

Colorado Department of Education
Decision of the State Complaints Officer
Under the Individuals with Disabilities Education Act (IDEA) and
the Protection of Individuals from Restraint and Seclusion Act (PPRA)

**State-Level Complaint 2023:598
Mesa County Valley School District 51**

DECISION

INTRODUCTION

On October 18, 2023, Mesa County Department of Human Services Supervisor and Mesa County Department of Human Services Case Manager (“Complainants”) filed a state-level complaint (“Complaint”) on behalf of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ against Mesa County Valley School District 51 (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified eight allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153, as well as the Protection of Individuals from Restraint and Seclusion Act (“PPRA”)² and its implementing regulations, the Rules for the Administration of the Protection of Persons from Restraint Act (the “Rules”).³ Therefore, the SCO has jurisdiction to resolve the Complaint.

On November 3, 2023, the District provided the Colorado Department of Education (“CDE”) with its Response. The SCO reviewed the Response, requested additional documents, and conducted interviews with relevant witnesses between November 30 and December 5, 2023. Based on the additional information provided in document requests and interviews, the SCO determined it was necessary to expand the scope of the investigation to fully resolve the Complaint by adding one allegation to those initially accepted for investigation. Expanding the scope of the investigation is consistent with the CDE’s authority pursuant to 34 C.F.R. §§ 300.1 and 300.149.

On December 7, 2023, the SCO extended the 60-day investigation timeline due to exceptional circumstances arising from the need to provide time for the District to respond to the additional allegation. 34 C.F.R. § 300.152(b)(1).

¹ 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.* The Exceptional Children’s Education Act (“ECEA”) governs IDEA implementation in Colorado.

² The Protection of Individuals from Restraint and Seclusion Act, C.R.S. § 26-20-101, *et seq.*, was previously titled the Protection of Persons from Restraint Act and referred to as the “PPRA.” This acronym lives on despite amendment of the Act’s title.

³ The Rules are codified at 1 C.C.R. 301-45.

RELEVANT TIME PERIOD

The CDE has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. 34 C.F.R. § 300.153(c); Rule 2620-R-2.07(2)(f). Accordingly, this investigation will be limited to the period of time from October 18, 2022 through the present for the purpose of determining if a violation of the IDEA or the PPRA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

Whether the District denied Student a Free Appropriate Public Education (“FAPE”) because the District:

1. Convened an IEP Team meeting in August 2023 without including Student’s parents or an individual with educational decision-making authority, in violation of 34 C.F.R. §§ 300.321(a)(1), 300.322(a)-(d), 300.519.
2. Failed to develop, review, and revise an IEP tailored to Student’s individualized needs, from August 2023 to present, in violation of 34 C.F.R. §§ 300.320 and 300.324.
3. Failed to conduct a manifestation determination within ten school days of the District’s decision to change Student’s placement in August or September 2023, in violation of 34 C.F.R. § 300.530(e).
4. Failed to provide notice of Student’s disciplinary change of placement in August or September 2023, in violation of 34 C.F.R. § 300.530(h).
5. Failed to convene Student’s IEP Team to determine the educational services necessary to enable Student to participate in the general education curriculum following his disciplinary change in placement from August 2023 to present, in violation of 34 C.F.R. § 300.530(d)(5).
6. Failed to provide Student educational services to enable him to participate in the general education curriculum and progress towards his annual IEP goals and failed to conduct a functional behavioral assessment or provide behavioral intervention services following his disciplinary change in placement from August 2023 to present, in violation of 34 C.F.R. § 300.530(d).

7. Failed to conduct a reevaluation at least once every three years and upon request by an individual with educational decision-making authority from September 2023 to present, in violation of 34 C.F.R. § 300.303.
8. Failing to educate Student in the LRE required by his IEP from August 2023 through present, in violation of 34 C.F.R. §§ 300.114, 300.117, and 300.323(c).

And whether the District violated the PPRA when:

9. The District improperly secluded Student in October 2023, specifically by:
 - a. Secluding Student in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a);
 - b. Secluding Student without first using less restrictive alternatives or determining that less restrictive alternatives would be inappropriate or ineffective under the circumstances, in violation of Rule 2620-R-2.01(1)(b);
 - c. Secluding Student as a punitive form of discipline or as a threat to control or gain compliance of Student's behavior, in violation of Rule 2620-R-2.01(2);
 - d. Failing to end the seclusion when it was no longer necessary to protect the Student or others, to reintegrate the Student or clearly communicate that the Student is free to leave the seclusion area, in violation of Rule 2620-R-2.02(1)(a)(v);
 - e. Secluding Student in a space without adequate lighting, ventilation and size, and in a space that was not, to the extent possible under the specific circumstances, free of injurious items, in violation of Rule 2620-R-2.02(2)(e); and
 - f. Failing to comply with the documentation and notification requirements for seclusion, in violation of Rule 2620-R-2.04.

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,⁴ the SCO makes the following FINDINGS OF FACT (“FF”):

A. Background

1. This Complaint was filed by Mesa County Department of Human Services (DHS) Case Manager⁵ on Student’s behalf after the county’s hotline received a call from a concerned parent stating that Student was being held in a “box” for hours at High School. DHS Case Manager also filed this Complaint to address concerns about the lack of educational services Student received in the 2023-24 school year following his suspension. DHS Case Manager has been recognized as a strong, caring, and dedicated advocate for Student. *Interviews with Residential Provider, court-appointed guardian ad-litem (“GAL”), Assistant Principal, and Special Education Behavioral Coordinator.*
2. Student is in the legal custody of DHS, and parental rights have been terminated. *Exhibit A, p. 4; Exhibit Q-9.* A court order dated October 19, 2023, specifically provides that “[l]egal and physical custody and legal guardianship of [Student] shall remain with [DHS] until further Court order.” *Exhibit Q-9, p. 1.*
3. From 2013 to November 11, 2023, Student resided at Group Home, a therapeutic group home for children who exhibit challenging behavior. Group Home is located within the District’s boundaries. *Interviews with DHS Case Manager, DHS Supervisor, Residential Provider, and GAL.* Student has resided in Group Home since he was three years old, and Residential Provider has known him for most of this time, approximately seven years. *Interview with Residential Provider.*
4. At the time that this Complaint was filed, Student was identified as eligible for special education and related services under the disability category of autism spectrum disorder (ASD). *Exhibit A, p. 1.* Student also demonstrates cognitive functioning and adaptive behavior in school, home, and community environments significantly below expectations for his age. *Id.* at p. 3. Consequently, access to the general education curriculum is provided through extended evidence outcomes (EEO) and academic performance is measured by alternate district and state assessment. *Id.* at pp. 3 and 18.
5. Student is affectionate and loves to spend time with adults he knows. Student has a sense of humor and likes to joke with trusted educators and caregivers. According to Residential Provider, Student enjoys baking and will lead her to the kitchen to help him bake cookies after he has independently collected all necessary ingredients. He also loves music and food.

⁴ The appendix, attached and incorporated by reference, details the entire Record.

⁵ Although DHS Case Manager is no longer in this position, she was Student’s designated case manager at most times relevant to this investigation. After Case Manager left her position, DHS Supervisor has continued to advocate for Student.

Exhibit A, Exhibit G-3; Interviews with Residential Provider, DHS Case Manager, Special Education Behavioral Coordinator, Special Education Coordinator, and Special Education Teacher.

6. Student's disability "impacts all aspects of his education and daily life." *Exhibit A*, p. 11. Student is nonverbal, significantly delayed in academic and functional performance, and exhibits disruptive behaviors that include physical aggression, property destruction, and self-injury. *Id.* at pp. 3-19.
7. Student's behavior presents exceptionally significant challenges. Property destruction is described as ripping, pulling, tearing, or peeling of materials with a visible imperfection, including flooring, light fixtures, molding, and walls. Once Student starts to destroy something, he will not stop until he has completed the cycle of destruction and may show physical aggression towards staff who attempt to redirect him or otherwise intervene. This behavior has resulted in significant damage to classrooms and hallways at High School, as well as significant damage to his bedroom and living spaces at Group Home and Hospital. Student also engages in self-injurious behavior that includes headbanging and throwing himself onto the ground or against metal and reinforced materials and walls. *Exhibit A*, pp. 8-9; *Exhibit G-3; Interviews with Residential Provider, Special Education Behavioral Coordinator, Special Education Teacher, and Special Education Coordinator; Consultation with Private Neuropsychiatric Special Care Providers.*
8. Student is nonverbal and has limited functional communication skills. At the end of the 2022-23 school year, Student was able to use 1-2 words to request a snack or a break when prompted. Student knows a few functional signs—eat, drink, more—but performs these signs in an idiosyncratic manner that is only understood by familiar listeners. Student also has an iPad but needs continued prompting and modeling from staff to use it. Student uses vocalizations to get attention and will frequently grab adults by the hand to show them what he wants. Student's primary form of communication is to take staff to what he wants or needs. *Exhibit A*, p. 10; *Interviews with SLP, Residential Provider, Special Education Behavior Coordinator, Special Education Teacher, and Registered Behavior Technician ("RBT").*
9. Student is not independent in personal care/hygiene. For example, Student wears an adult diaper and onesie under his clothes to prevent the spread—intentional and unintentional—of bodily fluids and fecal matter. *Exhibit A*, p. 11; *Interviews with DHS Case Manager, Residential Provider, and Special Education Behavior Coordinator.* Student's lack of independence in personal care has recently presented a significant barrier to finding an appropriate residential placement. *Interviews with DHS Case Manager, DHS Supervisor, GAL, and Residential Provider.*
10. Due to the severity of his disability-related needs, Student requires 1:1 paraprofessional support throughout the school day for safety, and 2:1 paraprofessional support for personal care and hygiene. *Exhibit A*, p. 11.

11. For the 2022-23 school year, Student was in eighth grade and attended the District's Significant Needs Autism (SNA) program at Middle School. The District's SNA program is designed for "students with autism who have significant academic, communication, and behavioral needs." The program provides explicit instruction and extensive supports to "foster and expand the students' learning through combinations of one-to-one and small group specialized instruction." *Exhibit M*, p. 9.
12. To best support Student's behavior at school and on the bus, the IEP team determined that he would attend the SNA program from 8:15 AM to 2:00 PM. *Id.* at p. 19. This schedule also allowed Student to receive services from a private applied behavior analysis (ABA) therapist. *Interviews with DHS Case Manager and Special Education Behavioral Support Coordinator.* The IEP identified the least restrictive environment as less than 40% in general education, specifically 0% time in the general education environment. *Exhibit M*, p. 21.
13. Student was reevaluated on January 13, 2022, and the team determined that he remained eligible as a child with ASD. *Id.* at p. 3. Although the reevaluation included a social-emotional assessment, specifically the Adaptive Behavior Assessment System, Third Edition (ABAS-3), it did not include a functional behavior assessment (FBA). *Exhibit G*, pp. 31-34. Indeed, it is unclear from the record when the last FBA was conducted, prior to the 2022-23 school year.
14. At the end of the 2022-23 school year, members of the Middle School SNA Program and Residential Provider toured the High School SNA Program to help prepare Student for the transition. During this tour, Middle School Paraprofessional, someone who had known and worked with Student for nine years, shared tips for how to work with Student and how to arrange the educational environment to minimize environmental triggers for property destruction, such as seams in the carpet, molding that was a different color than the wall, or filing cabinets that were not affixed to the wall. *Interviews with Residential Provider, Special Education Coordinator, and Special Education Behavioral Coordinator.*
15. Former Special Education Teacher, the teacher assigned to the High School SNA classroom, expressed no interest in the tips being shared and nothing was done to specifically prepare the classroom environment for Student before the start of the 2023-24 school year. *Id.*
16. As detailed below, Former Special Education Teacher would continue to ignore the recommendations of supervisors, peers, and others who knew Student in the coming school year.

B. Beginning of 2023-24 School Year: August Planning Meeting and Change of Placement

17. On August 9, 2023, Student began the school year as a ninth grader in the SNA Program at High School. *Response/Exhibit H*, p. 2. Student attended the SNA Program, consistent with his October 2022 IEP, from August 9 to August 15, 2023. During this time, Student exhibited the

type of disruptive behavior described above, including physical aggression and property destruction. *Id.*; *Exhibit M*, pp. 4-7.

18. Because Student' behavior impedes his learning, he has a behavioral intervention plan (BIP) that provides for the following:

- Strengths and Interests: Student “enjoys attention and affection from adults” and “following a routine.” Student uses “sign language and an AAC device to communicate his wants and needs.” Student has established positive relationships with adults in, and familiarity with, the SNA program “which supports his feelings of safety, security, and predictability.”
- Function of Behavior: “The purpose of [Student’s] behavior is to communicate his refusal to comply with adult directions and avoidance of nonpreferred activities, his response to change in his environment (e.g., visitors), as well as obtaining adult attention when not able to express his needs.”
- Setting Event Strategies: Structured daily routine, AAC and communication device, visual schedule, consistent language from staff, seating away from other students.
- Antecedent Strategies: Student responds negatively to “no” responses, so staff need to use redirection instead of saying “no.” Staff pre-teach or frontload new tasks or changes to routine, pairing nonpreferred and preferred tasks. Staff works to expand the use of sign language and AAC device so Student can express wants/needs independently. When Student shows signs of aggression, he is prompted to take a break in the calm area.
- Behavior Teaching Strategies: The team models “errorless learning,” provides significant praise and reinforcers during activities. The team actively teaches communication skills and provides consistent routines, expectations, and adult supported academics to encourage engagement and success.
- Reinforcement Strategies: The team uses “planned-ignoring strategies” to address negative attention seeking, and “praise for demonstrating positive attention seeking behaviors.” The team “explicitly names behaviors” and gives Student “alternative choices to provide him with control” in choosing appropriate behavior.

Exhibit M-1, pp. 1-2.

19. On August 14, 2023, Special Education Teacher conducted an observation of Student in the SNA classroom. Special Education Teacher specializes in behavior and works under the supervision of Special Education Behavioral Coordinator, providing support and coaching to

schools throughout the District to address behavioral challenges. Special Education Teacher is in the process of obtaining licensure as a board-certified behavior analyst (BCBA). *Interviews with Special Education Teacher and Special Education Behavioral Coordinator.*

20. To prepare for observation, Special Education Teacher reviewed Student's BIP and notes from Student's eighth grade teacher. *Exhibit K, pp. 44-45; Interviews with Special Education Teacher and Special Education Behavioral Coordinator.*

21. Special Education Teacher observed the following staff interactions with Student:

- When [Special Education Teacher] entered the room, [Student] was sitting on the floor with staff in proximity . . . expectation was to sit for five minutes (due to destruction of property) without engaging in behaviors and without standing up—timer was restarted when [Student] stood up to leave the area. *It is unclear as to what purpose this met.*
- *Verbalizations were primarily negatively stated: “no”, “no standing”, “no that’s not it” (when completing academic tasks).*
- If [Student] left his chair or expected area, he was prompted “[Student’s initial] chair go”—this verbal prompt from staff was repeated quickly without allowing for processing time. The verbal prompt from staff also increased in volume within close proximity to [Student].
- Prompts to [Student] were all verbal, including first . . . then, *no visuals were observed.*
- *No communication device (low or high tech) was observed.*
- *Minimal positive reinforcement was given to [Student] for completing tasks or complying with staff directives.*

Exhibit K, pp. 45-46 (emphasis added).

22. In comparing the BIP with Special Education Teacher's observations, the SCO finds that Former Special Education Teacher and Paraprofessionals were not properly implementing Student's BIP. Indeed, Former Special Education Teacher and Paraprofessionals acted in ways that directly contradicted the strategies identified in the BIP, such as: 1) use of the word “no” in place of redirection; 2) use of directives or requiring Student to sit for five minutes without engaging in behavior in place of explicitly naming the behavior and providing alternative choices; and 3) use of negative statements in place of modeling “errorless learning,” planned ignoring and providing significant praise and reinforcers during activities.

23. In addition to her observations, Special Education Teacher made the following recommendations:

- Provide consistent schedule and predictable routine
- Provide access to communication devices (low and high tech) consistent with what is written into Student's IEP/BIP
- Provide access to low tech options (pictures, icons, communication boards, core boards) available for communication during increased escalation
- Use redirection rather than saying "no"
- Offer reinforcement choices as detailed in BIP and consider expanding options for movement and sensory needs to ensure continued effectiveness
- Increase praise and positive feedback
- Use visual schedule
- Consider implementing routine from previous school

Exhibit K, p. 47.

24. Special Education Teacher immediately shared these observations and recommendations with Special Education Coordinator and District's Legal Counsel. *Id.* at p. 43. The SCO finds that the concerns and recommendations expressed by Special Education Teacher were made consistent with Student's BIP. Notably, there is no evidence in the record to show that these recommendations were shared with Former Special Education Teacher or Former Paraprofessionals.

25. In consultation with CDE Specialists in autism and behavior, the SCO further finds that the BIP did not adequately support Student's unique, individualized needs in behavior for the following reasons:

- The BIP does not address the severity of Student's needs and appears to be written for a student with a mild or moderate impact of disability. For example, the BIP indicates Student uses an AAC device to communicate wants and needs when the information in the record indicates that he only uses the device with prompting and in limited situations. Further, the BIP requires that Student be prompted to take a break in the calming area if he shows signs of aggression. Information provided in education records and interviews indicate that Student is very difficult to redirect once he is dysregulated, so prompting him to go to a calm area as an antecedent strategy shows a disconnect between the BIP and Student's disability-related strengths and needs. And given the difficulty with redirecting Student once he is dysregulated, this strategy also suggests an impermissible use of seclusion as an intervention strategy.
- The BIP does not provide sufficient detail to inform staff about how to reduce environmental triggers, redirect, or reinforce Student. For example, the Middle

School SNA staff and Special Education Behavior Coordinator have critical knowledge about how the classroom should be set-up (e.g., flooring in one material, molding and wall in same color) to reduce behavior caused by the classroom environment, yet none of this specific information is included in the “setting event strategies” section. In addition, the BIP lacks sufficient detail about how to communicate with Student or what reinforcement is effective, including type and frequency. For example, the BIP vaguely states that Student has an AAC device and communication device that is “available” and that staff use “consistent language” with Student with no further detail to inform staff what this should look like. The BIP also states that staff should provide reinforcers during activities with no detail on what this looks like or what reinforcers Student prefers. Notably, Occupational Therapist provided meaningful detail in the 2022 Reevaluation on how to decrease the likelihood of problematic behavior that is not included in the BIP, such as a timer for task completion, shorter work times interspersed with break activities, movement breaks, and the use of “first this/then that” statements. *Exhibit G, p. 6; Exhibit B.*

- The Summary Statement includes too many hypotheses to effectively guide the development of appropriate strategies. To ensure effectiveness, the FBA and resulting BIP should focus on one or two hypotheses at a time. *Consult with CDE Specialist in behavior.*

26. On August 15, 2023, Student engaged in behavior that resulted in significant destruction to the SNA classroom. During this incident, Student removed padding in the quiet/calming room, pulled up most of the carpeting in the classroom, and punched holes in the wall. *Response/Exhibit H, p. 2.*

27. Special Education Coordinator and RBT were called to assist staff in redirecting Student. Staff attempted to redirect Student by offering highly preferred reinforcers and by modeling “first, then” strategies, but their efforts were unsuccessful. Moreover, Former Special Education Teacher and Former Paraprofessionals defied explicit direction by Special Education Coordinator and RBT to allow Student access to the carpet in an effort to deescalate him. Instead, Former Special Education Teacher and Paraprofessional knelt close to Student’s face and prompted him *loudly* to sit. Eventually, Former Special Education Teacher and Paraprofessional left the room, but Student remained in an escalated state. *Exhibit D, p. 9.* For safety, Student was sent home for the rest of the school day. *Response/Exhibit H, p. 2; Interviews with Special Education Coordinator and RBT.*

28. There is confusion as to whether Student was formally suspended for this incident. In its Response, the District asserted that Student was officially suspended for seven school days for “property destruction and behavior detrimental to the welfare or safety of other students and school personnel.” *Response/Exhibit H, p. 2; Exhibit D, p. 4.* The notice of suspension stated that Student would be suspended through August 23, 2023, and that Student and his

“parent” would need to meet with the Principal or Assistant Principal before returning to school. This notice was addressed to Student’s residential provider. *Id.*

29. During an interview with the SCO, Assistant Principal stated that he did not suspend Student for the incident on August 15, and that the suspension letter, also dated August 15, was created in October because DHS Case Manager repeatedly requested a notice of suspension for Residential Provider. *Interview with Assistant Principal.* Nothing was done to clear up this confusion. Indeed, DHS Case Manager requested a copy of the suspension letter during the September 26 IEP meeting and was informed by Assistant Principal that the letter would be sent to her. *Exhibit A, p. 11; Interviews with DHS Case Manager and Assistant Principal.*
30. Although Assistant Principal informed the SCO that he has learned from this experience, the SCO finds that Student was suspended, regardless of intent, because Student was removed from his educational placement and denied the services described on his IEP for behavior that violated the student code of conduct. The SCO also notes that Student’s BIP states that school disciplinary procedures will be followed when Student’s behavior causes injury to others. *Exhibit B, p. 2.* As described in more detail below, Student was not allowed to return to school until October 2, 2023. *Response/Exhibit H, p. 3.*
31. On August 15, 2023, the District convened a “planning meeting” to discuss “Student’s placement.” This meeting was attended by Special Education Director, Special Education Coordinator, RBT, Assistant Principal, Special Education Teacher, and Residential Provider. *Response/Exhibit H, p. 2; Exhibit P; Interviews with Special Education Director, Assistant Principal, Special Education Coordinator, Special Education Teacher, and RBT.*
32. During this meeting, the team discussed Student’s “behavior, safety concerns, repair of the classroom, and whether supplemental aides or services could make a less restrictive placement viable.” *Response/Exhibit H, p. 2.; Exhibit P; Interviews with Special Education Director, Assistant Principal, Special Education Coordinator, Special Education Teacher, and RBT.*
33. The team, including Residential Provider, agreed that the classroom would need to be repaired prior to Student’s return or he would continue to engage in significant property destruction. For example, Residential Provider informed the team that the classroom floor would have to be comprised entirely of one material, carpet or linoleum, or it would trigger further property destruction. *Interviews with Residential Provider and Special Education Coordinator.* Notes from this meeting further indicate that the team recognized that Student needed routine and consistency to be successful and that redirection should be brief and come from one individual so as not to overwhelm Student. The team also recommended food as a frequent reinforcer, as well as the use of AAC device, sign language, and visuals for communication that were consistent with what was used at home. *Exhibit P.*

34. As a result of this meeting, the District determined that services to meet Student's IEP would be provided by the District in the home setting while the room was repaired. *Id.*
35. The SCO finds this meeting was not a properly convened IEP meeting and no one meeting IDEA's definition of parent, nor an assigned educational surrogate parent, was in attendance.
36. When asked who was serving as Student's parent for purposes of IDEA decision making, Special Education Director replied that DHS was serving in this role. *Interview with Special Education Director*. Although Student has a GAL who exercises educational decision making, the District has used or referred to DHS staff, Group Home staff, and GAL as Student's IDEA parent at various times within the past two years. *Exhibit A; Exhibit M; Exhibit G; Exhibit G-1; Exhibit H; Interview with GAL*. Most recently, District requested consent for reevaluation solely from DHS Supervisor in November 2023. *Exhibit G-1*.
37. The District's written procedures clearly state that DHS is never allowed to sign documents or act as the IDEA parent. *Exhibit P*, p. 39. The SCO finds that the District's practice is inconsistent with its own guidance and IDEA. *Exhibit A; Exhibit M; Exhibit G; Exhibit G-1; Exhibit H; Exhibit P*, p. 39; *Interviews with GAL, Group Home Provider, DHS Case Manager, DHS Supervisor, and Special Education Director*.
38. The District concedes, and the SCO agrees, that the District changed Student's placement and determined homebound services would be provided in August outside of a properly constituted IEP meeting and without the participation of an individual meeting IDEA's definition of parent or an assigned educational surrogate parent. *Response, Exhibit H*, pp. 7-8.
39. On August 17, 2023, Special Education Coordinator emailed Former Special Education Teacher the following directives or requests for updates:
- Do we have a timeline for the readiness of the room and repairs, including an expansion for room 502?
 - Are visual schedules with routines and pictures ready?
 - Has a visual timer been ordered?
 - Is there support needed from our team to prepare and train staff on how best to implement these with Student?
 - Is there a plan developed for safety and how to mitigate behavioral challenges, consistent with Student's BIP?
 - We will owe compensatory services and need to determine when those will be provided.
 - Please let us know what resources and support are needed to prepare the room.

Exhibit K, p. 42; Interview with Special Education Coordinator.

40. On August 18, 2023, Assistant Principal emailed Former Special Education Teacher and directed him to complete the following tasks:

- Communicate with Residential Provider immediately about the timeline for Student’s return and keep her updated;
- Have a visual schedule completed by Monday, August 21;
- Prepare to implement Student’s IEP/BIP prior to his return; and
- Reply to Special Education Coordinator’s emails.

Exhibit Q-6, pp.1-2; Interviews with Assistant Principal and Special Education Coordinator.

41. Nothing in the record indicates that Former Special Education Teacher responded to the above emails from Special Education Coordinator or Assistant Principal, nor did he confirm that any of the specified preparations had been made. *Exhibit K; Interviews with Special Education Coordinator, Special Education Behavioral Coordinator, and Special Education Teacher.*

42. Following the planning meeting, Former Special Education Teacher was instructed to convene the IEP team to “discuss the change in placement and appropriate services to enable Student to make progress.” *Response/Exhibit H, p. 3.* Despite multiple reminders and a warning from Assistant Principal, Former Special Education Teacher did not schedule an IEP meeting until September 26, 2023. *Id.; Exhibit Q-6.* Despite Former Special Education Teacher’s persistent lack of follow-up and responsiveness, no one in District or High School Administration took action to convene the IEP team or ensure that any of the concerns detailed in FF #s 39-40 were addressed.

43. Although the District expected classroom repairs to be completed by August 23, this did not happen. Various reasons for the delay were provided, including coordination with the maintenance department, carpet supply, financial responsibility for the repairs, and school calendar. Regardless of the reason for the delay, the necessary repairs were not made, and Student was not allowed to return to High School SNA program, until October 2, 2023, nearly seven weeks after he was removed from the SNA Program and placed on homebound services. *Interviews with Special Education Director, Special Education Coordinator, Special Education Behavioral Coordinator, DHS Case Manager, and Residential Provider.* As detailed below, this delay resulted in Student not receiving most of educational services to which he was entitled.

44. Student’s 2022 IEP was in effect between August 9 and September 27, 2023, and it required that Student be provided with the following special education and related services:

- Literacy: 450 minutes per week (MPW) of direct specialized instruction provided by special education teacher;

- Math: 200 MPW of direct specialized instruction provided by special education teacher;
- Social/Emotional: 450 MPW direct specialized instruction provided by special education teacher;
- Independent Living Skills: 520 MPW direct specialized instruction provided by special education teacher;
- Adapted Physical Education (PE): 60 minutes per month (MPM) direct specialized instruction provided by adapted PE teacher; and
- Speech/Language Services: 30 MPM direct specialized instruction and 60 MPM indirect services provided by SLP.

Exhibit M, p. 20. Student's LRE setting was identified as less than 40% in the general education environment, specifically 0% inside general education. *Id.* at 21.

45. The District provided Student with the following services in a homebound setting between August 23 and October 2, 2023:

- Literacy: 410 minutes
- Math: 390 minutes
- Social/Emotional: 160 minutes
- Independent Living: 340 minutes
- Speech/language: 0
- Adapted PE: 0

46. Based on Student's 2022 IEP and the school calendar, he missed the following services in the five weeks, between August 29 and October 2, 2023, that he was entitled to FAPE:

- Literacy: 1840 minutes of direct instruction by special education teacher
- Math: 610 minutes of direct instruction by special education teacher
- Social/Emotional: 2090 minutes of direct instruction by special education teacher
- Independent Living: 2260 minutes of direct instruction by special education teacher
- Speech/Language: 30 minutes direct and 60 minutes indirect instruction by SLP
- Adapted PE: 60 minutes of direct instruction by adapted PE Teacher

The SCO calculated services owed starting on August 29 because this was day eleven of Student's suspension. Although the District's notice of suspension stated that Student would be suspended for seven days, from August 15 through August 23, Student was not allowed to return to school until October 2, 2023. *Response*, pp. 2-3; *Exhibit D*, p. 1; *Exhibit F*, pp. 1-2. Consequently, the SCO counts the days that Student was not allowed to return as an extension to his suspension. Credit was given for homebound services that were provided between August 23 and October 2, 2023.

47. Former Special Education Teacher provided homebound services to Student during this time and his notes indicated that Student was often too dysregulated or distracted to attend to or benefit from instruction. *Exhibit F*, pp. 1-2. Consistent with these notes, Residential Provider indicated that Student did not respond to Former Special Education Teacher's efforts to engage him and that it did not appear Student benefited from any instruction during this time. *Id.*; *Interview with Residential Provider*.

C. September 2023 IEP Meeting

48. On September 26, 2023, the District convened a properly constituted IEP team to "review and update [Student's] present levels of academic achievement and functional performance, needs, and goals, and to develop a plan to provide special education and related services." *Exhibit C*, p. 1.

49. During the IEP meeting, DHS Case Manager asked for a copy of Student's "suspension letter" because "he had been out of school for so long." *Exhibit A*, p. 11. District staff responded that "they could provide her a copy." *Id.* The IEP Team agreed that Student was owed compensatory services because he had not received the full services described on his IEP during the time he was on a homebound placement. *Id.* at p. 23. The District provided a copy of the requested suspension letter to DHS Case Manager on October 10 but to this date has not provided a written proposal for compensatory education services. *Id.*, *Exhibit K*, p. 59; *Interviews with DHS Case Manager and Special Education Director*.

50. During the IEP meeting, DHS Case Manager asked that Student be provided with ABA therapy from a BCBA in the school setting. *Exhibit A*, p. 24; *Interview with DHS Case Manager*. In response to her request, the IEP team arranged for Special Education Behavioral Coordinator, who is also a BCBA, to join the meeting virtually. Special Education Behavioral Coordinator informed the team that indirect, social-emotional services could be added to Student's IEP, and she could work with teachers and providers to discuss and coordinate behavior support from an ABA lens. *Exhibit A*, p. 24; *Interviews with DHS Case Manager, Special Education Coordinator, and Special Education Behavioral Coordinator*. As noted below, the IEP team agreed with her recommendation and the IEP provides 30 minutes of indirect support in social-emotional instruction from a mental health provider, though not specifically a BCBA. *Id.* at p. 22.

51. Interviews with members of the IEP team and a review of documents demonstrate that Student's BIP was not substantively reviewed during this meeting, and there is no difference between the 2022 BIP and the September 2023 BIP. *Interviews with DHS Case Manager, Assistant Principal, and SLP; Compare Exhibit B*, pp. 1-3 with *Exhibit M-1*, pp. 1-3.

52. DHS Case Manager asked the IEP team to include assistance and instruction in toileting and personal care to improve Student's independence. In response, District members of the IEP team informed her that they could have Student use the bathroom every hour and pair the

request with a preferred reinforcer to encourage bathroom usage and added thirty minutes of daily “Life Skills” to reflect this. *Exhibit A*, p. 11. There was no annual goal added to specifically address this area of need in the IEP. *Id.*

53. Finally, DHS Case Manager asked why additional cognitive assessments had not been completed. In response, District informed her that a cognitive assessment would not result in a reliable IQ score because Student is nonverbal and requires hand-over-hand assistance to perform certain tasks. The team further informed her that there was sufficient available information to conclude that Student’s IQ and adaptive behavior was substantially below 70. *Id.* at p. 24. In consultation with CDE Specialist, the SCO finds that there are cognitive assessments available that produce reliable information about cognitive functioning for students who are nonverbal and require guided assistance, such as the “Comprehensive Test of Nonverbal Intelligence.”
54. There is no difference in the description of Student’s disability-related needs between the October 2022 IEP and the IEP developed on September 26, 2023. *Compare Exhibit A*, p. 11 with *Exhibit M*, p. 9.
55. In consideration of special factors, Student’s IEP indicated that he required special transportation, assistive technology, and had unique communication skills. For communication, the IEP specifically stated that Student needs access to a variety of assistive technology to aid in development of functional communication skills, including low tech core board, choice boards, visual schedule a dynamic display voice output communication device. *Exhibit A*, p. 12. No communication plan was provided or included as part of Student’s IEP.
56. Student’s IEP contained the following annual⁶ IEP goals:
- Reading: Given a text up to lexile Level 350 (k-1st Grade) with staff read aloud and pictorial supports, [Student] will be able to answer comprehension questions with 70% accuracy in 4 out of 5 trials. *There is no meaningful difference between the 2023 IEP goal and the 2022 goal.*
 - Writing: Given three 2-3 letter words, [Student] will be able to point to the given word with 50% accuracy in 4 out of 5 trials. *There is no meaningful difference between the 2023 IEP goal and the 2022 goal.*
 - Mathematics (2): Given a set of countable objects from 11-20 and pictures of numerals, [Student] will be able to identify the correct numeral with 60% accuracy in 4 out of 5 trials. *There is no meaningful difference between the 2023 IEP goal and the 2022 goal.*

⁶ The SCO is referencing the annual goals in this section, rather than each objective or benchmark.

Given a set of items in various shapes and colors, [Student] will be able to correctly sort the objects with 80% accuracy in 4 out of 5 trials. *The 2023 IEP goal in math eliminates the six categories referenced in the 2022 goal, otherwise the goal is the same.*

- Social/Emotional Wellness (3): Given a set of picture cards depicting faces with emotions of sad, happy, angry, and fear, [Student] will be able to match the faces to the correct emotions with 60% accuracy in 4 out of 5 trials. *The 2023 IEP goal eliminates prompts referenced in the 2022 goal, otherwise the goal is the same.*

Given a visual or gestural prompt and 15 seconds of wait time, [Student] will be able to fully complete the request in 4 out of 5 observations. *There is no meaningful difference between the 2023 IEP goal and the 2022 goal.*

Given coping strategies including social stories reviewed before an activity or a line to trace if having to wait, [Student] will be able to reduce aggressive behaviors (as defined by his behavior tracking chart) to a combined less than 35 per week of minor and major aggressions and property destruction. *There is no meaningful difference between the 2023 IEP goal and the 2022 goal.*

- Physical Motor Skills: In order to maintain cardiovascular endurance, [Student] will engage in 20 minutes or more of moderate-to-vigorous physical activity (Examples include: walking or jogging inside the gym, on the track, riding an adaptive trike, walking the stairs) in three or more sessions per week. *The 2023 goal is identical to the 2022 goal.*
- Speech/Language Skills: In 36 instructional weeks [Student] will use a low tech core board, signs, or speech generating device to communicate 1-2 core vocabulary words that relate to a given task, in 4-5 opportunities (80% accuracy) during structured tasks when given a verbal prompt. *The 2023 goal is identical to the 2022 goal.*

Compare Exhibit A, pp. 12-18 with Exhibit M, pp. 10-15.

57. In consultation with CDE Specialists on autism and significant support needs, the SCO finds that Student's IEP goals do not adequately address Student's most critical and fundamental disability-related needs for the following reasons:

- Student's most critical and immediate needs are in the areas of social-emotional regulation/behavior and communication, yet the goals in this area do not reflect the severity of the need and are not designed to teach Student necessary skills. For example, the goal requiring Student to match pictures of faces with emotion does not teach Student how to tell someone that he is sad. The severity of Student's behavior is likely related to his lack of a communication skills and

inability to express his wants and needs, so this skill gap should be a focus for annual goals.

- Goals in literacy, written expression, and math do not have a clear learning purpose and are not taught in a natural setting that would allow Student to generalize skills and apply them to daily life. For example, Student's math goal requires him to sort various shapes and colors, but it is unclear what the purpose of this task is. Student's behavior during these tasks, such as scribbling on paper and throwing/ripping materials, suggests Student is bored or does not understand the purpose of the task. *Exhibit G-4, p. 2.*
- For many students with an ASD, the *ability to benefit from explicit specialized instruction in academics is predicated on the acquisition of foundational skills in social communication and emotional/behavioral regulation.* Without a focus on improving behavior and communication skills, Student is not likely to be able to access or progress in academic content, such as literacy and math.
- Student's 2023 goals are essentially the same as 2022 goals. A lack of progress towards IEP goals should have been addressed by the IEP team through revised goals, as well as changes to special education and related services designed to meet these goals.

58. Student's September 2023 IEP contained the following services:

- Literacy: 300 MPW direct instruction provided by special education teacher
- Written Expression: 300 MPW direct instruction provided by special education teacher
- Math: 300 MPW direct instruction provided by special education teacher
- Independent Living Skills: 450 MPW direct instruction provided by special education teacher
- Independent Living Skills: 30 minutes daily of direct instruction provided by special education teacher
- Adaptive PE: 60 MPW indirect instruction provided by adapted PE teacher
- Social/Emotional Direct: 450 MPW provided by special education teacher
- Social/Emotional Indirect: 30 MPM provided by mental health worker
- Speech/Language Direct Services: 30 MPM instruction provided by SLP
- Speech/Language Services Indirect: 60 MPM provided by SLP

Exhibit A, p. 22.

59. The IEP provided that Student would receive services in the District's SNA Program and the LRE was identified as less than 40% in the general education environment, specifically 10% in general education environment. *Exhibit A, pp. 11 and 23.* The District concedes, and the SCO

agrees, that Student was not educated in the LRE described in the IEP during the time he was receiving services in a homebound setting. *Response/Exhibit H*, p. 8.

D. Student's Return to School in October and Alleged Seclusion

60. On October 2, 2023, Student was allowed to return to High School. *Response*, p. 3; *Interviews with Complainants, Residential Provider, and Special Education Coordinator*.
61. While some repairs had been made to the classroom, the record does not demonstrate that anything else was done to prepare for Student's return. For example, Former Special Education Teacher did not have visual supports (e.g., visual schedule, visual timer, icons) prepared and displayed for Student, nor is there any evidence that Former Special Education Teacher and Former Paraprofessionals had reviewed Student's BIP or received further training on how to implement it, prior to Student's return on October 2. *Interviews with Assistant Principal, Special Education Director, Special Education Coordinator, Special Education Behavioral Coordinator, and Special Education Teacher*.
62. In consultation with CDE Specialist in autism, the SCO finds that having visual supports in place for Student when he returned was of primary importance given the severity of his autism-related needs and cognitive impairment. Given the length of time that Student had been out of school, it was also critical to prepare Student for the transition back to school through the use of social stories or other graduated strategies. Nothing in the record indicates that any specific and necessary action was taken to prepare Student for a return to school.
63. Student was dysregulated throughout the first day of his return to High School. Student threw tables and chairs at staff, hit staff, head-butted staff, picked holes in walls, damaged the bathroom, slammed doors, attempted to tear out lights, and broke a door handle. Student also threw himself against walls, slammed his head into walls, and removed his clothing. Attempts to redirect Student were unsuccessful. *Response*, p. 3; *Exhibit D*, p. 9; *Interview with Special Education Coordinator*.
64. On October 3, 2023, RBT reported to the SNA classroom to observe Student and provide coaching and support to High School SNA staff to address behavioral challenges. *Response/Exhibit H*, p. 3; *Interview with RBT*.
65. Upon arrival, RBT noticed Student was missing from the classroom and asked staff where Student was. To his shock and concern, RBT was informed by SNA staff that Student and Former Special Education Teacher were "in the cage." *Id.* The room that staff referred to as "the cage" was a room that was being remodeled as a "quiet or therapeutic room." *Exhibit Q-3; Exhibit Q-4; Interviews with Special Education Director, Special Education Coordinator, RBT, Assistant Principal, and Special Education Teacher*. Because the room was not yet completed, staff were not authorized to use it for educational purposes. *Id.*

66. Despite being unauthorized for use, Former Special Education Teacher and two Former Paraprofessionals forcefully guided Student to the unfinished room where he would remain for a significant portion of the school day. RBT immediately informed Special Education Coordinator, Special Education Behavioral Support Coordinator, and Special Education Teacher of what was happening, and RBT remained with Student to ensure his safety while waiting for members of District Administration to arrive and intervene. *Id.*

67. RBT, Special Education Behavioral Support Coordinator, and Special Education Teacher made the following observations of SNA staff interactions with Student on October 3, 2023:

- Former Special Education Teacher and Paraprofessionals forcefully guided Student to where they wanted him to go, including the unfinished room.
- Former Special Education Teacher and Paraprofessionals appeared visibly frustrated with Student and used a harsh and escalated tone of voice when interacting with him.
- Former Special Education Teacher and Paraprofessionals relied excessively on negative redirection and did not provide positive reinforcement when Student complied with directives or expectations.
- The difference in these specific SNA staff interactions with Student was noticeably different than SNA staff interactions with other students in the classroom.
- Signs of dysregulated behavior in Student, which included “wailing,” intensified when Former Special Education Teacher was near Student.
- At least one or more staff was always present with Student in the unfinished room.
- The doors to this room locked automatically, preventing staff from entering or exiting the room without a key. Former Special Education Teacher and/or Former Paraprofessionals were the only SNA classroom staff who had a key to this room. Both RBT and Special Education Teacher reported being locked inside the room with Student on occasion during the day.
- All three expressed concern about what may have been occurring in the classroom when no other staff were present based on how comfortable Former Special Education Teacher and Former Paraprofessionals were in their negative interactions with Student, even though they were being observed by peers.

Response/Exhibit H, p. 4; Interviews with RBT, Special Education Behavioral Support Coordinator, and Special Education Teacher.

68. Special Education Director arrived early that afternoon to investigate the situation and provide support to Student and RBT, Special Education Teacher, and Special Education Behavioral Coordinator. Based on what Special Education Director observed and learned, she immediately relieved Former Special Education Teacher and two Paraprofessionals of their duties and filed a report with law enforcement concerning alleged child abuse. *Response/Exhibit H, p. 5; Interview with Special Education Director.* None of these individuals remain employed by the District. *Id.*

69. On October 4, Student again engaged in behavior that resulted in significant property destruction. Student's behavior included pulling blinds off windows, pulling the cord from a projector in the ceiling that caused the ceiling to buckle and lose tiles, throwing objects at the ceiling to bring down remaining tiles, and pulling up laminate flooring in the hallway. *Response/Exhibit H*, p. 6; *Exhibit D*, pp. 1 and 4. Student pulled approximately 100 pieces of linoleum off the floor next to his classroom and would not stop despite bleeding and torn fingernails. Because staff could not redirect him and were reasonably concerned about injury to his hands, Student was sent home to interrupt the cycle and stop the behavior. *Id.*; *Interviews with RBT, Special Education Teacher, and Special Education Behavioral Coordinator*.
70. The District suspended Student for four days, from October 4 through October 10, for this incident. *Exhibit D*, p. 4.
71. For the reasons described in Findings of Fact (FF) #s 28-30, the SCO finds that Student was subjected to a disciplinary change of placement on August 29, 2023. Consequently, Student was entitled to a manifestation determination by September 13, 2023, and entitled to receive educational services to enable him to access the general education curriculum and make progress towards his IEP goals, consistent with 34 C.F.R § 300.530(d).

E. October Manifestation Determination Review and IEP Meeting

72. On October 10, the District convened an IEP team to conduct a manifestation determination review (MDR). At this meeting, the District expressed concern that Student's behaviors made the school environment unsafe for Student and others. *Response/Exhibit H*, p. 6. Ultimately, the IEP team was not able to complete the MDR as scheduled, and a subsequent meeting was scheduled for October 17, 2023. *Id.*
73. On October 17, 2023, the District convened a properly constituted IEP team, which included Student's GAL, to conduct an MDR and then review the IEP. *Exhibit E*, pp. 1-7. For the MDR, the team concluded 1) that Student's behavior was a manifestation of disability, and 2) that the IEP and BIP had been properly implemented. *Id.* Based on FF #s 16-17, 19-23, 41, 46, 59, and 61-68, the SCO specifically finds that the Team's conclusion to question 2, whether Student's IEP and BIP had been properly implemented, is inconsistent with the student-specific data in the record. Indeed, the credible evidence in the record supports a finding that Student's IEP had not been properly implemented *at any time* during the 2023-24 school year.⁷
74. Following the MDR, the IEP team reviewed and revised the IEP. Student's placement was changed from inside the general education environment for less than 40% to homebound/hospital setting. *Exhibit A-1*, p. 1.

⁷ The SCO recognizes that a substantive review of the MDR is beyond the scope of the investigation and provides this finding as guidance.

75. The IEP team replaced Student’s annual goal in social-emotional wellness to comply with adult directives with a goal in independent living skills to address need for independence in toileting/hygiene. *Compare Exhibit A*, pp. 15-17 with *Exhibit A-1*, pp. 14-16. The new IEP goal stated: In order to increase his awareness of utilizing the bathroom, when given a visual prompt, [Student] will independently walk to the bathroom 3 out of 5 opportunities as measured by a daily checklist, by the end of the IEP year. *Exhibit A-1*, p. 16.
76. All other IEP goals remained the same, and the SCO finds that these goals still failed to address Student’s most critical areas of need: social-emotional regulation and communication skills. No changes were made to Student’s BIP. *Exhibit A-1*.
77. The IEP team determined that Student would receive specialized instruction in math, literacy, social-emotional skills, and independent living skills from a special education teacher or specialist in his home. *Id.* at p. 19. In determining LRE, the IEP team selected a residential placement as the most appropriate option but recognized that finding a residential facility would be difficult based on continuing efforts by DHS to find a facility that would accept Student. For Student to receive educational services while a residential facility was being sought, the IEP team determined that Student would receive 90 minutes of services each school day in the home. During this time, the IEP team would look at data to determine if service time could be increased. *Id.* The SCO finds that this change in placement was not based on consideration of reevaluation. As detailed below, the District did not request consent to reevaluate until November 2, 2023.
78. The IEP provided the following educational services in a homebound setting:
- Reading: 112 minutes per week (MPW) direct instruction provided by special education teacher
 - Written Expression: 112 MPW direct instruction provided by special education teacher
 - Math: 224 MPW direct instruction provided by special education teacher
 - Social/Emotional Direct: 112 MPW provided by special education teacher
 - Social/Emotional Indirect: 60 minutes per month (MPM) provided by mental health provider
 - Speech/Language Indirect: 60 MPM provided by SLP.

The IEP team also eliminated direct instruction in Speech/Language and Independent Living Skills, and significantly reduced direct instruction in social-emotional skills. Notably, there are no services provided to support independent living skills despite the addition of an annual goal to improve independence in toileting, an area of need that has made placement in a residential facility challenging. *Id.* at 16 and 20.

Accordingly, the SCO finds that the instructional services offered in this IEP do not address the most critical areas of need: communication skills and emotional/behavioral regulation.

79. Despite the decision to provide services in a homebound setting, some members of the IEP team expressed concerns that Student was not responding well to receiving educational services in his home. Special Education Behavior Coordinator, who delivered some of these services, reported that she had observed homebound services contribute to Student's dysregulation and increase in behaviors. She informed the team that "what we are trying currently is not working." *Exhibit A-1*, p. 7.
80. During her interview, Special Education Behavioral Coordinator clarified that this comment was made in reference to the educational services being provided by Former Special Education Teacher during the October 10 IEP meeting, rather than the October 17 IEP meeting, and her statement is inaccurately described in the IEP as an update made on October 17. Special Education Behavioral Coordinator further asserted that she, RBT, and Special Education Teacher had together been able to maintain Student's engagement consistently for 60 minutes of homebound instruction. *Interview with Special Education Behavioral Coordinator*.
81. In contrast, the service logs describe Student as being dysregulated for the entire 30-minute session on October 11, and services did not appear to resume until October 18, 2023. *Exhibit F*, pp. 3-4. Between October 18 and November 1, the service logs only indicate two sessions where Student was able to maintain focus or was otherwise available for instruction for 45 to 60 minutes. *Id.* Consistent with the service logs, DHS Case Manager and Residential Provider reported that Student was not responding well to educational services provided in his home. *Id.* at p. 9; *Interviews with DHS Case Manager and Residential Provider*. Further, they stated that Student seemed confused and frustrated by educational services being delivered in his home rather than at school, a confusion that was escalating behavior at home. *Id.*
82. For these reasons, the SCO finds it more likely than not that Student was not responding well to services being provided in the homebound setting, and these concerns were reported by various members of the IEP team on October 17, 2023.
83. Student received the following homebound services between October 11 and November 11, 2023:
- Literacy: 185 minutes
 - Math: 185 minutes
 - SEL: 380 minutes
 - Independent Living: 0 minutes
 - SLP: 0 minutes
 - Adapted PE: 0 minutes

Exhibit F, pp. 2-4.

84. Special Education Behavioral Coordinator, Special Education Teacher, and RBT together provided homebound services to Student during this time. The three specialists had developed a tight cycle for presenting Student with a task, providing errorless instruction and positive feedback during the task, and reinforcing Student for completing tasks. With all three working together, there was very little wait time between tasks. Following this approach, Student was able to maintain focus and benefit from instruction for 45 to 60 minutes on days that he was not dysregulated when they arrived or experiencing apparent side-effects from medication changes. *Id.*; *Interviews with Special Education Behavioral Coordinator, Special Education Teacher, and RBT.*
85. The only IEP goals supported by homebound instruction were those related to literacy, written expression, and math, which do not adequately address Student's most critical areas of need. Indeed, no instructional time in the homebound setting appeared to be devoted to social-emotional wellness or communication goals. *Exhibit G-4*, p. 2; *Exhibit F*, p. 2-4; *Interviews with Special Education Teacher, Special Education Behavioral Coordinator, and RBT.*
86. On November 2, 2023, the District requested consent to conduct a reevaluation. *Exhibit G-1*, p. 1. The consent form stated that the District was seeking to conduct a new FBA to "gather behavior data that will be used to revise/inform [Student's] BIP" because it had "been a while since this had been redone." *Id.* The consent form further stated that DHS Case Manager specifically requested an FBA to explore how Student's sensory needs may be impacting behavior, and the current FBA did not fully evaluate this concern. *Id.* DHS Supervisor signed the consent to reevaluate on the same day. *Id.*
87. On November 11, 2023, Student was sent to an emergency room by Group Home, and from there, Student was airlifted to Hospital and placed on an emergency hold. *Interviews with Special Education Director, DHS Supervisor, and Residential Provider.*
88. The District completed an FBA on or around November 17, 2023, which included a file review, two observations from homebound instruction, and interviews with staff. The FBA's summary statement describes the function of the behavior as: When presented with a flaw in materials (seam in carpet, small hole in wall, molding on wall, etc) [Student exhibits] property destructive behavior to complete a cycle (a function of gaining a complete cycle) and gaining adult support to redirect the cycle. *Exhibit G-3*, p. 2. The FBA also warned that the summary statement should be taken with caution because behaviors "seemed to be medically induced due to obsessive behaviors and thoughts." *Id.*
89. On November 28, 2023, the District conducted a reevaluation to determine if Student was eligible as a child with an intellectual disability. *Exhibit G-4*, p. 1. Although the current IEP recognized that Student had a significant cognitive impairment, DHS Case Manager and

Supervisor hoped that formally identifying Student with an additional eligibility category would increase options for funding and placement. *Interviews with Special Education Director, Special Education Teacher, School Psychologist, DHS Case Manager, and DHS Supervisor.*

90. This reevaluation consisted primarily of a review of existing data, with new information summarized as follows:

- Homeschool Observations/Teacher Input: During homeschool teachers used errorless learning to keep Student focus and allow him to access reinforcers. Given a field of two numbers, Student will always pick the right side, so determining his number accuracy is difficult. When presented with a writing task, Student is able to trace on the dotted line, but will then scribble all over the paper and refuse to return the paper until he has finished scribbling. He can also mark the highlighted words when presented on a worksheet. (EX: Worksheet with 12 boxes with 2 letter words, and the word is highlighted). He has done that 100% of trials, yet again will scribble all over the sheet before handing it in and often also throwing the marker. Teachers end the session when Student begins to exhibit obsessive behaviors that indicate he is struggling.
- Evaluation by Private Provider in November 2023: The evaluation supported continued eligibility in the category of ASD and supported eligibility in the category of intellectual disability. The private evaluator also noted that Student "exhibited significant interests in food and carpet tiles that dominated his focus," and as a result, they were "unable to effectively redirect his behavior and attention to standardized measures for play based assessments and other cognitive measures."
- Adaptive Behavior Assessment System, Third Edition (ABAS-3): School Psychologist administered this assessment and noted that Student was rated as extremely low in conceptual, social, and practical domains. The results also indicated that Student has not yet mastered fundamental adaptive skills, such as reading and obeying common signs and using the restroom independently.

Exhibit G-4, pp. 2-5.

91. On December 7, 2023, the District convened the IEP team to review the reevaluation report. Following reevaluation, the team identified Student with multiple disabilities, including ASD, intellectual disability, speech or language impairment, and serious emotional disability. The team determined that Student's disability-related needs impact "all aspects of his education and daily life and he demonstrates "global delays in all cognitive, adaptive, and academic areas." *Exhibit A-3, p. 8.*

92. There were no changes in consideration of special factors between the October and December IEP. *Compare Exhibit A-1, p. 10 with Exhibit A-3, p. 9.*

93. The IEP included the following revised annual goals:

- Reading: When presented with environmental signs (i.e. stop sign, exit, hospital, go, poison, walk, don't walk, restroom, etc), [Student] will match the signs to printed words with 60% accuracy in 3 out of 5 trials by his next annual IEP.
- Writing: Given fading visual prompts (i.e. multiple dotted lines to just the letter orientation point), [Student] will be able to write his name ("name") correctly and legibly in 3 out of 5 trials by his next annual IEP.
- Social-Emotional: Given a field of three tasks and then reinforcement, [Student] will complete the tasks with less than two aggressive behaviors, in 60% of trials.

[Student] will utilize a visual prompt to access adult attention by pointing to the person he would like to work with picture (can use AAC device) and verbal cues in 40% of attempts.

Exhibit A-3, pp. 9-13.

94. The goals in math, speech/language, and independent living remained the same as in the October 2023 IEP. *Compare Exhibit A-1, pp. 10-16 with Exhibit A-3, pp. 9-13.*

95. The service delivery statement (SDS) described the following special education and related services:

As determined by the IEP team, including guardian, [Student] will receive specialized services in a separate location. [Student] will receive math, writing, reading, social emotional and independent living skills at his home, provided by a Special Education teacher or specialist. [Student] will receive extended school year services through homebound instruction. These services will include instruction in literacy, math, independent living and social skills.

[Student] will receive indirect speech and/or language services as specialized instruction to support functional communication. Services will be provided by a Speech-Language Pathologist (SLP) and/or Speech-Language Pathology Assistant (SLPA) under the supervision of the SLP. Services will be provided in a small group or one to one setting outside the general education and as

consultation with the staff and IEP team to address communication needs. *Exhibit A-3*, p. 16.

This description of Speech/Language services is *identical* to the services described in the IEP dated September 26, 2023. *Compare Exhibit A-3*, p. 16 *with Exhibit A*, p. 21.

96. With the exception of 60 minutes of indirect instruction in adapted physical education, there are no service delivery minutes described in the service delivery grid. In the LRE section, the IEP states that the team determined that Student would receive 90 minutes of homebound instruction per day while “looking at data to determine if the time could be increased.” *Exhibit A-3*, p. 18.
97. The recommended placement in the LRE identified both residential and homebound settings. To explain its rationale, the IEP team indicated that a residential facility was agreed upon, but DHS had not been able to find a suitable placement. As a result, homebound services would be provided while looking for residential placement options. *Id.*
98. In consultation with CDE Specialists, the SCO finds that 90 minutes of instruction in a homebound/hospital setting does not provide the consistency or specialized instruction in communication and social-emotional skills to reasonably support progress towards Student’s IEP goals or confer educational benefit.
99. Student is currently residing on a specialized unit in Hospital. Although he has been “discharged,” Student is expected to remain at Hospital until a suitable residential placement is found. According to the Psychologist overseeing Student’s care at Hospital, Student is making progress in regulating behavior, responding positively to requests from different adults on a regular basis, and enjoys eating and spending time with a peer on the same unit. Student is also staying engaged with tasks for upwards of 60 minutes and participating in a full day of programming at Hospital. Based on his expertise and recent observations, Psychologist opined that Student is more stable and should be able to tolerate up to six hours of educational services in a school day. *Consultation with Psychologist.*
100. In its Supplemental Response, the District asserted the following:

A factor frustrating the implementation of the Student’s IEP is the Student’s continual medicine change and hospitalization. Prior to this school year, and at times during this school year, the District has been able to implement the IEP and make progress toward the Student’s goals.

F. Review of District Policy/Procedure and Findings in State Complaint 2023.532

101. In reviewing the District’s written procedure related to manifestation determinations, the SCO finds two areas in need of revision to ensure that the District is properly implementing IDEA’s disciplinary protections. First, the example provided on who must attend a manifestation determination review impermissibly suggests that attendance can be based on the student’s disability category. Second, the District’s written procedures do not adequately describe when an in-school-suspension would count as a day of removal because it does not specify that a student must be served consistent with the LRE described on their IEP for an in-school suspension to *not* count as a removal. *Exhibit O*, pp. 44-45.

102. In State Complaint 2023.532, issued on June 2, 2023, the CDE concluded that the District violated the following IDEA requirements relevant to this investigation:

- Failing to educate Student in the LRE, in violation of 34 C.F.R. §§ 300.114, 300.116, 300.117, and 300.323(c). The SCO specifically concluded that the District failed to educate Student in the LRE consistent with his IEP when it placed Student in a separate classroom and shortened school day.
- Making a significant change to Student’s educational placement without involving Parent or Student’s IEP Team and consideration of reevaluation, in violation of 34 C.F.R. §§ 300.114, 300.116, 300.501(c), and ECEA Rule 4.03(8)(b).

Because the District’s written procedures concerning a change of placement were consistent with IDEA, the SCO concluded that the violation was not systemic in nature. The SCO attributed the failure to follow District procedures as a “one-time error” arising from one individual’s failure to oversee the process and from a “lack of supervision by and among the other special education staff in School and District.” The SCO further noted that the District conceded this error and is treating it as an opportunity to identify and correct weaknesses in its supervisory structure.

- Failing to conduct an MDR within ten school days of the decision to change Student’s placement, in violation of 34 C.F.R. §§ 300.530(e). Here, the SCO acknowledged that District and School staff did not intend to discipline Student by changing his placement, and yet his removal to a separate classroom on a shortened day constituted a disciplinary change of placement under IDEA.

Because the District’s procedures were consistent with IDEA and the Special Education Director stated that the small number of students with IEPs and shortened school days were being served consistent with their IEPs, the SCO concluded that this violation was not systemic in nature. Again, the Special Education Director viewed this as a “one-time error” and an “indication of a need for better oversight.”

CDE Exhibit 2, pp. 8, 22-26, and 35.

103. Based on FF#s 28-30, 39-43, and 100-101, the undersigned SCO further finds that weaknesses in the District's supervisory structure persist. Remedies will be designed to address the District's obligation to ensure appropriate supervision in the implementation of IDEA's procedural requirements.

CONCLUSIONS OF LAW

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

Conclusion to Allegation 1: Although the August 2023 "planning meeting" was not an IEP meeting, the District has inappropriately relied on DHS staff to serve as Student's IDEA parent, inconsistent with 34 C.F.R. § 300.519(d) and ECEA Rule 6.02(8)(e). This violation did not result in a denial of FAPE, but it is systemic in nature.

A. The District relied on DHS employees to serve as Student's IDEA parent.

Complainants allege that the District held an IEP meeting on August 15, 2023 and did not include Student's "parent" or an individual with educational decision making authority. Complainant's specific concern was that she, Student's DHS Case Manager, was not present at this meeting.

Before determining whether the meeting on August 15 constituted an IEP meeting, the SCO first addresses who may serve in the role of parent for a student who is defined as a ward of the state, consistent with IDEA.

IDEA requires public agencies to ensure that the rights of a child are protected when parents cannot be identified or located, including protection for a child who is defined as a ward of the state. 34 C.F.R. § 300.519(a)(3). For purposes of IDEA, state law defines "ward of the state" as a child who is in the custody of a public child welfare agency. ECEA Rule 2.53(1)(c). Student, who is in the legal and physical custody of DHS, is a ward of the state entitled to protection under IDEA and ECEA's educational surrogate parent (ESP) mandate. (FF # 2).

The ESP mandate specifically requires the District to have a process for determining whether a child needs an ESP and for then assigning a *qualified* ESP to any child who needs one. 34 C.F.R. § 300.519 (b); ECEA Rule 6.02(8)(a). An ESP is responsible for representing the child in all matters relating to identification, evaluation, educational placement, and the provision of FAPE. ECEA Rule 6.02(8)(i).

In describing qualifications, federal and state law explicitly prohibit an individual who is directly involved in the care or education of the child from serving as an ESP. 34 C.F.R. § 300.519(d)(2)(i); ECEA Rule 6.02(8)(e)(iii)(A). This prohibition ensures that a child will not have their educational rights protected by someone who may have to balance the interests of the child they are assigned to represent with the interests of their employer.

Here, the SCO finds and concludes that the District has impermissibly relied upon DHS staff to serve in the role of IDEA parent or ESP for Student, in violation of 34 C.F.R. § 300.519(d)(2)(i) and ECEA Rule 6.02(8)(e)(iii)(A). As described in FF # 36, the District has relied on DHS Case Manager and DHS Supervisor to serve as the IDEA parent at various times over the past two years. Most recently, the District requested consent for reevaluation from DHS Case Supervisor. (*Id.*) Special education evaluations fall within the specific responsibilities of an ESP, and the District may not rely on DHS staff to provide consent for a reevaluation.⁸ To be clear, DHS staff often have important information about the child and should be invited to participate in IEP meetings; they just cannot serve as the IDEA parent.

For a child who is in the legal custody of DHS, the ESP may be appointed by the court overseeing the child's case as long as they otherwise meet the qualifications described in 6.02(8)(e)(iii). ECEA Rule 6.02(8)(d). Here, Student has a GAL who exercises educational decision-making. (FF #36). Going forward, the District must rely on Student's GAL or assign a qualified ESP to represent Student in all matters involving identification, evaluation, educational placement, or the provision of FAPE; it may not continue to rely on DHS staff for these matters.

Failure to comply with a procedural requirement of the IDEA results in substantive harm supporting compensatory remedies if the violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); see *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765-66 (6th Cir. 2001).

Although IDEA explicitly prohibits DHS employees who are directly involved in Student's care from serving in the role of parent, the SCO recognizes that DHS Case Manager and DHS Supervisor have been strong and dedicated advocates for Student. Indeed, they took direct action to protect Student's educational rights by filing this Complaint. It is due to the effectiveness of their advocacy *alone* that the SCO further concludes that the District's procedural violation of IDEA and ECEA did not result in a substantive denial of FAPE.

This violation is systemic in nature.

Pursuant to its general supervisory authority, CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the district. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the State Complaint Procedures are "critical" to the State Educational Agency's "exercise of its general supervision responsibilities" and serve as a "powerful tool to identify and correct noncompliance with Part B." *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46601 (Aug. 14, 2006).

⁸ For *initial evaluations only*, the IDEA does not require consent for a child who is a ward of the state if the child is not residing with parents, parents cannot be located, parental rights have been terminated by court order, or parents have had educational decision-making authority removed by court order. 34 C.F.R. § 300.300(a)(2).

Here, the SCO finds and concludes that this violation is systemic in nature. Although the District's written procedures clearly state that DHS may never sign documents or serve as a student's IDEA parent, the District's practice does not align with its written procedures. (FF #s 36-37). Special Education Director informed the SCO, without hesitation or qualification, that DHS was serving as Student's IDEA parent. (*Id.*) Because Special Education Director is responsible for ensuring compliance with IDEA and ECEA for the District, the SCO concludes that the disconnect between the District's procedures and its practice is systemic in nature. The SCO will design a remedy to ensure the future provision of appropriate services for children who are entitled to protection under IDEA's surrogate parent mandate.

B. The August 15 Planning Meeting was not an IEP Meeting.

Complainants allege that the meeting on August 15 was an IEP meeting. For the reasons explained below, the SCO finds and concludes that the meeting on August 15, 2023 was not an IEP meeting.

IDEA distinguishes an IEP meeting from "informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision." 34 C.F.R. § 300.501(b)(3). Further, an IEP meeting "does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting." *Id.* To promote efficiency, this provision simply excludes some of the planning and coordination activities that school district personnel routinely engage in from the more extensive procedural requirements related to convening an IEP team.

When applying these exclusions, the CDE recognizes the following factors as relevant for determining if a particular meeting should have been recognized and noticed as an IEP meeting: 1) whether the parent was specifically invited to the meeting; 2) whether the meeting was scheduled in advance; 3) whether the participants invited to the meeting would otherwise constitute an IEP team; and 4) whether the topic of discussion would involve identification, evaluation, educational placement and/or the provision of FAPE. If the answer to these questions is yes, the meeting can reasonably be characterized as an IEP meeting, even when it was not formally noticed as one.

Here, the SCO finds and concludes that the August 15 meeting does not satisfy these factors and therefore should not be characterized as an IEP meeting. First, the District held this meeting without DHS Case Manager in attendance. Although DHS Case Manager was not qualified to act as Student's parent under IDEA, she was the individual the District consistently relied upon to serve in this role. If the District intended this meeting to be an IEP meeting, DHS Case Manager would have been expected to attend. Second, this meeting was scheduled on the very day that Student had exhibited significant property destruction, rather than in advance and at a mutually agreeable time. Third, the participants in this meeting would not constitute an IEP team.

Although the meeting was attended by Special Education Director, Special Education Coordinator, RBT, Assistant Principal, Special Education Teacher, and Residential Provider, it did not include someone authorized to serve as Student's IDEA parent, nor DHS Case Manager, the individual the District has consistently relied upon to serve as Student's parent. The meeting also did not include Student's current special education teacher, Former Special Education Teacher. (FF #s 31-37).

The fourth factor, the extent to which the discussion involved identification, evaluation, educational placement, or the provision of FAPE, requires closer analysis. The purpose of the August 15 meeting was to discuss safety concerns, the timeline for classroom repairs, educational services for Student while repairs were being made, and whether supplemental aids or services could make a less restrictive placement viable. (FF #s 32-33). During this discussion, all agreed that the classroom floor would need to be repaired and be comprised entirely of one material, carpet or linoleum, or it would trigger further property destruction. (*Id.*) Although the topics of discussion at this meeting included educational placement and the provision of FAPE, the District directed Former Special Education Teacher to immediately convene Student's IEP team to discuss these matters and determine educational placement while repairs were made. (FF #s 32, 33, and 42). For this reason, the SCO finds and concludes that the District did not intend for this meeting to determine educational placement *at the time it scheduled the meeting*. Consequently, this factor weighs in favor of a conclusion that the August 15 meeting was not an IEP meeting.

Despite multiple reminders to schedule an IEP meeting, however, Former Special Education Teacher failed to do so until September 26, 2023. (FF # 42). Further, no one in District Administration ensured that the IEP team convene immediately following the August 15 planning meeting, despite multiple red flags concerning Former Special Education Teacher's job performance. The District concedes, and the SCO agrees, that it changed Student's placement and determined homebound services would be provided in August outside of a properly constituted IEP meeting and without the participation of an individual meeting IDEA's definition of parent. (FF # 38). For the reasons explained in the conclusions to allegations 3-6, the SCO concludes that this delay resulted in Student's educational services and placement being determined outside of an IEP meeting.

Conclusion to Allegation 2: The District failed to timely develop, review, and revise an IEP tailored to Student's individualized needs, from August 2023 to present, consistent with 34 C.F.R. §§ 300.320 and 300.324. This violation resulted in a denial of FAPE.

A. IEP Development, Review and Revision

The IDEA requires school districts to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development process

complied with the IDEA's procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Id.* Taken together, these two prongs assess whether an IEP is procedurally and substantively sound.

Here, there are three IEPs subject to review: 1) September 2023 IEP; 2) October 2023 IEP; and 3) December 2023 IEP. The SCO will evaluate each one in turn for procedural compliance and substantive adequacy.

B. IEP Development Process

In developing an IEP, the team must consider the strengths of the child, the parent's concerns, evaluation results, and "the academic, developmental, and functional needs of the child." 34 C.F.R. § 300.324(a)(1). An IEP must include a statement explaining how the child's disability impacts the student's involvement in and progress in the general education curriculum. *Id.* § 300.320(a)(1)(i). An IEP must contain measurable annual goals designed to: (1) meet the needs that result from the student's disability to enable him or her to be involved in and make progress in the general education curriculum, and (2) meet each of the student's other educational needs that result from his or her disability. *Id.* § 300.320(a)(2). Also, an IEP must include the special education and related services and supplementary aids and services that will be provided to allow the child to (1) attain the annual goals, (2) be involved and make progress in the general education curriculum and (3) participate in nonacademic activities. *Id.* § 300.320(a)(4).

Student's September 2023 IEP complied with IDEA procedural requirements.

Student's September IEP was developed by a properly constituted IEP team, including GAL, on September 26, 2023. The IEP contained a description of Student's strengths and disability-related needs, nine annual IEP goals, and a statement of special education and related services. (FF #s 48 and 56). Thus, as to the first prong of the *Rowley* standard, the SCO finds and concludes that the development process for the September 2023 IEP complied with IDEA's procedures.

Student's October 2023 IEP did not comply with IDEA procedural requirements.

Although Student's October IEP was developed by a properly constituted IEP team, including GAL, on October 17, the District failed to comply with procedural requirements concerning a significant change of placement.

Educational placement must be based on the child's IEP and be made by the IEP team. ECEA Rule 4.03(8)a). Further, a significant change of placement must be based on consideration of reevaluation. Relevant here, a significant change of placement occurs when changes to instructional services would result in a change in educational environment. ECEA Rule 4.03(8)(b)(ii)(A)(II); *See Weld RE-5J School District, 77 IDELR 148 (SEA CO 07/14/2020)* (holding

that a move to a placement where Student was completely removed from the general education environment and taught one-on-one by a special education teacher constituted a significant change in placement).

Following the MDR, Student's IEP team reviewed his IEP and changed Student's placement from the SNA Program, a centered-based program, to hospital/homebound. Hospital/homebound is considered the most restrictive placement on the continuum of placements because it removes a student from access to *all* peers, disabled or nondisabled. In addition to changing the educational setting, the IEP team significantly reduced Student's instructional services to 90 minutes per day to be delivered at Group Home by a special education teacher. Notably, the IEP team eliminated direct instruction in Speech/Language and Independent Living Skills, and significantly reduced direct instruction in social-emotional skills, from 450 MPW to 112 MPW. (FF #s 58, 73 - 78).

These changes to instructional services constituted a significant change of placement requiring the consideration of reevaluation. Although DHS Case Manager requested evaluations related to Student's cognitive skills and social-emotional functioning in September, the District would not request consent for reevaluation until November 2, 2023. (FF # 86).

Because this significant change in placement was not based on reevaluation, or meaningful consideration of the need for reevaluation, the SCO finds and concludes that the development process for the October 2023 IEP did not comply with procedures.

Student's December 2023 IEP did not comply with IDEA procedural requirements.

Although the December IEP was developed by a properly constituted IEP team on December 7, 2023, the District failed to comply with procedural requirements related to the service delivery statement. (FF #s 91-97).

An IEP must include the special education and related services and supplementary aids and services that will be provided to allow the child to (1) attain the annual goals, (2) be involved and make progress in the general education curriculum and (3) participate in nonacademic activities. 34 C.F.R. § 300.320(a)(4). It must "include information about the services that will be provided to the child, so that the level of the agency's commitment of resources will be clear to parents and other IEP Team members." *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46667 (August 14, 2006).

This statement, commonly known as a service delivery statement, must be sufficiently detailed for parents to understand what specific services and supports the school district is offering to provide. *Tamalpais Union Sch. Dist. v. D.W.*, 70 IDELR 230 (N.D. Cal. 2017) (noting that "Parents can't make an informed decision on whether to accept a proposed IEP if the document includes only a vague description of the student's services"); *see also Douglas Cnty. Sch. Dist.*, 118 LRP 35788 (SEA CO 7/6/18). The service delivery statement must clearly specify the amount and type

of services that will be provided to a student. *Adams 12 Five Star Schs.*, 75 IDELR 86 (SEA CO 2019). This includes describing the setting in which a particular service will be provided. *See, e.g., S.H. v. Mount Diablo Unified Sch. Dist.*, 70 IDELR 98 (N.D. Cal. 2017) (finding that the district violated the IDEA when it failed to spell out whether the 40 minutes of speech and language services would be delivered to the student individually or in a group setting).

Here, Student's IEP lacks the information needed to determine what educational services the District offers to provide. First, the information in the December IEP is too vague and lacking in detail to determine what educational services will be provided and by whom. For example, the IEP does not clearly describe the amount of instruction Student is to receive in the areas of academics, social-emotional, speech-language, or independent living skills. Rather, the service delivery statement vaguely provides that Student will receive specialized services in a separate location that will include math, writing, reading, social emotional and independent living skills at his home, provided by a special education teacher or specialist. While the LRE section of the IEP states that 90 minutes of homebound instruction will be provided on a daily basis, the service delivery grid contains no information about how instructional services will be allocated and if the services will be provided by a special education teacher or "specialist." (FF # 95). By comparison, Student's October 2023 IEP identified the weekly instructional minutes and provider for each area, such as 112 MPW direct instruction in written expression by a special education teacher. (FF # 78). Although the IEP states that the District will increase these daily services based on "data," it does not provide details as to what data will be examined and how often it will be examined to make this determination. (FF # 95).

Second, the IEP contains conflicting information that appears to be left over from previous IEPs. Regarding speech language services, the December IEP contemplates direct and/or indirect speech language instruction, including services provided in a small group setting. (FF # 95). The language in the December 2023 IEP is identical to the language in the September 2023 IEP when Student was attending the SNA Program and was to receive direct instruction by an SLP. Given that the December IEP offers services in a homebound setting and does not provide for any direct instruction by an SLP, the language in the service delivery statement conflicts with other information in the IEP. This conflict makes it impossible to understand what services are being offered, where, and by whom.

Because Student's December IEP contains vague and conflicting information related to educational services and setting, the development process does not meet the procedural requirement for the service delivery statement. This failure is both procedural and substantive in nature.

The SCO turns next to the question of whether the same 2023 IEPs were substantively appropriate. *Rowley*, 458 U.S. at 207.

C. Substantive Adequacy of Student's IEPs

The IDEA does not promise a particular educational or functional outcome for a student with a disability, but it does provide a process for reviewing an IEP to assess achievement and revising the program and services, as necessary, to address a lack of expected progress or changed needs. 34 C.F.R. § 300.324(a)(2). Thus, whether an IEP is reasonably calculated to allow a student to make appropriate progress is determined prospectively, based on what was known when the IEP was drafted, and not determined by the student's actual progress. *Fuhrmann v. East Hanover Bd. of Educ.*, 19 IDELR 1065 (3d Cir. 1993), *reh'g denied*, 110 LRP 65930 (3d Cir. 06/08/93); *Adams v. State of Oregon*, 31 IDELR 130 (9th Cir. 1999).

The SCO will evaluate Student's September, October, and December IEPs for substantive adequacy by considering whether: 1) annual goals adequately addressed Student's unique needs; 2) positive behavioral supports and strategies adequately addressed Student's unique needs; and 3) special education and related services offered were adequate to ensure progress towards annual goals.

Annual Goals

An IEP is "the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982)). In developing an IEP, the IEP Team must consider the strengths of the child, the parent's concerns, evaluation results, and "the academic, developmental, and functional needs of the child." 34 C.F.R. § 300.324(a). Along with a statement of the special education and related services to be provided to the student, an IEP must contain measurable goals designed to: 1) meet the needs that result from the student's disability to enable him or her to be involved in and make progress in the general education curriculum, and 2) meet each of the student's other educational needs that result from his or her disability. *Id.* § 300.320(a)(2).

To allow for the evaluation of a student's progress, IEP goals must be clear and objectively measurable. *Kuszewski v. Chippewa Valley Schs.*, 34 IDELR 59 (E.D. Mich. 2001), *aff'd*, 38 IDELR 63 (6th Cir. 2003, *unpublished*). This includes accurately identifying the skill areas in which the student requires specialized instruction, although specific words or the most expansive phrasing is not required. See *Benjamin A. v. Unionville-Chadds Ford School District*, 70 IDELR 150 (E.D. Pa. 2017) (holding that goals that addressed executive functioning skills was not deficient because it failed to use the term "executive functioning").

While Student's disability significantly impacts all areas of his education and daily life, his most critical disability-related needs are in the areas of social-emotional functioning/behavioral regulation, functional communication, and independent living. Student's behavior presents exceptionally significant challenges that threaten the safety of himself and others, including property destruction, physical aggression, and self-injurious behavior. Student's behavior is also

difficult to redirect or interrupt. For example, once Student starts to destroy something he will not stop until he has completed the cycle of destruction and may show physical aggression towards staff who attempt to redirect him or otherwise intervene. This behavior has resulted in significant damage to classrooms and hallways at High School and his removal from the SNA Program to the most restrictive setting on the continuum of placements, the hospital/homebound setting. (FF #s 6, 7, 26, 63, and 69).

Student is also nonverbal and lacks functional communication skills, a lack of skills which likely contributed significantly to the behavioral challenges discussed above. For example, Student knows a few functional signs—eat, drink, more—but performs them in a way that is only understood by familiar listeners. To express what he wants or needs, Student uses vocalizations to get attention and will frequently grab adults by the hand to show them what he wants. Indeed, Student’s most used form of communication is to take staff to what he wants or needs. (FF # 8).

Finally, Student is not independent in hygiene or toileting and wears an adult diaper and onesie. Student’s behavior during toileting requires 2-1 staffing for safety. Student’s needs in this area have presented barriers to residential placement options. (FF #s 9 and 52).

For the reasons explained below, the SCO finds and concludes that the annual goals in Student’s September, October, and December IEPs all failed to adequately address Student’s most critical disability-related needs in the areas of social-emotional functioning, communication, and independent living.

September IEP: Student’s September IEP contained nine annual goals, each of which were either identical or without meaningful difference from the October 2022 IEP. Of these nine goals, three addressed social-emotional functioning, one addressed communication, and there were no goals to address independent living/hygiene. In consultation with CDE Specialists, the SCO finds and concludes that the social-emotional and communication goals did not adequately address the severity of Student’s disability related needs. For example, the goal requiring Student to match pictures of faces with emotion does not teach Student how to tell someone that he is sad. Student’s one communication goal was identical to the prior IEP goal and did not address the severity of Student’s needs in this area. (FF #s 56-57).

In addition to missing critical areas of need in social-emotional functioning and communication, Student’s academic goals in literacy, written expression, and math all lacked a learning purpose. For example, Student’s math goal requires him to sort various shapes and colors, but it is unclear what Student is supposed to be learning from this. Understandably, Student’s behavior during these tasks, such as scribbling on paper and throwing/ripping materials, suggests that he was either bored or did not understand the purpose of the task. Moreover, without a focus on improving behavior and communication skills, Student is not likely to be able to access or progress in academic content, such as literacy and math. (*Id.*)

October IEP: Except for the addition of an annual goal in the area of independent living skills to address hygiene/toileting, the annual goals in Student's October IEP are the same as the September IEP. (FF #s 75-76). Although the additional goal addressed a critical need, the SCO finds and concludes that the annual goals in the October IEP did not adequately address Student's unique, disability-related needs for the same reasons that the September IEP failed to do so.

December IEP: Student's December IEP contained several revised annual goals in the areas of reading, writing, and social-emotional learning. While the revised goal in reading addressed a functional skill, i.e., identifying environmental signs, the revised goals still do not adequately address Student's individualized needs. For example, a revised goal in social-emotional functioning required Student to access adult attention by pointing to the person he would like to work with. Given that Student currently accesses adult attention through gesture, it is unclear how this goal addresses a critical need. The other revised goal in social-emotional functioning required Student to complete tasks with less than two aggressive behaviors when given three tasks and a reinforcer. (FF # 93). While this goal targets a critical need, it is unclear what Student will be taught or what skill he will learn to regulate his behavior given that there is no replacement behavior to be reinforced. Annual goals in communication, math, and independent living remained the same as the October IEP. (FF #94).

For these reasons, the SCO finds and concludes that the September, October, and December IEPs each failed to provide annual goals to address Student's most critical areas of need: behavior regulation, communication, and independent living skills. As such, the IEPs were not reasonably calculated to enable Student to receive an educational benefit, violating the IDEA's substantive requirements related to the development of an IEP at 34 C.F.R. § 300.320(a)(2).

BIP

For students whose behavior impedes their learning or the learning of others, the IDEA requires IEP Teams to consider the use of positive behavioral strategies and supports. 34 C.F.R. § 300.324(a)(2). As contemplated by 34 C.F.R. § 300.324(a)(2), this includes where the consequences of a child's behavior, including "violations of a school's code of student conduct, classroom disruptions, disciplinary removals, and other exclusionary disciplinary measures," impede the child's learning. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 122 LRP 24161 (OSERS 07/19/22).

The regulations do not require an IEP Team to use a particular tool or assessment when considering positive behavioral support; however, "conducting a functional behavioral assessment typically precedes developing positive behavioral intervention strategies." *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46,683 (Aug. 14, 2006). Development of a BIP is an "acceptable way of considering a child's behavioral needs", though not required. *Coleman v. Wake Cnty. Bd. of Educ.*, 120 LRP 4253, at *9 (E.D. N.C. 2020). To be effective, a BIP should detail the target behaviors and the motivation behind these target behaviors. *CDE IEP Procedural Guidance Manual*, p. 121.

Here, Student has a BIP to address behavior that interferes with his learning and the learning of others. Under the second prong of *Rowley*, the SCO finds and concludes that the IEP was not substantively appropriate because it was not tailored to adequately meet Student's unique behavioral needs. Student's IEP Team did not substantively review Student's BIP at IEP meetings in September and October. (FF #s 51 and 73). These BIPs remained identical to Student's BIP from 2022. (*Id.*) The SCO recognizes that a BIP need not always change from year-to-year. But, at a minimum, a BIP must accurately identify Student's problem behaviors and adequately address individualized needs. Indeed, there is no information in the record concerning when the FBA on which these BIPs relied was even completed. (*Id.*) Although the District completed a new FBA in November of 2023, Special Education Behavior Coordinator, who conducted the FBA, stated that the hypothesis or summary statement should be taken with caution because behaviors seemed to be "medically induced." (FF # 88). Consequently, the November FBA did not provide information that would be sufficiently reliable to inform the BIP.

In consultation with CDE Specialists in autism and behavior, the SCO finds and concludes that Student's BIP did not adequately address Student's unique needs. First, the BIP does not address the severity of Student's needs. For example, the BIP requires that Student be prompted to take a break in the calming area when he shows signs of aggression. The credible evidence in the record suggests that Student is very difficult to redirect once dysregulated. This demonstrates a disconnect between the antecedent strategy provided by the BIP and Student's disability-related need. (FF # 25).

Second, the BIP does not provide sufficient detail to inform staff about how to reduce environmental triggers, redirect, or reinforce Student. For example, Middle School SNA staff and Special Education Behavioral Coordinator have critical information about how the classroom should be set-up to reduce environmental triggers, yet none of this information is described in the "setting event strategies" section of the BIP. Similarly, OT provided meaningful information as part of the 2022 reevaluation on how to decrease problematic behavior, such as shorter work times interspersed with break activities and movement breaks, that are not included in the BIP. (*Id.*)

For these reasons, the SCO finds and concludes that the BIPs in place for the 2023-24 school year did not include adequate behavior strategies and supports to address Student's needs, in violation of 34 C.F.R. § 300.324(a)(2)(i). This resulted in a denial of FAPE. *See D.S. v. Bayonne Bd. Of Ed.*, 602 F.3d 553, 565 (3d. Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA's procedural requirements).

Special Education and Related Services

An IEP must include the special education and related services and supplementary aids and services that will be provided to allow the child to (1) attain the annual goals, (2) be involved and

make progress in the general education curriculum and (3) participate in nonacademic activities. 34 C.F.R. § 300.320(a)(4).

While the September 2023 IEP provided specially designed instruction and related services in the SNA program for a full school day, the October and December IEPs provide 90 minutes of instruction in a homebound setting. (FF #s 58-59, 78, 95-97). The homebound instruction contemplated and provided in this setting is directed at academic goals in literacy, reading, and math, rather than targeting Student's most critical needs in behavior, communication, and independent living. (FF # 85). Notably, the District removed direct instruction in speech-language skills despite Student's profound needs in this area. Moreover, the credible evidence in the record demonstrates that Student has not benefited from homebound instruction and can engage in programming for longer than 90 minutes a day. (FF #s 47, 79, 90 and 98).

The SCO finds and concludes, in consultation with CDE Content Specialists, that 90 minutes of instruction each day is insufficient to enable Student to make progress appropriate in light of his circumstances. *Andrew F.*, 137 S. Ct. at 999. Student requires consistency and reinforcement, as well as instruction in social-emotional functioning, communication, and independent living skills. Ninety minutes of instruction targeted to academic skills each day falls far short of what Student requires to adequately address his most critical disability-related needs and enable him to make progress towards his IEP goals. Further, there is no evidence that Student has benefited from homebound instruction during the 2023-24 school year; nor is there evidence that he has made progress towards any of his IEP goals. (FF #s 47, 80-82, and 99).

The failure to develop IEPs in September, October, and December that were substantively adequate resulted in a denial of FAPE. *See D.S. v. Bayonne Bd. Of Ed.*, 602 F.3d 553, 565 (3d. Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA's procedural requirements). To remedy this denial, the SCO will require that Student's IEP team convene and develop an IEP that meets IDEA requirements and addresses each of the specific concerns noted here.

This violation is not systemic in nature.

Pursuant to its general supervisory authority, CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the district. 34 C.F.R. § 300.151(b)(2).

Here, nothing in the Record indicates that the violations related to the development, review, and revision of Student's IEP is systemic in nature. Rather, these violations are more likely related to the unique challenges related to Student's behavior and confusion in applying IDEA's disciplinary protections—which the SCO considers next. The SCO recognizes that Student's disability-related needs present exceptional challenges, including the current hospitalization. The SCO further recognizes that Special Education Behavior Coordinator and Special Education Teacher have critical knowledge about Student's strengths and needs; both are deeply invested in Student's education and success. The SCO finds and concludes, however, that no evidence in the record

supports a claim that Student has made progress towards any of his IEP goals in the 2023-24 school year.

Conclusion to Allegations Nos. 3 through 6: With respect to Allegations Nos. 3 and 4, the District failed to provide notice of Student’s disciplinary change of placement in August of 2023 and failed to conduct a manifestation determination within ten school days of its decision to change placement, in violation of 34 C.F.R. § 300.530(e) and (h). With respect to Allegation No. 5, the District failed to convene Student’s IEP Team to determine the educational services necessary to enable Student to participate in the general education curriculum following his disciplinary change in placement in August, in violation of 34 C.F.R. § 300.530(d)(5). With respect to Allegation No. 6, the District failed to provide educational services to enable Student to participate in the general education curriculum and progress towards annual IEP goals and failed to conduct an FBA or provide behavioral intervention services following disciplinary change of placement from August 2023 to present, in violation of 34 C.F.R. § 300.530(d)(1). These violations resulted in a denial of FAPE and are systemic in nature.

A. Requirements for an MDR

Discipline of a student with a disability may result in a change to the child’s placement and entitle the student to procedural protections under the IDEA. *See* 34 C.F.R. §§ 300.530, 300.536. Within ten school days of any decision to change the placement of a student with a disability because of a violation of a code of conduct, a school district must conduct an MDR to determine whether the behavior at issue was a manifestation of the student’s disability or a direct result of the school district’s failure to implement the IEP. *Id.* § 300.530(e)(1).

B. Determining Whether a Change of Placement Is Disciplinary

Before analyzing whether the District was obligated to conduct an MDR, the SCO must determine whether a disciplinary change of placement occurred and, if so, the date the District decided to make that change. A disciplinary change of placement occurs if: (1) a student has been removed from his current educational placement for more than 10 consecutive school days, or (2) a student has been subjected to a series of short-term removals that total more than 10 school days and constitute a pattern. *Id.* § 300.536(a). A series of removals may constitute a pattern, but this is determined on a case-by-case basis; this determination is inherently subjective. *Id.* § 300.536(b)(1); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities (“Assistance”)*, 71 Fed. Reg. 46715 (Aug. 14, 2006).

The IDEA’s disciplinary procedures apply to a unilateral removal arising from a violation of a code of conduct unless all three of the following factors are met: (1) The child is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) the child continues to receive the services specified on the child’s IEP; and (3) the child continues to participate with nondisabled children to the extent the student would have in the student’s current placement. *Assistance*, 71 Fed. Reg. 46715. Federal guidance has also restated the first

of these requirements as affording the student “the opportunity to continue to be involved in and make progress in the general education curriculum.” *Dear Colleague Letter*, 68 IDELR 76 (OSERS 2016).

School districts must consider both formal removals (such as suspensions) and informal removals. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions (“Discipline Q&A”)*, 122 LRP 24161, Question C-6 (OSEP 2022).⁹ Informal removals include “action[s] taken by school personnel in response to a child’s behavior that excludes the child for part or all of the school day, or even an indefinite period of time.” *Id.* at p. 54.

C. Student’s New Placement Was a Disciplinary Change of Placement

The SCO acknowledges that District may not have intended to discipline Student by changing his placement to homebound instruction following the behavioral incident on August 15, 2023. (FF #s 28-30). Yet Student’s removal to homebound placement while the District made repairs to the classroom *was* effectively disciplinary under the IDEA for the following reasons: First, the District changed his setting and schedule—placing him on homebound instruction—after he violated the school code of conduct on August 15, 2023. Student was subsequently removed for more than ten consecutive days, from August 15 to October 2, 2023. (FF #s 28, 30, 60, and 71). Accordingly, the change was initially made because of Student’s violations of the code of conduct, which is the first requirement to trigger IDEA’s disciplinary protections. 34 C.F.R. § 300.530(e)(1). Second, his new placement significantly reduced his opportunity to be involved in the general curriculum, resulted in the termination of most of his specialized instruction, and prevented him from access to *any* peers—disabled or nondisabled. (FF #s 44-47). Any one of these new limitations would be enough to invoke the IDEA’s disciplinary safeguards. *Assistance*, 71 Fed. Reg. 46715. Finally, the District removed Student from his placement in the SNA classroom and shortened his school day to ninety minutes, excluding him from school as effectively as if he were formally suspended or sent home for disciplinary reasons. (FF #s 16-21). A shortened school day is an informal removal that must be treated like a suspension for purposes of the IDEA. *Discipline Q&A*, Question C-6.

For these reasons, the SCO finds and concludes that changing Student’s setting from the SNA Program to homebound instruction and reducing his daily schedule to 90 minutes of instruction per day until repairs had been made to the classroom, constituted a disciplinary change of placement under the IDEA.

D. The District Failed to Conduct an MDR by September 13, 2023

A school district is required to conduct an MDR within ten school days of its decision to make a disciplinary change of placement. 34 C.F.R. § 300.530(e)(1). Here, the District’s decision to change Student’s placement was made on August 29, 2023, when Student had been removed from his placement for more than 10 consecutive school days for property destruction. (FF #s 28-29, and 71). Accordingly, the District was required to conduct an MDR within ten school days, i.e., on or

⁹ Available at <https://sites.ed.gov/idea/files/ga-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf>.

before September 13, 2023. (FF # 71). The District did not conduct an MDR until October 17, 2023, more than a month after it was required to do so. (FF # 73).

For these reasons, the SCO finds and concludes that the District failed to conduct an MDR within 10 school days of deciding to change Student's placement for disciplinary reasons, in violation of 34 C.F.R. § 300.530(e).

Failure to comply with a procedural requirement of the IDEA results in substantive harm supporting compensatory remedies if the violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); see *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765-66 (6th Cir. 2001).

Here, the District's failure to timely conduct the MDR contributed to a denial of FAPE. To protect a student from being punished for conduct that is the result of their disability, IDEA requires a multidisciplinary team meet to review the conduct and all relevant information to answer two primary questions: (1) Was the behavior in question "caused by, or have a direct and substantial relationship to" the student's disability, or (2) Was the behavior in question a result of the school district's failure to implement the student's IEP. 34 C.F.R. § 300.530(e)(1). Relevant here, if the answer to the second question is yes, the district is required to take immediate action to remedy the failure to implement the IEP, such as meeting with each teacher to review their specific responsibilities and further verifying that the student is receiving all special education and related services. 34 C.F.R. § 300.530(e)(3); *Discipline Q&A*, Question F-4. A timely and properly conducted MDR would have revealed that critical components of Student's IEP, including the BIP, were not being properly implemented by Former Special Education Teacher. (FF #s 16-17, 19-23, 41, 46, 59, 61-68, and 73). The failure to ensure that Student's IEP was being properly implemented via a timely MDR impeded Student's right to FAPE.

E. Determination of Educational Services Following Disciplinary Change of Placement

Once a student has been removed from his or her educational placement for ten days, the IDEA requires a school district to provide educational services during any subsequent days of removal. 34 C.F.R. § 300.530(b)(2). Such educational services must allow the student "to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." *Id.* § 300.530(d)(1)(i). If the removals result in a change of student's placement—as they did here—the IEP Team must determine what services are necessary for the student to progress toward meeting his or her IEP goals. *Id.* § 300.530(d)(5).

In this case, the District provided homebound services from August 23 to October 2, while repairs to the classroom were made. The determination of what services to provide was not made by an IEP team. Although Former Special Education Teacher was directed to immediately convene

Student's IEP team to discuss placement and services following his removal from the SNA program on August 15, 2023, he failed to do so. Further, no one in administration acted to ensure that the IEP team met to discuss services. (FF #s 35, 41-44.) Consequently, the SCO finds and concludes that educational services following the disciplinary change of placement were not determined by an IEP team, consistent with § 300.530(d), until October 17, 2023.

Failure to comply with a procedural requirement of the IDEA results in substantive harm supporting compensatory remedies if the violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); see *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765-66 (6th Cir. 2001).

Here, the District's failure to determine educational services through the IEP team significantly impeded the IDEA parent from participating in the decision-making process. The District effectively determined educational services at the "planning meeting" in August of 2023, following Student's suspension. The participants of this meeting did not constitute an IEP team and did not include anyone meeting IDEA's definition of "parent." (FF #s 31-35, 38). Consequently, the SCO concludes that determining services outside of an IEP team significantly impeded "parent's" opportunity to participate in the decision-making process.

F. Provision of Educational Services Following Disciplinary Change of Placement, including FBA and BIP

After the tenth day of removal, the student must also "[r]eceive, as appropriate, a functional behavior assessment, and behavior intervention services and modifications designed to address the violation so that it does not recur." *Id.* § 300.530(d)(1).

As detailed in FF # 44-46, Student missed a significant amount of the services to which he was entitled by his IEP between August 29, the eleventh day of removal, until October 2, the day he was allowed to return to school. Because services during this time were not determined by an IEP team, the SCO relies on the IEP that was in place during this period as a guide to services. (FF #s 34, 38, and 46). Between August 29 and October 2, Student missed approximately 1840 minutes of direct instruction in literacy, 610 minutes of direct instruction in math, 2090 minutes of direct instruction in social-emotional skills, 30 minutes of direct instruction in speech language services provided by an SLP, and 60 minutes of direct instruction in adapted PE. Moreover, Student did not appear to benefit from any of the homebound instruction offered during this time. (FF #47).

On October 17, 2023, Student's IEP team changed placement from the SNA Program to homebound instruction and determined that Student would receive 90 minutes of instruction per day. Although the October 2023 IEP significantly reduced instructional services, the District still failed to provide all of the services to which Student was entitled between October 17 and Student's transfer to Hospital on November 11. Specifically, Student missed 263 minutes of

instruction in reading, 771 minutes in math, 448 minutes in written expression, and 128 minutes of social-emotional skills. (FF #s 78 and 83).

The District also failed to conduct a new FBA until November 2 or provide any behavior intervention services designed to address the violation (i.e., property destruction) so that it does not recur. As discussed in the conclusion to allegation 7, the November FBA did not produce information that would be sufficiently reliable to inform educational programming. Had the District conducted a new FBA in September, it may have been able to gain better and more reliable information to inform programming.

The failure to provide services can result in a denial of FAPE when the failure is material. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard does not require that a child “suffer demonstrable harm.” *Holman v. Dist. of Columbia*, 67 IDELR 39 (D.D.C. 2016). Instead, “the crucial measure” is the “proportion of services mandated to those provided.” *Id.*

Here, the difference between the educational services that should have been provided and what was provided is material and undoubtedly impacted Student’s ability to make progress towards his IEP goals. The SCO accordingly finds and concludes that the District’s failure to provide services was a material failure amounting to a denial of FAPE. This denial of FAPE entitles Student to an award of compensatory services which will be detailed below. *See Colo. Dept. of Ed.*, 118 LRP 43765 (Colo. SEA June 22, 2018).

Conclusion to Allegation No. 7: The District failed to timely conduct a reevaluation to address Student’s behavioral challenges, consistent with 34 C.F.R. § 300.303. This resulted in a denial of FAPE.

DHS Case Manager asserts that the District did not conduct a reevaluation upon her request in September of 2023. Although IDEA prohibits DHS Case Manager from serving in the role of Student’s IDEA parent, the SCO will construe her request as a parental request for reevaluation because the District consistently relied upon her to serve in this role. (FF # 36).

Districts must ensure that a reevaluation of a child with a disability is conducted if “the child’s parent or teacher requests a reevaluation.” 34 C.F.R. § 300.303(a)(2). Reevaluations cannot occur more than once a year, unless the parent and district agree otherwise, and reevaluations must occur at least once every three years, unless the parent and district agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b). However, districts must honor a parental request to reevaluate a student where the most recent reevaluation is more than one year old. *G.W. v. Boulder Valley Sch. Dist.*, 2019 WL 4464130, at *12 (D. Colo. Sept. 18, 2019) (holding that the district was obligated to reevaluate the student upon parental request because the most recent reevaluation was then one year old).

Here, DHS Case Manager requested an FBA, additional assessments in the area of cognitive functioning, and expressed concerns with Student's independent living skills during the IEP meeting on September 26, 2023. (FF #s 48-53 and 86). In response, the District stated that it had sufficient information concerning Student's cognitive functioning and could not assess Student further in this area because he was nonverbal and required hand-over-hand assistance. The District did not provide prior written notice or initiate request for reevaluation following DHS Case Manager's request for reevaluation in September. (*Id.*) Student's most recent reevaluation, dated in January of 2022, occurred more than one year prior to the request by DHS Case Manager in September of 2023. Consequently, the SCO finds and concludes that the District should have reevaluated Student in September because the request was made by someone deemed by the District as Student's IDEA parent, and the most recent reevaluation was more than a year ago.

Even if one might argue that it is unfair to treat this as a parental request for reevaluation, the SCO notes that the obligation to conduct or consider a reevaluation exists, regardless of parental request, whenever the District proposes a significant change in placement or a change in student's educational or related services needs warrant reevaluation. ECEA Rule 4.02(8)(b)(ii)(B); 34 C.F.R. § 300.303(a)(1). Moreover, the District had relied on DHS to serve as the IDEA parent at most times relevant to this investigation. Based on either standard, the District was required to consider reevaluation when it changed Student's placement to homebound instruction in October of 2023. It did not do so. Instead, the District requested consent to conduct an FBA on November 2 and completed a reevaluation on November 28, 2023, after Student had been placed on homebound instruction for most of the school year, first as a disciplinary removal in August and then as a change in placement in October.

The SCO finds and concludes that the reevaluation was not timely, consistent with ECEA Rule 4.02(8)(b)(ii)(B) and 34 C.F.R. § 300.303(a)(1). Moreover, the November reevaluation, which consisted of a file review, two observations of Student during homebound instruction, and the ABAS-3, did not produce sufficiently reliable information about Student's current needs, including cognitive functioning and behavior, to adequately inform educational programming and services. (FF #s 86-90).

Failure to comply with a procedural requirement of the IDEA results in substantive harm supporting remedial action if the violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *see Knable*, 238 F.3d at 765-66.

Here, the District's delay in conducting a comprehensive reevaluation deprived Student of an educational benefit. Had the District promptly conducted a comprehensive reevaluation, including an FBA, in September, it would have had better access to Student to conduct assessments. With better access to Student, the reevaluation would have produced more reliable information that could then have been used to better inform Student's October's and December IEPs. The failure to timely conduct a comprehensive reevaluation likely contributed to the

development of IEPs in October and December that were not tailored to Student’s unique disability-related needs. Combined, this resulted in a denial of FAPE.

To address this denial of FAPE, the SCO will order the District to conduct a reevaluation, through which it must consider evaluation and assessment data collected by Hospital, conduct further observations of Student, and determine, with input from Student’s GAL or assigned ESP, whether additional data is needed to inform special education programming and services.

Conclusion to Allegation No. 8: The District failed to educate Student in the LRE required by his IEP from September 2023 through present, consistent with 34 C.F.R. §§ 300.114, 300.117, and 300.323(c). This resulted in a denial of FAPE.

Placement—a term used to denote the provision of special education and related services—is determined by the IEP Team, including parents, and must be individualized, as well as based on the IEP. 34 C.F.R. § 300.116; ECEA Rule 4.03(8)(a); *Questions and Answers on Endrew F. v. Douglas Ctny. School Dist. Re-1*, 71 IDELR 68 (EDU 12/7/17). Placement must be determined annually, be based on the child’s IEP and be as close as possible to the child’s home. 34 C.F.R. § 300.116(b). Any significant change in placement, such as a move to a homebound setting or a shortened day, must be made by the IEP team—including the parents of the child—and in consideration of a reevaluation. ECEA Rule 4.03(8)(b)(ii)(B); *See Weld RE-5J School District*, 77 IDELR 148 (SEA CO 07/14/2020) (holding that a move to a placement where Student was completely removed from the general education environment and taught one-on-one by a special education teacher constituted a significant change in placement.).

“Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA’s most important substantive requirements.” *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004). This means that children with disabilities receive their education in the general education setting with typical peers to the maximum extent appropriate, and that they attend the school they would if not disabled. 34 C.F.R. §§ 300.114 and 300.116. Children with disabilities should only be placed in separate schooling, or otherwise removed from the regular educational environment, “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 C.F.R. § 300.114(a)(2)(ii).

Accordingly, an IEP must include “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.” 34 C.F.R. § 300.320(a)(5). This statement describes a student’s recommended placement in the LRE. *Id.* Students with disabilities must be educated consistent with the LRE described in the IEP. *Id.*

Here, Student has not been educated in the LRE specified by his IEP for most of the 23-24 school year. From the beginning of the school year to October 17, 2023, Student’s IEP (October 2022 and September 2023) required him to be educated in High School’s SNA Program, a center-based program, where his LRE was listed as in the general education environment for less than 40%,

specifically 0% inside the general education classroom. (FF #s 17 and 44.) Student was suspended on August 15 and was not allowed to return to the SNA Program until repairs were made to the classroom on October 2, 2023. During this time, Student was educated in a homebound setting where he had no access to peers. (FF # 45). The SCO finds and concludes that this setting was not consistent with the LRE specified in Student's IEP.

On October 17, 2023, Student's placement was changed from inside the general education environment for less than 40% to homebound/hospital. (FF # 74). The LRE section of the IEP stated that the IEP team selected residential placement as the most appropriate option but recognized that DHS had not yet found a suitable placement. Consequently, the team decided that Student would be provided with 90 minutes of homebound services at home and the team would "look at data" to determine if time could be increased. (FF # 77). As discussed above, this constituted a significant change of placement that was made without consideration of reevaluation. From October 17 to November 11, Student was provided with homebound services. (FF # 78).

On December 7, 2023, Student's IEP team convened to discuss reevaluation and determine services. Consistent with the October IEP, Student's LRE was identified as both residential and homebound/hospital. The team listed the same rationale for its selection, i.e., difficulty in finding a suitable residential placement. (FF # 97). The SCO has not been provided with any documentation that Student has received educational services since November 11, 2023, when Student was transferred to Hospital on an emergency hold.

If FAPE can be provided in a less restrictive setting, i.e., residential setting, it is a substantive violation of the IDEA's LRE mandate to provide Student FAPE in a more restrictive setting, i.e., hospital/homebound. *Nebo*, 379 F.3d at 976. *The difficulty in finding a residential placement does not relieve the District of its responsibilities under Student's IEP to serve him in the LRE.* Accordingly, the SCO finds and concludes that Student is entitled to be educated in a residential setting, the LRE described on his IEP.

For these reasons, the SCO finds and concludes that Student was not educated with nondisabled peers to the extent described in his IEP and that he was not educated in the placement agreed upon by the IEP team, in violation of 34 C.F.R. §§ 300.116(a)(1), 300.320(a)(5), 300.327 and 300.501(c)(1). This resulted in a denial of FAPE. To remedy this violation, the SCO will order the District to convene Student's IEP to determine placement in the LRE following reevaluation.

Compensatory Services for Denial of FAPE

Compensatory services are an equitable remedy designed to restore a student to the position they would be in if the violation had not occurred. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory services need not be an "hour-for-hour calculation." *Colo. Dept. of Ed.*, 118 LRP 43765. The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs

of each child and ensuring children receive the services to which they are entitled. *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010).

In consultation with CDE Content Specialists, the SCO finds and concludes that the following award of compensatory services is necessary to restore Student to the position he would be in had the violations detailed in the conclusions to Allegations 2 and 6 had not occurred:

- 35 hours of instruction in social-emotional skills by a mental health provider or special education teacher with expertise in behavior;
- 35 hours of instruction in independent living skills by a special education teacher;
- 5 hours of instruction in communication skills by an SLP; and
- 20 hours of consultation between compensatory service providers and Hospital providers to ensure consistency in communication and behavior intervention strategies.

G. The Violations Related to Allegations Nos. 3-8 are Systemic.

Pursuant to its general supervisory authority, CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the district. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the State Complaint Procedures are “critical” to the State Educational Agency’s “exercise of its general supervision responsibilities” and serve as a “powerful tool to identify and correct noncompliance with Part B.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46601 (Aug. 14, 2006).

Moreover, the CDE must review state complaint decisions to identify patterns within a specific Administrative Unit, or the state, that suggest systemic noncompliance with IDEA requirements. *State General Supervision Under Parts B and C of the IDEA* (“OSEP QA 23-01”), Question A-7, (OSERS, July 24, 2023). “Where such patterns are present, the State, as part of its general supervision system, must determine whether systemic noncompliance occurred or is occurring and ensure correction in a timely manner. 20 U.S.C. §§ 1412(a)(11) and 1435(a)(10); 34 C.F.R. §§ 300.149 and 303.120.” *Id.*

Here, the SCO finds and concludes that the findings of noncompliance in State Complaint 2023.532 concerning disciplinary change of placement, change of placement made outside of an IEP team and without consideration of reevaluation, and educating students consistent with the LRE identified on their IEPs (discussed directly below) are close enough in proximity and nature to establish that these concerns are systemic in nature. In SC 2023.532, the District conceded that the findings of noncompliance were an opportunity to identify and correct weaknesses in its supervisory structure. (FF #s 101-102). Here, the SCO will order corrective action designed to support the District in addressing weakness in its supervisory structure to ensure the future provision of educational services for IDEA-eligible students.

Conclusion to Allegation No. 9: Student was not secluded, as defined by PPRA, because he was never alone in the unfinished room. Consequently, no violation occurred.

Complainants have alleged that Student was secluded when he was placed in a “box” for hours at High School.

The SCO must first determine whether Student was “secluded” within the meaning of the PPRA.

“Seclusion”, within the scope of the PPRA, means “the placement of a student *alone* in a room from which egress is involuntarily prevented.” Rule 2620-R-2.00(9) (emphasis added). Seclusion explicitly excludes: (a) placement of a student in residential services in his room for the night; and (b) time-out, where a student is removed from “potentially rewarding people or situations.” *Id.* Any space used for seclusion “must have adequate lighting, ventilation, and size.” *Id.* 2620-R-2.02(2)(e)(ii). “To the extent possible under the specific circumstances, the space should be free of injurious items.” *Id.*

On October 3, 2023, District staff observed Former Special Education Teacher and Former Paraprofessionals with Student in an unfinished room, which they called “the cage.” While this room was not authorized for use, Former Special Education Teacher had forcefully guided Student to this room where he would remain for a significant portion of the school day. That morning, RBT arrived to provide coaching and behavioral support to High School SNA program staff. Once he observed Former Special Education Teacher and Paraprofessionals interactions with Student in the unfinished room, he immediately notified District Administration, including the Special Education Director, of what was happening. RBT stayed with Student for safety while he waited for District staff to intervene. During that time, he observed Former SNA staff interactions with Student that were overtly negative and inconsistent with the strategies outlined in Student’s BIP. What was not observed, however, was any time during which Student was *alone* in the unfinished room. (FF #s 64-67).

Again, for seclusion to occur, 1) a student must be placed *alone* in a room and 2) egress must be involuntarily prevented. Rule 2620-R-2.00(9) (emphasis added). Because Student was never alone, the SCO finds that Student was not “secluded” within the meaning of the PPRA on October 3, 2023. Allegation No. 9, subparts a through g, concern PPRA requirements that apply only when a student has been secluded. Because the SCO does not find that District “secluded” Student within the meaning of the PPRA, the District did not need to meet these requirements.

For these reasons, the SCO finds and concludes that the District did not violate the PPRA by improperly secluding Student on October 3, 2023.

Although the District did not violate PPRA because Student was never alone, the SCO must address the seriousness of what did occur and what it reveals about the District’s lack of supervision and oversight of the High School SNA Program and Former Special Education Teacher and Paraprofessionals. As early as August 15, 2023, District and High School administration were

aware that Former Special Education Teacher was not properly implementing Student's IEP/BIP and was not responsive to feedback from peers on how to work with Student. (FF #s 21-24). The interactions staff observed between Former Special Education Teacher/Paraprofessionals and Student on August 14, 15 and October 3 were not only grossly unprofessional, but they were also in direct contradiction to Student's IEP/BIP. (FF #s 19-27 and 41-43). These negative interactions undoubtedly caused Student educational harm, as evidenced by increased dysregulation and wailing. (FF #s 27, 63, 67).

Although the Administrators sent directives and warnings to Former Special Education Teacher, they did not ensure that he complied with those directives, nor did they take direct action to ensure that special education processes were followed. For example, the failure to ensure that Student's IEP team met immediately following the August 15 "planning meeting" resulted in a change of placement made outside of an IEP meeting. (FF #s 35 and 38). The failure to provide adequate oversight of Former Special Education Teacher occurred even though the District had multiple red flags concerning his job performance. Finally, the SCO is very concerned that Assistant Principal was not aware that staff were using an unfinished room to isolate Student from his peers at High School.

For these reasons, the SCO concludes, as described in Section G above, that the District's lack of supervision is systemic in nature and remedial action is warranted to ensure the future provision of services for IDEA-eligible students.

REMEDIES

The CDE has the authority to order the District to take remedial actions to bring the District into compliance with the IDEA. 34 C.F.R. §§ 300.149, 300.151(b); CDE, *State-Level Complaint Procedures*, ¶ 12 (2010). Under C.R.S. § 22-32-147(6), the CDE has the same enforcement authority for PPRA investigations.

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

- a. Relied on DHS employees to serve as Student's IDEA-parent or ESP, in violation of 34 C.F.R. § 300.519(d)(2) and ECEA Rule 6.02(8)(e).
- b. Failed to develop, review, and revise an IEP tailored to Student's individualized needs, from August 2023 to present, in violation of 34 C.F.R. §§ 300.320 and 300.324.
- c. Failed to conduct a manifestation determination within ten school days of the District's decision to change Student's placement, in violation of 34 C.F.R. § 300.530(e).
- d. Failed to provide notice of Student's disciplinary change of placement, in violation of 34 C.F.R. § 300.530(h).

- e. Failed to convene Student’s IEP Team to determine the educational services necessary to enable Student to participate in the general education curriculum following his disciplinary change in placement, in violation of 34 C.F.R. § 300.530(d)(5).
- f. Failed to provide Student educational services to enable him to participate in the general education curriculum and progress towards his annual IEP goals and failed to conduct a functional behavioral assessment or provide behavioral intervention services following his disciplinary change in placement, in violation of 34 C.F.R. § 300.530(d).
- g. Failed to conduct a timely reevaluation upon request by an individual with educational decision-making authority, in violation of 34 C.F.R. § 300.303.
- h. Making a significant change to Student’s educational placement without consideration of reevaluation, in violation of ECEA Rule 4.03(8)(b).
- i. Failed to educate Student in the LRE, in violation of 34 C.F.R. §§ 300.114, 300.116, 300.117, and 300.323(c).

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

1. Corrective Action Plan

- a. By **February 5, 2024**, the District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm the District’s timely correction of the areas of noncompliance.

2. Final Decision Review

- a. Special Education Director, Special Education Coordinator, Special Education Behavioral Coordinator, and Assistant Principal must review this Decision. This review must occur no later than **February 12, 2024**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **February 19, 2024**.

3. Reevaluation and Review/Revision of IEP for Denial of FAPE

- a. District must provide GAL with consent for a reevaluation of Student by **January 12, 2024**. The reevaluation may include a review of records but must include all

assessments conducted by Hospital, including the FBA. The reevaluation must also include new observations of Student and assessments in the areas of communication and cognitive functioning. **The reevaluation must be completed within 30 days of obtaining consent.**

- b. District must convene Student’s IEP Team, at a mutually agreeable date and time, within 15 days of completion of the reevaluation and no later than **March 19, 2024**. The District must ensure the IEP team includes Hospital Psychologist (or Hospital staff he designates), DHS Supervisor, GAL, Special Education Behavioral Coordinator, and Special Education Teacher. The District will be excused from including these individuals from the IEP team only if they are no longer employed by the District or *refuse* to participate and are not District staff. A determination that the District diligently attempted to secure these specific participants rests solely with CDE.
- c. In consideration of the reevaluation and Student’s current setting, the IEP Team must review and, as necessary, revise (a) Student’s annual goals, (b) Student’s special education and related services, and (c) the behavior supports and services in Students IEP and BIP, consistent with the requirements of 34 C.F.R. §§ 300.320(a), 300.324(a), to address Student’s unique needs and the concerns identified in this Decision. For example, the IEP must include annual goals that meet Student’s most critical disability-related needs, a revised BIP, and provide special education and related services reasonably calculated to ensure progress towards IEP goals. An IEP that provides only 90 minutes of instruction will be considered substantively inadequate.
- d. By **April 19, 2024**, District must provide copies of the signed consent for reevaluation, PWN, evaluation report, notice of the IEP meeting, proof of IEP team members (such as a signature page), and finalized IEP to the CDE Special Education Monitoring and Technical Assistance Consultant. The PWN must provide a detailed explanation as to why the District determined certain assessments were or were not needed, and why information from outside sources was not accepted, if appropriate.

4. Compensatory Education Services for Denial of FAPE

- a. Student shall receive the following compensatory services provided by appropriately trained and credentialed District staff or through a contract between the District and a suitable provider at the District’s expense:
 - i. 35 hours of in-person instruction in social-emotional skills by a mental health provider or special education teacher with expertise in behavior;

- ii. 35 hours of in-person instruction in independent living skills by a special education teacher;
 - iii. 5 hours of in-person instruction in communication skills by an SLP; and
 - iv. 20 hours of consultation between compensatory service providers and Hospital providers to ensure consistency in communication and behavior intervention strategies.
- b. By **January 19, 2024**, the District shall schedule compensatory services in collaboration with Student's GAL and Hospital. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. The District shall submit the schedule of compensatory services, to include the dates, times, and durations of planned sessions, to the CDE no later than **January 26, 2024**. If the District and Hospital cannot agree to a schedule by **January 26, 2024**, the CDE will determine the schedule for compensatory services by **February 2, 2024**.
 - i. The parties shall cooperate in determining how the compensatory services will be provided. If GAL or Hospital refuses to meet with the District within this time, District will be excused from delivering compensatory services, provided that District diligently attempts to meet and documents such efforts. A determination that the District diligently attempted to meet with GAL and Hospital, and should thus be excused from providing compensatory services, rests solely with the CDE.
 - ii. GAL may opt out of some or all of the compensatory services if it is determined that services are not benefitting Student.
- c. Monthly consultation between the provider(s) delivering compensatory services, Hospital Psychologist (or designee), and Special Education Behavioral Coordinator shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. Designated members of CDE's Autism Team shall also participate in these monthly consultations. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. District must submit documentation that these consultations have occurred by **the second Monday of each month**, once services begin, until compensatory services have been completed. Consultation logs must contain the name and title of the provider and the date, the duration, and a brief description of the consultation.

- d. To verify that Student has received the services required by this Decision, the District must submit records of service logs to the CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service must be included in the service log.
- e. These compensatory services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. If Student is not available because Hospital determines he does not have the stamina for a scheduled service, the District will reschedule services. If for any reason the District fails to provide a scheduled compensatory session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consultation with Hospital and notify the CDE of any change in the appropriate service log.

5. Revision of Written Procedures to Ensure Compliance with IDEA Disciplinary Protections

- a. By **April 1, 2024**, District must submit revised procedure or guidance to ensure compliance with IDEA's disciplinary procedures at 34 C.F.R. § 300.530.
- b. At a minimum, the revisions must address concerns with MDR membership and counting removal when students are not receiving services in the LRE specified on their IEPs, as detailed in FF#s 101-102.
- c. District can submit existing procedure(s) that meet these requirements, but they must be submitted to CDE Special Education Monitoring and Technical Assistance Consultant for review and approval prior to being finalized.
- d. District must ensure that all special education providers in District receive a copy of the procedure no later than **May 1, 2024**. Evidence that the procedure was shared with staff, such as a copy of the email notice sent, must be provided to CDE no later than **May 3, 2024**.

6. Procedure for Oversight of SNA Program

- a. By **May 1, 2024**, District must submit a written procedure or guidance to ensure proper supervision of its SNA program and staff to address the concerns in this Decision related to supervision of Former Special Education Teacher and Paraprofessionals, as well as the use of an unfinished room to isolate Student.
- b. At a minimum, the procedure must detail practices that ensure both District and School Administration oversight and support for the SNA program and staff.

- c. District can submit existing procedure(s) that meet these requirements, but they must be submitted to CDE Special Education Monitoring and Technical Assistance Consultant for review and approval prior to being finalized.
- d. District must ensure that all District Administration staff receive a copy of the procedure no later than **May 15, 2024**. Evidence that the procedure was shared with staff, such as a copy of the email notice sent, must be provided to CDE no later than **May 22, 2024**.

7. Training

- a. Director, Special Education Coordinator, Special Education Behavioral Coordinator, School Psychologist, Special Education Teacher, special education teachers, special education coordinators, and any District staff responsible for convening the IEP team or requesting consent for evaluation, must attend a training provided by CDE on educational surrogate parents. If these individuals are no longer employed by District, the District may substitute individuals occupying identical roles to demonstrate compliance with this remedy.
 - i. This training will address, at a minimum, the requirements of 34 C.F.R. § 300.519 and ECEA Rule 6.02(8), and the related concerns addressed in this Decision.
 - ii. Within 30 days of the completion of this training, the District must review the files of all students within the District who are in the custody of a child welfare agency to ensure they have a qualified ESP assigned. Documentation that this review has been completed must be submitted to CDE within 60 days following the date of the ESP training.
- b. Director, Assistant Principal, and any individual within District Administration with the authority to suspend or expel students must attend and complete training provided by CDE on IDEA Disciplinary Protections. If these individuals are no longer employed by District, District may substitute individuals occupying identical roles to demonstrate compliance with this remedy. This training will address, at a minimum, the requirements of 34 C.F.R. § 300.530 and the related concerns addressed in this Decision.
- c. Director, Special Education Behavioral Coordinator, School Psychologist, Special Education Teacher, and all Middle School and High School SNA professional staff must attend a two-day, in-person training, on conducting FBAs and developing BIPs. For day one, the District may invite any other District staff it deems

appropriate. Day two will be a workshop tailored specifically to the SNA program staff.

- d. Director and CDE Special Education Monitoring and Technical Assistance Consultant will determine the time, date, and format of the trainings. These trainings, apart from the training described at (c) which must occur in person, may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.
- e. Such trainings shall be completed no later than **April 26, 2024**. Evidence that these trainings occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to CDE no later than **May 3, 2024**.

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

Colorado Department of Education
Exceptional Student Services Unit
Attn.: CDE Special Education Monitoring and Technical Assistance Consultant
1560 Broadway, Suite 1100
Denver, CO 80202-5149

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

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. CDE, *State-Level Complaint Procedures* ¶ 13 (2010). If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. CDE, *State-Level Complaint Procedures* ¶ 13 (2010); *see also* 34 C.F.R. § 300.507(a); 71 Fed. Reg. 46607 (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 6th of January, 2024.



Candace Hawkins
State Complaints Officer

APPENDIX

Complaint, pages 1-8

- Exhibit 1: Photographs of Alleged Seclusion Room
- Exhibit 2: Photographs of Alleged Seclusion Room

Response, pages 1-10

Supplemental Response, pages 1-2

- Exhibit A: IEP dated September 2023
- Exhibit A-1: IEP dated October 2023
- Exhibit A-2: Eligibility Determination 2023
- Exhibit A-3: IEP Dated December 2023
- Exhibit B: BIP
- Exhibit C: Notices
- Exhibit D: Disciplinary Reports
- Exhibit E: Manifestation Determination
- Exhibit F: Homebound Service Logs
- Exhibit G: Reevaluation Report dated January 2022
- Exhibit G-1: Request for Consent to Evaluate Dated November 2023
- Exhibit G-3: November 2023 FBA
- Exhibit G-4: December 2023 Evaluation Report
- Exhibit H: District's Response/Position Statement
- Exhibit I: Training Records/Certification
- Exhibit J: District Policy and Procedures for Restraint
- Exhibit K: Correspondence
- Exhibit L: Training
- Exhibit M: IEP dated October 2022
- Exhibit M-1: BIP dated October 2022
- Exhibit N: Annual Restraint Report
- Exhibit O: District Special Education Policies and Procedures ("Procedural Guidelines")
- Exhibit P: Notes from August Planning Meeting
- Exhibit Q: Additional Documentation Submitted by District
 - Q-1 and Q-2: Personnel Action
 - Q-3: Media Correspondence
 - Q-4: Video
 - Q-5: Personnel Action
 - Q-6: Email Correspondence
 - Q-7: Photographs
 - Q-8: Correspondence
 - Q-9: Court Order

- Q-10: Notes on Personnel Action
- Q-11 (a) and (b): Picture of Student’s Room at Group Home and Depictions of Classroom and Adjacent Rooms.

Complainants did not submit a Reply. Additional information provided via telephone interview.

CDE Exhibits

CDE Exhibit 1: 2023-24 Board Approved School Calendar

CDE Exhibit 2: State Complaint 2023.532

Interviews

- Complainants: November 20, 2023
- Special Education Director: December 5, 2023
- SLP: November 29, 2023
- School Psychologist: December 5, 2023
- Behavioral Support Coordinator: November 29, 2023
- Special Education Coordinator: November 29, 2023
- Assistant Principal: November 29, 2023
- Registered Behavior Technician: November 29, 2023
- Special Education Teacher: November 29, 2023
- Residential Direct Care Provider: November 30, 2023
- Guardian ad Litem: December 1, 2023

Professional Consults

- CDE Specialist 1 (Autism)
- CDE Specialist 2 (Significant Support Needs)
- CDE Specialist 3 (Monitoring and Technical Assistance)
- CDE Specialist 4 (Affective Needs)
- CDE Supervisor, Office of Facility Schools
- Neuropsychiatric Special Care Psychologist