

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

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**State-Level Complaint 2017:526  
WELD RE-4 SCHOOL DISTRICT**

**DECISION**

**INTRODUCTION**

This state-level complaint (“Complaint”) was properly filed on November 8, 2017 by the parents (“Parents” or “Mother” and “Father”) of a child (“Student”) who is identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup>. Parents bring this Complaint against Weld RE-4 School District (“District” or “School District”).

This state-level complaint (“Complaint”) was properly filed on November 8, 2017 by the parents (“Parents” or “Mother” and “Father”) of a child (“Student”) who is identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>2</sup>. Parents bring this Complaint against Weld RE-4 School District (“District” or “School District”).

Based on the written Complaint, the State Complaints Officer (“SCO”) determined that the Complaint identified three allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.<sup>3</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**SUMMARY OF COMPLAINT ALLEGATIONS**

Whether the School District has violated the IDEA and denied Student a free appropriate public education (“FAPE”) by:

1. Failing to conduct an evaluation of Student’s behavior from December 2016 through August 2017;
2. Removing Student from the general education environment resulting in a failure to provide supports and services provided for in Student’s IEP since December 2016; and

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

<sup>2</sup> 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.*

<sup>3</sup> Hereafter, only the IDEA regulation and any corresponding Exceptional Children’s Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

3. Changing Student's placement without meaningful input from Parents or any other members of Student's IEP team on September 19, 2017.

**Summary of Proposed Remedies.** To resolve the Complaint, Parents propose, in summary, that School District receive training on IEP processes, conducting FBA assessments, and writing behavior intervention plans. Parents also propose that Student be provided with tutoring as compensatory services due to time outside of the classroom.

### **FINDINGS OF FACT**

After a thorough and careful analysis of the credible record,<sup>4</sup> the SCO makes the following FINDINGS:

1. At all times relevant to the Complaint, Student lived with Parents within the boundaries of the School District and attended School #2. Student's family moved from Other State into School District during the summer of 2015. Student, who is in elementary school, was diagnosed with autism spectrum disorder ("ASD" or "autism") and attention deficit hyperactivity disorder ("ADHD") at a young age. School District determined that he is a child with a disability, eligible for special education and related services under the IDEA and ECEA<sup>5</sup> and accepted Student's March 11, 2015 IEP from Other State ("Other State IEP").<sup>6</sup>
2. Parents stated that Student had done well the previous year in Other State. Student had steadily increased the amount of time he was spending in the general education classroom and was also beginning to close academic gaps. Other State IEP shows that Student attended a school where he spent part of his day in a general education classroom with one-to-one ("1:1") paraprofessional support and the other part in a self-contained ABA therapy program.<sup>7</sup>
3. Student also had a behavior intervention plan ("BIP") in Other State ("Other State BIP") that was developed after conducting a functional behavioral assessment ("Other State FBA") in February 2014. Other State FBA noted that Student's concerning behaviors were non-compliance, aggression, property destruction, and inappropriate vocals. Other State FBA identified that Student's behaviors occurred primarily when a demand was in place or he desired an item or activity and that the function of his behavior was task avoidance and access to preferred activities. Other State FBA specifically noted that staff's inconsistent follow through with demands, occasional commenting on behaviors, and blocking his access to preferred items or activities reinforced the behaviors. SCO notes that the documentation provided by School District only contains a partial copy of Other State BIP and, as such, SCO

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<sup>4</sup> The appendix, attached and incorporated by reference, details the entire record.

<sup>5</sup> SCO notes that in 2015 School District determined that Student was eligible under ASD and SLI and in April 2017 changed his secondary eligibility category from SLI to Other Health Impairment ("OHI"). See Exhibit A

<sup>6</sup> Exhibits A and B

<sup>7</sup> Interviews with Parents; Exhibit B

reviewed only a portion of Other State BIP.<sup>8</sup>

#### 2015-16 School Year

4. Student attended School #1 during his first year in School District. Initially, he was placed in a general education classroom for part of the day and in a significant support needs (“SSN”) classroom for part of the day, however, he was quickly moved to a general education classroom with special education supports provided in a resource room. Mother admitted that Parents were worried all year that Student’s behavior would become a problem in a general education classroom all day, but it did not. Student’s general education classroom provided all students with structures that worked well for him (i.e., assigned seating, visual schedules, etc.). Student did well and Parents did not even notice that School District had not also adopted Other State BIP, but explained that it was not an issue because his behavior was not a concern.<sup>9</sup>

5. Student moved from School #1 to School #2 the next school year with his peers. Prior to the first day of the 2016-17 school year, Father and Student visited his assigned general education classroom and Father was immediately concerned about the open seating arrangement. He discussed his concerns with Teacher #1, explaining that Student has autism and needs structure in order to feel safe and comfortable (i.e., assigned seating, his own desk, etc.). Teacher #1 stated that she did not understand why the open seating would be a problem.<sup>10</sup>

#### 2016-17 School Year

6. Throughout the first several months of school, Mother continued to advocate for more structure and emphasized the importance of the supports in Student’s IEP (i.e., “Student needs help from adults to recognize a dysregulated state and take measures to recover”, calming techniques to be initiated by teachers, etc. ).<sup>11</sup> Mother was concerned about the daily charts School #2 was sending home and explained to Special Education Teacher #1 and Teacher #1 that the charts were inconsistent and that Student did not understand what he was working toward. Mother recommended that they should focus on one or two targeted goals. Student was reporting to Parents that Teacher #1’s classroom was too noisy and that Special Education Teacher #1’s room was calmer, less bright, and not noisy. Parents were receiving frequent emails, texts, and phone calls from School #2 related to Student’s behavior, including requests to pick him up early. Feeling frustrated that his behavior was disrupting Student’s education and that his class was too chaotic and lacked the structure he needed, Mother requested that

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<sup>8</sup> Exhibits B and 5; Interview with Mother

<sup>9</sup> Interviews with Special Education Coordinator and Parents; September 2016 IEP; SCO notes that Mother explained that Student did have some problematic behaviors at the end of the school year when his teacher went out on maternity leave.

<sup>10</sup> Interviews with Parents, Principal, and Teacher #1; Exhibit 5; Daily sheets

<sup>11</sup> SCO notes that Student was provided with his own desk in Teacher #1’s class sometime in the beginning of October 2016.

Student be assigned to another classroom.<sup>12</sup>

7. In an effort to address emotional and behavioral concerns outside of school, Parents arranged for Student to begin therapy with Private Therapist. From September 17<sup>th</sup> and continuing throughout the 2016-17 school year, Private Therapist worked with Student in the family's home twice a week.<sup>13</sup>

8. Student's IEP team met for an annual review on September 21, 2016 ("September 2016 IEP"). September 2016 IEP indicates that at that time Student was already struggling in the general education classroom. The IEP specifically noted behavioral concerns (i.e., anger, melt downs, yelling, pushing/shoving furniture, etc.). September 2016 IEP also noted Parents' input that Student was "struggling significantly" at daycare and at home. Less than two weeks after the IEP meeting, Mother emailed Special Education Teacher #1, noting that September 2016 IEP did not include a BIP, which had been helpful in Other State. She requested a BIP at that time and asked about conducting an FBA. Mother's request was not noted in September 2016 IEP, despite emails indicating that Special Education Teacher #1 was seeking Mother's input in order to finalize the September 2016 IEP at the time. A review of the documentation provided by School District also reveals that there is no prior written notice ("PWN") related to Mother's request for a BIP or an FBA.<sup>14</sup>

9. The Behavior Detail Report indicates that Student received the following disciplinary actions during the 2016-17 school year:

- November 28 – detention
- January 12 – within school day detention
- January 19 - detention
- January 26 - within school day detention
- March 7 - 2 ½ days of out of school suspension
- April 11 – 1 day of in school suspension
- April 24 - detention
- May 16 - detention
- May 17 - classroom suspension
- May 18 – 1 day of out of school suspension

A review of the report reveals that the behaviors were all related to Student's non-compliance, destructive behavior, aggression and inappropriate vocals and that Student was frequently removed from the classroom for non-compliance, which then led to aggression and safety

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<sup>12</sup> Interviews with Parents, Special Education Director, Principal, Special Education Teacher #2; Exhibits 3, 5, A, B, C, and D; SCO notes that Student was provided with his own desk in Teacher #1's class sometime in the beginning of October 2016. SCO also notes that Mother is a teacher.

<sup>13</sup> Interview with Parents; Exhibit 4

<sup>14</sup> Interviews with Parents and Principal; Exhibits 3, 5, A and B

issues. School #2 staff explained that they continued to try different strategies, but “could never pin down” the source of Student’s behavior and that rewards were constantly changing or did not work at all. Principal, who provided 1:1 support for Student regularly, stated that School #2 did not have the expertise to support Student.<sup>15</sup>

10. Based on a thorough review of the credible record, SCO concludes that School District failed to evaluate Student’s behavior or to develop an appropriate behavior plan (or BIP) during the 2016-17 school year. SCO further concludes that Student was frequently removed from the general education classroom and spent many of his days working alone with various staff members in other areas of the school. Mother emailed Special Education Teacher #1 on November 29<sup>th</sup>, the day after Student received his first detention, and reiterated her October 2016 request for a written behavior plan and an FBA<sup>16</sup>. Special Education Teacher #1 responded by providing Mother with a plan Special Education Teacher #1 had prepared sometime in mid-November. The plan is a bulleted partial list of the accommodations in September 2016 IEP (i.e., reward at the end of the day for behavior chart, incentives for work completion, frequent check-ins, built in breaks for snacks and bathroom, etc.). The plan to address Student’s behavior was either Student’s removal from the classroom, taking a break, or choosing a calming strategy using a “Wheel chart of emotions”.<sup>17</sup>

11. The following week, School Psychologist #1 was tasked with conducting an FBA. Mother provided written consent on December 5<sup>th</sup> and School Psychologist #1 started the FBA process.<sup>18</sup> In its Response, School District explained that School Psychologist #1 suffered an injury and never returned to work at School #2 and that, as a result, the FBA was not completed by School Psychologist #1 at that time. SCO notes that School #2 also did not have a school psychologist available for consult in the building for the remainder of the school year, despite the September 2016 IEP service delivery statement specifying that “[t]he school psychologist is available on an as-needed basis to assist in developing and implementing positive behavior support strategies.”<sup>19</sup>

12. School District confirms that Student’s behavior was a concern and contends that they addressed it through a PST (or Problem-Solving Team) process that resulted in a “behavior support plan” that School #2 implemented from February 2<sup>nd</sup> through the remainder of the school year. School District stated that Mother was consulted throughout this process. Mother described the meetings she attended as brainstorming sessions. A review of the documentation reveals that School #2’s process resulted in no substantive plan for addressing the behavior

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<sup>15</sup> Interviews with Principal, Special Education Teacher #2, SLP, and Teacher #1; Exhibit C

<sup>16</sup> SCO notes that Mother also asked Special Education Teacher #1 about the use of restraint.

<sup>17</sup> Interview with Mother; Exhibit 5

<sup>18</sup> SCO notes that Mother also consented to the use of restraint.

<sup>19</sup> Response; Exhibit C; Interviews with Parents, Principal, Special Education Director, Special Education Teacher #2, Teacher #1; Emails SCO also notes that September 2016 directs that “Autism consultation will also be provided as needed.”

concerns and that the behavior support plan School District identified is identical to the plan Special Education Teacher #1 Plan made in mid-November.<sup>20</sup>

13. In its Response, School District also asserts that various amendments were made to Student's IEP addressing his behavior. Based on a thorough review of the record, SCO concludes that the amendments related to Student's behavior did not involve a school psychologist to support in developing strategies and added "social/emotional intervention" to be provided outside the general education classroom by a special education teacher to address "classroom behavior and anger".<sup>21</sup>

14. School #2 staff described Student's behavior as violent and severe, explaining that they rotated working 1:1 with Student and were directed never to be alone in a room with Student due to safety concerns. In its Response, School District admits that Student was unable to join his peers in general education consistent with the LRE placement documented in the IEP during times when Student was a danger to himself or others or was removed from the classroom for a disciplinary infraction.<sup>22</sup>

15. SCO also concludes that School #2 did not appropriately program for the Student's needs related to autism. Principal, who frequently provided 1:1 support for Student, stated that School #2 did not have the expertise to support Student. On March 10<sup>th</sup> School #2 and Mother agreed that School #2 would bring in a school psychologist to consult. Principal contacted School Psychologist #2 who works in School #3, one of School District's elementary schools which also has a specialized program to address behavior. SCO notes that Parents had started asking about School #3 as a possible solution due to Student's behavior issues. School Psychologist #2 observed Student once during the morning of April 6<sup>th</sup>, a day on which Student's behavior was not a significant concern.<sup>23</sup> School Psychologist #2 prepared notes to share with School #2, which summarized his observations that Student follows a schedule rigidly, has too much transition in his day, needs support in awareness of personal space, and was confused about the behavior sheet goals. School Psychologist #2 recommended that School #2 create an afternoon schedule (noting that the morning schedule is effective) and that Student spend more time in the general education classroom and less time transitioning in and out of the classroom.<sup>24</sup>

16. On March 23<sup>rd</sup> Special Education Director, School #2, and Mother also agreed that School District would conduct additional assessments to assist School #2 in better understanding Student's needs and to address the question about whether Student's needs were more related to a serious emotional disability ("SED") rather than autism. They also

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<sup>20</sup> Interviews with Mother, Teacher #1, Special Education Teacher #2; Exhibits A, B, D, and 5

<sup>21</sup> Exhibit A; Interviews with Special Education Teacher #2 and Principal

<sup>22</sup> Response; Interviews with SLP, Special Education Teacher #2, Principal, and Teacher #1

<sup>23</sup> SCO notes that from December 2016 until April 6, 2017, School #2 did not consult with a school psychologist or an autism specialist about Student.

<sup>24</sup> Interviews with Principal, School Psychologist #2; Exhibits A, B, D, and H

agreed to conduct an FBA, which would be a “first priority”. SCO concludes that the evaluation was intended to determine whether Student fit the eligibility criteria for ASD or SED, but was not an FBA, nor did it evaluate the function of Student’s behavior.<sup>25</sup>

17. An evaluation of a child’s behavior is a vital tool in determining how best to provide support to children who are exhibiting behavioral concerns. The evaluation should provide the team with the following information:

- What the challenging behavior is in observable and measurable terms, and where, when, and with whom the behavior occurs;
- What the antecedents are;
- What consequences reinforce or maintain the behavior;
- What interventions and strategies have been tried previously and their effects; and
- What the setting events are.

FBA’s are rooted in the theory that behavior is functional (meaning it has a purpose), predictable, and changeable. An FBA is a process for gathering information about behaviors of concern, whether the behaviors are academic, social, or emotional, to determine the function of the behavior. Understanding the function or purpose underlying a student’s behavior can help a school team develop a plan to teach the child more appropriate replacement behaviors.<sup>26</sup>

18. Autism is a “spectrum disorder,” meaning that it affects each individual person in different ways. Under the IDEA, autism means a “developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child’s educational performance. Other characteristics often associated with autism are engaging in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term autism does not apply if the child’s educational performance is adversely affected primarily because the child has an emotional disturbance.” 34 C.F.R. §300.8(c)(1)(i)

19. Special Education Director tasked Autism Specialist, one of School District’s school psychologists with experience conducting autism assessments, with conducting the evaluation. The consent School District requested from Parents and signed by Mother on March 23<sup>rd</sup> did not indicate that behavior was to be evaluated. The evaluation report itself states that the evaluation was intended to determine whether Student fit the eligibility criteria for autism.

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<sup>25</sup> Response; Exhibits A, B, C, and H; Interviews with Principal, Teacher #1, Special Education Director, Special Education Coordinator, Special Education Teacher #2, Autism Specialist, and Mother;

<sup>26</sup> CDE, ESSU Technical Assistance, *Functional Behavioral Assessment (FBA) and Behavior Intervention Plans (BIP)*(August 2017)

Autism Specialist stated and Special Education Teacher #2 confirmed that the evaluation was not an FBA. Autism Specialist explained that Special Education Director had asked for the evaluation to answer the question about whether the primary concern was related to a mental health issue rather than autism and whether there should be a change of eligibility category.<sup>27</sup>

20. The evaluation report did not identify Student's challenging behaviors in observable or measurable terms or where, when and with whom the behaviors occur; the antecedents; the consequences that reinforce or maintain the behavior; interventions and strategies that have been tried before and their effects; or identify the setting events. The report did, however, confirm Student's eligibility under the category of ASD, as well as the potential for adding the category of Other Health Impaired ("OHI") based upon Student's ADHD diagnosis. Autism Specialist also listed the following considerations in terms of planning for Student:

- Social Skills Curriculum – Super Flex (training, implementation, monitoring, service delivery) timeline
- Positive Behavior support system with consistent language and expectations frequent rewards with fading of schedule or reinforcement
- Classroom accommodations to fit learning style (i.e. executive functioning deficits) and modifications of academic work to academic and cognitive level
- Social skills group
- Focused academic pull out time
- Consistent crisis management plan with restitution if necessary<sup>28</sup>

21. On April 27th, the IEP team met to discuss the evaluation and determined that Student remained eligible under the category of ASD and changed the secondary disability from SLI to OHI.<sup>29</sup> Some School #2 staff members were surprised by the results of the evaluation, stating that they were certain that Student's behaviors were attention seeking rather than autism-related. School District confirms that a BIP was not written, nor were any changes made to Student's IEP at that time.<sup>30</sup>

### 2017-18 school year

22. Prior to the beginning of the 2017-18 school year, Mother spoke with Special Education Teacher #2 about Student's behavior, and requested that the FBA that was started in December 2016 be completed and that a BIP be written. Based on the entirety of the credible record, SCO concludes that in the fall of 2017 School District completed the FBA started in December

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<sup>27</sup> Exhibit B and EMAILS; Interviews with Autism Specialist, Special Education Teacher #2, Principal, SLP, Special Education Director

<sup>28</sup> Exhibit B

<sup>29</sup> SCO notes that an SLP was not involved in the evaluation.

<sup>30</sup> Response; Exhibits A, B and C; Interviews with Teacher #1, Special Education Teacher #2, Principal, and Mother;



2016.<sup>31</sup>

23. School Psychologist #3, who had just started with School District at School #2, was tasked with completing the FBA. The FBA documentation provides that School Psychologist #3 based the FBA on behavioral observations, data collection sheets, daily point sheets, and staff interviews. School Psychologist #3 observed Student twice for a total of sixty minutes. During that time she observed Student “wandering around the room, and arguing with the teacher” and “wandering, asking the teacher to repeat herself, hugging, and wandering around the room.” Based on her observations, School Psychologist determined that Student was on task a total of 17% and 26% of the time. Notably, School Psychologist #3 never spoke with or contacted parents at any time during the FBA process, nor did the FBA report reference their input. The FBA report also notes that from the beginning of the school year until September 11<sup>th</sup>, Student had a total of eight documented behavioral incidents and described that Student displays an array of behavioral intensity, ranging from mild to severe, posing a physical danger to Student and/or others and that his behavior lasts from twenty minutes to four hours. Based on the data collections sheets, daily point sheets, and staff interviews, the perceived function of the behavior was to gain attention and avoid work. The FBA report, however, lacks information related to any consequences that reinforce or maintain the behavior. Moreover, School #2 staff admitted that they were not consistently able to discern what triggered Student to become dysregulated (i.e., time of day, staff members, or activities when behaviors occur).<sup>32</sup>

September 20, 2017 IEP (“September 2017 IEP”)

24. Based on the credible record, SCO concludes that School District predetermined Student’s placement. On September 20<sup>th</sup>, the IEP team met for its annual review and was to include a discussion of the FBA and BIP, which Special Education Teacher #2 emailed to Parents prior to the meeting. Special Education Director started off the meeting by announcing that he had secured a spot for Student at Day Treatment Program, an out of district program over an hour’s drive away. Day Treatment Program only serves students with intensive behavioral needs and provides autism services, which would restrict Student’s access to non-disabled peers. Student’s placement had not yet been changed. Indeed, the IEP had not even begun their review of Student’s IEP. School #2 IEP team members were surprised by Special Education Director’s announcement as they had only been informed a few minutes prior to the meeting about Special Education Director’s plan. Parents became visibly upset. Mother started crying and Father left the meeting, which continued without him. The FBA and BIP were never discussed on September 20<sup>th</sup>. Special Education Director stated that School District did not have programming in School District to support Student and that Day Treatment Program was the

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<sup>31</sup> Interviews with Special Education Teacher #2, Special Education Director, Principal, and Parents. SCO notes that a new consent was not requested at this time. SCO notes that the documentation of the FBA is undated and, although there is a section to fill in defined as “Date Sent”, there is no date on the document.

<sup>32</sup> Exhibit A; Interviews with School Psychologist #3, Special Education Teacher #2, Teacher #1, Principal, Parents, Private BCBA

only available option. The meeting ended with Special Education Director's instructions for Parents to visit Day Treatment Center before they reconvene.<sup>33</sup>

25. On September 29<sup>th</sup> School District provided Parents with procedural safeguards and PWN indicating that "The IEP team has determined sufficient evidence exists to determine LRE," yet also requested consent to reevaluate Student. Mother provided written consent on October 3<sup>rd</sup>. School District conducted no new assessments.<sup>34</sup>

26. Beginning in October, Parents engaged Private BCBA who started working with Student at home twice a week. Private BCBA also conducted an FBA and developed an individualized support plan. Private BCBA explained that the FBA involves ascertaining the function of the behavior and a devising a plan to replace the behavior. Parents also obtained a private evaluation that was conducted between September and November 2017.<sup>35</sup>

27. A thorough review of the credible record leads SCO to conclude that Student spent little time in the general education classroom with non-disabled peers during the 2017-18 school year. Student's behavior from the beginning of the year was described as explosive by School #2 staff members, who explained that Student was seldom able to attend the general education classroom and was removed from the classroom for the safety of himself and others. The Behavior Detail Report indicates that Student received eight disciplinary actions during his four months at School #2 in the 2017-18 school year. On October 2<sup>nd</sup>, Student's schedule was changed so that he was completely removed from the general education classroom and provided with 1:1 instruction by Principal, Teacher #1<sup>36</sup>, School Psychologist #3, and Special Education Teacher #2. Private BCBA observed Student at School #2 sometime after October 2<sup>nd</sup>. School #2 provided Private BCBA with a copy of Student's schedule and "plan", which she observed Student followed. Private BCBA stated that she also observed Student working alone with adults in Teacher #1's office and that he was not provided with any type of expectation and could completely manipulate any situation (i.e., if he was told no, he would be able to do it anyway).<sup>37</sup>

28. The IEP team reconvened on October 19<sup>th</sup>, facilitated by Facilitator, an impartial facilitator whom Parents had requested. Facilitator led the team through a full review of Student's IEP, including a discussion of the FBA and BIP. School Psychologist #3 explained that the team was stuck at the antecedents on the BIP because they could not find a reliable way to deescalate Student. The BIP was written on a board for the IEP team to brainstorm together.

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<sup>33</sup> Response; Exhibit D; Interviews with Special Education Teacher #2, Special Education Director, Principal, School Psychologist #3, and Parents

<sup>34</sup> Exhibits 2 and A

<sup>35</sup> Interviews with Private BCBA and Parents; Exhibits A, B, 3, and 6

<sup>36</sup> SCO notes that Teacher #1 became the Assistant Principal at the beginning of the 2017-18 school year.

<sup>37</sup> Response; Exhibits C, D, and I; Interviews with Private BCBA, Principal, Special Education Teacher #2, SLP, Teacher #1, and Parents. School Psychologist #3, and Teacher #1; SCO notes that they attempted to include Student in recess and lunch with limited success during this time period, so Student had recess alone with adult supervision.

School Psychologist #3 explained that Mother made some suggestions about sensory strategies, which were helpful and were implemented at School (i.e., movement break in a swing, red blanket for deep pressure), but otherwise the team came up with no other replacement or de-escalation strategies. Notably, Father requested that School District provide an independent educational evaluation (“IEE”) for the FBA, which Special Education Director refused and provided Parents with PWN.<sup>38</sup>

29. The resulting IEP (“September 2017 IEP”) changed Student’s LRE placement from “General education class 40% to 79% of the time” to “General education class less than 40% of the time”, specifying “Time outside general education environment: 97.6%”. The PWN indicates that the team discussed a variety of services and service options and that Parents notified School District that they would be moving out of School District, but does not explain Student’s change of placement.<sup>39</sup>

30. SCO concludes that School District determined that Student could only be served in Day Treatment Program or through homeschooling due to unavailability of programming in School District. Parents and School #2 team members wanted to consider School #3 as an option due to its behavior programming and access to general education peers at School #3, however, Special Education Director rejected the suggestion due to Student’s “language deficits.”<sup>40</sup> Parents informed the IEP team that they had planned to move to Neighbor School District in December 2017. Student enrolled in a school in Neighbor School District and began attending on November 20, 2017.<sup>41</sup>

### **CONCLUSIONS OF LAW**

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

**Issues 1 and 2: Whether the School District failed to evaluate Student’s behavior (or conduct an FBA) from December 2016 through August 2017 resulting in a failure to develop and implement Student’s IEP in the least restrictive environment (“LRE”).**

Under the IDEA, public school districts are required to provide children with disabilities with a “free appropriate public education” (or 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 (or IEP) that is developed according to the IDEA’s

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<sup>38</sup> Exhibits A, B, and D; Interviews with Parents, Special Education Director, School Psychologist #3, Principal, and Special Education Teacher #2. SCO notes that the IDEA ensures that parents have the right to an IEE at public expense if they disagree with an evaluation obtained by the district. A public agency may only refuse if it can demonstrate in a due process hearing that its own evaluation of the child was appropriate or that the evaluation obtained by the parents did not meet district criteria. 34 C.F.R. §§ 300.502(b)(1) through 300.502(b)(2)

<sup>39</sup> Exhibit A

<sup>40</sup> SCO notes the removal of SLI as a result of the April 2017 evaluation and eligibility determination.

<sup>41</sup> Interviews with Parents, Special Education Director, School Psychologist #2, and Special Education Teacher #2

procedures. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. The IDEA's extensive procedural requirements relate to the development of the IEP, including the requirements that it be developed by a team of individuals with knowledge about the child, including parents, and that it be based upon the input of the IEP meeting participants, as well as on evaluations conducted in compliance with the IDEA's requirements. *See, e.g.*, 34 C.F.R. §§ 300.301-300.304 and §§ 300.320-300.324.

In the seminal case of *Board of Education v. Rowley*, the United States Supreme Court emphasized the importance of compliance with the IDEA's procedural requirements, particularly given the lack of specificity provided by the IDEA with respect to the substantive requirements for FAPE.

“[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g. 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrate[s] the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.”

*Board of Education v. Rowley*, 458 U.S. 176, 205-206 (1982).

Typically, contemplation of the two prong analysis set forth in *Rowley* is necessary to determine whether the procedural violation resulted in a denial of FAPE. *Rowley, supra* at 206-207. “First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?” *Id.* It is well-established, however, that where the procedural inadequacies seriously infringe upon the parents' opportunity to meaningfully participate in the IEP process, the result is a “per se” denial of FAPE. *See, e.g., O.L. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11<sup>th</sup> Cir. 2014); *Deal v. Hamilton County Bd. Of Educ.*, 392 F.2d 840 (6<sup>th</sup> Cir. 2004); *see also*, 34 C.F.R. § 300.513(a)(2)(ii) (“In matters alleging a procedural violation, a hearing officer may find that the child did not receive a FAPE only if the procedural inadequacies ... [s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child...”).

With regard to evaluations, the IDEA specifies that a school district must “[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent.” 34 C.F.R.

§§300.304-300.306. The IDEA is intentional that parents' participation in the development of an IEP be meaningful, including giving consideration to their concerns about their child. 34 C.F.R. §§ 300.321, 300.322, and 300.324. This is because parents are critical to the process. In terms of assessing behavior, parents can provide information to the school team about where, when, and with whom the behaviors occur. Parents may also know which intervention strategies have been tried before (either at home or at school) and which strategies have been effective.<sup>42</sup>

Although not defined by the IDEA, an FBA is generally understood as a tool for examining and identifying the reasons behind inappropriate or disruptive behavior for the purpose of developing an IEP that is tailored to the specific needs of the student. *Harris v. District of Columbia*, 5761 F. Supp.2d, 63, 68 (D.C. 2008)(concluding that an FBA is an educational evaluation for purposes of 34 C.F.R. §300.502 because it is essential to evaluating a student's behavioral difficulties and developing an appropriate IEP.) An FBA typically involves the identification of the target behavior and its antecedents and consequences; the development of a hypothesis about the cause or function of the behavior; the development of interventions to test the hypothesis; and the collection of data concerning the effectiveness of the interventions. *Independent Sch. Dist. No 2310*, 29 IDELR 330 (SEA MN 1998).

Under the IDEA, an IEP team is only required to conduct or order an FBA relative to the disciplinary actions specified in 34 C.F.R. § 300.530. Nonetheless, an IEP team must evaluate a student in all areas related to the suspected disability. 34 C.F.R. §300.304(b)(4). Consistent with the IDEA's provisions for the continual review and revision of a student's IEP, the regulations provide that reevaluation shall occur at parental request, provided reevaluation has not occurred more than once a year. 34 C.F.R. §300.303. The IDEA also provides that an evaluation must be conducted within 60 days of receiving parental consent for the evaluation. 34 C.F.R. §300.301. Further, in developing and reviewing a student's IEP, the IEP team must also consider the use of "positive behavioral interventions and supports, and other strategies," to address behavior that impedes the learning of the student or the learning of others. 34 C.F.R. §300.324(a)(2)(i). While the regulations do not require an IEP team to use a particular tool or assessment, including an FBA, when considering positive behavioral supports, "conducting a functional behavioral assessment typically precedes developing positive behavioral intervention strategies." 71 Fed. Reg. 46683 (comments to the 2006 Federal IDEA regulations).

Because the IDEA requires an IEP team to use a variety of assessment tools and does not specifically require the use of an FBA when considering positive behavioral supports, courts have been reluctant to conclude that the failure to conduct an FBA constitutes a procedural violation. See *J.W. v. Unified Sch. Dist. No. 231*, 2012 U.S. Dis. LEXIS 24564 (D. Kans. 2012)(holding that the failure to conduct an FBA as part of a reevaluation did not violate the

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<sup>42</sup> CDE, ESSU Technical Assistance, *Functional Behavioral Assessment (FBA) and Behavior Intervention Plans (BIP)*(August 2017)

IDEA because parents did not seek an FBA at the time and the IDEA does not require the use of a single and specific assessment when considering the use of positive behavioral interventions); *M.N. v. New York City Dept. of Educ.*, 700 F. Supp. 2d 356 (S.D.N.Y. 2010)(holding that a failure to conduct an FBA is not necessarily a procedural violation when the IEP provides strategies to address the student’s behavior).

This case, however, is distinguishable from the cases cited above. Unlike the parents in *J.W.*, Parents in this case requested an FBA as early as October 2016 and provided School District with consent in December 2016. In *M.N.*, the court concluded that the failure to conduct an FBA did not “render the IEP procedurally inadequate” where the school program utilized the ABA methodology, a methodology specifically designed to teach adaptive behavior through positive reinforcement, and parents had not argued that student’s behavior impeded learning. 700 F.Supp.2d at 366-67. Here the informal planning and problem solving lack the specificity and content necessary to accurately document and address Student’s behavior, as did the FBA conducted in the fall of 2017. (FF 10, 12, 18, 20, 22). Without consistent and reliable data concerning the antecedents, the development of positive behavioral interventions to effectively address Student’s behavior is not likely. *See Harris*, 561 F.Supp.2d at 68. School District was also aware of Other State FBA (and Other State BIP) that described Student’s current behavior and admits that Student’s behavior impeded Student’s learning and the learning of others. (FF 3, 8, 12, 13). Regardless of whether the assessment is called an FBA or a behavioral assessment or a reevaluation, School District was obligated to conduct an appropriate and comprehensive evaluation to assist in determining whether Student’s behavior was impeding his learning and what revisions, if any, should be made to Student’s IEP to address this. 34 C.F.R. §§ 300.303-304 and 300.324(a)(2)(i). Reading 34 C.F.R. §§ 300.303-304 and 300.324(a)(2)(i) together with the cases cited above, the SCO concludes that the failure to conduct a behavioral assessment upon Parents’ request from December 2016 until August 2017 violated the procedural requirements of the IDEA.

Although the failure to conduct an evaluation of Student’s behavior violated the procedural requirements of the IDEA, it is well-settled that procedural violations 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); *Systema v. Academy Sch. Dist. No. 20*, 538 f.3d 1306(10<sup>th</sup> Cir. 2008). In this case, the SCO concludes that the failure to conduct a behavioral assessment resulted in a related lack of specific information about the causes and functions of Student’s behavior. The lack of information, in turn, resulted in the failure to develop behavioral strategies and interventions that would be individually tailored to address Student’s specific behavioral needs, interfering with Student’s ability to attend to instruction resulting in a denial of FAPE.

The IDEA demands that each public agency ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled. 34 C.F.R. §

300.114(a). Because Student's behavioral concerns were not evaluated in a timely manner, nor completely, Student's access to general education and non-disabled peers were changed without the benefit of having been able to develop a meaningful plan to address his behavioral needs, a denial of FAPE. (FF 10, 13-15). SCO also concludes that, despite the fact that Student's IEP had not yet been completed and placement had not been decided until October 20<sup>th</sup>, School District changed Student's schedule to completely remove Student from general education on or about October 2<sup>nd</sup>, also a denial of FAPE. (FF 27).

**Issue 3: Whether the District denied Parents meaningful participation in the development of Student's IEP on September 20, 2017 by predetermining Student's change of placement.**

The IDEA requires that the IEP be developed according to its extensive procedural requirements, including that it be developed by a team of individuals with knowledge about the child, including parents, and that it be based upon the input of the IEP meeting participants. 20 U.S.C. § 1401(9); 34 C.F.R. §§ 300.17, 300.301-300.304 and §§ 300.320-300.324. A change in placement triggers a number of IDEA procedural safeguards, which includes PWN be provided "a reasonable time" before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of FAPE. 34 C.F.R. § 300.503(a). PWN is critical in putting parents on notice of decisions that affect the provision of FAPE and must be provided, regardless of how a change was suggested or whether the parent agreed to it. *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008).

The IDEA also requires districts to ensure that the parents of each child with a disability are members of any group that makes decisions about their child's educational placement. 34 C.F.R. §§ 300.327 and 300.501(c)(1). Predetermination occurs when members of the IEP team decide a student's placement in advance of an IEP meeting without parents' participation or input. *Deal v. Hamilton County Board of Education*, 42 IDELR 109 (6<sup>th</sup> Cir. 2004), *cert. denied*, 110 LRP 46999, 546 U.S. 936 (2005). Predetermination constitutes a denial of FAPE because it significantly impedes parental participation in the decision making process.

Even when the same IEP is used, the student's educational program could be viewed as a different placement if the opportunities for interaction with nondisabled children in nonacademic activities are affected by the move. If the relocation of a disabled child will result in a substantial change in the IEP or violate the LRE requirements, the change results in a change of placement. *Letter to Earnest*, 211 IDELR 417 (OSERS 1986); and *H.ED. v. Central Bucks Sch. Dist.*, 59 IDELR 275 (E.D. Pa. 2012). The regulations are also clear that modifications to a student's services or IEP must be based on individual needs and not "the availability of services." *Washoe County Sch. Dist.*, 115 LRP 3790 (SEA NV 1/5/15).

With regard to a significant change of placement, the ECEA rules also provide additional protections:

“A significant change in placement shall be made upon consideration of reevaluation. Such change shall be made only by an IEP Team with the addition of those persons conducting such reevaluation unless the parent and the administrative unit or state-operated program mutually agree to change the IEP after the annual IEP meeting in a school year consistent with 34 C.F.R. § 300.324(a)(4).” ECEA Rule 4.03(8)(b)(ii)(B)

Here, SCO concludes that Special Education Director predetermined Student’s placement prior to the September 20<sup>th</sup> and October 20<sup>th</sup> IEP meetings, before the IEP team had reviewed Student’s IEP. SCO also concludes that School District’s offer of FAPE was based on unavailability of programming in School District and was made without determining a plan to address Student’s unique behavioral needs, without consideration of a reevaluation or Father’s IEE request, and without meaningful consideration of Parents and other IEP team members. (FF 24, 25, 27-30). Accordingly, SCO finds that Student’s change of placement on October 20<sup>th</sup> violated the IDEA and resulted in a denial of FAPE.

For all of the aforementioned reasons, SCO concludes that Student has been denied a FAPE and is entitled to compensatory education. Compensatory education is an equitable remedy intended to place a student in the same position they would have been, but for the violation. *Reid v. District of Columbia, 401 F.3d 516, 518 (D.D. Cir.2005)*. Accordingly, Student is awarded compensatory education as specified in the remedies section of this decision.

### **REMEDIES**

The SCO has concluded that the District committed the following violations of the regulations:

- a. Failure to conduct an evaluation as set forth in 34 C.F.R. §§ 300.301-300.311 and 300.324(a)(2)(i).
- b. Failure to provide meaningful participation to the child’s parents and predetermination of placement. 34 C.F.R. §§ 300.321(a)(1), 300.324, 300.327 and 300.501(c)(1).
- c. Failure to provide parents with prior written notice a reasonable time before it proposes or refuses to change the educational placement of a child. 34 C.F.R. § 300.503(a).
- d. Failure to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled. 34 C.F.R. § 300.114(a).



- e. Failure to consider reevaluation upon a significant change of placement. ECEA Rule 4.03(8)(b)(ii)(B)

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

1. By February 5, 2018, the School District must submit to the Department a proposed corrective action plan (CAP) that addresses each and every violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the School District is responsible. The CAP must, at a minimum, provide for the following:

- a. Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violation, no later than February 19, 2018.
- b. Effective training must be conducted for all School #2 administrators, special education case managers, coordinators, and designees concerning the policies and procedures, to be provided no later than March 5, 2018.
- c. Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department no later than March 12, 2018.

2. To address the aforementioned violations and to provide compensatory services, School District shall:

- a. reimburse Parents \$2,100.01 for Private Therapist (See Exhibit 4 billing statements);
- b. reimburse Parents for the cost of Private Evaluation (See Exhibit 3);
- c. reimburse Parents for services provided by Private BCBA from October 2017 until the date of this Decision, including twice weekly sessions, FBA and behavior support plan development.
- d. reimburse Parents or pay for services provided by Private BCBA for the remainder of the 2017-18 school year, including twice weekly sessions, FBA and behavior support plan revision;
- e. reimburse Parents or pay for private tutoring in the family's home up to twice a week. Tutoring will be provided by a teacher of Parents choice and will be provided as soon as Parents provide School District with notification of their choice and will continue

through the 2017-18 school year, to include the summer.

- f. Parents will provide School District with necessary documentation regarding services that have been billed, paid for, and provided.

The Department will approve or request revisions of the CAP. Subsequent to the approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely compliance with this Decision. Please submit the documentation detailed above to the Department as follows:

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

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

#### **CONCLUSION**

The Decision of the SCO is final and 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.

This 5th day of January, 2018.

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Lisa A. Weiss, Esq.  
State Complaints Officer

## APPENDIX

### **Complaint, dated 11/7/17, pages 1-3**

- Exhibit 1: IEP (9/19/17); ESY Data Documentation (9/20/17); Behavioral Intervention Plan (9/20/17)
- Exhibit 2: Page 5 of BIP (9/20/17); Consent for Special Education Reevaluation (10/3/17); Email correspondence (9/5/17-12/8/17)

### **Documentation provided by Parents at SCO request**

- Exhibit 3: Private Evaluation Report (12/1/17)
- Exhibit 4: Private Therapist billing statements (12/17/17)
- Exhibit 5: Email correspondence (9/30-10/4/16; 11/29-11/30/16)

### **Documentation provided by Private BCBA at SCO request**

- Exhibit 6: Private BCBA's Individualized Treatment Plans for Student

### **Response, dated 11/27/17, pages 1-5**

- Exhibit A: All 2016-18 special education documentation: Progress Reports; Diagnostic Reports; Growth Reports; OT Therapy Notes; IEP Amendments (5/13/16; 12/9/16; 12/15/16; 2/14/17; 2/28/17); IEPs (9/24/15; 9/21/16; 9/20/17); SLP Therapy Notes; Meeting notes; Weekly Charts; Notices of Meetings (9/17/15; 8/18/16; 1/26/17; 3/7/17; 4/27/17; 9/8/17; ); IEP Review Meeting (2/2/17; 3/10/17; 4/27/17); PST Meeting Reports (3/10/17); Psychological Assessment Report (4/25/17); Team Member Excusals (9/25/15; 9/19/17; 10/19/17); ESY Data Documentation (9/20/17); BIP (9/20/17); Prior Notice & Consent for Reevaluation (3/23/17; 9/29/17); Request to Release or Secure Confidential Information (11/1/17); Determination of Eligibility (4/27/17); Evaluation Report (4/27/17); Functional Behavioral Assessment (undated); Prior Written Notice of Special Education Action (10/19/17); Behavior Plan
- Exhibit B: Other State Special Education records (2014-15); Student's schedule; Student's Chart; Behavior Intervention Planning; Behavior Plan; Parent notification regarding the use of restraint; Parent/guardian consent for student observations; Daily charts; correspondence regarding FBA (12/16/16); SAP- Observation Form; PST Meeting Reports (3/10/17; 3/23/17); IEP Review Meeting (4/27/17); Psychological Assessment Report (4/25/17); Determination of

Eligibility (4/27/17); Prior Notice & Consent for Reevaluation (3/23/17); Day Reports ; Daily Goal Sheets; Think Sheets; Student's schedule; Student's handwritten apology notes; BIP (9/20/17);

Exhibit C: Student Daily Attendance Report; Behavior Detail Report; Condition Summary Report; Report Cards

Exhibit D: Email correspondence

Exhibit E: School District staff and title information

Exhibit F: Procedural Safeguards Notice; Complaint Policies; State Complaint; Comprehensive Plan for the Provision of Special Education (September 2012)

Exhibit G: Speech and Language Data sheets (2016-17)

**Documentation provided by School District at SCO request**

Exhibit H: School Psychologist #2's observation notes (4/6/17)

**Documentation provided by Special Education Teacher B at SCO request**

Exhibit I: Email correspondence related to Student's change of schedule on 10/2/17

**Interviews with:**

Father

Mother

Private BCBA

Special Education Teacher #2

Teacher #1

Teacher #2

Special Education Director

Special Education Coordinator

Principal

School Psychologist #2

School Psychologist #3

Autism Specialist