

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

State Complaint 2013: 505

Academy School District D20

DECISION

INTRODUCTION

This pro-se, state-level complaint (Complaint) was properly filed with the Colorado Department of Education (CDE) on February 15, 2013 by the parent of a child presently identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

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

- [Father], Father of Child, (“Father” or “Parent”);
- [Mother], Mother of Child (“Mother” or “Parents”);
- [Student], Child of Parent, (“Student,” “she” or “her”);³
- Student’s age of [Age], [Age];
- [Support Coordinator], Resource Exchange Family Support Coordinator, (“Support Coordinator”);
- [Developmental Pediatrician], M.D., (“Developmental Pediatrician”);
- [Pediatric Neurologist], M.D., (“Pediatric Neurologist”);
- Academy School District #20, (“District”);

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

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

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

- [District Legal Counsel], Esq., District Legal Counsel, (“District Legal Counsel”);
- Pikes Peak BOCES, (“BOCES”);
- [BOCES Legal Counsel], Esq., BOCES Legal Counsel (“BOCES Legal Counsel”);
- [Special Education Director], District Executive Director of Exceptional Student Services, (“Special Education Director”);
- [Behavior Coordinator], District Secondary Behavior Coordinator, (“Behavior Coordinator”);
- [Autism Specialist], District Secondary Autism Specialist, (“Autism Specialist”);
- [SN Specialist], District Significant Needs Specialist, (“SN Specialist”);
- [Middle School], (“Middle School”);
- [Former School], (“Former School”);
- [Present School], (“Present School”);
- [Private Center], (“Private Center”);
- [Private Center Director], Private Center Clinical Director, (“Private Center Director”);
- [ESY Teacher], Former School 2012 ESY Teacher, (“ESY Teacher”);
- [Special Education Teacher #1], 2012-2013 Former School Special Education Teacher, (“Special Education Teacher #1”);
- [Para], Paraprofessional (“Para”);
- [Special Education Teacher #2], 2011-2012 Former School Special Education Teacher, (“Special Education Teacher #2”);
- [School Psychologist #1], Former School Psychologist, (“School Psychologist #1”);
- [School Psychologist #2], Former School Psychologist, (“School Psychologist #2”);
- [LPC], Former School Licensed Professional Counselor, (“LPC”);
- [Assistant Principal], Former School Assistant Principal, (“Assistant Principal”);
- [BCBA], Former School Board Certified Behavior Analyst (“BCBA”) and
- [R.N.], Former School Registered Nurse, (“R.N.”).

A State Complaint, signed by Parent, was received on February 7, 2013. After carefully reviewing the Complaint and speaking with Parent on February 15, 2013, the State Complaints Officer (SCO) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaint process and its implementing regulations at 34 CFR §§ 300.151 through 300.153.⁴ The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

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

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

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

On February 15, 2013, SCO interviewed Father by telephone.

On March 4, 2013, District requested an extension of time for the Response.

On March 4, 2013, SCO issued an Order Extending Response Time (to March 13, 2013).

On March 13, 2013, the District's Response was timely received.

On March 20, 2013, the District's legal counsel responded in writing to SCO's questions regarding the Response.

On March 21, 2013, the SCO interviewed Private Center Director by telephone.

On March 22, 2013, the SCO interviewed Support Coordinator by telephone.

On March 26, 2013, the SCO interviewed Mother by telephone.

On March 27, 2013, the SCO interviewed Father by telephone.

On March 28, 2013, the SCO interviewed Mother by telephone.

On March 28, 2013, the SCO conferred with Melinda Graham, CDE Autism Consultant.

On April 1, 2013, the SCO conferred with Heather Hotchkiss, CDE Brain Injury Education Consultant.

On April 2, 2013, the SCO interviewed: Behavior Coordinator; Special Education Director; School Psychologist #1; Para; Special Education Teacher #1; Special Education Teacher #2; BCBA; ESY Teacher; R.N.; and Assistant Principal. The interviews were conducted in the presence of: CDE Autism Consultant; District Legal Counsel; and BOCES Legal Counsel.

On April 5, 2013, the SCO conferred with CDE Autism Consultant.

On April 5, 2013, the SCO conducted a conference telephone call with both District and BOCES Legal Counsel.

On April 5, 2013, the SCO received medical records from Student's Developmental Pediatrician.

On April 11, 2013, the SCO interviewed Behavior Coordinator and Special Education Director in a telephone conference call in the presence of District Legal Counsel.

On April 11, 2013, District Legal Counsel supplied additional documentation marked as Exhibit "W."

On April 11, 2013, the SCO closed the Record.

COMPLAINT, RESPONSE AND REPLY

Parent's Complaint allegations, the District's Response and Parent's Reply are summarized as below:

Allegation #1: Student's May 2012 (Current) IEP failed to provide educational benefit, as evidenced by the fact that between June and December 2012, Student did not make measurable and adequate gains (i.e., her aggression and self-injurious behaviors increased and her skills regressed).

Response: The District denied the allegation arguing that Student made progress on all three of her IEP goals between June and December 2012.

Reply: Parent argued that the District's [progress reports] relied on measurements inappropriate to the severity of Student's disability. During the fall semester, Student caused over \$2,000 worth of damages at home and lost her ability to sleep. Since being withdrawn from Former School [on January 11, 2013], Student's sleeping has improved and her self-injurious behaviors are 95% better.

Allegation #2: The IEP Team's January 11, 2013 decision concerning Student's continued attendance at Former School was predetermined inasmuch as Parent's concerns (i.e., that Student's needs could be better served by attendance at Private Center) were not considered.

Response: The District denied that the IEP Team's placement was predetermined. Discussion at the meeting centered on whether Student was making progress towards her IEP goals. Parent fully participated in the discussion and concluded that Student had not made progress and should be allowed to attend Private Center. The rest of the IEP Team concluded that Student had made progress in the current placement and therefore [Former School] was an appropriate placement in the least restrictive environment (LRE).

Reply: Parent argued that making “some progress” sets the bar too low. Parent reiterated that the District relied on measurements inappropriate for the level of Student’s disability. Parent also claimed that Former School “is the most restrictive environment.”

Parent’s Proposed Remedies: The District should be ordered to provide funding and transportation to and from Private Center or at a mutually agreed to educational placement within the District. Accompanied by a 1:1 paraprofessional, Student should be allowed to take a couple of electives with non-disabled peers. The District should be ordered to pay for an IEE of Student’s educational needs.

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,⁵ the SCO makes the following FINDINGS:

Factual Background:

1. At all times relevant to the Complaint, Student, [age] years of age, was a resident of the District and was identified as having a physical disability. There is no dispute that Student is eligible for special education and related services.
2. Student transferred from public school in another Colorado school district to the District on August 27, 2009 at which point she was enrolled in Middle School.
3. As a result of Student hitting two assigned paraprofessionals, on October 5, 2009, Student’s placement was moved from Middle School to Former School.⁶ Father characterized the change in placement as an “expulsion.” There is no evidence in the Record substantiating Father’s claim. At the time, Father attributed Student’s aggressive behaviors to be the result of side effects of seizure medication (Trileptal) she was then taking.⁷ The District reported that Student’s levels of aggression towards herself and others made it unsafe for her to continue to

⁵ Appendix A (which consolidates information from several exhibits) and Appendix B (which indexes the entire record), are attached and incorporated by reference.

⁶ Response, pg. 2 and Exhibit K, pg. 1.

⁷ Interview of Father and Complaint, pg. 2. According to Food and Drug Administration (FDA) information provided at www.drugs.com/pro/trileptal.html, Trileptal is used to treat partial seizures in children. The website reports that some nervous system side effects of Trileptal have included: dizziness, somnolence, headache, absence of motor coordination, drowsiness, abnormal gait and tremor, confusion, nervousness, anxiety and insomnia.

attend her neighborhood school (Middle School), *even with the support of two paraprofessionals and a teacher.*⁸

4. Former School is a public, out-of-district school program, operated by the BOCES, which serves students requiring very structured routines and specialized behavioral supports. For students in the District needing such supports and routines, the District has contracted with the BOCES to have special education services supplied to students at Former School when placed there by the District.⁹

5. Father believes that the placement at Former School “worked well for over 2 years, but not for the past year.”¹⁰ However, Father opines that Student’s high frequency self-injurious behaviors at home were “caused by how [she] processes [her] quiet room [i.e., regulation room] time and exposure to higher functioning children with behavior problems (i.e., modeling).”¹¹

6. On January 11, 2013, an IEP meeting was conducted to discuss Parent’s request for a change of placement from Student’s then current placement at Former School to Private Center. During the meeting the IEP Team discussed whether Student had made progress in her placement during the fall semester. Special Education Teacher #1, LSW and BCBA presented information concerning Student’s progress during the first two quarters of the 2012-2013 school year. Parent expressed the belief that Student had not made progress and sought placement at Private Center. The remainder of the IEP Team concluded that Student had made some progress at Former School and that, therefore, the placement was the LRE and appropriate to Student’s needs. As to Private Center, Behavior Coordinator noted that the District would always choose a program that is endorsed by CDE when an appropriate program is available.¹² Having determined that placement at Former School was the appropriate placement, the team did not discuss the pros and cons of services offered at Private Center.¹³

7. Private Center does not have an academic curriculum, providing applied behavioral analysis (ABA) services exclusively. Private Center is not endorsed by CDE.¹⁴

8. As a result of the IEP meeting, Parents withdrew Student from Former School the same date and, since January 11, 2013, she has been Home Schooled.¹⁵

⁸ Response, pg. 2. (Emphasis added). Student’s aggressions towards others include: head butting, hitting, kicking, scratching, biting and pinching. Student’s self-aggressions include: hitting herself on her head and ears; banging her head on solid objects and biting the back of her hand and arm. Student also destroys property (e.g., computers, keyboards, car windshields, windows, walls, microwave ovens, etc.).

⁹ *Id.*

¹⁰ Complaint, pg. 2.

¹¹ Exhibit 7, pg. 2. (Father’s writings are the bolded and underlined language).

¹² Exhibit A, pgs. 3-5.

¹³ Exhibit #7, pg. 2.

¹⁴ Interviews of Private School Director, Behavior Coordinator and Assistant Principal.

¹⁵ Interviews of Mother and Father and Exhibit O, pg. 1.

9. In their Complaint, Parents' claim that Student's aggressive behaviors and insomnia improved since she stopped attending Former School. Parents' reason that, given her cognitive regression over the past year and recent improved behaviors, it is appropriate for Student's placement to be changed from Former School to Private Center.¹⁶

Allegation #1: The May 2012 (Current) IEP failed to provide educational benefit, as evidenced by the fact that between June and December 2012, Student did not make measurable and adequate gains (i.e., her aggression and self-injurious behaviors increased and her skills regressed).

10. Father reported that, during the past year:

Student has regressed in all areas, time on tasks, academics, especially in math . . . in the past six months [Student] has shattered two windshields and has punched numerous holes in walls at home . . . between August and December 2012, [Student] lost [her] ability to sleep . . . [Student] was getting 3-4 hours of sleep during a 24 hour period. [Student] went to school partial days if [she] had to sleep in . . . Between June and December 2012, Student's self-injury behavior was huge – biting [her] forearms and back of hands . . . hitting [herself] in the head 2-3 times per day . . . it started becoming more prevalent in June . . . [She]'s doing these behaviors about 90% less frequently since [she] began being homeschooled in December [2012].¹⁷

11. Mother reported that in 2010, Student could read and would correct Mother's mispronunciations of words read to her. Student was also able to multiply and divide. Now, Student has difficulty reading and can no longer multiply or divide.¹⁸

12. **The 2012-2013 school year.** Between August 21, 2012 when the school year started, and January 11, 2013, there were a total of 79 school days. Student was absent on at least 23 school days and arrived late or left early on several other school days. Student missed ten of those school days in December 2012.¹⁹

13. According to Former School staff, Student began exhibiting a substantial increase in aggressive behaviors shortly after the beginning of the 2012-2013 school year.²⁰ Although not specifically required by the May 16, 2012 (Current) IEP, shortly after the start of the 2012-2013

¹⁶ Interviews of Father and Mother.

¹⁷ Interview of Father. Yet, in a January 23, 2013, Father claimed that "Student is 55% better, has caused no property damage since being out of school, and is starting to sleep well." Exhibit 7, pg. 2. And, in the February 2013 Complaint, Father stated that Student's "behaviors have improved over 65% since taking [her] out of school in December 2012 and [her] severe and self-injurious behaviors have improved over 85%." Complaint, pg. 2.

¹⁸ Interview of Mother.

¹⁹ See Appendix A and Exhibit O.

²⁰ Interviews of Special Education Teacher #1 and BCBA. Exhibit L, pg. 3.

school year, Paraprofessional was assigned to provide Student full-time, one-to-one support in the classroom due to Student's aggressive behaviors.²¹

14. At the beginning of the 2012-2013 school year, when Student towered²² or displayed aggressive behaviors, Former School staff verbally prompted "safe hands" in a calm voice. Most of the time, Student "towered" immediately before exhibiting aggressive behaviors. If Student escalated, the Student's wrists were briefly grasped while stating "safe hands" in a calm voice. If Student continued to escalate or was aggressive towards others, she was taken to the regulation room (RR) until she calmed. The RR was not used every time Student exhibited aggressive behavior. Rather, use of the RR depended on the level of aggression or whether Student stopped when instructed "safe hands." Additionally, if Student requested, she was also taken to the RR.²³

15. In September, Father notified Special Education Teacher #1 that Parents did not want Student to "be in a time out room for sensory, etc. . . . unless it's an emergency. [She] was able to get through last year without one."²⁴ Mother objected to use of the RR for either positive or negative behaviors.²⁵ In a September 26, 2012 email string, Assistant Principal advised Father in part:

As you know [Student] has regressed in almost all areas since last fall. Although we are not doctors, the school staff hypothesizes this regression of skills and increase in aggression is due to the number and severity of the seizures [she] continues to have. We know that you and [Mother] are doing everything you can to work with the doctors to find the appropriate medications to help with [her] medical issues . . . As a whole, we are very concerned about [her] health and the deterioration we have all observed (from [her] loss of skills to [her] considerable loss of weight . . . we have, on occasion, used the regulation room for [her] safety and the safety of others. I believe you have received a

²¹ Interview of Special Education Teacher #1 and Paraprofessional.

²² Paraprofessional defined "towering" as Student suddenly standing up, with both hands clinched into fists and raised higher than shoulder height.

²³ Interview of Special Education Teacher #1. The SCO and CDE Autism Specialist inspected the RR and B-lab regulation rooms on April 2, 2013. The RR is variously referred to in exhibits and interviews as the "regulation room," "soft regulation room," "quiet room," or "sensory room." This room is approximately 10' x 10' with a carpeted floor and padded walls. There is one door with a small window to permit observation. The door has no locks and can be propped open. There was a portable, cocoon type nylon swing hanging from the ceiling. The swing can be removed from the room, depending on the situation. The B-lab regulation room is a carpeted room, approximately 10' by 11' with cinderblock walls and one door with a small window to permit observation. The room is bare, having no furniture or objects. The door had no locks but could not be propped open due to a malfunctioning door prop when inspected by SCO and CDE Autism Specialist.

²⁴ Exhibit K, pg. 105.

²⁵ Interviews of Mother and Special Education Teacher #1. Exhibit K, pgs. 102-105. Each day Parents were supplied with copies of Student's Daily Behavior Records and a RR Report if the RR or B-lab was used.

report on every such occasion. Although we were able to “get through” without [the RR] last year, [Student] is considerably different this year.²⁶

Father replied, stating in part:

We are about out of options with medications, and we don’t know the cause of [her] outbursts (digestive issues, chemicals/amino acids in [her] foods, mini seizures, or puberty). Hopefully, [she]’ll improve as [she] approaches [Age] and I believe that [she] was a bit better this week.²⁷

Assistant Principal replied, stating in part:

Have the doctors been able to provide you with any answers as to why [Student] has lost some of [her] skills and the cause of [her] dramatic weight loss? If I remember correctly, I think you told me [she] has lost over 30 pounds . . . My staff is committed to finding appropriate interventions and I believe that is why we have seen some improvement this week. We have developed a very structured, well thought out, consistent behavior intervention plan. The data is showing progress. I would invite you and [Mother] to make an appointment and come observe what we are doing . . . Perhaps we could help develop something for you to use at home as well.²⁸

Mother did come to observe Student from time to time in the classroom of Special Education Teacher #2 during the 2011-2012. However, during visits, Mother interfered and disrupted the class. If Student squeezed her head and said “headache” Mother would point to her stomach and tell her “no, you have gas.”²⁹ During the 2012-2013 school year, Parents have made no attempts to observe and learn behavior techniques being employed by Former School staff.³⁰

16. As a result of Student’s increased aggressive behaviors, in mid-September, Special Education Teacher #1 and BCBA conferred and jointly filled out a functional analysis screening tool (FAST). The FAST is a one page questionnaire that is intended to identify problem behaviors, the frequency of those behaviors, the antecedents or theorized antecedents. In completing the form, it was noted that Student displayed aggressive behaviors most frequently when experiencing headaches or stomach pain. Additionally, it was determined that Student also displayed aggressive behaviors for attention, to get preferred activities and for sensory stimulation.³¹ Because Student was requesting to go to the RR and because her aggressive

²⁶ Exhibit K, pg. 104.

²⁷ *Id.*, pg. 103.

²⁸ *Id.*, pg. 102.

²⁹ Interview of Special Education Teacher #2.

³⁰ Interviews of Special Education Teacher #1 and BCBA.

³¹ *Id.* and Exhibit L, pg. 3(A). Paraprofessional also reported that Student frequently grimaced her face, as if in pain, held her head or pointed to her stomach prior to exhibiting aggressive behaviors. Interview of Paraprofessional.

behaviors seemed to sometimes be exhibited in order to obtain access to the RR, it was determined that, henceforth, the RR (containing the cocoon swing) would only be used as positive reinforcement when Student had accumulated sufficient points due to non-aggressive behaviors. Instead, when aggressive behaviors required removal, Student might be transported to one a variety of safe locations (e.g., the B-lab, to a hallway, outside to run or walk, etc.) until she calmed.³²

17. The Change of Intervention Behavior Plan (Behavior Plan) was implemented on September 26, 2012. The Behavior Plan listed antecedent interventions and a plan for when Student exhibited “towering behavior” (i.e., clinched fists raised higher than shoulder height).³³ The Behavior Plan did not directly address aggressive behaviors that were not preceded by towering because “most of the time Student towered immediately before exhibiting aggressive behaviors.”³⁴ Careful review of the Record reveals that, with implementation of the Behavior Plan, she was taken the B-lab for aggressive negative behaviors that could not be calmed and taken to RR for positive behaviors and upon request although this practice was not followed with fidelity (i.e., October 4th & 9th, November 6th, December 5th & 11th).³⁵

18. **The May (Current) 2012 IEP.**³⁶ Relevant portions of the Current 2012 IEP are summarized below:

- The IEP is in effect from May 16, 2012 to May 16, 2013. At Parents’ request, Student’s school year ended on May 16, 2012 and she began the ESY program on June 11, 2012.
- Present Levels of Educational Performance Summary (PLEPS). Special Education Teacher #2 reported the following: **Academic** - Success Maker: Reading May 2011, 3.14; Aug. 2.25; May 2012, 2.79. Math May 2011, 2.83; Aug 2.50; May 2012 3.01. AimsWeb data shows a 22% decrease in reading ability. Math continues to be a strength but *she is currently struggling with previously learned skills.* **Behavior** - Student has not dropped or attempted to drop her pants since February 23, 2012. *Student continues to have numerous episodes of yelling, banging and physical aggression.* These incidents have become much shorter (≤ 15 sec) in duration and the intensity has decreased.³⁷ **Psychological** - *February 10, 2010 Comprehensive Test of Non-Verbal Intelligence (C-TONI) nonverbal total was 80; April 30, 2012 C-TONI nonverbal total was 70 indicating some possible cognitive regression that may be worthy of further investigation.* **Health** - Student has diet restriction of no dairy,

³² Interviews of Special Education Teacher #1 and BCBA.

³³ *Id.* and Exhibit L, pg. 3(B).

³⁴ Interview of BCBA and Exhibit L, pg. 3(B).

³⁵ Exhibit K, Daily Activity Logs and RR Reports.

³⁶ Exhibit B.

³⁷ *Id.*, pg. 3. (Emphasis added). Behavior charts referenced in the 2012 IEP indicate a weekly tally of aggressive behaviors well in excess of 20 occurrences in the weeks between September 2011 and February 2012. See Exhibit P, pgs. 1-7

- citrus or pepper due to chronic abdominal complaints; complains of frequent headaches; a seizure health care plan is in place for Student's seizure disorder.
- Needs: Student's cognitive delays, inappropriate social skills, and lack of independence affect her ability to participate in the general curriculum. She requires constant supervision for safety. Student needs to develop skills to answer questions about what she wants/needs and in response to comprehension questions about material she, or someone else, has read, and/or about an activity she has participated in. Student needs to learn to follow a schedule for greater independence and to learn age appropriate behaviors.
 - Special Factors: A (Former) School Wide Behavior Intervention Plan (SW BIP) will be used until Student transitions back to the District at which time an individual BIP will be written. Under the SW BIP, every student earns points by demonstrating appropriate behavior. Several program privileges are connected to the point card system which serves as a primary incentive as well as a record of the student's behaviors. An Escalation Cycle Management Plan, dated December 2011 and attached to the IEP, described antecedent events that regularly preceded or triggered escalation of Student's aggressive behaviors. A Significant Behavior Check List, dated October 13, 2011 and attached to the IEP, described Student's verbal aggression, physical aggression towards others and self-harming behaviors.
 - Service delivery statement: Educational and behavior support provided by a special education teacher and paraprofessionals. Mental health support to help learn to better cope with frustrations and emotions. Targeted case management in order to coordinate services between home, school, and health professionals. (32 hours p/wk of direct special education, 1.5 direct hours p/wk of mental health services. 0.25 indirect service minutes p/wk of S-L and OT).
 - Placement: Options discussed were the general classroom with support, home school SPED program and separate school.
 - Recommended Placement in LRE: Student requires a very structured, routine environment with specialized support to benefit from her education. The severity of her behaviors, health concerns, and educational needs outweigh the benefits of being around typical peers in a general education setting. Former School best meets Student's needs at this time.
 - Educational Environment: Separate school. All services provided within a separate school program for students with dual diagnosis and/or on the autism spectrum.
 - Prior Written Notice (PWN): Other options considered: general classroom w/support and home school SPED program. Those options were rejected due to the severity of Student's behaviors, health concerns, and educational needs. Other factors: *Student's current level of resistance and aggression makes her unsafe for a typical school setting.*³⁸

³⁸ *Id.* (Emphasis added).

19. **The May 16, 2012 IEP meeting notes.** Special Education Teacher #2 reported that Student “demonstrated regression in [her] academic skills across the board. [Her] reading skills have deteriorated and [she] is not recognizing many of the words [she] used to. In addition, [her] math skills have deteriorated as well. [In the 2010-11 school year] Student was working on division with decimals. This year [she] is having difficulty with addition, subtraction and even mixes up the numbers 3, 5, and 8.”³⁹ Special Education Teacher #2 noted that although Student still has incidents of aggression, the frequency, duration and intensity of each episode has decreased. It was noted that Student continued to experience headaches, severe gas, and indigestion and there have been no definitive answers for the headaches and digestive problems. The teacher also shared that Student had begun exhibiting squinting behaviors which might be indicative of petit mal seizures.⁴⁰ Mother did not believe that Student received enough attention at school and requested that a full-time, one to one paraprofessional be assigned to Student. The meeting notes indicate that School Psychologist #1 opined that Student’s lower scores on the 2012 administration of the C-TONI as compared to the 2011 scores “could be the result of seizures.”⁴¹ (Student was first diagnosed with a seizure disorder in March 2010 after Parents observed her to have two “Gran Mal” seizures at home on March 20, 2010. The duration of each seizure was less than 120 seconds.)⁴²

20. **Current IEP Goals and Progress Reports.**⁴³ Student was in Special Education Teacher #2’s classroom at Former School during the 2011-2012 school year and at the time of the Current IEP (May 16, 2012) meeting notes.⁴⁴ Student was in Special Education Teacher #1’s classroom at Former School during the 2012-2013 school year.⁴⁵ Student’s IEP progress reports for the 2012-2013 school year are as follows:

Goal #1: When Student is angry, frustrated, or in pain, she will communicate her feelings to appropriate adults either verbally or through the use of augmentative, alternative, or assisted communication (AAAC) without becoming aggressive toward herself or others. **Unit of measurement:** ≤ 1 occurrence over 1 week with ≤ 2 verbal prompts in multiple environments for one month. **Baseline:** ≥ 20 occurrences over one week with ≥ 2 verbal or physical prompts in two environments.

5/18/2012: New skill.⁴⁶

ESY 2012: Student maintained ≤ or = one occurrence per week.⁴⁷

³⁹ *Id.*, pg. 20. (Emphasis added).

⁴⁰ *Id.*, pgs. 20-21.

⁴¹ *Id.*, pg. 21.

⁴² Exhibit #12, pg. 1. (Student’s complete history of known seizures occurring at home and at school, March 10, 2010 to March 26, 2013, was supplied by Father).

⁴³ Exhibit B, pgs. 6-7 and 20-22.

⁴⁴ Interview of Special Education Teacher #2. (Student was also in Special Education Teacher #2’s classroom in the 2010-2011 school year).

⁴⁵ Interview of Special Education Teacher #1.

⁴⁶ Exhibit K, pg. 14. (The May 2012 progress reports were made by Special Education Teacher #2).

⁴⁷ Exhibit N, pg. 25. (The 2012 ESY report was made by ESY Teacher).

10/12/2012: Insufficient progress made, goal not to be met on time. Beginning new communication system. Daily behavior record.

12/13/2012: Insufficient progress made, goal not to be met on time. Daily behavior record. Increased aggression.⁴⁸

01/11/2013: “Student has fewer aggressive behaviors. [She] has had fewer than 20 occurrences of aggressive behavior per week for all but one week during the 18 weeks of the fall semester. According to the data, a correlation may exist between absences and incidents of aggression. There are multiple weeks where Student was in school 2-3 days. The data is not conclusive but a possible correlation is worth investigating. Student was taught to use pictures to help support [her] vocal communication. Student has used the pictures to communicate feeling sad, angry, and sick or hurt. [She] has also used the pictures to communicate the location of pain. Student is receiving direct instruction in learning the picture/word representation for feelings through use of the Cognitive Affective Training (CAT) kit, facial expression, social stories, and physical representation. Student is still learning the language necessary to communicate feelings without being aggressive. Student verbally requests the “quiet room” and in [sic] while walking to the room [she] acts aggressively. In the past, Student was taken to the quiet room when [she] acted aggressive. Based on teacher observation and daily data records, this behavior appears to be functioning as a “request” for the quiet room. A differential reinforcement procedure was begun with Student to place aggression on extinction ([she] no longer goes to the quiet room when [she] acts aggressively) while teaching [her] alternative ways to ask for the quiet room (both pictures and speech) as well as providing the quiet room on a regular basis to satiate [her] desire for the quiet room . . . More data needs to be collected to determine the effectiveness of this intervention.”⁴⁹

Goal #2: Student will demonstrate an understanding of money exchange for goods and services by exchanging tokens/money at least two times per day. **Unit of Measurement:** ≥ 80% in 4 of 5 consecutive trials, over the course of 1 week, with ≤ 2 verbal prompts in multiple environments. **Baseline:** Does not participate.

5/18/2012: New skill.⁵⁰

ESY 2012 (Student will participate in money exchange for goods and services activities): Student successfully used \$2.00 to pay for golf on community education trip.⁵¹

10/12/2012: Insufficient progress made, goal not to be met on time. Work sample – test analysis.

⁴⁸ Id, pg. 26. (The October and December 2012 progress notes were reported by Special Education Teacher #1).

⁴⁹ Exhibit A, pg. 6. (The January 2013 progress reports were reported by Special Education Teacher #1).

⁵⁰ Exhibit K, pg. 14.

⁵¹ Exhibit N, pg. 25.

12/13/2012: Insufficient progress made, goal not to be met on time. Work sample – Teacher observation.⁵²

01/11/2013: “Student practices buying items from point store when [she] has earned this incentive. Student completes interactive instruction completing “one dollar more” activities. Student compares prices and chooses the most/least expensive item.”⁵³

Goal #3: Student will make a spontaneous request at least 2 times during every 30 minute section of each school day. (13 sections, 26 requests total per day). **Unit of Measurement:** ≥ 80% success at 2 spontaneous requests per 30 minute section each day. 13 sections, 26 requests, multiple environments. **Baseline:** 2-4 spontaneous requests each day.

5/18/2012: New skill.⁵⁴

10/12/2012: Progress made, goal to be met on time. Beginning new communication system – task observation.

12/13/2012: Insufficient progress, goal not to be met on time. Task observation – daily behavior record.⁵⁵

01/11/2013: “Student has increased [her] spontaneous requesting from a baseline of 2-4 per day to a maximum of 12 on seven (non-consecutive) days . . .”⁵⁶

When questioned concerning the conflicting progress reports in Goal #1, (i.e., ESY 2012, to January 2013), Special Education Teacher #1 explained that Student’s aggressive behaviors were reducing from the baseline (i.e., ≥ than 20 occurrences per week) but Student was not making sufficient progress to accomplish the goal by May 2013.⁵⁷ There is no dispute that Student met Goal #1 during the 2012 ESY session.⁵⁸

21. **The January 11, 2013 IEP meeting.** During the meeting, Special Education Teacher #1, BCBA and LPC presented oral progress reports. BCBA also prepared and offered Father a chart⁵⁹ which tracked the number of aggressive behaviors Student demonstrated each week during the fall of 2012. In preparing the chart, BCBA relied on the raw data and Daily Activity Reports collected by Special Education Teacher #2 and Paraprofessional.⁶⁰

⁵² *Id.*, pg. 26.

⁵³ Exhibit A, pg. 6.

⁵⁴ Exhibit K, pg. 15.

⁵⁵ Exhibit N, pg. 27.

⁵⁶ Exhibit A, pg. 6.

⁵⁷ Interview of Special Education Teacher #1.

⁵⁸ *Id.* and Interview of ESY.

⁵⁹ Exhibit L, pg. 3.

⁶⁰ Interviews of Special Education Teacher #1 and BCBA. Exhibits T and K (Daily Activity Reports).

22. The data and chart (i.e., Exhibit L, pg. 3) indicate that, in the fall of 2012, Student exhibited between one and 39 aggressive behaviors per week. However, the frequency of Student's absences impacted the number of days each week that data could be collected, thus impacting the total number of aggressive behaviors tallied each week. Therefore, it is instructive to compare the number of aggressive behaviors tallied during all weeks that Student attended school for a full five days:

- Week #2 (August 27th through 31st), 12 aggressive behaviors were tallied;
- Week #4 (September 10th through 14th), 39 aggressive behaviors were tallied; and
- Week #12 (November 5th and 9th), eight aggressive behaviors were tallied.⁶¹

23. The 2012 quarterly progress reports from LPC concerning IEP goal #s 1 and 3,⁶² are as follows:

10/12/2012: LPC Report: 3/3.5 Moderate Progress. Student is struggling this year following directions and keeping "safe hands." It seems that [she] will hit to see our reaction or when [she] may not be feeling well. However, when [she] is in good spirits and feeling well, [she] can be quite cooperative and compliant. [She] willingly participates in group therapy sessions with [her] peers.⁶³

12/14/2012: LPC Report: 3/3.5 Moderate Progress. Student continues to present with behavioral challenges including aggression towards others. [She] has also had several absences due to not feeling well per parent. It is often difficult for Student to adjust to [her] school routine when [she] returns after absences. Student can most often participate appropriately in our group therapeutic sessions, enjoying the interactions from [her] teachers and peers. However, [she] can be unpredictable at times depending on the setting, [her] mood, and degree of well-being.⁶⁴

⁶¹ Exhibit L, pg. 3.

⁶² Exhibit G, pgs. 4 & 10.

⁶³ *Id.*, pg. 4.

⁶⁴ *Id.*, pg. 10.

24. The following scores are a summary of Student’s “overall school behaviors” between May and December 2012:⁶⁵

| <u>Goal</u> | <u>Scores</u> <u>5/22/2012⁶⁶</u> | <u>Scores</u> <u>10/12/2012⁶⁷</u> | <u>Scores</u> <u>12/13/2012⁶⁸</u> |
|--|--|---|---|
| Respects right of others | 2 | -1 | +2 |
| Respects authority | 2 | 2 | 2 |
| Follows rules | 3 | -2 | 2 |
| Shows self-control | 2 | -1 | 1 |
| Works cooperatively w/others | 3 | -2 | 2 |
| Participates in large group activities | 3 | -1 | 1 |
| Accepts responsibility | 2 | -1 | 1 |
| Listens attentively | 2 | -1 | +2 |
| Follows directions | 2 | 2 | 2 |
| Uses time wisely | 2 | -1 | 1 |
| Demonstrates fine motor skills | 3 | -2 | 2 |
| Shows neatness in work | 3 | -2 | +3 |
| Works to her ability | 3 | -2 | +3 |

Reporting code key: 4 = consistently demonstrates, 3= usually demonstrates, 2 = sometimes demonstrates, & 1=seldom demonstrates.

25. The SCO notes that Student has an extensive history of aggressive behaviors, headaches, abdominal pain, and seizures. Furthermore, since at least 2012, Student has been experiencing insomnia and weight loss.

26. **Aggressive Behaviors.**⁶⁹ Student began exhibiting aggressive behaviors against others, herself and personal property in approximately 2007 or 2008. Father observed that Student’s self-injurious behaviors started becoming more prevalent in June 2012.⁷⁰

27. Parents believe that Student’s aggressive behaviors are caused by her digestive issues (i.e., gas, abdominal cramping, stomach aches and pain) and her “misinterpreting [the]

⁶⁵ Interview of Special Education Teacher #1.

⁶⁶ Exhibit K, pg. 13 (Recorded by Special Education Teacher #2). General comments: “Student struggles with appropriate ways to demonstrate [her] wants and needs. Student’s work is very neat and [she] is working with materials at [her] academic level.”

⁶⁷ Exhibit G, pg. 2 (Recorded by Special Education Teacher #1) (“-“ = decrease in score from prior report).

⁶⁸ *Id.*, pg. 7. (Recorded by Special Education Teacher #1) (“+“ = increase in score from prior report). General comments: “Student has missed several days of school due to medical problems. *Student has increased in behavioral issues in part due to medical problems.*” (Emphasis added).

⁶⁹ Student’s aggressions towards others include: head butting, hitting, kicking, scratching, biting and pinching. Student’s self-aggressions include: hitting herself on her head and ears; banging her head on solid objects and biting the back of her hand and arm. Student also destroys property (e.g., computer keyboards, car windshields, windows, walls, microwave ovens, etc.).

⁷⁰ Interview of Father.

digestive signals.”⁷¹ Father also stated that Student’s behaviors are “usually caused by not feeling well or having a mini seizure that we just can’t see.”⁷²

28. At home, when Student displays aggressive behaviors towards herself, others or property, Parents speak softly saying “no, don’t do that,” encourage her to do deep breathing; if biting, Student is encouraged to bite a cushion. Parents give her Pepto-Bismol, have her lie down and Mom rubs Student’s tummy because “frequently [she]’ll have gas.” Student is calmed when given an ice bag to put on her head. Parents may also send Student to her room.⁷³

29. While attending Former School during the 2012-2013 school year, Student frequently exhibited aggressive behaviors in conjunction with communicating complaints of headache or stomach pain or when she was suffering from an ear infection or sinus infection.⁷⁴ Paraprofessional noted that Student exhibited a lot of physical discomfort, such as a grimacing face, and would often motion to her stomach, saying “tummy hurts” or hit her desk as an apparent coping mechanism for headaches.⁷⁵

30. **Seizures.** Student was first diagnosed with a seizure disorder in March 2010 after Parents observed her to have two “Gran Mal” seizures at home. The duration of each seizure was less than 120 seconds.⁷⁶ Student’s first seizure at Former School occurred in September 2010. According to the September 16, 2010 IEP meeting notes, Father opined that the “seizure meds seem to increase [her] aggressiveness - - so [Parents were] not going to give seizure meds.”⁷⁷ Father reports that, over the years, Student’s known seizures have become more frequent and more severe:

- 2010: four seizures;
- 2011: six seizures;
- 2012: twenty-two seizures; and
- 2013: eleven seizures (through March 26, 2013).⁷⁸

31. In February 2012, Special Education Teacher #2 reported that Student had begun exhibiting “squinting behaviors.” Because Student did not respond during the squinting behaviors, Special Education Teacher #2 theorized that Student was having petit mal seizures.

⁷¹ Interviews of Mother and Father.

⁷² Interview of Father and Exhibit 12, pg. 2.

⁷³ Interviews of Father and Mother. Parents denied that Student has ever exhibited aggressive behaviors towards a sibling.

⁷⁴ Interviews of Special Education Teacher #1, BCBA, LPC and Paraprofessional. Exhibit A, pg. 8.

⁷⁵ Interview of Paraprofessional.

⁷⁶ Exhibit #12, pg. 1. (Student’s complete history of known seizures occurring at home and at school, March 10, 2010 to March 26, 2013, was supplied by Father).

⁷⁷ Exhibit #9, pg. 4. (The IEP meeting notes were recorded by Assistant Principal).

⁷⁸ Interview of Father and Exhibits #11, pg. 1 and #12.

The squinting behaviors became much more frequent and, when Father picked up Student for a doctor appointment, Special Education Teacher #2 asked Father if he had noticed Student's squinting behaviors. The following week, Father advised Special Education Teacher #2 that the neurologist had said that the squinting was probably some form of seizure.⁷⁹

32. During the May 16, 2012 IEP meeting, School Psychologist #1 opined that Student's cognitive regression could be attributable to the seizure disorder and urged Parents to follow-up with treating physicians. Citation to scientific research supporting this theory was included in the IEP meeting notes.⁸⁰ CDE Brain Injury Education Consultant and Autism Consultant also subscribe to this belief.⁸¹ Additionally, during the course of the investigation, several Former School staff expressed the belief that Student's uncontrolled seizures were suspected of causing the cognitive regression.⁸²

33. Father has never discussed with Student's physicians whether Student's chronic seizures could contribute to, or cause, Student's cognitive regression.⁸³

34. Student's seizures remain uncontrolled.⁸⁴ In a December 12, 2012 email to Special Education Director, Father stated:

Our immediate focus for [Student] right now is finding [her] an effective seizure medicine that will not interfere with [her] sleep or attribute [sic] to [her] behavioral outburst [sic]. The last two weeks have been bad and [she] has missed a huge amount of school because of it (i.e., having 3 seizures in one day, and not getting to sleep until 2:30 a.m.)⁸⁵

35. Father has kept a list of medications prescribed to Student between 2003 and 2012.⁸⁶ Since December 26, 2012, Student has been prescribed Zonisamide for seizures although Pediatric Neurologist cautioned that the medication has a tendency to increase or worsen behaviors and irritability. The dosage was started at 100 mg. per day and was gradually increased up to 300 mg. per day on February 17, 2013.⁸⁷ Other seizure medications that were tried during 2012 include: Neurontin ("continued to have seizures and sleep issues"),

⁷⁹ Interview of Special Education Teacher #2.

⁸⁰ Interview of School Psychologist #1 and Exhibits B, pg. 21 and A, pg. 8.

⁸¹ Consultations with CDE Brain Injury Education Consultant and Autism Consultant.

⁸² Interviews of Special Education Teacher #1 and BCBA.

⁸³ Interview of Father.

⁸⁴ Exhibits #8, pg. 4 and #12, pg. 5.

⁸⁵ Exhibit R, pg. 4.

⁸⁶ Interview of Father and Exhibit 11, pgs. 1-2.

⁸⁷ Exhibits #11, pg. 1 and #8, pgs. 3 and 7. According to FDA information provided at www.drugs.com/pro/zonisamide.html, some of the general side effects of Zonisamide include somnolence, headaches, fatigue, behavior disorders, abdominal pain, gastro intestinal irritation and insomnia. (Emphasis added).

Lamotrigine (“phased off – hostility/assaults”), Depakene (“insomnia”), and Topomax (“phased off due to hostility after one week”).⁸⁸ Between 2011 and May 1, 2012, Student was also prescribed Haliperdol (“school has noticed confusion and regression the past year”) for aggressive behaviors without noticeable benefit.⁸⁹ Previously, Student had taken Abilify for two years but this was discontinued in March 2011 when the medication no longer helped aggressive behaviors.⁹⁰

36. Additionally, for at least the past two years, Parents have also supplied Student with various unidentified homeopathic herbs.⁹¹ Nothing in the Record suggests that Student’s physicians are aware of this or how the homeopathic herbs might influence the effectiveness of prescribed medications.⁹²

37. **Insomnia.** Mother reported that Student sometimes wakes up and screams and yells until 2:00 or 3:00 a.m.⁹³ Father reported that Student’s insomnia has improved, and since December, she “gets up in the middle of the night 2-3 times per week.”⁹⁴

38. **Weight Loss.** The medical records indicate that Student weighed 206 lbs. on May 9, 2012; 176 lbs. on August 21, 2012; and 166 lbs. on January 11, 2013 (i.e., a loss of 40 lbs).⁹⁵

39. On or about August 20, 2012, during back to school night, Special Education Teacher #2 observed Student and estimated that she had lost 40-50 pounds since the first week of the summer session. Special Education Teacher #2 recalled being shocked by Student’s appearance noting that Student exhibited tardive dyskinesia, was dragging her right leg and was “out of it.” She approached Father and asked about Student’s weight loss. Father reportedly stated that Student “had been running over the summer.”⁹⁶

40. **Consent to communicate with Student’s physicians.** Parents have never provided consent to allow direct communications between District/Former School staff and Student’s medical providers. At the time of Student’s initial enrollment at Former School in 2009 and,

⁸⁸ Exhibit 11, pg. 1. According to FDA information provided at www.drugs.com all of these drugs cause multiple side effects, which variously include: *nausea*, diarrhea or constipation and *upset stomach, headaches, weight changes, weight loss, insomnia, changes in behavior, irritable behavior, dizziness, memory problems.* (Emphasis added).

⁸⁹ *Id.*, pg. 1. According to FDA information provided at www.drugs.com/pro/haliperdol.html, side effects include insomnia, headache, feeling restless or anxious, tardive dyskinesia, dizziness, shuffling gait, and constipation.

⁹⁰ *Id.* and Interview of Father. According to FDA information provided at www.drugs.com/pro/abilify.html, side effects include agitation, anxiety, headaches, insomnia, constipation, dizziness, stomach upset, choking or trouble swallowing and impaired memory.

⁹¹ Interviews of Mother and Father.

⁹² Exhibits #8 and V.

⁹³ Interview of Mother.

⁹⁴ Interview of Father.

⁹⁵ Exhibit V, pgs. 1, 10 and 14.

⁹⁶ Interview of Special Education Teacher #2.

thereafter, at the beginning of each subsequent school year, Parents were asked to complete a form listing health and medication information including an authorization to release/exchange information with Student's physicians. Parents have never provided the requested consent.⁹⁷ At the top of the form is the following statement:

This information will be shared with school staff who may work with your child and who may have need to know. Please contact the school nurse if you have any additional concerns or information. This health services plan will remain in effect for the school year or until the health status or physician's orders change. *It is the responsibility of the parent to notify the school nurse whenever there is any change in the student's health status or care.*⁹⁸

41. In a December 6, 2012 email exchange, Special Education Director noted that Student was to be seen by a specialist in Denver at the end of the month. "I would think that the information gleaned at that Dr. visit may help inform the decisions the team may need to discuss especially with regard to the expected timeframe for stabilization of medications to control seizure activity."⁹⁹ Father replied, stating in part "*the 26 Dec 12 appointment with the neurologist is inconsequential to the IEP meeting.*"¹⁰⁰ There is no evidence in the Record indicating that Parents have ever supplied the District or Former School with copies of any of Student's medical reports or allowed any direct communications between District or Former School staff and the treating physicians.

42. In summary, the SCO specifically finds that:

- Student has been regressing cognitively since the beginning of the 2011-2012 school year;
- Student made some progress on the three goals in the Current IEP;
- Student has a history of chronic, uncontrolled seizures;
- Since the beginning of 2012, Student's seizures have become more frequent and more severe;
- These chronic and uncontrolled seizures may be the cause or contribute to Student's cognitive regression;
- Student has a history of aggressive behaviors;
- Both Parents and Former School staff believe that Student's aggressive behaviors are often exhibited in conjunction with physical pain (gastro-intestinal pain and headaches) and illness (sinus and ear infections);
- Student's aggressive behaviors spiked in early September;

⁹⁷ Interviews of R.N. and Assistant Principal. Exhibit Q, pgs. 3-7 and 49-50(A).

⁹⁸ Exhibit Q, pg. 49. (Emphasis added).

⁹⁹ Exhibit R, pg. 6.

¹⁰⁰ *Id.*, pgs. 5-6. (Emphasis added).

- Subsequent to implementation of the Behavior Plan, there was a measurable decrease in Student's aggressive behaviors;
- Parents have failed to work cooperatively with the District or School, refusing to provide written consent to allow open communications between Former School staff and Student's physicians;
- Parents have not made any attempts during the 2012-2013 school year to observe behavioral techniques being employed at Former School;
- The Current IEP is intended to measure Student's progress over a 12 month time period (i.e., through May 16, 2013);
- The Current IEP had only been in effect for one-half of the 2012-2013 school year when the Complaint was filed;
- There are numerous intervening factors that may be contributing to Student's cognitive regression and slow progress in the 2012-2013 school year (e.g., multiple and uncontrolled seizures, multiple sinus and ear infections, insomnia and insufficient rest, poor school attendance, inconsistent behavioral techniques at home and school, possible side effects of multiple prescribed medications and Student's undiagnosed pain issues); and
- Given Student's multiple physical challenges and disabilities, it is essential that there be an open and continued dialogue between all care-takers (i.e., Parents, educators and medical providers).

Allegation #2: The IEP Team's January 11, 2013 decision concerning Student's continued attendance at Former School was predetermined inasmuch as Parent's concerns (i.e., that Student's needs could be better served by attendance at Private Center) were not considered.

43. The January 11, 2013 IEP meeting was attended by: Parent, Support Coordinator, Assistant Principal, Special Education Teacher #1, BCBA, SN Specialist, LPC, Autism Specialist and Behavior Coordinator. Assistant Principal functioned as the Special Education Director Designee and recorded the IEP meeting notes.¹⁰¹ Behavior Coordinator chaired the meeting.¹⁰²

44. During the IEP meeting, Special Education Teacher #1 presented information on Student's progress on the three goals. The presentation included reporting the data collected and tallied between August and December 2012. BCBA also explained the Behavior Plan as well as the data collected concerning Student's aggressive behaviors. BCBA presented information contained in the graph she had prepared for the meeting. BCBA explained that the data was based on tallies and daily activity reports collected by Special Education Teacher #1.¹⁰³

¹⁰¹ Interview of Assistant Principal and Exhibits A, pgs. 3-5 and E, pgs. 1-2.

¹⁰² Interview of Behavior Coordinator.

¹⁰³ Interviews of Special Education Teacher #1 and BCBA. Exhibits A, pg. 6 and L, pg. 3 was prepared using data from daily behavior logs and Regulation Room reports (See Appendix B for the specific page numbers of data contained in Exhibit K).

45. During the IEP meeting, Father expressed multiple concerns about Student (e.g., increased frequency of seizures and aggressive behaviors, insomnia, undiagnosed pain and gastro-intestinal issues and the fact that Mother no longer wants Student to attend Former School). Father disputed IEP Team statements concerning Student’s progress and discussed his belief that no progress had been made. Father expressed the belief that he should be able to choose the school that Student attends and that placement should be at Private Center.¹⁰⁴

46. After discussion and the input of the IEP Team members, including Father, Behavior Coordinator determined that the Team’s consensus was that Student had made some progress. Behavior Coordinator concluded that, therefore, Former School met Student’s needs and was an appropriate placement. Father claimed the decision was predetermined and announced that, effective immediately, Student would be home schooled.¹⁰⁵

47. The District’s practice is to base IEP Team meeting determinations on the discussions and consensus of the IEP Team members rather than through individual polling of each team member.¹⁰⁶

48. In his Complaint, Father quoted Behavior Coordinator as having stated at the end of the IEP meeting “To conclude . . . Special Education Director *stated before this meeting* “some” progress has been made with [Student] and the District will retain Student at Former School.” Father believed this alleged statement supplied evidence of the claim that the IEP Team’s placement decision was determined in advance of the meeting.¹⁰⁷

49. The SCO notes that, subsequent to the IEP meeting, Father requested that the meeting notes be revised to reflect Behavior Coordinator’s alleged statement as well as Father’s thoughts “This was startling considering the conclusion contradicted the past 90 minutes of discussion on [Student’s] significant regression . . .”¹⁰⁸ Thereafter, Special Education Director requested that a meeting note revision include her statement that, in communications with Father, she “neither said nor implied that a [placement] decision was made prior to the meeting.”¹⁰⁹ Behavior Coordinator also requested that the meeting notes be revised to include her statement that quotes Father attributed to her at the conclusion of the IEP meeting were not accurate. “I did have a conversation with Special Education Director prior to the meeting in which we discussed what I would be directed to do *based on the outcome of the information*

¹⁰⁴ Interviews of Father, Special Education Teacher #1 and Behavior Coordinator. Complaint and Exhibit A, pgs. 3-5.

¹⁰⁵ Interview of Behavior Coordinator. Exhibit A, pg. 4.

¹⁰⁶ Interview of Behavior Coordinator.

¹⁰⁷ Interview of Father.

¹⁰⁸ Exhibit A, pg. 5.

¹⁰⁹ *Id.*

*and data presented at the meeting by Former School staff concerning Student's progress . . .*¹¹⁰
The comments of Father, Special Education Director and Behavior Coordinator were noted in a January 15, 2013 revision to the IEP.¹¹¹

50. Importantly, Support Coordinator, who attended the IEP meeting at Father's request, did not recall Behavior Coordinator making any statement that could be construed as a predetermination of Student's placement. Support Coordinator did recall that, at the conclusion of the meeting, Behavior Coordinator stated "because Student has made some progress, the District will retain Student at Former School" or words to that effect.¹¹² Father's predetermination allegation is not supported by the credible evidence in the Record.¹¹³ Neither Special Education Director nor Behavior Coordinator made any statements prior to the IEP meeting which could be construed as predetermination of Student's placement.

51. During the course of the investigation, Special Education Director was asked why she wrote the PWN, dated January 24, 2013, when she had not attended the IEP meeting. Special Education Director stated "I wanted to close the loop on Dad's request and I didn't think that the [IEP] meeting notes had a clear PWN advisement in it, including his request and the rationale for the team's response."¹¹⁴

52. In a January 10, 2012 email to Assistant Principal, Behavior Coordinator, SN Specialist and Autism Specialist, Special Education Director reminded staff who would be attending the January 11, 2012 IEP meeting of the legal standard for changing a placement:

The purpose of the meeting is to discuss the request for a change of placement. I think starting with meeting notes to document the discussion is appropriate. It is unclear if anything in the IEP will change as a result of the meeting, so I'm sure an actual IEP document will be necessary. Certainly Present Levels will be a big part of the discussion and progress towards goals to establish that [she] is or isn't receiving some benefit. Our stance is that we are not obligated to change a placement IF the student is showing benefit from [her] program. The continuum of service delivery (LRE) allows for a public school placement in favor of a private school placement if needs can be met in less restrictive setting ---private more restrictive than public . . . (I know you all know this, but want to share my anticipated points of argument from the parents and advocates). The discussion should not be about what is "better" or what would provide more growth, but rather, is progress happening and is benefit being received . . .¹¹⁵

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Interview of Support Coordinator.

¹¹³ Interviews of Support Coordinator, Special Education Director and Behavior Coordinator. Exhibit A, pg. 5.

¹¹⁴ Interview of Special Education Director.

¹¹⁵ Exhibit U, pg. 1.

This portion of the email also supports the District's position that Student's placement was not predetermined. However, the last sentence of Special Education Director's email is troubling: "I may send a PWN to you for the conclusion of the meeting. (I know that sounds like PREDETERMINATION!!! But I can't be there). I am still needing to craft some wording."¹¹⁶

53. Consequently, after reviewing the email, the SCO conducted follow-up interviews with Behavior Coordinator and Special Education Director. Behavior Coordinator stated flatly that she had not received a PWN from Special Education Director prior to the IEP meeting. In a separate interview, Special Education Director stated that she did not draft nor send out a PWN prior to the January 11, 2013 IEP meeting. Special Education Director stated that she did not prepare the PWN until after receiving that IEP draft on January 14, 2013 and interviewing staff that had attended the meeting. At SCO's request, Special Education Director supplied a copy of Assistant Principal's January 14, 2013 email to which a draft of the January 11, 2013 IEP was attached.¹¹⁷ Although inferences of predetermination could be drawn from the last sentence of the January 10, 2013 email, the credible evidence in the Record supports the finding that Special Education Director did not draft the PWN until after the IEP meeting and Student's placement was not predetermined by the District or BOCES staff or meeting participants.

54. Given the credible information in the Record, the SCO finds that:

- All of Parents' concerns and Father's input were considered during the January 11, 2013 IEP meeting;
- Despite a multitude of challenges (e.g., multiple uncontrolled seizures, multiple illnesses, chronic and undiagnosed pain, multiple school absences), Student demonstrated some progress on the IEP goals during the first two quarters of the school year;
- Behavior Coordinator's determination (i.e., that placement at Former School was appropriate and met Student's needs) was made only after a full discussion, based on a consensus of the IEP Team;
- Neither Special Education Director nor Behavior Coordinator predetermined the appropriateness of Student's placement; and
- The IEP Team's decision was not predetermined.

¹¹⁶ *Id.*

¹¹⁷ Interviews of Behavior Coordinator and Special Education Director. Exhibit W, pgs. 1-9.

CONCLUSIONS OF LAW

Based on the foregoing FF, the SCO enters the following CONCLUSIONS OF LAW:

Allegation #1: Educational benefit claim.

55. Under the IDEA and the corresponding Colorado law, the Exceptional Children's Educational Act (ECEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. 1400 *et seq.*; ECEA 1 CCR 301-8, 2220-R-1.00 *et seq.*)¹¹⁸

56. The United States Supreme Court, in *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), examined the level of instruction and services that must be provided to a student with disabilities in order to satisfy the requirement of FAPE under IDEA. Under *Rowley*, the standard for determining whether a school district's provision of services constitutes a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide these services to the student in the least restrictive environment. *Id.*, at 203. Although a school district is not required to maximize the potential of a child with a disability, it is required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. *Id.*, at 201-202.

57. Reviewing the adequacy of an IEP is a two step process: first, whether the IEP conformed with the IDEA procedures; and secondly, whether the IEP was reasonably calculated to enable the student to receive educational benefits. *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996).

58. Relevant to this Complaint, IDEA procedures require that the IEP to contain the following content:

- i. A statement of the child's present level of academic achievement and functional performance;
- ii. A statement of measurable annual goals including academic and functional goals that are designed to meet each of the child's needs that result from the child's disability;
- iii. A description of a) how the child's progress towards meeting the goals will be measured; and b) when periodic reports will be provided;
- iv. A statement of the special education and related services and supplementary aides and services, program modifications or supports that will be provided to enable

¹¹⁸ Hereafter, only the IDEA regulation and corresponding ECEA rule will be cited.

the child to a) advance appropriately towards attaining the annual goals; b) to be involved in an make progress; and c) to be educated and participate with other children with disabilities in activities;

- v. An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class;
- vi. If the IEP Team determines that the child must take alternate assessments, a statement of why a) the child cannot participate in the regular assessment; and b) the particular alternate assessment selected is appropriate for the child; and
- vii. The projected date for the beginning of services and modifications and the anticipated frequency, location, and duration of those services and modifications.

§ 300.320(a)(1)-(7). In developing the child's IEP, the IEP Team must also consider special factors. In the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. § 300.324(a)(2)(i).

59. Additionally, the adequacy of an IEP can only be determined at the time it is offered to the student and not at some later date. *O'Toole* quoting *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520 at 534 (3d Cir. 1995)). The SCO concludes that Student's IEP contained the required content. Student's present levels of academic achievement and functional performance were thoroughly documented in the IEP (FF #18). The IEPs contained annual goals that were designed to meet Student's needs as identified in the present levels of academic achievement and functional performance (FF #20). The IEPs contained a statement of services to be provided to Student and the dates that services would begin (FF #18).

60. The parties agree that Student's cognitive skills have regressed. (FF #s 10-11, 15, 19 and 42).

61. Furthermore, Student's rate of educational progress continues to be undermined by a number of intervening factors that are beyond the control of the District and Former School staff (e.g., an increase in the intensity and number of seizures, the uncontrolled nature of the seizures, chronic and undiagnosed pain which appears to precede many aggressive behaviors, the side effects of the multiple drugs prescribed in an attempt to control the seizures, the significant number of school absences, and multiple illnesses). (FF #s 23, 35, 54 & 63). Additionally, Parents' failure to work cooperatively with the District and Former School staff (i.e., failure to allow direct communications with Student's health care providers and the failure to collaborate with and learn behavioral techniques employed by school staff) has had a significant negative effect on Student's ability to make educational progress. (FF #s 15 & 40-42).

62. The Current IEP is in effect from May 16, 2012 to May 16, 2013. (FF #18). At time of the January 11, 2013 IEP meeting, only two quarters of the school year had occurred. (FF #6).

Therefore, the fact that Student has not demonstrated more than “some progress” is not necessarily surprising.

63. The IEP has three measurable goals: Goal #1 measures the number of aggressive behaviors Student demonstrates each week; Goal #2 measures Student’s ability to exchange goods and services using tokens and money each week; and Goal #3 measures the number of times per day that Student communicates spontaneously. (FF #20). By December 2012, Student had made insufficient progress on the three Goals to meet those goals by May 2013. However, raw data, daily activity records and reports reviewed during the January 11, 2013 IEP meeting supplied credible evidence of Student’s slow but measurable progress towards each of the three goals. (FF #s 20-24). The SCO concludes that the Current IEP was reasonably calculated to enable Student to receive educational benefits. There being no violation, no remedy is ordered.

Allegation #2: Predetermination claim.

64. The development of a student’s IEP is a collaborative process that “places special emphasis on parental involvement.” *Systema v. Academy School District No. 20*, 538 F.3d 1306, page, (10th Cir. 2008). In developing an IEP, school districts are required to consider parental suggestions and requests and, to the extent appropriate, to incorporate them into the IEP. *O’Toole v. Olathe Dist. Schools*, 144 F.3d 692, 107 (10th Cir. 1998). However, parental preferences must not take precedence over the purpose of the IDEA, to provide a FAPE in the least restrictive environment. In short, a parent does not have veto power over IEP provisions viewed by other team members as necessary or unnecessary for a FAPE. *See, Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7th Cir. 1988) (parents, no matter how well-motivated, do not have a right under the IDEA to compel a district to provide a specific program).

65. Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when the agency presents one placement option at the IEP meeting and is unwilling to consider others. (*See Ms. S. ex. rel. G. v. Vashon Island School Dist.*, “A district may not enter an IEP meeting with a ‘take it or leave it’ position.” 337 F.3d 1115, 1131 (9th Cir. 2003).

66. Predetermination violates a parent’s right to participate and, as such, constitutes a per se denial of FAPE. §§ 300.322(a), 300.501(b)-(c) and 300.513(a)(2)(ii). *H.B. v. Las Virgenes Unified School District.*, 48 IDELR 31 (9th Cir. 2007).

67. Father fully participated in the January 11, 2013 IEP meeting. The IEP Team’s placement decision was reached only after presentation of data and reports as well as full and robust discussion of the concerns and points of view of team members, including those of Parent. (FF

#s 44-53 and 60). The SCO concludes that the IEP Team's placement decision was not predetermined. There being no violation, no remedy is ordered.

CONCLUSION

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

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

Dated this 15th day of April, 2013.

Jeanine M. Pow, Esq.
State Complaints Officer

Appendix A:
SCO Summary from Exhibits 11; 12; J,pg.2; K; L, pgs. 3(B) & 5; O, pg.1; and T.

[Appendix A has been REDACTED in its entirety to protect the identity of the student]

Appendix B:
Exhibit Index

Parent's Complaint, pages 1 through 5 and Amendment, pgs. 1-2.

- Exhibit 1: 01/24/2013 PWN
- Exhibit 2: 12/12/2012 string emails re: Student and Behavior visit
- Exhibit 3: Student's daily routine at Former School
- Exhibit 4: 01/21/2013 string emails re: Final Paperwork
- Exhibit 5: 01/10/2013 Notice of Meeting
- Exhibit 6: 01/11/2013 IEP Meeting Notes
- Exhibit 7: 01/23/2013 Letter from Assistant Principal & Father's comments in bold
- Exhibit 8: Medical Reports of Pediatric Neurologist
- Exhibit 9: 09/16/2010 IEP
- Exhibit 10: 05/16/2011 IEP
- Exhibit 11: Student's medication history from 2003 to 2013
- Exhibit 12: Student's seizure history from 2010 to 3/26/2013

District's Response, pages 1 through 9.

- Exhibit A: 01/11/2013 IEP Meeting Notes
- Exhibit B: 05/16/2012 (current) IEP
- Exhibit C: 04/30/2012 ESY Report
- Exhibit D: Notices of Meetings (01/02/2013, 01/10/2013, & 05/07/2012)
- Exhibit E: Meeting Participants (01/11/2013, 05/16/2012 & 04/23/2012 ESY)
- Exhibit F: 01/24/2013 PWN & 05/16/2012 PWN
- Exhibit G: 1st & 2nd Qtr. Grade reports and progress reports
- Exhibit H: District & Former School Staff having knowledge of facts
- Exhibit I: 2011-2012 Former School Calendar
- Exhibit J: 2012-2013 Former School Calendar
- Exhibit K:

(Pgs. Document):

- 1 Enrollment History
- 2 IEP Goals from May 2012 IEP
- 3 Charts depicting aggressive incidents Fall 2011 and Spring 2012
- 4-7 Psychological Report of School Psychologist #2 dated March 18, 2010
- 8 CoAlt assessment results Reading Grade [grade]
- 9 CoAlt assessment results Writing Grade [grade]

- 10 CoAlt assessment results Mathematics Grade [grade]
11 CoAlt assessment results Science Grade [grade]
12-16 [Former School] report card/progress reports to parent, including [grade] grade report; mid-term 4th quarter progress report dated May 22, 2012 progress toward goals and objectives annotated May 18, 2012; and [Former School] Therapy Review/Progress Report May 21, 2012
17-146 [Former School] records, including archived daily point sheets, incident reports, and email correspondence between parents and [Former School] staff, in reverse chronological order

(**Regulation Room Reports:** pgs. 19, 22, 27,29, 32, 38, 40, 42, 45, 46, 55, 54, 66, 71, 85, 92, 95, 98, 110, 119, 142 and 151.)

(**Daily Activity Logs:** pgs. 18, 21, 26, 28, 31, 33, 34-36, 39, 41, 43, 47-48, 51-53, 60, 64-65, 68, 73-74, 78, 80-84, 87-89, 91, 93-94, 96-97, 99-101, 107, 114, 117, 121, 123, 127-129, 131-133, 135, 137, 139-141, 143, and 145-149)

Exhibit L: Various (8) charts

Exhibit M: 9/26/12 to 12/13/12 email chain Re: Student's regression

Exhibit N: IEP Goal Progress Reports, 2009-10 SY to 2011-12 SY

Exhibit O: 2012-2013 School Attendance Log

Exhibit P: Charts that accompanied the May 2012 IEP

Exhibit Q: School medical records, 8/26/2009 to 10/23/2012

Exhibit R: 01/02/2012 email chain re: placement request

Exhibit S: 09/26/2012 email chain re: regulation room

Exhibit T: Raw data (09/06/2012 to 12/11/2012) used to draft chart at "L, pg. 3"

Exhibit U: 01/10/2013 email chain re IEP meeting

Exhibit V: Medical reports of Developmental Pediatrician

Exhibit W: Email dated 01/14/2013 from Assistant Principal to Special Education Director.

Parent's Reply, pgs. 1-14.

Interviews with:

Father on 02/15/2013 and 3/27/2013;

Mother on 3/26/2013 and 3/28/2013;

Private Center Director on 3/21/2013;

Support Coordinator on 3/22/2013;

Behavior Coordinator; Special Education Director; School Psychologist; Para; Special Education Teacher #1; Special Education Teacher #2; BCBA; ESY Teacher; R.N.; and Assistant Principal on 4/2/2013; and

Behavior Coordinator and Special Education Director on 4/11/2013.