

Colorado Department of Education  
Decision of the State Complaints Officer  
Under the Individuals with Disabilities Education Act (IDEA)<sup>1</sup>

**State-Level Complaint 2016:502  
Pueblo School District 70**

**DECISION**

**INTRODUCTION**

This pro-se, state-level complaint (Complaint) was properly filed on February 19, 2016 by the parents (Parents) of two children (Student #1) and (Student #2) or (Students) who were evaluated and determined to be ineligible as children with disabilities under the IDEA. Parents bring this Complaint against Pueblo School District 70 (School District).

Based on the written Complaint, dated February 18, 2016, the State Complaints Officer (SCO) determined that the Complaint allegations identified three issues subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.<sup>2</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**COMPLAINT ALLEGATIONS**

Parents' Complaint raised the following issues, in summary:

Whether the School District has violated Parents' rights and denied Students a free appropriate public education (FAPE):

1. by failing to appropriately evaluate Students for eligibility as children with disabilities from on or about May 2015;
2. by failing to appropriately determine Students' eligibility as children with disabilities and needs for special education and related services in or about May 2015 and December 2015; and
3. by denying Parents meaningful participation from on or about May 2015.

**Summary of Proposed Remedies.** To resolve the Complaint, Parents proposed that Students receive speech and language and Orton-Gillingham reading program at School, as well as reimbursement for costs incurred for private tutoring.

**FINDINGS OF FACT**

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

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 C.F.R. § 300.1, *et seq.*

<sup>2</sup> Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

1. At all times relevant to the Complaint, Students have lived with Parents within the boundaries of the School District and have attended School.

### Spring 2015 Evaluations

2. In the Spring of 2015, Parents advised School District that they were concerned about Students' speech and learning, requesting that both Students be evaluated for special education. On April 21, 2015, Parents consented to School District evaluating Students in the areas "Academic, Memory, Speech, Language". Special Education Teacher #1, a trained and licensed special education teacher, coordinated the evaluations (Spring 2015 Evaluations), which were completed on May 12, 2015.<sup>3</sup>
3. Student #1's Spring 2015 Evaluation consisted of the following assessments and results:<sup>4</sup>
  - a. Broad scores on the Kaufman Test of Educational Achievement (KTEA II) administered by Special Education Teacher #1 placed Student #1 within the average range of Student #1's age group;
  - b. Special Education #1 observed Student #1 in Teacher's classroom working independently while writing in a journal;
  - c. A structured developmental history (BASC) completed by School Psychologist #1 and Mother noted that Mother's biggest concern is Student #1's learning, that an outside speech therapist has noted that Student #1 struggles with retention [of information], and that she sees Student #1 having a hard time with letter and sound recognition, as well as word retention;
  - d. Results of the Wide Range Assessment of Memory and Learning 2 (WRAML) administered by School Psychologist #1 placed Student #1 within the average range for Student #1's age group;
  - e. A review of NWEA scores by School staff showed that Student #1 fell below benchmark in reading and math during the fall assessment;
  - f. A review of DIBELS-Next scores by School staff showed that Student #1 fell below benchmark for first sound fluency during the fall assessments and nonsense word fluency and phoneme segmentation during the winter assessments;
  - g. SLP #1 used the Clinical Evaluation of Language Fundamentals – 5<sup>th</sup> Edition (CELF-5) to assess receptive and expressive language skills, which showed no significant speech/language concerns; and
  - h. SLP #1 used the Clinical Assessment of Articulation and Phonology 2<sup>nd</sup> edition (CAAP-2) in order to assess Student #2's articulation skills, in which Student #2 displayed two misarticulations, but SLP #1 found Student #1 was stimulable for corrections and assessed Student #1's articulation skills as being in the average range for Student #1's

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<sup>3</sup> Exhibits E-1 and E-2 and Interviews with Mother, Father, Teacher, Special Education Teacher #1, School Psychologist #1, and SLP #1.

<sup>4</sup> Exhibit E-2 and Interviews with Mother, Father, Teacher, Special Education Teacher #1, School Psychologist #1, and SLP #1.

age.

4. Student #2's Spring 2015 Evaluation consisted of the following assessments and results:<sup>5</sup>
- a. Broad scores on the Kaufman Test of Educational Achievement (KTEA II) administered by Special Education Teacher #1 placed Student #2 within the average range of Student #2's age group;
  - b. Special Education #1 observed Student #2 in Teacher's classroom working independently while silently reading;
  - c. A structured developmental history (BASC) completed by School Psychologist #1 and Mother noted that Mother's biggest concern is Student #2's learning and that an outside speech therapist noted that Student #2 struggles with retention;
  - d. Results of the Wide Range Assessment of Memory and Learning 2 (WRAML) administered by School Psychologist #1 placed Student #2 within the low average range for Student #2's age group;
  - e. A review of NWEA scores by School staff showed that Student #2 fell below benchmark in reading and math during the winter assessment and math in the spring;
  - f. A review of DIBELS-Next scores by School staff showed that Student #2 fell below benchmark for phoneme segmentation fluency and nonsense word fluency during the winter assessments;
  - g. SLP #1 used the Clinical Evaluation of Language Fundamentals – 5<sup>th</sup> Edition (CELF-5)<sup>6</sup> to assess receptive and expressive language skills, which showed no significant speech/language concerns; and
  - h. SLP #1 used the Clinical Assessment of Articulation and Phonology 2<sup>nd</sup> edition (CAAP-2) in order to assess Student #2's articulation skills, at which time Student #2 presented with two misarticulations, however, SLP #1 found Student #1 was stimulable for corrections and assessed that Student #2's articulation skills were in the average range for Student #2's age.

#### May 20, 2015 Eligibility Meetings<sup>7</sup>

5. On May 20, 2015, the Spring 2015 Evaluations team (Spring 2015 Team), including Parents, properly convened, at which time they discussed Parents' concerns, Spring 2015 Evaluations,

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<sup>5</sup> Exhibit E-1 and Interviews with Mother, Father, Teacher, Special Education Teacher #1, School Psychologist #1, and SLP #1.

<sup>6</sup> SCO notes that although assessments performed by SLP #1 were not specifically listed in the Assessment Strategy or Tool section of Student #2's Eligibility Report, the report went on to describe the assessments that were clearly conducted by SLP #1.

<sup>7</sup> SCO notes that although Students were evaluated separately, both eligibility meetings at issue in the Complaint involved discussions about both Students at the same time. Although there is no disagreement and it is understandable in terms of preserving time for Parents, School, and School District staff members, and given the similarities between Students and concerns about them, holding separate meetings is advisable due to the difficulty of discerning information about each child individually.

and Students' eligibility for special education under the categories of SLI and SLD.<sup>8</sup>

6. The eligibility team, including Parents, reviewed the disability categories of SLI and SLD, determining that Students did not qualify for special education. SCO concludes, based on a thorough review of the credible record, including numerous interviews with reliable witnesses, that School District lacked meaningful functional information required in order to determine eligibility under the SLD category. School District's eligibility documentation includes no reference at all to discussions about instruction specific to Students or their response to instruction. Moreover, Special Education Teacher observed Students only once while working independently, not while receiving instruction from Teacher. SCO also notes that although there is no requirement for checklists, the Spring 2015 team did not provide checklists for the SLI or SLD eligibility categories which are oftentimes used to ensure that eligibility teams comply with the IDEA procedures. School District also never provided Parents with prior written notice "PWN" of the determinations after the meetings and School District's Eligibility Reports contain nothing with regard to parent input, with the exception of the information in the BASC.<sup>9</sup>

#### Private Interventions and Clinical Evaluations

7. Over the summer of 2015, Private SLP began working separately with Students in their home once a week. Private SLP works with Students on goals related to expressive language, remediation of phonological and articulation errors, problem solving, and reading. Private SLP states that reading is a significant area of concern and has observed that reading and homework is extremely stressful for both Students.<sup>10</sup>
8. Parents continued to be concerned about Students' learning and speech issues and took both Students to Private Hospital in October 2015 to be evaluated at their own expense.<sup>11</sup>
9. Student #2's evaluation (Student #2 Clinical Evaluation) included a review of medical records, interviews with Student #2 and Parents, a background questionnaire completed by Parents, the Behavior Rating Inventory of Executive Function, the SNAP-IV, and the Behavior Assessment System for Children-Second Edition (BASC2). Student #2 Clinical Evaluation also included Student #2's performance on the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition, Wide Range Assessment of Memory and Learning-Second Edition (verbal subtests), NEPSY-II (Memory for Faces), Developmental Test of Visual-Motor Integration – Sixth Edition, Weschler Individual Achievement Test – Third Edition, Test of Word Reading Efficiency-Second Edition, and Comprehensive Test of Phonological Processing-Second Edition. Student #2 Clinical Evaluation resulted in diagnoses of both dyslexia (a reading disorder) and dyscalculia (a math disorder) and identified deficits in

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<sup>8</sup> Exhibits E-1 and E-2 and Interviews with Mother, Father, Teacher, Special Education Teacher #1, School Psychologist #1, and SLP #1.

<sup>9</sup> *Ibid.*

<sup>10</sup> Exhibits 5 and 8 and Interviews with Mother, Father, Private SLP.

<sup>11</sup> Complaint.

phonemic awareness, decoding, word reading and reading fluency. Student #2's Clinical Evaluation report also noted letter writing fluency and retrieval of verbal based information as concerns.<sup>12</sup>

10. Student #1's evaluation (Student #1 Clinical Evaluation) included a review of medical records, interviews with Student #1 and Parents, a background questionnaire completed by Parents, the Behavior Rating Inventory of Executive Function and the Behavior Assessment System for Children-Second Edition (BASC2). ). Student #1 Clinical Evaluation also included Student #1's performance on the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition, Wide Range Assessment of Memory and Learning-Second Edition (verbal subtests), NEPSY-II (Memory for Faces), Developmental Test of Visual-Motor Integration – Sixth Edition, Grooved Pegboard, Weschler Individual Achievement Test – Third Edition, Test of Word Reading Efficiency-Second Edition, Gordon Diagnostic System – Third Edition, and Comprehensive Test of Phonological Processing-Second Edition. Student #1 Clinical Evaluation also resulted in a diagnosis of dyslexia and identified phonics and phonemic awareness difficulties, as well as articulation problems. Student #1's Clinical Evaluation also noted concerns when Student #1 had to process multiple pieces of verbal information simultaneously.<sup>13</sup>
11. Private Tutor began working with Students separately twice a week on October 29, 2015 in order to provide tutoring, as well as Barton Reading Program (Barton), a multisensory and highly structured Orton-Gillingham approach created for students with dyslexia. Private Tutor states that Student #2 could not pass the reading screening to begin using Barton at that time so Student #2 began with the Lindamood Bell system in order to establish phonemic awareness and has since progressed onto Barton. Student #1 immediately began working in the Barton program and has been progressing through Barton.<sup>14</sup>

#### Fall 2015 Evaluations

12. Parents advised School District of Students' diagnoses from Private Hospital on October 25, 2015, requesting that they both be reevaluated for special education and providing School District with copies of the Clinical Evaluation reports.<sup>15</sup>
13. Special Education Teacher #1 asked Special Education Teacher #2 to quickly draft a consent to evaluate Students, informing Special Education Teacher #2 that the evaluations would consist of DIBELS and MAPS scores, a review of the Clinical Evaluation reports, Weschler,

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<sup>12</sup> Exhibit 1.

<sup>13</sup> *Ibid.*

<sup>14</sup> Interviews with Parents and Private Tutor and Exhibits 3, 5, and 8.

<sup>15</sup> Exhibit G.

Speech and Language assessments, and Occupational Therapy (OT) assessments.<sup>16</sup> Special Education Teacher #2 understood that Parents wanted evaluations performed based on the diagnoses from Private Hospital and Clinical Evaluation reports.<sup>17</sup>

14. On October 26 and 31, 2015, Parents consented to School District's reevaluations of Students in the areas of "Academic, Cognitive, Speech/Language (Articulation, Vocabulary, and Language), Occupational Therapy."<sup>18</sup> SCO notes that neither consent form notes specific areas of academic concern or academic skill areas to be assessed. Special Education Teacher #1, a trained and licensed special education teacher, coordinated the reevaluations (Fall 2015 Evaluations), which were completed on December 2, 2015. Neither Special Education Teacher #1 nor Special Education Teacher #2 consulted with Parents about the reevaluations, however, Special Education Teacher #1 did inform Parents which assessments would be used.<sup>19</sup>
15. Student #1's Fall 2015 Evaluation consisted of the following assessments and results:<sup>20</sup>
  - a. Broad scores on the Woodcock-Johnson IV Test of Achievement Form A (WJIV) administered by Special Education Teacher #1 showing that Student #1's Brief Achievement score, which is an overview of skill development across the reading, writing and math areas, was at the 39%ile;
  - b. School Psychologist #2 administered the Kaufman Assessment Battery for Children –II (KABC-II) which revealed an average overall Mental Processing Index, but showed a relative weakness in the area of learning;
  - c. Occupational Therapist (OT) assessed Student #1 using the Wide Range Assessment of Visual Motor Abilities (WRAVMA), revealing no concerns;
  - d. School Psychologist #2 provided a review of Clinical Evaluation in which it was noted that Student #1's profile is consistent with a language-based learning disorder and demonstrated concerns when having to process multiple pieces of verbal information simultaneously, as well as phonics and phonemic awareness difficulties and articulation problems;
  - e. Special Education #1 observed Student #1 participating in a small reading group with Teacher for one 15 minute period in Teacher's classroom, at which time Student #1 read aloud and required one correction, but elaborated no further;

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<sup>16</sup> Interview with Special Education Teacher #2. SCO notes that OT assessments have not been specifically raised as an issue in this Complaint, however, Special Education Teacher #2 stated that it was her understanding that the OT assessments were requested by Parents.

<sup>17</sup> Interview with Special Education Teacher #1

<sup>18</sup> Exhibits D-2b and D-2c and Interviews with Mother, Father, Special Education Teacher #2, Special Education Teacher #1, School Psychologist #2, Special Education Director, Principal, and SLP #2.

<sup>19</sup> Exhibits D-2b and D-2c and Interviews with Mother, Father, Special Education Teacher #1, Special Education Teacher #2, School Psychologist #2, SLP #2, Principal, and Special Education Director.

<sup>20</sup> Exhibits M and D-2b and Interviews with Mother, Father, Principal, Special Education Director, Special Education Teacher #1, School Psychologist #2, and SLP #2.

- f. SLP #2 used the Test of language Development –Primary: 3<sup>rd</sup> Edition (TOLD-P:3) to assess Student #1’s receptive and expressive language skills, which placed Student #1 within the average range;
  - g. SLP #2 used the Goldman Fristoe Test of Articulation 2<sup>nd</sup> ed. in order to assess Student #1’s articulation of speech sounds in words and in sentences. The assessment revealed articulation errors, but SLP #2 noted that Teacher reports no difficulty understanding Student #1 and that Student #1 is stimuable for corrections, judging Student #2 as 85-90% intelligible in conversational speech;
  - h. A review of NWEA scores by School staff for the Fall showed that Student #1 fell below benchmark in Nonsense Word Fluency during the fall reading assessment; and
  - i. A review of DIBELS-Next scores by School staff showed that Student #1 met benchmarks during the fall assessments.
16. Student #2’s Fall 2015 Evaluation consisted of the following assessments and results:<sup>21</sup>
- a. School Psychologist #2 administered the Kaufman Assessment Battery for Children –II (KABC-II) which revealed an average overall Mental Processing Index, but showed a relative weakness in the area of learning;
  - b. Broad scores on the Woodcock-Johnson IV Test of Achievement Form A (WJIV) administered by Special Education Teacher #1 showing that Student #2’s Brief Achievement score, which is an overview of skill development across the reading, writing and math areas, at the 27<sup>th</sup> percentile;
  - c. Occupational Therapist (OT) assessed Student #2 using the Wide Range Assessment of Visual Motor Abilities (WRAVMA), revealing no concerns;
  - d. School Psychologist #2 provided a review of Clinical Evaluation in which it was noted that Student #2’s profile is consistent with dyslexia and dyscalculia, revealed deficits in phonemic awareness, decoding, word reading, and reading fluency, as well as concerns with letter writing fluency and retrieval of verbal based information;
  - e. Special Education Teacher #1 observed Student #1 while coloring independently in Teacher’s classroom for one 15 minute period;
  - f. A review of NWEA scores by School staff for the Fall showed that Student #2 fell below benchmark in Nonsense Word Fluency during the fall reading assessment, meeting benchmarks for all other NWEA assessments;
  - g. A review of DIBELS-Next scores by School staff showed that Student #2 fell below benchmarks in both reading and math during the fall assessments;
  - h. SLP #2 used the Test of language Development –Primary: 3<sup>rd</sup> Edition (TOLD-P:3) to assess Student #2’s receptive and expressive language skills, which placed Student #2 within the average range; and
  - i. SLP #2 used the Goldman Fristoe Test of Articulation 2<sup>nd</sup> ed. in order to assess Student #2’s articulation of speech sounds in words and in sentences, revealing 11 sound errors, but noting that Teacher reports no difficulty understanding Student #2

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<sup>21</sup> Exhibits M and D-2c and Interviews with Mother, Father, Principal, Special Education Director, Special Education Teacher #1, School Psychologist #2, and SLP #2

and that Student #2 is stimulable for corrections. SLP #2 also judged Student #2 as 85-90% intelligible in conversational speech.

### December 3, 2015 Eligibility Meetings

17. The eligibility team (Fall 2015 Team), including Parents, who were accompanied by Advocate and another advocate, properly convened on December 3, 2015, at which time they discussed Parents' concerns regarding Students' learning issues, Fall 2015 Evaluations, and a lengthy discussion of Parents' right to request IEEs. The eligibility team reviewed the disability categories of SLI and SLD, providing checklists for both categories, determining that Students still did not qualify for special education. Parents disagreed.<sup>22</sup>
18. Based on a thorough review of the credible record, SCO concludes that the Fall 2015 team lacked any meaningful functional information required when determining eligibility in the SLD category. Although Teacher referred to several reading curricula used for all students in Teacher's class, which was noted in School District's eligibility documentation, there was no discussion about instruction specific to Students or their response to instruction. With regard to math, Teacher stated that Student #2 gets 100% or 95% on every test, but never discussed math instruction or how Student #2 responded to instruction.<sup>23</sup> Parents, however, reported that although Students do receive passing marks on their school work, the work itself is obviously incorrect. Observations of Students were also notably light. Although Student #1 was observed while receiving reading instruction, the report notes that Student #1 required a correction, but then provided no further information. Student #2 was never even observed receiving instruction or in any of the areas of concern, but only while coloring independently.<sup>24</sup>
19. On the other hand, Parents provided a wealth of information related to how Students were struggling functionally, which was scarcely, if at all, mentioned in School District's eligibility documentation. Parents spoke at length about how both Students struggle with homework, which Students are completely unable to independently complete, and cry when trying to read. Moreover, prior to the meeting, Private SLP and Private Tutor both provided School District with letters explaining their work with Students and their observations, however, there is also no reference to either of them in the School District's eligibility documentation. All of this was shared at the Fall 2015 meetings, yet, the parent input sections in the School District's eligibility documentation only reference the Clinical Evaluations, concerns regarding

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<sup>22</sup> Exhibits M, D-2b and D-2c and Interviews with Mother, Father, Principal, Special Education Director, Advocate, Teacher, Special Education Teacher #1, School Psychologist #2, and SLP #2.

<sup>23</sup> SCO notes that Key Math was listed as an assessment on the Consent for Evaluation for Student #2, but was not included in Student#2's Fall 2015 Evaluation report.

<sup>24</sup> Exhibits M, D-2b and D-2c and Interviews with Mother, Father, Principal, Special Education Director, Advocate, Teacher, Special Education Teacher #1, School Psychologist #2, and SLP #2. SCO also notes that Student #1 fell well below benchmark in specific areas of the DIBELS and NWEA which were not discussed.



Students' diagnoses, and the discussion about IEEs.<sup>25</sup>

20. SCO also concludes, based on a thorough review of the credible record, that School and School District Fall 2015 Team members focused largely on DIBELS and NWEA scores, relying on the fact that neither of the Students required a READ plan in order to determine educational impact. Principal, Special Education Director, and School Psychologist #2 all confirmed that the team was primarily concerned with whether Students were able to access the general education curriculum, however, notably absent from their consideration of the DIBELS and NWEA data is the fact that Students were actually failing to meet benchmarks, as well as their own assessments which contain data relevant to Students' areas of concern.<sup>26</sup>
21. SCO further concludes that Fall 2015 Team members were not all privy to information necessary to determine how to assess or determine Students' eligibility related to all areas of concern. Highly concerning was the lack of communication between Special Education Teacher #1 and SLP #2 with regard to the purpose of the speech and language assessments. SLP #2 admitted that she was unaware and had never seen or heard about the Clinical Evaluation reports prior to assessing Students and only became aware of Students' diagnoses and the Clinical Evaluations at or shortly prior to the Fall 2015 team meetings. SLP #2 determined which assessments to use in consultation with SLP #1. Indeed, SLP #2 even shared with SCO that she recalled thinking it was strange that Students were being evaluated again since they were evaluated in May 2015 and admitted being confused during discussions at the meetings about Students' language delays.<sup>27</sup>
22. SCO also concludes that School District did not provide Parents with sufficient PWN of their determinations after the December 2015 meetings. Although School District did provide Parents with PWN after the meetings this time, the documentation does not describe its rationale related to the eligibility criteria in determining Students' eligibility, but states only that the decisions were based on review of evaluation data. Parent input sections in School District's Eligibility Reports are also noticeably absent.<sup>28</sup>

#### Agreements between School District and Parents regarding IEEs and Barton

23. Following the Fall 2015 Team meeting Parents requested and Special Education Director agreed to IEEs, however, there was much communication between them about what the

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<sup>25</sup> Exhibits M, 5, 9, D-2b and D-2c and Interviews with Mother, Father, Advocate, Private SLP, Private Tutor, Principal, Special Education Director, Advocate, Teacher, Special Education Teacher #1, School Psychologist #2, and SLP #2.

<sup>26</sup> Exhibits M, D-2b and D-2c and Interviews with Mother, Father, Private SLP, Private Tutor, Principal, Special Education Director, Advocate, Teacher, Special Education Teacher #1, School Psychologist #2, and SLP #2.

<sup>27</sup> Exhibits D-2b and D-2c and Interviews with SLP #2, SLP #1, Principal, Special Education Teacher #1, Special Education Teacher #2, and School Psychologist #2.

<sup>28</sup> Exhibits D-2b and D-2c.

IEEs would consist of and who would be evaluating Students. Based on a thorough review of credible evidence in the record, including numerous interviews with reliable witnesses, SCO concludes that IEEs have not been obtained to this date, however, evaluations related to all areas of concern identified in Clinical Evaluations, including speech and language evaluations, have been agreed to and have already been scheduled with Private Evaluators in July 2016.<sup>29</sup>

24. SCO further concludes that the Parties have agreed to meet immediately after the evaluations are concluded and reported, including Private Evaluators at the meeting and no later than early August 2016 to discuss the evaluations and determine whether Students are eligible for special education.<sup>30</sup>
25. School District began providing Barton and reading tutoring at School four times a week with Private Tutor in early March 2016. Director of Student Services stated that Student #1 is progressing well, but Student #2 is not. Principal stated that School staff check Students' oral reading fluency every other week showing that Student #1 is making good progress, but Student #2 is not. Private Tutor states that Student #2 is completely unable to read independently.<sup>31</sup>
26. SCO also concludes that School District and Parents have agreed that Students will be provided with Barton by Private Tutor in School during the regular school day until each of the Students successfully complete the first ten modules of the Barton program.<sup>32</sup>

### **CONCLUSIONS OF LAW**

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

1. The IDEA requires local education agencies such as the School District to provide eligible students with disabilities with a FAPE, by providing special education and related services individually tailored to meet the student's unique needs, and provided in conformity with an individualized educational program ("IEP") developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. The IDEA's procedural requirements for developing, reviewing, and revising the IEP require a school district to timely convene an IEP meeting with the required participants (including the child's parents) in order to review the student's progress, new evaluative information, parent concerns, etc., in order to develop a current education plan. In the development of an IEP, parents must be afforded

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<sup>29</sup> Exhibits 2, 10, M, J and Interviews with Mother, Father, Special Education Director, and Director of Student Services.

<sup>30</sup> Interviews with Mother, Father, Principal, Director of Student Services, and Special Education Director.

<sup>31</sup> *Ibid.*

<sup>32</sup> Interviews with Mother, Father, Principal, Director of Student Services, Special Education Director, and Private Tutor.

the opportunity to attend and meaningfully participate, which includes giving consideration to their concerns about their child. 34 C.F.R. §§ 300.321 (a)(1), 300.324(a)(ii) and 300.501(b).

**A. School District failed to appropriately evaluate Students in the eligibility process.**

4. Parents allege that the School District failed to appropriately evaluate Students for eligibility as children with disabilities, specifically SLI and SLD. Based on a thorough review of the credible record, SCO agrees and concludes that School District failed to appropriately assess Students in all areas of their suspected disabilities.
5. In order to qualify as a student with a disability under the IDEA, a student must be found to have one of the 13 qualifying impairments and, for that reason, require special education and related services. 34 C.F.R. § 300.8; ECEA Rule 2.8. It is not enough that a child has one of the qualifying disabilities – the child must also require “specially designed instruction ... to meet the unique needs of the child” as a result of that disability. *Id.*; *see also*, 34 C.F.R. § 300.39. Therefore, a determination that a child is an eligible child with a disability would be based on a suspicion that a child has a qualifying disability and that the child needs special education as a result of that disability.
6. The procedural requirements of the IDEA specify how school districts are to evaluate students to determine whether they are eligible students with disabilities. Specifically, the school district must:
  - a. Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability;
  - b. Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability;
  - c. Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors;
  - d. Ensure that assessments and other evaluation materials are selected and administered without racial or cultural bias, are provided in the child’s native language, are valid and reliable, and are administered by trained and knowledgeable personnel;
  - e. Select assessments relevant to specific areas of educational need;
  - f. Assess the child in all areas of suspected disability;
  - g. Make an eligibility determination by a group of qualified professionals and the child’s parents.

34 C.F.R. §§ 300.304 – 300.306.

7. SLI is defined in the regulations as a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance. 34 CFR § 300.8 (c)(11). The IDEA defines SLD as a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. 34 C.F.R. § 300.8(c)(1).
8. Eligibility determinations of students suspected of having an SLD are sometimes particularly complex and, as a result, the regulations have established additional procedures for the SLD category. 34 C.F.R. §§ 300.307 through 300.311. For a child suspected of having SLD, the team making the determination must ensure that the child is observed in the child's learning environment to document the child's academic performance and behavior in the areas of difficulty. 34 C.F.R. § 300.310.
9. In the Spring of 2015, Parents informed School District of their concerns about Students' speech and learning and requested that School District evaluate Students for special education. Although School District professionals do appear to have selected assessments relevant to speech and learning issues, it also appears that the information gleaned from the assessments was never integrated with necessary functional information that should have been obtained through things such as required observations in areas of concerns, Teacher interviews, discussions about academic instruction specific to Students and their response to instruction, as well as discussions about the possible impact and implications of Students' missing DIBELS and NWEA benchmarks and mild speech impairments. Because Spring 2015 Team did not either collect or report this information required by regulations, specific to the SLD category being considered, SCO finds that the School District did not sufficiently assess all areas of Students' suspected disabilities in order to enable Spring 2015 Team to make determinations about Students' needs for special education in the Spring of 2015.
10. In the Fall of 2015, having received diagnoses for both Students in a dyslexia and Student #2 in dyscalculia from Private Hospital, Parents requested that Students be reevaluated for special education and provided School District with Clinical Evaluation reports. This time, the School District's evaluation team had the benefit of the specific diagnoses as well as additional information provided in Clinical Evaluation reports. Moreover, Students had been working with Private SLP and had begun working with Private Tutor, who both provided School District with information and observations about Students. Unfortunately, it does not appear to SCO that they truly used any of that information to inform further assessments of Students' in specific academic deficits areas, but rather, selected similar assessments as the Spring 2015 Evaluations team.<sup>33</sup> Notably, SLP #2 was not even aware of Students' diagnoses until the meeting and other School District evaluation team members confirmed that they either were unfamiliar with the assessments used in Clinical Evaluations or just felt they

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<sup>33</sup> SCO notes that, although the assessment instruments used in Fall 2015 Evaluations were different than those used in Spring 2015 Evaluations, evaluators used these assessments due having the short period of time between their assessments.

were of little value. SCO also notes that School District's Evaluations are particularly light in terms of functional information, i.e., observations of Students relevant to specific areas of concern and specific information regarding instruction and Students' response. Moreover, data reported in Fall 2015 Evaluations indicates that Students were actually not meeting benchmarks, making School District's heavy reliance on the data in finding that Students were not educationally impacted confusing.

11. Accordingly, SCO finds that School District failed to sufficiently assess all areas of Students' suspected disabilities in both the Spring and Fall 2015 evaluations in order to properly determine whether Students qualified as children with disabilities eligible for special education, denying Students' their right to FAPE.

**B. School District failed to provide Parents with sufficient Prior Written Notice (PWN).**

12. Next, SCO turns to the issue of whether School District provided Parents with written notice meeting the procedural requirements of the IDEA.
13. The IDEA provides that before a school district proposes or refuses to initiate or change the identification, evaluation or educational placement of a child with a disability, the school district must provide the parents with "prior written notice" (PWN) describing and explaining the basis for the school district's action. 34 C.F.R. § 300.503. The regulations specify the content required in the PWN, which must include an explanation of why the agency refuses to take the action. 34 C.F.R. § 300.503(b)(2).
14. Although Parents did not allege in their Complaint that School District failed to provide PWN in either of the two determinations that Students did not qualify for special education, during the course of the investigation of the allegations in the Complaint, SCO discovered the deficiency of PWN in both of School District's eligibility determinations. In fact, after the School District provided no PWN at all after the May 2015 meetings.<sup>34</sup> With regard to the December 2015 determinations, School District did provide PWN, however, the notices provide no meaningful information regarding the rationale for the determinations whatsoever, concluding only that the decisions were based on reviews of the evaluation data.
15. Accordingly, SCO finds that School District failed to provide Parents with sufficient PWN for their decisions regarding Students' eligibility after either eligibility meeting.

**C. School District denied Parents meaningful participation in the eligibility determination process.**

16. Finally, SCO considers Parents' allegations that School District violated the procedural requirement related to parent participation in the eligibility process. Parents allege

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<sup>34</sup> SCO also notes that, despite School District's voluminous production of documentation and additional requests for information, School District did not provide copies of PWN for the May 2015 determination.

specifically allege that information provided by Parents were not meaningfully considered by School District its Fall 2015 eligibility process. SCO agrees.

17. It is well-established that where the procedural inadequacies seriously infringe upon the parents' opportunity to meaningfully participate in the IEP process, the result is a "per se" denial of FAPE. *See, e.g., O.I. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11<sup>TH</sup> Cir. 2014); *Deal v. Hamilton County Bd. Of Educ.*, 392 F.2d 840 (6<sup>th</sup> Cir. 2004); see also, 34 C.F.R. §300.513(A)(2)(II) ("In matters alleging a procedural violation, a hearing officer may find that the child did not receive a FAPE only if the procedural inadequacies ... [s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child...").
18. Here, Parents informed School District of Students' diagnoses from Private Hospital, requesting that Students be reevaluated for special education on the basis the diagnoses, providing Clinical Evaluation reports. Based on a thorough review of the credible record, including numerous interviews with reliable witnesses, SCO concludes that School District violated the procedural requirement related to parent participation in the eligibility process by not meaningfully considering information provided by Parents. Indeed, School District team members admitted that the Fall 2015 eligibility meeting included only a brief discussion of the Clinical Evaluations and that Special Education Teacher #1, who was assessing Students' academic needs, was unfamiliar with Private Hospital's assessments. SLP #2 was completely unaware of Students' diagnoses until right before the eligibility meeting and School Psychologist #2 report provided only a brief reference to Clinical Evaluation reports, explaining that they were "only a snapshot" and that the Fall 2015 Team relied on their own evaluations. Notably, there was very little with regard to parent input in the documentation, with the exception of mentioning their concern regarding the diagnoses and the discussion of IEEs, despite a great deal of discussion by Parents regarding Students' struggles with homework and receiving passing grades despite obviously incorrect work, none of which was noted in School District's documentation.
19. Accordingly, SCO concludes that School District violated the procedural requirement related to parent participation in the eligibility process by failing to meaningfully consider information provided by Parents, resulting in a per se violation of Student's right to a FAPE.

## REMEDIES

The SCO has concluded that the School District committed the following violations of IDEA:

1. Failure to appropriately evaluate Students for eligibility as children with disabilities in accordance with the procedural requirements of the IDEA, specifically SLI and SLD (34 C.F.R. §§ 300.8 and 300.304-300.311);
2. Failure to provide written notice describing and explaining the basis for the school district's action (34 § C.F.R. 300.503); and
3. Failure to provide meaningful participation to the child's parents in the eligibility process (34 § 300.320 and 324).

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

1. By no later than May 23, 2016, the School District must submit to the Department a proposed corrective action plan (CAP) that addresses each and every violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the School District is responsible. The CAP must, at a minimum, provide for the following:
  - a. Effective training concerning relevant policies and procedures to address the cited violations must be conducted for School administrators, special education case managers, and School District evaluators. Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department no later than June 30, 2016.
2. In accordance with the agreements already referred to herein made between Parents and School District :
  - a. IEEs in all identified and suspected areas of disability shall be completed by Private Evaluator, including speech and language assessments to be coordinated through Private Evaluator, no later than July 31, 2016; and
  - b. Separate meetings for Student #1 and Student #2 will be convened (to include Private Evaluator) for determinations of Students' eligibility for special education.

The School District shall provide the Department with documentation that it has complied with these requirements no later than August 29, 2016. Documentation must include a copy of the results of the IEEs and eligibility meetings, including all required notices and consent forms.

3. Compensatory Education Services for Failure to Provide Student with FAPE. As previously discussed, the School District has agreed to and already begun providing Students with Barton through Private Tutor at School during regular school hours throughout the successful completion of the first ten

modules of the Barton program. The parties shall continue to cooperate in determining how these compensatory education services will be provided, with special consideration to Students' needs, stamina, and academic schedule.

The Department will approve or request revisions of the CAP. Subsequent to the approval of the CAP, the Department will arrange to conduct verification activities to verify the School District's timely compliance with this Decision. Please submit the documentation detailed above to the Department as follows:

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

Failure by the School District to meet the timelines set forth above will adversely affect the School District's annual determination under the IDEA and will subject the School District to enforcement action by the Department.

#### **CONCLUSION**

The Decision of the SCO is final and not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *See*, 34 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

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

This 19<sup>th</sup> day of April, 2016.

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Lisa A. Weiss, Esq.  
State Complaints Officer



## APPENDIX

### **Complaint, dated February 18, 2016, pages 1-14**

- Exhibit 1: 12/7/15 correspondence from Private Hospital; Clinical Evaluations
- Exhibit 2: Email correspondence
- Exhibit 3: Documentation regarding payment and schedule with Private Tutor
- Exhibit 4: Student #2: 5/20/15 Eligibility documentation; 12/3/15 Eligibility documentation; 504 Plan documentation
- Exhibit 5: mClass Literacy Performance Reports of DIBELS and NWEA; Private Tutor reports regarding Student #2; Private SLP correspondence regarding Student #2
- Exhibit 6: Students' work samples
- Exhibit 7: Student #1: 5/20/15 Eligibility documentation; 12/3/15 Eligibility documentation; 504 Plan documentation
- Exhibit 8: mClass Literacy Performance Reports of DIBELS and NWEA with handwritten notes; Private Tutor reports regarding Student #1; Private SLP correspondence regarding Student #1
- Exhibit 9: Students' work samples
- Exhibit 10: 1/20/16 correspondence from School District counsel to Parents; correspondence related to IEEs; 1/16/16 correspondence from CDE to Parents regarding their mediation request; 2/1/16 correspondence from U.S. Department of Education Office of Civil Rights (OCR); OCR Discrimination Complaint Form;

### **Reply, pages 1-43**

#### **Response**

- Exhibit A: Lists of individuals with knowledge
- Exhibit B: School District Policies
- Exhibit C: State-Level Complaint Procedures; 2/22/16 SCO correspondence to parties
- Exhibit D: Complaint Response Section
- Exhibit D 1: "Question #1"
- Exhibit D 2: "Question #2" and "Assessments & Results"
- Exhibit D 2b: ["Student #2"]
- Exhibit D 2c: ["Student #1"]
- Exhibit D 2d: CDE guidance documents
- Exhibit E: "Evaluation May 2015"
- Exhibit E 1: ["Student #2"]: 5/20/15 Eligibility Report; 4/27/15 Notice of Meeting; 4/27/15 Prior Notice of Special Education Action; Physical Health Staffing Form; 4/21/15 Prior Notice and Consent for Evaluation; 2015 NWEA Student Report
- Exhibit E 2: ["Student #1"]: 5/20/15 Eligibility Report; Physical Health Staffing Form; 4/27/15 Notice of Meeting; 4/27/15 Prior Notice of Special Education Action; 4/21/15 Prior Notice and Consent for Evaluation; 2015 NWEA Student Report
- Exhibit F: "Scientific Research Intervention": Document entitled "Failure to use

Scientifically Based Research-Violation 2.38”; Approved Interventions Programs; pages pulled from the CDE website regarding eligibility; 3/3/16 email correspondence; 10/19/15-10/21/15 email correspondence; 12/1/15 email correspondence

- Exhibit G: “Question #3A”: document entitled “Failure to consider Parental Decisions-Violation of 300.501(b) Parent Participation in Meetings; 10/23/15 OSEP letter; 10/23/15 Clinical Neuropsychological Consultation; 10/9/15 Clinical Neuropsychological Consultation; Confidential Test Scores; correspondence from private speech therapist; 10/22/15 correspondence from Barton Reading & Spelling system Tutor; 10/25/15 email correspondence; 11/30/15 email correspondence; 11/23/15 email correspondence; 11/9/15 email correspondence; 11/8/15; 11/5/15
- Exhibit H: “Question #3B”: page entitled “3. B. By denying Parents meaningful participation, predetermining eligibility.”; written statement by Principal; 12/6/15 email correspondence; 504 plan powerpoint page with handwritten notes; 12/14/15 email; 12/16/15; 1/20/16; 11/18/15 with handwritten notes and highlighting
- Exhibit I: “Question #3C”: page entitled “Failure to Provide access to [Student #2] and [Student #1’s] Educational Records-Violation of Access Right’s 300.613”; written statement by Principal; Email correspondence with highlighting and handwritten notes (1/3/16, 1/4/16, 1/10/16, 1/13/16, 1/14/16, 1/18/16, 2/11 -2/18/16, ); [Student #1 and Student #2’s] 1/5/16, 2/9/16, 2/16/16, 2/26/16 progress monitoring ; 1/12/16 document request with handwritten notes and highlighting; 2/16/16 Student Portfolio Reports; READ Act Data statement by Principal
- Exhibit J: “IEE”: page entitled “Failure to Evaluate-Violation of 3300.304”; Special Education Director letter to proposed IEE evaluator with hand written note; 12/4/15, 12/8/15, 1/10-1/19/16, email correspondence with highlighting and handwritten notes; Service Provider Referral List; Evaluating Professional Fact Sheet; IDA Provider Directory; Wrightslaw website pages with highlighting
- Exhibit K: “FAPE”: page entitled “Failure to provide FAPE-Violation of 2.19”;11/16/15 OSEP letter with highlighting
- Exhibit L: “Legal”: Principal’s statement with handwritten notes; 1/20/16 correspondence from School District attorney; 11/20/15 Special Education Director correspondence with handwritten note; 11/21/15 email
- Exhibit M: IEP Audio Recordings
- Exhibit N: Special Education Teacher #1’s 5/20/15 written statement requested by SCO

**Interviews with:**

Mother

Father

Advocate

Private Tutor

Private SLP

Director of Student Services

Special Education Director

Principal

Special Education Teacher #1

Special Education Teacher #2

School Psychologist #1

School Psychologist #2

Teacher

Speech Language Pathologist #1

Speech Language Pathologist #2