

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

State-Level Complaint 2013: 512
El Paso County School District 2, Harrison

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on November 4, 2013, by the parent of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

Based on the written Complaint and a telephone interview with Parent on November 4, 2013, the State Complaints Officer (SCO) determined that the Complaint identified three allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

PARENT'S COMPLAINT ALLEGATIONS

Parent's Complaint raised three allegations, summarized as follows:

1. Since August 5, 2013, Student has been denied a free appropriate public education because the IEP dated September 2012 has not been properly implemented. Specifically:
 - a. Student has been placed in the regular education environment 100% of the time, rather than the 40-79% specified on her IEP, and has not received the specialized instruction required by her IEP, e.g., specialized instruction in math;
 - b. Student has not been provided with the modifications and accommodations listed on her IEP, specifically the "use of assistive technology for writing;"

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 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).

- c. Student has not had access to social skills curriculum to emphasize pro-social strategies;
 - d. Student's BIP has not been properly implemented, resulting in disciplinary action including multiple in and out-of-school suspensions; and
 - e. Student's progress on her IEP goals has not been monitored or reported to Parent.
2. The manifestation determination conducted on October 31, 2013, violated the IDEA because:
 - a. The manifestation determination was not timely conducted; and
 - b. Parent was not provided with adequate notice of the manifestation determination meeting, resulting in her inability to determine if all relevant members of the IEP team had been invited or if she needed to invite others.
3. The IEP meeting held on October 3, 2013, violated the IDEA's procedural requirements regarding the development, review, and revision of an IEP because:
 - a. No information or data was provided regarding Student's progress on IEP goals; and
 - b. Student's annual IEP review was not conducted within 365 days.

Summary of Proposed Remedies: To resolve the Complaint, Parent proposed that Student's IEP be properly implemented and that the District provide oversight to the charter school to ensure it complies with IDEA.

SUMMARY OF THE DISTRICT'S RESPONSE

The District failed to provide a Response that adequately admitted or denied the Complaint allegations. While the District supplied various documents requested by the SCO, it did not in any way address the specific allegations raised by Parent in the Complaint, nor did it provide the names of District staff who had information about the underlying Complaint allegations, as requested. The one-page letter signed by Charter School Assistant Principal asserted that the Charter School provided various educational services to ALL students, but failed to identify specific services provided to Student as required by her IEP or otherwise address the allegations raised in the Complaint. Based on the District's failure to adequately respond to the Complaint, the SCO deemed the allegations as admitted and conducted an investigation for the primary

purpose of determining appropriate remedies, i.e., whether the violations resulted in substantive harm to Student and whether the violations were systemic in nature.³

SUMMARY OF PARENT'S REPLY

Parent asserted that Charter School was aware of Student's needs since the beginning of the school year but did not try to implement the IEP until Parent filed this Complaint. Parent further asserted that the Charter School's recent effort to provide Student with the necessary special education programming and services still falls short of what the IEP requires. Parent also highlighted inconsistencies in the documents provided by Charter School related to Student's disciplinary history. Finally, Parent requested that Student receive one-on-one tutoring from a private tutor or agency to compensate Student for the special education services she was entitled to but did not receive.

FINDINGS OF FACT (FF)

After thorough and careful analysis of the entire record,⁴ the SCO makes the following FINDINGS:

Background

1. At all times relevant to the Complaint, Student was [years of age], lived in the District, and attended Charter School. As the administrative unit (AU) authorizing Charter School, the District is the entity ultimately responsible for ensuring compliance with all special education requirements, including the provision of a free appropriate public education (FAPE) to Student.⁵
2. Student is eligible for special education and related services as a child identified with a serious emotional disability (SED). Student's diagnoses include bi-polar disorder, ADHD, and atypical seizures. Due to complications between medications prescribed for bi-polar and ADHD, Student is currently taking only a seizure medication prescribed for the purpose of treating the worst symptoms from her three diagnoses.⁶
3. In the academic environment, Student "struggles with regulating her emotions, controlling her impulses, and managing conflict which makes access to general education and participation in the general education environment without special education support difficult."⁷ Student has stated that she "believes other students try to upset her as much as possible when she is in the classroom" and deliberately "frustrate her so that she will have an

³ The failure to admit or deny the specific allegations in a state complaint can be fairly and reasonably treated as admissions by the SCO. State-Level Complaint Procedures ¶ 3.

⁴ The appendix, attached and incorporated by reference, details the entire record.

⁵ ECEA Rules 4.03 (8)(b)(iv), 2.06 (1) and 8.01 (1)(e).

⁶ Exhibit 1, p. 6.

⁷ Exhibit 2, p. 6.

outburst.”⁸ Math Teacher, Special Education Teacher, Charter School Counselor, Charter School Counselor Aide, and Assistant Principal, all agree that Student’s primary challenge and the one that most impedes her ability to learn is her difficulty positively engaging with her peers.⁹

4. For the 2012-2013 school year, Student attended a center-based program at Former School where she was in the regular education environment between 40-79% of the day and also received significant special education programming and support in the affective needs classroom, including 322 minutes of behavioral intervention and 573 minutes of academic intervention each week.¹⁰ Student’s math skills had been identified as below grade-level and she was also enrolled in a special education math class.¹¹ For the 2012-2013 school year, Student made progress and was on track to meet all of her IEP goals on time and Student’s grades were mostly passing, with the exception of “F”s in social studies and math.¹²

Enrollment at Charter School for 2013-2014 School Year

5. On or around August 2, 2013, Parent enrolled Student in Charter School because it explicitly advertised high expectations for students, amazing teachers, *and* supportive services for students with IEPs.¹³ Parent provided Charter School with a copy of Student’s IEP dated September 2012 the day she enrolled. Charter School admitted Student and Student started attending classes on August 5, 2013. Student’s attendance at Charter School is possible through the state Public Schools of Choice Act. C.R.S. § 22-36-101.

6. Because Charter School does not offer a center-based program, i.e., does not have an affective needs classroom, Student went from participating in the general education environment from 40-79% of the time, as required by her IEP, to being in the general education environment 100% of the time at Charter School. Consequently, Student’s transfer from Former School to Charter School constituted a significant change in placement as defined by ECEA Rule 4.03(8)(b)(ii)(A). The District, the administrative unit within which Charter School is located, did not conduct a reevaluation of Student consistent with ECEA Rule 4.03(8)(b)(ii)(B) and convene an IEP Team to ensure that Charter School was an appropriate placement for Student in accordance with ECEA Rule 4.03(8)(b)(iv).

7. Sometime near the end of August, Assistant Principal contacted Special Education Coordinator, the District special education professional designated to support and supervise charter schools, to express concern that Charter School did not have the program and resources to properly serve Student’s significant behavioral needs. Charter School requested that the District contact Parent to discuss the situation, but Special Education Coordinator decided that

⁸ Exhibit 2, p. 6.

⁹ Interviews with Special Education Teacher, Math Teacher, School Counselor, School Counselor Aide, and Assistant Principal.

¹⁰ Exhibit 2, p. 13; Interviews with Parent, Special Education Director, and Special Education Coordinator.

¹¹ Exhibit 2, p. 3; Interview with Parent.

¹² Exhibit 10; Exhibit 6, p. 1.

¹³ Exhibit H and interview with Parent.

Parent would eventually call her if Parent was indeed concerned.¹⁴ The SCO finds that, as a result of this conversation, the District was on notice by the end of August that Charter School may not be implementing Student's IEP.

8. Between the end of August and the end of September, there was apparently no further discussion between the District and the Charter School, even though, as discussed below, Student had already received nine days in either in-school (ISS) or out-of-school suspension (OSS).¹⁵

October 2013 IEP Meeting

9. On September 26, 2013, Parent contacted Special Education Director and Special Education Coordinator because she had not yet received a notice from Charter School for Student's annual IEP review, and she knew the annual review was due by September 28, 2013.¹⁶ During this conversation, Parent also expressed her belief that Charter School was not implementing Student's IEP, including her BIP, and requested that the District contact Charter School about her concerns, and attend the upcoming IEP meeting.¹⁷

10. Student's annual IEP review was due by September 28, 2013.¹⁸ Because Parent had not been notified that an IEP meeting was being scheduled, she contacted Special Education Director on September 26, 2013, and requested that Special Education Director notify the Charter School that an IEP meeting should be convened as soon as possible and that she plan to attend.¹⁹

11. An IEP meeting was held on October 3, 2013.²⁰ Although the IEP team was properly constituted, limited data was available or presented concerning Student's present levels of academic and functional performance, and no data was available concerning progress on her IEP goals. As detailed more fully in the findings below, the fundamental reason limited data was presented concerning Student's present levels of performance was that she was exhibiting behavior for which she was subjected to repeated in-school suspension (ISS) and out-of-school suspension (OSS). For example, Student's writing teacher opined that Student's "behavior causes her to miss class about 3-4 days of the week."²¹ Similarly, her math teacher expressed that Student had not "taken either assessment from me because she's missed so much school, so it is very hard for me to get a sense if she's absorbing the material or not."²² No data was

¹⁴ Interviews with Special Education Coordinator and Assistant Principal.

¹⁵ Exhibit 15; Interviews with Assistant Principal, Special Education Director, and Special Education Coordinator.

¹⁶ Exhibit 2, p.1; Interviews with Parent, Special Education Director, and Special Education Coordinator.

¹⁷ Exhibit I; Interviews with Parent, Special Education Director, and Special Education Coordinator.

¹⁸ Exhibit 2, p. 1.

¹⁹ Interview with Parent and Special Education Director.

²⁰ Exhibits B and C; Interview with Parent.

²¹ Exhibit C, p. 3.

²² Exhibit C, p. 3.

available concerning progress on Student's IEP goals because, as discussed more fully below, Charter School was not implementing Student's September 2012 IEP.

12. Because there was such limited information or data presented about Student's strengths and needs, the IEP team decided to reconvene in a month to discuss Student's progress. On November 5, 2013, a properly constituted IEP team was convened for the purpose of conducting Student's annual review. As a result, Student's annual IEP review was completed nearly five weeks after it was due.

13. The SCO finds that this October 2013 IEP meeting failed to comply with IDEA's procedural requirements concerning the development and review of an IEP because there was no data or discussion concerning progress on IEP goals, and limited discussion concerning Student strengths and needs. Further, the failure to have a compliant IEP meeting on October 3, 2013, resulted in the additional failure to timely review Student's IEP.

14. Most concerning is that, since the very beginning of the school year, Student's behavior had been significantly and consistently impeding her ability to attend class, and yet both Charter School and District failed to utilize the IEP process and IDEA's disciplinary procedures in a manner consistent with federal regulation.

Manifestation Determination and Disciplinary Change of Placement

15. Parent has alleged that the District failed to conduct a timely manifestation determination and failed to provide her with adequate notice of the manifestation determination meeting held on October 31, 2013. The SCO agrees. In its Response, the District failed to admit, deny, or specifically respond to this allegation in any way. Consistent with the discretion afforded to the SCO in this situation, allegation two has been deemed admitted. The SCO conducted an investigation into this allegation for the primary purpose of determining the contours of the violation and the appropriateness of a remedy.

16. In this case, the SCO counts both out-of-school suspension (OSS) and in-school-suspension (ISS) as days of removal. Consistent with long-standing U.S. Department of Education policy, ISS is not considered a removal as long as the student "is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. 71 Fed. Reg. 46715 (Comments to the 2006 federal IDEA regulations).

17. At Charter School, all students on ISS, including Student, spend the day copying, verbatim, essays provided to them by the staff in the "character room,"²³ and are not eligible to

²³ The character room is the place designated for students to serve ISS, wait to be picked up by parents when they have received OSS, or receive nursing and counseling services. The character room is supervised by School Counselor and School Counselor Aide.

participate in academic classes or activities. While Student was allowed “extra-time” to complete the required number of essays, she did not have access to any of the general education curriculum or receive any academic instruction or special education services while on ISS.²⁴ Consistent with the description of ISS provided by School Counselor and School Counselor Aide, Special Education Teacher informed Parent in an email that “when students are on suspension or facing discipline, they do not get pulled for services” because “services are part of academic classes, so if a student is deemed unable to participate in academic classes as a result of poor behavior, they also do not participate in special education classes.”²⁵ Consequently, the SCO finds that any day Student was in ISS counts as a day of removal for purposes of IDEA’s disciplinary procedures because she had no access to the general education curriculum and did not receive any of the services specified on her IEP.

18. In reviewing Student’s disciplinary history, the SCO notes that the behavioral logs used by the Charter School to document days of ISS and OSS are not always consistent with attendance records and Special Education Teacher’s service logs. For example, Special Education Teacher noted that Student returned to class on October 10, 2013, after being on ISS since October 3, 2013, yet there is no notation in the behavior log that Student was on ISS for October 3 or October 7 through 10, 2013.²⁶ Further complicating the inquiry into the days of removal is the District’s failure to count the days of removal in conjunction with the manifestation determination on October 31, 2013. Considering the inconsistencies, SCO has done her best to evaluate the various sources of documentation and interview relevant staff.

19. Based on the credible evidence, the SCO finds that Student has been removed for disciplinary reasons for 20 days during the 2013-2014 school year, summarized as follows:²⁷

- Five days of OSS/ISS in August, 2013 (August 20, 21, 22, 23, and 30);
- Five days of OSS/ISS in September, 2013 (September 9, 17, 25, 26, and 27);
- 10 days of OSS/ISS in October 2013, with the eleventh day of OSS/ISS for the 2013-2014 school year being imposed on October 3, 2013 (October 3, 4, 7, 8, 9, 10, 11, 21, 29, and 30).

While this finding represents full days of removal, the SCO notes that Student spends some class time on most school days in the character room as a result of misbehavior during a class period or because she is permitted to leave her regular class on a “take five” pass. Based on the information documented in the behavior log, Charter School staff estimated that Student has spent 117 hours and 40 minutes in the character room from August 20, 2013, to November 8,

²⁴ Interviews with School Counselor, School Counselor Aide, Special Education Teacher, and Assistant Principal.

²⁵ Exhibit D, p. 1.

²⁶ Comparing Exhibits 5 and 15.

²⁷ Comparing Exhibits 5, 11 and 15; Interviews with Parent, School Counselor, School Counselor Aide, Assistant Principal, and Special Education Teacher.

2013.²⁸ In addition, Math Teacher estimated that Student has been in his math class for the entire class period fewer than 4 days this semester, and Special Education Teacher estimated that she spends significantly more time out of class than she does in class as she is typically sent out of class at least three times a day by her teachers.²⁹ The amount of classroom instruction Student regularly misses as the result of behavior is extremely alarming.

20. By October 3, 2013, Student had been subjected to a series of short-term removals that totaled more than 10 days in the school year. The behavior for which Student was suspended has been described as negative, inappropriate, and sometimes unsafe interactions with her peers that then escalated to the point of causing a disruption to the classroom environment. As such, the behavior resulting in suspension has all been substantially similar.³⁰ And, as detailed immediately above, the removals were numerous, lengthy, and very close in proximity.

21. Student received her eleventh day of suspension constituting a removal on October 3, 2013. Accordingly, October 3, 2013, is the date on which the decision was made to make a removal that constituted a change in placement for purposes of IDEA's disciplinary procedures.

22. Because Student received her eleventh day of removal on October 3, 2013, the District was required to convene a manifestation determination meeting within 10 school days, i.e., no later than October 18, 2013.³¹ The District did not convene a manifestation determination until October 31, 2013. Consequently, the SCO finds that the District did not timely convene the manifestation determination. For the 10 days she was suspended on or following her eleventh day of removal, Student also did not receive any academic services, including any of the services identified on her IEP.

23. In addition to the failure to timely convene the manifestation determination meeting, the District did not provide Parent with adequate notice of the meeting. On October 30, 2013, Special Education Teacher left Parent a message informing her that there would be a meeting on October 31 to discuss Student but did not tell Parent that the specific purpose of the meeting or who would be invited.

24. On October 31, 2013, about an hour before the meeting, Parent contacted Special Education Coordinator to ask her if she knew the purpose of the meeting. Special Education Coordinator informed Parent that she believed the meeting was intended to be a manifestation determination meeting.

25. Parent was actually provided with written notice of the manifestation determination meeting during the meeting itself on October 31, 2013, at which time she was also provided

²⁸ Exhibit 15, p. 1; Interviews with School Counselor and Assistant Principal.

²⁹ Interviews with Math Teacher and Special Education Teacher.

³⁰ Exhibit 15; interviews with Assistant Principal, Special Education Teacher, School Counselor, School Counselor Aide, and Math Teacher.

³¹ Charter School calendar [].

with a copy of the procedural safeguards.³² Although Parent attended the meeting, the lack of proper notice impeded her ability to prepare for and meaningfully participate in the meeting.³³ For example, Parent was not informed of her right to invite others to the meeting and did not know who had been invited to the meeting. These facts were necessary for Parent to be able to determine if relevant members of the IEP team had been invited and would be present at the meeting.

26. Student's manifestation determination team determined that the behavior for which Student had been repeatedly suspended was caused by or had a direct and substantial relationship to her disability *and* that it was the direct result of the failure to implement the IEP, including Student's BIP.³⁴ As a result of the manifestation determination, the IEP team reviewed Student's current BIP, but did not modify the BIP or conduct a functional behavioral assessment (FBA), even though the credible evidence indicates that the most recent FBA was completed on May 31, 2011. Rather, the IEP team identified that the following immediate steps were to be taken to remedy the deficiency: 1) direct instruction in social skills that would begin on November 5, 2013, and thirty minutes a week in a social skills group led by a special education staff person, 2) a new schedule with "push-in" and "pull-out" classes, and 3) an IEP review to be conducted the week of November 4, 2013.

27. While Student's IEP team met on November 5, 2013 and Student began receiving 30 minutes per week of direct instruction from a District school psychologist, the other actions/services identified by IEP team did not begin until November 18, 2013. Further, the social skills class had still not met when the SCO conducted interviews the week of December 2, 2013, and the 30 minutes of behavioral intervention provided by a District School Psychologist is not enough to meet the IEP requirement that Student be provided with 322 minutes of direct behavioral intervention each week.³⁵

Implementation of Student's September 2012 IEP at Charter School

28. Student's September 2012 IEP, the IEP in place at all times relevant to the Complaint allegations, identified Student's primary education environment as in the regular classroom 40-79% of the time and specified that Student was to receive specialized instruction from a special education teacher comprised of 322 minutes of behavioral intervention and 573 minutes of academic intervention each week.³⁶ Notably, the District presented no documentation or narrative to rebut Parent's allegation that she is in the regular education classroom 100% of the time without support, or that Student has received the specialized instruction identified on her IEP, including math. Consequently, the SCO finds that from August 5 to November 18, 2013,

³² Exhibit 15, p. 12; Interviews with Parent, Special Education Director, and Special Education Coordinator.

³³ Interviews with Parent and Special Education Coordinator.

³⁴ Exhibit 15, p. 10.

³⁵ Exhibit D; Interviews with Special Education Teacher, Special Education Coordinator, and Special Education Director.

³⁶ Exhibit 2, pp. 1 and 13.

Charter School has failed to provide any of the specialized instruction and service minutes required by Student's IEP in the educational setting identified.

29. As a result of the failure to implement her IEP, Student has missed approximately eleven weeks of special education programming and services, resulting in a loss of 3,542 minutes or approximately 59 hours of behavioral intervention and 6,303 minutes or approximately 105 hours of academic intervention.³⁷

30. Parent also alleged that Charter School has failed to provide the accommodations listed on Student's IEP, specifically the use of assisted technology for writing. The SCO agrees. Student's September 2012 IEP lists the following accommodations: extended time, oral presentation, small group, break down tasks, visual cues, frequent feedback, shorter sessions with breaks in-between, and use of assisted technology for writing.³⁸ The letter from Charter School Assistant Principal asserted that Student received "extended time, oral presentation, break down task, visual cues, and more but shorter sessions with breaks in between," but failed to address whether Student has been provided with assistive technology for writing, the one accommodation specifically mentioned by Parent in her Complaint, or explain how he knows the other accommodations are being provided in the classroom.³⁹ Student's Math Teacher reported that he had access to Student's IEP, but was not familiar with her accommodations or BIP because she had spent so little time in his class. Concerning access to assistive technology, Special Education Teacher reported that Student would have been able to use her teacher's computer, but did not want to do so because she felt stigmatized by standing at the front of the classroom. Student was finally provided with a tablet to use for homework assignments on or around November 18, 2013. Consequently, the SCO finds that Student had not received the accommodations listed on her IEP, including access to assistive-technology for writing.

31. Parent also alleged that Charter School has failed to implement Student's BIP and provide access to social skills curriculum to emphasize pro-social strategies. The SCO agrees. Because Student is identified as a child with serious emotional disability, the IEP included specialized instruction, supports, and IEP goals designed to address Student's disability-related needs. For example, Student's IEP specifies she is to receive 322 minutes of direct behavioral intervention each week, as provided by a special education teacher.⁴⁰ In addition, Student's BIP identified "access to social curriculum that emphasize pro-social strategies" as a support needed to implement the BIP in the current educational environment.⁴¹ At the manifestation determination meeting conducted on October 31, 2013, the team concluded that Charter School had failed to implement Student's IEP, including her BIP, by not providing access to

³⁷ In calculating the weeks of services missed, the SCO consulted the Charter School calendar and deducted 10 days that Student was serving suspension as the District was not obligated to provide educational services for the first ten days of removal for the 2013-2014 school year.

³⁸ Exhibit 2, p. 11.

³⁹ Response, p. 3.

⁴⁰ Exhibit 2, p. 13.

⁴¹ Exhibit 2, p. 7.

social skills curriculum and specialized instruction related to social skills training and behavioral intervention.⁴² Consequently, the SCO finds that the District failed to implement Student's BIP and provide access to social skills training and curriculum in accordance with her IEP.

32. Parent also complains that she has not been provided with progress reports in accordance with the IEP. The SCO agrees. Student's IEP provides that progress reports will be sent home quarterly.⁴³ Based on Charter School calendar, Parent should have received a progress report by October 14, 2013. Parent's first IEP progress report was dated November 5, 2013, nearly a month after the end of the first quarter, and did not include any progress monitoring for Student's three social/emotional goals which were to be monitored on a weekly basis.⁴⁴ Most concerning is this lack of any progress monitoring or data collection concerning Student's three behavior-related IEP goals-- a fact which further supports the finding that the Charter School failed to implement Student's BIP and provide the behavioral programming and supports Student needs to be successful in the general education environment.

33. A failure to implement a student's IEP in its entirety is clearly material and as such requires little if any evidence of harm. In this case, however, the failure has resulted in significant and obvious harm to Student. As described below, the behavior for which Student was repeatedly suspended from school was the direct result of the failure to implement Student's IEP/BIP, and has resulted in Student missing at least 20 days of school.⁴⁵ Further, Student has received failing grades for math, reading, science, social studies, and writing for quarter one and quarter two of the 2013-2014 school year and has failed to make progress on four of her five IEP goals.⁴⁶ The failure to implement Student's IEP with regard to social and behavioral programming and services has had a profound impact on Student's ability to learn and to access the general education environment.

34. Based on interviews with Special Education Director, Special Education Coordinator, Special Education Teacher, and Assistant Principal, the SCO has no confidence that Charter School has the staff and resources to properly implement Student's IEP. Consequently, the failure to implement Student's IEP is ongoing in nature.

Concerns with Implementation of Student's November 2013 IEP at Charter School

35. Since approximately November 18, 2013, Charter School and the District have attempted to provide the services listed on Student's November 2013 IEP by having Special Education Teacher attend all of Student's academic classes with her and by assigning a paraprofessional to work with Student during an after-school study hall. Because Special Education Teacher is responsible for teaching seventh-grade students, and Charter School has

⁴² Exhibit 15, pp. 10-12.

⁴³ Exhibit 2, p. 7.

⁴⁴ Exhibit 11, Exhibit 2, pp. 7-8.

⁴⁵ Exhibit 15, p. 4.

⁴⁶ Exhibit 7, p. 1; Exhibit 11.

not been able to hire an eight-grade special education teacher to replace the one who left at the beginning of October, there is no reason to believe that this level of support is sustainable with the resources and programming currently available at Charter School. Further, District and Charter School agree that the level of services identified by Student's IEP requires a center-based program for students with significant behavioral needs. Charter School does not offer a center-based program.⁴⁷

36. The content of the prior written notice dated November 5, 2013, and correspondence between Special Education Director and Parent, reveal some confusion concerning the District's obligation to ensure Student is receiving a FAPE, i.e., that her IEP is being properly implemented. In the prior written notice sent to Parent following the November 5, 2013 IEP meeting, the District states that Charter School "has the capacity to educate special education students with only moderate academic and behavioral needs" and that "[Student's] needs would best be met in a program that has programming for students with more significant behavioral needs."⁴⁸ The prior written notice also states that Parent did not agree with the recommendation that Student attend a center-based program within the District because she wanted Student to remain at Charter School.⁴⁹

37. Then, in a letter to Parent dated November 14, 2013, Special Education Director admits that she is concerned that Student "is not making progress with the lack of compliance with the IEP process and the lack of services." Special Education Director further admits that her conversations with Charter School Managing Director have revealed that "it will be difficult to provide the services on Student's IEP because they have not yet filled an open special education teacher position." Despite the acknowledgement that Charter School does not have the program and staff to properly implement Student's IEP, Special Education Director expects Charter School to develop these resources because Parent does not want Student to attend another program.⁵⁰ While the District is obligated to provide Student with a FAPE, Charter School is not obligated to create a center-based program to appropriately serve Student's unique needs.

38. The SCO cannot ignore the professional opinions of District and Charter School staff who all agree that Charter School is not capable of implementing Student's November 2013 IEP because it currently lacks the dedicated staff and center-based program necessary to provide the services identified on Student's IEP. Consequently, the SCO finds that Student has been denied a FAPE since August 5, 2013, and that the violations constituting a denial of FAPE, i.e., the failure to implement Student's IEP, are ongoing in nature.

⁴⁷ Exhibit 1, p. 4; Interviews with Special Education Director, Special Education Coordinator, Assistant Principal, and Special Education Teacher.

⁴⁸ Exhibit 1, p. 4.

⁴⁹ Exhibit 1, p. 4.

⁵⁰ Exhibit 1, p. 4.

39. Finally, the SCO finds that the violations cited above are not unique to the circumstances described in this Complaint, but are systemic in nature. There is no reliable procedure or system in place for Charter School to evaluate its ability to implement a prospective student's IEP prior to accepting them as a student. Further, there is no reliable procedure in place for notifying the District when a student with an IEP who resides in the District has enrolled in Charter School.⁵¹ While the District and Charter School have identified the turn-over in District special education administration as a significant and contributing factor to these violations, the SCO finds that such turn-over is precisely the reason why reliable procedures concerning communication between Charter School and District about students with IEPs are paramount.

CONCLUSIONS OF LAW

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

Allegation One: The Charter School failed to properly implement Student's IEP, resulting in a denial of FAPE from August 5 to November 18, 2013.

1. Under IDEA, local education agencies, i.e., the District, are required to provide eligible students with disabilities with a free appropriate public education (FAPE) by providing special education and related services individually tailored to meet the student's unique needs and provided in conformity with an individualized education program developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to implement an IEP can result in a denial of FAPE. *Id.*
2. Here, Parent alleged that the District failed to properly implement Student's IEP in various ways, including: placing Student in the wrong educational setting and failing to provide the required academic and behavioral interventions; failing to properly implement Student's BIP and provide access to social skills curriculum; failing to provide accommodations; and failing to provide progress reports in accordance with the IEP. The SCO found that Charter School has failed to implement Student's IEP, in its entirety, from August 5 to November 18, 2013.
3. Not every deviation from an IEP's requirements results in a denial of FAPE. *See, e.g., L.C. and K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005). In this case, it is clear that the failure to implement Student's IEP was material and resulted in a total denial of educational opportunity. First, Student was educated in an educational setting that violated her IEP and constituted a significant change of placement. Although Student's September 2012 IEP required that Student participate in the regular education environment 40-79% of the time, she was placed in the regular education environment 100% of the time because Charter School does not have the staff and resources of a center-based program. As a result, Student has missed over eleven weeks of direct behavioral and academic intervention specified on her IEP,

⁵¹ Exhibit I; Interviews with Assistant Principal, Special Education Coordinator, and Special Education Director.

resulting in a loss of 3,542 minutes or approximately 59 hours of behavioral intervention and 6,303 minutes or approximately 105 hours of academic intervention. Further, the failure to implement Student's BIP resulted in Student exhibiting behavior for which she was suspended from school, resulting in a loss of a *minimum* of 20 entire school days. In addition to losing entire days, Student regularly spends class periods in the character room where she misses academic instruction. As a result of not receiving academic instruction and the special education services and supports identified on her IEP, Student is currently failing all of her classes. There is no question that the failure to implement Student's IEP was material and has resulted in significant educational harm.

4. Because Student has been denied a FAPE, Student is entitled to compensatory education. Compensatory education is an equitable remedy intended to place a student in the same position they would have been, if not for the violation. *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Student is awarded compensatory education as specified in the remedies section of this decision.

5. The SCO also concludes that the District violated ECEA Rule 4.03(8)(b)(iv) by not conducting a reevaluation and convening an IEP Team to specifically determine whether Charter School was an appropriate placement. In Colorado, when a transfer under Public Schools of Choice constitutes a significant change of placement, "the administrative unit in which the receiving program is located must conduct a reevaluation consistent with Section 4.03(8)(b)(ii) of these Rules and also convene an IEP Team to ensure that the receiving school or program is an appropriate placement for the student." ECEA Rule 4.03(8)(b)(iv). A significant change of placement includes a change in the primary educational environment. ECEA Rule 4.03(8)(b)(ii).

6. Here, Student went from a center-based program where she was in the regular education environment for 40-79% of the time to Charter School where she was in the regular education environment 100% of the time. Because Charter School does not have a center-based program, affective needs classroom, or the staff to provide the services listed on Student's IEP in the identified educational environment, continued placement at Charter School represents a significant change of placement.

7. Consequently, the District was required to conduct a reevaluation, consistent with ECEA Rule 4.03(8)(b)(ii)(B), and convene an IEP Team to determine whether Charter School was an appropriate placement. The District has not done so, even though it has been on notice since late August of 2012 that Charter School is not capable of properly implementing Student's IEP. Rather, the District has mistakenly laid the burden on Charter School to develop a center-based program or add the staff/resources required to implement Student's IEP, something it is not required to undertake to serve the special needs of Student. C.R.S. 22-36-101 (b). As a result, Student has languished in a school that cannot properly serve her unique needs.

Allegation Two: The manifestation determination meeting conducted on October 31, 2013, violated the IDEA because it was not timely conducted and Parent was not provided adequate notice.

8. The IDEA provides extensive regulations governing the discipline of students with disabilities that are designed to prevent students from being punished for conduct that is the result of their disability and discourage the use of discipline to change educational placement. At issue here is the District's obligation to timely conduct a manifestation determination and provide Parent with adequate notice of the manifestation determination meeting and prior written notice of the decision to change Student's educational placement through disciplinary removal.

9. Relevant to this Complaint, a disciplinary change of placement occurs when a child with a disability is removed from her current educational placement and the child has been subjected to a series of removals that constitutes a pattern. 34 CFR § 300.356. A series of removals constitutes a pattern when: 1) the series totals more than ten school days in a school year, 2) the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals, and 3) additional factors exist such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 CFR § 300.356(a)(2).

10. Here, Student was subjected to a series of removals that constituted a pattern. First, she was removed for more than 10 school days in a school year. By placing Student in ISS on October 3, 2013, Charter School had made the decision to remove Student for the eleventh school day that year. Second, all of Student's suspensions were substantially similar in that they resulted from negative interactions with peers that escalated to the point of becoming disruptive to the class or unsafe. Third, the removals have occurred in close proximity to one another and represent a significant amount of time that child has been removed from the educational environment. In August, Student was removed on the following five dates: 20, 21, 22, 23, and 30. In September, Student was removed on the following five dates: 9, 17, 25, 26 and 27. Consequently, this series of removals resulted in a disciplinary change of placement on October 3, 2013, when the Charter School decided to give Student ISS.

11. Parental notification is a fundamental requirement in implementing IDEA's disciplinary requirements. On the date that a decision is made to remove a student with a disability in a manner that constitutes a change in placement, the public agency must notify parents of that decision and provide them with a copy of the procedural safeguards notice. 34 CFR § 300.530(h). Because a change of placement triggers the IDEA's requirement to provide prior written notice, the district must provide written notice that complies with 34 CFR § 300.503.

12. In this case, the decision to make a disciplinary change of placement was made on October 3, 2013, but Parent was not provided with prior written notice of the change and a

copy of the procedural safeguards notice until October 31, 2013, in violation of 34 CFR § 300.530(h).

13. In addition, the District must provide parent with notice of the manifestation determination meeting because the parent has a role in determining the relevant members of the IEP team who will participate in the manifestation determination. See 34 CFR § 300.530(e). Essentially, the District must notify the parent of the relevant IEP team members invited by the district so that the parent can exercise his/her right to determine whether additional individuals should be included as relevant members of the IEP team. Colorado Department of Education State Complaint Decision 2010.516 (available at <http://www.cde.state.co.us/sites/default/files/documents/spedlaw/download/sc2010-516.pdf>).

14. In this case, Parent did not receive adequate notice of the manifestation determination meeting. Special Education Teacher left a message for Parent on October 30, 2013, the day before the meeting was to be held that did not identify the purpose of the meeting or reveal who would be invited to attend. Rather, Parent was provided with notice of the meeting at the meeting itself. This impeded Parent's ability to exercise her right to determine the relevant members of the IEP team conducting the manifestation determination, in violation of 34 CFR § 300.530(e).

15. In addition to notifying parents when a disciplinary change of placement has been imposed, the District must conduct a manifestation determination within 10 school days to determine if the conduct in question was caused by, or had a substantial relationship to the child's disability, or if the conduct was the direct result of a failure to implement the child's IEP. 34 CFR § 300.530(e). Because a disciplinary change of placement was imposed on October 3, 2013, a manifestation determination was required by October 18, 2013. The District did not conduct a manifestation determination until October 31, 2013, in violation of 34 CFR § 300.530(e).

16. This failure to timely conduct a manifestation determination resulted in substantive educational harm to Student that amounts to a denial of FAPE. Between October 3 and October 31, 2013, Student was removed for an additional 10 school days, during which she should have been provided with access to the general education curriculum and special education services. 34 CFR § 300.530(d). Considering that the manifestation determination meeting concluded that the removals were a manifestation of Student's disability and the result of the failure to implement her IEP, the SCO can only assume that a timely conducted manifestation determination may have prevented Student from losing an additional ten school days during which she did not have access to the general education curriculum or the special education services identified in her IEP.

Allegation Three: The IEP meeting conducted on October 3, 2013, violated IDEA because Charter School did not provide information regarding Student's progress on IEP goals and failed to timely review and revise Student's IEP.

17. Any analysis of the appropriateness of an IEP must begin with the standard established by the United States Supreme Court in *Rowley v. Board of Education*, 458 U.S. 176 (1982), in which the Court set out a two-pronged analysis for determining whether an IEP has offered a FAPE. The first part of the analysis looks to whether the IEP development process complied with the IDEA's procedures; the second looks to whether the resulting IEP was reasonably calculated to confer some educational benefit upon the child. *Id.* at 207; *see also Thompson R2-J School Dist. V. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008). If those two questions are satisfied in the affirmative, then the IEP is appropriate under the law.

18. Under the IDEA, each school district has an affirmative duty to ensure that a child's IEP team meets no less than annually to review and revise the IEP. 34 CFR § 300.324(b). In conducting an annual IEP review, the IEP team must consider whether the annual goals are being achieved, and revise the IEP, as appropriate, to address any lack of expected progress toward annual goals and in the general education curriculum, the results of any reevaluation, information about the child provided to or by the parents, the child's anticipated needs, or other matters. 34 CFR § 300.324(b). Here, the IEP team failed to discuss Student's present levels of performance or progress on her IEP goals, as required, because it did not have the data. As a result, Student's annual IEP was rescheduled and completed on November 5, 2013, approximately five weeks after it was due, in violation of 34 CFR § 300.324(b).

19. However, it is well-settled that procedural violations of the IDEA are only actionable to the extent that they impede the child's right to FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). In this case, the September 2012 and November 2013 IEP provide essentially the same special education programming and services. Further, neither party disputes that either IEP was not appropriate. Consequently, the failure to timely review Student's IEP did not itself result in substantive harm.

20. While the appropriateness of Student's November 2013 is not in dispute, it is apparent that Student's current IEP cannot be implemented at Charter School. As detailed above, the SCO concluded that Charter School could not implement Student's September 2012 IEP because it did not have the staff and resources to provide the special education programming and services described in the IEP in the appropriate education setting. Because the November 2013 IEP requires nearly identical services, it is unlikely that Charter School is any more able to implement Student's current IEP than the previous IEP. Consequently, District must convene an IEP meeting consistent with this decision and as specified in the remedies section, *below*, in

order to determine a placement for Student that is capable of implementing Student's IEP and providing her with the free appropriate public education to which she is entitled.

21. The degree and the extent to which the District's has abdicated its responsibility for providing Student with FAPE is distressing, to say the least. In Colorado, public school choice is a factor to be considered by the IEP team when considering placement. As such, Charter School is one placement option along a continuum of options. School choice, however, does not trump the District's obligation and responsibility for providing FAPE. When, as here, a parent's choice of school is incompatible with the District's obligation to provide FAPE, the student must be placed where she can receive FAPE. Had the District complied with its obligations under the IDEA, Student would not have missed nearly an entire semester of school. Instead, the District demonstrated an astounding level of indifference to Student's needs and rights, where it failed to take any action to provide Student with appropriate special education and related services, while being on notice that Student was not being served properly.

REMEDIES

The SCO has concluded that the District violated the following IDEA and ECEA requirements:

- a) Failure to properly implement Student's IEP, resulting in a denial of FAPE, in violation of 34 CFR § 300.17.
- b) Failure to timely conduct reevaluation and convene an IEP Team to determine whether Charter School is an appropriate placement, in violation of ECEA Rule 4.03(8)(b)(iv);
- c) Failure to timely conduct a manifestation determination meeting, in violation of 34 CFR § 300.530(e).
- d) Failure to provide Parent with adequate notice of the manifestation determination meeting and prior written notice concerning a change of placement, in violation of 34 CFR §§ 300.530(e)-(h) and 300.503.
- e) Failure to timely develop, review, and revise Student's IEP, in violation of 34 CFR § 300.324(b).

To remedy this violation, the District is ordered to take the following actions:

- 1) **By January 13, 2014**, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
 - a) Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violations, no later than **January 13, 2014**. These procedures must include a plan for monitoring the provision of special education and related services for students with disabilities who reside within the District and are

attending Charter School, including a procedure for notifying the District of students with IEPs enrolled in Charter School and an identified District-level contact for expressing concerns. In addition, Charter School must provide a detailed plan for evaluating whether the Charter School has the resources to implement the IEP of any prospective student before admitting them.

- b) Effective training must be conducted for all District Special Education Directors, Coordinators, and intended designees, including Social Workers and School Psychologists, concerning the policies and procedures, to be provided no later than February 28, 2014.
- c) Effective training must also be conducted concerning these policies and procedures for all Charter School staff routinely involved in case management and instruction of students eligible for special education, including special education teachers, special education case managers, character room staff, and any administration official involved in determining whether to accept a student's application for admission to the Charter School and/or decisions regarding student discipline. Training must be provided no later than February 28, 2014.
- d) Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to CDE no later than March 7, 2014.

The Department will approve or request revisions to the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance. At the request of the District, CDE is willing and able to provide the training specified above. Should the District choose to request training from CDE, it must coordinate any such training with Joyce Thiessen-Barrett.

To remedy the failure to provide Student with a FAPE, the District is ordered to take the following actions:

- 2) **Convene an IEP meeting as soon as possible, but no later than 12/19/2013, for the purposes of determining an appropriate placement where Student's IEP can be implemented, and to schedule compensatory services.** The IEP team meeting and the resulting IEP must be consistent with the IDEA and this Decision. In conjunction with this IEP team meeting, the District shall:
 - a) Include a behavioral specialist of the District's choosing that has demonstrated experience in developing behavioral interventions and social skills programming for students who are identified as having a serious emotional disability, including training and experience in cognitive behavioral therapy;

- b) Consider the need to conduct a reevaluation, including the need to conduct a new FBA that includes a strength-based assessment. Should the IEP team determine that reevaluation, including a new FBA, is not necessary, it must provide a detailed written explanation of its decision to the Department.
- c) Determine an appropriate placement, consistent with this Decision, where Student's IEP can be properly implemented.
- d) Schedule compensatory services identified in paragraph #3 below. The District shall supply the Department with written documentation (e.g., schedule) of how the District plans to fully comply with this remedy no later than the close of business on **1/6/2014**;
- e) Supply a complete copy of the resulting IEP, including prior written notice, detailed team meeting notes and verification of items a-d, to the Department by the close of business on 1/6/2014.

3) Provide Compensatory Education and Related Services.

- a) The District shall provide Student with 59 hours of behavior therapy/intervention to be provided by a private therapist who has experience treating adolescents diagnosed with ADHD and bipolar disorder and demonstrated skill and knowledge in cognitive behavioral therapy. Behavioral services shall be provided on a schedule of 2 hours/week and be completed no later than 8/31/2014. These services shall be provided at the District's expense. If the parties cannot agree on a private therapist, each shall submit a list of two qualified therapists to the Department and the Department will select the therapist. To document the provision of these services, the District must submit records of service logs to CDE by the second Monday of each month until September 8, 2014.
- b) From January through June 2014, the District or School professional providing behavioral interventions in accordance with Student's IEP must consult with the private therapist described above on a monthly basis to discuss Student's progress on IEP goals related to behavior, Student's classroom behavior and any disciplinary consequences delivered to Student that month, such as suspension, to determine appropriate interventions and supports. The District must provide documentation to CDE to demonstrate these consultations are occurring. This consultation shall be provided at the District's expense.
- c) The District shall provide 105 hours of direct, individualized academic instruction in areas of demonstrated need, including math and writing. Educational services shall be provided by a qualified teacher on a schedule of 3 hours/week and be completed no later than 8/31/2014. To document the provision of these services, the District must submit records of service logs to CDE by the second Monday of each month until September 8, 2014.

These compensatory services shall be in addition to any services Student currently receives, or will receive, which are designed to advance Student towards IEP goals and objectives, including ESY. The Parties shall cooperate in determining how the compensatory education services will be provided, with special consideration to Student's needs and family schedule.

If Parent refuses the ordered compensatory education, Parent must notify the Department of the refusal in writing no later than December 19, 2013. If Student does not show up for any scheduled compensatory services, the District will be excused from providing the service scheduled.

The District shall provide the Department with documentation that it has complied with this requirement no later than September 8, 2014. Documentation must include the service logs for providing compensatory services, documentation that required consultations have occurred, including any contracts for consulting with the private therapist and or instructor.

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

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

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

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 CFR § 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 10th day of December, 2013.

Candace Hawkins

Candace Hawkins, Esq.
State Complaints Officer

Appendix

Complaint, pages 1-7.

Exhibit A: IEP dated September 2012
Exhibit B: IEP meeting agenda dated October 2013
Exhibit C: Draft IEP dated October 2013

Reply, pages 1-3.

Exhibit D: Email with Student Schedule.
Exhibit E: Student grade report.
Exhibit F: Charter School notice of test dates.
Exhibit G: Charter School notice of assignment to study hall.
Exhibit H: Advertisement for Charter School.
Exhibit I: Email and letter from Special Education Director to Parent.

Response, pages 1-4.

Exhibit 1: IEP dated November 2013.
Exhibit 2: IEP dated September 2012.
Exhibit 3: Prior written notices dated October 2013.
Exhibit 4: Notice of Meeting dated February 2013.
Exhibit 5: IEP meeting agenda dated November 2013 and observation log.
Exhibit 6: Grade report for 2012-2013 school year.
Exhibit 7: Grade reports for the 2013-2014 school year.
Exhibit 8: Schedule for the 2012-2013 school year.
Exhibit 9: Schedule for the 2013-2014 school year.
Exhibit 10: Progress reports for the 2012-2013 school year.
Exhibit 11: Progress reports for the 2013-2014 school year.
Exhibit 12: Spring 2013 TCAP test results.
Exhibit 13: Not provided because there have been no evaluations and assessments of Student for the 2013-2014 school year.
Exhibit 14: Attendance records for the 2012-2013 school year.
Exhibit 15: Behavior logs and manifestation determination meeting outcome.
Exhibit 16: Additional behavior logs, including duplicates.
Exhibit 17: Draft District guidance on manifestation determination meetings.
Exhibit 18: Contact information for relevant Charter School staff.

Interviews with:

- Parent
- Special Education Director
- Special Education Coordinator

- Charter School Assistant Principal
- School Counselor
- School Counselor Aide
- Special Education Teacher
- Math Teacher