

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

State-Level Complaint 2015:503
Adams County School District 50, Westminster

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on April 6, 2015, by the parent of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

Based on the written Complaint, the State Complaints Officer (SCO) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

COMPLAINT ALLEGATIONS

Parent's Complaint raised two allegations, summarized as follows:

1. Since January 30, 2015, the District has offered to place Student in a setting that is not appropriate and violates IDEA's least restrictive environment (LRE) requirement, resulting in a denial of a free appropriate public education (FAPE). Specifically:
 - a. A separate school is not the LRE for Student;
 - b. The District did not consider adding supplementary aids and services in the general education environment before placing Student in a separate school; and
 - c. Student's educational placement was changed from being in the general education environment at least 80% of the time to being in a separate school

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

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

without parental input and outside of the IEP meeting held on January 30, 2015.

2. On or around March 16, 2015, the District improperly denied Parent's request for an Independent Education Evaluation (IEE).

FINDINGS OF FACT

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

Background:

1. Student is a third-grade student who has been determined eligible for special education and related services as a child with Other Health Impairment.⁴ At all times relevant to the Complaint, Parent has resided within the District boundaries.
2. Student is intelligent, enjoys learning, tries hard in class, and is interested in everything going on around him. Despite these strengths, Student's academic and social skills are below that of same-aged peers. When Student transferred into the District during the 2013-14 school year, educators initially suspected that the noted academic delays were most likely the result of missed instruction because Student did not attend kindergarten and had missed a significant amount of first-grade due to absenteeism. Notably, Student transferred into the District with an open truancy case.
3. In addition to academic delays, Student has struggled with social expectations and peer relationships at school, routinely displaying defiance, aggression, and disruptive behavior when frustrated or when confronted by peers and teachers about inappropriate behavior. By the end of the 2013-14 school year, Student had been suspended on five separate occasions with most of the suspensions occurring between March and May of 2014.⁵
4. In May of 2014, the District conducted a functional behavior assessment (FBA) and developed a behavioral intervention plan (BIP) that was implemented for the remainder of the 2013-14 school year and the beginning of the 2014-15 school year.⁶

October 2014 IEP and Amendments:

5. At the beginning of the 2014-15 school year, the District conducted a comprehensive special education evaluation with parental consent, and Student was determined to be eligible

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

⁴ Exhibit 1, p. 2.

⁵ Exhibits A and F.

⁶ Exhibit 5, p. 2; Exhibit 9, p. 9.

for special education and related services in October of 2014. Student's evaluation included a review of the FBA completed on May 19, 2014. The District chose not to conduct a new FBA as part of this evaluation because Student's teachers from the previous year had more knowledge and experience with Student and the FBA was still quite recent.⁷

6. Relevant to the allegations in this Complaint, the October 2014 IEP described Student's primary needs as struggling to develop positive peer relationships and demonstrate appropriate behavior during unstructured time, and staying in school for the entire day. In the area of peer relationships, Student had difficulty sharing, taking turns, listening to another's perspective, treating others with respect, and letting go of past conflicts. For example, when frustrated or upset with a peer or confronted about his own behavior, Student often responded with physical and verbal aggression. Unable to let the conflict go, Student would then continue to target peers with whom he had had previous conflicts.

7. In addition, Student has historically struggled with regular attendance, preferring to be at home with Parent rather than be in school. Student has learned through previous suspensions that he can be sent home for certain behavior. Consequently, Student will escalate his behaviors until he is suspended, and Parent is called to take him home.⁸ Further frustrating the District's efforts to keep Student in school, Parent will often come pick Student up early to take him home, despite requests from School Principal and Social Worker that he remain in school for the entire day.

8. To meet identified social and behavioral needs, Student's IEP contained an annual goal in the area of social/emotional wellness intended to improve peer relationships by teaching emotional regulation and problem solving strategies. Because the IEP team concluded that Student's behavior was impacting his relationships with peers and his ability to stay in the classroom, the IEP also included a BIP that identified specific strategies to be used to decrease the likelihood that inappropriate behavior would occur, strategies for teaching alternative or replacement behavior, and strategies for reinforcing appropriate behavior. Student was also provided with a check-in/out before and after transitions and unstructured time because this is when Student was most likely to exhibit inappropriate behavior.⁹

9. To help Student meet these goals, the October 2014 IEP provided 30 minutes of direct mental health interventions each week and 30 minutes of specialized instruction. Student's IEP team determined that the least restrictive environment to receive these services was in the regular education classroom for at least 80% of the time.

10. Despite these supports and services, Student's behavioral challenges grew worse, resulting in approximately 8 days of suspension between October 15, 2014, i.e., the date the

⁷ Exhibit 5, p. 2.

⁸ Exhibit A.

⁹ Exhibit 1, pp. 10-15.

IEP was implemented, and December 3, 2014.¹⁰ The behavior resulting in disciplinary action included spitting in peer's hair and lying about it; calling multiple peers names; making fun of peers; kicking a peer in the groin; punching multiple peers; fist fighting with a peer; threatening physical aggression against multiple peers; and refusing to serve in-school suspension.

11. On December 3, 2014, Special Education Teacher met with Parent to discuss Student's continuing behavioral challenges and the need for increased academic and behavioral support. During this discussion, Parent agreed to amend the IEP without holding an IEP meeting, as permitted by state and federal regulation, signing the IEP amendment documenting the changes. At this meeting, Parent agreed that Student was often anxious in the larger classroom and would benefit from additional supports.¹¹

12. Changes to Student's IEP included adding paraprofessional support during unstructured times, i.e., transitions, recess, lunch, and during specials. In addition, Student would receive direct intensive support in reading and math each day and push-in support in the classroom during independent work time. The specific changes in support and services were as follows:

- Mental health support increased from 30 minutes to 210 minutes each week;
- Push-in support for 135 minutes each day; and
- Pull-out support for 120 minutes each day.¹²

13. Further changes to Student's educational program were made on December 15, 2015, when the District implemented a "containment plan" that added various supports and environmental changes intended to increase the safety of Student and peers as Student continued to act aggressively towards others. With parental consent, the containment plan provided Student with adult supervision throughout the entire school day, including lunch and recess, transition time, in the restroom, and before and after school. For further support, Student was provided with a daily check-in with designated staff and two additional meetings with Social Worker each week to process his feelings.¹³

14. Although no changes were made to Student's BIP, Social Worker continued to explore and to use meaningful behavior teaching strategies, such as how to deal with anger, to help Student develop emotional regulation and anger management skills. In addition, Social Worker used peer mediation and restorative justice practices to help resolve conflicts between Student and his peers.¹⁴ Moreover, all staff working directly with Student, including General Education

¹⁰ Response, pp. 9-10; Exhibits 9 and 13.

¹¹ Complaint; Exhibit 1, p. 19; Interviews with Parent, Parent's Advocate, Social Worker, and Special Education Director. During an interview, Parent for the first time alleged that her signature on the IEP amendment was forged. The SCO does not find this allegation credible.

¹² Exhibit 1, p. 17.

¹³ Exhibit 1, pp. 20-23. Interviews with General Education Teacher, Social Worker, and Special Education Director.

¹⁴ Exhibit 1, pp. 14-16; Exhibit 14; Interviews with General Education Teacher and Social Worker.

Teacher, Social Worker, Special Education Teacher, and various paraprofessionals, implemented the BIP in the education setting.¹⁵

15. The District proposed the changes detailed above because Student continued to struggle significantly with peer relationships and cognitive flexibility, and it was hoped that the increase in mental health services would allow Student “to process his feelings and release pent up anger, anxiety, and sadness.” In addition, the increased support and supervision offered through the containment plan was determined necessary to protect both Student and peers because Student had been targeting specific students with verbal and physical aggression.¹⁶

16. As a result of these changes, Student went from being in the general education classroom for approximately 80% to 58% of the school day. Moreover, the containment plan provided paraprofessional support in all but one of Student’s general education classes and direct adult supervision in all classes.¹⁷

17. Despite the significant level of supports and services added in early December, Student continued to engage in aggressive behavior towards other students. In the month of December, Student’s behavioral incidents included pushing a peer with a lunch tray; punching a peer; pinching and scratching a peer, causing injury; punching a peer in the back; punching a peer in the arm while in the presence of Social Worker; threatening a peer; pushing a peer with significant support needs; and bullying. Student’s peers often avoided being near him and refused to partner or work with him out of fear.¹⁸

18. By December 10, 2014, three different families contacted the School regarding Student’s bullying behavior.¹⁹ Most importantly, Student’s behavior had become so unpredictable that teachers feared they could not keep Student and peers safe despite one-on-one support and supervision. General Education Teacher observed that Student was now, without any provocation, threatening students with whom he had had no prior history of conflict. For example, Student poked a shy and quiet student in the back with a pencil forcefully enough to break the skin while seated behind her.²⁰

19. In addition to missing instruction due to behavioral incidents, Student was so easily distracted in the large classroom that it is doubtful he was available to receive instruction--even on days when he was in class. General Education Teacher observed that Student was distracted by such routine activity as someone walking by the classroom or a peer sharpening their pencil. In addition, Student routinely became highly distracted or agitated during the last hour of the day in anticipation of Parent coming to pick him up. Concerning educational progress, Special

¹⁵ Interviews with Social Worker, General Education Teacher, and Special Education Director.

¹⁶ Exhibit 1, p. 17.

¹⁷ Response, pp. 11-12; Exhibit 1, p. 19; Interviews with Social Worker, General Education Teacher, and Special Education Director.

¹⁸ Interviews with General Education Teacher and Social Worker.

¹⁹ District’s Response at page 13; Exhibit 9, pp. 20-21.

²⁰ Interview with General Education Teacher.

Education Teacher observed that Student was so distractible in the classroom that “he has not been able to produce any work that would show he has mastered a skill.”²¹ Parent has also shared that Student is highly distracted at home.²²

20. On January 7, 2015, the District convened an IEP team to conduct a manifestation determination due to the number of suspensions and continuing behavioral concerns. At this meeting, the IEP team determined that Student’s behavior was a manifestation of his disability and that the behavior was not the result of the District’s failure to implement Student’s IEP.²³

21. The IEP team described Student’s behavior as follows:

When [Student] is in unstructured settings he is unable to stop himself from harassing, threatening or attacking targeted students. [Student] also does not have the social skills needed to use words to get what he needs, and struggles with taking turns and sharing. This causes him to have conflicts with his peers who get angry when [Student] cuts in line, takes something he wants, or says something hurtful. . . . [Student] struggles with the executive functioning skill of emotional regulation and cognitive flexibility. These directly impact his ability to stay calm and handle conflicts in a peaceful way. Also, once he gets an idea in his head, he struggles to let it go. This has continued to cause him ongoing problems with specific peers.²⁴

22. During this meeting, the IEP team also discussed the need to reevaluate Student in light of ongoing behavioral challenges. Even though Student had been placed on a containment plan and was receiving increased mental health support and specialized instruction in December, his aggressive behavior toward peers continued without much change.²⁵ Accordingly, the District requested parental consent to reevaluate Student on January 20, 2015. The District proposed evaluation in academic performance and social emotional status. The consent form also indicated that the District was considering placement in the District’s Day Treatment Program, referred to as the Instructional Services Center (ISC). Parent provided written consent for reevaluation on January 20, 2015.²⁶

23. In conducting the evaluation, Social Worker conducted classroom observation, and reviewed school records and discipline referrals, behavioral strategies applied and their results, and progress monitoring of behavior chart/data. Despite the increase in supports described

²¹ Exhibit 1, p. 35.

²² *Id.*

²³ Exhibit 9, pp. 9-14.

²⁴ Exhibit 9, p. 9.

²⁵ Exhibit 9, p. 11.

²⁶ Exhibit 8, p. 1.

above, the report concluded that Student continued to struggle with behavior, and progress monitoring on his behavioral goals showed, that he was deteriorating rather than improving. For example, Student's BIP allowed him to earn a reward for demonstrating respect, defined as not having any teacher reports or disciplinary referrals. Student's progress on this goal decreased from 56% in September of 2014 to 18% in December of 2014. Further, Student's aggression toward peers continued despite increased support and adult supervision for the entire school day.²⁷

24. In addition to behavioral incidents, the report documented Student's struggle to stay in school. Once Student had a disciplinary incident or referral, his anxiety would get so high that he would want Parent to be called. If Parent was called, Student was often able to talk her into taking him home early, despite requests from School staff that Student should remain in school. Between October 2014 and January 30, 2015, Student had at least 10 unexcused absences for leaving early.²⁸ Moreover, if Parent was not called or did not come early, Student would escalate his behavior to such a dangerous or disruptive level that the School would suspend him and Parent would be called to come take him home.²⁹

IEP Meeting on January 30, 2015:

25. On January 30, 2015, the District convened an IEP team to discuss the evaluation report. The notice informed Parent that the IEP team would discuss the evaluation data, and if appropriate, would review and update the current IEP. The notice further informed Parent that the team would also discuss whether Student may "benefit from a higher level of services."³⁰

26. At the meeting, the team discussed Student's continuing behavioral challenges, as well as academic progress. Academically, Student is below grade-level in reading and math despite specialized instruction in these areas. Special Education Teacher reported to the team that Student is highly distracted in a large classroom and his behavior significantly impacts his ability to learn when he routinely misses class time due to behavioral incidents. The team also concluded that Student continues to struggle with emotional regulation, cognitive flexibility, social skills, and the ability to stay focused.

27. Parent attended the IEP meeting with her advocate. During the meeting, Parent actively participated by asking questions and offering input. For example, Parent informed the IEP team that Student has severe anxiety and has difficulty "letting things go." Parent also reported that Student is currently working with two in-home therapists to address behavioral challenges at home. Concerning the educational environment, Parent informed the IEP team that Student

²⁷ Exhibit 5, p. 6.

²⁸ Exhibit 8. The SCO is only counting days when Student left more than 5 minutes prior to the dismissal bell. Because Student struggles with peers in his own neighborhood, Parent would often come 5 minutes before the dismissal bell to walk Student home ahead of his peers.

²⁹ Exhibit 5, p. 6.

³⁰ Exhibit 4, p. 3.

does not do well in large groups and prefers structure. Parent also stated that Student does not like change, and for this reason, Parent was concerned about him attending a different school, i.e., the ISC.

28. To meet these needs, the IEP team developed three annual goals in the area of social/emotional wellness, and one goal in writing.³¹ To help Student meet these goals, the IEP team identified the following specialized instruction and related services:

- 240 minutes of direct mental health services each week;
- 30 minutes of indirect occupational therapy each month; and
- 1860 minutes of direct specialized instruction each week.

29. The IEP team determined that Student would receive these services in the ISC, a separate school, where there is no access or interaction with typical peers. The ISC is a highly structured, small group therapeutic setting where students receive academic instruction in math, literacy, language arts, science, social studies, and affective education. Class size is typically limited to 8 students. In addition, students attending the ISC may receive treatment services including, individual, group, and family therapy.³² Significant to Student's situation, ISC staff are able to communicate and coordinate with professionals who are offering service and treatment in the home.³³

30. In determining the least restrictive environment, the IEP team discussed keeping Student in the general education classroom with additional support, but determined that Student continued to display verbal and physical aggression despite additional services and supervision, and needed a higher level of support to keep him and others safe.

31. At the end of the meeting, the District requested that Parent visit the ISC, and Parent agreed to do so. Although the IEP clearly identified placement at the ISC, Parent did not understand that this was Student's new placement as a result of the meeting itself. Instead, Parent thought that placement at the ISC was subject to her approval because School Social Worker presented it as such, in hopes that Parent would be pleased with the ISC following her visit.³⁴

32. The District attempted to schedule Parent's visit to the ISC as early as February 2 but Parent cancelled several appointments. Parent eventually visited the ISC with Student, Parent's Advocate, Social Worker, and the ISC Director on February 12, 2015. Student was warmly greeted by students at the ISC and appeared to enjoy the visit.³⁵ While the ISC Director and

³¹ Exhibit 1, p. 29.

³² Response; ISC overview available at <http://www.adams50.org/domain/685>.

³³ Interview with ISC Director and Special Education Director.

³⁴ Complaint; Interview with Parent, Parent's Advocate, and Social Worker.

³⁵ Interviews with Social Worker and ISC Director.

School Social Worker thought the visit went well, Parent had various concerns, including the fact that the classrooms were locked and she was asked to sign paperwork regarding restraint. Parent was also concerned that the other students were too polite and didn't act like typical kids.³⁶ ISC Director explained that the classrooms are locked from the outside as a safety measure. Students can always exit a classroom because they are not locked from the inside. Regarding restraint, the ISC Director clarified that all parents receive an information packet informing them of parental and student rights regarding the use of restraint, including the specific training ISC staff receive.³⁷ While ISC Director recalls that Parent seemed overwhelmed and concerned at the beginning of the visit, she thought that Parent's only remaining concern was how she would get Student to ride the bus to the ISC. ISC Director and Social Worker assured Parent that the District would help Student adjust to riding the bus.³⁸

33. On February 18, 2015, Parent asked to meet with various School and District staff to express her concerns about Student attending the ISC. Parent stated that she was unhappy with placement at the ISC and wanted Student to remain at School. In response, the District reviewed the recent evaluation and behavioral data and explained that the change in placement was necessary to appropriately meet Student's needs. Although Parent initially agreed that Student would start attending the ISC on February 23, 2015, she abruptly changed her mind and informed everyone that she was concerned that she could not get Student on the bus, and more importantly, that she and her children were moving out of the District within the next couple of weeks to a month. Parent was concerned about Student having to transition to two different schools within such a short period of time. In response to Parent's concerns and pending move, the District agreed to delay the start date at the ISC until March 2, 2015. If Student was still residing in the District by March 2, 2015, it was understood that he would attend the ISC.

34. It was at the meeting on February 18, 2015, that Parent understood for the first time that placement at the ISC was not her choice but rather the District's offer of placement. Although the IEP clearly identified the District's offer of placement, the SCO finds it more likely than not that Parent did not receive a copy of the IEP until this meeting, or at the very latest, a week after this meeting.³⁹

35. Student remained at School for the month of February and continued to demonstrate verbal and physical aggression towards peers. Student's behavior included multiple incidents of verbal aggression, e.g., threatening to punch others and making antagonistic and derogatory statements, as well as multiple incidents of physical aggression, e.g., chasing and pushing

³⁶ Interview with Parent.

³⁷ Interview with ISC Director.

³⁸ Interviews with Parent, Social Worker, ISC Director.

³⁹ During her interview, Parent asserted that she did not receive the IEP until she requested records in mid-February. School Social Worker confirmed that she provided a copy of the IEP to Parent on February 25, 2015. Special Education Teacher would have been the person to initially send the IEP to Parent but she was not available for an interview and School does not keep a record of when IEPs are sent out.

another peer, fighting with a younger peer, and pulling items off of the bulletin board in the Principal's office.⁴⁰

36. On February 25, 2015, Parent requested another meeting to discuss placement at the ISC. At this meeting, Parent stated that she wanted Student to remain at School until the family moved and if that was not possible, she was considering revoking consent for special education and related services. In order to ensure the safety of Student and others at School, District Special Education Director agreed to provide Student with homebound services until March 16, 2015, to allow the family to finalize the moving process.

37. On March 3, 2015, an informal meeting was held to discuss homebound services. Parent informed the District that she was still in the process of moving, and it was agreed that the District would provide educational services in Student's home from 10:15-11:15 on Monday, Wednesday, and Friday. The District provided Parent with prior written notice dated March 2, 2015, stating that the IEP team had "recommended placement at the ISC based on Student's social/emotional/behavioral needs." The notice stated that the District had agreed to provide a temporary homebound placement until March 16, 2015, because the family was moving out-of-district and Parent did not want Student to have to transition to two new schools. The notice also stated that if Student was residing within the District after March 16, 2015, placement would be at the ISC.⁴¹ Special Education Director stated that homebound services are generally only offered to students who cannot attend school due to medical conditions. In this case, the Special Education Director offered these services to Parent in good faith, believing that the family would soon be moving out-of-the District and that the transition to two different schools would be very difficult for Student.⁴²

38. From March 9 until March 20, 2015, Student received homebound instruction. Student worked on reading, writing, and math skills as well as increasing on-task behavior. Student's teacher reported that Student is capable of making reasonable progress in literacy and math when focused. She reported that Student works best with limited distractions and frequent breaks and responded well to positive reinforcement.⁴³

39. On March 16, 2015, the District convened another meeting to discuss Student's educational program. At this meeting, Parent requested that homebound services continue for the rest of the 2014-15 school year. Special Education Director denied Parent's request for continued homebound services because Student's IEP team had determined that the appropriate placement would be at the ISC, and it was clear that the family's move was not imminent. Special Education Director informed Parent that educational services for Student would be offered at the ISC beginning March 23, 2015, in accordance with his IEP. Parent again expressed concern that she would not be able to get Student on the bus to the ISC. The District

⁴⁰ Exhibit 9, p. 6.

⁴¹ Exhibit 3, p. 11.

⁴² Interview with Special Education Director.

⁴³ Response, p. 18.

reminded Parent that Homebound Instructor had agreed to help in this area by riding with Student to the ISC on his first day.

40. Parent responded in various ways to the District's determination that educational services would be provided at the ISC starting March 23, 2015. At first, Parent indicated that she would revoke consent for special education and related services so that Student would attend School as a general education student. Special Education Director warned Parent that Student would likely be facing expulsion/suspension due to his behavior if she followed this course. Next, Parent talked about using another residential address to enroll Student in a different school district. By the end of the meeting, Parent indicated that she would be homeschooling Student. Following the meeting, the Superintendent informed parent that that District would not identify Student as truant if Parent could provide a homeschool application by April 8, 2015. To date, Parent has not provided a homeschool application.

41. Since March 20, 2015, Student has remained at home without educational services because Parent has refused the educational services offered at the ISC.

IEE Request:

42. Parent has also alleged that the District denied her request for an IEE. At some point during the meeting on March 16, 2015, Parent requested an IEE. The District's position is that it neither granted nor denied Parent's request for an IEE because it did not understand that Parent was requesting an IEE at the meeting. The SCO finds that this allegation has been resolved because the District granted Parent's request for an IEE on May 15, 2015.⁴⁴

CONCLUSIONS OF LAW

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

1. As a threshold matter, the SCO will address the District's assertion that Parent "bears the burden of proof to show that the placement fails to properly address [Student's] needs." *District Response* at page 19. While several previous state complaint decisions have cited *Schaffer v. Weast*, 44 IDELR 150 (2005) for the proposition that the party seeking relief carries the burden of proof, the federal Office of Special Education Programs (OSEP), which implements and enforces the IDEA, has recently declared that this standard does not apply in the state complaint process. *Letter to Reilly*, 64 IDELR 219 (OSEP 2014). OSEP specifically states that:

Once a state complaint is properly filed, it is solely the SEA's duty to investigate the complaint, gather evidence, and make a determination as to whether a public agency violated the IDEA. It is not the burden of the complainant -- or any other party -- to

⁴⁴ Exhibit 15.

produce sufficient evidence to persuade the SEA to make a determination one way or another. Rather, the SEA must independently review and weigh the evidence, generally by reviewing student and school records, data and other relevant information, and come to a determination supported by relevant facts. *Id.*

Consistent with OSEP guidance, the SCO will investigate Parent's allegations and apply a preponderance of the evidence standard in making the determination as to whether the District violated IDEA.

Allegation One: The District's proposed placement, as described in the January 2015 IEP, is substantively appropriate and does not violate the LRE requirement.

2. Parent alleges that the District has violated IDEA's least restrictive environment requirement by offering a placement in a separate school without considering supplemental aids and services in the general education environment, and without her participation. In Response, the District argues that it provided Student with a variety of supplementary aids and services in the general education classroom, and that the decision to place Student in a separate school was made by Student's IEP team, which included Parent, on January 30, 2015, in accordance with IDEA. The SCO agrees with the District, concluding that the January 2015 IEP offered a substantively appropriate placement in the LRE.

3. The IDEA requires that students with disabilities receive their education in the general education environment with typical peers to the maximum extent appropriate, and that they attend the school they would attend if not disabled. 34 CFR §§ 300.114 and 300.116. Moreover, students should only be placed in separate classes, separate schools, or otherwise removed from the general education setting "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR §§ 300.114 (a)(2)(ii).

4. In determining whether the LRE requirement has been met, the Tenth Circuit applies a two-part test to determine: 1) whether education in a regular classroom with the use of supplementary aids and services can be achieved satisfactorily, and if not, 2) whether the school district has mainstreamed the student to the maximum extent appropriate. *Nebo Sch. Dist.*, 379 F.3d at 980.

5. Consistent with *Nebo*, the SCO considers the following factors to determine whether the first prong has been met: 1) the steps taken to accommodate the student in the regular classroom, including consideration of a continuum of placement and support services; 2) the academic benefits the student will receive in the regular classroom compared with those he will receive in the special education classroom; 3) the student's overall educational experience in the regular classroom, including non-academic benefits; and 4) the effect the student's

presence has in the regular classroom. *Id.* These factors, as applied to the findings in this case, weigh in favor of a conclusion that Student cannot be educated satisfactorily in the regular education classroom with supplementary aids and services.

6. First, the District has provided Student with intensive and increasing support and supervision in the regular education classroom. In October 2014, Student was receiving 30 minutes of specialized instruction and 30 minutes of mental health intervention each week. In addition, Student's IEP contained a BIP that was being implemented in the regular education classroom. Despite this support, Student exhibited verbal and physical aggression that disrupted the classroom environment, threatened the safety of others, and resulted in multiple suspensions.

7. In an attempt to better meet Student's needs, the District and Parent agreed to amend Student's IEP on December 3, 2014 to significantly increase the behavioral support, services, and supervision Student was receiving. These changes included direct intensive support in reading and math each day, 210 minutes of direct mental health support, and paraprofessional support during specials, lunch, recess, and independent work time. Further supervision was provided through a "containment plan" that Parent agreed to on December 15, 2015. As a result of these changes, Student was receiving significant increases in specialized instruction, mental health intervention, and paraprofessional support in all but one of his classes, as well as during lunch and recess. Despite the additional supervision and supports, Student continued to demonstrate aggressive behavior that threatened his own safety and that of others, including punching peers, pinching and scratching a peer causing injury, threatening peers, and bullying. Consequently, the SCO concludes that Parent's allegation that the District did not consider adding supplemental supports and services before placing Student in a separate school is not supported by the credible evidence.

8. Second, Student is not receiving academic benefits in the regular classroom because the environment of the larger classroom is distracting and increases Student's anxiety. Special Education Teacher and General Education Teacher observed that even when Student is in the classroom, he is easily distracted by routine activity and often not able to pay attention or produce work that demonstrates what he knows. Consistent with Student's teachers' observations, Parent reports that Student has severe anxiety and does not do well in a large classroom due to anxiety. Consequently, the SCO concludes that that Student would receive more education benefit in the special education classroom as compared with the regular education classroom.

9. Third, Student's overall experience in the classroom is not beneficial. Because Student has exhibited aggressive and unpredictable behavior in the classroom, including targeting specific individuals, Student's peers avoid meaningful social interaction with him. General Education Teacher observed that Student's classmates do not want to sit next to or partner with Student because they are afraid of him. Student's peers also avoid him during lunch, recess, and specials for the same reasons. While meaningful opportunities to interact with

typical peers may provide significant non-academic benefits, this benefit is not present for Student. Although Student attends class with typical peers, he is not developing positive peer relationships or interacting with them in a way that benefits his social/emotional development. Consequently, the SCO concludes that this factor does not weigh in favor of Student being educated in the regular education setting.

10. Finally, Student has exhibited behavior that disrupts the classroom and threatens the safety of both Student and peers. Placement in the regular education classroom may not be appropriate when the student is engaging in dangerous or disruptive behavior that threatens the safety of others or interferes with the education of peers. *See Clyde K. v. Puyallup Sch. Dist.*, 21 IDELR 664 (9th Cir. 1994)(placement in regular education not required for student engaging in dangerous conduct requiring intensive counseling and support); *Burbank Unified Sch. Dist.*, 114 LRP 34255 (SEA CA 2014)(placement in regular education classroom not required for student who threatened safety of self and others). In *Burbank*, the Administrative Law Judge concluded that placement in the regular education classroom was not appropriate for a nine-year old student who routinely broke rules, disobeyed, defied, lied, teased and called other children names, threatened others, and engaged in acts of physical aggression that included poking peers and stepping on their feet. *Id.* In addressing parent's claim that placement in a separate school violated the LRE requirement, the ALJ concluded that the student's behavioral problems, caused by underlying anger and control issues, called for placement in a therapeutic program that offered behavioral supports, psychiatric counseling, and small group instruction. *Id.*

11. In this case, Student has exhibited behavior very similar to the student in *Burbank* by engaging in acts of physical aggression that threatened the safety of others and interfered with their education. Student's behavior included calling others' names, threatening physical aggression, hitting, punching, poking, and pushing peers. At least two incidents resulted in physical injury to others. Consequently, the SCO concludes that this factor weighs heavily in favor of educating Student in a therapeutic setting such as the ISC where he can receive the individual therapy that Student needs to develop the social and emotional skills necessary for building positive peer relationships.

12. Concluding that Student cannot be educated satisfactorily in the regular education setting, the SCO addresses the second part of the test and determines whether Student has been mainstreamed to the maximum extent appropriate. The IDEA requires that each public agency have a continuum of placement options available to meet the needs of students with disabilities, including instruction in regular classes, special classes, special schools, in home, and in hospitals and institutions. 34 CFR §§ 300.115. The less a placement resembles a regular classroom, the more restrictive it is considered to be. In this case, the District has a continuum of options available including instruction in regular classes, special classes, and separate school. Although the District recently dissolved its center-based program, i.e., affective needs classroom, because it had determined the program was not effective in improving academic and social outcomes for students with disabilities, it offers special classes and direct behavioral

support in all schools that is similar to the support offered in the center-based program. For example, Student was receiving specialized instruction and direct mental health interventions for approximately 162 minutes each day and paraprofessional support during specials, lunch, recess, and independent work-time. With the exception of the smaller class size, this level of support is comparable to the level of support Student would be receiving in a center-based program. Consequently, the SCO concludes that the District offers a continuum of options and that Student has been mainstreamed to the maximum extent appropriate.

13. Related to Parent's allegation regarding LRE, is her assertion that the placement decision was made outside of the IEP meeting held on January 30, 2015, and without her participation. The SCO concludes that the decision to place Student at a separate school, i.e., the ISC, was determined at the IEP meeting on January 30, 2015, at which Parent was provided with a meaningful opportunity to participate.

14. The IDEA's procedural requirements for developing a student's IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Sytsema v. Academy School District No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008). Essential to a parent's ability to participate in the IEP process is the requirement that parents be invited and encouraged by the school district to attend the IEP meeting. To that end, the federal regulations specifically require that the school district notify parents of the meeting early enough that they have an opportunity to attend and "schedule the meeting at a mutually agreed on time and place." 34 CFR § 300.322(a). The invitation, or "notice of meeting" as it is commonly known, must also indicate the purpose, time, and location of the meeting, and who will be in attendance; and inform the parent that they may invite others who they believe have knowledge or special expertise regarding the child. 34 CFR § 300.322(b)(1). Courts have further found that parents have been afforded an opportunity for meaningful participation when an educational agency considers their suggestions and requests, and to the extent appropriate, incorporates them into their child's IEP. *O'Toole v. Olathe Dist. Schools*, 144 F.3d 692, 107 (10th Cir. 1998).

15. In this case, Parent received proper notice and attended the IEP meeting on January 30, 2015, with her advocate. Most importantly, Parent actively participated in the meeting by asking questions, providing input on Student's needs, and offering suggestions about the type of education setting would best serve Student's needs. In fact, Parent's input is consistent with the IEP team's determination that Student be placed in an educational setting similar to what is offered at the ISC. Parent shared with the IEP team that Student had severe anxiety, was receiving in-home therapy, and did not do well in a larger classroom. At the ISC, Student will receive services in a small, structured classroom, and can be provided with individual and family therapy. In addition, the ISC treatment staff would consult with Student's in-home therapists for consistency.

16. Although Parent did not understand that the District's placement offer was a separate school and did not receive a copy of the IEP until approximately three weeks following the IEP

meeting, the SCO concludes that this delay did not prevent Parent from exercising her procedural safeguards or harm Student. Although the District is required to make special education and related services available to the child in accordance with the IEP “as soon as possible after its development,” this does not mean immediately. 34 CFR § 300.323(c)(2); *Board of Educ. of Montgomery County v. Brett Y.*, 28 IDELR 460(4th Cir. 1998)(Waiting 30 days to implement the IEP was consistent with IDEA regulations). Consequently, the SCO concludes that setting the initial start date for Student to attend the ISC for February 23, 2015, would have satisfied the District’s obligation to make the special education and related services identified on the January 2015 IEP available in a timely manner. The District, however, again delayed the start date based on Parent’s claim that the family would soon be moving out-of-district.

17. To avoid any possible liability, the District should have provided Parent with prior written notice that it was offering services at the ISC in accordance with the January 2015 IEP starting February 23, 2015, and that it was refusing to provide the requested homebound services because this more restrictive setting was not consistent with the placement offered in the IEP. Instead, the District and School staff who work directly with Student and Parent acted compassionately by providing homebound services in response to Parent’s claim that the family would soon be moving. The District, in good-faith, believed the family’s move was imminent and provided these temporary homebound services so that Student would continue to receive some academic instruction without having to transition to two different schools within a short time, a situation that Parent and the District recognized would be very difficult for Student. Consequently, the SCO concludes that the District’s decision to provide temporary services that were not consistent with Student’s IEP did not harm Student and did not violate IDEA. Moreover, it is highly doubtful that Parent would have sent Student to the ISC had the District refused to offer homebound services. Please note that this conclusion is based on the unique circumstances presented in this case and public agencies should be careful in interpreting this as general guidance.

Allegation Two: Any allegation that the District improperly denied Parent’s request for an IEE has been remedied.

18. Parent alleges that the District denied her request for an Independent Educational Evaluation (IEE). Parents have the right to request an IEE at public expense if they disagree with an evaluation conducted by the district. In response to a parent’s request for an IEE, the District has two options: 1) provide the IEE at public expense, or 2) request a due process hearing to demonstrate that its evaluation of the student was appropriate. 34 CFR § 300.502. While the regulations do not set a specific time by which school district must respond to the request, the school district must respond without unnecessary delay. Further, the District may ask the parent why they object to the evaluation but cannot require that the parent provide an explanation. *Id.*

19. In this case, Parent asserted that she requested an IEE at a meeting on March 16, 2015. In response, the District asserted that it did not respond to Parent’s request because Special

Education Director did not understand Parent was requesting an IEE. On May 15, 2015, the District granted Parent's request for an IEE. Consequently, this allegation has been remedied.

REMEDIES

Because the SCO has concluded that the District did not violate IDEA as alleged by Parent in this Complaint, no remedies are ordered.

CONCLUSION

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

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

Dated this 26th day of May, 2015.

Candace Hawkins, Esq.
State Complaints Officer

Appendix

Complaint, pages 1-5.

- Exhibit A: IEP dated October 2014.
- Exhibit B: Notice of IEP Amendment dated December 2014.
- Exhibit C: Manifestation determination report dated January 2015.
- Exhibit D: Prior notice and consent for reevaluation dated January 2015.
- Exhibit E: Evaluation report dated January 2015.
- Exhibit F: IEP dated January 2015.

Response, pages 1-24.

- Exhibit 1: IEPs dated October 2014, including amendment, and January 2015.
- Exhibit 2: Blank/no documents responsive to SCO request exist.
- Exhibit 3: Prior written notices issued during 2014-15 school year.
- Exhibit 4: Notices of meeting issued during 2014-15 school year
- Exhibit 5: Evaluation Reports dated October 2014 and January 2015.
- Exhibit 6: Blank/no documents responsive to SCO request exist.
- Exhibit 7: Blank/no documents responsive to SCO request exist.
- Exhibit 8: Attendance records.
- Exhibit 9: Behavior and discipline reports.
- Exhibit 10: Progress monitoring data.
- Exhibit 11: Blank/no documents responsive to SCO request exist.
- Exhibit 12: Contact information of relevant witnesses.
- Exhibit 13: Notes from Social Worker and District policy regarding change of placement.

Reply, pages 1-6.

- Exhibit G: Previously submitted documentation.
- Exhibit H: Previously submitted documentation.
- Exhibit I: Previously submitted documentation.
- Exhibit J: Letter from Parent to Superintendent.
- Exhibit K: Previously submitted documentation.
- Exhibit L: Previously submitted documentation.
- Exhibit M: Letters from Private Therapist.
- Exhibit N: Previously submitted documentation.

In-person interviews with:

- Parent
- Advocate
- Special Education Director

- Social Worker
- Special Education Coordinator/ISC Director
- General Education Teacher