindly also provide me with a "list of the types and locations of the [requested] education records" that are "collected, maintained or used" by the School District.

⁶ This information seems to support the District's assertion that the Student has shown improvement. However, the District is correct that this information was not available at the time of the evaluation.

The District replied on October 19, 2015:

The District is in receipt of your request. I will begin working on collecting [the Student's] records and notify you when they are available for review. Please let me know if I can be of any further assistance.

- The Complainants asserted that the District failed to provide the following education records regarding the Student upon request by the parents:

Complete copies of reportcards;

IHPs from 2012 to the present;

Nursing records for 2012;

Response to Intervention (RTI) paperwork forms and meeting notes from the December 17, 2012, meeting;

PWN for the December 17, 2012, meeting;

PWN and notes from the June 4, 2014, meeting;

Follow up to the RTIs enacted on 12/17/2012 and 6/4/2014;

Documentation of August 28, 2014 incident in the lunchroom where he threatened to "eat" someone and she reported him for ..threatening to murder her;" and

Documentation regarding removal for threat to self-harm and referral for a psychiatric evaluation.

- The District's policy JRA-R, Student Records, states that the District may destroy data no longer needed to provide direct educational services where the data does not concern the "referral, evaluation, staffing, and placement of a disabled student or a student suspected at one time of having a disability."
 - The Complainants received some documents she requested from the District on November 18, 2015, but not all.
 - The District stated that the Complainants never contacted it regarding records that may have been overlooked.
 - The District conceded that some records were not provided, and states: "The District regrets these oversights, although [the Complainants'] own submission indicates they had copies of many of these documents."The District indicated in its response that "the aforementioned documents are available for inspection and review. [The Complainants] may contact Dr. Amy Maziarz to schedule a mutually agreeable time and place to review the records."
 - Dr. Maziarz and the Complainants exchanged emails in October and November of 2015. The Complainants requested an IEE at public expense. Dr. Maziarz asked for further clarification. The Complainants responded with concerns about testing scores, and stated that the Student would be getting a neuropsychological evaluation and an OT assessment soon. Dr. Maziarz asked for clarification on what type of evaluation she was asking for from the District.
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- Dr. Maziarz responded in an email on October 27, 2015:

Thank you for the additional information. In regards to your request for an independent psycho-educational evaluation (IEE), are you asking that the district pay for the neuropsychological testing that is being conducted by Child and Family Development next month or are you asking that a separate IEE be conducted? If you are requesting that the district pay for the Child and Family Development evaluation, I need to verify that the evaluator meets Fort Mill Schools' criteria. Please provide me with the name of

the evaluator so that I can verify their credentials and review the district criteria with them. If you are requesting that an additional independent evaluation be conducted there would need to be coordination between the two evaluators to ensure that tests are not duplicated as this would invalidate results.

- On November 10, 2015, Dr. Maziarz emailed the Complainants and stated:

I wanted to follow up and make sure that everyone is on the same page as it relates to the independent educational evaluation your family is pursuing for your son, [the Student]. As I understand it, your family is pursuing a neuropsychological evaluation at your own expense. I believe that this is appropriate given that there is not a prior District-conducted neuropsychological evaluation to disagree with. I understand that you plan to present the final evaluation report, as well as medical information, to a multi-disciplinary team for consideration of IDEA and 504 eligibility. You further explained that if the District will require a psycho educational evaluation in addition to the neuropsychological testing to determine eligibility, you wished to use Dr. Hunter at Child and Family Development to conduct that evaluation as an IEE at District expense.

Upon your submission of the neuropsychological testing, which would act as an evaluation request/referral for special education services, it would then be up to a multi-disciplinary team to determine what, if any, additional information or assessments are needed to determine IDEA or 504 eligibility. When planning an evaluation, the team determines what information it already has (such as the private parental testing) and what additional information and components are needed to determine eligibility and, if eligible, the educational needs of the child. In addition to formal evaluation assessments and tests, information from general education curriculum progress and interventions, existing records, interviews, and observations are also considered. Therefore, I cannot make any guarantees about what additional assessments or information a future multi-disciplinary team may request after it considers the private neuropsychological evaluation report.

- Since the filing of the complaint, the Student had a neuropsychological evaluation performed by xxxxxx, PhD. Her findings indicate:
-

While his current medication regimen is providing support with modulating hyperactivity symptoms as evidenced by behavioral report, his ability to accurately and consistently regulate his attention on a cognitive task remains significantly impaired.

- The Complainants and the District met on February 4, 2016, to discuss the new data available.
- In that meeting, the team discussed multiple areas of discrepancy to include cognitive processing, writing fluency, and fine motor skills.
- In the meeting, the District stated that "504 [plans] are more than just accommodations. You can provide related services. You can provide specialized instruction."

CONCLUSION

Issue 1: Whether the District failed to follow appropriate child find procedures as required by the IDEA.

Under the IDEA regulation 34 C.F.R. § 300.101(a), a FAPE must be available to all students residing in the state between the ages of three and twenty-one. The "child find" provision of the IDEA imposes on States a requirement that "[a]ll children with disabilities residing in the State, . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A). The "child find" duty extends even to "[c]hildren who are suspected of being a child with a disability . . . even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c)(1). Furthermore, where a child is suspected of being a child with a disability, the local educational agency shall ensure that "the child is assessed in *all* areas of suspected disability." 20 U.S.C. § 1414(b)(3)(B) (emphasis added).

Though the "child find" duty does not impose a specific deadline by which time children suspected of having a qualifying disability must be identified and evaluated, evaluation should take place within a "reasonable time" after school officials are put on notice that behavior is likely to indicate a disability. *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir.1995), *abrogated on other grounds by A. W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir.2007). Thus, the "child find" obligation is triggered where the state has reason to suspect that the child may have a disability and that special education services may be necessary to address that disability. *Dept. of Educ., State of Haw. v. Cari Rae S.*, 158 F.Supp.2d 1190, 1194 (D. Haw. 2001). A local educational agency (LEA) is deemed to have knowledge that the child may suffer from a disability where (1) "the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;" (2) "the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B);" or (3) "the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency." 20 U.S.C. § 1415(k)(5)(B).

To establish a procedural violation of the "child find" requirement, the claimant "must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." *Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir.2007) (adopting the standard set forth in *Clay T. v. Walton Cnty. Sch. Dist.*, 952 F.Supp. 817, 823 (M.D.Ga.1997)).

Consistent with the consent requirements in the IDEA regulation 34 C.F.R. § 300.300, either a parent of a student or a public agency may initiate a request for an initial evaluation, at any time, to determine a student's possible eligibility as a student with a disability. Although a parent's request does not automatically trigger the right to an evaluation, school districts and agencies charged with the responsibility of providing educational services to students with disabilities must not delay in responding to a parent's request for an evaluation by either moving forward with granting the evaluation request or specifically denying the request through the issuance of PWN. Each public agency must conduct a full and individual initial evaluation, in accordance with §§ 300.305 and 300.306, before the initial provision of special education and related services to a student with a disability. The initial evaluation must be conducted within sixty days of receiving parent consent for the evaluation. An exception to the 60-day time frame includes if a student enrolls in a school of another public agency after the relevant timeframe has begun and prior to a determination by the student's previous public agency as to whether the student is a student with a disability. 34 C.F.R. § 300.301.

In considering whether child find violations have occurred, it may be appropriate to consider evidence that precedes the one-year limitation for other state complaint issues. See *Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 314 (6th Cir. 2007) (in which a hearing officer considered evidence as far back as five years to determine if there was a violation of child find procedures by a school district)

As part of an IDEA eligibility determination, a team must determine whether the child needs special education and related services as a result of the disability. Special education is specially-designed instruction that adapts the content, methodology, or delivery of instruction to address the unique needs of a child that resolute from the child's disability to ensure access of the child to the general education curriculum in order to meet the educational standards that apply to all children. 34 C.F.R. §300.39(b)(3)(i)-(ii). The SCDE has explained that "to have a need for special education services, the child has specific needs which are so unique that they require specially designed instruction in order to access the general education curriculum." SCDE Office of Exceptional Children Special Education Process Guide, p. 37 (March 2013).

Under the IDEA regulation 34 C.F.R. § 300.503(a), PWN must be provided to the parents a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a FAPE to the child, or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a PAPE to the child. The notice should include a description of the action proposed or refused by the agency; and an explanation of why the agency proposes or refused to take the action.

Receiving counseling or medication does not automatically trigger compliance with the IDEA. A FAPE is defined in the Section 504 regulation as the provision of regular ~~m~~: special education and related services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of nondisabled persons are met, and that are provided without cost (except for fees imposed on nondisabled students and their parents). 34 C.F.R. §§ 104.33(b)-(c).

A school district's obligation to provide a FAPE extends to students with disabilities who do not need special education but require a related service. For example, if a student with a disability is unable to self-administer a needed medication, a school district may be required to administer the medication if that service is necessary to meet the student's educational needs as adequately as the needs of nondisabled students are met. To satisfy the FAPE requirements described in the Section 504 regulation, the educational institution must comply with several evaluation and placement requirements, afford procedural safeguards, and inform students' parents or guardians of those safeguards. 34 C.F.R. §§ 104.35(a), 104.36. It is beyond the purview of this investigation to examine compliance with Section 504 regulations.

Although 34 C.F.R. § 300.153 states that a complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with § 300.151, there are no such limitations on the state education agency (SEA) to confine its resolution to acts within one year. Rather, *if an SEA has found a failure to provide appropriate services*, an SEA, pursuant to its general supervisory authority under Part B of the Act, the resolution *must* address: (1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and (2) Appropriate future provision of services for all children with disabilities. 34 C.F.R. § 300.151.

The District is incorrect in its assertion that the SCDE may only review the District's actions and decisions based only upon information known to the District at the time of the decision or action. According to 34 C.F.R. § 300.111, there is no deadline for the District's obligations under child find. These obligations are ongoing during a child's residence in the District. Therefore, information regarding the District's actions both before and after a single evaluation are relevant in determining whether or not the District is compliant in its child find processes and procedures. In regards to the IDEA, the Complainants advised the District of the Student's ADHD concerns in or around August 2011. The District responded on August 8, 2011, discussing the concerns; After this conversation, the District reasonably believed that there was no request for an evaluation under the IDEA. On November 19, 2012, the Student's mother requested an IEP meeting. A meeting was held on December 17, 2012, but no documentation exists to confirm what was decided in this meeting. The Student's mother specifically requested an evaluation on May 27, 2014. A meeting was held on June 4, 2014, but no documentation exists for this meeting.

Either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability, and this evaluation must be conducted within 60

days of receiving parental consent for the evaluation. 34 C.F.R. § 300.301. The email on May 27, 2014, clearly initiated a request for an initial evaluation. However, the District took no steps, according to the documentation provided, to obtain parental consent, to complete the evaluation, or to provide PWN explaining why an evaluation was or was not warranted in December, 2012, and in June, 2014. Because the District failed to evaluate, and failed to provide a rational justification for not deciding to evaluate, the SCDE finds that the District is in violation of 34 C.F.R. § 300.111(c)(1). Because the District did not provide PWN either rejecting or accepting the proposal that the Student have an IEP, did not explain in PWN why the proposal was accepted or rejected, or provide in PWN the evidence that was used in making its decision, the SCDE finds that the District is in violation of 34 C.F.R. § 300.503(a).

Did not comprehensively test the Student in all areas related to the suspected disability

Under the IDEA regulation 34 C.F.R. § 300.304(c)(4), each public agency must ensure that a student is assessed in all areas related to the suspected disability, including, if appropriate, health vision, hearing, social and emotional status, general intelligence, academic performance, communicate status, and motor ability.

The documents indicate that the Student was tested in 2015 in all areas related to the suspected disability. A planning guide was completed and the Complainants signed the planning guide. Under the SEED guidelines for SLD, there must be evidence that the child does not achieve adequately for his/her age or to meet state approved grade level standards in Basic reading skills, Reading fluency, Reading comprehension, Mathematics calculation, Mathematics problem solving, Written expression, Oral expression, or Listening comprehension before any other criteria are considered.

The only area raised as a concern under the SLD criteria was written expression. The test scores indicate that the Student showed inconsistencies with written evaluations, as sometimes he scored exemplary and other time he scored average or in the very low range in regards to writing fluency or expression. While the District explained in its response that the assessment scoring the Student in the very low range was an outlier, this was not made a part of any PWN, conference notes, or in the determination documentation. Since there were inconsistencies with the evaluations, and these were not reconciled at the time the decision was made, the District should have obtained more data before determining whether or not the Student had an SLD. However, the fact that there was no additional testing does not rise to the level of a violation. In addition, there is no evidence that the Student is not achieving adequately for his age or to meet state approved grade level standards for written expression.

In regards to handwriting, the District consulted with an OT to determine that no special education services were needed in this area. Instead, the District provided the accommodation of typing. According to the documentation, the Student is making progress in writing with this accommodation. The Complainants have since obtained an OT evaluation. The District should consider this evaluation in the upcoming meetings with the Complainants.

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In regards to OHi and executive functioning, the District found that the Student had ADHD, and a 504 plan was implemented. Emails and the class messaging system indicated that the Student did have problems with memory and occasionally gets distracted. However, the SEED document also states that for a child with ADHD to qualify under the IDEA for special education services, there should be a rating within the highest level of significance on a valid and reliable problem behavior rating scale in areas related to the diagnosis of ADHD by both his classroom teacher and parent, and documentation that the student's observable school and/or classroom problem behaviors related to ADHD are occurring at a significantly different rate, intensity, or duration than the substantial majority of typical school peers. The medical diagnosis may not be used as the sole criterion for determining eligibility. The District compiled behavior rating scales, and there was no clinically significant finding that met the criteria for OHi. Therefore, the SCDE finds that the District did not violate 34 C.F.R. § 300.304(c)(4).

Used the Student's placement in the GT programs to deny special services

While it is uncontested that the Student was placed in the GT program, there is not enough evidence or indication that the District relied on this placement as evidence that the Student did not qualify for special education services. Therefore, the SCDE finds that the District did not use the Student's placement in the GT program to rule out the need for special education services.

Whether the District denied the Student a FAPE

A determination of whether the District failed to identify a student eligible for special education services in a timely fashion requires a finding that the District knew, or should have known, that the child was disabled or in need of special education. *D.K. v. Abington Sch. Dist.*, 2010 WL 1223596, at *6 (E.D. Pa. Mar. 25, 2010) *aff'd*, 696 F.3d 233 (3d Cir. 2012). The Enrich eligibility determination for OHi for the Student is contradictory, because while it states that the Student did not meet the criteria for OHi, "this disability does have an adverse effect" on the Student's educational performance. Even if this was a typographical error, this should have been fleshed out and explained in the documentation in parent-friendly terms as to why the District felt that the Student did not meet the criteria and/or there was or was not an adverse effect. If the Student did not meet the criteria and there was no disability, then there would be no need to consider whether there was an adverse effect. This worksheet and other documentation submitted by the District leaves much to be desired in terms of completeness and a full explanation of contradictions. The District failed to document, failed to retain, or failed to provide documentation of the team member's discussions regarding evaluations on at least two separate occasions and failed to provide PWN for those meetings. The District failed to document appropriately the reasons for the District decisions on the eligibility determination worksheet.

A procedural violation results in the denial of a FAPE if it: "(I) impeded the child's right to a [FAPE]; (m) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a [FAPE] to the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii). In addition, multiple procedural violations

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may cumulatively result in the denial of a FAPE even if the violations considered individually do not. *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012).

The IDEA has two major notice requirements; prior written notice and procedural safeguards notice. 34 C.F.R. § 300.503(a); and 34 C.F.R. § 300.504(a). The District must provide parents with PWN whenever it proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a FAPE to a child. The procedural safeguard notice is meant to inform parents of their rights under the IDEA. These two procedural requirements are a fabric of the foundation of the IDEA's right that it bestows upon parents to meaningfully participate in the evaluation and eligibility processes and in the development of an education program for a child who is determined to have a disability. When a school district commits a violation of the tenets of the IDEA, the procedural violations are not simply technical violations. The violations are substantive and threaten to deny the child a FAPE. These procedural violations seriously infringe on the parent's right to meaningfully participate in the process and may result in a loss of educational opportunity for the child.

The District's multiple violations of failure to evaluate, failure to provide rational justification for deciding not to evaluate, failure to provide PWN, and failure to comply with 34 C.F.R. § 300.502 (see discussion below) have significantly impeded the parents' opportunity to participate in the decision-making process regarding a FAPE for their child, since they did not have the knowledge necessary to make an informed decision on whether to proceed under the procedural safeguards, did not have the knowledge to consider whether a private evaluation was appropriate, and did not have knowledge of any justification the District may have offered as to why the Student did not qualify for special education services. These violations affected the parents' right to meaningfully participate in the process as required under IDEA. In addition, the parents did not receive their procedural safeguards until the meeting on February 4, 2015, more than two years after the first meeting was held to discuss whether or not the Student would be evaluated. Because the parents did not receive their procedural safeguards, they did not know of their right to request a due process hearing. This amounts to a substantive procedural violation.

However, it is unknown whether the substantive violation resulted in a deprivation of educational benefit for the Student. According to the documents submitted, the Student did not have excessive absences nor did he have a significant reduction in achievement. While much of his success may be due to his parents' support in terms of therapy and other mechanisms, it is impossible to discern whether or not the Student has been deprived of educational benefit because of the action and inaction of the District. The SCDE warns the District that although there was not enough evidence to support the denial of FAPE in this case, the practice of failing to provide parents with proper notice and procedural safeguards may eventually result in such a ruling. Therefore, the SCDE finds that the District did NOT deny the Student a FAPE under 34 C.F.R. §300.43.

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Issue 2: Whether the District did not comply with the IEE requirement in 34 C.F.R. § 300.502.

According to 34 C.F.R. § 300.502:

a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this subpart —

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either —

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

The United States Department of Education, Office of Special Education and Rehabilitative Services, published Letter to Baus, February 23, 2015, which gave guidance in this area. The letter stated:

Specifically, you ask whether a parent can request an IEE in an area that was not previously assessed by the school district's evaluation.

Under 34 C.F.R. §300.502(b)(1) of the IDEA, a parent of a child with a disability is entitled to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency. Evaluation is defined at 34 C.F.R. §300.15 as procedures used in accordance with 34 C.F.R. §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. An initial evaluation of the child is the first completed assessment of a child to determine if he or she has a disability under IDEA, and the nature and extent of special education and related services provided. 34 C.F.R. §300.301. Once a child has been fully evaluated for the first time in a State, a decision has been rendered that a child is eligible under the IDEA, and the required services have been determined, any subsequent evaluation of a child would constitute a reevaluation. See the *Analysis of Comments and Changes* published as Attachment I to the March 12, 1999 final regulations at 64 Fed. Reg. at 12606. Evaluation procedures at 34 C.F.R. §300.304(b)(1) require that in conducting an evaluation, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum. Furthermore, the State must ensure that in evaluating each child with a disability under 34 C.F.R. §§300.304 through 300.306, the evaluation is sufficiently comprehensive to assess the child in all areas related to the suspected disability, and must identify all of the child's special needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. §300.304(c)(4) and (6). When an evaluation is conducted in accordance with 34 C.F.R. §§300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs. Under 34 C.F.R. §300.502(b)(2), if a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either: (i) initiate a hearing under 34 C.F.R. §300.507 to show that its evaluation is appropriate; or (ii) ensure

that an IEE is provided at public expense, unless the agency demonstrates in a hearing under 34 C.F.R. §300.507 that the evaluation obtained by the parent did not meet agency criteria.

The Complainants asked for an IEE. The District eventually conducted a psychoeducational report on the Student in April, 2015, but found that the Student did not qualify for special education services. The parents of the Student disagreed with the evaluation. The parents stated that the child was not given a proper OT assessment, nor was he assessed for executive functioning. The law required the District, at this point, to pay for an evaluation at public expense or to file for a due process hearing. The District did neither of these. If a parent requests an IEE, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, *the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint* to request a due process hearing to defend the public evaluation. The Complainants requested an IEE at public expense in October, 2015. The District should have given the Complainants the required information on where to obtain an IEE. The District instead stated that "Upon your submission of the neuropsychological testing, which would act as an evaluation request/referral for special education services, it would then be up to a multi-disciplinary team to determine what, if any, additional information or assessments are needed to determine IDEA or 504 eligibility." There is no requirement that the parents submit testing or evaluations. It is not up to the team to determine what assessments the evaluator will need. The District was required to proceed with the evaluation, at public expense, without unreasonable delay, or to file a due process complaint.

The District should have provided the parent information about where an IEE may be obtained and the agency criteria applicable for IEEs. The public agency should have given the criteria under which an IEE can be obtained at public expense, including the location of the evaluation and the qualifications of the examiner, which must be the same as the criteria the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. Except for these criteria, *a public agency may not impose conditions or timelines* related to a parent obtaining an IEE at public expense. 34 CFR §300.502(e). Because the District imposed two conditions (bringing in a neuropsychological exam and meeting with the team) before providing the IEE information to the Complainants, the SCDE finds that the District is in violation of 34 C.F.R. § 300.502. In addition, according to the documentation received from the District regarding the meeting on February 4, 2016, the District still has not provided this information to the Complainants. Instead, the team discussed available data to support eligibility. While it is commendable that the District is considering multiple sources of information, the Complainants are still entitled to an IEE at public expense, which should be considered along with any data obtained by the District's evaluation that was planned on February 4, 2016.

Issue 3: Whether the District misplaced or destroyed records relevant to the Student's disability determination in violation of its own policy and procedure guidelines.

Under FERPA, schools may destroy education records without notice to the parent unless there is an outstanding request by the parent to inspect and review such records. *letter to Anonymous,*

111 LRP 18281 (FPCO 2010); *Letter to Anonymous*, 111 LRP 72174 (FPCO 2011); *Letter re: Keystone Central School District*, 105 LRP 25813 (FPCO 2005). However, the District's policy JRA-R, Student Records, states that the District may destroy data no longer needed to provide direct educational services where the data does not concern the "referral, evaluation, staffing, and placement of a disabled student or a student suspected at one time of having a disability." The Complainants began requesting an evaluation of the Student in December, 2012. This means that the District was required to keep all records related to the evaluation involving the Student, including intervention records. "RTI models provide the data the group must consider on the child's progress when provided with appropriate instruction by qualified professionals as part of the evaluation." *Comment in the Federal Register*, p. 46658. This directly relates to the evaluation process under the IDEA. The District, by its own admission, discussed intervention for the Student in the December 17, 2012, team meeting. In addition, the District should have kept and provided complete records of grades and nursing services. The District has not done this, and cannot rely on assumptions that the Complainants already had copies of some items.

The definition of "education records" under 34 C.F.R. § 300.61 l(b) is: "Education records means the type of records covered under the definition of "education records" in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA))." A record includes any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm and microfiche. 34 C.F.R. § 99.3. "Education Records" are directly related to a student, and maintained by an educational agency or institution or by a party acting for the agency or institution. The term does not include records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record. Under FERPA regulation 34 C.F.R. § 99.10, parents or eligible students must be given the opportunity to inspect and review the student's education records.

The District has not substantially complied with the parents' request. The Complainants' list of records not provided subsists primarily of documents that should have been provided to the parents within the 45 day timeline established under FERPA. Either the District did not follow its own policy with regard to records retention or the District simply failed to deliver the documents.

Since the District has offered for the Complainants to come in and view the remaining documents, the SCDE finds the District is in violation of the FERPA regulations at 34 CFR § 99.3 and 34 C.F.R. § 99.10(a) for failure to deliver educational records to the parents upon request within 45 days. The SCDE encourages the District to locate the remaining records within ten days and provide them to the Complainants.

ADDITIONAL ISSUE:

Whether the District is using 504 plans as a substitute for IEPs

According to 34 C.F.R. § 300.39(b)(3), specially-designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery

of instruction to address the unique needs of the child that result from the child's disability; and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. If this instruction is provided in the classroom, it qualifies as special education. 34 C.F.R. § 300.39(a)(1). If a determination is made that a child has a disability and *needs special education* and related services, an IEP must be developed for the child in accordance with §§ 300.320 through 300.324. 34 C.F.R. § 306(c)(2).

A District employee stated that specialized instruction could be provided under a 504 plan. This is not the case. If a team determines that specialized instruction is needed for a child because of his disability, then the child is a child with a disability under the IDEA and an IEP must be implemented.

The SCDE is aware of the District's concern regarding the voluminous amount of material submitted by the Complainants during the investigation of the complaint. Correspondence from the District's attorney indicated that the District requested an opportunity to respond to the Complainants' submissions. The SCDE has allowed such responses, though they were not required under the complaint investigation process.⁷ The complaint investigator has thoroughly examined all evidence submitted and requested additional relevant information as needed throughout the investigation.

CORRECTIVE ACTIONS

When issues of noncompliance are identified, corrective actions must be taken.

- 1) The District must, as soon as possible, but no later than Friday, February 19, 2016, provide the parent information about where an IEE may be obtained and the agency criteria applicable for IEEs. This IEE must be provided at the District's expense.
- 2) The District must convene a team meeting to determine whether the Student qualifies for special education services under the IDEA after the IEE is conducted. The team must

7ca) *Time limit; procedure.* Each SEA must include in its complaint procedures a time limit of 60 days after a complaint is filed under § 300.153 to—

- (1) Carry out an independent on-site investigation, if the SEA determines that an investigation is necessary;
- (2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;
- (1) Provide the public agency with the opportunity to respond to the complaint, including, at a minimum—
 - (i) At the discretion of the public agency, a proposal to resolve the complaint; and
 - (ii) An opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation consistent with § 300.506;
- (4) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part; and
- (5) Issue a written decision to the complainant that addresses each allegation in the complaint and contains—
 - (i) Findings of fact and conclusions; and
 - (ii) The reasons for the SEA's final decision.

34 C.F.R. § 300.152.

consider any adverse impact on the Student's education. The District must provide a written, detailed explanation of this determination to the SCDE no later than March 4, 2016. The District must provide a written, detailed explanation of each eligibility finding and the outcome to the SCDE no later than March 4, 2016.

- 3) If the District determines that the Student is eligible for services, the team must reconvene to:
- a) determine how and the extent to which the Student was negatively impacted by the District's failure to comply with the IDEA child find requirements by failing to appropriately identify, locate, evaluate, and place the Student as a student with a disability in a timely manner and provide the Student the appropriate special education and related services; and
 - b) determine what remedies are necessary to put the Student in the place that it is reasonable to anticipate he would have been, if not for the violations that occurred.

If the team believes an appropriate remedy includes the provision of compensatory services, the IEP team must determine the amount, type, and frequency of compensatory services owed to the Student and develop a plan for the delivery of the services. The team should consider the options of whether to use the District's personnel to provide compensatory services or contract with outside service providers.

The District must also provide documentation of the team's decisions relative to:

- a) the amount of compensatory services owed to the Student;
- b) a detailed explanation of how the determination was made concerning the amount of services the Student needs to remedy the identified issues;
- c) who will provide the compensatory services;
- d) how the District will measure the effectiveness of the compensatory services;
- e) the proposed timeline for the delivery of the compensatory services; and
- f) how the District will document the delivery of the services. The District must provide the required documentation of these determinations no later than March 4, 2016.

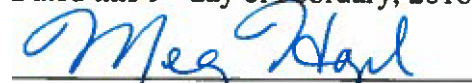
The District must develop and maintain an efficient and accurate system for capturing and reporting the provision of any compensatory services and provide this documentation to the SCDE beginning no later than April 1, 2016, and the first day of each month thereafter, until the provision of all compensatory services is completed.

The IEP team must use a thoughtful process in determining the appropriate amount of compensatory services owed to the Student and how and where the services will be delivered. The IEP team must determine the impact of the noncompliance and make individualized determinations. The IEP team must document the process used in making each determination. The process should include input from persons such as outside service providers, the teachers, and the Complainants.

If the team determines that no compensatory services are warranted the District must provide a detailed written explanation regarding the team's decision and forward this explanation to the SCDE.

- 4) The District must develop a training plan that instructs all personnel in the areas of proper response to IEE requests and document retention in accordance with the District's policies and procedures detailing if and when documents are required to be archived and the procedures to be followed to ensure that those documents are made available to parents. The District must also develop a training plan that instructs all pertinent personnel in the proper use of 504 plans as opposed to specialized instruction offered in IEPs. The District must also submit documentation, which includes, but is not limited to, the training materials the District plans to use, a list of persons who will participate in the training and their titles or jobs within the District, and copies of the agenda from the training activities, no later than one week after the completion of each training activity. The District is not required to provide copies of statutes, regulations, or any SCDE policies and procedures or guidelines used during training activities. A listing of any such documents is sufficient. The District must also include an explanation of how the District will determine the effectiveness of the training activities and submit a long-range training plan to avoid a recurrence of the identified issues of noncompliance with current and future staff. The District must submit the required training plan to the SCDE no later than March 11, 2016.
- 5) The District must provide a written assurance signed and dated by the District's superintendent and the executive director of special education that all issues of noncompliance identified in this letter of resolution and the corrective actions, which include those developed by the District, will be addressed in accordance with this letter of resolution and as set forth in the training plan that the District must submit to the SCDE. The District must assure that it will comply with the IDEA evaluation requirements and provide parents a copy of the procedural safeguards when a parent requests that the District conduct an evaluation of his or her child. Additionally, the District must indicate that it understands that if it fails to correct the issues of noncompliance identified during this investigation, pursuant to its general supervisory authority, the SCDE may order additional corrective actions that include, but are not limited to the imposition of sanctions. The District must submit the required letter of assurance to the SCDE no later than Friday, February 19, 2016.

Dated this 9th day of February, 2016



Meg H. plaint Investigator
Office of General Counsel
South Carolina Department of Education
1429 Senate Street-Room 1015
Columbia, South Carolina 29201

THIS WRITTEN DECISION CONCLUDES THE SCDE'S INVESTIGATION OF TIDS
COMPLAINT

The IDEA provides mechanisms for resolution of disputes affecting the rights of students with disabilities. This complaint is in the process of being resolved. It cannot be closed, however, until the District submits verification that it completed the required corrective action activities.

All corrective actions must be completed as soon as possible, but in no case later than one year from the February 9, 2016, letter of resolution. This decision may not be reconsidered or appealed. The Complainant retains any and all rights provided under federal and state law, including the right to mediation and/or a due process hearing, to further pursue this matter.

General Supervision

In accordance with the IDEA regulation 34 C.F.R. § 300.151(b), the state educational agency, pursuant to its general supervisory authority must address the failure to provide appropriate services, including corrective actions appropriate to address the needs of the student and appropriate future provision of services for all children with disabilities. The SCDE, Office of General Counsel and the Office of Special Education Services will determine if additional activities are necessary, which include, but are not limited to monitoring, technical assistance, or any other activity deemed necessary. Failure to comply with the corrective actions may result in sanctions as outlined in the IDEA.