

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 2019:501  
Denver Public Schools**

**DECISION**

**I. INTRODUCTION**

The mother (“Parent”) of a student (“Student”) identified as child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> initiated this action against Denver Public Schools (“District”) through a state-level complaint (“Complaint”) filed on January 3, 2019.

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. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**II. RELEVANT TIME PERIOD**

The Colorado Department of Education (“CDE”) has the authority to investigate alleged violations of the IDEA that occurred not more than one year from the date the Complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, this investigation will be limited to events that transpired no earlier than January 3, 2018 to determine whether or not a violation of IDEA occurred. *Id.* Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

**III. COMPLAINT ALLEGATIONS**

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

1. Deprived Parent of meaningful participation in the IEP process at the December 18, 2018 IEP meeting by declining to consider Parent’s concerns with respect to the evaluation data, consistent with 34 C.F.R. §§ 300.321(a)(1) and 300.324(a)(1)(ii).

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* and its corresponding regulations are found at 34 C.F.R. § 300.1, *et seq.* IDEA implementation in Colorado is governed by the Exceptional Children’s Educational Act (“ECEA”).

2. Changed Student's educational placement to a more restrictive setting based on the results of a fall 2018 evaluation that did not support such a placement decision, specifically the data derived from classroom-based observations and reviews of records, consistent with 34 C.F.R. §§ 300.304, 300.305, and 300.116.
3. Amended Student's IEP in December of 2018 without agreement from Parent and outside of an IEP meeting, in violation of 34 C.F.R. § 300.324(a)(6).

#### IV. FINDINGS OF FACT

After a thorough analysis of the record as detailed in the appendix attached and incorporated by reference, the SCO makes the following FINDINGS OF FACT:

##### A. Background

1. Student, a seven-year-old currently eligible for special education and related services under the disability category of Other Health Impairment ("OHI"), is presently enrolled in a dual language elementary school ("School") within District as a first grader. *Exhibit A*, p. 20. He completed kindergarten at a District-operated therapeutic day program. *Exhibit D*, p. 131.
2. Student is a social and creative child who enjoys forming friendships, coloring, and playing games. *Interviews with Parent and Special Education Instructional Specialist*. He thrives on companionship, but struggles to maintain these interpersonal relationships with peers. *Interview with Parent*. This challenge is met in the educational setting with a manifestation of significant behaviors, such as physical aggression, profanity, and refusal, along with extensive academic deficits, described in detail below. *Exhibit D*, pp. 116-153, 174-185.
3. District identified Student as a child with a disability in January 2018, but Parent revoked consent for the continued provision of services in August 2018 and thus Student was not IDEA eligible upon enrollment in School. *Id.* at p. 132; *Exhibit H*, p. 8. Recognizing Student's special education and related services history, Principal and Social Worker 1 met with Parent on September 12, 2018, Student's first day of attendance at School, at which time she expressed interest in exploring eligibility under a Section 504 plan. *Exhibit J*, p. 37.
4. Parent disagreed with a prospective Section 504 plan's recommended placement in an affective needs program ("AN Program"), and revoked consent for services on October 29, 2018. *Id.* at p. 339; *Response*, p. 2; *Exhibit F*, p. 11-12. Two days later, on October 31, 2018, Parent requested that District evaluate Student for IDEA eligibility. *Exhibit J*, p. 361. On December 4, 2018, District issued a *Notice of Meeting* inviting Parent to an initial eligibility meeting, and if deemed IDEA eligible, an initial IEP meeting for Student. *Exhibit G*, p. 2. A

properly convened multidisciplinary team (the “MDT”), including Parent, met on December 18, 2018 (the “December IEP Meeting”). *Exhibit A*, p. 21.

5. The crux of the instant controversy centers on parental participation, placement, and IEP amendment. *Complaint*, pp. 2-3. The genesis of each of these issues raised by Parent emanates initially from the December IEP Meeting. *Id.* Therefore, the SCO first reviews the meaning of the evaluation data discussed with Parent at the December IEP Meeting.

## **B. The IDEA Evaluation**

### ***i. Full Assessment Overview***

6. District conducted an evaluation of Student in November and December 2018, to include a review of the following existing evaluation data: (a) Kaufman Assessment Battery for Children – Second Edition (“KABC-2”), (b) cumulative enrollment, attendance and special education history, (c) Wechsler Individual Achievement Test-Third Edition (“WIAT-III”) (d) Occupational Therapy Notes and Wide Range Assessment of Visual-Motor Abilities, and (e) Cumulative Testing in Speech-Language. *Exhibit D*, pp. 116-153.
7. As a result of the record review, the MDT amassed additional data through the following formal assessments: (a) vision screening, (b) hearing screening, (c) health assessment, (d) Test of Oral Language Development Primary, Fourth Edition (“TOLD-P:4”), (e) Woodcock-Johnson IV Tests of Achievement Form A and Extended (“WJ-IV”), (f) Conners 3 (“Conners”), (g) Behavior Assessment System for Children, Third Edition (“BASC-III”), (h) Emotional Disturbance Decision Tree (“EDDT”), and (i) Functional Behavior Assessment (“FBA”). *Id.*
8. The MDT also interviewed Parent, and collected data from the following formal observations: (a) Oral Language Sample, (b) Academic Performance, (c) Motor Assessments, (d) Peer Behavior Comparisons, (e) Response to Intervention Behavior Data, (f) Daily Classroom Behavior, and (g) Academic Demand Response Data. *Id.*

### ***ii. Review of Records***

9. Parent argues that the review of existing evaluation data was improper based on past CDE findings, and an agreement between Parent, her previous advocate (“Former Advocate”), and Student’s prior school to delete 2016 evaluation data. *Interview with Parent*.
10. In a 2018 state-level complaint filed by Parent against District, the investigating SCO found deficiencies related to an October 2017 FBA and a fall 2017 evaluation, specifically that the “evaluation was not sufficiently comprehensive to be able to determine Student eligible in the category of SED.” *Denver Public School District*, 118 LRP 28084 (SEA CO 4/6/18). In the

instant matter, the MDT administered an FBA anew, leading to the development of a behavioral intervention plan, and the aforementioned finding of insufficiency does not implicate the records reviewed here. *Id.*; *Exhibit D*, pp. 138.

11. Also, any purported 2016 agreement cited by Parent does not prevent a review of existing evaluation data in this case. *Interview with Former Advocate*.<sup>2</sup> Plus, apart from Student's cumulative record, the review of records here concerned 2017 data. *Exhibit D*, pp. 116-153. To the extent Parent believes the MDT accessed any of the unspecified 2016 evaluation data, District fully redacted this at-issue data. *Interview with Former Advocate*.

### ***iii. Observation Data***

12. Parent's next challenge to the evaluation is the assertion that the MDT did not perform a sufficient number of observations. *Interview with Parent; Exhibit N*. The evidence, seven observation-specific assessments, is not in accord with Parent's position.
13. Student's general education teachers completed daily sheets, broken into half-hour blocks, between October 9 and December 17, 2018, to document the intensity of in-class behaviors. *Exhibit D*, pp. 20-71, 134-137. The teachers shaded each block with a color corresponding to behavior intensity, using green for accessing academics and displaying appropriate behavior, yellow for not accessing academics and interrupting classroom environment, orange for not accessing academic work, throwing objects and verbal aggression, or red for not accessing academics, profanity, throwing objects, refusal, and verbal threats. *Id.* Three color-coded graphs depict the behaviors as a total across all days, as a total across individual days, and as a total across all days by hour. *Id.* at pp. 136-137.
14. Overall, red was the most frequent color reported, followed by yellow, orange, and green, with the raw data consistently revealing the following significant behaviors: refusal, elopement, extreme profanity, throwing materials at classmates and staff, interrupting peers, yelling, screaming, verbal threats, and physical aggression aimed at classmates and staff, to include hitting, kicking, spitting, tripping, and choking. *Id.* at pp. 20-71.
15. Student's general education teachers also informally observed responses to prompts to participate in academic work between December 4 and December 14, 2018. *Id.* at pp. 2-17, 137-138. When presented 137 opportunities to engage in academic work, which included choice of work and the ability to earn rewards upon task completion, Student refused eighty percent of the time. *Id.* Refusal behaviors involved either physical or verbal aggression, or elopement, twenty-four percent of the time according to a raw data summary chart. *Id.*

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<sup>2</sup> Parent provided the SCO with a redacted e-mail from Former Advocate, contained at Exhibit 2, and advised that Former Advocate could provide further clarity with respect to her position in this regard.

16. Psychologist Intern observed Student, during two separate group occasions in social studies and math on December 10, 2018, to exhibit appropriate behavior fifty percent of the time and seventy-two percent of the time, respectively. *Id.* at pp. 147-149. He did not engage in whole class academic instruction in each instance, even with teacher interventions and the support of a one-to-one paraprofessional for sixty percent of the second observation. *Id.*
17. Occupational Therapist informally observed Student for short periods over the course of several months during recess, lunch, and transitions, and for thirty minutes in music class on December 5, 2018. *Id.* at pp. 150-151. Student demonstrated age appropriate balance and coordination on the playground, but generally sat away from classmates and moved about the classroom. *Id.* During the extended observation, he refused an instructor's invitation to join classmates on the carpet and instead watched videos on an iPad. *Id.* Student danced and jumped with peers during music class, but also attempted to trip a classmate which cued peers and staff to ask Student multiple times to keep his hands to himself. *Id.*
18. Also on December 5, 2018, Special Education Teacher 2 observed Student in English Teacher's classroom. *Id.* at p. 120. During this twenty-five minute academic observation, the following behaviors were noted: refusal to join classmates on the carpet, repeatedly shouting profanity, making inappropriate comments in general and toward staff, throwing objects at peers, and exhibiting physical aggression toward a paraprofessional. *Id.*
19. Social Worker 1 and Special Education Teacher 1 collected data, between November 14 and December 14, 2018, to document responses to attempted staff interventions. *Id.* at pp. 134, 174-185. The observations disclosed twenty-eight instances of profanity, thirty-nine instances of physical aggression, and forty-eight instances of refusal. *Id.* Emblematic examples of this significant behavior derived from the raw data include:
  - When offered scheduled breaks, Student responded with "Leave me alone. Fucking leave me alone" or "God damnit, bitch. You're rude. No wonder nobody likes you."
  - When prompted to complete academic work, Student cursed, refused, eloped, twice kicked a teacher, and pushed a desk onto a teacher's foot.
  - When asked to listen or join peers in line, Student yelled "Fuck you" on one occasion and "Fuck you, you fucking bitch" on another occasion.
  - When provided two choices of academic work, Student responded with "I'm not doing any of that" or "You people are rude. This is why I hate you people."
  - When offered positive praise, Student punched Social Worker 1 in the arm seven times while stating "Get away from me bitch" in one instance and stated "Can you leave now? Are you almost done being dumb?" in another instance.
  - When a special education teacher entered the room to provide literacy and math supports, Student shouted "Oh my god I hate you, leave me alone you bitch" in one instance and "Get away from me you fucking bitch" on another occasion.

- Student stated to one classmate “You’re a god damn liar” and referred to another peer as a “motherfucker” while displaying his middle finger.
- When asked to join the class group, Student refused, threw objects at peers, ran around the room, and crafted a rubber band slingshot to launch objects at peers.
- When asked to leave a slide due to unsafe behavior, Student spit in a teacher’s hair.
- Student punched Principal in the leg while stating “I hate you.”
- Student’s acts of physical aggression directed toward peers include kicking one classmate in the face and another in the groin, punching a peer, throwing woodchips in another student’s eyes, and elbowing another student in the nose.
- Student’s disruptive behaviors impacting peers include running around the classroom and chasing other students, distracting a student for an entire morning, throwing items around the classroom, mimicking weapon use, shouting, and eloping.

*Id.* at pp. 174-185.

20. The FBA indicates that Student’s physically aggressive behavior is likely or extremely likely to occur in every subject throughout the school day, apart from specials. *Id.* at p. 140. Spanish Teacher reported that Student has choked two peers, hit a peer with an icy snowball, stabbed a peer in the leg with a paper clip, twisted a peer’s arm, and kned a peer in the chest. *Id.* at pp. 141-142. English Teacher reported that, as a result of Student’s behaviors, peers are fearful of him, and that peers have “shut down and put their head on the desk” and stated “this is the worst day of my life.” *Id.* at p. 142. Parent reported a complete absence of physical aggression at home during the FBA. *Id.* at pp. 143-144.
21. Finally, Student’s IEP (the “IEP”) provides that behavior technicians supported him in the classroom between September 13 and November 16, 2018. *Exhibit A*, p. 25. It indicates further that two behavior technicians were initially assigned to Student, to ensure the safety of himself and peers, but oftentimes Student’s unsafe behavior required the support of three or four behavior technicians. *Id.* According to the IEP, behavior technicians implemented a “first/then” schedule throughout the day where Student would receive a ten-minute break in exchange for ten minutes of safe behavior. *Id.* Behavior technicians reported to the MDT that Student was often more physically aggressive toward female staff and that there were “no significant improvements in the reduction of unsafe behaviors with the provision of additional adult staff members in the general education environment.” *Id.*
22. The results of Student’s responses to these interventions were not included in the Evaluation Report. *Exhibit J*, p. 206; *Exhibit D*, pp. 116-153. At the December IEP Meeting, Behavioral Supports Manager described the supports and interventions his team provided to Student, though there was not a discussion of the quantitative data. *Interviews with IEP Facilitator and Special Education Instructional Specialist*. Parent ultimately received a one-page summary spreadsheet detailing nine days of complete data collected, along with a corresponding explanation of the data, on January 17, 2019. *Exhibit P*.

23. According to a service log, the support strategies implemented include crisis response support, rethink sheets, positive behavioral and interventions support incentives, visual aids, a first/then board, file folder games, and one-to-one and two-to-one support. *Exhibit C*, pp. 2-12. Nonetheless, the raw data describing Student's responses to interventions in specific, observable, and measurable terms, as well as the length, level, and timing of each intervention, has not been made available to either Parent or the SCO. *Exhibit N*. For example, although the service log indicates file folder games were created, introduced, and modeled for Student on October 18, 2018, there are no details or charts describing the effectiveness of this intervention or how Student responded. *Exhibit C*, p. 8.
24. The SCO, having considered Parent's specific concerns with the evaluation data, now breaks down the other information collected and contemplated by the MDT.

#### ***iv. Additional Formal Assessments***

25. School Psychologist administered the Conners through reports obtained by Parent, English Teacher, and Spanish Teacher. *Exhibit D*, pp. 122-123. Teachers indicated that Student falls in the "Very Elevated" range for the areas of inattention, defiance/aggression, peer relations, hyperactivity/impulsivity, ADHD predominantly inattentive presentation, ADHD predominantly hyperactive-impulsive presentation, conduct disorder presentation, and oppositional defiant disorder presentation. *Id.* Parent's results placed Student in the "Average" range for all scores, apart from a "High Average" mark for learning problems. *Id.*
26. School Psychologist administered the BASC-III through rating scales provided to Parent, English Teacher, and Spanish Teacher. *Id.* at pp. 123-127. Ratings for both teachers landed within the "Clinically Significant" range across the areas of hyperactivity, aggression, conduct problems, depression, learning problems, adaptability, and study skills. *Id.* Parent's results placed Student in the "At-Risk" range in terms of social skills and leadership, but within the "Average" range for all other categories. *Id.*
27. Psychologist Intern administered the EDDT through rating scales completed by Parent, Spanish Teacher, and English Teacher. *Id.* at pp. 127-130. The observations of both teachers placed Student in the "Very High Clinical" range for inability to build or maintain relationships, inappropriate behavior or feelings, and physical symptoms of fears. *Id.* Parent did not report any areas of significant concern. *Id.*
28. Student, after two refusals and inappropriate language, completed two of the nine TOLD-P:4 subtests with Speech Language Pathologist. *Id.* at p. 117. He ranked in the ninth percentile, or below average, for syntactic understanding, and in the thirty-seventh percentile, or low average, for picture vocabulary. *Id.* To supplement uncollected data, the

MDT reviewed Student's March 7, 2017 results from the Preschool Language Scale-Fifth Edition assessment. *Id.* at pp. 117-118.

29. Student's refusals, not unlike the noncompliant behavior exhibited during the TOLD-P:4 and other times during the evaluation, further compound the fact that he is drastically behind in all academic areas, thus creating increased levels of frustration and consistent in-class interruptions. *Exhibit A*, p. 26. After multiple refusals, Student completed the WJ-IV on November 28 and 30, 2018. *Exhibit D*, pp. 120-122. He ranked within the lowest one percent of seven-year-old children nationally on brief achievement, an overview of skill development in reading, writing, and math, and based on assessment scores his academic achievement age equivalent is four years and two months. *Id.*
30. In Letter-Word Identification, he was unable to apply phoneme-grapheme relationships, he identified only six letters, and when asked to read words, he was unable to identify letter sounds. *Id.* In Applied Problems, he demonstrated a limited understanding of age-appropriate math application tasks and answered twelve out of twenty-four questions correctly. *Id.* For Spelling, he was unable to write letters independently when given an oral prompt and he gripped the pencil in a fist. *Id.* He was unable to identify written words without visual supports in Passage Comprehension, and in Calculation he was not able to calculate numbers without visual supports. *Id.* On the Writing Sample, he was unable to write his name correctly but did write all of its letters, and when shown a visual he was unable to write the corresponding word. *Id.* Finally, in Word Attack, he showed a limited ability to apply phoneme-grapheme relationships. *Id.*
31. The MDT reviewed the results of the WIAT-III, previously administered on April 24, 2017 when Student was age five and seven months, to compare it to the data obtained from the WJ-IV. *Id.* at pp. 118-119. On the WIAT-III, Student's overall academic skills fell below average, specifically at a "level less than a 4 year old's expected performance." *Id.* at p. 119.
32. Special Education Teacher 1 specializes in academic recovery and first started providing social-emotional and academic support throughout the day for Student in October 2018, to include working with him outside of the classroom on literacy and math skills. *Interview with Special Education Teacher 1*. She reported that Student's academic deficiencies are severe enough to necessitate a smaller, intensified setting of specialized instruction. *Id.* In presently performing at a preschool level, Student "barely" knows letters and numbers. *Id.* Even more concerning, she added, is that Student must constantly be reminded each time he enters a room, through the use of visuals, "how to learn" by instructing him to use a calm voice and kind words, keep hands and bodies safe, and listen to the teacher. *Id.* For instance, he believes simply drawing on a piece of paper constitutes academic work. *Id.*



33. With the IDEA evaluation data now set forth, the SCO moves forward to examine the resulting determinations, and the degree of Parent's participation, with respect to Student's offer of special education and related services made at the December IEP Meeting.

### **C. The December IEP Meeting: Eligibility Determination**

34. The first portion of the December IEP Meeting involved a discussion of the evaluation results, and a determination of Student's IDEA eligibility. *Exhibit A*, pp. 40-41. As an initial matter, Parent expressed concerns to the SCO that she first obtained the Evaluation Report and a draft IEP (the "Draft IEP") at the December IEP Meeting. *Interview with Parent*.
35. Parent, on December 4, 2018, requested that she receive both documents prior to the December IEP Meeting, and Social Worker 1 indicated they would be provided by December 14, 2018. *Exhibit J*, p. 268. The requested documentation was not supplied by that time, in part because District's web-based data collection and reporting system, Enrich IEP, was inaccessible to District users between December 12 and December 14, 2018. *Id.* at p. 51. Social Worker 1 notified Parent of this fact on December 14, 2018. *Id.*
36. Parent reported to the SCO that she felt "rushed" as a result of having only thirty minutes to review the Evaluation Report and the Draft IEP, however, the SCO finds that Parent did not request that District suspend and continue the meeting to a future date. *Exhibit A*, pp. 40-45. Instead, Parent wished to proceed at that time with School's winter break on the immediate horizon. *Interview with Parent*.
37. With hard copies of the Evaluation Report and the Draft IEP in Parent's hand, and the corresponding evaluation data simultaneously projected on a large screen, a District special education specialist ("IEP Facilitator") guided the MDT's discussion. *Id.*; *Interviews with Special Education Instructional Specialist and IEP Facilitator*. Parent represents that IEP Facilitator rebuffed concerns she raised regarding the evaluation data. *Complaint*, p. 2.
38. The SCO finds that the MDT, as reflected in meeting notes, fully considered input and concerns from Parent. *Exhibit A*, p. 40-45; *Interview with IEP Facilitator*. For instance, both the IEP and the Evaluation Report document Parent's concern with respect to a review of records. *Exhibit A*, p. 40. IEP Facilitator, as credibly corroborated by Special Education Instructional Specialist, acknowledged Parent's disagreement in this regard, informed her that they could reconvene at a later date to discuss the concern at length, and ensured that Parent "felt comfortable moving forward" with the eligibility determination. *Interviews with Special Education Instructional Specialist and IEP Facilitator*. Parent did not introduce additional concerns with respect to the evaluation data, and the MDT qualified Student as eligible for special education and related services as a child with OHI. *Exhibit F*, p. 7.

39. The MDT found evidence of a medical diagnosis of Attention-Deficit/Hyperactivity Disorder Combined Type and determined that Student exhibits limited vitality and limited alertness, including heightened alertness to environmental stimuli with respect to the educational environment. *Id.*; *Exhibit E*, p. 5. Student also has difficulty managing and maintaining attention throughout the day. *Exhibit F*, p. 7. The MDT considered, but rejected, eligibility under the category of SED. *Exhibit E*, p. 5-6. Parent did not challenge eligibility, and consented to the provision of special education and related services. *Exhibit H*, pp. 5-6.

#### **D. The December IEP Meeting: IEP Development**

40. The second portion of the December IEP Meeting featured IEP development, during which time a properly convened IEP Team used the Draft IEP, simultaneously projected on a large screen, to steer the discussion. *Exhibit A*, pp. 41-45; *Interviews with Special Education Instructional Specialist and IEP Facilitator*.

41. The SCO finds that the IEP Team, during this part of the meeting, answered questions, recognized concerns, incorporated input, and fully discussed placement options. *Exhibit A*, pp. 41-45. For example, in response to Parent’s inquiry as to whether the IEP would account for reading assistance, Special Education Teacher 1 responded that she would include audio text. *Id.* at p. 42. The IEP identifies audio text as an accommodation. *Id.* at p. 32. In another instance, Social Worker 2 pointedly asked Parent whether she understood that the IEP Team was recommending a “pretty restrictive setting” as the conversation turned to service minutes, and Parent answered in the affirmative. *Interview with Special Education Instructional Specialist*. The SCO finds this report reliable, particularly in view of meeting notes detailing discussion around a small group setting of specialized instruction, and Parent’s concurrent lack of objection as to the service minutes. *Exhibit A*, pp. 43-45.

42. The IEP Team also addressed concerns that Student participate in general education to the greatest extent possible. *Id.* at pp. 35-36. To illustrate, the Draft IEP reflected total daily service minutes in the amount of 345 outside of general education and 45 inside general education. *Exhibit 3*, p. 3. The IEP Team deviated from the preliminary considerations, upon discussion with Parent, allocating time for Student in general education during recess, lunch, and specials to “rehearse coping strategies in an authentic setting with general education peers.” *Exhibit A*, pp. 35-36. The IEP reflects service minutes as follows:

- Social Work Services Inside General Education: 30 indirect minutes/month
- Social Work Services Outside General Education: 90 direct minutes/day
- Specialized Instruction (literacy) Outside General Education: 600 direct minutes/week
- Specialized Instruction (math) Outside General Education: 300 direct minutes/week
- Specialized Instruction (other) Inside General Education: 450 direct minutes/week
- Specialized Instruction (other) Outside General Education: 275 direct minutes/week

*Id.* at p. 36.

43. The IEP Team thoroughly discussed placement options, to include a regular classroom with any necessary supplemental aids and services, but concluded that the least restrictive environment (“LRE”) would be in general education less than forty percent of the time, specifying time outside of the general education environment at 77.4%. *Id.* at pp. 37-38. The SCO finds the service delivery statement, the LRE summary, and the prior written notice portions of the IEP to be correspondingly consistent in terms of the form of specialized instruction required to meet Student’s constellation of needs. *Id.* at pp. 35, 37-38.
44. The service delivery statement provides: “[Student] will receive individualized services in all academic areas outside of the general education classroom in a *small group setting* to provide an environment that is less distracting.” *Id.* at p. 35 (emphasis added). The LRE summary directs: “[s]mall group instruction tailored to meet [Student’s] needs to improve his ability to access general education curriculum will be provided in the least restrictive environment.” *Id.* at p. 37 (emphasis added). The prior written notice reads: “the team determined [Student] needs specialized instruction and a high level of predictable and controlled routines, *provided in a small-group setting* with limited distractions, and ongoing social emotional support.” *Id.* at p. 38 (emphasis added). The prior written notice also indicates: “[Student] *needs a smaller group setting*, as opposed to supplementary aids in the general education classroom, to make meaningful progress. *Id.* (emphasis added).
45. The IEP Team identified advantages and disadvantages of implementing the IEP at School, or alternatively, at an AN Program. *Id.* at pp. 38, 40-45. Parent specified concerns with a mid-year transition to an AN Program, stating that Student was “traumatized” while previously attending a District-operated therapeutic day program. *Id.* at p. 44.
46. Special Education Instructional Specialist replied that an AN Program is a “substantially different setting” in that it is embedded within an elementary school, and that as students demonstrate success at the primary level, they transition into general education. *Id.* at p. 44. Social Worker 2 added that an AN Program is “really beneficial” in that “[students are] getting specialized instruction with significant adult support and opportunities to integrate” into general education. *Id.* at p. 45. Special Education Teacher 1 stated that an AN Program would allow Student “to be less frustrated and not afraid to fail” and that an AN Program would present a “[b]etter environment for learning how to learn.” *Id.*
47. Social Worker 2 also stated to Parent that placement at School “will be very restrictive” and that Student “will not be getting typical peer interaction.” *Id.* at p. 44. She added “I think it will be *more restrictive than an AN program.*” *Id.* (emphasis added). Similarly, Special Education Instructional Specialist advised that if Student stays at School “he will not have peer interactions,” that AN Programs offer “small group instruction,” and that “there’s a lot of benefit to [AN Programs] instead of isolating him at [School].” *Id.* at pp. 44-45.

48. Consistent with the aforementioned representations of placement at School, Student's services are currently delivered in Principal's office, now converted into a special education classroom. *Interview with Special Education Teacher 1*. The space affords accessibility in terms of a central location, and proximity to Student's general education classroom across the hall. *Id.* The room contains a desk and a group work table, and the walls are adorned with a daily schedule, a clipboard of math and literacy work, the alphabet, numbers, and samples of Student's work. *Id.* As detailed further below, it is "restrictive." *Exhibit A*, p. 44.
49. Members of the IEP Team also answered Parent's questions related to the number of students and special education teachers typically in an AN Program classroom, and transportation availability. *Exhibit A*, p. 45. Parent was assured that School would support Student's transition to an AN Program, and multiple IEP Team members also highlighted the expertise of AN Program staff in social-emotional learning and behavior management. *Id.* at pp. 44-45. The prior written notice portion of the IEP corroborates the discussion regarding implications of implementing the IEP at School as opposed to an AN Program:
- If implemented at [School], [Student's] schedule would reflect *a more isolated program in which he would be instructed 1:1 outside the general education classroom with limited to no exposure to age-level peers*. An alternative was proposed to locate services to an [AN Program], where [Student] would be in a *smaller-group setting in a classroom of peers*, with lower student to teacher ratios. The Affective Needs center has staff members who have received specialized training in serving students with significant behavioral needs.
- Id.* at p. 38 (first and second emphasis added).
50. To better inform Parent's participation, IEP Facilitator suggested that Parent take time to process the information presented. *Id.* at p. 45. Parent requested a list of AN Programs to review, and received a lineup of available programs after the meeting, along with an offer to tour and observe each with Special Education Instructional Specialist. *Id.*; *Exhibit J*, p. 56.
51. Based on a review of the IEP and the corresponding meeting minutes, and consistent with interviews, the SCO finds the IEP Team's prevailing perception, despite Parent's hesitation, was for Student to transition to an AN Program once Parent researched proposed programs. *Exhibit A*, pp. 20-45; *Interviews with IEP Facilitator and Special Education Teacher 1*. Still, after the December IEP Meeting concluded and Parent departed, the IEP Team developed a schedule (the "Schedule") for implementation of the IEP within School. *Interviews with Parent, Special Education Instructional Specialist and Special Education Teacher 1*.

## **E. The Schedule**

52. The Schedule, first implemented on December 19, 2018 in Principal's office at School, breaks Student's academic day into fifteen, thirty, and forty-five minute blocks of learning. *Exhibit O*. Student starts each day with breakfast in the general education classroom, and ends each day in the general education classroom where he typically "shares out" a moment from his day and engages in activities with peers. *Interview with Special Education Teacher 1*. He also participates in general education during recess, lunch, and specials. *Id*.
53. Student receives social-emotional learning on three occasions throughout the day, at which time he selects a general education peer to join him to work on basic social skills, such as friendship development techniques and calming strategies. *Id*. Student enjoys technology and is allocated three blocks of time to access age-appropriate academic applications. *Id*. He also takes multiple "brain" and "movement" breaks outside of Principal's converted office, one of which includes interaction with a general education peer. *Id*.
54. Student receives one-to-one reading instruction, with an emphasis on phonological and phonemic practice. *Id*. On select occasions general education peers participate with Student, however, the reading instruction is "very basic" and thus these interactive opportunities are limited. *Id*. He receives reading instruction again mid-morning, which includes reading aloud. *Id*. As for writing instruction, the focus is on fine motor skills, and letter formation in order to help Student write his name. *Id*. It was reported to the SCO that Student is now able to appropriately grip a pencil, as opposed to "holding it like a fist." *Id*. During one-to-one math instruction a peer receiving services through an IEP learns with Student, though this option is not consistent as Student sometimes is "not being safe." *Id*.
55. A copy of the Schedule, along with a note to Parent asking her to review it with Student, was provided to Student's maternal grandmother when she picked him up from School on December 18, 2018. *Interviews with Parent and Special Education Instructional Specialist*. Parent instantly contacted Principal with a concern about the service location, and School staff thus convened a meeting with her on December 21, 2018. *Exhibit J*, p. 87; *Exhibit N*.

#### **F. The December 21, 2018 Meeting**

56. Parent contested the use of Principal's office to provide special education services and programming, and threatened to revoke consent for services if the IEP Team transitioned Student to an AN Program. *Interviews with Parent and Special Education Instructional Specialist*. She did not tour any AN Programs, despite offers to do so after the December IEP Meeting, and stated on December 21, 2018 that "we are going to stay [at School]." *Id*.
57. Special Education Teacher 1 reported that Parent had tentatively agreed to an AN Program transition for Student at the December IEP Meeting, but added, based on Student's significant academic gaps, a plan needed to be set up within School until that time as it would be "unfair" to place him back into general education because that is "where he's

frustrated all of the time.” *Interview with Special Education Teacher 1*. This decision was based on recognition of Student’s significant needs and the detrimental impact to his education if Parent were to revoke consent for services upon placement in an AN Program. *Interview with Special Education Instructional Specialist*. Special Education Teacher 1 did not cite any concerns with Student’s academic instruction or level of access to same-aged peers under the Schedule, but conceded that it is “not sustainable” in the long-term. *Interview with Special Education Teacher 1*. She specified that an AN Program would afford Student more opportunities in the presence of peers to learn the social skills he requires to be an effective learner, whereas age-level peers at School already possess such skills. *Id.*

58. Parent, having received the IEP on December 20, 2018, also expressed a belief at this meeting that service minutes had been changed. *Exhibit J*, p. 211; *Exhibit N*, p. 2. The SCO finds that while the Draft IEP’s service minutes differ from those of the IEP, the IEP Team made this modification in Parent’s presence during the December IEP Meeting as reflected in the meeting notes. *Exhibit A*, pp. 43-45. Moreover, in requesting an “updated IEP” by e-mail one day after the December IEP Meeting, Parent appeared to be aware that “yesterday’s changes” were still being incorporated into the IEP. *Exhibit J*, p. 86.
59. Finally, Parent articulated disagreement with observation data at this meeting, as previously noted at FF #12. *Exhibit N*. This concern coincides with the earlier expressed belief that it was improper for the MDT to consider a review of records. *Complaint*, p. 2. Given Parent’s ongoing concerns, the IEP Team met on January 16, 2019. *Exhibit F*, pp. 9-10.

### **G. The January 16, 2019 IEP Meeting**

60. The IEP Team again reviewed the body of evidence obtained through the evaluation, and noted that “[Student’s] learning difficulties are significant – he is several age/grade levels behind peers and demonstrates severe verbal and physical aggression.” *Id.* at p. 9. The IEP Team reiterated that “[Student] needs intensive interventions outside the general education classroom because he is less distracted in the *smaller-group*, outside the general education classroom setting. *Id.* (emphasis added). Special Education Teacher 1 and Special Education Instructional Specialist stated during this meeting that in the “small group” setting Student “learns better” and “is so much more successful.” *Exhibit A*, pp. 63-64.
61. Special Education Teacher 1 agreed to Parent’s request for three-week progress monitoring, and sends schoolwork and data sheets home with Student to track academic, behavior, and social performance in order to improve the “home-to-school connection that was a missing link.” *Id.* at p. 68; *Interview with Special Education Teacher 1*. Indeed, there is a high-level rapport between Parent and Special Education Teacher 1 as they communicate at least once per day. *Interviews with Parent and Special Education Teacher 1*. Parent reported that Student has been relatively successful based on the work she has seen, and added this is a “major improvement” because he never used to bring work home. *Interview with Parent*.

62. Still, the *Prior Written Notice of Special Education Action* highlights Student’s need for specialized instruction to learn how to count, read sight words, write a complete sentence, reduce instances of physical aggression, and develop social skills. *Exhibit F*, p. 9. The IEP Team considered increasing general education instruction, but did not amend the IEP, or relocate Student from School to an AN Program. *Id.* at pp. 9-10. Again, he requires “intensive interventions outside the general education classroom setting because there is reduced stimuli, reduced opportunities for distractions from peers, and more opportunities for individualized *small group* and 1:1 instruction.” *Id.* at p. 9 (emphasis added).
63. Overall, as exemplified by this meeting, reflected amongst these findings, and expounded upon in interviews, the instant matter epitomizes a high-wire act of aspiring to provide Student with intensive interventions and specialized instruction while at the same time minimizing conflict with Parent in light of an intent to fully revoke consent for such services.

## V. CONCLUSIONS OF LAW

Based on the FINDINGS OF FACT set forth above, the SCO enters the following CONCLUSIONS OF LAW:

**Conclusion to Allegation No. 1: District provided Parent with the opportunity to meaningfully participate in the development of Student’s educational program.**

The first allegation introduced in the Complaint, specifically that District declined to consider Parent’s concerns articulated at the December IEP Meeting, compels contemplation of collaboration and consideration under the IDEA.

The IDEA's procedural requirements for developing a child’s IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Sytsema v. Academy School District No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008). Thus, the creation of an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances” must involve a “fact-intensive exercise . . . informed not only by the expertise of school officials, but also by the input of the child's parents or guardians.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

To that end, the IDEA requires that parental participation be meaningful, to include carefully considering concerns for enhancing the education of the child. 34 C.F.R. §§ 300.321(a)(1), 300.322, and 300.324(a)(1)(ii). Meaningful consideration occurs where the IEP team listens to parental concerns with an open mind, exemplified by answering questions, incorporating some requests into the IEP, and discussing privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of the student. *O’Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 703 (10th Cir. 1998). Meaningful

consideration does not require that a school district simply agree to whatever a parent has requested. *Jefferson County School District RE-1*, 118 LRP 28108 (SEA CO 4/22/18).

The findings here clash with Parent's position that District failed to afford meaningful participation because Parent was "listened to" and given more than "merely the right to speak." *F.L. v. Bd. of Educ. Of the Great Neck U.F.S.D.*, 274 F. Supp. 3d. 94, 116 (EDNY 2017). The December IEP Meeting notes document extensive parental involvement leading up to the issuance of the IEP, to include acknowledgment of Parent's concern with the review of records at FF #38. Parent was offered a future meeting to discuss the concern, and IEP Facilitator ensured that Parent was amenable to proceeding with the meeting. Parent's request for reading assistance, noted at FF #41, was incorporated into the IEP, and the IEP Team answered her questions, to include inquiries regarding AN Programs at FF #49.

The IEP Team also discussed placement options with Parent, at FF #45-50, and as further evidence of efforts to encourage her informed and meaningful participation, Special Education Instructional Specialist offered to tour and observe AN Programs with Parent, though she did not accept the offer. Plus, as detailed below, Parent's preference drove placement here.

Finally, while Parent's receipt of the Evaluation Report the day of the December IEP Meeting, described at FF #34-36, could have deprived her of an opportunity to review the information and provide input, she did not wish for the December IEP Meeting to be continued. Also, District met with Parent on December 21, 2018, described starting at FF #56, and again on January 16, 2019, recounted at FF #60-62, to discuss her ongoing concerns.

Consequently, the SCO concludes that District conducted the December IEP Meeting in a manner that provided Parent with meaningful participation in the IEP development process.

**Conclusion to Allegation No. 2: District conducted a sufficiently comprehensive evaluation to appropriately determine LRE inside general education at less than forty percent of the time, but failed to document information from all sources, resulting in a procedural violation, and failed to make a formal offer of placement in the LRE, resulting in a substantive violation.**

#### **A. Evaluations under the IDEA**

The second allegation raised in the Complaint, in part a challenge to the review of records and quantity of observations conducted, requires the SCO to first consider whether District followed the relevant IDEA procedures and standards for conducting an evaluation.

The SCO concludes that District, because Parent revoked consent for services in August 2018, properly construed her October 31, 2018 request to determine Student's IDEA eligibility as a request for an initial evaluation. *Letter to Cox*, 54 IDELR 60 (OSEP 2009).



The purpose of an initial evaluation under IDEA is twofold: (1) to determine whether the child has a disability, and because of the disability needs special education and related services, and (2) to help the IEP team determine the child's specific needs. 34 C.F.R. § 300.304(b)(1)(i)-(ii). The IDEA has specific and extensive procedural requirements governing how school districts are to evaluate students. 34 C.F.R. §§ 300.304 - 300.306. For instance, as part of an initial evaluation, where appropriate, the IEP team must review existing data on the child, and based on that review and input from the child's parents, identify what additional data, if any, are needed to determine eligibility and educational needs. 34 C.F.R. § 300.305.

In this case, consistent with 34 C.F.R. § 300.305, and as summarized at FF #6, the MDT examined Student's existing evaluation data ahead of the initial evaluation. For this reason, and others described at FF #10-11, neither prior CDE findings nor the purported agreement cited by Parent preclude the MDT's review of records. Rather, the consideration of existing data here not only informed the administration of additional assessments, but also delivered an all-inclusive understanding of Student necessary to determine eligibility and educational needs.

In conducting the initial evaluation itself, "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent" must be used. 34 C.F.R. § 300.304(b)(1). The IEP team must employ "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." 34 C.F.R. § 300.304(b)(3). The IDEA prohibits the use of "any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child." 34 C.F.R. § 300.304(b)(2).

Here, as summarized at FF #7 and #12-20, highly qualified professionals with extensive educational experience observed Student on numerous occasions, at different times, and in distinct settings. The data collection generally resulted in detailed and thorough logs, such as the color-coded tracking sheets and graphs of in-class behavior described at FF #13-14, the tracking sheets and summary charts of academic response data highlighted at FF #15, and the peer comparison data chronicled at FF #16. The MDT, in a largely specific and measurable manner, executed a sufficient number of thorough observations related to pertinent behaviors.

As specified at FF #6-20 and #25-32, District adequately assessed Student through a variety of formal tools and strategies, including information provided by Parent, to obtain relevant data in the areas of health, vision, hearing, functional behavior, academic performance, communicative status, motor abilities, and social and emotional status. Qualified professionals deployed technically sound testing instruments, to include the WJ-IV, the Conners, the BASC-III, and the EDDT, and they also conducted an FBA. Overall, District undertook a sufficiently comprehensive evaluation and considered the entirety of the relevant data collected in concluding that Student's significant academic deficits, coupled with severe verbal and physical aggression, require intensive interventions outside of the general education environment.

The SCO reaches this conclusion despite the concerns with the behavior technician data, recounted at FF #21-23. A one-page summary spreadsheet based on nine days of complete data collection, along with an explanation of the data, was omitted from the Evaluation Report. This results in a procedural violation of 34 C.F.R. § 300.306(c)(1)(ii) as information obtained as part of an evaluation must be documented and carefully considered.

The United States Supreme Court stressed the importance of compliance with the IDEA's procedural safeguards. *Board of Education v. Rowley*, 458 U.S. 176, 205-206 (1982). However, failure to comply with a procedural safeguard amounts to a violation of FAPE only if the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent's opportunity to participate in the IEP process).

Although the omission of this summary information could have deprived Parent of a meaningful opportunity to participate in an informed manner, the evidence at FF #22 demonstrates that she received an oral description of the interventions at the December IEP Meeting, and a copy of the one-page summary spreadsheet on January 17, 2019. Thus, this procedural violation did not result in a denial of FAPE under 34 C.F.R. § 300.513(a)(2).

Finally, the SCO notes at FF #23 that District failed to document the core quantitative behavior technician data. This intervention information is dependent on the fidelity of data collection, and in this case, it is impossible to gauge the individual effectiveness of each intervention executed by the behavior technicians, or their interplay, as neither the one-page summary spreadsheet with explanation nor the service log capture the relevant source data relied upon. The absence of this raw data casts doubt upon the meaning of the information within the corresponding one-page summary spreadsheet, but it does not compromise the overall comprehensiveness of the evaluation given the wealth of information collected and considered.

The outstanding inquiry presented through the Complaint's second allegation now commands analysis of the relationship between LRE and placement. These two concepts are inextricably intertwined, and a consideration of LRE is essential to understanding placement in this case.

## **B. Least Restrictive Environment**

The SCO must first consider one of two distinct LRE issues: whether placement outside of the general education setting for 77.4% of the school day is consistent with the evaluation data.

"Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements." *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004). This means that children with disabilities receive their education in the general education setting with typical peers to the

maximum extent appropriate, and that they attend the school they would if not disabled. 34 C.F.R. §§ 300.114 and 300.116. Children with disabilities should only be placed in separate schooling, or otherwise removed from the regular educational environment, “if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii).

The Tenth Circuit adopted the following two-part test from *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989) to determine if a school district has met the IDEA’s LRE provision: (1) whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily, and if not, (2) whether the school district has mainstreamed the child to the maximum extent appropriate. *L.B. ex rel. K.B.*, 379 F.3d at 976-977.

Four non-exhaustive factors aid the analysis of the test’s first prong: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those he will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the child's presence in that classroom. *Id.* at 976. As applied to the findings in the case at bar, the totality of these four factors show that District met part one of the *Daniel R.R.* test.

First, District took appropriate steps to accommodate Student in general education, as noted at FF #15-16, #19-20, and #32. Student was offered regular breaks, choices of work to complete, verbal redirection, positive praise and incentives for work completion, reduced work demands, and one-to-one support. Nonetheless, his behavior continued to escalate, and in addition to spending more time outside of the general education classroom, he exhibited disruptive, defiant, and aggressive responses. In light of concerns noted at FF #21-23 with certain data collection, the SCO notes that while an IEP team must consider a range of supplementary aids and services that could be offered to facilitate placement in general education, a child with a disability need not be placed in the regular education classroom and fail before a more restrictive environment is considered. *Letter to Cohen*, 25 IDELR 516 (OSEP 1996).

Second, Student’s significant behaviors, substantial academic deficits, and social-emotional needs impede his ability to benefit from instruction within the general education classroom. The classroom behavior data collected by general education teachers, summarized at FF #13-14, demonstrate that Student was not accessing academic work or learning with peers due to refusals to follow directives, verbal threats directed toward teachers and peers, and physical acts of aggression. It also reflects that Student regularly missed instruction after extensive elopement and classroom removals. When in the classroom, and presented with 137 chances to engage in academic work, FF #15 shows that Student refused eighty percent of the time. Moreover, as noted at FF #29-32 and #62, Student performs academically at a preschool level. Student’s academic gaps, in conjunction with significant functional behavior to avoid tasks and

activities he does not enjoy, are further complicated by a short attention span, an inability to focus, and a tendency to become easily distracted in large groups, as noted at FF #39 and #60.

Third, Student's overall educational experience in regular education, including non-academic benefits, is stymied by disruptive behavior, and a lack of engagement and responsiveness to supports, as detailed at FF #14-15 and #18-20. Student responded with refusals, physical aggression, and movement about the classroom when given verbal cues from teachers to join a group of peers. His inability to benefit from peer interactions is corroborated by Parent's observation at FF #2 that he has difficulty maintaining friendships. Even so, as decided by the IEP Team at FF #42, he participates in general education during recess, lunch, and specials.

Finally, Student's presence in the general education classroom has interfered with the ability of other students to benefit from instruction, as described at FF #14-15 and #18-20. The disruptive behavior includes frequent profanity, coupled with physical aggression, directed at peers. Additional significant behaviors demonstrated by Student, which not only disrupt the classroom environment but also deplete the time and energy of teachers, thus detracting from their ability to adequately educate other students, include routine refusals and elopement.

The SCO concludes that Student's education cannot be achieved satisfactorily in the regular classroom with supplementary aids and services, and now moves to part two of the *Daniel R.R.* test to determine whether District has mainstreamed him to the maximum extent appropriate.

The IDEA requires school districts to ensure a continuum of placement options is available to meet the needs of children with disabilities, as opposed to taking an "all-or-nothing" LRE approach. 34 C.F.R. § 300.115; *Daniel R.R.*, 874 F.2d at 1050. Thus, as school districts must take "intermediate steps where appropriate" that may include both mainstream and special education coursework, the continuum of program options can include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. *Id.* "The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops." *Daniel R.R.*, 874 F.2d at 1050.

District mainstreamed Student here to the maximum extent appropriate by considering a continuum of placement options, detailed at FF #42-44. The IEP placed Student in a small-group setting for specialized instruction with limited distractions, while at the same time affording exposure to peers in general education during recess, lunch, and specials, in order to support his substantial behavior, academic, and social-emotional needs. District satisfied the full two-part *Daniel R.R.* test, and thus, consistent with the evaluation data, properly determined placement outside of the general education setting for 77.4% of the school day.

### **C. Placement**

The SCO now considers the second of two distinct LRE issues: whether there was a firm offer of placement, based on the IEP, in the aforementioned LRE.

FAPE dictates, in part, that school districts provide special education and related services in conformity with a child's IEP. 34 C.F.R. § 300.17(d). A child's IEP is "the centerpiece of the statute's education delivery system for disabled children . . . [and] the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F. ex rel. Joseph F.*, 137 S. Ct. at 994 (internal citations omitted). To that end, a child's IEP forms the basis for the child's placement decision. *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994). The term "placement" is not defined by the IDEA, but the following rule provides guidance:

The terms 'placement' or 'educational placement' are used interchangeably and mean the provision of special education and related services and do not mean a specific place, such as a specific classroom or specific school. Decisions regarding the location in which a child's IEP will be implemented and the assignment of special education staff responsibilities shall be made by the Director of Special Education or designee.

ECEA Rule 4.03(8)(a).

While Parent raised a concern with implementation of the IEP in Principal's office, ostensibly implicating location, her specific challenge is to the IEP itself and the mandate that Student spend 77.4% of the academic day outside of general education. For example, Parent wants Student to remain at School, just not in Principal's office, as opposed to shifting to an AN Program. The SCO consequently characterizes this conflict as one about educational placement rather than location. *See Denver Public Schools*, 118 LRP 45301 (SEA CO 9/28/18).

The educational placement decision must be made 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." 34 C.F.R. § 300.116(a)(1). Although parental preference is an appropriate consideration regarding the educational placement of a child, it cannot be the sole or predominant factor in a placement decision. 34 C.F.R. § 300.327; *Letter to Burton*, 17 IDELR 1182 (OSERS 1991). Otherwise stated, parents do not have the right to veto the placement decision made by the group outlined in 34 C.F.R. § 300.116(a)(1). *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003).

"After discussing the advantages and disadvantages of various programs that might serve the needs of a particular child, the school district must take the final step and clearly identify an appropriate placement from the range of possibilities." *Glendale Unified Sch. Dist. v. Almasi*, 122 F.Supp.2d 1093, 1108 (C.D. Cal. 2000). The placement offer should be described as specifically as possible, and IEP meeting notes are not enough to constitute a formal, written offer of placement. *Mill Valley Elem. Sch. Dist. v. Eastin*, 32 IDELR 140 (N.D. Cal. 1999).

The IEP Team here discussed advantages and disadvantages of various programs that might serve Student's needs, as recalled at FF #45-49, but did not make a specific offer of placement.

Parent hesitated with the IEP Team's AN Program recommendation, and stated an intent to revoke consent for services if the IEP Team moved Student from School, effectively preventing any other alternative placement. In adhering to Parent's preference for School, District slotted Student into a more restrictive environment, Principal's office, inconsistent with the IEP as written. *See Pueblo City Schools, District 60*, 118 LRP 4605 (SEA CO 10/26/17) (ruling that the less a placement resembles a regular classroom, the more restrictive it is).

Where, as here, LRE is at issue, one physical location compared to another, even when an identical IEP is used, can be viewed as a more restrictive placement if "opportunities for interaction with nonhandicapped children would be virtually non-existent." *Letter to Earnest*, 211 IDELR 417 (OSERS 1986). The IEP described at FF #42-44 consistently conveys a need for specialized instruction, with a high level of predictability and controlled routines, to be provided in a small group setting with limited distractions and ongoing social-emotional support.

Student has received services under the IEP in Principal's office at School since December 19, 2018. While he interacts with peers in general education during recess, lunch, and specials, specialized instruction is provided primarily in a one-to-one format, as opposed to within a small group setting. At most, one other peer joins Student on limited occasions, but given Student's significant behaviors and academic deficits, these opportunities are infrequent.

Essentially, placement at School has affected Student's "general program of education." *Steven R.F. v. Harrison Sch. Dist.*, 331 F.Supp.3d 1227, 1237 (D. Colo. 2018) (quoting *Christopher P. v. Marcus*, 915 F.2d 794, 796 n.1 (2d Cir. 1990), *cert. denied*, 498 U.S. 1123, 111 S. Ct. 1081, 112 L.Ed.2d 1186 (1991)). This is because there has been "a fundamental change in, or elimination of a basic element of the education program." *Steven R.F.*, 331 F.Supp.3d at 1237-1238 (quoting *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984)). Through application of the "basic element" standard here, the SCO concludes School and an AN Program constitute "distinct educational placements" because they serve separate populations of students, offer distinct student to teacher ratios, and have a different focus. *Steven R.F.*, 331 F.Supp.3d at 1238. Even if the IEP could be implemented in both settings, "there are sufficient essential differences between the two programs to make them distinct placements." *Id.* Paramount here, "as highlighted by his IEP," small group instruction is an "essential element" of Student's education program that has effectively been eliminated by placement at School. *Id.*

The SCO credits District's good faith efforts to accommodate repeated requests that Student remain at School, especially in recognition that failure to do so would result in Parent revoking consent for services. Nevertheless, the IEP Team's failure to make a "formal, specific" offer of placement is a procedural violation. *Glendale Unified Sch. Dist.*, 122 F.Supp.2d at p. 1106-1107 (quoting *Union School Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994)). This procedural violation results in a substantive IDEA violation where it is shown that although FAPE has been provided, it was not provided in the LRE. *L.B. ex rel. K.B.*, 379 F.3d at 975.

If FAPE can be provided in a less restrictive setting, i.e. an AN Program, it is a substantive violation of the IDEA to provide Student FAPE in a more restrictive setting, i.e., School. *Id.* The discussion during the December IEP Meeting detailed at FF #45-49 underscores this concept. Comments included: School is “very restrictive,” School is “more restrictive than an AN program,” and Student will “not be getting typical peer interaction” at School. Conversely, it was noted that AN Programs offer a small group curriculum centered on intensive, individualized academic and social-emotional supports within a self-contained and highly structured environment, with opportunities to integrate into general education.

While the obligation to provide FAPE in the LRE is District’s alone, the SCO concludes that Parent contributed to this violation with conduct to include ignoring invites to tour AN Programs and threatening to revoke consent for services. *See El Paso County School District 3*, 115 LRP 9424 (SEA CO 11/10/14). Also, the Complaint alleges that District did not educate Student in the LRE, yet Parent requested that Student stay at School where he ultimately does not have access to an appropriate small group setting of similarly situated peers to meet his learning profile and other substantial needs. *Id.*

The unique facts of this case disclosed two competing, incompatible interests: meeting Student’s significant educational needs and curtailing conflict with Parent. School, apart from small group instruction, has implemented the IEP’s provisions through the Schedule described in detail at FF #52-55. The decision to keep Student at School was “understandable” when considering Parent’s imminent stated intent to revoke consent for services, especially where Parent recently revoked consent in a similar instance with School at FF #3-4. *Id.*

Thus, while a child denied FAPE is generally entitled to compensatory education, there is no evidence that Student in this case suffered educational harm as a result of the violation. *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Consequently, the SCO declines to order such an award here. *El Paso County School District 3*, 115 LRP 9424 (SEA CO 11/10/14).

**Conclusion to Allegation No. 3: The changes to the IEP were made by the entire IEP Team, and in the presence of Parent, through discussion at the December IEP Meeting.**

The third and final allegation received through the Complaint, that amendments to the frequency of Student’s special education and related services occurred outside of the December IEP Meeting, necessitates an overview of when and how an IEP may be modified.

Once an annual IEP is created, it may be amended by either the entire IEP team at an IEP meeting, or if the parent and the school district agree, by a written document amending or modifying the current IEP. 34 C.F.R. § 300.324(a)(6).

Parent’s precise concern derives from the difference in service minutes between the Draft IEP presented during the December IEP Meeting and the IEP she received two days later. A draft IEP can be an effective roadmap used to develop a completed IEP, and while it is permissible for

a school district to prepare and present a draft IEP, a draft IEP cannot be represented to parents as a completed IEP. *Letter to Helmuth*, 16 IDELR 503 (OSEP 1990).

The IEP Team here departed from the Draft IEP's proposed description of services following a conversation with Parent during the December IEP Meeting, illustrated at FF #42. The IEP Team framed the discussion through a visually projected version of the Draft IEP, did not represent the Draft IEP to be complete, and modified the Draft IEP's service minutes to increase interaction with general education peers during recess, lunch, and specials. Although Parent did not receive the IEP at the December IEP Meeting, based on FF #58 and a review of the meeting notes, the SCO concludes the changes were made by the IEP Team, including Parent.

## VI. REMEDIES

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

- a. Documenting and describing evaluation information, specifically behavior technician response to intervention data, consistent with 34 C.F.R. § 300.306(c)(1)(ii).
- b. Ensuring placement is made in conformity with IDEA's least restrictive environment requirements, consistent with 34 C.F.R. § 300.116.

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

1. By **April 5, 2019**, the District must submit to CDE a proposed corrective action plan ("CAP") that effectively addresses the two (2) violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
  - a. Comprehensive training on the requirements of 34 C.F.R. § 300.306(c)(1)(ii), in accordance with this Decision and with a specific focus on designing, collecting, and analyzing progress monitoring data for social-emotional and behavioral interventions, must be conducted with the behavior technicians who worked with Student in this matter (i.e. the individuals identified in Exhibit C), in addition to any other staff deemed appropriate by District, no later than **May 3, 2019**.
  - b. 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, with roles noted) and provided to CDE no later than **May 10, 2019**.
2. By **March 22, 2019**, District must convene an IEP meeting with Parent, at a mutually convenient time and setting, to provide a firm offer of placement consistent with the IEP



Team's determination at the December IEP Meeting that Student receive specialized instruction in a small-group setting, and identify a location for implementation of the IEP in conformity with 34 C.F.R. § 300.116. The determination of a specific location at which to implement Student's IEP shall be determined solely by the District in accordance with ECEA Rule 4.03(8)(b)(iii). Evidence that this IEP meeting occurred must be documented by providing a copy of the Notice of Meeting, IEP, and PWN to CDE no later than 10 days following the IEP meeting. If Parent does not respond to District's efforts to convene an IEP meeting by March 22, 2019, CDE will determine compliance with this remedy in accordance with 34 C.F.R. § 300.322. If Parent revokes consent for services, District shall be excused from further compliance with this specific remedy No. 2, though this would not excuse District's compliance with respect to remedy No. 1 identified above.

CDE will approve or request revisions to the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to confirm the District's timely correction of the areas of noncompliance. Please submit the documentation detailed above to CDE as follows:

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

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

## VII. CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13. If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *Id.*; *See also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 4th day of March, 2019.

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Brandon Edelman, Esq.  
State Complaints Officer

## APPENDIX

### **Complaint, pages 1-3**

- Exhibit 1: Evaluation Report
- Exhibit 2: Former Advocate E-mail
- Exhibit 3: Portions of Draft IEP and the IEP

### **Response, pages 1-16**

- Exhibit A: 2017-2018 and 2018-2019 IEP Documentation
- Exhibit B: 2017-2018 and 2018-2019 BIP Documentation
- Exhibit C: Behavior Technician Service Log
- Exhibit D: Evaluation Reports and Documentation
- Exhibit E: Eligibility Determinations
- Exhibit F: Prior Written Notice Documentation
- Exhibit G: Notice of Meeting Documentation
- Exhibit H: Requests for Parental Consent
- Exhibit I: Grade and Progress Reports
- Exhibit J: Correspondence
- Exhibit K: Witness/Staff List
- Exhibit L: *Denver Public School District*, 118 LRP 28084 (SEA CO 4/6/18)
- Exhibit M: FedEx Delivery Notification
- Exhibit N: December 21, 2018 Meeting Notes
- Exhibit O: The Schedule
- Exhibit P: Special Education Instructional Specialist E-mail

### **Telephonic Interviews**

- Parent: January 30, 2019
- Special Education Instructional Specialist: January 31, 2019
- Former Advocate: January 31, 2019
- IEP Facilitator: January 31, 2019
- Special Education Teacher 1: February 8, 2019