

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

---

**State-Level Complaint 2022:540**  
**Douglas County RE-1**

**DECISION**

**INTRODUCTION**

On August 23, 2022, the Parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> filed a state-level complaint (“Complaint”) against Douglas County RE-1 (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified four allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. § 300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from August 23, 2021 through August 23, 2022 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

**SUMMARY OF COMPLAINT ALLEGATIONS**

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

1. Failed to conduct a reevaluation at Parent's request, between September 28, 2021 April 29, 2022, in violation of 34 C.F.R. § 300.303;
2. Failed to review and revise Student’s IEP between September 28, 2021 and April 29, 2022 to address Student’s behavior, in violation of 34 C.F.R. § 300.324(a)(2)(i) and (b)(1);

---

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

3. Failed to follow IDEA's least restrictive environment ("LRE") provisions, specifically by:
  - a. Determining Student's educational placement from December 2021 through April 2022 outside of a properly convened IEP meeting, in violation of 34 C.F.R. §§ 300.116(a)(1), 300.321(a)(1), 300.327 and 300.501(c)(1);
  - b. Failing to educate Student in his LRE from September 2021 through May 2022 by repeatedly sending him home early, in violation of 34 C.F.R. §§ 300.107, 300.114, 300.117 and 300.320(a)(5).
4. Failed to provide Student transportation to and from School as required by his IEP from September 2021 to present, in violation of 34 C.F.R. §§ 300.34(c)(16) and 300.323.

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire Record,<sup>2</sup> the SCO makes the following FINDINGS:

#### **A. Background**

1. Student is nine years old and, during the 2021-2022 school year, attended third grade at a District school ("School"). *Exhibit A*, p. 22. Student and his family currently reside within the boundaries of District. *Id.* This year, Student attends another school in District. *Interviews with Parent and District's former Special Education Coordinator ("Coordinator")*.
2. Student is currently identified as a child with Multiple Disabilities ("MD"), with eligibility as a student with an Intellectual Disability ("ID"), Orthopedic Impairment ("OI"), Speech or Language Impairment ("SLI"), and Other Health Impairment ("OHI"). *Exhibit B*, p. 29.
3. Student is described as a sweet, friendly child who joyfully greets peers and staff and particularly enjoys getting to know adults in the building. *Interviews with Parent, Student's Special Education Teacher and Case Manager ("Case Manager"), Psychologist at School ("School Psychologist"), and Principal at School ("Principal")*. Student has a lot of great academic strengths and independent skills. *Id.*
4. Student has a history of trauma and struggles with anxiety and a need for control. *Interview with Parent*. Student's SLI impacts his ability to access the general education classroom and social relationships. *Exhibit A*, p. 25. His cognitive deficits impact him globally, and he struggles with attention. *Id.* During third grade, Student started exhibiting increasing

---

<sup>2</sup> The appendix, attached and incorporated by reference, details the entire Record.

challenges with emotional regulation, resulting in disruptions to his learning. *Interviews with Parent, Case Manager and School Psychologist.*

### **B. May 2021 IEP**

5. At the beginning of the 2021-2022 school year, Student's IEP dated May 7, 2021 ("2021 IEP") was in effect. *Exhibit A*, pp. 1-20. Student was eligible as a child with a Developmental Delay. *Id.* at p. 1. The 2021 IEP noted that, while Student had been receiving "informal social/emotional support at school," he might benefit from more formal, direct, mental health support "to help him regulate his emotions, learn coping skills, and develop strategies for flexible thinking." *Id.* at p. 4.
6. According to the 2021 IEP, Student's difficulties with receptive and expressive language as well as speech sound production impact his ability to access the general education classroom socially and academically. *Id.* at p. 7. His fine motor deficits impact his "ability to produce written work" and his limited cognitive abilities impact him globally. *Id.* He struggles with attention and focus in all settings, including one to one, and "needs constant verbal and/or physical redirection to attend." *Id.* He requires assistance with personal care services, "safety monitoring and special transportation." *Id.*
7. Parent noted that Student had "a history of attention seeking and 'manipulation' behaviors and will interrupt at times" and asked about conducting an FBA before middle school. *Id.*
8. The 2021 IEP notes that Student has limited English proficiency ("LEP"), requires a health plan for his seizure disorder and requires "special transportation for safety monitoring to and from school." *Id.* at p. 8.
9. There are 13 goals in the 2021 IEP: three math goals, one writing goal, one reading goal, four communication goals, one self-determination goal and, relevant here, three social/emotional wellness goals. *Id.* at pp. 8-14. The three social/emotional wellness goals are:
  - Social/Emotional Wellness: "[Student] will be able to name and use more than three developmentally appropriate coping strategies to help him calm down in situations which tend to make him frustrated, overwhelmed, or anxious in 4 out of 5 trials," from a baseline of 1/5 trials.
  - Social/Emotional Wellness: "[Student] will be able to label rigid vs. flexible thinking and use flexible thinking strategies to help change his mindset either socially or in his academics in 3 out of 5 trials with less than 2 adult prompts," from a baseline of 1/5 trials.

- Social/Emotional Wellness: “Given direct instruction in perspective taking/empathy skills, [Student] will be able to label the perspective of others through role play or in reflecting on his own life situations in order to think about how he is making others feel with 1-2 prompts in 3 out of 5 consecutive trials,” from a baseline of 0/5 trials.

*Id.* at pp. 13-14. Parent is to be informed of progress twice a year, when grades are reported at the end of each semester. *Id.* at p. 8.

10. The 2021 IEP contains 18 accommodations, including “the following Personal Care Services on an as needed basis: safety monitoring with eating (choking); toileting schedule; safety monitoring for movement around the building and during recess,” “[c]ues to maintain focus,” “[c]lose proximity to teacher,” “Special Transportation for safety monitoring” and “Social/emotional checkin (sic) with familiar adult throughout day as needed.” *Id.* at pp. 14-15. It also calls for a modified math curriculum based on Student’s current level and not his grade level. *Id.* at p. 15.

11. Under the 2021 IEP, Student received the following special education and related services:

- Speech/Language Services: 150 minutes per month (“MPM”) of direct instruction provided in a small group or on an individual basis “to target [Student’s] communication skills.”
- Specialized Instruction:
  - 1,200 minutes per week (“MPW”) of direct specialized instruction provided by the SSN teacher outside of general education for “math skills, reading comprehension, and writing skills.”
  - 900 MPW of “supported instruction inside the general education classroom with an educational assistant under the supervision of a licensed special education teacher” to accommodate the curriculum, e.g. “allowing for breaks, attention to task, work completion, following directions, prompting to join groups.”
- Occupational Therapy: 60 MPM of direct services outside of general education “to support motor needs and legibility associated with his writing goal.”
- Social/Emotional Skills Development: 90 MPM of direct services to be provided by a school mental health provider outside of general education.

*Id.* at pp. 17-18.

12. According to the 2021 IEP, Student's LRE was general education 40-79 percent of the time because Student benefited from being exposed to the general education reading curriculum and peers as much as possible. *Id.* at p. 19. However, the IEP indicated that Student was spending just 36.6 percent of the time in the general education environment. *Id.*
13. The Prior Written Notice ("PWN") notes that the team increased Student's specialized instruction from 60 minutes daily to 240 minutes daily because of the jump between second and third grade and Student's deficits in math and writing. *Id.*

### C. First FBA Request

14. When parents in District request an evaluation, school teams are advised to meet with the family to determine what they are seeking and whether the evaluation is appropriate at that time. *Interviews with District Special Education Director ("Director") and Coordinator.* After meeting with parents, teams are advised to either conduct the evaluation, if there are disability related concerns potentially impacting the student's education, or issue PWN explaining why they are not conducting the evaluation. *Interview with Coordinator.* If a parent requests a functional behavioral assessment ("FBA") specifically, school teams are still advised to meet and discuss the request and issue a PWN if the FBA will not be conducted. *Interview with Director.*
15. If a student is exhibiting behaviors that are impacting his ability to access his education, school teams are advised to consider an FBA and then determine next steps. *Id.* District relies on CDE guidance and state and federal regulations to manage when and how to conduct an FBA. *Interview with District Behavior Specialist supporting School ("Behavior Specialist 1").*
16. A District workgroup also created an FBA guidebook, the "[District] Functional Behavioral Assessment (FBA): ENRICH Resource Guide" ("FBA Handbook"). *Id.; See Exhibit S.* The FBA Handbook "provides resources and support for teams working to develop strong functional behavior assessments that align with CDE recommendations." *Exhibit S*, p. 3. The FBA Handbook offers examples and resources for developing FBAs but does not offer guidance on when FBAs should be conducted. *Id.* at pp. 1-45.
17. When School receives a request for evaluation, they follow up with parents to discuss the request. *Interview with Principal.* School Psychologist generally responds to requests in the same manner as they are made; for instance, if the request is made via email, she will respond via email. *Interview with School Psychologist.*
18. Requests for an FBA almost always come from the school team and not from parents. *Id.* School generally considers an FBA if behaviors are frequent and cannot be addressed by minor tweaks. *Interview with Principal.* If parents request an FBA and the student is exhibiting behaviors in the school environment, School will generally begin the FBA process, if it has not

already. *Interview with School Psychologist*. School does not pursue the “labor-intensive” FBA process if students have a bad day or an isolated incident. *Interview with Principal*.

19. Best practice when conducting an FBA is to collect 10 consecutive days of data. *Interview with Director*. Consistent with best practice, the computer-generated FBA forms prompt staff to collect data over 10 consecutive days. *Interview with School Psychologist*. School Psychologist does not wait for 10 incidents and will begin collecting data when behaviors appear to be occurring daily or weekly. *Id.* School Psychologist sometimes reviews data to look for patterns and design interventions without conducting a formal FBA or drafting a behavior intervention plan (“BIP”). *Id.*
20. On September 28, 2021, Student had an incident during tutoring. *Interviews with Parent, Case Manager, and School Psychologist*. Parent was also getting increasing reports from staff that Student was “sassy” or argumentative during the school day. *Id.* That night Parent noted, via email, that the behavior was likely to recur due to Student’s neurological damage and requested an FBA to develop a BIP. *Exhibit 1*, pp. 1-2.
21. School Psychologist told Parent that Student responded well to redirection during the incident and that it was an isolated incident. *Id.* at p. 1. She said an FBA required “10 instances of data at least in order to find patterns of behavior” and that Student was not exhibiting patterns of behavior at School. *Id.* Instead, School would continue to redirect Student and take a deeper look if that stopped working. *Id.*
22. If an FBA was not possible, Parent asked that the team have “something” in place to protect Student and others when he is in different settings to make sure he would not hurt a student or teacher. *Id.* at p. 3. She also expressed concern about waiting for 10 incidents to occur before instituting a solution. *Id.* Parent was not comfortable with the decision not to conduct an FBA, but she did not know what other options she had. *Interview with Parent*. She was also hoping to avoid conflict to keep working with a team she trusted. *Id.*
23. District did not include Parent’s full email in its Response to this Complaint. *See Exhibit L*, p. 41. District’s Response incorrectly represented that Parent did not “dispute either the action or reasoning.”<sup>3</sup> *Response*, p. 3. District did not issue a PWN in response to Parent’s September request for an FBA. *Id.* at pp. 3-4.

---

<sup>3</sup> The SCO is concerned by the language District used in its Response in reference to Parent. Regardless of the outcome of this investigation, Student remains enrolled in a District school. Parent and District will need to continue collaborating to develop IEP services and ensure FAPE for so long as Student remains an IDEA eligible child in District. *See Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174, 137 S. Ct. 988, 997 (U.S. 2017) (holding that the IDEA’s procedural requirements for developing a student’s IEP are designed to provide a collaborative process between parents and educators, a process that places special emphasis on parental input and involvement.) The use of language like “accusation,” “baseless,” “absurd,” “mystified,” and “unfounded” when referring to Parent serves only to further inflame tensions instead of promoting future collaboration in the best interest of Student. *Response*, pp. 4-7; *See Mesa Valley School District 51*, 119 LRP 5665 (SEA CO 12/17/18) (Finding that effective collaboration requires relationship-strengthening strategies and empowers parents to meaningfully participate in the IEP process.)

#### **D. Tutoring**

24. School used federal funding to offer afterschool tutoring to help students fill gaps caused by the COVID-19 global pandemic. *Interview with Principal*. Student was the only IDEA-eligible student accessing these tutoring services. *Id.*
25. Student accessed the services throughout second grade and into third grade. *Interview with Parent*. Parent recalled that Student had to stop attending tutoring in October because of increasing behaviors. *Id.* Case Manager started volunteering to stay after school for an hour to be present if Student had an issue at tutoring. *Interviews with Principal and Case Manager*.
26. Student attended tutoring four times in September, twice each in October and November, once in December, four times in January, and twice in February. *Exhibit U*, pp. 6-11. The final session in February ended after 30 minutes instead of 60, and Student never returned to tutoring. *Id.* at pp. 11-15. The teacher in the tutoring program asked Parent about her preferred schedule in March to accommodate conferences and Spring Break and never heard back. *Exhibit L*, p. 91.

#### **E. Second FBA Request**

27. Starting at the end of October, and continuing into November, Student was having “almost manic” episodes where he was very fidgety and speaking in rambling tangents that did not make sense and were at a higher pitch than his normal voice. *Interview with Case Manager*. These incidents were occurring frequently enough for Case Manager notice, approximately once every other week. *Id.* Student regularly arrived home scared and dysregulated. *Interview with Parent*. Student started a new antipsychotic medication on November 8, 2021 to try and address “continued mood changes and irritability.” *Exhibit Q*, p. 2.
28. Parent and Case Manager had a phone call about Student’s behavior in November. *Interviews with Parent and Case Manager*. Case Manager told Parent that Student’s behaviors were beginning to impact her ability to serve other students, and Parent again requested an FBA. *Interview with Parent*. Case Manager told Parent she would talk to School Psychologist but that an informal plan would be best because the behaviors were too infrequent to know what was causing them. *Interview with Case Manager*. Parent emailed to follow up a week later and offered to share the results of a private evaluation. *Exhibit 1*, p. 5.
29. Between November 17, 2021 and winter break, Case Manager and School Psychologist agreed to work on a “plan” for Student that they would send Parent to review. *Id.* Case Manager was envisioning an informal plan with strategies to use when Student was in that “manic” state. *Interview with Case Manager*. The plan would be informal because Case Manager did not know why the behaviors were occurring or if they were just a temporary reaction to medication changes. *Id.* Parent never received a draft plan. *Interview with Parent*.

30. At the time Case Manager sent that email, on November 17, Student was upset and ranting about a variety of things. *Exhibit 1*, p. 5. He was “pacing around and ranting and raving” and would “calm himself down just to start ranting again.” *Id.* In all, the incident lasted over half an hour. *Id.* She indicated that she now understood Parent’s concerns about his behavior. *Id.* Student had another incident that afternoon but was able to calm down after Case Manager took him to a neighboring classroom to process. *Exhibit Q*, p. 10. At that point, he had been taken off all antipsychotic medication. *Id.* at p. 11. With no formal plan, School was using best practices to address the escalations, which were emotional but not aggressive. *Interview with School Psychologist.*
31. Student started a new medication over the Thanksgiving break. *Exhibit Q*, p. 13. With about three weeks of school between Thanksgiving and Winter Break, the period in December can be challenging, with a lot going on at school, and Student occasionally started to display anger during periods of escalation. *Interview with Case Manager.* For instance, Student yelled at peers on December 10, 2021 and was mad that he was told he could not do so. *Exhibit Q*, p. 22. Student was still attending his general education classes but was also sometimes choosing to stay in the special education classroom for certain activities. *Interview with Case Manager.*

#### **F. The January 2022 FBA**

32. Student had a calm Winter Break, leading Parent to conclude that something happening at School was triggering his behaviors. *Interview with Parent.* On January 5, 2022, Parent emailed Case Manager and School Psychologist to again request an FBA for Student based on the frequency of behavior occurring at School. *Exhibit 1*, p. 7.
33. This time School Psychologist agreed that an FBA was appropriate to help Student be successful and safe at school. *Exhibit L*, p. 36. School Psychologist was already working on the informal outline of an FBA that she had started in December. *Id.*
34. On January 6, 2022, District sent Parent Prior Written Notice and Consent for Reevaluation (Non-Eligibility) (“FBA Consent”) to conduct an FBA. *Exhibit B*, p. 26. The FBA was not being conducted to determine Student’s continued eligibility for special education services. *Id.* The FBA was needed to develop a BIP to address Student’s behaviors, based on the increase in frequency and severity of behaviors. *Id.* Parent signed the FBA Consent on the day she received it, January 6, 2022. *Id.*
35. The FBA was completed on January 25, 2022. *Exhibit B*, p. 21. The behaviors of concern were yelling/trying to gain control and refusal. *Id.* Behaviors lasted anywhere from two to 15 minutes and occurred in all settings. *Id.* at pp. 21-22. From when tracking started in mid-November until Winter Break, Student was exhibiting the behaviors of concern approximately once a week. *Id.* There were eight behaviors of concern in three weeks in January. *Id.*



36. The FBA also included two observations. *Id.* at p. 24. During the observation on January 5, 2022, Student became escalated twice in general education, once having to be removed from the classroom and once requiring the classroom to be cleared. *Id.* During the observation in the special education classroom on January 14, 2022, Student became escalated and tried to grab another student. *Id.* Shortly after that Student had to take another break after trying to push an adult in the room. *Id.*
37. Antecedents to the behavior were being told no, classwork, wanting to be the teacher, being corrected, and transitions. *Id.* at p. 23. The FBA hypothesizes that Student “is impacted by his inability to expressively communicate to others his needs and manage his emotions when he is feeling overwhelmed or frustrated with a situation or a task,” impacting his relationships with peers and adults. *Id.* Student requires “explicit instruction and adult support in the general education classroom and small group settings to help him navigate and problem solve through daily expectations and routines.” *Id.* The FBA concludes that the behaviors of concern allow Student to “gain attention from adults, to gain access to being ‘teacher’ or technology, avoidance of assignments, and possibly being overstimulated.” *Id.* at p. 25.
38. Parent agreed to finalize the FBA on February 4, 2022 and agreed that “getting a BIP sooner than later is good!” *Exhibit L*, p. 6.

### **G. Reevaluation**

39. Prior Written Notice and Consent for Reevaluation (“Reevaluation Consent”) was sent to Parent on January 5, 2022. *Exhibit B*, p. 19. District proposed evaluating Student in the areas of general intelligence, communicative status, academic performance, social and emotional status, and motor abilities. *Id.* Parent signed the consent on January 10, 2022. *Id.* at p. 20. The Reevaluation Consent noted that Student’s eligibility of developmental delay would need to be changed as he was turning nine and was due for a triennial reevaluation. *Id.* at p. 19.
40. The results of the reevaluation (“Evaluation Report”) were shared with Parent at an eligibility meeting on February 10, 2022. *Exhibit D*. A multidisciplinary team (“MDT”) including Parent, Student’s Father, Student’s English Language Development Teacher (“ELD Teacher”), Case Manager, Student’s Speech Language Pathologist (“SLP”), Student’s Occupational Therapist (“OT”), and School Psychologist attended the eligibility meeting. *Exhibit B*, p. 31.
41. School Psychologist evaluated Student’s general intelligence using the Weschler Intelligence Scale for Children-Fifth Edition (“WISC-V”). *Exhibit B*, at p. 1. Student’s Full Scale IQ (“FSIQ”) score was very low, at 78. *Id.* His lowest composite score was extremely low, a 69 for working memory. *Id.* His other scores ranged from very low to average. *Id.* Student appeared distracted and impulsive during testing. *Id.* at p. 2. The Evaluation Report does not note if

Student's LEP or cultural background were taken into consideration in interpreting the results. *Id.*

42. SLP, Case Manager, School Psychologist and OT assessed communicative status, academic performance, social and emotional status, and motor abilities. *Id.* at pp. 2-18. Student demonstrated difficulty with expressive and receptive language and speech sound production. *Id.* at p. 18. He performed significantly below grade level in reading and math. *Id.* He struggled with adaptive skills and social emotional functioning across settings and required adult support to "maintain friendships, work independently, stay on task, and regulate his emotions." *Id.* at p. 17. Although his disability "impacts motor function on the left side of his body," he was generally able to access the educational setting with minimal assistance. *Id.* at p. 17.
43. After considering the Evaluation Report, the MDT determined that Student remained eligible for special education and related services. *Id.* at p. 29. According to the MDT, Student was eligible as a child with an ID, OI, SLI and OHI. *Id.* As a child with two or more eligibilities, including an ID, Student was eligible as a child with MD. *Id.*
44. The eligibility meeting in February went long, so they agreed to reconvene to discuss Student's IEP. *Interviews with Parent and Case Manager.* An IEP meeting was scheduled for March 10, 2022. *Exhibit A*, p. 50.

#### **H. Ongoing Behavioral Concerns**

45. If students in District are sent home early for any reason other than illness, District has instructed school teams to record it as a suspension. *Interview with Director.*
46. Throughout February and into March, Student's behavior continued to escalate. *Interviews with Parent, Case Manager, and School Psychologist.* School saw a significant increase in Student's behaviors in January. *Interview with School Psychologist.* Student was struggling to stay in the general education setting and becoming escalated very quickly. *Id.* It took longer to calm him down, and he would become escalated as much as five times a day. *Id.* Although there was still no BIP, School was responding using best practices including Crisis Prevention Institute ("CPI") de-escalation strategies, taking deep breaths, offering safe locations, and using preferred fidgets. *Id.*
47. Despite having the option to return to general education when regulated, Student was spending more time in the special education classroom, often opting to work in the sensory room or in the emptier half of the special education classroom with Case Manager and another student. *Interview with Case Manager.* Case Manager's special education classroom is divided into two sides, with an office and sensory room in the middle. *Id.* The door to the sensory room stays open and students are free to come and go as they please. *Id.*

48. On February 14, 2022 Student became escalated at recess after a difficult interaction with peers. *Id.* at p. 52. Student remained escalated throughout the afternoon, and classmates had to be removed from the special education classroom after he began yelling at them. *Id.* Because Student was still “pacing and talking,” Case Manager told Parent “the bus will be fun!!!” *Id.* Parent asked Case Manager to have the bus aide “run his hands” because she was worried about a restraint being needed on the bus. *Id.* at p. 53.
49. Student had another difficult day on February 15 and “blew up” at Case Manager. *Id.* at p. 53. Case Manager was not sure he should go to tutoring because she was unable to stay late. *Id.* at pp. 52-53. Case Manager sent Parent a description of Student’s “manic” behavior to share with the doctor who was adjusting his medications. *Id.* at p. 54. Student screamed, cried, and threw himself on the ground for about half an hour. *Exhibit L*, p. 25. He started to escalate several times throughout the remainder of the day and generally appeared “manic” and almost anxious. *Id.* When “manic” he is “very talkative and not in an appropriate way (either babyish or bossy), he paces, unfocused, giggly, ‘yawns’,” and is “anxious/can’t sit still.” *Id.*
50. At 10:50 a.m. on February 22, 2022, Case Manager notified Parent that Student had been throwing “fall to the ground fits” since 10:00 a.m. *Exhibit Q*, p. 56. Student also eloped from the classroom. *Id.* Student continued to throw fits anytime Case Manager placed a request or demand on him. *Id.* at p. 57. Parent and Case Manager were both at a loss for how to handle the behavior. *Id.* at pp. 57-58. Case Manager noted that Student became upset anytime she walked away to work with other students, “like he is reassuring himself I am not going away again or something.” *Id.* at p. 58. Parent asked if she should pick Student up from tutoring after just 30 minutes since he was struggling and pointed out the connection between Student’s trauma and fear of having to leave School. *Id.* at pp. 59-60.
51. Student continued to have additional smaller incidents at school, and Parent and Case Manager had a phone call and discussed bringing in a District behavior specialist with a background in trauma (“Behavior Specialist 2”). *Id.* at pp. 64-66.
52. On March 1, 2022, Student was mean and angry, screaming at others and trying to elope from the classroom. *Id.* at p. 67. Case Manager told Parent to come get Student because “it is taking three of us to contain him.” *Id.* Parent agreed to pick him up and noted that Student’s doctor had stopped one of Student’s medications for a fresh start. *Id.* at pp. 68-69. School had not yet finalized a BIP. *Interview with Parent.*
53. After the March 1 incident, School Psychologist and Case Manager were “stumped as to what is happening with [Student] right now.” *Exhibit L*, p. 17. If Parent was willing to sign a permission slip, School Psychologist proposed bringing in District’s behavior team to help figure out how to best support Student in the school environment. *Id.* Parent agreed to sign

the permission slip but reiterated the importance of integrating a trauma-informed approach with any behavior interventions. *Id.*

54. School Psychologist also offered to send home a release of information so School team could share what they were seeing with the doctor overseeing Student's medication changes. *Id.* Parent indicated that Student's provider would be happy to speak with the team. *Id.* at p. 16. Student's doctor was weaning Student from one of two medications to get him back to a baseline. *Id.*
55. If Parent was willing, School wanted to try a modified day because Student "had the best day he has had in a long time" when he came in late one morning. *Id.* Parent explained that Student would have to be on a modified schedule after ABA therapy started, as he was supposed to attend from 1-5 p.m. daily. *Id.* However, she did not know when services on that schedule would start. *Id.*
56. Parent then kept Student home on March 2, 2022 because she did not want to put the school team "through that much stress." *Exhibit Q*, p. 70. Student returned for a short day on March 3, 2022 and was picked up early for a doctor's appointment. *Id.* at p. 72.
57. Case Manager thought Student should come for a half day on March 4, 2022 because she was leaving early that day. *Id.* at p. 74. At 10:08 a.m. on March 4, 2022, Case Manager told Parent Student was "RAGING" and "losing it" in the sensory room, but that they should give him 15 minutes to calm down before deciding if Parent needed to pick him up. *Id.* at p. 75. He calmed down enough to work in the sensory room with a paraeducator but escalated anytime other staff approached. *Id.* at p. 76. Parent picked him up around noon as planned. *Id.* at pp. 74-76.
58. From 10:01-10:20 a.m. on March 4, 2022, staff blocked Student's egress from the sensory room because Student was kicking the door and trying to throw himself out of it. *Exhibit H*, pp. 1-2. Case Manager completed a "Student Restraint Incident Report Form" ("Restraint Report"). *Id.* at pp. 1-4. The Restraint Report notes that this was part of a pattern of steadily increasing behaviors and that Student's BIP was still in draft form. *Id.*
59. On Monday, March 7, 2022 Parent asked if she should plan to pick up Student, instead of having him take the bus, based on how his days went. *Exhibit Q*, p. 77. Case Manager indicated that Student's behavior had fluctuated throughout the afternoon, and he was working by himself in the other side of the classroom to avoid people. *Id.* Parent indicated she would pick him up because she was worried he would be triggered on the bus where there is little support. *Id.* at p. 78. Case Manager did not respond to Parent's concerns about the bus. *Id.*
60. Student was "spiraling with anxiety, self doubt (sic), and fear." *Id.* at p. 80. On March 8, 2022, he gave himself a massive nosebleed and was choosing to work alone on the other side of

the special education classroom or in the sensory room. *Id.* at p. 81. Parent asked if she should come get him. *Id.* at p. 82. Instead of answering, Case Manager told her he had yelled at paraeducators and another student, so Parent picked him up at 2:00 p.m. *Id.* at pp. 82-83.

#### I. March 2022 IEP Meeting

61. When students are struggling with behavior at school, school teams are advised to start with the resources available in their building. *Interview with Coordinator*. If a student's behaviors necessitate an FBA, the IEP team might meet to plan next steps. *Id.* However, it is more likely that the FBA will be arranged through emails and the IEP team will meet after the FBA is complete. *Id.*
62. If the student continues to struggle, school teams can reach out to District's behavior support team ("BST") for assistance developing interventions. *Id.* For more difficult cases, District will hold a BST meeting with members of the IEP team along with two members of District's BST. *Id.* To facilitate a multidisciplinary approach, members of the BST try to attend meetings in pairs. *Interview with Behavior Specialist 1*.
63. Parent, Student's Father, Case Manager, Student's general education teacher, Student's ELD Teacher, SLP, OT, and School Psychologist attended a March 10, 2022 IEP team meeting. *Exhibit A*, p. 36. Together, they drafted an updated IEP ("2022 IEP"). *Exhibit A*, pp. 38-51.
64. The summary of the Evaluation Report is copied and pasted as the Present Levels of Educational Performance Summary. *Exhibit A*, pp. 40-41. There is no description of the nature of Student's behavioral challenges or their increasing frequency and intensity. *Id.* The 2022 IEP does not include any information about progress on the 13 goals in the 2021 IEP. *See Id.* at pp. 38-51. However, Student made progress on most of his prior goals during the fall 2021 semester, although he stagnated or regressed in some areas late in the semester or early in spring semester. *Exhibit I*, pp. 6-18.
65. The Student Needs and Impact of Disability statement is copied directly from the 2021 IEP. *Compare Exhibit A*, pp. 7 and 41. It does not include any new information from the Evaluation Report. *Id.* at p. 41. Also, there is no mention of Student's new behavior needs. *Id.*
66. Parent provided detail about Student's background and expressed concern about the need for a trauma informed approach to his behaviors. *Id.* The 2022 IEP notes that Student requires a BIP which is kept online and in the special education classroom. *Id.* at p. 42. The 2022 IEP also notes that Student has LEP and received ELD services to address "reading, writing, listening, and speaking." *Id.* According to the IEP, Student needs access to assistive technology for predictive text and requires special transportation on a bus "with an aide on it to help support behavioral needs." *Id.* Finally, he no longer requires a health plan. *Id.*

67. The 2022 IEP contains five annual goals and Parent is to “be informed of progress two times yearly” at the end of each semester:

- Communication: From a baseline of 11, “[Student] will improve his receptive and expressive language skills, as evidenced by improving 7 points on the 2022-2023 Language Rubric (see attached) following an adult model.”
- Reading: From a baseline of 68 percent “[g]iven 8 Functional Reading Curriculum Units, [Student] will demonstrate understanding of functional reading concepts and vocabulary as evidenced by working through each unit and scoring at least 80% on the post test for each unit.”
- Mathematics: From a baseline of 20 percent, “[g]iven 8 Functional Math Curriculum Units, [Student] will demonstrate understanding of functional math concepts as evidenced by working through each unit and scoring at least 80% on the post test for each unit.”
- Writing: From a baseline of 60 percent, “[g]iven a picture or topic, [Student] will write 4 complete sentences in varying length, with 90% accuracy in sentence structure and grammar, in 3 out of 4 opportunities.”
- Social\Emotional Wellness: From a baseline of 50 percent, “[Student] will be able to use learned strategies to regulate his emotions in order to participate in his general education classroom, complete academic tasks, and maintain peer relationships greater than 85% of the academic week." This goal has three objectives:
  - “[Student] will be able to recognize his level of anxiety and/or frustration using a visual tool (thermometer, number scale, etc) in 4 out of 5 trials.”
  - “[Student] will be able to name more than 3 developmentally appropriate coping strategies that he can use when he is feeling overwhelmed, frustrated, or anxious in 4 out of 5 trials.”
  - “Given direct instruction in perspective taking/empathy skills, [Student] will be able to label the perspective of others through role play or in reflecting on his own life situations in order to think about how he is making others feel with 1-2 prompts in 3 out of 5 trials.

*Id.* at pp. 42-45.

68. The 2022 IEP lists 22 accommodations, including visual cues and visual schedule, checks for understanding, proximity to teacher, social/emotional check in with familiar adult as needed

and several accommodations to address academic and motor needs. *Id.* at p. 45. The only new accommodations address motor needs for writing and eating and assistive technology for literacy: “Word Prediction for laptop,” “use of a mouse instead of a touchpad” and “audiobooks for reading comprehension.” *Id.* Student’s math curriculum is modified to his level. *Id.* at p. 46.

69. Student was to receive the following special education and related services:

- Occupational Therapy: 30 MPM of indirect occupational therapy services “to support motor needs and access to accommodations.”
- Speech/Language Services: 120 MPM in a small group or on an individual basis outside the general education classroom to target communication skills.
- Specialized Instruction: 1,550 MPW (or 310 minutes a day) of direct academic instruction outside the general education classroom “for academic skills and to work on behavior goals.”
- Social/Emotional Skills Development: 90 MPM of direct services with a school mental health provider outside the general education classroom.

*Id.* at pp. 48-49. No services were to be provided inside the general education classroom. *Id.*

70. Per the 2022 IEP, Student’s LRE was general education less than 40 percent of the time because of the “nature of the behaviors currently seen.” *Id.* at p. 50. The selected LRE would allow Student to focus on behavior with the opportunity to attend the “general education classroom instruction when he so chooses without the anxiety of having to be made to go to his general education setting.” *Id.* Based on the services included in the 2022 IEP, Student was spending 20.1 percent of his day in general education. *Id.*

71. The 2022 IEP includes an embedded PWN which notes that the IEP meeting was rescheduled for March 10, 2022 due to time constraints. *Id.* The PWN also states that the full day offer of FAPE was “was rejected by the team due to [Student’s] on going (sic) need for behavior support in terms of a modified day.” *Id.* The team agreed that Student would start on a modified schedule because flexibility was needed for Student to be successful. *Id.* at pp. 50-51. The team would “determine when a change within his school day/week is needed during the remainder of the 2021-2022 school year and beginning of the 2022-2023 school year” based on communication between Parents and the School team. *Id.* at p. 51.

## J. BIP Development

72. The IEP team ran out of time to discuss Student's BIP at the March 10, 2022 IEP team meeting. *Interviews with Parent and School Psychologist*. On Friday, March 11, 2022 Parent signed a permission slip to allow the District behavior team to become involved. *Exhibit L*, p. 7. Parent also asked how they move forward on the BIP. *Id.* at p. 8. School Psychologist noted that Parent had a draft of the BIP and asked for dates when they could meet to complete it. *Id.*
73. The following week was District's Spring Break. *Exhibit J*. The Monday morning after Spring Break, in an email not provided to the SCO by District, Parent enquired about the plan for Student and a time to meet and discuss a schedule and behavior plan for Student. *Exhibit 1*, p. 13. Parent was hesitant to move forward as there was still no formal plan for responding during escalations. *Id.* Parent also indicated that she was not comfortable having Student on the bus until a formal plan was in place. *Id.*
74. School Psychologist agreed to meet anytime that week but noted that Case Manager would not be available. *Id.* at p. 12. School Psychologist explained that it would take time to get input from the behavior team and gave Parent the choice of waiting for the behavior team or meeting to make sure Student was supported and safe while at school. *Id.*
75. In another email not provided to the SCO by District, Parent opted for a meeting with School Psychologist because Student's behaviors had not been fully discussed at the March IEP team meeting. *Id.* at p. 14. Parent was concerned about who was working with Student while Case Manager was out. *Id.* Without a BIP or even a tentative plan, Parent was worried that responses to Student would vary by staff member and not be trauma informed. *Id.*
76. School Psychologist agreed that Student's current behaviors required a meeting to put a plan in place and proposed having another meeting later with District's BST to get their insights and suggestions. *Id.* She told Parent that the School team talked often about what was or was not working for Student, so the response to Student's behavior was the same whether or not Case Manager was present. *Id.* Finally, she asked if Parent would be dropping Student off if she did not feel he was safe on the bus. *Id.* Parent and School Psychologist agreed to meet March 22, 2022 to discuss a plan for Student. *Exhibit L*, p. 43.
77. After the meeting on March 22, Parent requested a full team meeting to discuss a temporary behavior plan and schedule to plan for Student's future. *Exhibit L*, p. 76. The SCO finds that Parent and School Psychologist did not finalize a BIP during their meeting on March 22, 2022.
78. Behavior Specialist 1 met with School Psychologist on March 24 and observed Student on March 28. *Interview with Behavior Specialist 1*.



79. On Thursday, March 24, 2022, School Psychologist proposed a meeting with herself, Case Manager and Behavior Specialist 1 the following Tuesday. *Exhibit L*, p. 19. Behavior Specialist 1 trains District staff on trauma. *Id.* School Psychologist confirmed a meeting date and time, adding that Behavior Specialist 2, another trauma expert, would also be present. *Id.* at p. 62. During the March 29 meeting, Parent shared more about Student's background. *Interview with Behavior Specialist 1*. The team agreed that the behavior specialists would put together a cheat sheet for the staff working with Student and review the BIP. *Id.*
80. School Psychologist and Behavior Specialist 1 met on April 5 to discuss the draft BIP. *Exhibit L*, p. 84. Behavior Specialist 1 recommended more trauma informed language and strategies. *Id.* Behavior Specialist 1 and Behavior Specialist 2 also agreed to do a training on trauma for all the staff working with Student's special education classroom. *Id.* Parent agreed to finalize the updated draft BIP on April 7. *Id.* at pp. 83-84.
81. On April 11, 2022, Behavior Specialist 1 offered a training at School to help staff with implementation. *Interview with Behavior Specialist 1*. Only Case Manager attended. *Id.*

#### **K. Shortened Day**

82. If a student requires a shortened day to access education, IEP teams are supposed to note that in the service delivery section of the IEP. *Interview with Director; Exhibit T*, p. 1. The IEP or embedded PWN should include a plan to increase the length of student's day, or at least a reference to such a plan maintained elsewhere. *Interview with Coordinator; Exhibit T*, p. 4.
83. Parent and School staff contemplated the idea of a shortened day in several conversations after Student had a good day after coming in late. *Interviews with Case Manager and School Psychologist*. School Psychologist was unsure exactly when a modified schedule was agreed upon. *Interview with School Psychologist*. Case Manager remembers talking about it again at the March IEP team meeting to allow for ABA therapy. *Interview with Case Manager*. During the meeting on March 22, 2022, Parent and School Psychologist agreed to try a shortened day to "rewire [Student] to have success" and accommodate his outside appointments. *Interview with Parent*.
84. The PWN from the 2022 IEP notes that the IEP team decided that a modified day was necessary for Student to be successful. *Exhibit A*, pp. 50-51. Student started a modified schedule on March 23, while Parent was still waiting to hear when ABA therapy would start. *Exhibit L*, p. 76. On March 23, Parent requested a PWN to note the change in services, and Parent and School Psychologist discussed the times for a modified schedule. *Id.* March 23 is also the date when School Psychologist shared the modified schedule for Student. *Exhibit L*, p. 48; *Exhibit 1*, p. 15. The service delivery section of Student's IEP was not modified to reflect a shortened day. *Exhibit A*, pp. 62-63.

The SCO finds that Parent and School Psychologist agreed to the modified day at their meeting on March 22, 2022, and it started on March 23, 2022. The SCO also finds that the change was made to Student's schedule due to his behavior and not to accommodate ABA therapy, which had not yet started.

85. Student's modified schedule was intended to give him lots of choices. *Interview with School Psychologist*. Student was very triggered by worksheets at that point, so they temporarily removed academic demands. *Id.* The goal was to rebuild his trust and sense of safety at school. *Interview with Case Manager*. Student was working one-on-one with a new paraeducator in various locations around the building. *Interview with Behavior Specialist 1*. With the modified schedule, he was at school for about three hours per day. *Exhibit 1*, p. 15
86. Related service providers and Student's ELD teacher continued to try to meet with Student, but his behaviors often got in the way. *Interview with Case Manager and School Psychologist*. In November of 2021, School Psychologist provided Student with 105 minutes and SLP provided Student with 165 minutes of services. *Exhibit F*, pp. 46-51. In December of 2021, during which there were 12 school days, Student met with School Psychologist for 60 minutes and SLP for 105 minutes. *Id.* at pp. 38-46; *Exhibit J*. In January of 2022, Student had 60 minutes with School Psychologist and 200 minutes with SLP. *Exhibit F*, pp. 26-38. In February, he received 60 minutes with School Psychologist and 90 minutes with SLP. *Id.* at pp. 15-26. In the month from March 23, 2022 until April 26, 2022, when Student was on a shortened day, Student received 120 minutes of services with School Psychologist and 30 minutes with SLP. *Id.* at pp. 4-10. Other services in February, March and April were missed because of Student's behavior or because the provider was unavailable. *Id.* at pp. 4-26.
87. When Behavior Specialist 1 conducted her observation on March 28, 2022 Student had been on a modified schedule for a few days and the team was celebrating that he had not tried to elope in three days. *Id.* Behavior Specialist 1 observed that Parent and School staff were using appropriate strategies and Student appeared to feel safe and have a sense of belonging in the building. *Id.* He did not have any escalations during the observation period. *Id.*
88. During the meeting on March 29, 2022, Behavior Specialist 1 recommended returning Student to a full day of instruction to "create a sense of safety and regulation," but Parent preferred to continue with a shortened day, in anticipation of ABA services starting soon. *Interview with Behavior Specialist 1*.
89. School Psychologist met with Behavior Specialist 1 on April 5 to discuss strategies to introduce more academics into Student's schedule. *Exhibit L*, p. 9. By April, Student's behavior was improving. *Interview with Case Manager*. Student started choosing to spend more of his time working in the special education classroom and working with Case Manager. *Id.* Throughout April, Student's behavior was improving, and he was engaging in more academic supports.

*Interviews with Behavior Specialist 1, Case Manager and School Psychologist.* Nevertheless, Student did not work on any of his goals after the March IEP team meeting. *Exhibit I*, pp. 1-5.

#### L. BST Meeting

90. School Psychologist emailed Parent to schedule a BST meeting in late April to discuss Student's progress and next steps. *Exhibit L*, p. 49. Parent agreed to meet on April 26, 2022 with Case Manager, Parent, School Psychologist, Behavior Specialist 1, Behavior Specialist 2 and possibly Principal. *Id.* On April 20, Parent sought, and received, permission to bring Student's Board Certified Behavior Analyst to the meeting. *Id.* at pp. 44-45.
91. Unbeknownst to Parent, School team became concerned that Parent was "setting the stage" for an out of district placement. *Exhibit L*, p. 149. With the belief that Parent took Student off his medications, causing an increase in behavior, Coordinator began conversations at District to consider an administrative transfer to a smaller special education classroom. *Id.* The only programs with fewer students were on the other side of District, at a considerable distance from Student's home. *Id.* Moving Student to a smaller program would be good "mostly because of the younger and more fragile students in the [School] program." *Id.* at p. 108.
92. When Parent arrived at the BST meeting, she was concerned to see Coordinator, whom she knew from prior meetings for her other children. *Interview with Parent.* School team noted that the meeting felt unusually tense from the start. *Interviews with Principal, Case Manager and School Psychologist.* The first part of the meeting went well, while they talked about Student's recent successes and made some adjustments to the BIP. *Interview with Parent.* Parent asked about how to get Student back to a full day and was told District would offer him a full day immediately. *Id.*
93. After the BST portion of the meeting ended, Coordinator explained that as an alternative to remaining at School, District could transfer Student to another school with fewer students for the coming school year. *Interviews with Coordinator, Principal, and School Psychologist.* District explained it was presenting the option because School would have a full program for the coming year and Student appeared to be triggered by other students. *Id.* It seemed as if this was the continuation of ongoing conversations between Parent and School. *Interview with Behavior Specialist 1.* Parent became very upset and left the meeting, but staff was not sure why. *Interview with Case Manager, Coordinator and School Psychologist.*
94. Parent felt "blindsided" by the conversation and "very hurt" that School would propose moving Student considering Student's history of trauma and fear of abandonment. *Interview with Parent; Exhibit L*, pp. 3-4. She took from the meeting that School team did not think it was in Student's best interest to return as they would be too full to meet his level of need. *Id.* Parent did not return Student to School for the remaining 21 school days of the 2021-2022 school year. *Interview with Parent; Exhibit J.*

## **M. Transportation**

95. If students need additional supports or services to safely access required transportation services, that is worked out between the school team, family, and transportation team. *Interview with Director*. Each transportation manager in District handles it differently. *Id.* Transportation has its own CPI trainer on staff. *Id.* All transportation providers get CPI training every other year, with a refresher in between. *Id.*
96. When students at School have BIPs, they are always shared with bus drivers and any aides on the bus. *Interviews with Case Manager and School Psychologist*.
97. Student had a tough time on the bus after school on December 2, 2021. *Exhibit Q*, p. 15. He had another challenging bus ride on December 9, 2021, requiring physical redirection. *Id.* at p. 19. Parent expressed concern about restraint being required on the bus and inquired about next steps. *Id.* Case Manager said she would reach out to see what was required since “the bus/transportation is such a different process.” *Id.* Case Manager did not reach out to transportation because Parent said it was fine, she “just wanted to make sure nothing happened like that again.” *Interview with Case Manager*.
98. School was not concerned about Student’s ability to ride the bus safely and was not aware of Parent’s concerns until the Spring. *Interviews with Principal and School Psychologist*. Parent was in frequent communication with the bus aide about Student’s schedule and when he was having difficulties on the bus. *Interview with Parent*. At drop off, the bus driver and/or bus aide frequently give her looks or said “good luck with him today” to tell Parent that Student had struggled on the bus. *Id.*
99. Based on the personal experience of a friend, Parent was concerned that Student would be injured if restrained on the bus by someone without appropriate training. *Id.* She wanted a BIP for Student to make sure bus staff had the appropriate tools to support Student. *Id.* Concerned for Student’s safety on the bus without an appropriate plan, Parent started picking him up more frequently so he would not be on the bus when he had been dysregulated at school. *Id.*
100. Student continued to take the bus intermittently until his schedule changed in March. *Id.* After Student started the modified schedule, Parent notified the bus aide that Student would not be able to take the bus anymore because of scheduling. *Id.*

## **CONCLUSIONS OF LAW**

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

**Conclusion to Allegation No. 1: District failed to conduct a reevaluation at Parent’s request and failed to issue proper PWN, in violation of 34 C.F.R. §§ 300.303 and 300.503. District also conducted a reevaluation without consent of Parent, in violation of 34 C.F.R. § 300.300(c)(1). These violations did not result in a denial of FAPE.**

Parent’s first concern is that District twice refused to conduct FBAs she requested and did not issue PWN in connection with those refusals.

District’s must ensure that a reevaluation of a child with a disability is conducted if “the child’s parent or teacher requests a reevaluation.” 34 C.F.R. § 300.303(a)(2). However, reevaluations cannot occur more than once a year and must occur at least once every three years, unless the parent and district agree otherwise. 34 C.F.R. § 300.303(b). Districts must obtain parent consent prior to conducting a reevaluation. 34 C.F.R. § 300.300(c)(1). “Once a parent requests evaluation, the school district has two choices: agree to evaluate the child and obtain parental consent to conduct the evaluation or deny the request to evaluate and provide parent with written notice explaining its decision.” *Poudre School District*, 118 LRP 28104 (SEA CO 02/5/2018).

The IDEA requires PWN to be provided to the parents of a child with a disability within a reasonable time before the public agency:

- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

34 C.F.R. § 300.503(a).

Failure to provide PWN within a reasonable time before proposing or refusing to initiate the evaluation of a child constitutes a procedural violation that may result in a denial of FAPE. *See El Paso County Sch. Dist. 2*, 113 LRP 44602 (SEA CO 08/15/13). PWN must be provided so that parents have enough time to fully consider and respond to the action before it is implemented. *Letter to Chandler*, 59 IDELR 110 (OSEP 2012).

PWN must include a description of the action proposed or refused by the district; an explanation of why the district proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report used by the district as a basis for the action; a description of other options the IEP team considered and the reasons why those options were rejected; and a description of any other factors relevant to the district’s proposal or refusal. 34 C.F.R. § 300.503(b)(1)-(3) and (6)-(7). It must also include a statement that the parents of a child with a disability have protections under the procedural safeguards and the means of obtaining a copy of the procedural safeguards if the notice is not for an initial evaluation, and sources for

parents to contact to obtain assistance in understanding the procedural safeguards. *Id.* § 300.503(b)(4)-(5).

#### **A. An FBA is an Evaluation**

District contends that it did not have to conduct an FBA at Parent’s request because an FBA is not evaluation. Thus, as a preliminary matter, the SCO must determine whether an FBA is an evaluation. FBAs are “used to understand the function and purpose of a child’s specific, interfering behavior and factors that contribute to the behavior’s occurrence and non-occurrence for the purpose of developing effective positive behavioral interventions, supports, and other strategies to mitigate or eliminate the interfering behavior.” *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions*, 81 IDELR 138 (OSEP 2022). As such, FBAs focusing on the needs of a specific child have generally been understood to be an evaluation entitled to the procedural safeguards included in the IDEA. *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007) (advising that if an FBA focuses on the individual educational and behavioral needs of a specific child then the FBA qualifies as an initial evaluation or reevaluation and requires informed parental consent).

One appellate court has recently decided that an FBA is not an evaluation or a reevaluation under the IDEA. *D.S. v. Trumbull Board of Education*, 77 IDELR 122 (2d Cir. 2020). However, opinions from the Second Circuit are not binding in this jurisdiction. No court in this jurisdiction has ruled on this issue and no other appellate court in the country has agreed with the Second Circuit. Although OSEP is reevaluating its position that an FBA is an evaluation, it has not issued a new position. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions*, 81 IDELR 138 (OSERS 2022).

In the absence of a controlling decision or a plurality of decisions to the contrary, the SCO finds and concludes that, where used to determine whether a child has a disability or the nature and extent of special education and related services that a child may need, an FBA is an evaluation. As such, the decision not to conduct an FBA obligates a district to issue PWN. *See Pikes Peak Board of Cooperative Educational Services*, 122 LRP 39730, (SEA CO 05/21/2022). Similarly, districts must obtain parental consent prior to conducting an FBA. 34 C.F.R. § 300.300(c)(1).

#### **B. First Request for an FBA**

Parent first requested an FBA on September 28, 2021, to develop a BIP to support Student. (FF # 20.) School Psychologist refused, in writing, to conduct an FBA. (FF # 21.) District’s position is that School Psychologist’s email constitutes PWN because it contained all the required information.

The SCO finds that School Psychologist’s email to Parent included much, but not all, of the information that must be included in PWN. The email told Parent what District was refusing to do (conduct an FBA). (FF # 21.) It explained District’s reasoning—District did not have 10 instances

of behavior to draw from in identifying patterns due to a lack of behavior incidents at school. *Id.* It also contained descriptions of other options considered—reassessing if redirection stopped working—and other factors relevant to District’s decision, such as this being an isolated incident. *Id.* However, the email did not contain other information required by 34 C.F.R. § 300.503(b). It did not explain what procedures, assessments, records, or reports District used as a basis for its decision. (FF # 21). It did not state that “parents of a child with a disability have protection under the procedural safeguards of” IDEA or a description of how Parent could access those safeguards. 34 C.F.R. § 300.503(b)(5); (FF # 21). Finally, it did not include sources where Parent could obtain assistance in understanding these provisions. (FF # 21).

For these reasons, the SCO finds and concludes that District did not conduct an FBA or issue proper PWN when it refused to conduct an FBA at Parent’s request on September 28, 2021, resulting in a procedural violation of 34 C.F.R. §§ 300.303(a)(2) and 300.503.

### **C. Second Request for an FBA**

Parent again requested an FBA to address Student’s behavior in a conversation with Case Manager in November. (FF # 28.) Case Manager told Parent School would put together an informal plan instead of conducting an FBA. (FF # 28.) In reality, School Psychologist started working on the outline of an FBA in December. (FF # 33.) As part of the FBA, School Psychologist observed Student on January 5, 2022. (FF # 36). Parent received and signed consent for an FBA on January 6, 2022. (FF #34.)

For these reasons, the SCO finds and concludes that, in response to Parent’s November request for an FBA, District began conducting an FBA. As such, District was not obligated to issue PWN documenting its refusal to do so. However, prior to conducting the FBA, District was obligated to obtain parental consent, or pursue the override procedures in 34 C.F.R. § 300.300(c). In this case, District obtained Parent’s consent on January 6, 2022, after starting the FBA in December and conducting a formal observation of Student on January 5, 2022. Therefore, the SCO finds and concludes that District did not obtain parental consent *prior to* conducting the FBA, resulting in a procedural violation of 34 C.F.R. § 300.300(c)(1) (emphasis added).

### **D. Procedural Violation**

The United States Supreme Court has stressed the importance of complying with the IDEA’s procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, procedural violations of IDEA are only actionable to the extent that they impede the child’s right to a FAPE, significantly impede the parents’ opportunity to participate in the decision-making

process regarding the provision of a FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008).

Here, District’s failure to issue PWN upon refusing to conduct the requested evaluation meant that Parent was not reminded of her rights or directed toward sources to help her understand her rights. As a result, Parent was not aware of the options she had to disagree with District’s decision. (FF # 22.) However, Parent was also motivated to keep the peace with the team at School at that time. *Id.* Therefore, the SCO finds and concludes that Parent would not have proceeded differently had she received PWN with all the required information, and that the procedural violation of 34 C.F.R. §§ 300.303(a)(2) and 300.503 did not result in a denial of a FAPE.

As for conducting the FBA without parental consent, an FBA was necessary to ensure the provision of a FAPE for Student so starting the FBA in December did not impede his right to a FAPE or cause a deprivation of educational benefit. Conducting an evaluation without consent would generally significantly impede parents’ opportunity to participate in the decision-making process as they do not even know a decision is being made. However, in this case, in conducting the FBA the District was doing what Parent wanted and had already requested twice. Therefore, the SCO finds and concludes that the procedural violation of 34 C.F.R. § 300.303(a)(2) did not result in a denial of FAPE.

**Conclusion to Allegation No. 2: District failed to review and revise an IEP for Student that was individually tailored to address Student’s needs, in violation of 34 C.F.R. §§ 300.320(a)(1)(i), (a)(2), (a)(4) and 300.324(a)(2). This violation resulted in a denial of FAPE.**

Parent’s concern is that District failed to review and revise an IEP for Student that was individually tailored to address his increasing behavior needs.

#### **A. 2021 IEP: Review and Revision**

Parent’s concern is that while Student’s behavior started increasing in the fall of 2021—causing Student to miss services and spend less time in the general education classroom—District did not review and revise the 2021 IEP until March of 2022.

The IDEA requires school districts to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). For a student whose behavior impedes their learning, the IEP must, among other things, also “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. § 300.324(a)(2). The IDEA does not promise a particular educational or functional outcome for a student with a disability, but it does provide a process for reviewing an IEP to assess achievement and revising the program and services, as necessary, to address a lack of expected progress or changed needs. *Id.* To that end, school



districts have an affirmative duty to review and revise a student's IEP at least annually. 34 C.F.R. § 300.324(b).

However, the IDEA's procedures contemplate that a student's IEP may need to be reviewed and revised more frequently to address changed needs or a lack of expected progress. *See id.* §§ 300.324(a)(4)-(6), (b); *Endrew*, 137 S. Ct. at 994. The obligation to revise a student's IEP to address changing behavior needs exists whether or not the district is considering disciplinary action to address the behavior. *See e.g., Morgan v. Chris L.*, 25 IDELR 227 (6th Cir. 1997, unpublished), cert. denied, 112 LRP 24142, 520 U.S. 1271 (1997) (holding that the district was obligated to convene an IEP team meeting to address behaviors even if school officials were not considering any disciplinary actions that would trigger the procedural safeguards in the IDEA).

In this case, Parent first suggested that District update Student's IEP to address behaviors on September 28, 2021. (FF # 20.) District declined to create a BIP on the grounds that Student had not had 10 instances of behaviors at School. (FF # 21.) There is no IDEA requirement that school districts must wait for 10 incidents to conduct an FBA. Moreover, District practice is to collect 10 days of data with no requirement that a behavior occur on all 10 days. (FF # 19.) FBAs can be conducted to evaluate a wide range of behaviors that are interfering learning, not just behaviors that create a safety concern. *See* CDE, *Functional Behavioral Assessment (FBA) and Behavior Intervention Plans (BIP)* at p. 1 (August 2017), available at [https://www.cde.state.co.us/cdesped/ta\\_fba-bip](https://www.cde.state.co.us/cdesped/ta_fba-bip) (noting that FBAs can be conducted to gather information about behaviors including not completing class work, hitting, or refusing to follow classroom expectations). While the incident at tutoring may have been unique at the time in terms of its intensity, the 2021 IEP included three social/emotional wellness goals and time with a mental health provider to help Student develop strategies to avoid and cope with feelings of frustration or anxiety. (FF #s 9 and 11.) For these reasons, the SCO finds that, as of September of 2021, Student's social and emotional needs were interfering with his learning.

Student's behavior noticeably increased in October and November of 2021, although Case Manager did not know what was causing the behavior. (FF #s 27-29.) In late November, Parent again asked to develop a BIP to address Student's behaviors and offered to share an outside evaluation. (FF # 28.) Student's escalations became angrier in December of 2021 and Student sometimes chose not to attend general education classes. (FF # 31.) Student's behaviors were occurring across all settings and increasing in frequency into January. (FF # 35.) Although the FBA concluded that the target behaviors were occurring about twice a week in January, Student had multiple escalations which interrupted instruction during both observations included in the FBA. (FF # 36.) Thus, the SCO finds that behaviors which interfered with his learning were occurring consistently by January.

The FBA was completed on January 25, 2022. (FF # 35.) However, Student's IEP was not modified until March and a BIP was not implemented until April. (FF #s 63 and 80.) Contrary to District's position, Student's behavior did not escalate because Parent took him off medications. (FF # 91.)

As Parent regularly reported to Case Manager, the SCO finds that Student's doctor was adjusting Student's medications because of his increasing behaviors. (FF #s 27, 30, 31, 49, 52, and 54.) The SCO also finds that any delay in completing the BIP was not caused by Parent. Contrary to District's position, Parent promptly responded to District and inquired about getting a BIP in place. (FF #s 34, 38, 51, 53, 59, 72, 73, 75-77, 79 and 80.) It was also School Psychologist's recommendation to involve District's behavior specialists. (FF # 53.)

A student need not be exhibiting a pattern of unsafe behaviors to warrant a BIP or other strategies to address behaviors. IEPs must address any behaviors that are impeding learning, including by causing student to miss instruction or avoid work. 34 C.F.R. § 300.324(a)(2). District issued a separate consent for the FBA and should not have waited for the reevaluation process to address Student's behavior. (FF # 34.) The SCO finds that allowing Student's behavior to escalate for five months, from October until March, without modifying the 2021 IEP was not reasonable.

For these reasons, the SCO finds and concludes District failed to review and revise Student's 2021 IEP to address Student's behavior needs from October of 2021 until March of 2022, in violation of 34 C.F.R. § 300.324(a)(2).

### Procedural Violations

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, procedural violations of IDEA are only actionable to the extent that they impede the child's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008).

By the time Student's IEP was developed in March, without intervention, Student's behaviors had increased in frequency, intensity, and duration. (FF #s 35 and 46-60.) By the March IEP meeting, Student was not staying for full days of school, District had resorted to seclusion at least once, and School Psychologist was recommending a modified schedule. (FF # 52-60.) In fact, just days after the IEP team met in March, it was agreed that Student required a shortened day to be successful. (FF # 84.)

District's failure to review and revise Student's IEP to address his increasing need impeded Student's right to a FAPE and likely resulted in a deprivation of educational benefit. As a result, the SCO finds and concludes that District's procedural violation resulted in a denial of a FAPE. To remedy this violation, District must provide the compensatory services described below.

## **B. 2021 IEP: Tutoring Services**

Parent's concern is that Student was unable to continue accessing after-school tutoring provided at School because Student's IEP did not include appropriate supports or services.

The IDEA requires a school to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with the IDEA's procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Id.* Taken together, these two prongs assess whether an IEP is procedurally and substantively sound.

An IEP is "the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 181 (1982)). An IEP must include supplementary aids and services that will be provided to allow the child to (1) attain the annual goals, (2) be involved and make progress in the general education curriculum and (3) participate in nonacademic activities. 34 C.F.R. § 300.320(a)(4). District's must ensure that students are provided with the supplementary aids and services necessary to afford students with disabilities equal opportunity for participation in extracurricular activities and services. 34 C.F.R §§ 300.107(a) and 300.117. It is the responsibility of the IEP team to determine what supports and services are necessary and appropriate to allow a student with disabilities to participate in nonacademic and extracurricular activities with nondisabled students to the maximum extent appropriate. *Id.*

### IEP Development Process

In this case, the 2021 IEP does not indicate that any accommodations or other supports or services were necessary for Student to participate in extracurricular activities. (FF # 10.) As a result, the SCO finds and concludes that the development of the 2021 IEP did not comply with IDEA's procedures and fails the first prong of the assessment. *Rowley*, 458 U.S. at 206. Nevertheless, the SCO turns next to the second question of whether the 2021 IEP was substantively appropriate. *Rowley*, 458 U.S. at 207.

### Adequacy of IEP

When the 2021 IEP was written, Student's deficits impacted him globally and across settings and Student required constant redirection and safety monitoring. (FF # 6.) Still, Student's 2021 IEP

included no supports or services to ensure Student could participate in extracurricular activities with nondisabled peers to the maximum extent appropriate. Therefore, the SCO finds and concludes that the 2022 IEP was not reasonably calculated to enable Student to receive an educational benefit and that it violated the IDEA's substantive requirements related to the development of an IEP at 34 C.F.R. § 300.320(a)(4), resulting in a denial of FAPE. *See D.S. v. Bayonne Bd. Of Ed.*, 602 F.3d 553, 565 (3d. Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA's procedural requirements).

However, Student continued accessing tutoring through February of 2022 because Case Manager stayed at School to support Student as needed. (FF #s 25 and 26.) This mitigated any denial of FAPE caused the by the failure to include supports and services in the IEP. Student's 2022 IEP still does not include any supports or services to ensure Student can participate in extracurricular activities with nondisabled peers. (FF # 68.) At the meeting District must convene, described below, the IEP team must also consider what supports and services are necessary for Student to participate in extracurricular activities with nondisabled peers to the greatest extent appropriate.

### C. 2022 IEP

Parent's concern is that Student was not afforded a FAPE because he was only able to access the school environment for three hours a day after the development of the 2022 IEP.

The IDEA requires a school to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with the IDEA's procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Id.* Taken together, these two prongs assess whether an IEP is procedurally and substantively sound.

An IEP is "the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 181 (1982)). In developing an IEP, the IEP Team must consider the strengths of the child, the parent's concerns, evaluation results, and "the academic, developmental, and functional needs of the child." 34 C.F.R. § 300.324(a). An IEP must include a statement explaining how the child's disability impacts the student's involvement in and progress in the general education curriculum. 34 C.F.R. § 300.320(a)(1)(i).

Along with a statement of the special education and related services to be provided to the student, an IEP must include measurable goals designed to "[m]eet the child's needs that result

from the child's disability to enable the child to be involved in and make progress in the general education curriculum" and any other educational needs that result from the child's disability. *Id.* at § 300.320(a)(2). To allow for the evaluation of a student's progress, IEP goals must be clear and objectively measurable. *Kuszewski v. Chippewa Valley Schs.*, 34 IDELR 59 (E.D. Mich. 2001), *aff'd*, 38 IDELR 63 (6<sup>th</sup> Cir. 2003, *unpublished*). Appropriate goals should be clear enough that a stranger, or person unfamiliar with the IEP, would be able to implement the goal, monitor student's progress on the goal and determine whether that progress was satisfactory. *Mason City Cmty. Sch. Dist.*, 46 IDELR 148 (SEA IA 2006).

### IEP Development Process

Here, the 2022 IEP was developed at a properly constituted IEP team meeting on March 10, 2022. (FF # 63.) The 2022 IEP contains annual goals to address Student's academic and functional needs and a statement of the services to be provided. (FF #s 67 and 69.) It also includes a statement of the impact Student's disability has on his ability to access the general education curriculum and notes that he requires special transportation, access to assistive technology and a BIP. (FF #s 65 and 66.) Thus, the SCO finds and concludes that the development process for the 2022 IEP complied with IDEA's procedures. *Rowley*, 458 U.S. at 206. The SCO turns next to the second question of whether the 2022 IEP was substantively appropriate. *Rowley*, 458 U.S. at 207.

### Adequacy of IEP

The 2022 IEP does not include a description of Student's escalating behavior concerns and the explanation of the impact of Student's disability does not include any new information from the Evaluation Report. (FF #s 64-65.) Despite Student's increasing need, the 2022 IEP replaces three social/emotional wellness goals with one, keeps the same number of minutes with a mental health provider, and eliminates all specialized instruction inside the general education setting without a concurrent increase in specialized instruction outside the general education setting. (FF #s 9, 11, 67, and 69.) The 2022 IEP also does not include any new accommodations to address Student's behavior. (FF #s 10 and 68.) For these reasons, the SCO finds and concludes that the 2022 IEP does not adequately consider Student's functional needs or accurately describe how Student's disability impacts his progress and involvement in the general education curriculum, in violation of 34 C.F.R. §§ 300.324(a) and 300.320(a)(1)(i).

The 2022 IEP replaces three social/emotional wellness goals with one. (FF # 67.) The new social emotional goal has three objectives, two of which are identical to prior goals. (FF #s 9 and 67.) The new goal is to be measured by Student's ability to "participate in his general education classroom, complete academic tasks, and maintain peer relationships greater than 85% of the academic week." (FF # 67.) It is not clear to the SCO what "maintaining peer relationships" for more than 85 percent of the academic week means or how it would be measured. Moreover, the three wide-ranging objectives each set out a separate standard for measuring success. (FF # 67.) For these reasons, the SCO finds and concludes that Student's social/emotional wellness goal is

not measurable or designed to enable Student to participate in the general education curriculum, in violation of 34 C.F.R. § 300.320(a)(2).

In sum, the SCO finds and concludes that the 2022 IEP was not reasonably calculated to enable Student to receive an educational benefit and that it violated the IDEA's substantive requirements related to the development of an IEP at 34 C.F.R. § 300.320(a)(1), (a)(2) and 300.324(a), resulting in a denial of FAPE. *See D.S. v. Bayonne Bd. Of Ed.*, 602 F.3d 553, 565 (3d Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA's procedural requirements). However, because Student was placed on a modified day, the 2022 IEP has never been implemented. The SCO will order that District convene an IEP team meeting to remedy these deficiencies.

### Student's Eligibility Category

Although it is outside the scope of this investigation, the SCO is concerned by Student's identification as a student with an intellectual disability. Students with an intellectual disability exhibit "significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior." 34 C.F.R. § 300.81(6). To be found eligible as a student with an intellectual disability, a student shall receive a "full scale score of 2.0 or more standard deviations below the mean on" a measure of cognitive ability, like the WISC-V. ECEA Rule 2.08(4)(a)(i). In this case, Student's FSIQ was 78, which is not two or more standard deviations below the mean. (FF # 41.) Student's only composite score that was two or more standard deviations below the mean was working memory, at 69. *Id.* If the evaluation did not take into consideration Student's LEP or cultural background, it is possible that Student's intellectual capacity is even greater. *Id.* The Complaint did not raise allegations or concerns about Student's eligibility, but the SCO, in consultation with CDE Content Specialist 1, cautions District that a higher functioning student inappropriately placed in a program for students with intellectual disabilities might exhibit behaviors because of inappropriate programming.

### **D. Compensatory Services**

Compensatory education is an equitable remedy intended to place a student in the same position she would have been in if not for the violation. *Reid v. Dist. Of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education need not be an "hour-for-hour calculation." *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child, and ensuring children receive the services to which they are entitled. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010).

In this case, the failure to revise Student's IEP to address his escalating behaviors is not easily remedied. From October of 2021 until March of 2022, District failed to review and revise Student's IEP to account for Student's behavior needs. As a result, Student's progress on several

goals stopped or reversed heading into spring semester. (FF # 64.) Because of District's failure to revise Student's IEP, by March 22, 2022, Student's behavior had deteriorated to the point that he could only attend school for three hours a day. (FF #s 84 and 85.) He was primarily working one-on-one with staff, who removed academic demands. (FF # 85.) From March 10, 2022 until April 26, 2022, Student did not work on any of the goals from the 2022 IEP. (FF # 89.) Throughout the period in question, related service providers continued to try to meet with Student in whatever setting he was in, but Student missed 150 minutes with SLP in February and his time on a modified schedule. (FF # 86.) Student also missed countless hours of academic instruction in both the special education and general education setting. It was Parent's choice to keep Student home after the BST meeting in April, so compensatory services are not being awarded for the period from April 27, 2022 until the end of the year. (FF # 94.)

Because Student's progress is only reported once a semester, Student's current level of performance is unknown to the SCO. (FF # 67.) However, a full semester of lost progress is significant. Upon consultation with CDE Content Specialist 2 and in consideration of Student's age and individualized needs, including an intensive schedule of outside therapies and a long commute to his new school, the SCO finds and concludes that awarding the full amount of missed services would be overly burdensome. Considering the missed instruction and lack of progress, the SCO awards the following compensatory educational services: 45 hours of specialized instruction and 75 minutes of specialized speech/language services.

**Conclusion to Allegation No. 3: District did not educate Student consistent with the LRE described in his IEP, in violation of 34 C.F.R. §§ 300.116(a)(1), 300.320(a)(5), 300.327 and 300.501(c)(1). This resulted in a denial of FAPE.**

Parent's concern is that District failed to educate Student in his LRE. Specifically, Parent states that, from December of 2021 through April of 2022, Student's educational placement was changed outside of a properly convened IEP team meeting when he was removed from the general education and special education classrooms to work in spaces with no other children, like the sensory room, and then put on a modified schedule. Parent further states that Student was repeatedly sent home early from September of 2021 through May of 2022 due to behavior, resulting in a change of placement.

#### **A. Placement and LRE**

Placement—a term used to denote the provision of special education and related services—is determined by the IEP Team, including parents, and must be individualized, as well as based on the IEP. 34 C.F.R. § 300.116; ECEA Rule 4.03(8)(a); *Questions and Answers on Endrew F. v. Douglas Cnty. School Dist. Re-1*, 71 IDELR 68 (EDU 12/7/17). Placement must be determined annually, be based on the child's IEP and be as close as possible to the child's home. 34 C.F.R. § 300.116(b). Any significant change in placement, such as a move to a one-on-one setting or a shortened day, must be made by the IEP team—including the parents of the child—and in consideration of a

reevaluation. ECEA Rule 4.03(8)(b)(ii)(B); *See Weld RE-5J School District*, 77 IDELR 148 (SEA CO 07/14/2020) (holding that a move to a placement where Student was completely removed from the general education environment and taught one-on-one by a special education teacher constituted a significant change in placement.).

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

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

After a student’s annual IEP team meeting in a school year, a district and parent may agree to modify the student’s IEP via written document, without convening another IEP team meeting. 34 C.F.R. § 300.324(a)(4)(i); ECEA Rule 4.03(8)(b)(ii)(B). The district must then ensure the child’s IEP team is made aware of those changes. *Id.* at § 300.324(a)(4)(ii).

### **B. Placement Change Outside of IEP Team Meeting**

Parent’s concern is that Student’s placement was changed outside of a properly constituted IEP team meeting when he was removed from the general education and special education classrooms because of behavior. Parent’s additional concern is that Student was regularly removed from his general education and special education classrooms to work in the sensory room.

#### **Removal from General Education Classroom**

Under the 2021 IEP, which was in effect until March 10, 2022, Student’s LRE was general education 40-79 percent of the time. (FF # 12.) However, based on the service delivery statement included in the 2021 IEP, Student was spending just 36.6 percent of his time in general education. (FF #s 11 and 12.) Because Student could not have been both in general education 36.6 percent of the time and more than 40 percent of the time simultaneously, the SCO finds and concludes that Student was not educated in the placement described in his IEP.



Although Student's behaviors were increasing from October through December, they were still infrequent, occurring about once a week. (FF #s 27 and 35.) However, by December Student was sometimes choosing to stay in the special education classroom instead of going to general education. (FF # 31.) Starting in January, his behaviors became more frequent, and he was struggling to remain in the general education classroom. (FF #s 35 and 46.) The SCO finds and concludes that, without appropriate supports to address his increasing need, Student was not able to consistently access his general education classroom from December of 2021 until March of 2022.

For these reasons, the SCO finds and concludes that Student was not educated with nondisabled peers to the extent described in his IEP and that he was not educated in the placement agreed upon by the IEP team, including Parent, in violation of 34 C.F.R. §§ 300.116(a)(1), 300.320(a)(5), 300.327 and 300.501(c)(1).

Procedural violations of IDEA are only actionable to the extent that they impede the child's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008).

In this case, the SCO finds and concludes that the difference between spending 36.6 percent of the time in general education and 40.1 percent of the time in general education is small and did not result in a denial of FAPE or deprivation of educational benefit. Since the 2021 IEP was written outside the one-year window for this Decision, the SCO does not consider whether the conflict between the service statement and LRE in the 2021 IEP impeded Parent's opportunity to participate in the decision-making process.

The SCO also finds and concludes that Student was removed from the general education classroom because he was unable to maintain or learn in that environment. Therefore, these removals did not result in a denial of FAPE or a deprivation of educational benefit. However, the SCO further finds and concludes that removing Student from the general education classroom outside the confines of a properly convened IEP team meeting significantly impeded Parent's opportunity to participate in the decision-making process as she was unable to participate in conversations about how best to support Student, resulting in a denial of a FAPE. This denial of a FAPE is sufficiently remedied by the package of compensatory services described above.

#### Removal from Special Education Classroom

By March, in addition to missing general education classes, Student was often choosing to work away from peers in the sensory room or empty half of the special education classroom. (FF # 47.) The sensory room and empty half of the special education classroom were part of Student's special education classroom. *Id.* Student was free to come and go from those spaces and other special education students also used those spaces, sometimes simultaneously. *Id.* Therefore, the

SCO finds and concludes that use of those spaces was consistent with the placement agreed upon by the IEP team, including Parent.

### Modified Schedule

Student's 2022 IEP described services for a full day of instruction. (FF # 69.) However, Student started attending school for about three hours per day on March 23, 2022. (FF #s 84-85.) While the idea was discussed several times, the decision to start Student on a modified day was made by Parent and School Psychologist. (FF #s 83-84.) No other members of the IEP team were present. *Id.* As part of the modified schedule, Student was working one-on-one with a paraeducator, outside of both his special education and general education classrooms. (FF # 85.) The modified day was intended to rebuild Student's sense of safety at school and was not chosen by Parent to accommodate outside therapies. (FF #85.) Student's behaviors often prevented him from working with related service providers and his ELD teacher. (FF # 86.)

The embedded PWN in the 2022 IEP indicates that the IEP team decided that the modified schedule was necessary for Student. (FF # 84.) However, it appears to have been added after the fact, as the modified day was agreed upon two weeks after the May 10 IEP team meeting. (FF # 84.) Student's 2022 IEP was not otherwise amended to reflect the reduction in services or change in LRE. (FF # 84.) Although Behavior Specialist 1 proposed returning to a full day of instruction on March 29, 2022, a BIP still had not been finalized and no plan was put forward as to how to successfully return Student to a full day. (FF # 88.) There also was not an IEP team present at the March 29 meeting to agree to a change Student's placement. (FF # 79). No further IEP team meetings were held. Therefore, the SCO finds and concludes that the shortened day continued to be District's offer until Student stopped attending School on April 26, 2022.

A modified schedule working one-on-one with a paraeducator outside of both the special education and general education classrooms for three hours a day constitutes a significant change in placement from the placement described in Student's 2022 IEP. *Weld RE-5J School District*, 77 IDELR 148 (SEA CO 07/14/2020). This placement change was not made by an IEP team upon consideration of a reevaluation, as required by ECEA Rule 4.03(8)(b)(ii). Parent and District did not agree in writing to make the change outside of an IEP team meeting, as required by 34 C.F.R. § 300.324(a)(4)(i). For these reasons, the SCO finds and concludes that the decision to place Student on a modified schedule was not made by a group of persons and was not consistent with Student's IEP, in violation of 34 C.F.R. § 300.116(a)-(b).

Procedural violations of IDEA are only actionable to the extent that they impede the child's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008).

Although many conversations and the final decision occurred outside the confines an IEP team meeting, Parent was an active participant in the decision to move Student to a shortened day. (FF #s 83-84.) Therefore, the violation of 34 C.F.R. § 300.116(a)-(b) did not impede Parent's opportunity to participate in the decision-making process. Prior to the move to a modified day, Student's behavior was rapidly intensifying, and Student was struggling to maintain in the classroom. (FF # 46.) Student experienced some success with the modified day. (FF #s 87 and 89.) His behavior was improving, and he was engaging in more academics. *Id.* Although the modified schedule substantially reduced Student's services, the SCO finds and concludes that it was necessary for Student's success and therefore did not result in a denial of FAPE or deprivation of educational benefit.

### **C. Sending Student Home Early**

Parent's concern is that Student was repeatedly sent home early, resulting in a change of placement.

A change of placement occurs if a student (1) is removed for more than 10 consecutive school days, or (2) has been subjected to a series of removals that total more than 10 school days in a school year, for behaviors that constitute a pattern. 34 C.F.R. § 300.536(a). Days when students are sent home early for behavioral reasons should be considered in determining whether a change of placement occurred, even if no suspension was formally recorded. *School Dist. of the City of Flint*, 66 IDELR 197 (SEA MI 2015); *See also Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 122 LRP 24161 (OSERS 07/19/22) (noting that exclusions which occur because of behavior and result in denials of access to a child's educational program generally count towards the 10 days of suspension).

In this case, Parent was asked to pick Student up early due to behavior once on March 1, 2022. (FF # 52). Parent chose to keep Student home on March 2 and had to pick him up early on March 3 for a doctor's appointment. (FF # 56.) Parent was also encouraged to pick Student up early on March 4 because Case Manager would not be available in the afternoon. (FF # 57.) On March 8, Case Manager told Parent Student was struggling and just described further difficulties when Parent asked if she needed to pick him up, leaving Parent with the impression she needed to pick Student up early. (FF # 60.) There is no evidence that Parent was asked to pick Student up early after any other challenging behaviors. (FF #s 49, 50, 57, 59). For these reasons, the SCO finds and concludes that Student was sent home early on three occasions, which does not constitute a change of placement. Therefore, there is no violation of 34 C.F.R. §§ 300.114 or 300.320(a)(5).

**Conclusion to Allegation No. 4: District provided Student with transportation to and from school, consistent with §§ 300.34(c)(16) and 300.323. No violation of the IDEA occurred.**

Parent's concern is that District failed to provide Student transportation to and from School, as required by his IEP.

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is “the centerpiece of the statute’s education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student’s IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

A school district must ensure that “as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child’s IEP.” *Id.* An IEP must identify the special education and related services necessary to allow the student to advance appropriately towards annual goals, to be involved in the general education curriculum, and to be educated and participate with other nondisabled children. *Id.* at § 300.320(a)(4). Special transportation is one such related service. *Id.* § 300.34. Inclusion of special transportation in Student’s IEP, therefore, indicated that Student needed transportation to receive a FAPE.

In this case, both Student’s 2021 IEP and 2022 IEP included special transportation as a required related service. (FF #s 8 and 66.) Parent was concerned about Student’s safety on the bus without a plan ensuring a consistent response to Student’s behavior. (FF #s 59, 73, 97, 99.) District did not respond to Parent’s concerns about the bus. (FF #s 59 and 76.) Student had two bad days on the bus in December that were successfully managed by the aide on the bus. (FF # 97.) Even when Student rode the bus after particularly challenging days at School, there were no noted incidents on the bus. (FF # 48.) Parent contemplated picking Student up when he was having a bad day. (FF # 59.) However, transportation was consistently provided for and regularly used by Student. (FF #s 48, 57 and 100.) Parent opted not to put Student back on a bus after Spring Break. (FF # 73).

While the SCO understands Parent’s concern, Student was safely taking the with an aide, until March 21, 2022. For these reasons, the SCO finds and concludes that there was no violation of 34 C.F.R. §§ 300.34(c)(16) or 300.323.

**Systemic IDEA Violations: This investigation does not demonstrate violations that are systemic and will likely impact the future provision of services for all children with disabilities in District if not corrected.**

Pursuant to its general supervisory authority, CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in District. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the state complaint procedures are “critical” to the SEA’s “exercise of its general supervision responsibilities” and serve as a “powerful tool to identify and correct noncompliance with Part B.” *Assistance to States for the*

*Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46601 (Aug. 14, 2006).

Here, there is no evidence that the violations are systemic or have impacted other students. District's practices with respect to the conduct of evaluations, IEP development, review and revision, placement decisions, and transportation are consistent with IDEA requirements. (FF #s 14-16, 45, 61, 62, 82, and 96.) The SCO finds that the issues in this case were due to staff not following District policies and procedures and the uniquely challenging nature of Student's rapidly intensifying behavior. For instance, District procedures require that IEP teams decide if a shortened day is necessary and record that decision in several places in the IEP. (FF # 82.) Had district procedure been followed, Student's placement would have been determined by his IEP team and have been consistent with his IEP. District practice is to hold a meeting to discuss requests for evaluation and issue PWN if the evaluation will not be conducted. (FF # 14.) Had District practice been followed, School might have better understood Parent's concerns, and, at the very least, Parent would have received PWN of District's decision not to conduct an FBA, with all the required information. For these reasons, the SCO finds and concludes that the violations are not systemic in nature.

### **REMEDIES**

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

- a. Failing to evaluate Student at Parent request or issue a PWN documenting the refusal to evaluate, in violation of 34 C.F.R. §§ 300.303(a)(2) and 300.503.
- b. Failing to obtain parental consent prior to evaluating Student, in violation of 34 C.F.R. § 300.300(c)(1).
- c. Failing to develop, review and revise and IEP tailored to Student's individual needs, in violation of 34 C.F.R. §§ 300.320(a) and 300.324(a)(2).
- d. Failing to educate Student in the placement agreed upon by the IEP team, including Parent, in violation of 34 C.F.R. §§ 300.116(a), 300.327 and 300.501(c)(1).
- e. Failing to educate Student in the placement described in his IEP, in violation of 34 C.F.R. §§ 300.116(b) and 300.320(a)(5).

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

## 1. Corrective Action Plan

- a. By **Tuesday, November 29, 2022**, District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom District is responsible. The CAP must, at a minimum, provide for the following:
  - i. Director, Coordinator, Principal, School Psychologist and Case Manager must review this decision, as well as the requirements of 34 C.F.R. §§ 300.116, 300.300(c), 300.303(a), 300.320(a), 300.324(a), 300.327 and 300.501(c). This review must occur no later than **Friday, December 23, 2022**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Friday, January 6, 2023**.
- b. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm District’s timely correction of the areas of noncompliance.

## 2. IEP Team Meeting

- a. Convene Student’s IEP Team, at a mutually agreeable date and time, by **Friday, December 2, 2022**. In consideration of the concerns identified in this Decision, and in conjunction with the Evaluation Report and FBA, Student’s IEP team must review and, as necessary, revise Student’s IEP to reflect his current needs and the appropriateness of his current educational placement. The IEP Team must ensure Student’s educational placement is consistent with the IDEA’s placement requirements set forth in 34 C.F.R. § 300.116. The revised IEP must be tailored to Student’s unique needs, in accordance with 34 C.F.R. §§ 300.320(a) and 300.324(a)(2).
  - i. To evidence that District appropriately tailored Student’s IEP, District shall provide a copy of Student’s final IEP to CDE by **Friday, December 23, 2022**.

## 3. Compensatory Education Services for Denial of a FAPE

- a. Student shall receive **45 hours of specialized instruction**. This instruction must be provided by an appropriately licensed special education teacher. These hours must be completed by **Monday, July 31, 2023**.

- b. Student shall receive **75 minutes of specialized speech/language services**. These services must be provided by an appropriately licensed speech/language pathologist or speech/language pathologist assistant. All 75 minutes must be completed by **Monday, July 31, 2023**.
- c. **By Friday, December 2, 2022**, District shall schedule compensatory services in collaboration with Parent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. District shall submit the schedule of compensatory services to the CDE no later than **Monday, December 9, 2022**. If District and Parent cannot agree to a schedule by December 2, 2022, the CDE will determine the schedule for compensatory services by **Friday, January 6, 2023**.
  - i. The parties shall cooperate in determining how the compensatory services will be provided. If Parent refuses to meet with District within this time, District will be excused from delivering compensatory services, provided that District diligently attempts to meet with Parent and documents such efforts. A determination that District diligently attempted to meet with Parent, and should thus be excused from providing compensatory services, rests solely with the CDE.
- d. Monthly consultation between the provider(s) delivering compensatory services and Director shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. District must submit documentation that these consultations have occurred **by the second Monday of each month**, once services begin, until compensatory services have been completed. Consultation logs must contain the name and title of the provider and the date, the duration, and a brief description of the consultation.
- e. To verify that Student has received the services required by this Decision, District must submit records of service logs to the CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service must be included in the service log.
- f. These compensatory services will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. If for any reason, including illness, Student is not available for any scheduled compensatory services, District will be excused from providing the

service scheduled for that session. If for any reason District fails to provide a scheduled compensatory session, District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent and notify the CDE of the change in the appropriate service log.

- g. These compensatory services must be provided to Student outside of the regular school day to ensure Student is not deprived of the instruction Student is entitled to receive during the school day (including time in general education). Parties are encouraged to consider arranging for services over holidays or breaks from school, to avoid overburdening Student.

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

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

**NOTE:** Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the CDE. **Given the current circumstances surrounding the COVID-19 pandemic, the CDE will work with District to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

### CONCLUSION

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

Dated this 22nd day of October 2022.



---

Rachel Dore  
State Complaints Officer



## APPENDIX

### Complaint, pages 1-10

- Exhibit 1: Emails
- Exhibit 2: FBA
- Exhibit 3: Progress Reports

### Response, pages 1-12

- Exhibit A: IEPs
- Exhibit B: Evaluations
- Exhibit C: None
- Exhibit D: NOM
- Exhibit E: None
- Exhibit F: Service Logs
- Exhibit G: Attendance
- Exhibit H: Discipline Records
- Exhibit I: Progress Reports
- Exhibit J: District Calendar
- Exhibit K: District Policies
- Exhibit L: Emails
- Exhibit M: None
- Exhibit N: Verification of Delivery to Parent
- Exhibit O: Photos
- Exhibit P: BIP
- Exhibit Q: Text Messages
- Exhibit R: Student Report Card
- Exhibit S: District Guide
- Exhibit T: District Guide
- Exhibit U: Tutoring Logs
- Exhibit V: Supplemental Authority

### Reply, pages 1-14

- Exhibit 4: Email
- Exhibit 5: Emails
- Exhibit 6: Text Messages
- Exhibit 7: Text Messages

## Telephone Interviews

- Parent: September 28, 2022
- Coordinator: September 28, 2022
- Behavior Specialist 1: September 29, 2022
- Principal: September 29, 2022
- School Psychologist: September 29, 2022
- Case Manager: September 29, 2022
- Director: September 29, 2022