

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

**State-Level Complaint 2020:501
Academy School District 20**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on January 2, 2020, by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

Based on the written Complaint, the SCO determined that the Complaint identified 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 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate allegations of violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from January 2, 2019 through January 2, 2020 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

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).

1. Failing to consider Parents' request to allow Student's private Registered Behavior Technician to assist in developing Student's IEP on October 21, 2019, consistent with 34 C.F.R. § 300.324(a)(1)(ii);
2. Failing to develop an IEP in October 2019, specifically a behavior intervention plan, that was tailored to meet Student's individualized needs, consistent with 34 C.F.R. §§ 300.304, 300.324(a)(1)-(2)(i);
3. Failing to provide transportation services to Student consistent with his IEP during extended school year services in June and July 2019, consistent with 34 C.F.R. §§ 300.34(c)(16), 300.323(c)-(d).

FINDINGS OF FACT

After thorough and careful analysis of the entire record,³ the SCO makes the following FINDINGS:

A. Background

1. Student is an eleven-year-old who is eligible for special education and related services under the category of Multiple Disabilities, specifically Autism Spectrum Disorder and Intellectual Disability. *Ex. 3, p. 29.* Student is a fifth-grader at School, which is located within the District. *Id.*
2. Student has strong memory and visual-spatial skills, and enjoys hands-on tasks such as completing puzzles and playing with Legos. *Interview with Parents; Ex. 3, p. 36.*
3. Student struggles with self-regulation and behavioral issues. When Student becomes dysregulated, he engages in self-injurious behaviors and physical aggression toward others. *Ex. 3, p. 38, 59.* During the first semester of the 2019-20 school year, School staff documented 12 disciplinary incidents during school or on the bus when Student became dysregulated and aggressive toward staff or classmates. *Ex. 7, pp. 2-8.*
4. To address behavioral issues, Student receives private behavior therapy at an Applied Behavior Analysis Center (ABA Center) Monday through Friday from 1-4 p.m. *Interview with Parents.* Student has attended school part-time, while receiving private ABA therapy part-time in the afternoon, continuously since kindergarten. *Complaint, pp. 2-5.*
5. A team of four Registered Behavior Technicians (RBTs) provide Student one-on-one instruction at ABA Center. These RBTs are supervised by a Board Certified Behavior Analyst (BCBA) and a Board Certified Assistant Behavior Analyst (BCaBA). BCBA and BCaBA created a behavior plan for Student that the RBTs implement at ABA Center.

³ The appendix, attached and incorporated by reference, details the entire record.

ABA Center programming focuses solely on behavior and not academics. *Interview with Parents.*

6. Parents and the District disagree on the behavioral supports necessary for Student to receive FAPE. Parents argue that Student’s ongoing behavioral referrals at School are proof that the District cannot adequately address his behavior, and that Student requires the assistance of an RBT at all times throughout the school day. The District contends that it has the resources and behavioral supports necessary for Student without adding direct services from an RBT, and that Student would benefit from attending School on a full-time basis.
7. This disagreement—central to all three allegations in the instant Complaint—is the reason Parents elected for Student to continue to attend School during the morning and the ABA Center during the afternoon.

B. Development of Student’s BIP in October 2019

8. Parents’ first allegation stems from their request to allow an RBT from ABA Center to assist Student at School. Parents contend that support from an RBT is necessary “to create consistency in programming, reduce aggression, self-injurious behaviors, property destruction and elopement.” *Complaint*, p. 1.
9. Parents’ second allegation—related to the first allegation in terms of addressing behavior—involves the development of Student’s behavior intervention plan (BIP) in October 2019. Parents contend that School Psychologist was not qualified to conduct a functional behavior assessment (FBA), and that the resulting BIP is overly vague. *Id.* at p. 6. Based on this, Parents requested that the District implement the ABA Center behavior plan at School.
10. Prior to completion of the FBA, and in preparation for Student’s reevaluation due in October 2019, the District funded an Independent Educational Evaluation (IEE) at public expense per Parent request. *Ex. 4*, p. 2. During May and June 2019, Private Psychologist conducted an IEE consisting of cognitive, academic, and behavioral evaluations. Private Psychologist noted that throughout the evaluation process Student became dysregulated and physically aggressive, which impacted the administration of the evaluations. *Ex. G*, p. 4.
11. Based on Student’s behavior, Private Psychologist recommended that School and ABA Center staff collaborate and coordinate to provide consistent intervention across all environments. Private Psychologist also recommended that BCBA be embedded with Student at School to work solely on behavioral issues. *Id.* at p. 11.
12. As Private Psychologist completed the IEE, Former Special Education Director requested parental consent on May 24, 2019 to conduct an FBA in order to update Student’s BIP.

Ex. 8, p. 25. School Psychologist—because he regularly administered evaluations to include FBAs—led the effort to conduct this FBA. Although he is not trained as a BCBA, School Psychologist studied behavioral issues while earning his master’s degree.

Interview with School Psychologist.

13. School Psychologist reviewed Student’s disciplinary history, medical diagnoses, and BIP, as well as the IEE and District’s reevaluation performed in September and October 2019. *Id.* School Psychologist also submitted questionnaires to Parents and significant support needs (SSN) Teacher, conducted classroom observations, and spoke to SSN Coordinator, Student’s teacher from the prior academic year. *Id.* Based on this data, and in collaboration with other members of the IEP team, School Psychologist prepared a draft BIP for the October 25, 2019 IEP meeting. *Id.* Parents received the draft before the IEP meeting. *Interview with Assistant Special Education Director.*
14. The draft BIP highlights Student’s strengths, explaining that he does well with schedule and routines, that he can effectively communicate his needs with adults, that he enjoys sensory activities, and that he has strong visual-spatial skills. *Ex. 3, p. 59.*
15. FBA data is also summarized in the draft BIP, with problem behaviors identified as: “self-injurious behaviors, crying/screaming, aggression towards staff members/adults, and throwing objects.” *Id.* It is further noted that these behaviors occur when Student “is denied or delayed access to a preferred object or activity, when presented with a non-preferred activity, or when preferred items or tasks are removed.” *Id.*
16. The “strategies/outcomes worksheet” section of the draft BIP contains setting event, antecedent, behavior teaching, and reinforcement strategies. This section details a number of sensory strategies, such as the use of noise cancelling headphones and dim lighting when possible. Consistency and predictability in Student’s schedule is also emphasized. *Id.* at pp. 60-61. Other strategies outlined include using a first/then board, as well as teaching and modeling appropriate verbal requests in order to access a preferred activity. *Id.*
17. The draft BIP also contains a crisis plan detailing steps to take if Student remains dysregulated and becomes dangerous to himself or others, despite the behavioral supports. If Student is not demonstrating safe and appropriate behavior, staff are to use verbal and non-verbal de-escalation techniques to help regulate his emotions and behaviors. If those techniques prove unsuccessful and Student escalates to the point of being dangerous to himself or others, appropriately trained staff may employ physical restraint techniques. *Id.* at p. 61.
18. The evaluation section of the draft BIP specifies that behaviors are to be tracked by Student’s daily behavior log, and identifies a measurable goal for Student to refrain from aggression—by using a coping strategy in 4 of 5 opportunities—when he is denied a

preferred activity. *Id.* at p. 62. The “contextual fit” section specifies that all staff working with Student must be made aware of the BIP’s requirements. Finally, the draft BIP provides that a case manager is responsible for communicating all BIP requirements to staff responsible for its implementation. *Id.* at p. 63.

19. During the IEP team’s discussion of the draft BIP at the October 25, 2019 IEP meeting, Parents’ Attorney objected on the basis that School Psychologist, and not a BCBA, conducted the FBA and prepared the draft BIP. *Ex. 4*, p. 15. Parents also objected to the draft BIP on the basis that it was vague and subjective, and requested that the ABA Center behavior plan be implemented at School. *Ex. 4*, p. 15. BCaBA then offered to provide a copy of ABA Center’s behavior plan to the IEP team.
20. The SCO finds that the BIP developed by the District and the behavior plan created by ABA Center staff are very similar. Both plans list similar antecedent strategies, reinforcement techniques, and replacement behavior. Like the BIP, the ABA Center behavior plan identifies Student’s problem behaviors as aggression, elopement, property destruction, protest, and self-injurious behavior. Additionally, the ABA Center behavior plan notes that the antecedents to these behaviors occur when access to a preferred object or activity has been denied or removed, or a demand has been presented. The main difference between the BIP and the ABA Center behavior plan is that the latter contains more detailed instructions for each problem behavior. *Id.*
21. Also during the meeting, Parents and their legal counsel repeated their request to have an RBT from ABA Center provide support at School for Student, citing Private Psychologist’s recommendation. *Interview with Parents*. Parents submitted a proposed transition plan, with the goal of integrating Student’s behavior programming from ABA Center “into the educational environment in order to help transfer instructional control and increase treatment integrity across multiple environments.” *Ex. 3*, p. 64.
22. The IEP team discussed Parent’s proposed transition plan, the IEE, and the District’s reevaluation. Based on this discussion, the District rejected Parents’ request to directly integrate outside services from ABA Center into School. Rather, the District’s offer of FAPE comprised a combination of behavioral interventions and supports outlined in the draft BIP, occupational therapy, speech language therapy, mental health services, and support from both the SSN staff and the District’s autism specialist. *Id.* at p. 57.
23. The District explained its reasoning regarding the decision to reject Parents’ proposed transition plan, noting that: “. . . it is more restrictive in nature than the current center-based program and the supports from the Autism Specialist/Tutor on positive behavioral supports as well as the behavior intervention plan are effective to help [] support him within an educational environment.” *Ex. 4*, p. 15.

24. The District further emphasized its position that Student should be attending School full-time rather than attend ABA Center each afternoon, indicating that attending School on a half-day basis caused Student to miss instruction in core content classes. *Ex. 3*, p. 54. The District noted that this would present more opportunities to interact with grade level peers, result in a more consistent schedule, and reduce transitions. *Ex. 4*, p. 15.
25. Following the October 25, 2019 IEP meeting, District and ABA Center staff began collaborating as SSN Teacher, BCBA, and BCaBA corresponded via email and phone in November and December 2019. BCBA—consistent with the offer presented at the October 25, 2019 IEP meeting—sent SSN Teacher a copy of the ABA Center behavior plan on November 20, 2019. *Ex. 8*, pp. 83-85. SSN Teacher and ABA Center staff also met the first week of February 2020 to compare the two behavior plans, and further discuss ways to create consistency in Student’s behavioral supports. *Interviews with SSN Teacher and Assistant Special Education Director*.
26. In conjunction with this collaboration between School and ABA Center staff, the SCO finds that the District’s interventions have been effective in addressing Student’s behavioral issues. Data collected by the District show that Student’s aggressive and self-injurious behavior declined in November and December 2019. *Ex. 6*, pp. 4-6. A detailed behavior log maintained by SSN Teacher documents Student’s positive and negative behaviors, and the effectiveness of various behavior strategies. *Id.* at pp. 118-156.
27. These records show that while Student continues to become dysregulated at times, School staff effectively implement his BIP to help him regulate. As one example, on December 4, 2019, Student became dysregulated, acted aggressively toward staff, and engaged in self-injurious behaviors. SSN Teacher implemented the BIP by setting a timer and engaging Student in a first/then strategy which involved completing a math problem prior to participating in a preferred activity. *Id.* at p. 147. The behavior log indicates that these interventions were successful, and that Student did not become dysregulated the rest of the day at School. *Id.*

C. Extended School Year (ESY) Transportation in June and July 2019

28. Parents’ third and final allegation is that the District failed to provide transportation services to Student, consistent with his IEP, for ESY services. *Complaint*, p. 7. The IEP team determined Student was eligible for ESY services during a February 2019 IEP meeting. *Ex. 12*, p. 5. However, the “ESY Qualification Form” completed on that date did not specify the services that Student would receive. *Id.* ESY services were not discussed again until an IEP team meeting held on May 8, 2019. Meeting notes indicate that the District planned to collaborate with ABA Center to provide services. *Ex. 3*, p. 70.
29. Following the May 8, 2019 IEP meeting, Former Special Education Director and Parent discussed ESY services via email. On May 15, 2019, Former Special Education Director

proposed ESY services three days per week at ABA Center—8:15 a.m. to 12:30 p.m. each day—from June 11 through July 19. *Ex. H*, p. 19. Parents objected, and requested that the District provide ESY services at ABA Center five days per week. *Ex. 8*, p. 22.

30. On June 13, 2019, Former Special Education Director sent Parents a PWN proposing that Student attend the District’s SSN ESY program from July 8 through July 25. *Ex. I*. Parents objected, and requested that Student attend ABA Center in the morning on Tuesdays and Thursdays in addition to the District’s ESY program. *Ex. H*, p. 5.
31. On June 20, 2019, Special Education Director replied to Parent, explaining that Former Special Education Director was retiring and that she would be the point of contact moving forward. She further explained that while the District would consider a plan that included both ABA Center and the SSN ESY program, Parents’ most recent proposal would conflict with the SSN ESY services schedule. Special Education Director then proposed afternoon sessions on Tuesday and Thursday at ABA Center. *Ex. I*. Special Education Director explained to the SCO that she was not directly involved in formulating the ESY services offer, and that she was working from notes provided by Former Special Education Director. *Interview with Special Education Director*.
32. On June 28, 2019, the District issued Parents a PWN providing that Student would attend the SSN ESY program Monday through Thursday—8:30 a.m. to 11:30 a.m. each day—from July 8 to July 25, and that ESY services would be provided at ABA Center on July 2, July 30, August 1, August 6, August 8, and August 13 from 8:15 a.m. to 12:30 p.m. The PWN provided further: “special transportation for SSN ESY services will be provided to and from home. Per parent request, Special Transportation for [ABA Center] for the dates above will be provided one way from home for AM drop off only at 8:15. Special Transportation will be provided for programs and services provided by [District].” *Ex. 4*, p. 6.
33. The service delivery statement in Student’s IEP in effect at that time was not amended to include the District’s offer for ESY services. *Ex. 3*, pp. 15-16. The SCO accordingly finds that not only was Student’s IEP not amended or otherwise updated to reflect the information contained in the PWN, but also that the nature and scope of ESY services for Student were determined outside of the IEP process.
34. During the first week of the ESY services session—July 8 through July 11—the District transported Student from home to the SSN ESY program, and then from the SSN ESY program to ABA Center for private services. On July 11, 2019, District staff realized transporting Student from the SSN ESY program location to ABA Center was inconsistent with the PWN issued on June 28, 2019, and Special Education Director notified Parent that: “[District] does not provide transportation for programs and services that are not planned/contracted by the district. The transportation forms, signed by you, outlined the times/days [Student] would be transported based on the programs and services we

have agreed upon.” *Ex. 8*, p. 32. As a result, the District transported Student home following services at the SSN ESY program beginning the next week. Parent was unable to be at home to receive Student after services at the SSN ESY program concluded, and thus beginning on July 15 Student stopped attending the SSN ESY program. *Ex. 1*.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: The District properly considered Parents’ request to allow an RBT to provide behavioral support to Student at School.

Under IDEA, local education agencies are required to provide eligible students with disabilities a FAPE by providing special education and related services individually tailored to meet the student’s unique needs and provided in conformity with an IEP developed according to the Act’s requirements. 34 C.F.R. § 300.17; ECEA Rule 2.19. In developing a student’s IEP, the IEP team must consider—among other things—a parent’s concerns for “enhancing the education of their child.” 34 C.F.R. § 300.324(a)(ii).

IDEA requires that parental participation—to include carefully considering concerns for enhancing the education of the child—be meaningful. 34 C.F.R. §§ 300.321(a)(1), 300.322, and 300.324(a)(1)(ii). However, meaningful consideration does not require that a school district simply agree to whatever a parent has requested. *Jefferson Cnty. Sch. Dist. RE-1*, 118 LRP 28108 (SEA CO 4/22/18).

Here, the credible evidence in the Record shows that the District considered and discussed Parents’ request to have an RBT from ABA Center in the classroom to assist with Student’s behavioral needs. During the October 25 IEP meeting, the IEP team discussed the IEE, District’s reevaluation, and the FBA, as well as considered Parents’ proposed transition plan. Ultimately, the District concluded that it had sufficient resources to address Student’s behavior, namely through occupational therapy, speech language therapy, mental health services, the BIP, and support from the District’s autism specialist. (FF #22). Additionally, the District concluded that its FAPE offer provided a less restrictive alternative than having an RBT assist Student throughout the school day, as called for by Parents’ proposed transition plan. The District thoroughly documented its reasoning and this discussion in the PWN embedded in the IEP.

Although the District chose not to adopt Private Psychologist’s recommendation that supports from ABA Center be directly integrated at School, the District did adopt the recommendation that it collaborate with ABA Center to provide consistency for Student across all environments. (FF #11). As noted at FF #25, ABA Center staff provided SSN Teacher with a copy of the ABA Center behavior plan, and the parties continue to collaborate to provide consistency and discuss effective strategies to address behavior. For these reasons, the SCO finds and concludes

that the District properly considered Parents' at-issue request consistent with the requirements of 34 C.F.R. § 300.324(a)(ii).

Conclusion to Allegation No. 2: The District developed a BIP for Student in October 2019 that was tailored to meet his individualized needs.

IDEA requires a school district to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 69 IDELR 174, 580 U.S. ____ (2017), 137 S. Ct. 988, 999.

An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with IDEA's procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Westminster Pub. Sch.*, 118 LRP 50551 (SEA CO 11/14/2018).

In developing the IEP, the IEP team must consider the use of positive behavioral interventions and supports to address behavior for a student whose behavior impedes his ability to learn. 34 C.F.R. § 300.324(a)(2)(i).

Here, the IEP team considered the use of positive behavioral interventions and supports to address Student's behavior. As part of Student's reevaluation in October 2019, the District conducted an FBA to update his BIP. School Psychologist reviewed Student's disciplinary history, medical diagnoses, and existing BIP, as well as the IEE and reevaluation. School Psychologist also submitted questionnaires to Parents and SSN Teacher, conducted classroom observations, and conferred with Student's former special education teacher. Based on this information, School Psychologist created a draft BIP, which was sent to Parents in advance of the October 25, 2019 IEP meeting. During this meeting, the IEP team discussed the draft BIP, noted Parents' objections, and agreed to collaborate with ABA Center staff to finalize Student's BIP. Accordingly, the SCO finds and concludes that the process used to update and develop Student's BIP complied with IDEA's procedural requirements. The question now is whether these supports and interventions were substantively appropriate.

"IEP Teams must consider and, if necessary to provide FAPE, include appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs of children whose behavior impedes their own learning or the learning of their peers." *Questions and Answers on Andrew F. v. Douglas Cnty. Sch. Dist. Re-1*, 71 IDELR 68 (EDU 12/7/17). IEP teams typically conduct an FBA prior to determining positive behavioral interventions and developing a BIP. However, there is no requirement that behavioral interventions be based on an FBA. See 71

Fed. Reg. 46683 (August 14, 2006). Additionally, there is no requirement that a specific individual—such as a BCBA—conduct an FBA. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

The IDEA is silent on the specific contents of a BIP, but CDE advises that an IEP team document: all sources of information that were used in developing a BIP (such as interviews, observations, checklists, academic assessments or record reviews); strengths and interests; a summary of the FBA; a strategies and outcomes worksheet containing setting event strategies, antecedent strategies, behavior teaching strategies, and reinforcement strategies; a crisis intervention plan; a description of the ongoing evaluation of the effectiveness of the BIP; how the BIP is designed specifically for the environment in which it will be implemented; and who needs to be notified of the BIP. *Colo. Dep't of Educ. IEP Procedural Guidance Manual*, pp. 120-122.

In this case, the SCO finds and concludes that the BIP was tailored to meet Student's unique behavioral needs because it not only contained positive behavior interventions, supports, and strategies, but it also was developed in conjunction with a thorough FBA.

First, there is no requirement that a BCBA or any other specific individual conduct an FBA. Nevertheless, based on School Psychologist's background and education, the SCO finds and concludes that he was qualified to do so. Second, although there is no requirement that behavioral interventions be based on an FBA, the FBA completed by School Psychologist informed the IEP team's development of Student's BIP.

Third, although the IDEA does not set forth specific contents for a BIP, as described at FF #14-18, the IEP team developed a BIP consistent with CDE's IEP procedural guidance. Fourth, as discussed at FF #26-27, the credible evidence in the Record indicates that the District's interventions have been effective at reducing Student's behavioral issues. It is for these reasons that the SCO finds and concludes that the BIP was developed consistent with IDEA's requirements and CDE guidance, and that the BIP is individually tailored to effectively address Student's needs and behaviors.

Finally, although the ABA Center behavior plan is more detailed and specific than the BIP, both plans are very similar. Moreover, as ABA Center programming focuses solely on behavior, it would be impractical for the District to implement the ABA Center behavior plan at School in an educational environment. As described at FF #23, this would also result in a more restrictive environment for Student. Accordingly, the SCO finds and concludes that the District developed a BIP for Student in October 2019 that was tailored to meet his individualized needs.

Conclusion to Allegation No. 3: The District provided transportation for Student to and from ESY services in July 2019. However, the District determined Student's ESY services outside of the IEP team process, and failed to update Student's IEP to reflect ESY services, resulting in procedural violations of IDEA.

Transportation to and from school is a related service that must be included in a student's IEP if the service is required for the student to benefit from special education. 34 C.F.R. § 300.34(a); *Cherry Creek Sch. Dist.*, 119 LRP 37631 (SEA CO 6/25/19). A child's IEP team is responsible for deciding "if transportation is required to assist a child with a disability to benefit from special education and related services, and how the transportation services should be implemented." *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009) (citing 34 C.F.R. §§ 300.107 and 300.117).

When deciding whether transportation between school and another location is required, the IEP team must determine whether "transportation between school and other locations is necessary in order for the child to receive FAPE." 71 Fed. Reg. 46576 (August 14, 2006).

Here, the District provided its offer of FAPE related to transportation services for SSN ESY services in the PWN issued to Parents on June 28, 2019. This offer of FAPE specified that the District would provide academic services—and round-trip transportation to the District SSN ESY program site—from July 8 to July 25. It specified further that the District contracted with ABA Center to provide services on July 2 and 30, and on August 1, 6, 8, and 13, and that District would provide one-way transportation from home to ABA Center on those dates. After mistakenly transporting Student from the SSN ESY program site to ABA Center from July 8-11, the District recognized its error and advised Parent that it would thereafter transport Student consistent with the PWN. Parent withdrew Student from receiving SSN ESY services on July 15.

Ultimately, the District was not responsible for providing transportation to ABA Center on days that it did not contract with ABA Center to provide services. Otherwise stated, since the District's offer of FAPE communicated through the PWN did not include private therapy at ABA Center, District was not required to transport Student to ABA Center apart from July 2, July 30, August 1, August 6, August 8, and August 13. Accordingly, the SCO finds and concludes that the District provided transportation for Student to and from ESY services in July 2019.

Nevertheless, the credible evidence in the Record demonstrates that Student's ESY services were determined outside of the IEP team process. ESY services means "special education and related services that are provided to a child with a disability beyond the normal school year . . . in accordance with the child's IEP and at no cost to the parents of the child." 34 C.F.R. § 300.106(b)(1). Once an IEP team determines that ESY services are appropriate, a school district must ensure the services are made available to provide FAPE and must ensure those services are determined on an individual basis in accordance with the student's IEP. *In re: Student with a Disability*, 111 LRP 49954 (SEA MT 7/20/11) (holding that a school district committed a substantive violation by unilaterally determining ESY services).

In this case, the IEP team determined in February 2019 that Student qualified for ESY services, but at that time it did not discuss the specificity of these services. The IEP team next discussed ESY services at a May 8, 2019 IEP team meeting, but again it did not make a formal offer of

FAPE. The IEP team did not reconvene between May 8 and the start of ESY services on July 11, yet the District's ESY services offer changed multiple times in May and June 2019. The District ultimately presented Parent with its ESY services FAPE offer on June 28 via PWN. Former Special Education Director determined the ESY services schedule and programming in conjunction with Parent. The District's failure to develop Student's ESY services through the IEP process results in a procedural violation of IDEA.

A procedural violation results in a denial of FAPE if it "seriously impair[s] the parents' opportunity to participate in the IEP formulation process, result[s] in the loss of educational opportunity for the child, or cause[s] a deprivation of the child's educational benefits." See 34 C.F.R. § 300.513(a)(2).

Here, although Former Special Education Director ultimately determined the schedule of ESY services outside of the IEP process, Parents were still afforded the opportunity to participate in the decision. After corresponding multiple times with Parent as described at FF #29 - 31, the District presented Parent with its FAPE offer on June 28 via PWN. This offer included services at both the District SSN ESY program, and six supplementary sessions at ABA Center. This compromise shows that District considered Parents' request for ABA Center services. Accordingly, although these services were not determined via the IEP team process, Parents were not denied a meaningful opportunity to participate in their formulation. Moreover, there is no evidence that this procedural violation resulted in the loss of educational opportunity for Student, or caused a deprivation of Student's educational benefits. The SCO therefore concludes that this procedural violation did not result in substantive harm.

Finally, related to the actions that resulted in the first procedural violation here, an "IEP . . . must specify the special education and related services, including any required extended school year services, needed to ensure that the student receives a free appropriate public education (FAPE)." *Colo. Dep't of Educ. IEP Procedural Guidance Manual*, p. 36; 34 C.F.R. 300.320(a)(4). An IEP "embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP." *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1197 (9th Cir. 2017).

In this case, the SCO finds and concludes that District did not amend Student's IEP to include its offer of FAPE for ESY services and transportation. Instead, the District provided its FAPE offer for ESY services to Parent on June 28 via PWN. Although this results in a procedural violation, the SCO finds and concludes that the procedural violation did not impair Parents' opportunity to participate in the IEP formulation process, impede Student's right to FAPE, or cause a deprivation of an educational benefit. 34 C.F.R. § 300.513(a)(2). Rather, Parent was informed of the FAPE offer via the PWN, and Student attended the first week of the SSN ESY program. The failure to amend Student's IEP had no impact on the delivery or availability of ESY services or transportation, and Parent withdrew Student from the SSN ESY program on July 15, 2019.

REMEDIES

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

- a) Determining ESY services outside of the IEP process, in violation of 34 C.F.R. § 300.106;
- b) Failing to document ESY services and transportation as a related service in the IEP, consistent with 34 C.F.R. § 300.324(a)(4);

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

- 1) By **March 23, 2020**, the District shall submit to CDE a corrective action plan (“CAP”) that adequately addresses the two (2) violations noted in this Decision. The CAP must effectively address how the 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) Special Education Director, SSN Teacher, and any District staff responsible for determining ESY eligibility and ESY services must review Findings of Fact section “C” and Conclusion to Allegation 3, as well as the requirements of 34 C.F.R. §§ 300.106 and 300.324(a)(4). This review must occur no later than **April 13, 2020**. A signed assurance that the above materials have been reviewed must be completed and provided to CDE no later than **April 20, 2020**.
 - b) CDE will approve or request revision to the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to confirm the District’s timely correction of the areas of noncompliance.

The Department will approve or request revisions that support compliance with 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.

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

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

NOTE: Failure by the District to meet any of the timelines set forth above may adversely affect the District’s annual determination under the IDEA and subject the District to enforcement action by the 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 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46607 (August 14, 2006).

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

Dated this 2nd day of March, 2020.

Thomas Treinen
State Complaints Officer

Appendix

Complaint, pages 1-7

- Exhibit A: IEP dated 10/24/16; PWN dated 9/7/16
- Exhibit B: IEP dated 10/23/17
- Exhibit C: IEP dated 12/5/18
- Exhibit D: 4th grade BIP
- Exhibit E: 10/21/19 IEP and related documents
- Exhibit F: Behavior referral forms
- Exhibit G: IEE
- Exhibit H: various email correspondence
- Exhibit I: email from Parent to SCO dated 2/9/20

Response, pages 1-20

- Exhibit 1: District special education procedures and guidance
- Exhibit 2: District transportation policies
- Exhibit 3: IEP dated 12/5/18; IEP dated 10/21/19; 5/8/19 meeting notes
- Exhibit 4: various PWN
- Exhibit 5: various notices of meeting
- Exhibit 6: grade, progress, and evaluations reports
- Exhibit 7: behavior incident reports
- Exhibit 8: email correspondence
- Exhibit 9: list of District personnel
- Exhibit 10: state-level complaint procedures
- Exhibit 11: ESY contract with Autism Center
- Exhibit 12: ESY eligibility dated 2/20/19; IEP progress report dated 12/20/19

Interviews with:

Parents
School Psychologist
Special Education Director
SSN Coordinator
SSN Teacher
Assistant Special Education Director