

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

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**State-Level Complaint 2016:530**  
**Adams 27 J School District**  
**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on December 22, 2016, by a family friend and the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup>

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

**COMPLAINT ALLEGATIONS**

1. Whether, from January 2016 to the present, the School District violated Student's IEP and denied Student a free appropriate public education ("FAPE") by failing to properly implement her behavior intervention plan ("BIP") including failing to collect appropriate data relating to Student's instances of aggression and failing to conduct an appropriate functional behavioral assessment("FBA");
2. Whether, during the 2016-2017 school year, the School District has violated Student's IEP with respect to Student's special transportation needs, specifically the use of a harness while riding the school bus;
3. Whether the School District has denied Student a FAPE by failing to educate her in an appropriate school placement with appropriately trained staff suitable to meet her individual needs.

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

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

## **FINDINGS OF FACT**

After a thorough and careful analysis of the entire record,<sup>3</sup> the SCO makes the following FINDINGS:

1. At all times relevant to the Complaint, Student resided with Parents within the District's boundaries. Student is in the [grade level] and has attended the District's school since Kindergarten.<sup>4</sup>
2. Student has numerous and significant disabilities that impact her ability to learn. She has been diagnosed with autism, Down syndrome and intellectual disability. Student has been identified as a student with a disability, eligible for special education and related services under the IDEA and ECEA. Her disabilities as they pertain to her eligibility for special education services include autism, intellectual disability<sup>5</sup>, speech or language impairment, visual impairment and multiple disabilities. In addition, she exhibits significant and challenging behaviors, is non-verbal and requires feeding through a gestational g-tube. All of Student's disabilities are significant and in combination present a complex profile. Lastly, Student's medical issues have a significant impact on her schooling due to the resulting absences and/or increased behaviors.<sup>6</sup>
3. Over the last year, District conducted two reevaluations for Student, both of which included a Behavioral Intervention Plan (BIP).<sup>7</sup>

### **Behavioral Intervention Plan**

4. By all accounts, Student's behavior impacts her ability to receive academic instruction and impedes her learning. Family and school staff report that Student exhibits self-injurious behavior, aggression towards staff and aggression towards others when she is attempting to avoid a task or she is not feeling well. These behaviors impact all aspects of her school day, including her feeding times, access to academic time and access to her service providers. There have been instances both last school year and this school year when Student's behavior was so severe that the school contacted Parent

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<sup>3</sup> The appendix, attached and incorporated by reference, details the entire record.

<sup>4</sup> Interview with Parent.

<sup>5</sup> Student's IEP identified her under the "significant limited intellectual capacity" category, but the 2014 amendments to the Colorado ECEA rules changed that category to "intellectual disability." See ECEA Rule 2.08(4).

<sup>6</sup> Complaint, Interview with Parent, School Staff, Response, Exhibit C.

<sup>7</sup> Interview with Parent, Private BCaBA, and School Staff; Response.

requesting that Student be picked up. Staff report that Student's behaviors have increased in frequency and intensity this school year.<sup>8</sup>

5. Over the course of the year (January 2016 through present), Student has had three BIPs to address her episodes of aggression. While the most recent BIP is much more detailed and precise than the one developed in January 2016, all of the BIPs lack key components making them ineffective to address Student's behavioral needs.<sup>9</sup>
6. The January 2016 BIP was based on an FBA completed in January 2015. The FBA itself is problematic in that it is a year old and does not address many of the behaviors listed in the January 2016 evaluations, *e.g.*, hitting, biting, pushing and pulling hair. Additionally, the behaviors listed are not observable or measurable. For example, there is no guidance as to how aggression is defined (*i.e.*, is it limited to scratching or does it include other forms of aggression? are attempts at aggression included with the term?), or to what degree Student needs to exhibit the behavior for it to be counted. Among the other deficiencies in the 2016 BIP is its failure to provide clear steps for staff to take when Student's behavior becomes aggressive towards self or others. The BIP outlines steps for staff to take to try to prevent Student from exhibiting aggression, but provides no guidance on what to do once Student's behavior has already escalated to the point of aggression. The method identified to assess effectiveness of the strategies outlined in the BIP was to monitor "frequency of aggressive behavior."<sup>10</sup>
7. It also is unclear exactly what Student's behavior looked like the second half of last year. According to staff reports, Student's aggressive behavior could last anywhere from 2 to 10 minutes an episode and she could have anywhere from 0 to 10 episodes a day depending on if it was a "good" day or a "bad" day. The monitoring data provided by District does not clarify the issue further but rather seems to contradict staff's perception of the frequency of the behaviors during any given day. For example, the data for the month of January 2016 shows that Student either had only two "behaviors" the entire month or had an average of two "behaviors" a day when she was present. This would seem to indicate that Student's behaviors were significantly less frequent than what was perceived by staff.<sup>11</sup> Overall, the reports provided are incomplete and inconsistent, *e.g.* the data for the months of February and March are missing. Additionally and more importantly, a number of staff admitted that from January 2016 through September 2016, frequency data was not collected as contemplated by the

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<sup>8</sup> Response and Interviews with Parent, Private BCaBA, SSN Paraprofessional 1, SSN Paraprofessional 2, SSN Teacher.

<sup>9</sup> Response and Exhibit C.

<sup>10</sup> Response and Exhibit C.

<sup>11</sup> Similarly, District's perception of Student's attendance is not supported by the data. The SCO notes that District's perception that Student's attendance has significantly improved this year from last year is contradicted by the documentation. Attendance records from the 2015-2016 school year show that for 2<sup>nd</sup> and 3<sup>rd</sup> quarter Student was absent a total of 70 periods (each period being a ½ day) and for the 2016-2017 school year for the 1<sup>st</sup> and 2<sup>nd</sup> quarter Student has been absent a total of 84 periods. Exhibit C pgs 150-158.

January 2016 BIP. By all accounts, there was not improvement of Student's behavior over the course of the last half of the year. As a result of failing to take and review data, School Staff were not able to make necessary changes in order to address the lack of progress. Accordingly, the SCO finds that School District failed to properly develop or implement her BIP.<sup>12</sup>

8. On September 28, 2016, a meeting was held to address concerns brought up by Parent and Student's private BCaBA regarding Student's lack of progress on her goals, Student's behaviors, the BIP not being properly implemented, and concerns about Student's current and future placement. The team agreed to conduct a re-evaluation and as part of that re-evaluation, the District completed an updated FBA and BIP. Due to the severity of Student's behaviors, a Crisis Intervention Plan was also developed.<sup>13</sup> Although the District developed a much more precise and usable FBA, it still lacks some of the specificity necessary to make it a functional document for all staff members. For example, the FBA does not include all of self-injurious behaviors<sup>14</sup> nor does it include all the types of aggressions towards staff.<sup>15</sup> Given the frequency and intensity of her behaviors, it is necessary to have a complete picture of her behaviors and their impact on her school day.
9. While the December 2016 BIP is much more detailed as a result of the October FBA being more fully developed, it too lacks meaningful response to Student's behavior that occurs on average of 80 "behaviors" per day during the months these plans were in effect.<sup>16</sup> The BIPs section/category dealing with physical discomfort is the only place that provides staff with steps to take when Student is displaying aggression. However, nowhere in that section does it discuss how to address this as a possible basis for the aggression. Furthermore, the Crisis Intervention Plan does not provide specific steps and strategies to address Student's aggression rather it provides a number of options with no real direction as to how or when to offer those options. Lastly, these "techniques," which include calling parent, are problematic as they are allowing Student to "avoid" or "escape" unwanted activities, thereby potentially reinforcing negative behaviors.<sup>17</sup>
10. Since the September meeting, the District has made efforts to collect frequency data but it has been a work in progress to develop appropriate definitions of the behaviors and a methodology for collecting the data and to train staff appropriately. For example,

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<sup>12</sup> Response and Exhibit C; Interviews with SSN Teacher, District BCBA, SSN Paraprofessional 1 and SSN Paraprofessional 2

<sup>13</sup> Complaint, Response and Exhibit C. Interviews with Parent, Private BCaBA, SPED Director, Sped Coordinator and SSN Teacher.

<sup>14</sup> The record reflects and a number of staff report that Student often hits/bangs her head against surfaces.

<sup>15</sup> The record reflects and a number of staff report that Student pinches and scratches.

<sup>16</sup> The months of November and December 2016.

<sup>17</sup> Response, Exhibit A and Exhibit C. Interviews with Parent, SSN Teacher, SSN Paraprofessional #1 and Paraprofessional #2.

less than one month into the collection of data, staff used a different technique for collecting data for approximately one week. A little over one month later, the methodology for collecting data was once again changed in order to further define the behaviors and to clarify a more usable means for staff to collect the data.<sup>18</sup> Notably, the target goal for daily behaviors remained the same at 50.<sup>19</sup>

11. What is clear is that when the FBA was completed in January 2015, it was documented that Student was exhibiting aggressive behaviors towards self and others 1-2 times a day in each category. In the FBA completed in October of 2016, Student was documented as exhibiting behaviors towards self 10-30 times per day and aggression towards staff 5-15 times per day. This is a significant increase.<sup>20</sup> In fact, based on the record and on interviews, Student's behaviors have escalated to a point that staff report they are finding it difficult to meet her needs. Additionally, service providers are often prevented from providing services due to Student's behaviors.<sup>21</sup> The SCO finds that the BIPs as written and as implemented have not been successful in addressing Student's aggression. Based on the above, on the record and interviews, the SCO finds that the BIP in place from January 2016 through October 2016 was based upon an inappropriate FBA and did not address Student's aggression resulting in a denial of FAPE. The SCO further finds that the BIP in place from December to present, while much improved and detailed, does not address Student's aggression resulting in a denial of FAPE.<sup>22</sup>

### **January 2016 – September 2016**

12. With respect to Student's IEP and placement, Mother alleges that School is failing to educate Student in an appropriate school placement with appropriately trained staff. As the Student's IEP is the plan that dictates Student's educational setting and the services Student receives, it is useful to review the IEPs in place during this one year time period. As previously mentioned, Student has had two reevaluations in the last year, one in January 2016 and one in October 2016.
13. The January 2016 IEP provided for Student to receive support for her g-tube feedings, support for toileting, support for transition from place to place in or outside of the

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<sup>18</sup> The staff was initially "tallying" each hit as a behavior. Currently they are tallying each incident as a behavior.

<sup>19</sup> Response, Exhibit B and Exhibit C. Interviews with District BCBA, Current School Psychologist, SSN Teacher, SSN Paraprofessional 1 and Paraprofessional 2 and Sped Director.

<sup>20</sup> SCO notes that many staff members reported that, in addition to absences and medical issues, the increase in behavior can be attributed, in part, to puberty and menstruation cycles. Parent reports that Student is not menstruating and not going through puberty at this time which is confirmed by thyroid monitoring.

<sup>21</sup> Complaint and Exhibit C. Interviews with Parent, Private BCaBA, SSN Teacher, SSN Paraprofessional # 1, SSN Paraprofessional #2, Current School Psychologist, Occupational Therapist, Teacher of the Visually Impaired, District BCBA, and Current Speech Language Pathologist.

<sup>22</sup> Parent reports that since the Christmas Break, she has been called three times to pick up Student due to behaviors.

school building, math and reading provided by a special education teacher, safety support throughout her entire school day, and direct and indirect services from the adaptive physical education teacher, vision specialist, occupational therapist, mental health provider and special education teacher. The IEP contains five goals that are functional in nature and address Student's speech/language needs, access skills, self-care, self-determination and gross motor skills. The IEP, however, completely lacks academic goals<sup>23</sup> and given that the Student takes alternative assessments, lacks benchmarks or short-term goals except for the first goal in the area of Speech/Language.<sup>24</sup>

14. Furthermore, given Student's difficulties with vision and communication, one methodology, the Picture Exchange Communication System (PECS), was documented during the January reevaluation as being one of the more successful communication strategies and increasing its use was discussed and documented. However, based on the record and interviews, the SCO finds that the School did not follow-up, implement or train on this methodology.<sup>25</sup>
15. Additionally, there is no consensus regarding Student's Primary Learning Mode. The January 2016 Literacy Modality Plan identifies visual as Student's primary and tactual/auditory as the secondary. The October 2016 Learning Media Plan identifies recommended multi-sensory as the primary learning and literacy mode and tactual as the secondary. Because Student engages for such brief periods throughout the day, it is essential to have an approach supported by the data and developed and implemented throughout her day by all staff members. Based on interviews and the record, it appears that school staffs have differing opinions regarding her learning modality. As this learning modality was changed, the Teacher for the Visually Impaired reduced her service time from 120 minutes direct and 60 minutes indirect on the January 2016 IEP to only 30 minutes indirect on the most current IEP.<sup>26</sup> The result is a lack of consistency that is necessary for Student given her needs.
16. While the progress data from May 2016 shows Student made adequate progress or met her goals by the end of the 2015/2016 school year, based on the record and interviews Student has not made progress or has made minimal progress since then.<sup>27</sup>

### **October 2016-present**

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<sup>23</sup> School and Parent reports that due to lack of progress on academic goals these were removed on Parent's request.

<sup>24</sup> Exhibit C.

<sup>25</sup> Exhibit C and Interviews with Parent, Private BCaBA, Current School Psychologist, SSN Paraprofessional #1, SSN Paraprofessional #2, SSN Teacher, Teacher for the Visually Impaired.

<sup>26</sup> Exhibit C, Exhibit Z,

<sup>27</sup> Exhibit C Interviews with Parent, Private BCaBA, SSN Teacher, SSN Paraprofessional #1, SSN Paraprofessional #2. SCO notes that in the area of self-care, Occupational Therapist reports that Student has made some progress.

17. As agreed upon after the September 28, 2016 meeting, a re-evaluation was completed during the month of October 2016 to address Parent's concerns. The eligibility meeting was held October 31, 2016 and a subsequent meeting to address goals was held December 1, 2016. The school staff, along with District's Special Education Coordinator, met a few days later on December 5, 2016 to "pull" the information together and draft a "final" version to send to Parent. On December 19, the School Speech Language (SLP) therapist changed some of the goals in response to goals she received from Student's private SPL therapist via an e-mail sent by Parent.<sup>28</sup>
18. Overall, it is clear the school is attempting to address Student's needs and Parent's concerns, resulting in a more detailed IEP and BIP. The December 2016 IEP changed a number of goals and the means to accomplish those goals including short term objectives. The IEP's service delivery statement is similar to the prior year in that it provides for occupational therapy, special education services, personal care for feeding and toileting, adapted physical education, speech and language services, vision services and mental health service minutes. However there was a significant change in that it removed direct service hours for both the mental health and vision service providers. Similar to the January 2016 IEP, there are no goals that address Student's academic needs.<sup>29</sup>
19. Furthermore, there seems to be a lack of understanding or buy-in regarding Student's visual and communication needs. Student's primary learning mode, as identified in the present levels section of the December 2016 IEP, is visual, with auditory as her co-primary and tactual<sup>30</sup> as her secondary.<sup>31</sup> Yet, throughout the IEP, there are numerous references to other learning modes. For example, in the section addressing Student's strengths, it identifies Student as a tactile learner. In another section, tactile/visual schedules and the use of tactile objects are mentioned. Throughout the record and based on interviews, it is apparent that a number of staff believe that tactile is Student's primary mode of learning and as a result do not implement the visual piece consistently. There seems to be a lack of deliberate and frequent collaboration with all team members, resulting in a lack of consistent instruction and feedback from staff members who come in contact with Student.<sup>32</sup>
20. Additionally, there is also a great deal of confusion over the October re-evaluation and the resulting IEP as to its status and date of implementation. In fact, the confusion began after the October meeting, when a number of staff were unsure as to whether they were to start implementing the new goals as discussed or if they were still

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<sup>28</sup> *Id.*

<sup>29</sup> Exhibit C and Interviews Teacher for the Visually Impaired, Current Psychologist, Parent, SSN Teacher, Sped Director and Sped Coordinator.

<sup>30</sup> Tactual is the term used by The Teacher for the Vision Impaired.

<sup>31</sup> This is different than what was recommended on the Learning Media Plan dated October 26, 2016.

<sup>32</sup> Exhibit C, Interviews with Parent, Private BCaBA, SSN Teacher, Paraprofessional 1, Paraprofessional 2, Teacher for the Visually Impaired, Occupational Therapist, SPL Teacher.

implementing the January 2016 IEP. In fact, one school staff member immediately began working under the new service hours discussed during the October meeting which significantly impacted direct service hours. It is also unclear when the School considered the IEP finalized and began its implementation. The Service Delivery Statement lists the start date as December 2, 2016, a note on the December 21, 2016 progress report states that a new goal was implemented on December 19, 2016 and the only Prior Written Notice is dated January 10, 2017 with no indication of a start date and no evidence that it was provided to Parent.<sup>33</sup>

21. Parent was provided a copy of the December 2016 IEP prior to school break with the words "DRAFT" written on it but it is unclear exactly when it was sent or received because there are no records kept by the school and staff were unsure. Additionally, it appears there were two versions of the December 1, 2016 IEP<sup>34</sup> and that Parent received the earlier version though it appears that school is implementing the latter one. Parent responded on January 1, 2017 that she disagreed with the IEP and the BIP as written. The SCO finds that no further communication has occurred regarding the status of the IEP since that time and Parent has not received the most recent version of the December 2016 IEP nor any communication that District viewed the IEP as "finalized."<sup>35</sup>
22. Student has struggled significantly during the 2016/2017 school year and has made minimal progress. Many of the evaluation reports describe service providers not being able to successfully engage with Student, or provide services to her as outlined in the IEP. For example, the speech therapist reports that out of 15 opportunities to work with Student, on 6 of those occasions she was not able to engage with Student because of Student's significant behaviors. Similarly, the special education teacher attempted to engage Student in 17 math lessons, but 10 had to be stopped because Student was throwing objects, hitting herself and putting materials in her mouth. Based on the interviews and the record, it does not appear the service providers are helping to implement the behavioral intervention plan.<sup>36</sup>
23. The SCO finds that the District failed to develop and implement an individualized plan to meet Student's needs.
24. As of October, members of the school staff were unsure what IEP they were following. Even though some staff attempted to follow both IEPs, the confusion was significant enough that it impacted the nature and services Student was to receive. Additionally, the IEP as drafted does not contain any academic goals. While it is clear that District is

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<sup>33</sup> *Id.*

<sup>34</sup> The second version has the modifications made by the speech/language teacher.

<sup>35</sup> Exhibit C, Interviews with Parent, Private BCaBA, SSN Teacher, Paraprofessional 1, Paraprofessional 2, Teacher for the Visually Impaired, Occupational Therapist, SPL Teacher.

<sup>36</sup> *Id.*



attempting to draft a plan to meet Student's needs, it lacks a cohesive plan to deliver the necessary services to Student so that she can benefit from this setting. Lastly, it is clear the staff members that have the most contact with Student are not adequately trained to implement this plan.<sup>37</sup>

25. Student has made minimal to no progress this year. Some staff report, that in their opinion, Student has even shown regression on some of her skills. While Student's other disabilities, absences and medical issues also contribute to Student's difficulties, ultimately it is the lack of understanding regarding Student's behavior that appears to impact all other aspects of her education. School staff have consistently reported that Student's absences are a significant hindrance, however, they also report that when Student attends for only a half-day her behaviors are less extreme and she is able to attend and engage more successfully than when she is present the entire day. At this point in time, School staff is struggling to maintain her in the school environment, even with her reduced attendance. At this point in time, Parent is providing additional private therapies and addressing those times when Student's behaviors are most significant.<sup>38</sup>

### Transportation

26. Parent alleges that School District violated Student's IEP with respect to Student's special transportation needs, specifically, the use of a harness while riding the school bus. The School District admits this allegation and has taken steps to address it. However, during the course of the interviews and review of the record it became clear that this was not a one-time occurrence. The bus driver, the same bus driver assigned on those days for more than one year, was not aware of the requirement and consequently had not used the harness. Additionally, the SCO is concerned regarding how incomplete the Transportation Plan is given the needs of this Student and what may be required of transportation personnel. The most recent "Plan" is missing the following: 1) date school staff member faxed plan to transportation 2) emergency medical contact information 3) the names of alternative responsible adults approved to pick up Student<sup>39</sup> 4) the information to fill in the box that addresses behavioral concern 5) the transportation behavior intervention plan 6) both the case manager and parent's signature. Transportation also reported that they do not have direct access to the crisis plan and they would only request it if needed. During District interviews, transportation was not concerned with not having access to the behavioral intervention plan or crisis plan as the bus drivers and transportation paras have not reported any issues or

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Parent reported that there are afternoons when other adults pick up Student from bus.

concerns with Student. However, this is contradicted by school staff who reported that Student often arrives at school already exhibiting aggressive behavior.<sup>40</sup>

### **CONCLUSIONS OF LAW**

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

The District failed to develop and implement Student's IEP, thereby violating Student's right to receive FAPE (allegations 1,2 and 3).

1. Under the IDEA, local education agencies (such as the School District) are required to provide eligible students with disabilities with a free appropriate public education ("FAPE") by providing special education and related services individually tailored to meet the student's unique needs and provided in conformity with an individualized education program developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. FAPE is defined as special education and related services that: are provided free of charge; meet State standards; include an appropriate preschool, elementary school, or secondary school education; and are provided in conformity with a properly developed IEP. 20 U.S.C § 1401(a)(9); 34 C.F.R. § 300.17.
2. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a material failure to implement an IEP can also result in a denial of FAPE. *Id.*; see also *K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005); *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir 2007), *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003). Not every deviation from an IEP's requirements, however, results in a denial of FAPE. *E.g.*, *K.C. v. Utah State Bd. of Educ. et al.*, *supra* (minor deviations from IEP's requirements which did not impact student's ability to benefit from special education program did not amount to a "clear failure" of the IEP); *Van Duyn v. Baker*, *supra* (failure to implement IEP must be material to incur liability under IDEA, and minor discrepancies between the services provided and the services called for do not give rise to an IDEA violation); *Neosho*, *supra* (failure to implement "essential" element of IEP denies FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir.2000)(de minimis failure to implement IEP does not deny FAPE); *Lewis Palmer Sch. Dist. 38*, (SEA CO 2015).
3. The United States Department of Education summarized that "[u]nder the IDEA, the primary vehicle for providing FAPE is through an appropriately developed individualized education program (IEP) that is based on the individual needs of the child. 34 C.F.R §§ 300.17 and 300.320-300.324. In the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider –when necessary to provide

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<sup>40</sup> Complaint, Response, Exhibit B, Exhibit C, Exhibit S and Interviews with Parent, Transportation Personnel, SSN Teacher, Paraprofessional 2, Sped Coordinator, Sped Director.

FAPE, include in the IEP—the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R §§ 300.324(a)(2)(i) and (b)(2); and 300.320(a)(4)....The IDEA and its implementing regulations require IEP Teams to follow certain procedures to ensure that IEPs meet the needs, including the behavioral needs, of children with disabilities. See U.S.C. §1414(d) and C.F.R. 34 §§300.320-300.324. Those needs are generally identified during the initial evaluation or reevaluation, which must, among other matters, use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, and assess the child in all areas related to the suspected disability, including, if appropriate, social and emotional status. 34 C.F.R. §§300.304 (b) and 300.304(c)(4); see also 34 C.F.R. §§300.304-300.311. Further, the evaluation must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors. 34 C.F.R. § 300.304(b)(3).” *Dear Colleague Letter*, 61 IDELR 263 (OSEP, 2016).

4. Parent alleges that District failed to properly implement Student’s BIP, including failing to collect appropriate data relating to Student’s instances of aggression and failing to conduct an appropriate FBA. Based on a thorough review of the documentation and numerous interviews, the SCO agrees and concludes that District failed to implement Student’s IEP, thereby denying Student FAPE.
5. Student’s behaviors are a significant impediment to her accessing her education. While it is clear District is making efforts to develop the appropriate supports e.g. the hiring of a BCBA to assist in the development of the FBA and BIPS, it is a process/person that has only recently been utilized. While District has and continues to consider positive behavioral interventions, their efforts have not resulted in positive behavioral changes. On the contrary, Student’s behaviors have escalated dramatically. As it relates to Student, Student’s BIP lacks the detail and guidance that each and every staff member can use to address Student’s aggressive behaviors and what is in place is not implemented by all staff members. Additionally, not all staff members are adequately trained and educated on what is required to provide the positive interventions and collect the necessary data with fidelity. Lastly, there seems to be minimal collaboration among the entire IEP team to assess the data to determine, what, if anything, needs to be modified on a consistent and frequent basis. In a situation where Student is exhibiting as high as 354 behavioral “actions” or 54 behavioral “incidences” on her “bad” days and Parent is being called to pick her up due to her escalated behaviors, the IEP team is on notice that more collaboration/assessment is needed.
6. Parent alleges that District denied Student a FAPE by failing to educate her in an appropriate school placement with appropriately trained staff suitable to meet her individual needs. Based on a thorough review of the documentation and numerous interviews, the SCO concludes that District failed to implement Student’s IEP.

7. Student has a complex combination of disabilities. In addition to the behavioral challenges, Student lacks functional communication skills which are further complicated by her visual impairment. Developing a detailed and individualized plan for this specific Student and then having it implemented with consistency by properly trained staff is crucial. The January 2016 IEP, the one that covered the special education and related services student was to receive, was in effect for almost the entire period covered by this complaint. That IEP lacked academic goals, only one of goals had the requisite benchmarks or objectives, there is not a cohesive approach or understanding of Student's learning modality, and lastly, the issues regarding the BIP. Additionally, there is no documentation that staff followed-up on the possible use of the PECs system, a communication system that was documented as showing some success with Student. This is corroborated through staff interviews who report having no training or follow-up on the PECs system last year.
8. While District has made improvements to the most current IEP dated January 1, 2016, the development and its implementation is still lacking. It is clear that there continues to be significant confusion regarding Student's learning modes among the staff which results in inconsistent service delivery. For example, in the most recent statement regarding Student's present levels, the Teacher for the Vision Impaired reported that Student's primary learning modality is visual with auditory as her co-primary and tactual as her secondary. In contrast, the most recent Learning Media Plan specifies that the recommended Learning and Literacy Mode is Multisensory with tactual as her secondary which is different than the Learning Media Plan developed for the January 2016 IEP which had print enlargement/visual as the primary. The terms visual, tactile, and sensory are written throughout the IEP but not in a consistent, deliberate manner that corresponds to her style of learning and how it is to be utilized throughout her day. As previously discussed, while the current BIP is improved, it lacks clear steps to address those times Student becomes aggressive and has not been effective in decreasing Student's behavior. Lastly, as of October 31, 2016, more confusion existed among the team regarding which IEP was to be implemented. FAPE requires special education and related services that are provided in conformity with an IEP. 34 C.F.R. §300.17. At this point there is not one plan that all staff are implementing. The SCO is still unsure if staff are implementing the January 2016, a combination of both or they are implementing the December 2016 IEP. As for Parent, she has not received a Prior Written Notice and continues to believe the December 2016 IEP is still in draft form.
9. Parent alleges that School District violated Student's IEP with respect to Student's special transportation needs, specifically the use of a harness while riding the school bus. As discussed above, this allegation has been admitted and District promptly addressed this specific concern. Given that the IEP team made the determination that Student requires transportation as a related service, Student's transportation needs must be considered via the IEP process. *Letter to Smith*, 23 IDELR 344 (OSEP 1995). It is clear that transportation does not have all the information it should have regarding

Student and that they have not been included, or at a minimum fully informed, in Student's IEP. Student's needs, as they pertain to transportation, should be treated like her other related services and addressed via the IEP process and the personnel who work with Student should have all the training provided to others.

### REMEDIES

**The SCO has concluded that the District has violated the following IDEA requirements by:**

- a) Failing to develop an IEP according to the unique needs of a child with a disability (34 C.F.R. §§ 300.101 and 300.324);
- b) Failing to develop an IEP in accordance with the procedural requirements of IDEA, including providing parent with prior written notice (34 C.F.R. § 300.503(a)); and
- c) Failing to provide special education and related services in conformity with an individualized education program that meets the requirements of §§ 300.320 through 300.324 (34 C.F.R. § 300.17).

**To remedy these violations, the District is ordered to take the following action:**

1. By no later than February 28, 2017, the District must submit to the Department a proposed corrective action plan (CAP) that addresses each and every violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Students and all other students with disabilities for whom the School District is responsible. The CAP must, at a minimum, provide for the following:
  - a. Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violations, no later than March 3, 2017.
  - b. Effective training concerning these policies and procedures, which include effectively developing and implementing an Individualized Education Program, must be conducted for Special Education Director and all intended designees (which may include case managers, special education teachers, school psychologists, building administrators, district administrators, disability specific service providers, and general education teachers).
  - c. Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department no later than April 3, 2016.
2. Within 10 school days after receiving this Decision, District must conduct an IEP meeting in order to develop all areas of Student's IEP using a multidisciplinary approach and that

complies with all procedural requirements of the IDEA, particularly all of the provisions that the SCO has found the District to have violated.

- a. The IEP team meeting must include all professionals who currently provide services to Student, including transportation and private service providers who work with Student. District must also ensure that team members involved with developing and revising the IEP have expertise working with student who have multiple disabilities, have reviewed all existing data, and includes providers representing the modalities pertinent to Student's disabilities.
- b. The IEP team must review and revise Student's Functional Behavioral Assessment and Behavioral Intervention Plan using a multi-disciplinary approach. The District must ensure that the individuals involved with developing and revising the FBA and BIP have expertise with students with multiple disabilities. The District must conduct trainings to ensure that all staff in contact with Student are fully informed and trained to implement the BIP and collect data and provide ongoing support and training to ensure implementation of the BIP and the collection of data is done with fidelity.
- c. The IEP team must develop, review and revise Student's Learning Media Plan. The District must ensure that it is developed using a multidisciplinary approach, involving or in consultation with individuals who have expertise working with students with multiple disabilities. The District must conduct trainings to ensure that all staff in contact with Student are trained in the terminology and implementation of the Learning Media Plan.
- d. The IEP team must also discuss a plan for compensatory services to address any deficiencies that is consistent with its consideration of Student's present levels and needs related to the absence of services found in this Decision. These compensatory services shall be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory education services will be provided, with special consideration to Student's needs, stamina, cooperation, and schedule.
- e. If it is determined that additional information is needed to inform the IEP process, the District will provide Mother with a request to re-evaluate Student.
- f. If a reevaluation is required, once it is complete, the IEP team will reconvene within two weeks to review and revise Student's IEP, as necessary.
- g. The IEP team must develop a plan to review and monitor Student's progress on a consistent and frequent basis (no less than monthly) that includes all staff involved with Student, Parents, and private service providers.

- h. The IEP team must develop a plan for Student's transition to middle school that involves the training of staff and service providers who will work with Student.
- i. A complete copy of any new IEP developed for Student, including a plan for compensatory services, consent for evaluation, evidence that staff trainings have occurred with regard to implementation of the IEP, documentation demonstrating that the appropriate personnel have been provided a copy of the IEP and/or BIP, and prior written notice shall be provided to the Department within five days after the IEP meeting occurs or document is provided.

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

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

**NOTE:** Failure by the District to comply with the remedies or 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.

### **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 17th day of February, 2017.

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Jacqueline Esquibel, Esq.  
State Complaints Officer

## **Appendix**

### **Complaint, pgs 1-31**

#### **Response, pgs 1-52**

Exhibit A: Requested Documentation pgs 1-8

Exhibit B: Requested Documentation pgs 1-5

Exhibit C: Documentation to support District's Position on Claim 3, and Requested Documentation pgs 1-164

Exhibit D: Documentation to support District's Position and Requested Documentation pgs 1-9

### **Additional Documentation Requested by SCO from Parent and District**

Exhibit J: JFK Partners Autism and Developmental Disabilities Clinic School Consultation

Exhibit K: Evaluation Report and IEP Dated 10/17/2016 titled "DRAFT"

Exhibit L: Behavior Plan by [BCaBA], BCaBA Dated 8/2014

Exhibit M: Documentation from Private SPL

Exhibit N: School SPL Documented Service Time

Exhibit O: Private Notice of Special Education Action dated January 10, 2017

Exhibit P: Behavioral Intervention Plan (BIP) dated October 18, 2016

Exhibit Q: Progress Report dated January 1, 2017

Exhibit R: Various Daily Log Sheets

Exhibit S: E-mail communications between School staff and Parent

Exhibit T: Student's Health Plan dated 8/22/2016

Exhibit U: District's Autism Observation and Recommendations dated 4/5/2013

Exhibit V: Student's Daily Schedule

Exhibit W: Transportation Form for Red Book and Para Book

Exhibit X: Communication Matrix

Exhibit Y: School Psychologist Service Log

Exhibit Z: Learning Media Plan for Student with a Visual Impairment or Deaf-Blindness dated 10/26/2016

### **Interviews with:**

- Parent (Both Mother and Father)
- Private BCaBA
- Advocate
- Special Education Director
- Special Education Coordinator
- SSN Teacher
- SSN Paraprofessional 1
- SSN Paraprofessional 2
- Speech Language Pathologist
- Current Teacher of the Visually Impaired
- 2015-2016 Teacher of the Visually Impaired
- Current Psychologist
- 2015-2016 School Psychologist



- District BCBA
- Transportation Personnel in a group setting (Included Director of Transportation, Bus Driver (primary), Bus Monitor (primary), Bus Driver (1 day a week), Bus Monitor (sub) Bus Monitor (1 day a week) and Special Needs Coordinator)