

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 2023:602
Arapahoe County School District 5

DECISION

INTRODUCTION

On October 31, 2023, the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Arapahoe County School District 5 (Cherry Creek) (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 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.

RELEVANT TIME PERIOD

The Colorado Department of Education (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 31, 2022 to the present for the purpose of determining if a violation of the IDEA or 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.

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.

SUMMARY OF COMPLAINT ALLEGATIONS

1. Whether the District denied Student a Free Appropriate Public Education (“FAPE”) because the District:
 - a. Failed to properly implement Student's IEP from October 31, 2022 to present, in violation of 34 C.F.R. § 300.323, specifically by:
 - i. Failing to provide Student the special education and related services required by his IEP;
 - ii. Failing to educate Student consistent with the educational placement required by his IEP; and
 - iii. Failing to follow Student’s behavior intervention plan (“BIP”).
 - b. Failed to educate Student in the Least Restrictive Environment (“LRE”) from October 31, 2022 to present, specifically by:
 - i. Failing to ensure Student was educated to the maximum extent possible with students who are nondisabled, in violation of 34 C.F.R. § 300.114; and
 - ii. Failing to determine Student’s placement based upon his IEP, in violation of 34 C.F.R. § 300.116 and ECEA Rule 4.03(8)(a).
2. Whether the District improperly restrained Student in September 2023, specifically by:
 - a. Restraining Student in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a) and C.R.S. § 26-20-103(1)(a);
 - b. Restraining 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) and C.R.S. § 26-20-103(b)(I)-(II); and
 - c. Restraining 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) and C.R.S. § 26-20-103(1.5).

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,⁴ the SCO makes the following FINDINGS:

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

A. 78Background

1. Student attends eleventh grade at a District high school. *Interview with Parent*. Student moved back to the District in 2022, after living in another school district for several years. *Id.*
2. Student is eligible for special education and related services under the disability category of Multiple Disabilities. *Exhibit A*, p. 120. Student’s individual disability categories include Autism Spectrum Disorder (“ASD”), Intellectual Disability, Other Health Impairment, and Speech or Language Impairment. *Id.*
3. At school, Student is usually easy-going and kind. *Interview with Case Manager 2*. However, Student struggles with social boundaries and forming positive relationships with peers. *Id.* It takes Student longer to trust new adults. *Interview with Parent*. He loves cars and technology. *Interviews with Parent and Case Manager 2*. Student’s love of technology—in particular, his cell phone—often makes it hard for him to focus in class. *Interview with Case Manager 2*.

B. Student’s Return to the District

4. Student’s prior school district placed him in a separate school for Students with ASD (“Separate School”) in Fall 2021. *Interview with Parent*. He continued to attend Separate School until July 2022, when Parent removed Student from the school after she became frustrated with the administration and programming. *Id.*
5. After Student left Separate School, Parent informed the District and requested that Student be placed in one of the District’s high schools. *Id.*
6. At that time, Student’s May 6, 2021 IEP (“Prior IEP”) from his prior school district was his most recent IEP. *Exhibit A*, pp. 2-22. Under the Prior IEP, Student’s placement was a separate school. *Id.* at p. 21. The Prior IEP indicated Student was due for his next eligibility meeting on March 9, 2023. *Id.* at p. 2.
7. The District had not yet located a separate school for Student when the 2022-2023 school year began on August 15, 2023. *Exhibit K*, p. 2; *Interview with Out-of-District Placement Liaison (“Placement Liaison”)*.
8. On August 26, the District agreed to provide Student “interim educational services” while it worked to find a placement for Student. *Exhibit M*, p. 321. In an internal email, District’s Secondary Special Education Director stressed that this placement would be short-term:

Because the wait lists are long, we can’t have a student without some programming while we are seeking to secure placement somewhere else. . . . I would see this interim plan in place only until a new placement is found, specifically with [Day Treatment Program] that has a waitlist. I would think that it

would not go longer than 9 weeks. We will want to be clear with [Student's] parent as well that this is INTERIM, not an offer of FAPE.

Id. at p. 324 (emphasis in original).

9. That same day, Placement Liaison informed Parent that the District was willing to provide Student interim services. *Id.* at p. 321. At that time, Parent indicated Student would be receiving private therapies in the afternoon, so he could “only attend in the morning.” *Id.*
10. Placement Liaison recalled Parent not wanting Student to attend a traditional school so he could focus on his private therapies. *Interview with Placement Liaison.* Regardless, Placement Liaison referred Student to Day Treatment Program. *Id.* Day Treatment Program initially added Student to its waitlist. *Id.* However, on September 20, 2022, Day Treatment Program indicated they were ready to begin the referral process for Student. *Exhibit M*, p. 380. Placement Liaison told Day Treatment Program to “put this one on hold for now” because the District was going to reevaluate Student. *Id.*
11. Upon Parent's request, the District initiated a reevaluation in September 2022. *Exhibit C*, p. 2. While Student's reevaluation was underway, the District formalized an interim plan (“Interim Plan”) for Student. *Exhibit A*, pp. 72-83. Under the Interim Plan, Student would receive the following special education and related services until November 28, 2022:
 - Specialized Instruction: 600 minutes per week of direct specialized instruction provided by a special education teacher outside the general education classroom.
 - Social/Emotional Instruction: 30 minutes per month of direct social emotional instruction provided by special education teacher outside the general education classroom, as well as 20 minutes per month of indirect social emotional instruction.
 - Speech/Language Services: 30 minutes per month of indirect speech/language services provided by a speech language pathologist outside the general education classroom.
 - Occupational Therapy: 40 minutes per month of direct occupational therapy provided by an occupational therapist outside the general education classroom.

Id. at p. 81.

C. Student's Reevaluation

12. On September 23, 2022, Parent provided consent to evaluate Student in the areas of communicative status, academic performance, social and emotional status, health, and

motor abilities. *Exhibit C*, p. 2. The District did not intend to evaluate Student's cognitive abilities, because District staff felt Student's past assessments in that area were adequate. *Id.*

13. The District convened a multidisciplinary team to review Student's reevaluation and determine his eligibility on November 17, 2022. *Exhibit A*, pp. 84-89. During that meeting, some team members expressed concern about inadequate data regarding Student's general intelligence. *Interview with Placement Liaison*. Specifically, staff felt that Student's past assessments painted conflicting pictures of Student's cognitive abilities and that they could not determine his eligibility under Intellectual Disability without additional information. *Id.*
14. The team adjourned, and the District sought additional consent to evaluate Student in the area of general intelligence. *Exhibit C*, p. 6. Parent provided consent on November 22, 2022. *Id.*
15. The District's evaluation report, including the additional assessments, was completed on December 22, 2022. *Id.* at pp. 10-29. The evaluation results can be summarized as follows:
 - General Intelligence: Student's full-scale IQ fell within the 1st percentile and in the extremely low range when compared to his peers. *Id.* at pp. 11-15.
 - Communicative Status: The assessments showed that Student has difficulty with expressive and receptive language skills. Student did not use pragmatic language in expected ways. *Id.* at pp. 15-17.
 - Academic Performance: Student's performance on academic assessments was in the 1st percentile for students his age. *Id.* at pp. 17-20.
 - Social and Emotional Status: An assessment of Student's social-emotional functioning identified four areas (attention problems, withdrawal, leadership, functional communication) with clinically significant concern. Student's scores were low in all areas on an assessment of his adaptive skills. *Id.* at pp. 20-25.
 - Health: The health section of the reevaluation only recounted Student's medical diagnoses. *Id.* at pp. 25-26.
 - Motor: Assessments indicated Student has significant difficulty with visual processing and social participation. *Id.* at pp. 26-29.

D. Eligibility Determination and Development of Student's IEP

16. On December 22, the District reconvened a multidisciplinary team to consider Student's reevaluation—including the cognitive assessments—and determine his eligibility. *Response*, p. 5. Based on the reevaluation, the team determined that Student remained eligible for

special education and related services under the Multiple Disabilities category. The team found Student met the criteria for eligibility under the categories of ASD, Intellectual Disability, Other Health Impairment, and Speech or Language Impairment. *Exhibit A*, pp. 84-89.

17. Following the eligibility meeting in December, Student's IEP Team convened to develop Student's IEP. *Id.* at pp. 90-109. That IEP was dated November 30, 2022 ("2022 IEP"). *Id.* Home/Hospital Coordinator ("H/H Coordinator"), Case Manager 1, and Home/Hospital Teacher ("H/H Teacher") attended this meeting (among other IEP Team members). *Exhibit A*, p. 91.
18. The 2022 IEP reviewed Student's present levels of performance using information from H/H Teacher, noting that Student refused to work on addition or subtraction but would use math concepts in other ways (such as using technology to find distances between locations or talk about changes in temperature). *Id.* at p. 98. As for language arts, Student was working on sounding out words. *Id.*
19. Student's multiple disabilities impacted his ability to access the general education curriculum and necessitated additional instruction in social interactions, emotional regulation, and flexible thinking. *Id.* at p. 100.
20. The 2022 IEP contained a post-secondary transition plan to help Student achieve his goal of attending a community-based transition program and entering the workforce. *Id.*
21. The 2022 IEP had four annual goals in the areas of reading, math, social/emotional wellness, and communication. *Id.* at pp. 103-04.
22. The 2022 IEP included numerous accommodations, including, but not limited to, scaffolding assignments, providing movement breaks, and allowing wait time for responses. *Id.* at pp. 104-05. The IEP noted that Student received instruction using a modified curriculum. *Id.*
23. The 2022 IEP specified that Student would receive the following specialized instruction and related services:
 - Specialized Instruction: 1,610 minutes per week of direct specialized instruction provided by a special education teacher outside the general education classroom.
 - Speech/Language Services: 30 minutes per week of direct speech/language services provided by a speech language pathologist outside the general education classroom.
 - Mental Health: 150 minutes per week of direct mental health services and 30 minutes per week of indirect mental health services provided by a mental health provider outside the general education classroom.

- Occupational Therapy: 45 minutes per month of direct occupational therapy and 45 minutes per month of indirect occupational therapy provided by an occupational therapist outside the general education classroom.

Id. at p. 107.

24. Per the 2022 IEP, Student's placement continued to be a separate school. *Id.* at p. 108. "The IEP [T]eam determined that a separate school provide[d] the identified instruction, support and services needed for [Student] to make progress toward his IEP goals." *Id.* The prior written notice embedded in the IEP indicated the team made this decision, because there was "no new data to indicate that [Student] is able to be successful in a traditional school setting." *Id.* at p. 109.
25. Parent disagreed with the IEP Team's decision regarding Student's placement. *Interviews with Parent and Placement Liaison*. Based on his experience at Separate School, Parent did not want Student to attend another separate school. *Interview with Parent*.

E. Homebound Services

26. On September 9, 2022, Student began receiving homebound services from H/H Teacher and continued to receive homebound services until the school year ended on May 24, 2023. *Response*, p. 4; *Exhibit K*, p. 2; *Exhibit D*, p. 8. Student's home high school ("School 1") provided educational materials to H/H Teacher, and H/H Teacher used those materials to develop Student's programming. *Id.* Case Manager 1 was Student's assigned case manager from School 1. *Interview with Case Manager 1*.
27. Parent (or an adult over age 21) was required to be home at the time Student received services. *Interview with Parent*. Due to her job, Parent could not always be home. *Id.* On some days when an adult was not home, H/H Teacher provided Student's services online. *Id.*
28. H/H Teacher prepared quarterly progress reports detailing his work with Student. *Exhibit D*, pp. 2-9. H/H Teacher did not target Student's annual goals or track Student's progress on those goals. *Id.* at pp. 2-13.
29. Though H/H Teacher did not log the hours he spent with Student, he did note the days Student was unavailable for instruction. *Id.* at pp. 2-9. The District asserted that Student received 10 hours per week of homebound instruction. *Response*, p. 4. However, Parent indicated Student met with H/H Teacher for 45 minutes to one hour per day, for at most five hours of instruction per week. *Interview with Parent*. Parent speculated that an hour was probably the longest H/H Teacher could sustain Student's attention. *Id.*

30. As noted above, the Interim Plan developed by District required Student to receive social/emotional instruction, speech/language services, and occupational therapy. *Exhibit A*, p. 81. Other than the minutes provided by H/H Teacher, Student did not receive any other instruction or related services from the District during the 2022-2023 school year. *Id.*; *Exhibit D*, pp. 2-9. H/H Teacher’s progress reports indicated he worked with Student only on math and language arts. *Id.* Additionally, Student had no access to any peers. *Interview with Case Manager 1*.
31. The District concedes that Student did not receive all his special education and related services during the 2022-2023 school year and indicated it was willing to provide Student compensatory services. *Response*, p. 17. In its Response, the District asserted that Student would not have had any access to nondisabled peers at a separate school, so his homebound instruction did not impact his access to nondisabled peers. *Id.*

F. Continued Efforts to Locate Separate School

32. During Spring 2023, Placement Liaison continued to contact separate schools on behalf of Student. *Interview with Placement Liaison; Response*, p. 5. Based on the records provided, Placement Liaison contacted at least five schools without success. *Interview with Placement Liaison; Response*, p. 5. Some schools added Student to their waitlist; others indicated they did not have adequate staff to even process referrals or accept new students. *Interview with Placement Liaison; Response*, p. 5.
33. The District was unable to place Student in a separate school before the end of the 2022-2023 school year. *Interview with Placement Liaison; Response*, p. 5.

G. Summer Programming

34. The District offered to let Student participate in extended school year services (“ESY”) due to its inability to place Student in a separate school during the 2022-2023 school year. *Interview with Assistant Director of Secondary Special Education (“Assistant Director”)*. Student successfully participated in ESY during Summer 2023. *Id.*
35. The District also enrolled Student in a private program for individuals with disabilities on healthy relationships. *Id.* Student attended the program for one day before he decided that he did not like it. *Id.*; *Interview with Parent*.
36. On August 11, 2023, at Parent’s request, the District convened Student’s IEP Team to reconsider his placement in light of a recent independent educational evaluation (“IEE”). *Response*, p. 6. The IEP Team determined that Student could be served in a less restrictive environment, with 40-79% of his time spent in the general education environment, and updated his IEP accordingly. *Id.*; *Exhibit A*, pp. 120-40. Student would spend his day in a

significant support needs (“SSN”) classroom and access general education through electives. *Response*, p. 6.

37. Student’s IEP Team also developed a BIP for his return to in-person instruction. *Id.*
38. The BIP identified Student’s verbal aggression as the target behavior. *Exhibit A*, p. 110. An FBA found that Student “engage[d] in verbally aggressive behavior when avoiding work that he feels is challenging or when told ‘no’ or denied access to a preferred activity.” *Id.*
39. The BIP outlined setting event strategies, such as providing a structured environment, allowing Student movement breaks, and chunking working with breaks. *Id.* at pp. 110-111.
40. Listed antecedent strategies designed to reduce the target behaviors included a visual schedule and controlled choices with increased decision-making time. *Id.*
41. The BIP also included behavior teaching strategies to assist Student with respecting others’ personal space and regulating his emotions. *Id.* For example, the strategies for emotional regulation included self-talk, breathing, taking sensory breaks, going for walks, and talking to a trusted adult. *Id.*
42. As reinforcement strategies, the BIP listed providing Student a preferred activity or break after he completed tasks or offering technology as a reward. *Id.*
43. Additionally, the BIP detailed a Crisis Intervention Plan to be followed in the event Student displayed behavior dangerous to himself or others. *Id.* at p. 111. On such occasion, “[a]s a last resort and if unresponsive to other de-escalation strategies, [Student] may be placed in a CPI hold by appropriately trained staff.” *Id.*

H. Beginning of 2023-2024 School Year

44. Student began the 2023-2024 school year at a District high school (“School 2”) with an SSN classroom to meet his needs. *Response*, p. 6; *Interview with Case Manager 2*. Case Manager 2 provided a copy of Student’s IEP and BIP to the teachers and staff who would be working with Student. *Interview with Case Manager 2; Response*, p. 7.

I. September 15, 2023 Incident

45. School policy requires all students to wear ID cards when at School. *Interview with Assistant Principal*. When students are entering the school building—either at the beginning of the day or after lunch—School staff stand at the doors and do ID checks to ensure students’ IDs are visible. *Id.*

46. In her Complaint, Parent asserted that Student was restrained or secluded in an incident that occurred at School on September 15, 2023. *Complaint*, p. 6. She also alleged that the District failed to follow Student’s BIP during the incident. *Id.* As part of this investigation, the District provided a video of the incident captured by cameras in the hallway. *See Exhibit Q.*
47. On September 15, 2023, Student entered the academic hallways after lunch. *Interviews with Assistant Principal and Case Manager 2.* Student was not wearing his ID. *Interview with Assistant Principal.* When Assistant Principal asked Student to put on his ID, he made an obscene gesture towards Assistant Principal and kept walking down the hall. *Id.* Based on his reaction, Assistant Principal kept an eye on Student. *Id.* She noticed him sitting down in the hallway against some lockers. *Id.* At that point, Assistant Principal learned who Student was and staff contacted Case Manager 2. *Id.*
48. Case Manager 2 came out of a classroom and sat with Student to try to deescalate him. *Interviews with Assistant Principal and Case Manager 2; Exhibit Q.* At that time, Student was upset and cursing. *Interview with Case Manager 2.* Case Manager 2 asked Student to follow her to another space, but he refused. *Id.* While he was seated in the hallway, Student used a racial epithet towards a peer walking through the hallway. *Id.* At that point, Dean of Students was called. *Id.* Student also directed a racial epithet at Dean of Students, who is Black. *Id.*
49. As the video begins, Student was seated against the lockers with Case Manager 2. *Exhibit Q.* Dean of Students, Assistant Principal and other School staff were standing across the hallway from Student and Case Manager 2. *Id.* Case Manager 2 remained seated next to Student for the first 4:30 of the video, as other students occasionally passed through the hallway. *Id.* Student fidgeted with what appeared to be a cellphone. *Id.*
50. Student called Parent and placed the call on speakerphone. *Interviews with Assistant Principal and Case Manager 2.* Student used derogatory language to describe staff to Parent. *Id.* Parent told Student to let her talk to School staff, and Student tossed his phone on the floor. *Id.; Exhibit Q.* Case Manager 2 picked up the phone and handed it to Dean of Students. *Interviews with Assistant Principal and Case Manager 2; Exhibit Q.* At that point, Student stood up and charged towards Dean of Students to get his phone back. *Interviews with Assistant Principal and Case Manager 2; Exhibit Q.* As Student pulled on Dean of Student’s arm, she stuck her arm out to protect herself. *Exhibit Q.* The video showed Student and Dean of Students going around in a circle, as he reached for his phone and she used a stiff arm to keep him back. *Id.* At this point, the staff members across the hallway, including Assistant Principal and a school security guard—came over. *Id.*
51. In the video, Student can be seen falling to the ground after he apparently tripped over someone’s foot. *Exhibit Q.* Parent alleged that Student was “pushed [] hard enough to fall”; however, this fact cannot be substantiated by the video. *Complaint*, p. 6; *Exhibit Q.* The video does not show anyone pushing Student or using any physical force with Student. *Exhibit Q.*

Staff can be seen helping Student up after he falls. *Id.* At that point, Student picked up his phone and exited the building. *Id.*; *Interviews with Assistant Principal and Case Manager 2.*

52. Staff who witnessed the incident or viewed the video did not feel Student was restrained or secluded whatsoever on September 15, 2023. *Interviews with Assistant Principal, Case Manager 2, and Assistant Director.*

J. Student's New School

53. In November, the District and Parent agreed to move Student to another District high school ("School 3"), where Student's sibling attends school. *Interviews with Assistant Director and Parent.* Student had a great first month at School 3. *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1(a): The District failed to properly implement Student's IEP, in violation of 34 C.F.R. § 300.323. A denial of FAPE occurred.

The first allegation in Parent's Complaint concerns the implementation of Student's IEP during the 2022-2023 and 2023-2024 school years. Specifically, Parent contends the District failed to provide Student the special education and related services required by his IEP, failed to educate Student in the proper placement, and failed to follow Student's BIP.

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is "the centerpiece of the statute's education delivery system for disabled children . . . [and] 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 *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student's IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

A school district must ensure that "as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child's IEP." *Id.* To satisfy this obligation, each teacher and related services provider must be informed of "his or her specific responsibilities related to implementing the child's IEP," as well as the specific "accommodations, modifications, and supports that must be provided for the child in accordance with the IEP." *Id.* § 300.323(d).

A. Knowledge of Student's IEP

As a preliminary matter, the SCO must determine whether the District satisfied its obligation under 34 C.F.R. § 300.323(d). During the 2022-2023 school year, H/H Coordinator, H/H Teacher, and Case Manager 1 attended Student's IEP Team meetings and were aware of the District's obligations under Student's IEP. (FF # 17.) As the Findings of Fact demonstrate, Case Manager 2 provided Student's IEP and his BIP to staff at School 2 who would be working with Student in the 2023-2024 school year. (FF # 44.) For these reasons, the SCO finds and concludes that the District complied with 34 C.F.R. § 300.323(d) in both school years.

B. Implementation of Student's IEP

Parent's implementation concerns span two separate school years. As to the 2022-2023 school year, Parent alleges that the District neglected to provide Student the special education and related services required by his IEP and failed to educate Student in the placement required by his IEP. During the 2023-2024 school year, Parent asserts that the District did not follow Student's BIP during the incident on September 15. Each of these concerns are addressed separately below.

1. Special Education and Related Services

As noted above, a student's IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2). During the 2022-2023 school year, Student received, at most, ten hours of homebound instruction per week. (FF # 30.) The District did not provide Student any of the speech/language services, mental health support, or occupational therapy required by his IEP. (*Id.*) In its Response, the District conceded this violation and indicated its willingness to provide Student compensatory services as a remedy. (FF # 31.) As such, the SCO finds and concludes that the District failed to provide Student with the special education and related services required by his IEPs during the 2022-2023 school year, in violation of 34 C.F.R. § 300.323(c)(2).

2. Placement

The IDEA requires an IEP to identify the student's placement in the LRE, which is the amount of time the student will spend in the general education environment. 34 C.F.R. § 300.320(a)(5). School districts must educate students consistent with the placement specified by their IEPs. *Id.* §§ 300.320(a)(5), 300.323(c)(2).

This allegation relates to the District's use of homebound instruction during the 2022-2023 school year. Student spent the entire school year receiving 1:1 instruction from H/H Teacher. (FF #s 26, 30.) In this placement, Student had no access to any peers, limited access to academics, and no opportunity to work on his annual goals. (FF #s 28, 30.)

Student's IEPs required placement in a separate school throughout the school year. (FF #s 6, 24.) The District worked to find a separate school for Student (FF # 32), but even diligent efforts did

not relieve the District of its responsibilities under Student’s IEP. The District remained obligated to educate Student in a separate school even where it was unable to locate a facility with space. For these reasons, the SCO finds and concludes the District failed to educate Student in the placement required by his IEP, in violation of 34 C.F.R. § 300.320(a)(5) and 300.323(c)(2).

3. BIP

As noted above, a student’s IEP—including any BIP—must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2). Parent asserted that the District failed to properly implement Student’s BIP during the incident on September 15. (FF # 46.) At the time the incident occurred, Student was entering an academic hallway after lunch. (FF # 47.) After Assistant Principal told Student to display his ID, he walked down the hallway and sat against the lockers. (*Id.*) Case Manager 2—who was Student’s most trusted adult at School 2—came to deescalate Student. (FF # 48.) No staff member made Student do anything that he did not want to do. (FF #s 47-51.) For example, Case Manager 2 asked Student to follow her to another space to calm down; he refused, so they stayed in the hallway. (*Id.*) Staff did not take Student’s phone from him. (FF # 50.) Instead, he threw it on the floor when Parent asked to talk to staff. (*Id.*) Nothing staff did on September 15 was inconsistent with or violative of Student’s BIP. (FF #s 38-43, 47-51.) For this reason, the SCO finds and concludes that the District implemented Student’s BIP during the September 15 incident consistent with 34 C.F.R. § 300.323. No violation of the IDEA occurred.

C. Materiality of Failures to Implement

Where the definition of a FAPE specifically references delivery of special education and related services consistent with an IEP, the failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19. Not every deviation from an IEP’s requirements results in a denial of FAPE. Only the failure to implement a “material,” “essential,” or “significant” provision of a student’s IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with “sister courts . . . that a material failure to implement an IEP violates the IDEA”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an “essential element of the IEP” denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the “significant provisions of the IEP” denies a FAPE). “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn*, 502 F.3d at 822.

Here, the SCO finds that District’s failures resulted in a denial of FAPE. On a given week during the 2022-2023 school year, Student received, at most, less than 40% of his specialized instruction and *none* of his related services. (*See* FF #s 23, 29.) As a result, Student was deprived of hundreds of hours of specialized instruction, speech/language services, mental health support, and occupational therapy. (*See id.*) To compound the effect of the violations, Student was unable to work on his annual goals and had no access to any peers. (FF #s 28, 30.) The District retained Student’s separate school placement in his 2022 IEP based on a lack of data showing he would

be successful in a traditional school. (FF # 24.) Yet, at the same time, the District neglected to provide Student with any mental health support that might allow him to be able to return to a less restrictive setting. The SCO thus finds and concludes District's failure to implement was material and denied Student a FAPE. Given that Student was denied the benefit of an entire school year, he is entitled to compensatory services. *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

D. Compensatory Services

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 (Colo. SEA June 22, 2018). The purposes of the IDEA guide compensatory awards, and those purposes 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).

As detailed above, the District deprived Student of nearly all the benefits of his IEP for an entire school year. If the District had properly implemented the 2022 IEP, Student would have received: (a) 1,610 minutes per week of specialized instruction, (b) 30 minutes per week of speech/language services, (c) 150 minutes per week of mental health support, and (d) 45 minutes per month of occupational therapy. (FF # 23.) Student received only a fraction of the specialized instruction while he was homebound and none of the related services. (FF # 29.) In consultation with CDE Content Specialist, the SCO finds and concludes that the following award of compensatory services is necessary to restore Student to the position he would be in but for the District's violations: 100 hours of specialized instruction, 10 hours of speech/language services, 60 hours of mental health services, and 4 hours of occupational therapy.

Conclusion to Allegation No. 1(b): The District failed to educate Student in the LRE, in violation of 34 C.F.R. §§ 300.114, 300.116 and ECEA Rule 4.03(8)(a). This resulted in a denial of FAPE.

With the second allegation, Parent asserts that the District failed to educate Student in the LRE during the 2022-2023 school year.

The IDEA mandates that students with disabilities receive their education in the general education environment with typical peers to the maximum extent possible. 34 C.F.R. § 300.114. "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). Students with disabilities should only be 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). If a more restrictive program is likely to provide a child

with a meaningful benefit while a less restrictive program does not, the child is entitled to be placed in the more restrictive setting. *P. v. Newington Bd. of Educ.*, 51 IDELR 2 (2d Cir. 2008).

A child need not fail in general education before moving to a more restrictive program; however, more restrictive settings should only be considered after the IEP Team contemplates placement in general education, including the supplemental aids and services required to make that setting successful. *Letter to Cohen*, 25 IDELR 516 (OSEP 1996). IEPs must include evidence to support LRE placement decisions. *See, H.L. v. Downingtown Area Sch. Dist.*, 65 IDELR 223 (3d Cir. 2015) (unpublished) (finding that a district had not considered the full range of supplemental aids and services where the IEP and placement notice relied on general statements of need to support 90 minutes a day of pull-out services); *Yonkers (NY) Pub. Schs.*, 69 IDELR 18 (OCR 2016) (using boilerplate language in the LRE section evidences failure to make individualized determination of student's ability to participate in general education). A child's placement must be based on his or her IEP and be made by the IEP Team. 34 C.F.R. § 300.116; ECEA Rule 4.03(8)(a).

A. Ensuring Maximum Time with Nondisabled Peers

Throughout the 2022-2023 school year, Student's IEPs placed him in a separate school where he would have no access to the general education classroom or to nondisabled peers. (FF #s 6, 24.) The District defended Student's homebound placement by arguing that Student would not have been with nondisabled Students in either setting—homebound or separate school—so no violation occurred. (FF # 31.) This argument by the District ignores the underlying principle of LRE that students should be educated in the least restrictive environment appropriate for their needs. *See L.B.*, 379 F.3d at 976.

The plain language of the IDEA emphasizes a student's access to *nondisabled* peers because it assumes that students with disabilities would at least have access to other students with disabilities. By leaving Student in a homebound placement for an entire school year, the District denied him of access to all peers. The District took no action to maximize Student's time with peers—nondisabled or disabled—and completely isolated him. Even if the District could not locate a separate school for Student, the District could have developed creative ways to give Student access to at least some peers, such as providing related services online in a small group, or the District could have provided Student's related services to give him a greater chance of returning to a traditional school.

During the December IEP Team meeting, the IEP Team continued Student's placement in a separate school, even though the District had not been able to locate a separate school for at least three months. (FF # 24.) The IEP Team based its decision on the fact that no new data showed Student would be successful in a traditional school. (*id.*) At the same time, the IEP Team did not point to anything in Student's reevaluation that clearly showed he could not be successful in a traditional school if given appropriate supports. (*See id.*) For these reasons, the SCO finds and concludes that the District did not ensure Student was educated to the maximum extent possible with nondisabled peers, in violation of 34 C.F.R. §§ 300.114.

Additionally, the SCO cannot overlook the opportunity to provide guidance regarding the District's actions outside the relevant time period for this investigation. As early as July 2022, Parent informed the District that Student would no longer be attending Separate School. (FF #s 4-5.) In response, the District started to locate an available separate school for Student in reliance on an IEP from May 6, 2021. (FF #s 6, 10.) The District was obligated to have an IEP in place for Student when the school year started. 34 C.F.R. § 300.323(a). The District continued Student's placement in the most restrictive setting based on an outdated IEP and without conducting a reevaluation or considering whether Student could be successful in a center-based program. These actions by the District were improper under the IDEA.

B. Determining Student's Placement Based on his IEP

Under both the Prior IEP and the 2022 IEP, Student was placed in a separate school. (FF #s 6, 24.) In that setting, Student would have no access to the general education classroom or to nondisabled peers. Initially, the District offered Student homebound instruction while it tried to locate a separate school placement for Student. (FF #s 8, 9.) District staff stressed that the placement was temporary. (FF # 8.) Later, the District kept Student in a homebound setting even after it became clear that the District would not be able to place Student in a separate school. (FF # 24) Student's placement was inconsistent with his IEPs throughout the 2022-2023 school year. (FF #s 6, 24, 26.) For this reason, the SCO finds and concludes that the District did not determine Student's placement based on his IEP, in violation of 34 C.F.R. § 300.116 and ECEA Rule 4.03(8)(a). This resulted in a procedural violation of the IDEA.

C. Impact of Procedural Violations

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).

In this case, the District failed to educate Student in the placement required by his IEP during the 2022-2023 school year and failed to ensure Student received maximum time with peers. The violations continued for an entire school year and undoubtedly impacted Student's right to a FAPE and deprived him of an educational benefit. As such, the SCO finds and concludes that the District's violations resulted in a denial of FAPE. The LRE violations impacted Student the same way as the implementation violations making an additional award of compensatory services unnecessary.

Conclusion to Allegation Nos. 2(a)-(c): The District did not restrain Student during the incident on September 15, 2023. No violation of the PPRA occurred.

The next three allegations address the District's use of restraint or seclusion during an incident that occurred on September 15, 2023.

A. Whether Student was Restrained or Secluded

As a preliminary matter, the SCO must determine whether Student was restrained or secluded on September 15. As used in the PPRA, "restraint" refers to "any method or device used to involuntarily limit freedom of movement" and includes chemical restraint, mechanical restraint, and physical restraint. Rule 2620-R-2.00(8). "Physical restraint" involves "the use of bodily, physical force to involuntarily limit an individual's freedom of movement for one minute or more." *Id.* at 2620-R-2.008(c). The term "seclusion" means "the placement of a student alone in a room from which egress is involuntarily prevented." *Id.* at 2620-R-2.00(9).

The PPRA requires that restraints and seclusion:

- Only be used in an emergency and with extreme caution after the failure of less restrictive alternatives (or a determination that such alternatives would be inappropriate or ineffective);
- Never be used as a punitive form or discipline or as a threat to gain control of a student's behavior; and
- Be used only for the period of time necessary and using no more force than necessary, while prioritizing the prevention of harm to the student.

Id. 2620-R-2.01(1)-(3). The PPRA imposes additional obligations on school districts to ensure restraints do not inhibit a student's breathing, are administered by staff who have received training, and are removed when no longer necessary. *Id.* 2620-R-2.02(1).

Here, the District neither restrained nor secluded Student during the incident on September 15. The video produced by the District did not show any limits being placed on Student's freedom of movement. (See FF #s 47-51.) At one point, Student charged towards Dean of Students trying to get his phone back. (FF # 50.) As he pulled on her arm, she fended him off using a stiff arm, but she did not use any physical force. (*Id.*) Though Student fell, it appears he tripped over the feet of Dean of Students or another District staff member. (FF # 51.) No pushing can be seen in the video produced by the District. (FF #s 47-51.) For these reasons, the SCO finds and concludes that Student was not restrained on September 15.

The incident occurred in an open hallway. (FF # 48.) Student was never placed alone in a room during the incident. (FF #s 47-51.) As such the SCO finds and concludes that the District did not seclude Student on September 15.

The remaining subparts of Allegation No. 2 concern PPRA requirements that apply only when a student has been restrained or secluded. Because the SCO finds that Student was not restrained or secluded, the District was not obligated to satisfy these PPRA requirements. No further analysis of Allegation No. 2 is necessary.

Systemic IDEA Violations: This investigation demonstrates violations that are systemic and likely to impact the future provision of services for all children with disabilities in the District if not corrected. 34 C.F.R. § 300.151(b)(2)

Pursuant to its general supervisory authority, the 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 Enforcement 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).

Here, the violations initially stemmed from the District’s inability to locate an available separate school for Student. Though the District intended Student’s homebound placement to be an interim means of service delivery, it lasted an entire school year. (FF # 8, 26.) As his interim placement became long term, District administrators took no action to ensure Student received his related services or to consider other options to allow Student access to peers. The lack of action raises concern that these violations could be systemic and likely to impact the future provision of services for other students with disabilities in the District. Accordingly, the SCO finds and concludes that the District’s violations are systemic. As outlined below, the SCO has ordered training to correct this violation.

REMEDIES

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

- a. Failing to properly implement Student’s IEP, in violation of 34 C.F.R. §§ 300.323; and
- b. Failing to educate Student in the LRE, in violation of 34 C.F.R. §§ 300.114, 300.116 and ECEA Rule 4.03(8)(a).

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

1. Corrective Action Plan

- a. By **Friday, February 2, 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. Director of Special Education, Assistant Director(s), Health Services Director, Health Services Assistant Director, H/H Coordinator(s), Placement Liaison, and Case Manager 1 must review this Decision and the requirements of 34 C.F.R. §§ 300.323. These reviews must occur no later than **Friday, February 9, 2024**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than that same day, **Friday, February 9, 2024**.

3. Training

- a. Director of Special Education, Assistant Director(s), Placement Liaison, Health Services Director, Health Services Assistant Director, and H/H Coordinator(s) must attend and complete training provided by the CDE on IEP implementation and LRE. If these individuals are no longer employed by the District, the District may substitute individuals occupying identical roles to demonstrate compliance with this remedy. At a minimum, the training will address the requirements of 34 C.F.R. §§ 300.114, 300.116, and 300.323 and ECEA Rule 4.03(8)(a) and the proper process for determining a student's homebound placement.
- b. Director and CDE Special Education Monitoring and Technical Assistance Consultant will determine the time, date, and format of the training. This training may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.
- c. Such training shall be completed no later than **Friday, March 1, 2024**. Evidence that this training 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 **Monday, March 4, 2024**.

4. Compensatory Education Services

- a. Student shall receive **100 hours of direct specialized instruction** provided by a District special education teacher. All hours must be completed by **Friday**,

December 20, 2024, though Parent and the District are free to allocate the services however they see fit (i.e., weekly sessions, monthly, etc.).

- b. Student shall receive **10 hours of direct speech/language services** provided by a District speech language pathologist or a private speech language pathologist at the District's expense. All hours must be completed by **Friday, December 20, 2024**, though Parent and the District are free to allocate the services however they see fit (i.e., weekly sessions, monthly, etc.).
- c. Student shall receive **60 hours of direct mental health services** provided by a District mental health provider or private mental health provider at the District's expense. All hours must be completed by **Friday, December 20, 2024**, though Parent and the District are free to allocate the services however they see fit (i.e., weekly sessions, monthly, etc.).
- d. Student shall receive **4 hours of direct occupational therapy** provided by a District occupational therapist or private provider at the District's expense. All hours must be completed by **Friday, December 20, 2024**, though Parent and the District are free to allocate the services however they see fit (i.e., weekly sessions, monthly, etc.).
- e. By **Friday, March 15, 2024**, the District shall schedule all compensatory services in collaboration with Parent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via email, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. The District shall submit the schedule—including the dates, times, and durations of planned sessions, to the CDE no later than **Tuesday, March 19, 2024**. If the District and Parent cannot agree to a schedule by February 2, 2024, the CDE will determine the schedule for compensatory services by **Friday, April 5, 2024**.
 - i. The parties shall cooperate in determining how compensatory services will be provided. If Parent refuses to meet with the District within this time, the District will be excused from delivering compensatory services, provided that the District diligently attempted to meet with Parent and documented such efforts. A determination that the District diligently attempted to meet with Parent and, thus, should be excused from providing compensatory services, rests solely with the CDE.
 - ii. Parent may opt out of some or all compensatory services.
- f. Monthly consultation between the provider(s) delivering compensatory services and Director of Special Education or Interim Director of Secondary Special education shall occur to evaluate Student's progress towards IEP goals and adjust

instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. The 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.

- g. To verify that Student has received the compensatory services required by this Decision, the District must submit records of the services provided to the CDE by the **second Monday of each month** until all compensatory 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. The District must communicate with the selected provider to obtain this information.
- h. These 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. These services must be provided to Student outside of the regular school day (such as before and/or after school, on weekends, or during school breaks) to ensure Student is not deprived of the instruction Student is entitled to (including time in general education). If for any reason, including illness, Student is not available for any scheduled compensatory services, the District will be excused from providing the service scheduled for that session. If for any reason the District fails to provide a scheduled session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent, as well as notify the CDE of the change in the monthly service log.

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. 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; *see also* 34 C.F.R. § 300.507(a); 71 Fed. Reg. 156, 46607 (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 30th day of December, 2023.



Ashley E. Schubert
State Complaints Officer

APPENDIX

Complaint, pages 1-9

Response, pages 1-21

- Exhibit A: IEPs
- Exhibit B: BIPs
- Exhibit C: Evaluation and assessment results
- Exhibit D: Service logs and progress reports
- Exhibit E: Prior Written Notices
- Exhibit F: Notices of Meeting
- Exhibit G: Grade and attendance reports
- Exhibit H: Behavior information
- Exhibit I: Training materials
- Exhibit J: District's annual restraint review
- Exhibit K: District's calendars
- Exhibit L: District's policies and procedures
- Exhibit M: Email correspondence
- Exhibit N: Witness information
- Exhibit O: Verification of delivery of Response to Parent
- Exhibit P: Miscellaneous documents
- Exhibit Q: Video of 9/15/23 incident
- Exhibit R: Updated progress reports

Telephone Interviews

- Assistant Director of Special Education: December 15, 2023
- Assistant Principal: December 14, 2023
- Case Manager 1: December 15, 2023
- Case Manager 2: December 15, 2023
- Out-of-District Placement Liaison: December 15, 2023
- Parent: December 22, 2023