

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

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**State Complaint 2013: 501**  
**Boulder Valley RE-2 School District**

**DECISION**

**INTRODUCTION**

This pro-se, state-level complaint (Complaint) was properly filed with the Colorado Department of Education (CDE) on January 11, 2013 by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup>

To comply with the federal privacy laws (i.e., Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA))<sup>2</sup> and to protect the anonymity of the parents and their child, hereafter, the persons and locations identified in conjunction with the Complaint investigation and Decision will be labeled as follows and redacted prior to publication:

- [Mother], Mother of Child, (“Mother” or “Parent”);
- [Father], Father of Child, (“Father” or “Parent”);
- [Student], Child of Parents, (“Student” “he” “him”);<sup>3</sup>
- Student’s age of [age], [Age];
- [Parents’ Attorney], Esq., Parents’ Attorney, (“Parents’ Attorney”);
- [Private BCBA], Private Board Certified Behavioral Analyst, (“Private BCBA”);
- [Private School], Private School, (“Private School”);
- [JFK Evaluation], (“JFK Evaluation”);
- [JFK Evaluator], PhD., JFK Licensed Clinical Psychologist, (“JFK Evaluator”);
- Boulder Valley RE-2 School District, (“District”);

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

<sup>2</sup> FERPA, codified at 20 U.S.C. § 1232g, was enacted in 1974, to protect a parent’s access to education records and to protect the privacy rights of students and their parents. The IDEA regulations are found at 34 CFR § 300.1, *et seq.*

<sup>3</sup> Although Student’s gender may be either male or female, in order to preserve anonymity, the SCO has arbitrarily elected to identify Student as a male in this Decision.

- [Special Education Director], Director of Special Education , (“Special Education Director”);
- [Behavior Specialist], District Autism and Behavior Specialist, (“Behavior Specialist”);
- [School], (“School”);
- [Principal], School Principal, (“Principal”);
- [Case Manager], Case Manager/Special Education Teacher (“Case Manager”);
- [Special Education Teacher #2], Special Education Teacher (“Special Education Teacher #2”);
- [School Psychologist], School Psychologist (“School Psychologist”);
- [SLP], Speech/Language Pathologist, (“SLP”);
- [Para #1], Paraprofessional, (“Para #1”);
- [Para #2], Paraprofessional, (“Para #2”);
- [Para #3], Paraprofessional, (“Para #3”);
- [Para #4], Paraprofessional, (“Para #4”);
- [Para #5], Paraprofessional, (“Para #5”);
- [Para #6], Paraprofessional, (“Para #6”);
- [Para #7], Paraprofessional, (“Para #7”);
- [Para #8], Paraprofessional, (“Para #8”); and
- [Recreation Coordinator], Therapeutic Recreation Coordinator, City of Boulder (“Recreation Coordinator”).

A State Complaint, signed by both Parents, was received on January 9, 2013. After carefully reviewing the Complaint and interviewing Mother on January 11, 2013, the State Complaints Officer (SCO) determined that the Complaint identified eight allegations subject to the jurisdiction of the state-level complaint process and its implementing regulations at 34 CFR §§ 300.151 through 300.153.<sup>4</sup> The SCO has jurisdiction to resolve the Complaint allegations and claims pursuant to these regulations.<sup>5</sup>

The overriding issue and, therefore, the scope of the investigation identified by the SCO is:

Whether the District committed procedural violations of the IDEA and, if so, whether the procedural violations denied Student a free appropriate public education (FAPE).

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<sup>4</sup> Hereafter, only the IDEA regulation and any corresponding Exceptional Children’s Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

<sup>5</sup> The remainder of Parents’ claims (e.g., violations of the No Child Left Behind Act, regulation 34 CFR § 200.59, “disciplining of Student in May and August 2012” in violation of the Colorado Restraint Act, change of placement in violation of § 300.536(b)(2), and claims concerning matters that occurred before January 9, 2012) were rejected as being matters outside the SCO’s jurisdiction.

On January 11, 2013, the SCO conducted a face-to-face interview with Mother.

On January 29, 2013, the District's Response was timely received.

On February 8, 2013, the District's Supplemental Response was timely received.

On February 11, 2013, Parents' Reply was timely received.

On February 14, 2013, the SCO conducted telephone interviews with Mother and Father.

On February 20, 2013, the SCO conducted face-to-face interviews of Para #s 1 through 6.

On February 22, 2013, the SCO conducted a face-to-face interview of Behavior Specialist.

On February 25, 2013, the SCO conducted face-to-face interviews of Principal and Case Manager.

On February 26, 2013, the SCO conducted a telephone interview of Recreation Coordinator.

On February 27, 2013, the SCO conducted a telephone interview of Private BCBA.

On March 4, 2013, the SCO conferred with Melinda Graham, CDE Autism Consultant.

On March 5, 2013, the SCO conducted a telephone interview with Case Manager.

On March 6, 2013, the SCO received additional documentation from Mother.

On March 6, 2013, the SCO closed the Record.

On March 11, 2013, the SCO extended the Decision timeline from March 12, 2013 to March 19, 2013 due to exceptional circumstances (i.e., 16 allegations and claims, 13 people interviewed by SCO and voluminous documentation (61 exhibits)).

### **COMPLAINT ALLEGATIONS, RESPONSE AND REPLY**

Parents' Complaint allegations, the District's Response and Parents' Reply are summarized below.

**Allegation #1:** Between January 2012 and January 2013, Student was denied a Free Appropriate Public Education (FAPE). Specifically:

a) Between January 11, 2012 and January 11, 2013 Student's aggressive behaviors (e.g., hitting, kicking, pulling hair, throwing objects) increased. This regression is due to inappropriate IEPs and inappropriate Behavior Support Plans (BSPs).

**Response: Denied the claim.** The District denied that any increase in aggressive behaviors is attributable to the IEPs or BSPs. Student's behavioral needs were known and adequately addressed through the IEPs and BSPs. The May 2011 IEP included a classroom behavior goal and the service delivery statement included: "[Student] will need to have adult support in general education and special education classes due to [his] significant behavior and cognitive disabilities." A BSP was in place. Student made progress throughout the 2011-2012 school year until May 7, 2012. At the end of April 2012, Student's physically aggressive behaviors (e.g., hitting, kicking, throwing objects, spitting) escalated to the point that there were concerns for the safety of Student as well as the safety of other students. During the week of May 7, 2012, a schedule change was implemented to address these safety concerns. On May 16, 2012, the IEP team convened to develop a new IEP (i.e., May 2012 IEP) to address Student's changing behavioral needs within a more structured program.

**Reply:** Due to an inappropriate IEP and BSP as well as a lack of training and expertise in appropriate behavioral supports, the District staff was overwhelmed by Student's challenging behaviors. In reaction, the District placed Student in increasingly restrictive settings which prevented him from receiving a FAPE.

b) Between May 7, 2012 and January 11, 2013, Paraprofessionals assigned to Student were neither trained to deliver appropriate behavioral supports nor supervised in violation of 34 CFR § 300.156.

**Response: Denied the claim.** Paraprofessionals delivered appropriate behavioral supports to Student and were supervised by Case Manager. Paraprofessionals assigned to Student were supplied with the necessary knowledge and training to implement Student's IEP. This knowledge was developed through formal and informal meetings as well as daily discussions concerning Student's goals, tasks for the day, data collection procedures, modeling and directing. Daily feedback from Paraprofessionals informed Case Manager's ongoing supervision and direction of the Paraprofessionals.

**Reply:** Parents cited three instances illustrating the paraprofessional's lack of supervision. Per the District's documentation, three paraprofessionals had no specific training in behavioral supports.

c) Between May 7, 2012 and January 11, 2013 Student's placement was too restrictive. With appropriate behavioral supports, including a functional behavior

analysis (FBA), Student would not need to work on a 1:1 basis away from all other students and staff.

**Response: Denied the claim.** District staff conducted a functional behavior analysis (FBA) that demonstrated Student lacked skills necessary to be in a general classroom environment. Through Student's IEPs (i.e., the May 2012 IEP, the August 2012 amendment to the May 2012 IEP and the December 2012 IEP), the IEP team engaged in deliberate planning to revamp Student's program so that he would spend less time in the general education environment in order to learn how to tolerate non-preferred tasks. The FBA demonstrated Student lacked skills to "do school." Parents wanted Student to be fully included in general education. However, the IEP team concluded at the end of the 2011-2012 school year that a more structured approach was needed. To that end, Student is not taught in the Intensive Learning Center (ILC) classroom but in other spaces within School with other students working with him and in close proximity to him. With this change in approach, Student has demonstrated progress on his IEP goals, including a behavior goal.

**Reply:** In August 2012, Parents did not object to Student spending less time in general education but did object to Student being removed from ILC and taught in isolation during a shortened school day. Student was put in an overly restrictive setting in response to his behaviors. The District did not conduct an FBA. Nor did the May 2011 or the May 2012 BSPs reduce Student's aggressive behaviors. With proper behavioral supports, Student would not have needed to be educated away from all other students.

**d)** The social goal and objectives listed in Exhibit A, pgs. 6-7 were not measurable.

**Response: Allegation #1(d): Denied the claim.** The social goal, as measured by the objectives 1 and 2, was measurable.

**Reply:** The social goal was not measurable because the objectives and baseline data are not clear.

**e)** Contrary to Student's needs, the May 2012 IEP did not include any academic goals.

**Response: Denied the claim.** The IEP team determined that Student needed to "learn how to do school" as a prerequisite to development of direct academic goals. However, the May 2012 IEP behavioral goal was designed to address non-preferred tasks using academic content: "[Student] will participate in an academic school related staff chosen task for 5 minutes."

**Reply:** The District could not provide enough behavioral supports to allow Student to work on the most basic academic tasks.

**f)** Contrary to Student's needs, between September 4, 2012 and December 19, 2012 Student was only supplied special education and services on a reduced, partial day, basis.

**Response: Denied the claim.** The IEP team determined that it was appropriate to reduce the time Student spent at school while he built a tolerance for school. The reduction in school day hours was implemented so that Student could receive a FAPE. The length of Student's school day was gradually increased during the fall of 2012 and, since winter break, Student has attended school for the full school day. Student continued to progress on his August 2012 amended IEP goals while attending school for partial school days.

**Reply:** Parents only agreed to a shortened school day with the understanding that staff were looking into an out-of-district placement. In fact, on August 28, 2012, Principal agreed that Student needed an out-of-district placement. In written communications dated September 28, 2012 and October 16, 2012, Parents advised the District that they did not approve of Student's continued shortened school day.

**g)** The December 19, 2012 (current) IEP Service Delivery Statement (i.e., Exhibit F, pgs. 21-22) fails to describe how and where services will be delivered in violation of 34 CFR § 300.320(a)(7).

**Response: Denied the claim.** "Location" as used in the statute and regulations is more broadly defined than the physical location for providing services. The December 2012 (current) IEP provides that Student will receive services in the ILC program. However, the physical location (i.e., a particular classroom) need not be included in the IEP.

**Reply:** The IEP service delivery statement is inappropriate because it fails to describe how and where services are actually delivered and includes models (i.e., peer tutors) that School has no intention of supplying to Student.

**h)** Contrary to Student's needs, the current IEP fails to include a functional independent living skill goal.

**Response: Denied the claim.** The December 2012 IEP includes a functional independent living skill: "Life Skills: By 11/29/2013, [Student] will increase [his] self-care skills as measured by . . ."

**Reply:** The goal cited by the District (i.e., "Student will increase [his] self-care skills as measured by following a 3-step picture process with no more than three prompts") is not a functional independent living skill.

**Allegation #2:** In February 2012, the District unilaterally changed the placement listed in the May 18, 2011 IEP (May 2011 IEP) when Student was removed from all general education classes except for Physical Education (P.E.). This change of placement occurred without an IEP meeting, without prior written notice (PWN) and without amendment of the May 2011 IEP.

**Response: The District denied the allegation.** At all relevant times, Student had access to general education classes (i.e., Math, World Geography and Physical Education) as well as recess and lunch each day as called for in the IEPs. Although Student had opportunity to access general education on a daily basis, Student's behavior might impact whether he entered or remained in each general education class on a particular day.

**Reply:** Student attended general education classes less than 40% of the time after February 13, 2012.

**Allegation #3:** On May 7, 2012, the District unilaterally changed Student's placement. This was done without an IEP meeting and without PWN.

**Response: The District denied the allegation.** Although Student's services were not delivered in the ILC classroom, his IEP continued to be fully implemented and no PWN was required. An IEP meeting was held a few days later on May 16, 2012.

**Reply:** Student was removed from ILC and was spending the afternoons in the library conference room watching videos and playing with Legos. Contrary to the IEP, Student was not attending general education classes 40% to 79% of the time.

**Allegation #4:** On August 16, 2012 Student's placement was changed (i.e., no longer included in the Intensive Learning Center (ILC) or allowed to participate in general education lunch and Circle of Friends club) without PWN.

**Response: The District denied the allegation.** Services were not delivered in the ILC classroom because of Student's behaviors towards a medically fragile classmate in that classroom and his problematic work habits. Case Manager concluded that these behaviors could be addressed outside of the ILC classroom. Student's IEP continued to be fully implemented. PWN was not required concerning lunch procedures and the Circle of Friends club since these are essentially instructional methodologies.

**Reply:** Parents did not learn that Student was not being taught in ILC until Mother attended a meeting on August 23, 2012. "Lunch procedures" and "Circle of Friends" are not "instructional methodologies."

**Allegation #5:** The current Behavior Support Plan (i.e., Exhibit F, pgs. 28-29) is inappropriate since the District did not first conduct a Functional Behavioral Assessment (FBA).

**Response: The District denied the allegation.** During an IEP meeting held in conjunction with development of the current IEP, the team clarified for Parents that the FBA had been conducted although no formal report had been created.

**Reply:** Reiterated the claim.

**Allegation #6:** On September 26, 2012 the District conducted a meeting to discuss Student's progress, program and placement and, consequently, Parents should have been invited to participate in the meeting. This was a violation of 34 CFR § 300.501(b).

**Response: The District denied the allegation.** The meeting on September 26, 2012 was an informal staff conference to discuss Student's progress. Because it was not an IEP meeting it did not require parent participation.

**Reply:** Parents questioned how a meeting could be characterized as "informal" when it had been planned at least two weeks and was attended by the District's Assistant Director of Special Education and Behavior Specialist.

**Allegation #7:** The current IEP (Exhibit F) contains matters that were not discussed (i.e., "elopement" at pg. 10) as well as language to which Parents never agreed (i.e., "restraint" language at pg. 10, and "break space" language at pg. 27).

**Response: The District denied the allegation.** The current IEP was developed over the course of three meetings totaling over nine hours of team discussion. Because the issue of "elopement" was not raised during the IEP meetings, page 10 of the current IEP notes that "There are no current concerns with elopement." The issue of "restraint" was discussed at the December 2012 IEP meeting. Because Student had not been subjected to "restraint" within the meaning of the Colorado Rules, no use of "restraint" had been documented. The reference to "break space" (i.e., pg. 27 of the current IEP) simply notes that Parents were receptive to the suggestion that Student might benefit from continuity of "break space" routines between home and School and that Special Education Teacher would provide additional information to Parents.

**Reply:** Parents reiterated the claim as to "elopement," and acknowledged that "restraint" was discussed in the November meeting and withdrew the "restraint" and "break space" claims.

**Allegation #8:** The placement listed in Student's current IEP (i.e., Exhibit F, pgs. 1 & 22 - at School and "with general education class less than 40% of the time") was predetermined. This



is evidenced by the District's refusal to consider placement at an out-of-district school (e.g., Private School) and by the School Principal's statement "the District is no longer placing kids out-of-district." Parents believe that a placement at Private School would better meet Student's educational, social and emotional needs than the placement currently offered.

**Response: The District denied the allegation.** The IEP team had extensive discussion and consideration regarding the appropriate placement, including Student's current placement (i.e., with the general education class less than 40% of the time) as well as Parents' proposed placement in a separate school as documented at pgs. 23-24 of the current IEP. Although school districts are required to consider parental requests and concerns, they are not required to acquiesce to every parental demand.

**Reply:** Parents noted that the District's Response failed to address Principal's statement that "the District is no longer placing kids out-of-district." Parents cited several examples evidencing predetermination during the November IEP meeting.

**Parents' Proposed Remedies:** An IEP reasonably calculated to provide Student with a FAPE be drafted and implemented. Student be allowed and supported to attend lunch and recess with other students. Student be taught in a structured, small group, special education setting rather than away from all other students and staff. Student be placed in an out-of-district placement (i.e., [Private School]). Student be supplied compensatory education sufficient to remedy any educational deficits resulting from the District's failure to supply Student with a FAPE.

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire Record,<sup>6</sup> the SCO makes the following FINDINGS:

#### **Factual Background:**

1. At all times relevant to the Complaint, Student, [age] years of age, was a resident of the District and was identified as having multiple disabilities (i.e., physical disabilities of autism and trisomy 8 mosaicism, a speech/language impairment and an intellectual disability). There is no dispute that Student is eligible for special education and related services.
2. Student has been attending School since August 2010.<sup>7</sup> Historically, Mother has sought to have Student attend classes and activities (e.g., lunch and recess) in the general education setting.<sup>8</sup>

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<sup>6</sup> Appendix A, attached and incorporated by reference, details the entire Record.

<sup>7</sup> Interview of Mother.

<sup>8</sup> Interviews of Mother and Case Manager. Exhibit 22, pg. 10.

3. Throughout the 2011-2012 and the 2012-2013 school years, various Paraprofessionals (“Paras”) have been assigned to Student on a 1:1 basis for the entire school day in order to provide him with behavioral and cognitive supports.<sup>9</sup>

4. **The May 2011 IEP.**<sup>10</sup> Relevant portions of the May 2011 IEP are summarized below:

- The IEP was to be in effect throughout the 2011-2012 school year until May 18, 2012 when an annual review meeting was conducted.
- Present levels of educational performance (PLEPS): At times [Student] independently expresses wants and needs on the [Vantage Lite augmentative device].<sup>11</sup> At other times, [Student] will use talker with prompt “show me on your talker.”
- Needs: use of assistive technology; all academic work modified and adapted in order to participate; and significant support for managing his behavior.
- The IEP has seven goals, including a classroom behavior goal containing three measurable objectives.
- Service delivery statement: one-to-one adult support in all general education and special education classes due to Student’s significant behavioral and cognitive disabilities.
- Placement: instruction in 4-5 general education classes and instruction in the Intensive Learning Center (ILC) for individualized math, language arts and other goal related areas specific to Student’s needs.
- Educational environment: general education classes 40-70% of the time.
- A Behavior Support Plan (BSP) was part of the IEP. Behaviors of concern: i) inappropriate physical interactions with peers (e.g., hitting, kicking, pulling hair, throwing objects); and ii) refusal to do non-preferred tasks.

5. As the 2011-2012 school year progressed, Student’s aggressive behaviors increased. It became increasingly difficult for Student to attend general education classes, tolerate noisy environments or be in settings where there were several students.<sup>12</sup> The quarterly progress reports for the May 2011 IEP “classroom behaviors” goal are summarized below:

- **October 20, 2011 progress report:** adequate progress. Comments: “[Student] participates in PE activities every day and math about once a week. *[Student] sat in general education classes at least 15 minutes per period in the first few weeks of*

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<sup>9</sup> Supplemental Response, pg. 8 (i.e., in the 2011-2012 school year: Para #1; Para #3; Para #4; Para #5; Para #6; Para #7; Para #8; and Para #9; and in the 2012-2013 school year: Para #2; Para #3; and Para #6).

<sup>10</sup> Exhibit #1.

<sup>11</sup> Hereafter the “Vantage Lite augmentative device” is referred to as “talker”.

<sup>12</sup> Interview of Case Manager.

*school and now does it about twice a week. [Student] will ask to leave appropriately when prompted back about 50% of the time.*"<sup>13</sup>

- **December 12, 2011 progress report:** insufficient progress. Comments: "*[Student] is starting to demonstrate inappropriate behaviors in general education classrooms and runs to the ILC classroom. [Student] has been participating in P.E. class consistently. We will continue to try to use [the] talker to request to leave before Student does something inappropriate. We will create an area for [him] to do tasks in the ILC room before Student can get a preferred activity.*"<sup>14</sup>
- **March 8, 2012 progress report:** adequate progress. Comments: "*[Student] is able to participate appropriately in PE class for more than 15 minutes. We are continuing to work on this goal. Progress has been limited due to escalated behaviors in the general education setting.*"<sup>15</sup>
- **May 7, 2012 progress report:** insufficient progress. Comments: "*Despite following the [BSP] and attempting to modify [the] environment, [Student's] behaviors have escalated so that [he] has not been successful in making progress with the objectives.*"<sup>16</sup>

6. On January 4, 2012, Case Manager met with Mother in order to problem solve concerning Student's escalating aggressive behaviors. As a result of this meeting, it was concluded that lunch in the cafeteria with other students was too stimulating and resulted in Student not eating. It had become more and more difficult for Student to attend general education classes. Therefore, until the end of the school year, it was agreed that Student would:

- Take lunch alone with a Para in a room outside of the cafeteria;
- Remain enrolled in Science class although he continued to throw objects whenever he attended the class;
- Continue to attend Math and Geography classes as he was able to tolerate those general education classes; and
- Continue to attend recess with other students.<sup>17</sup>

7. On February 8, 2012, Mother was asked to pick up Student and keep him home for the next two days after Student hit several peers and staff multiple times. A meeting was held on February 13, 2012 which was attended by Parents, Principal, Case Manager, School Psychologist and Private BCBA. During the meeting it was agreed that Student would be removed from all

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<sup>13</sup> Exhibit #17, pg. 3 (Emphasis added).

<sup>14</sup> Id. pg. 5 (Emphasis added).

<sup>15</sup> Id. pg. 10 (Emphasis added).

<sup>16</sup> Id. pg. 11 (Emphasis added).

<sup>17</sup> Interviews of Mother and Case Manager. Exhibit X.

general education classes except P.E., with attempts to reintegrate him back into those classes as Student's behaviors improved.<sup>18</sup>

8. Beginning in April 2012, Student's aggressive behaviors escalated to the point that there were concerns about the safety of Student and other students. To address those safety concerns, the week of May 7, 2012, Student was removed from the ILC classroom due to his fixation on pulling off the glasses and pulling the hair of a medically fragile classmate. Student continued to be excluded from all general education classes except P.E. which he continued to attend with a Para and peer tutors. Finding of Fact (FF) #7, above. Student received all services and instruction on a 1 to 1 basis from Paras in a room separate from all other students.<sup>19</sup>

9. **The May 2012 IEP.**<sup>20</sup> An annual IEP meeting was conducted on May 16, 2012. That meeting was attended by Mother, Principal, School Psychologist, Case Manager and SLP.<sup>21</sup> The schedule changes (i.e., no general education classes except P.E., no classes in the ILC classroom, lunch and recess without peers) were recorded in the IEP to address Student's escalating aggressive behaviors. The IEP included PWN. Relevant portions of the IEP are summarized below:

- The IEP was in effect from May 17, 2012 until August 19, 2012.<sup>22</sup>
- Present levels of educational performance summary (PLEPS): Due to his behaviors, Student has access to recess and the cafeteria at times when other students are not present . . . *[Student's] physically aggressive behaviors (e.g., hitting, kicking, throwing objects, spitting) escalated to the point that concerns were indicated in regard to Student's safety and the safety of other students (e.g., [in ILC Student] appears to have developed a fixation on pulling another student's hair and glasses and hitting other peers)* . Despite attempts to modify Student's behavior . . . Student's behavior was not seen to change. During the week of May 7, 2012 a schedule change was initiated as a safety response . . . Student attended his classes in alternative settings to the [ILC] (e.g., alternative classroom settings, the library, the conference room, and outside for exercise) . . . and continued to access the general education PE class [with a peer tutor]. Student is with typical peers during the morning when in one classroom setting . . . peer tutors are able to continue to support him during the afternoon in a conference room setting. With

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<sup>18</sup> Interview of Case Manager and Exhibit 25.

<sup>19</sup> Interviews of Mother and Case Manager. Response, pgs. 3-4.

<sup>20</sup> Exhibit #2 (Emphasis added).

<sup>21</sup> Supplemental Response, pg. 5 and Exhibit 12. General Education Teacher was excused from the meeting. Exhibit #2, pgs. 15-16.

<sup>22</sup> Exhibit 18. Consequently, the IEP Team did not change Student's placement until approximately nine school days (i.e., May 7<sup>th</sup> to May 17<sup>th</sup>) after Student was removed from ILC due to safety concerns.

demonstration of appropriate behaviors, Student will have expanded opportunities to participate in different school settings.

- Needs: use of assistive technology; all academic work modified and adapted in order to participate with general curriculum; significant support for managing his behavior; and requires special education support to be successful.
- The IEP had three goals including a behavior goal with four objectives.
- Service delivery statement: Under the direction of Case Manager, IEP goals and objectives were supported by IEP implementers through an integrated service delivery model which included consultation, modeling, re-teaching, co-teaching, peer tutors, and direct instruction responsive to Student's individual needs. Paras provided direct instruction and proactive behavior intervention strategies to deescalate or prevent stressful situations according to BSP.
- Placement: Instruction in the ILC or another quiet environment for his individualized math and language arts programs and to meet other goal related areas specific to his needs. Student will have access to attending classes within the general education setting by demonstrating he can engage in safe and appropriate behaviors within that environment.
- Educational environment: general education class less than 40% of the time; and
- A BSP was part of the IEP. Behaviors of concern were i) inappropriate physical interactions with peers/physical aggression towards others (e.g., hitting, kicking, pulling hair, throwing objects); and ii) Non-compliance (e.g., refusal to do non-preferred activities, refusing to follow directions).

10. **2012-2013 Community Programs.** Student displayed aggressive behaviors in local community programs for the first time during the summer of 2012 although he had been assigned a 1:1 aide (staff employee). Parents had to come and get Student "a few times due to [his] aggressive behaviors."<sup>23</sup>

11. During the summer of 2012, Parents and Case Manager visited Private School in Denver. On or about January 1, 2013, a second Private School campus was opened not far from Parents' residence. Parents submitted an application for Student to attend Private School. Mother reports that Student has been accepted at Private School but Parents have not paid a tuition deposit.<sup>24</sup>

12. When the 2012-2013 school year began on August 16, 2012, the May 2012 IEP was still in effect.<sup>25</sup>

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<sup>23</sup> Interview of Recreation Coordinator.

<sup>24</sup> Interviews of Mother and Case Manager. Exhibit K, pg. 1. A Private School representative observed Student at School on September 21, 2012.

<sup>25</sup> Exhibits 2 and 19.

13. **JFK Evaluation.**<sup>26</sup> On August 24, 2012 Parents had Student evaluated at [JFK Evaluation]. The JFK Evaluation was comprehensive in scope, assessing Student in numerous areas (i.e., Parent interview; behavioral observation; review of medical records, review of Private BCBA assessment and IEP; and administration of: Autism Diagnostic Observation Schedule (ADOS), Leiter International Performance Scale-Revised (Leiter-R), and Vineland-II Adaptive Behavior Scales (Vineland)).<sup>27</sup>

14. The JFK Evaluation findings and diagnosis are summarized below:

- Student underwent an Abilify medication trial several years ago, but it was discontinued because, although his aggressive behaviors initially improved, after the first few months the medication did not seem to have the same effect;
- A gradual shift has taken place in Student's interactions with peers – when a peer approaches, he might hit or ignore them, or Student might approach and hit them;
- Student's aggression has been observed across settings and has been occurring since he was 8-9 years of age;
- He often exhibits aggressive behaviors towards others (e.g., throwing objects, hitting, kicking, slamming doors);
- Setting events and antecedents to aggressive behaviors include: hunger, illness, fatigue, change, difficult work, transitions, when asked to engage in self-care or non-preferred tasks, when he does not get what he wants, does not feel understood, and, sometimes, when he pretends to play Power Ranger;
- As Student has gotten older his aggression appears to have gotten worse;
- Student's behaviors have exacerbated in the last six months and Mother believes this is because Student has grown and is becoming much stronger;
- When Student displays aggressive behaviors at home, he is taken to his room and not allowed to come out until calm but this approach is not used consistently;
- Results of the Leiter-R suggest that, cognitively, Student is functioning at approximately a three year old level;
- Results of the Vineland indicate significant developmental delays across communication, social and adaptive skills domains;
- Results of the Leiter-R and Vineland indicate the presence of a significant intellectual disability;
- Student appears to experience many symptoms of Attention Deficit/Hyperactive Disorder (ADHD) which is demonstrated by difficulty focusing, attending, engaging during non-preferred activities and *difficulty sitting even during preferred activities*; and

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<sup>26</sup> Exhibit M. A copy of the JFK Evaluation was supplied to the District in advance of the October 23, 2012 IEP meeting.

<sup>27</sup> *Id.*, pgs. 4-5.

- Student’s DSM IV-TR/ICD-9 diagnosis consists of: Axis I: Autistic Disorder and ADHD, combined type; Axis II: Moderate Intellectual Disability; Axis III: Autosomal Anomalies (Trisomy 8 mosaicism); Axis IV: Significant aggression impacting his education and peer relationships; and Axis V: 30.<sup>28</sup>

15. The JFK Evaluation recommendations included:

- Parents discuss with Student’s pediatrician or psychiatrist options for medication and behavior management through a safe medical trial occurring in either a day treatment or inpatient hospitalization stay;<sup>29</sup>
- Parents and School staff meet to discuss Student’s present behavioral and academic needs;
- Consider revision of the current IEP and BSP to include a programmatic plan to transition Student back into [ILC] with peers;
- If Student’s aggression cannot be safely managed within an ILC within a reasonable time frame, consider other educational placements;
- Continue to assess setting events and antecedents for aggressive behaviors;
- Identify precursor behaviors for aggressive behaviors (e.g., loud vocalizations, pounding on table with fists) and provide access to a quiet place (e.g., adjoining room) where Student is prompted to go to in order to avoid escalation;
- Permit Student to request a break in order to go to this quiet place;
- Employ clear, immediate and time limited consequences for aggressive behaviors using time-out in a safe and quiet place without access to preferred activities;
- Collect time limited data re use of time-out;
- Focus on interventions that can help Student safely engage with peers once his aggression is significantly reduced; and
- Use a chart specifying what task(s) Student needs to complete in order to get a preferred task (e.g., “if \_\_\_\_ then \_\_\_\_”).<sup>30</sup>

16. On August 27, 2012, Student was sent home due to extreme aggressive behaviors. On August 28, 2012, an informal meeting was held between Parents, Principal and other staff at which time safety concerns and the option of shortening Student’s school day for the next eight weeks were discussed.<sup>31</sup>

<sup>28</sup> Id., pgs. 2-9 (Emphasis added).

<sup>29</sup> Interview of Mother and Exhibit M, pg. 10. Parents have not followed through on this recommendation. Mother explained “We have not done so yet because we have a lot of hesitation regarding [his] ability to take the medication . . . We’re not sure we’re ready for that [a day treatment or in patient hospitalization stay].”

<sup>30</sup> Id., pgs. 10-11.

<sup>31</sup> Exhibit K, pgs. 1-2.

17. **The August 30, 2012 amendment of May 2012 IEP.**<sup>32</sup> Because of Student's continuing aggressive behaviors, on August 30, 2012 the IEP Team amended the May 2012 IEP (August 2012 amendment to May 2012 IEP). Mother attended and participated in the IEP meeting.<sup>33</sup> Relevant portions of the amended IEP are summarized below:

- The IEP was in effect from September 4, 2012 until December 18, 2012.
- Present levels of educational performance (PLEPS): When in a calm space, Student independently expresses wants and needs on his talker. At other times, he uses his talker when prompted by telling him to "show me on your talker." Student can follow up to three step directions and do activities of his choosing for up to 30 minutes at a time.
- Needs: use of assistive technology; all academic work modified and adapted in order to participate with general curriculum; significant support for managing his behavior; and requires special education support to be successful.
- The IEP had three measurable goals including a behavior goal with four measurable objectives.
- Service delivery statement: Due to Student's disability, he has not benefited to a full seven period day in his current School setting. Based on data collected since 6<sup>th</sup> grade, Student's behavior has become increasingly escalated in the afternoon (e.g., hitting, punching, throwing objects) and non-violent crisis intervention as well as program interventions and changes have been unsuccessful in de-escalating him . . . *during the current school year, 60% of physical behaviors have occurred during the 5<sup>th</sup> through 7<sup>th</sup> periods as compared to 0% 1<sup>st</sup> through 3<sup>rd</sup> and 40% during 4<sup>th</sup> period/lunch. As Student's afternoon behavior has risen to a level of concern for safety of student and staff, his program will be reduced by three periods in order to provide a more meaningful learning experience for Student.* The IEP team agreed to meet again by October 25, 2012 to determine whether the IEP continued to meet Student's needs.
- Placement: Instruction in the ILC or another quiet environment for his individualized math and language arts programs and to meet other goal related areas specific to his needs. Student will have access to attending classes within the general education setting by demonstrating he can engage in safe and appropriate behaviors within that environment. Implementation of non-violent crisis intervention, program interventions and changes have been unsuccessful in de-escalating Student to the point where he can return his attention or focus on school tasks.
- Educational environment: general education class less than 40% of the time; and
- A BSP was part of the IEP. Behaviors of concern i) inappropriate physical interactions with peers (e.g., hitting, kicking, pulling hair, throwing objects); and ii) non-compliance (e.g., refusal to do non-preferred tasks, refusal to follow directions).

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<sup>32</sup> Exhibit 3 (Emphasis added).

<sup>33</sup> Interview of Mother and Exhibit 13.



In summary, Student continued to receive all services and instruction on a 1:1 basis, separate and apart from general education or ILC class peers. However, with the amendment, the school day was shortened from seven to four periods and, thereafter, increased incrementally back to seven periods during the remainder of 2012. Mother agreed to the shortened school day.<sup>34</sup>

18. On September 26, 2012, an informal meeting was attended by Case Manager, School Psychologist and possibly other staff. Parents were not invited to attend the meeting. The purpose of the meeting was to discuss Student's progress.<sup>35</sup>

19. **The December 2012 (current) IEP (triennial evaluation).**<sup>36</sup> The December 2012 IEP was developed over a period of nine hours during three IEP meetings (i.e., October 23, 2012, November 29, 2012 and December 19, 2012). Parents supplied Case Manager with a copy of the JFK Evaluation prior to the October 23, 2012 meeting.<sup>37</sup> The October and November IEP meetings were attended by Parents, Private Attorney, Private BCBA and numerous School and District staff.<sup>38</sup> The December IEP meeting was attended by Parents, Private Attorney and numerous School and District staff.<sup>39</sup> Relevant portions of the triennial evaluation are summarized below:

- The IEP has been in effect from December 19, 2012 to present.
- Triennial re-evaluation included: Parents' input, Private BCBA's input, review and inclusion of the JFK Evaluation (including the psychological, occupational therapy and speech-language evaluations), PLEPS, Case Manager's School Function Assessment (SFA), informal academic assessments by Case Manager.<sup>40</sup>
- PLEPS (12/19/2012 notes): Due to significant physically aggressive behaviors occurring during the afternoon, Student has been on a shortened schedule since September 4, 2012. Student currently attends school from 8:40-12:53 p.m. (the start of the 5<sup>th</sup> period). First period: is delivered by Para in a classroom with no other students; second period: program is delivered by Para and support by peer tutor in general education P.E. class; third period: delivered by a Para in the same classroom setting as first period; and fourth period: Student and Para walk outside and then transition to library conference room where Student eats lunch with no

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<sup>34</sup> Exhibits K, pg. 1 and L.

<sup>35</sup> Exhibit I, pgs. 1-3.

<sup>36</sup> Exhibit 4.

<sup>37</sup> Interview of Mother and Case Manager.

<sup>38</sup> Supplemental Response, pgs. 5-6. Exhibits 14 and 15.

<sup>39</sup> Supplemental Response, pg. 6 and Exhibit 16.

<sup>40</sup> The SFA is comprised of three parts (i.e., "Participation" – Student is functioning below the expected levels (for 4-6 grade expectations); "Task Supports" – Student is functioning below the expected levels (for 4-6 grade cohort and needs assistance and adaptations to the school routine); and "Activity Performance" – Student is not able to complete school day activities independently and with consistency and benefits from support in multiple activities).

other students present. Student engages in activities in the conference room setting the remainder of his day. The IEP quoted extensively from the JFK Evaluation. **Note:** As of January 8, 2013, Student returned to a full school day schedule although he continues to receive instruction on a 1:1 basis with Paras outside of the ILC and the general education classrooms. Student continues to take lunch and recess without other students although he does attend P.E. in the company of a Para and peer tutor.

- Needs: use of assistive technology; all academic work modified and adapted in order to participate with general curriculum; significant support for managing his behavior; and requires special education support to be successful.
- The IEP has six goals including an emotional regulation (i.e., behavior) goal with five measurable objectives.
- Service delivery statement: Under the direction of Case Manager, IEP goals and objective will be supported by Paras through an integrated service delivery model which includes consultation, modeling, re-teaching, peer tutors, and direct instruction response to Student's needs. Student provided direct instruction and proactive behavior intervention strategies to deescalate or prevent stressful situations according to BSP in a 1:1 setting
- Placement: Instruction in a structured learning environment and programming through the ILC although Student does not attend the ILC classroom. Student will have access to general education class when he can demonstrate the ability to engage in safe and appropriate behaviors within that environment.
- Educational environment: general education class less than 40% of the time; and
- A BSP was part of the IEP. Behaviors of concern i) inappropriate physical interactions with peers and teachers (e.g., hitting, pulling hair, climbing on top of furniture, hitting); and ii) difficulty participating in non-desired tasks or following adult directions upon second prompt.<sup>41</sup>

**Allegation #1 – Denial of a Free Appropriate Public Education (FAPE).** Specifically:

20. **Allegation #1(a) – Inappropriate IEPs and BSPs caused Student's increase in aggressive behaviors between January 11, 2012 and January 11, 2013.** During the 2011-2012 and the 2012-2013 school years, Case Manager and the assigned Paras collected data, typically on a daily basis, associated with Student's IEP goals and objectives. Based on the collected data, the SCO determined that Student exhibited one or more aggressive behaviors (i.e., hitting, kicking, throwing objects or pulling hair/glasses of peer) towards peers and/or staff the following number of days each month:

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<sup>41</sup> The BSP was updated in February 2013, after the Complaint was filed and, therefore, the updated BSP was not included in the documentation reviewed by the SCO.

**2011-2012 School year**<sup>42</sup>

August: 12 days

September: 8 days

October: 5 days (10/20/11 progress report: “adequate progress”)

November: 6 days

December: no data (12/12/11 progress report: “insufficient progress”)

January: 3 days (1/4/12 meeting: lunch alone & gen. ed. as tolerated)

February: 4 days

March: 9 days (3/8/12 progress report: “adequate progress”)

April: 10 days

May: 15 days (5/7/12 progress report: “insufficient progress”; no ILC or gen. ed. except P.E.)

**2012-2013 School year**<sup>43</sup>

August: 13 days

September: 19 days (9/4/12 shortened school day implemented)

October: 12 days

November: 14 days

December: 9 days

January: 7 days (full school day implemented)

February: 3 days

21. The specific findings are as follows:

- Student has exhibited aggressive behaviors for several years;
- As Student has gotten older his aggression has worsened;
- Student’s aggressive behaviors occurred across all settings (e.g., home, school, private behavioral therapy, community programs) and, beginning in January 2012, these behaviors began to increase across all settings;<sup>44</sup>
- Between January 2012 and January 2013, Student had four IEPs and four BSPs, reflecting the IEP Team’s efforts to address, in gradually more structured and restrictive environments, Student’s aggressive behaviors (including behavioral analysis of the antecedent/precipitating events) and needs while keeping Student, peers and District staff safe;
- In formulating the IEPs, the IEP Team drew from a variety of sources including the input of: Parents, Private BCBA, numerous District staff as well as the

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<sup>42</sup> Exhibits BB, Y and Z.

<sup>43</sup> Exhibits G, AA, CC, EE and 29, pg. 1. The 2012 school year began August 16, 2012.

<sup>44</sup> Interviews of Mother, Private BCBA, Case Manager and Recreation Coordinator. See FF #10.

findings and, in the case of the December 2012 IEP, the recommendations of the JFK Evaluator;<sup>45</sup>

- In School setting, Student's aggressive behaviors increased between March 2012 and September 2012 but have steadily decreased between November 2012 and February 2013;
- Given the persuasive evidence in the Record, the IEPs and BSPs developed and implemented between January 2012 and January 2013 were appropriate to Student's unique needs;
- Given the persuasive evidence in the Record, the IEPs and BSPs were implemented with consistency and fidelity by Case Manager and Paras;
- Student has demonstrated progress;<sup>46</sup> and
- There is nothing in the Record to support Parents' claim that inappropriate IEPs or BSPs caused Student's increase in aggressive behaviors between January 11, 2012 and January 11, 2013.

22. **Allegation #1(b) - Training and supervision of Paras.**<sup>47</sup> Specific findings are as follows:

- Between August 2011 and January 2013, Case Manager, School Psychologist and Behavior Specialist supplied Paras with frequent and relevant training on behavior management and strategies specific to Student's needs;<sup>48</sup>
- In developing BSPs, District personnel frequently consulted with Private BCBA;<sup>49</sup>
- Between August 2011 and January 2013 Case Manager has conducted monthly meetings with Paras;<sup>50</sup>
- Between August 2011 and January 2013, Case Manager provided continuous supervision of Paras who served Student;
- All of the Paras have implemented Student's IEPs and BSPs with consistency and fidelity; and
- Given the credible evidence in the Record, the Paras providing Student with special education and related services were well trained and closely supervised.<sup>51</sup>

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<sup>45</sup> Interviews of Behavior Specialist, Private BCBA and Mother. Exhibits M, #4, pgs. 6-8 and #23, pgs. 4-9.

<sup>46</sup> Interviews of Mother, Case Manager and Para #s 2, 3, and 6. Exhibits 1 through 4, G, AA, BB, CC, EE, Y, Z and 29, pg. 1.

<sup>47</sup> Of the six Paras interviewed, their paraeducator experience ranges from five to 25 years of service (i.e., a combined total of over 90 years of Para experience).

<sup>48</sup> Interviews of Case Manager, Behavior Specialist and Para #s 1-6. Exhibits 21, 22 and 28, pgs. 1-10(A), (B-1(d), 10, and 10(E)-2(F).

<sup>49</sup> Interviews of Private BCBA, Case Manager and Behavior Specialist. Exhibit 27

<sup>50</sup> Exhibits #28, pgs. 1 and 10, #21, pgs. 1-12, and #22, pgs. 1-17.

<sup>51</sup> Interviews of Case Manager and Para #s 1-6. Exhibits G, BB, Y, AA, CC, EE, 22 and 29.

23. **Allegation #1(c) - Appropriateness of Student's placements between May 7, 2012 and January 11, 2013.** Specific findings are as follows:

- May 2011 IEP - general education classes 40-90% of the time, 1:1 Para support in all settings and ILC for math, language arts and to meet other goals specific to his needs;<sup>52</sup>
- May 2012 IEP – general education classes less than 40% of the time, 1:1 Para support in all settings, no ILC or general education classroom except P.E.;<sup>53</sup>
- August 30, 2012 amendment of May 2012 IEP – general education classes less than 40% of the time, 1:1 Para support in all settings, no ILC or general education classroom except P.E., class day reduced to first four periods and then gradually increased throughout fall of 2012;<sup>54</sup>
- December 2012 IEP: general education classes less than 40% of the time, 1:1 Para support in all settings, no ILC or general education classroom except P.E., class day reduced to first four class periods and then gradually increased throughout fall of 2012;<sup>55</sup>
- Given the credible evidence in the Record, it was appropriate for Student to be placed in increasingly structured and quiet environments between January 2012 and May 2012 in order to manage Student's aggressive behaviors;
- When Student's aggressive behaviors continued in August 2012, it was appropriate to shorten Student's class day and to slowly reintegrate him into the last three periods of school;
- Since December 2012, Student's aggressive behaviors have decreased measurably;<sup>56</sup>
- Since January 8, 2013, Student has been attending School for the full school day;<sup>57</sup> and
- Although Student continues to receive special education services outside the general education and ILC classroom, it is appropriate for the IEP Team to determine when and under what circumstances Student can safely be re-integrated back into general education and ILC classrooms.

24. **Allegation #1(d) – Measurability of the social goal.** Specific findings are as follows:

- The May 2012 IEP and the August amendment of the May 2012 IEP both contain the same social goal and supporting objectives;<sup>58</sup>

<sup>52</sup> Exhibit #1 and Finding of Fact (FF) #4, above.

<sup>53</sup> Exhibit #2 and FF # 9, above.

<sup>54</sup> Exhibit #3, pgs. 10-11 and FF #17, above.

<sup>55</sup> Exhibits #4 and FF #19, above. Note: Student began attending school on a full-time basis on January 8, 2013.

<sup>56</sup> FF #20, above.

<sup>57</sup> Interviews of Mother and Case Manager.

<sup>58</sup> Exhibits #2, pgs. 7-8 and #3, pgs. 6-7.

- Social Goal: “Interpersonal relationships with peers and adults – Student will improve [his] interpersonal relationships with others by meeting the following [two] objectives . . .”;
- Objective 1: “Given [his] talker and/or picture cues, Student will communicate [his] needs and desires appropriately in 3 out of 4 trials. Baseline: Student runs out of classroom to get something or hits kids to gain their attention”;
- Objective 2: “Given an adult directive paired with a visual cue, Student will follow the direction in 3 out of 4 trials 50% of the time. Baseline: Student does not stop or wait when asked. He follows one step directions about 50% of the time when it is a desired task”;
- Whether Student has accomplished the social goal is measured by his progress on the two supporting objectives;
- Objective #1 is measurable however objective #2 is not measurable since it contains two measurements;
- In order to increase Student’s ability to follow directions, Behavior Specialist designed an “if \_\_\_ then \_\_\_” model for implementation by Case Manager and Paras;<sup>59</sup>
- Under the “if \_\_\_ then \_\_\_” model, Student is shown a desired reinforcer (like his iPad) and then prompted to follow directions in completing an undesired task (like walking on the treadmill) saying “first walk on treadmill then you get iPad”;<sup>60</sup>
- The December 19, 2012 IEP progress notes indicate that, “Student has increased [his] ability to successfully complete a non-desired task prior to receiving a desired task using the if \_\_\_ then \_\_\_ visual cues,” and “has increased [his] ability to follow a one-step directive;<sup>61</sup> and
- Although objective #2 was not measurable, Student received benefit from the goal, objective #1, and the “if \_\_\_ then \_\_\_” visual cues model.

25. **Allegation #1(e) – Lack of an academic goal in the May 2012 IEP.** Specific findings are as follows:

- Student’s May 2011 IEP had seven goals including one academic goal;<sup>62</sup>
- Parents objected to the fact that the May 2012 IEP did not contain an academic goal;
- The well documented Record reflects the fact that, in May 2012, Student’s aggressive behaviors had escalated to such a level as to put the safety of Student, peers and staff at risk;

<sup>59</sup> Interviews of Behavior Specialist, Case Manager and Para #s 2, 3 and 6.

<sup>60</sup> *Id.* and Exhibit 23, pgs. 7-8.

<sup>61</sup> Exhibit 4, pg. 6.

<sup>62</sup> Exhibit 1, pg 7.

- In May 2012, it was determined that, given his escalated aggressive behaviors, it was presently unsafe for Student to attend recess or to be in the general education or ILC classrooms with peers;<sup>63</sup>
- In May 2012, the IEP Team, including Mother, determined that it was appropriate to reduce to three the number of IEP goals in order to focus on Student's behaviors, communication and social (interpersonal) relationships;<sup>64</sup>
- In May 2012, Student was incapable of achieving a formal academic goal due to his escalating and unsafe behaviors;
- In the August 2012 amendment of the May 2012 IEP, the IEP Team determined that it was appropriate to continue to focus on the same three goals (i.e., behaviors, communication and social);<sup>65</sup>
- In addition to the goals described above, in the December 2012 IEP, the IEP Team added three more goals, including an academic goal;<sup>66</sup> and
- Given the credible information in the Record, in order for Student to benefit from academic training, he first needed to obtain communication skills, behavioral skills and social skills sufficient for him to function appropriately in a school setting.

**26. Allegation #1(f) - Appropriateness of reduction in school hours in August 2012.**

Specific findings are as follows:

- In August 2012, the IEP Team determined that, because the majority of Student's aggressive behaviors were occurring between the 5<sup>th</sup> and 7<sup>th</sup> periods, it was appropriate to shorten his school day and to then gradually increase his school day in increments as his behaviors improved;<sup>67</sup>
- Parents agreed that, due to safety concerns, it was appropriate for Student's school day to be shortened;<sup>68</sup>
- Since December 2012, Student's aggressive behaviors have been measurably reduced;<sup>69</sup> and
- Since January 8, 2013 Student has attended school on a full-time basis.<sup>70</sup>

**27. Allegation #1(g) - Appropriateness of service delivery statement in the current IEP.**

Specific findings are as follows:

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<sup>63</sup> Interviews of Case Manager and Mother and FF #8.

<sup>64</sup> Exhibit 2, pg. 4 and FF #9.

<sup>65</sup> Exhibit 3, pgs. 5-7 and FF #17.

<sup>66</sup> Exhibit 4, pgs. 16-20 and FF #19.

<sup>67</sup> Exhibit 3, pgs. 10-11.

<sup>68</sup> Exhibit K, pg. 1-2.

<sup>69</sup> FF #20.

<sup>70</sup> FF #19.

- Student’s aggressive behaviors increase when he becomes over-stimulated (e.g., surrounded by large groups of students during lunch or recess);
- He wants to engage peers but does so in a physical capacity (e.g., hitting, kicking, pulling hair);<sup>71</sup>
- The IEP Team determined that, due to safety concerns, Student be supplied services (including lunch and recess) at School on a 1:1 basis in classrooms and settings where other students are not present (e.g., placement is in the general education classroom less than 40% of the time);<sup>72</sup>
- The December 2012 (current) IEP service delivery statement provides that the IEP implementers (i.e., Case Manager, Paras and SLP) will deliver direct, 1 to 1 services and instruction, small group skill instruction or in inclusive natural settings;<sup>73</sup>
- Parents object to the fact that the service delivery statement does not specify precisely where in School building Student would receive his services;
- As Student is able to manage his behaviors, he is being gradually re-introduced into settings where there are other students (i.e., as of 12/19/2012, Student was able to attend the first through third periods in a classroom having one or more students for 10 minutes);<sup>74</sup> and
- Given Student’s behavioral and functional needs, the service delivery statement in the current IEP is appropriate.<sup>75</sup>

**28. Allegation #1(h) – Contrary to Student’s needs, the current IEP fails to include a functional independent living skill goal.** Specific findings are as follows:

- Since 2007, Private BCBA has been coming to the family home every week in order to: work on Student’s life skills (e.g., tooth brushing, hand washing, utensil use, walking safely), address Student’s behaviors as they arise, and train Mother in behavioral techniques;<sup>76</sup>
- Given the credible information in the Record, Student has been and continues to receive life-skills training, including tooth brushing skills, from Private BCBA;
- The current IEP includes a “life-skills” goal which provides “Life Skills: By November 29, 2013, Student will increase [his] self-care skills as measured by following a three-step picture process with no more than three prompts in order to be prepared for semi-independent living”;<sup>77</sup>

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<sup>71</sup> Exhibit 4, pgs. 7-8,

<sup>72</sup> *Id.*, pgs. 22-25.

<sup>73</sup> *Id.*, pg. 22.

<sup>74</sup> *Id.*, pg. 11.

<sup>75</sup> *Id.*, pgs. 4, 8, 11-12, 22-23.

<sup>76</sup> Interviews of Mother and Private BCBA. At first Private BCBA came for two hours, twice a week but currently, she comes once a week for two hours.

<sup>77</sup> Exhibit 4, pg. 18.



- On December 5, 2012, Parents emailed 16 objections about the current IEP as it had been developed to that date;<sup>78</sup>
- The District responded in writing to each and every Parental objection;
- Parents' objections and the District's responses are listed in the current IEP;<sup>79</sup>
- In the response, the District also noted that:

The IEP Team discussed replacing Student's tooth-brushing goal with a goal addressing his ability to follow a three step process for a non-preferred task. The team will use hand washing and tooth brushing activities to address this goal. Parent disagrees and wants to retain the tooth brushing goal. The school team feels teaching a three-step process for a non-preferred task is more educationally relevant in helping teach Student the tiered access skills he needs to achieve non-preferred tasks;<sup>80</sup>

- Given the credible information in the Record, the IEP Team discussed the appropriateness of including a tooth-brushing goal in the IEP and considered Parents' point of view; and
- After considering Parents' desires, the IEP Team determined that although tooth brushing and hand washing activities would be worked on at school, it was more appropriate that the *goal* address teaching Student to follow a three-step process for a non-preferred task.<sup>81</sup>

29. **Allegation #2 – Change in placement in February 2012.** Specific findings are as follows:

- Student's placement under the May 2011 IEP was instruction in 4-5 general education classes and instruction in the ILC for individualized Math, Language Arts and other goal related needs;<sup>82</sup>
- A meeting was held on February 13, 2012 which was attended by Parents, Principal, Case Manager, School Psychologist and Private BCBA;
- During the meeting, the parties discussed Student's escalating aggressive behaviors;
- It was agreed that it was appropriate to remove Student from all general education classes except P.E. with attempts to reintegrate him into those classes as Student's behaviors improved;
- All other class work was delivered in the ILC classroom;<sup>83</sup>

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<sup>78</sup> The final IEP meeting concerning the current IEP was conducted on December 19, 2012.

<sup>79</sup> Exhibit 4, pgs. 25-28.

<sup>80</sup> *Id.*, pg. 28.

<sup>81</sup> *Id.* (Emphasis added).

<sup>82</sup> Exhibit 1, pg. 12.

<sup>83</sup> FF #7 and Exhibit W.

- All attempts to reintegrate Student into general education classes were unsuccessful;<sup>84</sup>
- Because Parents were fully involved in the placement discussions and decision, the change of placement was not a unilateral change by the District;
- The May 2011 IEP was not amended to reflect these placement agreements;
- The IEP Team was not asked to reconvene to discuss the change in placement; and
- Although Parents participated in the discussions and decision, they were not supplied with PWN in advance of the change of placement.<sup>85</sup>

30. **Allegation #3 - Change in placement on May 7, 2012.** Specific findings are as follows:

- In an effort to stop Student's increasingly aggressive behaviors, during the week of May 7, 2012, the District initiated an immediate schedule change to address those safety concerns;
- As a result, Student was removed from the ILC classroom due to his fixation on pulling off the glasses and pulling the hair of a medically fragile classmate;
- Student began receiving all services and instruction on a 1 to 1 basis from Paras in School locations separate from all other students;<sup>86</sup>
- An IEP meeting was not conducted prior to the change in placement;
- It is unclear from the Record whether Parents were aware that Student had been removed from ILC;
- There is nothing in the Record to suggest that Parents received PWN of the change in placement;
- An IEP meeting, attended by Mother, was convened on May 16, 2012;<sup>87</sup> and
- As a result of that meeting, the May 2012 IEP was drafted and implemented on May 17, 2012; and
- The May 2012 IEP included the removal from all general education classes except P.E. and removal from ILC classroom.<sup>88</sup>

31. **Allegation #4 – A change of placement occurred on August 16, 2012 without PWN.**

The specific findings are as follows:

- The 2012-2013 school year began August 16, 2012;<sup>89</sup>
- The May 2012 IEP supplied Parents with PWN of the change in placement;<sup>90</sup>

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<sup>84</sup> Exhibit Y pgs. 6-20.

<sup>85</sup> Interviews of Mother and Case Manager. Exhibits O, pgs. 1-2, U, W and 25, pg. 3.

<sup>86</sup> FF #8.

<sup>87</sup> Exhibit 12.

<sup>88</sup> Exhibit 2, pg. 12.

<sup>89</sup> Exhibit 19.

- Given the credible information in the Record, the May 2012 IEP remained in effect on August 16, 2012; and
- No change of placement occurred on August 16, 2012.<sup>91</sup>

32. **Allegation #5 - Appropriateness of the November 29, 2012 BSP.** The specific findings are as follows:

- Parents alleged that the November 29, 2012 BSP was inappropriate because a Functional Behavior Analysis (FBA) was not done in advance of the BSP;
- Based on discussions she has had with Private BCBA, Mother does not believe that the District staff know how to help Student improve (i.e., decrease) his aggressive behaviors;<sup>92</sup>
- Private BCBA does not believe that: the BSP conforms with her Applied Behavioral Analysis (ABA) training or is descriptive enough for Paras to follow and, most importantly, she is concerned that the Paras do not have specific ABA training;<sup>93</sup>
- The District argued that an FBA had been conducted although no formal report was generated;<sup>94</sup>
- The IEP (i.e., the August 2012 amendment to the May 2012 IEP) and BSP were being revisited in conjunction with Student's triennial evaluation;<sup>95</sup>
- The BSP is summarized below:

**i) Behavior of concern:** Inappropriate physical interaction with peers and teachers (e.g., kicking, pulling hair, climbing on top [of furniture], hitting);

**Antecedents/Triggers (i.e., what happens immediately before/triggers the behavior):** Attempt to interact with peers, increased environmental distractions (noise, large number of people around), unstructured times (lunch, recess), times when Student does not have a role or expectation to complete, transitions, previous pattern of response with that person.

**Function/Outcomes (i.e., what seems to be the function/motivation of the behavior):** Get communication, get peer recognition, get sensory need met.

**Alternate Behavior (i.e., what alternate/replacement behavior will the student learn):** To communicate needs through talker vs. physical contact. To initiate social exchange using appropriate physical contact with peers. To rewind and repeat when

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<sup>90</sup> Exhibit 2, pgs. 4 and 11-12.

<sup>91</sup> Exhibit 2.

<sup>92</sup> Interview of Mother. Imagine, the state Children's Extensive Support Medicaid Waiver program, contracts with Private BCBA's employer to provide various services (e.g., living skill training, aides, behavior management training) in the home.

<sup>93</sup> Interview of Private BCBA.

<sup>94</sup> Response, pg. 7.

<sup>95</sup> Exhibit 4, pg. 1 and Exhibit 23.

aggressive behavior has occurred. Stopping, showing student an alternate way to meet his needs or use his talker and then move through the interaction again w/a successful outcome.

**Consequences and De-escalation (i.e., approach team will use to address the behaviors):** Verbal and visual cues and prompting – use first \_\_\_\_, then \_\_\_\_ 1:1 instruction – redirect to talker. Predictable daily routines – picture cues for clear, consistent expectations and consequences, visual schedule, picture cues for transitions. Change environmental setting and routine to ensure safety of Student and others. Trained staff will use CPI de-escalation strategies.

**Progress Monitoring (i.e., what data will team collect to monitor progress):** Incident count of inappropriate physical contact.

ii) **Behavior of concern:** Difficulty participating in non-desired task or following adult directions upon 2<sup>nd</sup> prompt.

**Antecedents/Triggers (i.e., what happens immediately before/triggers the behavior):** Seeking a desired object or activity, undesired task, participating in or preoccupation with his restricted or repetitive interest (shadow play, reflections).

**Function/Outcomes (i.e., what seems to be the function/motivation of the behavior):** Avoid non-preferred task, get preferred task or object, escape task.

**Alternate Behavior (i.e., what alternate/replacement behavior will the student learn):** Student will participate in non-desired tasks with visual prompts and reminders of high frequency incentive. Both tasks will be modeled and practiced with adults as they naturally occur throughout the day.

**Consequences and De-escalation (i.e., approach team will use to address the behaviors):** Verbal and visual cues and prompting – use first \_\_\_\_, then \_\_\_\_ 1:1 instruction – redirect to talker. Predictable daily routines – picture cues for clear, consistent expectations and consequences, visual schedule, picture cues for transitions. Change environmental setting and routine to ensure safety of Student and others. Trained staff will use CPI de-escalation strategies.

**Progress Monitoring (i.e., what data will team collect to monitor progress):** number of refusal(s) of work counted.<sup>96</sup>

- The four corners of the BSP incorporate FBA information (i.e., the antecedents/triggers occurring before the behavior and the suspected functions/motivations for the behavior) as to each inappropriate behavior;<sup>97</sup>
- While the November 29, 2012 BSP was in effect, Student demonstrated progress in decreasing the number of inappropriate behaviors;<sup>98</sup> and

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<sup>96</sup> Exhibit 23, pgs. 1-2.

<sup>97</sup> *Id.*

<sup>98</sup> Interview of Mother. Exhibits G, AA, CC and EE and FF #20.

- Given the credible evidence in the Record, the November 29, 2012 BSP was appropriate.

33. **Allegation #6 - September 26, 2012 meeting.** The specific findings are as follows:

- Parents were not invited to attend a meeting that was conducted by District staff on September 26, 2012;
- Parents allege that, because the purpose of the meeting was to discuss Student’s “progress, program and placement,” they should have been invited to the meeting;<sup>99</sup>
- Given the credible information in the Record, the September 26, 2012 meeting was not an IEP Team meeting to discuss Student’s IEP or his placement; and
- Instead, the purpose of the meeting was to discuss effective teaching methodologies and the coordination of services.<sup>100</sup>

34. **Allegation #7 - Matters discussed in conjunction with the current IEP.** The specific findings are as follows:

- Parents alleged that “elopement” was not discussed in the IEP meetings and, therefore, it was inappropriate to include in the statement “There are no current concerns with elopement” in the current IEP;<sup>101</sup>
- The District argued that because “elopement” was not discussed during the nine hours of IEP meetings, it was not inappropriate to note in the IEP under present levels of performance that “There are no current concerns with elopement”;
- For the past 12 months Student has had a 1:1 Para throughout the school day;
- The Record indicates that, during the past 12 months, District staff have worked extensively with Student to ensure that he asks for permission to leave a classroom and that he does not run to destinations *within the School*;<sup>102</sup>
- However, the Record does not contain any evidence that “elopement” (i.e., running away from School property) was discussed by the IEP Team; and
- Given the credible information in the Record, including the current IEP, there do not appear to be any current concerns about elopement.<sup>103</sup>

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<sup>99</sup> Complaint, pg. 9.

<sup>100</sup> Exhibit I, pgs. 1 and 3.

<sup>101</sup> Exhibit 4, pg. 11. In their Reply, Parents withdrew their claims concerning “restraint” and “break space.”

<sup>102</sup> See May 2011 IEP goals, Exhibit 1, pgs. 5 and 8; May 2012 IEP goal, Exhibit 2, pg. 8; and August 30, 2012 amendment to May 2012 IEP goal, Exhibit 3, pg. 6; and current IEP, pg. 23 (Emphasis added).

<sup>103</sup> Exhibit 4.

35. **Allegation #8 – The current IEP placement was predetermined.** The specific findings are as follows:

- Mother alleged that an October 4, 2012 email from Behavior Specialist to Special Education Director demonstrated that the District’s predetermined Student’s placement;<sup>104</sup>
- In the email, Behavior Specialist sought clarity concerning Mother’s recent email advising that [Mother] wanted the IEP to reflect that Parents disagreed with the placement. Behavior Specialist then inquired “I wanted to make sure we are all in agreement that . . . the IEP team *at this time* is not stating that they cannot meet [Student’s] needs right?”;<sup>105</sup>
- In a reply the same day, Special Education Director clarified the process noting “*Parents might state that they do not believe that the offering of placement in the ILC at School is appropriate and that they request Private School placement. That information would be reported in the IEP . . . along with whatever the District’s recommended placement is determined to be.* This information would also be documented in the PWN . . .”<sup>106</sup>
- Given the credible information in the Record, the email exchange does not provide evidence of predetermination by the District;
- In discussing placement at Private School, Parents argued during the December 19, 2012 IEP meeting that, in the past, other students in the District had been placed-out-of district;<sup>107</sup>
- Parents claimed that, in reply, Principal stated “the District is no longer placing kids out-of-district;”<sup>108</sup>
- Conversely, Principal recalled that he said “It is my understanding that the District is not placing out of district as long as we are meeting the needs of the students in the school” or words to that effect;<sup>109</sup>
- The SCO finds that it is more likely than not that Principal’s recollection of the December 19, 2012 exchange is accurate;
- This finding is buttressed by the fact that Parents’ Attorney attended all three of the IEP meetings, including the December 19, 2012 meeting, yet nothing in the Record suggests that Private Attorney made mention of the Principal’s alleged statement in letters to District’s legal counsel;<sup>110</sup>

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<sup>104</sup> Interview of Mother.

<sup>105</sup> Exhibit S, pg. 1 (Emphasis added).

<sup>106</sup> *Id.* (Emphasis added).

<sup>107</sup> Interviews of Mother and Principal.

<sup>108</sup> Interview of Mother and Complaint, pg. 10.

<sup>109</sup> Interview of Principal.

<sup>110</sup> Exhibits 14-16.

- Parents also alleged that the District’s predetermination was evidenced by its refusal to consider placement at an out-of-district school (i.e., Private School),<sup>111</sup>
- Parents felt that Student’s *current placement at School was more restrictive than necessary*,<sup>112</sup>
- Instead, Parents believed that placement at a smaller, specialized school using autism-specific supports and ABA instruction and enough staff support to keep Student and others safe at all times (i.e., Private School) was the appropriate placement;<sup>113</sup>
- However, Private School serves only children with developmental disabilities, including children with Autism Spectrum Disorder and, therefore, placement in Private School would be *more restrictive* since Student would never have the ability to interact with non-disabled students either inside or outside of a general education classroom;<sup>114</sup>
- Per the PWN in the IEP, the placement options discussed by the IEP Team during the November 29, 2012 meeting were:
  - i) At least 80% in general education (Team determined this would not provide Student with enough support at this time);
  - ii) 40-70% in general education (Team determined this would not provide Student with enough support at this time);
  - iii) *Less than 40% in general education (Team selected)*;
  - iv) Private School (Rejected because the Team felt Students current placement and programming were appropriate),<sup>115</sup>
- The IEP Team determined that the placement (i.e., less than 40% in general education) and 1:1 programming outside of the general education and ILC classrooms were appropriate;
- Parents disagreed with the placement and stated again that a separate school would be the appropriate placement;<sup>116</sup> and
- Given the credible evidence in the Record, the IEP Team discussed and considered a continuum of alternative placement options, including placement at Private School.

### **CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact (FF), the SCO enters the following CONCLUSIONS OF LAW:

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<sup>111</sup> Interview of Mother.

<sup>112</sup> Id., and Exhibit #4, pgs. 24-25.

<sup>113</sup> Exhibit 4, pgs. 24-25.

<sup>114</sup> Consultation with CDE autism consultant Melinda Graham.

<sup>115</sup> Exhibit 4, pg. 24 (Emphasis added).

<sup>116</sup> Id. pg. 25

36. In developing an IEP, the IEP Team must consider:

- (i) The strengths of the child;
- (ii) The concerns of the parents;
- (iii) The results of the initial or most recent evaluation of the child; and
- (iv) The academic, developmental, and functional needs of the child.

Section 300.324(a)(1)(i)-(iv). Additionally, the IEP Team must consider special factors:

- (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

...

Section 300.324(a)(2)(i).

37. **Allegation #1(a) – Inappropriate IEPs and BSPs caused Student's aggressive behaviors between January 11, 2012 and January 11, 2013.** Student's aggressive behaviors and inability to follow directions impeded Student's learning as well as the learning of other students. (FF #s 5-9, 14, 16-17, and 19-21). The IEP Team sought to address these behaviors by implementing positive behavioral supports and interventions in BSPs. As Student's aggressive behaviors increased, positive behavior supports and interventions were provided in an increasingly more structured School environment. As a result, although Student's aggressive behaviors initially increased, since November 2012 those behaviors have decreased substantially. There is no evidence that Student's aggressive behaviors were caused by inappropriate IEPs or BSPs. (FF #21). The IEPs and BSPs were consistent with § 300.324(a)(1)(i)-(iv) and (2)(i). There being no violation, no remedy is ordered.

38. The IEPs and BSPs developed by the IEP Team and in effect between January 11, 2012 and January 11, 2013 considered the concerns of Parents, the needs of Student and the recommendations of Private BCBA and JFK Evaluator. (FF #s 4-6, 9, 17, and 19-21). In formulating the IEPs and BSPs, the IEP Team drew from a variety of sources, including Parents' concerns, Student's needs, consultation with Private BCBA, consultation with District Behavior Specialist as well as consideration and adoption of many of the JFK Evaluator's recommendations. The IEPs and BSPs were appropriate and were implemented with consistency and fidelity. There is nothing in the Record to support Parents' claim that inappropriate IEPs or BSPs caused Student's aggressive behaviors. (FF #21). There being no violation, no remedy is ordered.

39. Under the IDEA, paraprofessionals who are appropriately trained and supervised are allowed to assist in the provision of special education and related services. § 300.156(b)(2)(iii). In Colorado, each administrative unit, here the District, determines the qualifications and competencies required for paraprofessionals. Rule 3.04(1)(e).



40. **Allegation #1(b) - Appropriateness of Paras training and supervision.** All Paras who worked with Student between January 11, 2012 and January 11, 2013 were very experienced and appropriately trained and supervised. (FF #22). There being no violation, no remedy is ordered.

41. The IDEA does not define the term “placement.” However, the terms “placement” and “educational placement” are used interchangeably to mean the provision of special education and related services rather than a specific location, specific classroom or specific school. A “placement” is a *point along the child’s continuum of placement options*. Conversely, a “location” is the *physical location* where the child receives services (such as a particular classroom). (See comments to 2006 IDEA regulations, 71 Fed. Reg. 46588 (Aug. 14, 2006)). Simply put, although the *IEP team determines a child’s placement, the district determines the physical location* where the placement will be provided.

42. Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities. The continuum must:

- 1) Include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and
- 2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

Section 300.115(a)-(b). This continuum of alternative placements is intended to ensure that a child with a disability is served in the least restrictive environment (LRE) in which the child can be successfully educated. (See comments to 2006 IDEA regulations, 71 Fed. Reg. 46,587 (Aug. 14, 2006)).

43. In determining the educational placement of a child with a disability, each public agency must ensure that:

- a) The placement is made in conformity with §§ 300.114 through 300.118 by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options;
- b) The placement is determined at least annually, based on the child’s IEP, and is as close as possible to the child’s home;
- c) Unless the IEP of the child requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- e) The child is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

Section 300.116(a) through (e). In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and nonacademic services, the public agency must ensure that each child with a disability *participates with nondisabled children to the maximum extent appropriate to the needs of that child*. Section 300.117. (Emphasis added).

44. In determining the LRE, each public agency must ensure that:

- i) *To the maximum extent appropriate*, children with disabilities, including children in public or private institutions or other care facilities, are *educated with children who are non-disabled*; and
- ii) Special classes, separate schooling, or other *removal* of children with disabilities *from the regular education environment occurs only 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*.

Section 300.114(a)(2). (Emphasis added).

45. **Allegation #1(c) - Appropriateness of Student's placements between May 7, 2012 and January 11, 2013.** Given Student's escalating aggressive behaviors, it was appropriate for Student to be placed in increasingly more structured environments between May 7, 2012 and January 11, 2013. (FF #s 7-8, 16 and 20-21 and 23). In August 2012, when Student's aggressive behaviors continued, particularly in afternoon school periods, it was appropriate to shorten Student's school day and then slowly reintegrate him into the last three school periods over a period of months. (FF #s 16-17). Given the nature and severity of Student's cognitive and functional needs, as well as the safety of other students, the IEP Team's placements between May 2012 and January 2013 were the LRE and have been appropriate to Student's unique needs. (FF #s 4, 9, 17, 19 and 20-21). There being no violation, no remedy is ordered.

46. An IEP must include a statement of measurable annual goals designed to meet the child's needs resulting from the child's disability and a description of how the child's progress in meeting the goals will be measured. § 300.320(a)(2)-(3). Neither the IDEA nor the ECEA require that the annual goals include measurable short-term objectives. However, if an IEP Team chooses to include short-term objectives, it follows that those short-term objectives must be measurable in order to demonstrate whether the child has made progress in meeting the goal.

47. **Allegation #1(d) - Measurability of social goal.** A social goal was included in Student's May 2012 IEP and the August 2012 amendment to the May 2012 IEP. The social goal included two objectives. Although the first objective was measurable, the second objective was not measurable since it included two types of measurements (i.e., "Student will follow the direction in 3 out of 4 trials 50% of the time"). (FF #24). However, Behavior Specialist had designed an "if

\_\_\_ then \_\_\_” model for the specific purpose of increasing Student’s ability to follow directions and to complete undesired tasks. Using this model, by December 2012, Student had made progress in his ability to follow directions and complete undesired tasks. Consequently, although the second objective was not measurable, Student made progress in his ability to follow directions. (FF #24). The non-measurability of the second objective constituted a violation of § 300.320(a)(2)-(3).

48. Under the IDEA, an IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the child’s needs. § 300.320(a)(2)(i)(A).

49. **Allegation #1(e) - Lack of an academic goal in the May 2012 IEP.** Student’s May 2011 IEP contained seven goals, including an academic goal. However, Student’s aggressive behaviors had escalated to such a level as to put the safety of Student as well as other students and staff at risk. (FF #s 4-8). Therefore, the IEP Team determined that it was appropriate to limit the May 2012 IEP to three goals in order to focus on Student’s behaviors, communication and social (interpersonal) relationships. (FF #9). Student could not benefit from academic goals until his behavior needs concerning aggressive behaviors could be reduced. (FF #s 9 and 25). The lack of an academic goal was a violation of § 300.320(a)(2)(i)(A).

**Allegation #1(f) – Appropriateness of the reduction in school hours in August 2012.** The IEP Team determined that Student’s appropriate placement was in the regular classroom less than 40% of the time. The IEP Team also determined that the LRE was the delivery of services to Student on a 1 to 1 basis, in classrooms and setting (including lunch and recess) separate and apart from other students with the length of the school day to be gradually increased from four periods to seven periods. Parents agreed to the temporary reduction in school hours. The IEP Team made these determinations based on Student’s functional and cognitive needs as well as concerns for the safety of Student and peers. (FF #s 26). It was entirely appropriate for the IEP Team to temporarily reduce Student’s school day while continuing to focus on his ability to successfully function in a structured school setting. The IEP Team decision was consistent with §§ 300.116(a) and 300.114(a)(2)(ii), above. There being no violation, no remedy is ordered.

**Allegation #1(g) – Appropriateness of service delivery statement in the current IEP.** The IEP Team determined that, due to safety concerns, Student would be supplied services (including lunch and recess) on a 1 to 1 basis in classrooms and settings where other students are not present. Parents’ objected to the fact that the service delivery statement did not specify precisely where in School building Student would receive his services. (FF #27). As previously noted, (FF #41), the *IEP team determines a child’s placement while the district determines the physical location* where the placement will be provided. However, nothing in the IDEA or the ECEA requires a District to identify the specific location in the School where services will be delivered. There being no violations, no remedies are ordered. This IEP Team decision was consistent with §§ 300.116(a) and 300.114(a)(2)(ii), above. There being no violation, no remedy is ordered.

50. **Allegation #1(h) – Contrary to Student’s needs, the current IEP fails to include a functional independent living skill goal.** The IEP Team, including Parents, discussed whether it would be appropriate for the IEP to include a specific living skill or, alternatively, whether it would be more effective for a goal to measure “life-skills” by Student’s ability to follow a three-step process. The IEP Team determined that a goal measuring Student’s ability to follow a three-step process was more appropriate although skills such as tooth brushing and hand washing would be worked on at School. (FF #28). Neither the IDEA nor the ECEA require that the annual goals include a tooth brushing or hand washing goal. There being no violation, no remedy is ordered.

51. Changes to an IEP after the annual IEP Team meeting may be made by:

- (i) The entire IEP Team at an IEP Team meeting; or
- (ii) The parents and public agency may agree not to convene an IEP Team meeting and, instead, develop a written document to amend or modify the child’s current IEP.

Section 300.324(a)(4) & (6).

52. Additionally, a reasonable time before a district proposes to change the placement of a child, the district must provide the parents with written notice a reasonable time before the district changes the educational placement of a child. § 300.503(a). The PWN must include the following information:

- (i) A description of the change in placement;
- (ii) An explanation of why the district proposes the change in placement;
- (iii) A description of each evaluation, procedure, assessment, record or report used by the district as a basis for the change in placement;
- (iv) A statement that the parents have procedural safeguard protections and where the procedural safeguards can be obtained;
- (v) Sources that parents can contact to obtain assistance in understanding the PWN;
- (vi) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (vii) A description of other factors relevant to the district’s proposal to change the placement.

Section 300.503(b).

53. **Allegation #2 – The February 2012 change in placement.** A meeting was held on February 13, 2012 which was attended by Parents, Private BCBA and School staff. At the meeting it was agreed that, due to Student’s escalating aggressive behaviors, Student would be removed from all general education classes except P.E. It was also agreed that reintegration into the general education classes would be attempted as Student’s behaviors improved.

Consequently, all classes except P.E. were then delivered by Case Manager or a Para on a 1 to 1 basis in the ILC classroom. All attempts to reintegrate Student in general education classes were unsuccessful. Reintegration into general education classes did not occur. The meeting decision constituted a change in placement. Student continued to receive all of the special education and related services listed in the May 2011 IEP. (FF #29). The District violated § 300.324(a)(4) and (6) since an IEP Team meeting was not convened, nor was a written document developed to modify Student's current IEP. Furthermore, although Parents participated in the meeting and the placement decision, contrary to § 300.503(a) and (b), the District failed to supply Parents with PWN in advance of the change in placement. (FF #29).

54. **Allegation #3 – The May 7, 2012 change in placement.** Student's aggressive behaviors were escalating to such a point as to cause concern for the safety of Students and others. Specifically, Student had a fixation on a medically fragile student in the ILC classroom and made multiple attempts on a daily basis to pull off the glasses or pull the hair of the student. Consequently, the week of May 7, 2012 Student was removed from the ILC classroom where, at the time, he was receiving all special education services except for P.E. Instead, Student was supplied with the IEP services on a 1:1 basis from Paras or Case Manager in School locations separate from all other students. Student's complete and immediate removal from the ILC classroom constituted a change in placement. (FF #s 8 and 30). The District violated § 300.324(a)(6) when it failed to convene an IEP Team meeting. The District also violated § 300.503(a) and (b) when it failed to supply Parents with PWN a reasonable time before the change in placement.

55. The District did convene an IEP Team meeting nine days later, on May 16, 2012. At the meeting, the IEP Team, including Mother, drafted the May 2012 IEP. The new IEP included the change of placement that had been initiated by agreement on February 13, 2012 (FF #s 9 and 29) as well as the District's unilateral change of placement that occurred the week of May 7<sup>th</sup> when Student was no longer allowed to receive services in the ILC classroom. (FF # 30). The May 2012 IEP included PWN which was supplied to Parents a reasonable time prior to the IEP being implemented. (FF # 9).

56. **Allegation #4 – The August 16, 2012 change of placement.** Contrary to Parents' claim, a change of placement did not occur on August 16, 2012 since the May 2012 IEP was still in effect. (FF # 31). The May 2012 IEP provided Parents with PWN of the change in placement. (FF #54, above). There being no violation, no remedy is ordered.

57. Under the IDEA, a manifestation determination must be held within 10 school days after the decision to change a student's placement because of a violation of the district's code of conduct. The parents and relevant members of the IEP Team must determine whether the student's conduct:

- (i) Was a manifestation of the child’s disability (i.e., was caused by, or had a direct and substantial relationship to the child’s disability); or
- (ii) Was the direct result of the district’s failure to implement the IEP.

If the conduct is determined to be a manifestation of the child’s disability, the IEP Team must either:

- (i) Conduct an FBA, unless the district had conducted an FBA before the behavior resulting in the change of placement occurred; and implement a BSP for the child; or
- (ii) If a BSP already has been developed, review the plan, and modify it, as necessary, to address the behavior.

Section 300.530. This is the only place in the IDEA regulations that an FBA is mentioned.

58. **Allegation #5 – Appropriateness of the November 29, 2012 BSP.** On November 29, 2012, Student’s placement was not being changed due to Student violating the District’s code of conduct. § 300.530(5)(e). Instead, the IEP Team was crafting a new IEP and BSP in conjunction with Student’s triennial re-evaluation. (FF #32). Therefore, the District had no duty under the IDEA to conduct an FBA. Furthermore, the November 29, 2012 BSP did incorporate FBA information as to each inappropriate behavior. (FF #32). Because no violation occurred, no remedy is ordered.

59. The IDEA requires that the IEP Team that is responsible for developing, reviewing and revising the child’s IEP include the parent. § 300.322(a)(1). Furthermore, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to (i) the identification, evaluation, and educational placement of a child; and (ii) the provision of FAPE to the child. However, a “meeting” does not include informal or unscheduled conversations involving district personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. Nor does it include preparatory activities that the district personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. § 300.501(b)(1) & (3).

60. **Allegation #6 - The September 26, 2012 meeting.** Parents claim that, because the purpose of the September 26, 2012 meeting was to discuss Student’s “progress, program and placement,” they should have been invited to attend. However, the credible information in the Record indicates that the purpose of the meeting was to discuss teaching methodologies and the coordination of services. It was not to review or revise Student’s IEP. (FF #33). There being no violation, no remedy is ordered.

61. The IDEA does not define the term “elopement.” However, in legal parlance, “elopement” means running away or escaping. Black’s Law Dictionary 560 (8<sup>th</sup> ed. 2004).

62. **Allegation #7 – Matters discussed in conjunction with the current IEP.** Given the credible information in the Record, “elopement,” (e.g., concerns about Student running away or escaping from School), was not discussed in the three IEP meetings conducted in conjunction with the current IEP. (FF # 34). Consequently, the SCO fails to see how the statement in the IEP “[t]here are no current concerns about elopement” constitutes a violation of the IDEA.

63. The IDEA provides that districts must ensure that parents are members of any group that makes decisions concerning their child’s educational placement. § 300.501(c)(1). *See also* § 300.116 (a)(1) (The placement decision is to be made by a group of persons, including the parents, and other persons knowledgeable about the child). Districts must ensure that a continuum of alternative placements (i.e., instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) are available to meet the needs of children with disabilities for special education and related services. § 300.115(a)-(b). Furthermore, Districts are required to consider parents’ suggestions and, to the extent appropriate, to incorporate them into the IEP. *O’Toole v. Olathe Dist. Schools*, 144 F.3d 692, 107 (10th Cir. 1998). Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when the agency presents one placement option at the IEP meeting *and is unwilling to consider others*. (*See Ms. S. ex. rel. G. v. Vashon Island School Dist.*, “A district may not enter an IEP meeting with a ‘take it or leave it’ position.” 337 F.3d 1115, 1131 (9th Cir. 2003). Predetermination of an IEP is a procedural error that hinders the parent’s participation in the IEP process in violation of the IDEA. *H.B. v. Las Virgenes Unified Sch. Dist.*, 52 IDELR 163 (C.D. Cal. 2008).

64. **Allegation #8 – The current IEP placement was predetermined.** Student’s current placement is “less than 40% in general education.” (FF #19). Consistent with that placement, Student receives ILC programming in a structured learning environment at School. Currently, those services are delivered through direct, 1 to 1 instruction, outside of the general education and ILC classrooms. However, the IEP notes that Student is to have access to attending classes in the general education setting “by demonstrating [he] can engage in safe and appropriate behaviors within that environment.” Furthermore, a note in the IEP indicates that, as of December 19, 2012, during first, second and third periods, Student was able to tolerate receiving services in a classroom for short periods of time when one or more other students were also in the classroom. (FF #35). Mother alleged that an October 4, 2012 email from Behavior Specialist to Special Education Director demonstrated that the District predetermined Student’s placement. However, when the email and the Principal’s reply are read in context, the Record simply does not support Parents’ claim. (FF #35).

65. During the December 19, 2012 IEP meeting, Parents’ asked why Student could not be placed out-of-district when, in the past, other students had been given out-of-district placements. Parents alleged that, in reply, Principal had stated “the District is no longer placing kids out-of-district.” However, given the credible information in the Record, it is more likely than not that the Principal actually stated “It is my understanding that the District is not placing

out-of-district as long as we are meeting the needs of the students in the school.” (FF #35). Parents also claimed that the District refused to consider an out-of-district placement but this claim is not supported by the Record. In fact, the District considered a continuum of placement options, including Private School. Parents’ input concerning Private School was considered. However, the IEP Team concluded that Student’s needs could be met at School in a placement that occurred in general education class less than 40% of the time. (FF #35). There being no violation, no remedy is ordered.

66. **Whether Student received FAPE.** Under the IDEA and the ECEA, Colorado’s corresponding rules, students with disabilities have the right to a free appropriate public education (FAPE). § 300.1 and Rule 1.00 .

67. The IDEA defines a FAPE to mean special education and related services that:

- a) Are provided at public expense, under public supervision and direction, and without charge;
- b) Meet the standards of the [Colorado Department of Education];
- c) Include an appropriate preschool, elementary school, or secondary school education; and
- d) Are provided in conformity with an IEP that meets the requirements of

Section 300.17(a)-(d) and Rule 2.19.

68. In assessing whether a district has provided a student with a FAPE, courts follow a two-step process as set forth by the U.S. Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176, 206-207 (1982). First, the court considers whether the district complied with the procedures set forth in the IDEA, including the specific requirements of the IEP. *Garcia v. Board of Educ.*, 520 F.3d 1116, 1125 (10<sup>th</sup> Cir. 2008). Next, the court looks at whether the special education services provided to the student in the IEP are reasonably calculated to enable the child to receive educational benefits. *Id.*

69. Applying the reasoning of *Garcia* to each of the procedural violations discussed above:

- i) **Measurability of social goal.** Because the second objective of the goal was not measurable, the District violated § 300.320(a)(2)-(3). However, by December 2012, using the “if \_\_\_\_ then \_\_\_\_” model Student had increased his ability to complete non desired tasks as well as his ability to follow one-step directions. Consequently, the District’s technical violation did not result in Student being denied a FAPE.
- ii) **Lack of an academic goal.** Failure to include an academic goal in the May 2012 IEP or the August 2012 amendment of the May 2012 IEP constituted violations of 300.320(a)(2)(i). However, Student could not benefit from academics until his



aggressive behaviors had improved. By December 2012, Student showed a measurable decrease in his aggressive behaviors. An academic goal was included in the December 2012 (current) IEP. Consequently, the District's technical violation did not result in Student being denied a FAPE.

**iii) The February change in placement.** The District violated § 300.324(a)(4) and (6) when it failed to convene an IEP meeting or develop a written document to modify Student's May 2011 IEP. It also violated § 300.503(a) and (B) when it failed to supply Parents with PWN a reasonable time before implementing the change of placement. However, Mother attended the February 13, 2012 meeting where the proposed change of placement was discussed. Furthermore, Mother agreed to the change of placement. Therefore, Parents knew of the change in placement. Furthermore, Student continued to receive all of the special education and related services listed in the May 2011 IEP. Consequently, although the District's actions constituted technical violations of §§ 300.324(a)(4) and (6) and 300.503(a) and (b), because Parents agreed to the change of placement and Student continued to receive services, no actual harm resulted. Because no harm resulted, Student was not denied a FAPE.

**iv) The May 7, 2012 change in placement.** Student was fixated on a medically fragile student in the ILC class. Student exhibited aggressive behaviors continuously against the student to the point that the student's safety was at issue. Consequently, during the week of May 7, 2012, Student was removed from the ILC classroom although he continued to receive all of IEP special education and related services on a 1 to 1 basis in an area separate from all other students. The District's actions violated §§ 300.324(a)(6) and 300.503(a) and (b). However, an IEP meeting was convened nine school days later. Mother attended and participated in the crafting of the May 2012 IEP. Consequently, although the District's actions constituted technical violations of §§ 300.324(a)(6) and 300.503(a) and (b), the medically fragile student was protected. Because no harm resulted, Student was not denied a FAPE.

There being no denial of FAPE, no compensatory services are ordered.

### **REMEDIES**

The District has violated the following IDEA requirements:

- Section 300.320(a)(2)-(3);
- Section 300.324(a)(4) and (6); and
- Section 300.503(a) and (b).

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

**1) Develop and implement a Corrective Action Plan (CAP) according to the dates listed below:**

**No later than April 15, 2013**, the District shall submit to the Department a Corrective Action Plan (CAP) that addresses each and every violation noted in this Decision. Furthermore, the CAP must also include specific information on **how School level staff hired subsequent to March 18, 2013** will receive the mandatory training described below. The CAP must, at a minimum, provide for the following:

- a. **By April 15, 2013**, submission of all revised District written policies, procedures, forms, notices and website information, consistent with the IDEA and this Decision.
- b. **By April 22, 2013**, submission of the name and title of each proposed trainer and complete copies of all proposed agendas and written training materials consistent with the IDEA and this Decision. (NOTE: CDE stands ready, willing and able to supply technical assistance in the form of trainers and training materials for each of the mandated trainings described below.)
- c. **By May 24, 2013**, conduct training concerning the IDEA regulations that were violated and, at a minimum, training on the proper procedures for amending an IEP and providing PWN.

**The District's training shall include all School staff and providers (e.g., Special Education Teachers, Case Managers, SLPs) who are or may be responsible for drafting IEPs or supplying PWN.**

- d. **By May 31, 2013**, submission of evidence that such training has occurred (i.e., complete copies of training schedule(s), agenda(s), curriculum/training materials, the name and title of each trainer, and legible attendee sign-in sheets which lists each attendee's printed name and job title).

Please submit the CAP and all other documentation detailed above to the Department as follows:

Colorado Department of Education  
Exceptional Student Services Unit  
Attn.: Joyce Thiessen-Barrett, Senior Consultant  
1560 Broadway, Suite 1175  
Denver, CO 80202-5149

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

The enclosed sample template provides suggested formats for the CAP and includes sections for "improvement activities" and "evidence of implementation of change."

70.

### **CONCLUSION**

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

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

Dated this 14th day of March, 2013.

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Jeanine M. Pow, Esq.  
State Complaints Officer

## Appendix A

### Parents' Complaint, pages 1 through 14.

- Exhibit A: 08/30/2012 amendment to 5/2012 IEP
- Exhibit B: 05/2011 IEP (including three quarterly progress reports)
- Exhibit C: 05/07/2012 (4<sup>th</sup> quarter) progress reports
- Exhibit D: 05/01/2010 Triennial Evaluation Report
- Exhibit E: 11/29/2012 (Partial) Draft IEP
- Exhibit F: 12/2012 (current) IEP (including BSP)
- Exhibit G: Behavior logs 5/8/2012 to 11/9/2012
- Exhibit H: Emails between Parents and District 11/16/2012 to 1/7/2013
- Exhibit I: Emails re 9/26/2012 meeting w/o Parents
- Exhibit J: Emails of 3/19/2011 and 3/9/2012 re how to address behaviors
- Exhibit K: 9/4/12 string emails re recap of meetings the previous week re Student
- Exhibit L: 09/28/2012 email to District staff re shortened school day
- Exhibit M: 08/24/2012 JFK Psychological Evaluation
- Exhibit N: Undated letter from Private BCBA
- Exhibit O: 02/09/2012 and 8/17/2012 emails re Student's behavior in ILC
- Exhibit P: 12/10/2012 letter from Parents' attorney to District's legal counsel
- Exhibit Q: School Function Assessment Scores 2<sup>nd</sup>, 5<sup>th</sup> and 8<sup>th</sup> grades and CSAPA scores 4<sup>th</sup>, -7<sup>th</sup> grade
- Exhibit R: 03/09/2011 email from Mother to ILC Teacher
- Exhibit S: 10/05/2012 string emails re: Letter from [Private School]

### District's Response, pages 1 through 9.

- Exhibit 1: 05/2011 IEP
- Exhibit 2: 05/2012 IEP
- Exhibit 3: 08/12 amendment to 5/2012 IEP
- Exhibit 4: 12/2012 (current) IEP
- Exhibit 5: 05/2/2011 (annual review) Notice of Meeting
- Exhibit 6: 05/03/2012 (annual review) Notice of Meeting
- Exhibit 7: 8/28/2012 (annual review) Notice of Meeting
- Exhibit 8: 10/11/2012 (annual review) Notice of Meeting
- Exhibit 9: 11/08/2012 (triennial review) Notice of Meeting
- Exhibit 10: 12/05/2012 (triennial review) Notice of Meeting
- Exhibit 11: 05/18/2011 IEP Meeting Participants
- Exhibit 12: 05/16/2012 IEP Meeting Participants
- Exhibit 13: 08/30/2012 IEP Meeting Participants
- Exhibit 14: 10/23/2012 IEP Meeting Participants
- Exhibit 15: 11/29/2012 IEP Meeting Participants
- Exhibit 16: 12/19/2012 IEP Meeting Participants

Exhibit 17: Progress Reports (10/20/2011, 03/08/2012, 05/07/2012 and 10/12/2012)  
Exhibit 18: 2011-2012 District Calendar  
Exhibit 19: 2012-2013 District Calendar  
Exhibit 20: List of District staff w/knowledge of facts relevant to Complaint  
Exhibit 21: District training records for Paras who worked with Student during Complaint time period.  
Exhibit 22: School training materials (meeting notes & agendas) for Paras who worked with Student during the Complaint time period.  
Exhibit 23: 11/29/2012 BSP.  
Exhibit 24: Information used to complete Student's FBA.  
Exhibit 25: Daily documentation re efforts to include Student in general education classrooms, 02/12 through 05/2012.

**District's Supplemental Response, pgs. 1-10.**

**Additional Documentation:**

Exhibit 26: 9/25/2012 City Parks & Recreation Behavior Plan  
Exhibit 27: 2/27/2013 email from Private BCBA re: dates of consultation w/School & Student observations  
Exhibit 28: 2011-12 and 2012-13 Para Training Documentation  
Exhibit 29: February 2013 data sheets and behavioral data

**Parents' Reply, pages 1 through 5.**

Exhibit T: 01/18/2013 email to Case Manager re visit at School  
Exhibit U: 02/13/2012 email to Case Manager re Student today  
Exhibit V: 10/16/2012 Letter from Parent's attorney to District's legal counsel  
Exhibit W: 02/13/2012 Meeting notes of Private BCBA  
Exhibit X: 01/24/2012 Meeting notes of Case Manager  
Exhibit Y: 11/7/2011 to 5/15/2012 Student Classroom Behavior Log  
Exhibit Z: 08/16/2011 to 5/11/2012

**Additional Documentation:**

Exhibit AA: Copy of 2012-2013 Back & Forth Logs through 2/14/2013  
Exhibit BB: Behavior data sheets pertaining to 2011-2012 SY  
Exhibit CC: Behavior data sheets pertaining to 2012-2013 SY  
Exhibit DD: 01/10/2013 string emails Re: Serious Safety concerns at SHMS  
Exhibit EE: 02/01/2013 behavioral data received from Case Manager  
Exhibit FF: 01/06/2012 Private BCBA's Treatment Plan.

**Interviews with:**

Mother on 01/11/2013, 2/14/2013 and 3/4/2013  
Father on 02/14/2013

Para #s 1-6 on 02/20/2013

District Behavior Specialist on 02/22/2013

Principal and Case Manager on 2/25/2013 and 3/5/2013

Recreation Coordinator on 2/26/2013

Private BCBA on 2/27/2013