

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

State-Level Complaint 2024:512
Weld RE-4

DECISION

INTRODUCTION

On February 7, 2024, the Parents (“Parents”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Weld RE-4 School District (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified four allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. § 300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from February 7, 2023, to the present for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Evaluated Student without parental consent between February and May 2023, in violation of 34 C.F.R. §§ 300.300, 300.503.
2. Failed to evaluate Student in all areas of suspected disability, specifically in the area of autism spectrum disorder (“ASD”), from February 2023 to present, in violation of 34 C.F.R. § 300.304.

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 C.F.R. § 300.1, *et seq.* The Exceptional Children’s Education Act (“ECEA”) governs IDEA implementation in Colorado.

3. Failed to develop, review and revise an IEP that included behavioral strategies and supports that adequately addressed Student's behavioral needs from August 2023 to present, in violation of 34 C.F.R. § 300.324(a)(2)(i).
4. Determined Student's educational placement outside of a properly convened Individualized Education Program ("IEP") meeting and without including Parents, in May 2023, in violation of 34 C.F.R. §§ 300.116(a), 300.321, 300.322, 300.324, 300.327, and 300.501(c) and ECEA Rule 4.03(8).

FINDINGS OF FACT

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

A. Background

1. Student is seven years old and, between February and October 2023, attended kindergarten and first grade at a school ("School") in District. *Response*, pp. 1-10.
2. Student is currently eligible for special education services as a student with a serious emotional disability ("SED") and other health impairment ("OHI"). *Exhibit A*, p. 18.
3. Student is very curious and enjoys video games and puzzles. *Interviews with Parents, Student's first grade teacher ("Teacher"), and Student's special education teacher and case manager for fall 2023 ("Case Manager 2")*. He also enjoys being outside and was very interested in bugs this fall. *Id.* He can be very well spoken with adults. *Id.*
4. He has a hard time with emotional regulation and transitions, particularly to non-preferred activities. *Interviews with Parents and Teacher*. He does not respond well to demands or directions, even if it is to do something he previously wanted to do. *Interviews with Parents and private evaluator ("Evaluator")*. When escalated, he can be physical with both peers and adults and disruptive in the classroom. *Interview with Teacher*. He struggles to understand expectations in social situations. *Interviews with Evaluator and Case Manager 2*.

B. Private Diagnostic Evaluation and Consent for District's 2023 Evaluation

5. In spring 2022, Parents obtained a private diagnostic evaluation ("Private Diagnostic Evaluation") of Student at a local organization. *Exhibit N*, pp. 80-86. It included observations, interviews and various rating scales and ultimately diagnosed Student with ADHD. *Id.* Student was not diagnosed with autism after completion of ASD-specific rating scales, but the evaluation noted concerns with social skills and difficulty with change and transition. *Id.* at pp. 80-81.

² The appendix, attached and incorporated by reference, details the entire Record.

6. Parents had concerns with the accuracy of the Private Diagnostic Evaluation they obtained because, among other things, Student was evaluated by multiple people, and it was on Parents to follow up about remaining testing. *Interview with Parents; Exhibit K*, p. 1. Parents were told Student did not meet criteria for ASD, but they continued to suspect that Student had autism. *Interview with Parents*. When Parents shared the Private Diagnostic Evaluation with School in January 2023, they noted their concerns and shared that they were pursuing another evaluation because they believed “they missed something.” *Exhibit K*, p. 1.
7. During fall 2022, Student had continuous adult support throughout his day and built strong relationships with staff at School. *Exhibit A*, p. 26. That semester he had a total of 34 incidents that required removing him from the classroom for physical or verbal aggression or disruptive behaviors. *Id.* These incidents lasted anywhere from 11 minutes to three hours. *Id.* Behaviors during this time included biting a peer, name calling, scratching, growling, spitting at peers and staff, pulling staff hair, kicking, hitting and biting staff, laughing uncontrollably, inappropriate language, verbal threats, and self-harm. *Id.* at pp. 21-25; *Exhibit 7*.
8. After he returned in January 2023, in less than a month, Student had “23 incidents ranging in duration from 15 minutes to 2 hours.” *Exhibit A*, p. 26. Behaviors during this time included pinching a peer, throwing his shoe at a peer, hitting a peer, kicking and punching staff, inappropriate language, undressing, self-harm and pulling staff hair. *Exhibit F*, pp. 5-7; *Exhibit 7*. In response, Parents asked to meet with the school team as soon as possible to address the behavior changes. *Exhibit K*, p. 1.
9. On January 23, 2023, Student’s services were adjusted to target “emotional regulation, social skills, and work completion outside of the general education setting.” *Exhibit A*, p. 26. For the next two months, Student spent 94% of his day with special education teachers and paraprofessionals. *Id.* Although he could complete work in the morning, he consistently became dysregulated around 11:45 a.m. each day and was unable to complete any further work. *Id.* at pp. 26-27.
10. As a result of his increasing challenges, District also agreed to reevaluate Student. *Exhibit C*, p. 1. On February 1, 2023, District issued a prior notice and consent for reevaluation (“February Consent”). *Id.* at pp. 1-3. To determine Student’s “strengths and areas of concern,” District proposed evaluating him in the areas of academic performance, social and emotional status, motor abilities and health. *Id.* at p. 1.
11. District intended to determine if he qualified for special education in other disability categories and conduct a functional behavior assessment (“FBA”) to “identify functions of behaviors and a possible behavior intervention plan” (“BIP”). *Id.* at p. 2. The evaluation would “consider educational assessments, academic file review, classroom observations, and current progress monitoring data.” *Id.* Parents signed and returned the February Consent on February 9, 2023. *Id.* at p. 3.

C. March Evaluation

12. District's evaluation was completed March 3, 2023 ("March Evaluation"). *Exhibit C*, pp. 7-34.
13. Formal academic testing was completed by Student's other special education teacher and then case manager ("Case Manager 1"). *Id.* at p. 7-9. Student scored in the average range across subtests, with relative strengths in writing samples, word attack, calculation, written language, and basic reading skills. *Id.* at pp. 8-9. Case Manager 1 noted that Student refused problems that were more challenging, so the testing might not be a true reflection of his abilities. *Id.* at p. 9.
14. Academically, "his percentages [had] decreased over the course of the year as his behaviors [had] increased." *Id.* at p. 11. He was not "completing work without escalation" so he was either not completing assignments or not completing them to the "best of his academic ability." *Id.*
15. The March Evaluation included a review of the new supports School was providing and almost eight pages of incidents from his behavior detail report for the 2022-2023 school year. *Id.* at pp. 16-25. Student's various behavior incidents included physical aggression towards staff, students, and school visitors. *Id.* At times, he engaged in verbal aggression towards staff. *Id.* There was no FBA or consideration of what was driving Student's behaviors. *Id.*
16. Parents, kindergarten teacher ("Kindergarten Teacher"), and Case Managers 1 and 2 completed the Behavior Assessment Scale for Children. *Id.* at pp. 25-32. Parents and Case Managers 1 and 2 indicated clinically significant concerns in hyperactivity, aggression, conduct problems, depression, atypicality, withdrawal, adaptability, and social skills. *Id.* Parents also noted concerns around anxiety, attention problems and activities of daily living, while one case manager noted concerns with somatization. *Id.* Kindergarten Teacher only noted clinically significant concerns with aggression, conduct problems, depression, and adaptability, but, at that time, Student was spending just six percent of his day in general education. *Id.* at pp. 16, 28-29. Kindergarten Teacher and Case Managers 1 and 2 note that Student is easily upset or stressed, loses control when angry, struggles to calm down once upset and hits or threatens to hurt peers. *Id.* at pp. 28-32.
17. An occupational therapist ("OT") conducted a record review and additional testing. *Id.* at pp. 32-34. Student struggled with interpreting sensory information, particularly "social participation, touch processing, balance and motion, and planning and ideas." *Id.* at p. 32. He demonstrated below average visual motor and low average fine motor skills. *Id.* at p. 33.
18. Student could demonstrate a mature pencil grasp for writing but refused to use it when writing. *Id.* He continued to need support to initiate and complete tasks, cooperate with others, process touch, and manage body proprioception and motion. *Id.* His limited food

choices might also be connected to sensory concerns. *Id.* During observations, OT noted that Student “displayed difficulty with peer relationships.” *Id.*

19. The March Evaluation did not include language or ASD specific assessments. *Id.* at pp. 7-34. With respect to ASD and ADHD, there is heavy overlap in terms of symptoms and needs. *Interview with CDE Content Specialist 1.* Parsing between ASD and ADHD is less important than providing supports that match the student’s needs. *Id.* Districts cannot diagnose a student, and a student with an ASD diagnosis might not meet the criteria for IDEA-eligibility under the ASD category, especially with an atypical presentation. *Id.* Districts also do not have to conduct an ASD-specific screener to qualify a student under the ASD category. *Id.*
20. Student struggles with emotional regulation, transitions, sensory processing and communicating his needs. *Id.*; *Exhibit C.* He also has average to high academic and cognitive scores. *Id.* The SCO finds, based on a consultation with CDE Content Specialist 1, that this presentation could fit within ASD, SED and/or ADHD. *Interview with CDE Content Specialist 1.* At the point District was conducting the March Evaluation, the main sign suggesting a possibility of ASD was Student’s difficulty with sensory processing, but District also had the recent Private Diagnostic Evaluation which had considered and not diagnosed ASD. *Id.* As such, the SCO finds District’s decision not to assess Student for ASD was reasonable. *Id.*

D. Eligibility Determination

21. On March 3, 2023, a multidisciplinary team (“MDT”) including Kindergarten Teacher, Parents, a dean at School, a contract school psychologist (“School Psychologist 1”), Case Manager 1, Case Manager 2, a District behavior specialist (“Behavior Specialist”), School’s principal (“Principal”) and Student’s private occupational therapist met to review the March Evaluation and determine Student’s eligibility. *Exhibit A*, p. 19.
22. The MDT determined the March Evaluation was sufficiently comprehensive to proceed, but Parents had concerns and noted that they were seeking an outside evaluation. *Interview with School Psychologist 1.* The MDT agreed to consider the outside evaluation once complete. *Id.*
23. The MDT determined that Student was eligible as a Student with an SED and an OHI. *Exhibit C*, pp. 4-5. After determining eligibility, the meeting ended because they ran out of time. *Interviews with Parents and School Psychologist 1.* They never reviewed an IEP or discussed the possibility of changing Student’s placement. *Id.*

E. Classroom Observations

24. Prior to the eligibility meeting, on February 16, 2023, School submitted a referral to District’s Director of Special Education (“Director”) to have Student considered for placement at a center-based program (“Center Program”) in another District school. *Response*, p. 3; *Exhibit*

K, p. 37; *Exhibit 1*, pp. 10-12. Parents were unaware of this referral or the possibility of a placement change. *Interview with Parents*.

25. The referral form asks questions about Student's current services and needs. *Exhibit 1*, pp. 2-4. It also asks the referring school to include documentation for review including IEPs, assessments, and incident reports. *Id.* at p. 4. On February 21, 2023, School also shared Student's incident reports with Director. *Id.* at p. 5.
26. Center Program staff reached out about scheduling an observation about a month later, on March 21, 2023, "to determine the best placement for" Student. *Exhibit K*, p. 148. On April 19, Center Program's school psychologist ("Program Psychologist") and an administrator from Center Program observed Student for one hour. *Interview with Program Psychologist; Response*, p. 5.
27. The observers from Center Program also met with School staff on May 1, 2023, to "make a decision." *Exhibit K*, pp. 151-153. Center Program staff met with School Staff to share some suggestions, including giving Student alternative means to get adult attention. *Interview with Program Psychologist*.
28. In addition, on April 20, 2023, a speech and language pathologist ("SLP") observed Student in two settings, to consider his pragmatic language needs. *Exhibit C*, p. 35. She concluded that Student's pragmatic language abilities fluctuated, with Student sometimes "able to demonstrate proficiency in many social skills" while those skills are other times absent. *Id.*
29. The SCO finds that it is common practice for district staff to observe a student, outside of a formal IDEA evaluation, to provide input on their current programming. *Interview with CDE Content Specialist 1*. However, consent must be obtained before conducting an observation for the purpose of considering a change in placement. *Id.*; 34 C.F.R. § 300.304(a).

F. May 5, 2023 IEP meeting

30. Parents requested to delay an IEP meeting scheduled for April 6, 2023 because they were still waiting for the results of Evaluator's testing. *Exhibit K*, p. 179. They ultimately agreed to reschedule it for May 5, 2023. *Id.* at p. 182.
31. On May 5, 2023, Parents, Kindergarten Teacher, School Psychologist 1, Behavior Specialist, Principal, Case Manager 1, and Case Manager 2 met to review and update Student's IEP. *Exhibit A*, p. 20. Evaluator also participated by phone. *Interviews with Parents and Evaluator*.
32. The team reviewed the present levels section, which included a review of the March Evaluation. *Interview with Parents and Evaluator*. It reviewed extended school year, goals, and accommodations. *Id.* A placeholder was included for adding sensory accommodations. *Exhibit 6*, p. 48.

33. When they got to services and placement, Case Manager 1 brought up the possibility of placement in the Center Program. *Interviews with Parents, Case Manager 2, Evaluator*. The draft IEP includes potential minutes for a placement at Center Program as well as potential minutes if Student remained at School. *Exhibit 6*, p. 51. This was the first Parents had heard about a potential placement change. *Id.*; *Exhibit K*, p. 235.
34. Parents left the meeting before it was finished or a BIP was reviewed. *Interviews with Parents and Evaluator*. The IEP team agreed that Parents needed more information about Center Program and the IEP team needed the information from the outside evaluation. *Exhibit E*, p. 4. After this meeting, Parents hired an advocate (“Advocate”). *Interview with Parents*.

G. May 19, 2023 IEP meeting

35. On May 19, 2023, an IEP team including Parents, Director, Kindergarten Teacher, Case Managers 1 and 2, Evaluator, School Psychologist 1, Behavior Specialist, Principal, OT, Program Psychologist, and Advocate reconvened to continue developing Student’s IEP. *Exhibit A*, p. 21. Parents wanted to brainstorm and problem-solve with the team, instead of making final decisions. *Exhibit E*, p. 7; *Interview with Parents*.
36. After two months of intensive 1:1 support, on March 20, 2023, the School team attempted to return Student to the general education setting as much as possible. *Exhibit A*, p. 26. In the first five weeks, before April 25, 2023, he had a total of 13 behavioral incidents, as opposed to 23 in less than a month in January 2023. *Id.* The March/April incidents included repeatedly removing his clothing as well as urinating in inappropriate locations, pulling staff hair, self-harm, inappropriate language and disrupting class. *Exhibit 7*. After April 25, 2023, staff encouraged Student to work with peers with less adult support. *Exhibit A*, p. 26. Between April 25 and May 3, Student had 11 incidents, five of which were “solved with a walk, break, and redirection.” *Id.* No behaviors after March 1, 2023, resulted in a formal write up. *Exhibit F*, pp. 3-4.
37. It was Parents’ understanding that Student was doing much better. *Exhibit E*, p. 7. Student was speaking positively about school at home and seemed to be making friends. *Id.* School was not sure about the transfer to Center Program, because they were seeing a “third” version of Student, who was different both from the Student they saw in the fall and the Student who had required intensive 1:1 instruction. *Interview with Case Manager 2*. He was interacting more positively with peers and accessing coping strategies. *Exhibit E*, p. 8. He was also engaging in more academic tasks. *Id.*
38. Evaluator had not yet completed her report, but she was able to share some preliminary information with the IEP team. *Id.* at p. 9; *Interview with Evaluator*. OT also shared information about strategies and tools to support Student. *Exhibit E*, p. 9.

39. The IEP team never discussed a BIP. *Id.*; *Interviews with Parents, Director, and Case Manager* 2. The meeting ended with an agreement to reconvene in August to continue developing an IEP for Student. *Id.*

H. Private Neurodevelopmental Evaluation and IEE

40. Evaluator is licensed as both a clinical psychologist and a school psychologist. *Exhibit N*, p. 36. Evaluator shared initial results of her privately obtained evaluation (“Private Neurodevelopmental Evaluation”) with Parents on May 20, 2023. *Interviews with Evaluator and Parent*. Parents shared a summary of Evaluator’s diagnoses and recommendations with District on June 23, 2023. *Exhibit K*, pp. 348, 300-310. Evaluator shared the final version of the Private Neurodevelopmental Evaluation with District on August 28, 2023. *Interview with Evaluator*; *Exhibit K*, p. 425.
41. Evaluator identified that Student met criteria for ASD with social communication impairment requiring support and restrictive and repetitive behaviors requiring substantial support. *Exhibit N*, p. 62. Her evaluation also diagnosed ADHD and anxiety. *Id.*; *Exhibit N*, p. 62.
42. Evaluator observed that any demand triggers an immediate fight or flight response for Student. *Interview with Evaluator*. As a result, she recommended a unique approach from school staff because even reinforcers could become demands that trigger anxiety. *Exhibit E*, p. 19.
43. The Private Neurodevelopmental Evaluation and the summary shared earlier include specific recommendations for how to support Student in a school setting. *Exhibit K*, pp. 305-308; *Exhibit N*, pp. 70-73. These include resources for his teachers, tips for how to connect with him, sensory supports, and recommended accommodations along with the need each accommodation would support. *Id.*
44. During summer 2023, Parents obtained a District-funded independent educational evaluation (“IEE”) in speech and language. *Response*, p. 7. The IEE was completed by a private speech language pathologist (“IEE SLP”) on July 31 and August 2, 2023. *Exhibit C*, p. 39.
45. IEE SLP identified both strengths and challenges for Student. *Id.* at p. 56. She specifically recommended speech therapy targeting articulation and social skills as well as appropriate literacy instruction and occupational therapy to address challenges with fine motor skills, grip, and sensory processing which “contribute to his writing resistance.” *Id.*
46. IEE SLP and Evaluator worked together to create a working document (“Outside Recommendations”) for the School team which summarized their findings and recommendations. *Id.*; *Interview with Evaluator*; *CDE Exhibit 1*; *Exhibit K*, p. 497.

I. Outside Recommendations and August 2023 IEP Meetings

47. On August 7, 2023, an IEP team including Parents, Director, Principal, Case Managers 1 and 2, Program Psychologist, Advocate, Evaluator, and IEE SLP met to continue reviewing Student's IEP and begin reviewing his BIP. *Exhibit A*, p. 22.
48. Evaluator shared Student's new diagnoses as well as an explanation of how the diagnosis presents for Student and can be supported in school. *Exhibit E*, p. 18. IEE SLP shared about his unique pragmatic language deficit. *Id.* She recommended wait time and less language. *Id.*
49. The Outside Recommendations were shared with District before this meeting and note that Student would not respond positively to the strategies that work for most students with ASD. *Interview with Evaluator; CDE Exhibit 1*, pp. 1-2.
50. The Outside Recommendations include specific suggestions to support Student in school. *CDE Exhibit 1*, p. 3. To support interactions, they recommended adding direct SLP services, limiting direct support to two to three adults who are specially trained to work with him, distinguishing "silly vs serious" or "expected vs unexpected," and allowing time to respond and process, among other things. *Id.* As an example, IEE SLP recommended responding with "that is unexpected, stop" without more. *Exhibit E*, p. 18.
51. To support Student in his environment, recommendations included continuing to use social stories, making a flexible schedule together, always having breaks available, and minimizing verbal direction by providing concepts in small, simple parts. *CDE Exhibit 1*, p. 4. The Outside Recommendations also include accommodations for reading and writing. *Id.* at pp. 8-9.
52. For behavior management, they recommended creating smaller, more achievable units by minimizing demands, a different plan for days Student is dysregulated, alternating between preferred and non-preferred tasks in a structured schedule, and limiting negative consequences as well as traditional external reinforcements, focusing instead on offering control and autonomy. *Id.* at pp. 4-5.
53. Evaluator and IEE SLP provided a recommended escalation management plan. *Id.* at p. 5; *Exhibit N*, pp. 30-31. The plan included setting events, antecedent strategies, and recommended adult responses to a variety of potential behaviors ranging from increasing energy or volume all the way to aggression and screaming. *Exhibit N*, pp. 30-31. It specifically recommended against ongoing use of School's "opportunity room" due to "isolation" concerns. *Id.* at p. 30; *Exhibit E*, p. 18. Other recommendations, prior to reaching a crisis point, included sensory breaks, pair verbal requests with visual supports, first then language, and allowing appropriate opportunities for control when escalating. *Exhibit N*, p. 30.
54. The bulk of the meeting was spent discussing the Private Neurodevelopmental Evaluation and the publicly funded Speech IEE. *Interview with Director; Exhibit E*, p. 18. The IEP team ran

out of time before updating the BIP and agreed to reconvene. *Interviews with Evaluator and Director*. They agreed Student would start the year at School and not Center Program. *Interviews with Parents and Director*. No other changes were made to the IEP. *Id*; *Exhibit E*, p. 18.

55. Although dated March 3, 2023, Student's IEP ("2023 IEP") was finalized after the August 7 IEP team meeting. *Exhibit A*, p. 18; *Interview with Case Manager 2*. District had kept Student's IEP in draft form all summer. *Interview with Director*; *Exhibit K*, p. 44. At some point the goals were changed to remove references to Center Program's curriculum and two additional goals were added. *Compare, Exhibit A*, pp. 51-55, *Exhibit 6*, pp. 45-48.
56. On August 16, 2023, an IEP team including a District SLP, School's new school psychologist ("School Psychologist 2"), Parents, Teacher, Director, Principal, Case Managers 1 and 2, Advocate, and Evaluator met to continue reviewing Student's IEP and BIP. *Exhibit E*, p. 21.
57. The IEP team discussed Student's schedule for the coming year and the potential need for additional evaluations. *Id*. Parents asked about avoiding all use of the opportunity room, which District would not agree to. *Id*.
58. Evaluator and IEE SLP agreed to help District plan for Student. *Interview with Evaluator*. They wanted to develop an updated BIP before the start of the school year, but School Psychologist 2 wanted to conduct an FBA after school started, before updating the BIP. *Id*. No changes were made to Student's BIP at this meeting. *Interviews with Parents, Evaluator and Director*.

J. 2023 IEP

59. The 2023 IEP included 25 pages of present levels, including a summary of prior services and a review of the March Evaluation results. *Exhibit A*, pp. 26-50.
60. The 2023 IEP also noted Student's response to the intensive 1:1 instruction that lasted from February through late March 2023. *Id*. at pp. 26-27. None of the private evaluations or the publicly funded IEE are summarized in the 2023 IEP. *Id*. at pp. 26-50. However, on August 20, 2023, District obtained consent for a reevaluation of Student to consider the areas of concern that had been identified in those evaluations and "not previously assessed in the school setting." *Exhibit C*, p. 65.
61. The student needs and impact of disability statement noted he had difficulty demonstrating his knowledge and following classroom routines. *Id*. at p. 50. Student was "often non-compliant when asked to participate in learning activities or projects that [were] not of his choosing" and sometimes jeopardized the safety of himself or others. *Id*. Challenges with visual/fine motor and sensory integration skills also interfered with his classroom participation. *Id*. Overall, this statement was essentially the same as the one in his prior IEP ("2022 IEP"). *Id*. at pp. 9, 50.

62. According to parent input, Parents were pursuing an outside evaluation where the evaluator was considering an autism diagnosis “with a non-traditional presentation.” *Id.* at p. 50. Student required a BIP, but no other special factors applied. *Id.* at p. 51.
63. The 2023 IEP included four social emotional goals and one self-determination goal, on which Parents would receive progress reports each quarter and at twice yearly conferences. *Id.* at pp. 51-55.
64. The 2023 IEP included 10 accommodations carried forward from the 2022 IEP, including predictable routine, non-contingent attention breaks and monitor for safety in all settings, including transitions. *Id.* at pp. 12, 55. The 2023 IEP also required “[c]onsistent use of language and strategies outlines in Behavior Intervention Plan by all adults working with” Student and “sensory/ot accommodations.” *Id.* at p. 55.
65. The service delivery statement notes that an OT and district behavior specialist would provide consultation services as needed. *Id.* at p. 58. In addition, Student would receive:
- 300 minutes per week (“MPW”) of direct instruction in social/emotional skills from a special education teacher outside of general education (a 60-minute increase from the 240 MPW in his prior IEP).
 - 1,900 MPW of special education support from a special education teacher or paraprofessional under the supervision of a special education teacher. These minutes would be provided inside general education to maintain adult supervision for safety and implement behavior teaching strategies “in a natural environment” (a 1,300 MPW increase from his prior IEP).
 - 120 minutes per month (“MPM”) from a school psychologist outside of general education to “support emotional regulation and social emotional needs” (a new service).
 - 80 MPM from an OT outside of general education to support sensory processing and fine motor skills (consistent with his prior IEP).

Id. at pp. 14-15, 58-59.

66. The SCO finds that the IEP team determined Student’s least restrictive environment was general education at least 80% of the time. This is consistent with the services included in the IEP, which would place him in general education at least 80% of the time. *Exhibit A*, p. 60. The embedded PWN also indicates that although the IEP team discussed placement in the self-contained Center Program, it ultimately determined he would return to School while the team gathered additional data and considered outside evaluations. *Id.* at p. 61.

K. May BIP

67. After the March Evaluation, in March 2023, Case Manager 1 and Behavior Specialist drafted an updated BIP. *Interview with Director; CDE Exhibit 2*. After the August 7 IEP team meeting, this was finalized as the BIP dated May 19, 2023 (“May BIP”). *Interview with Case Manager 2; Exhibit B*, pp. 1-6. The draft BIP and the May BIP are identical. *Exhibit B*, pp. 1-6; *CDE Exhibit 2*.
68. The May BIP is based on an FBA, ABC data collection, teacher interviews, student observations and other assessments and questionnaires. *Exhibit B*, p. 1. It includes a list of Student’s likes and interests, including adult attention, hugs, puzzles, Legos, drawing, superheroes, novelty, chips, and oranges. *Id.* at pp. 1-2.
69. It targeted three top problem behaviors: (1) physical aggression; (2) property destruction; and (3) refusal to complete tasks. *Id.* at p. 2. Other problem behaviors were noted as well. *Id.* It is hypothesized that Student engaged in the problem behaviors “to gain adult attention” when he is left alone. *Id.* He also engaged in problem behaviors to escape non-preferred tasks or locations. *Id.* The problem behaviors and hypotheses are the same as in Student’s prior BIP from September 2021 (“2021 BIP”). *Exhibit N*, pp. 91-95.
70. The only setting event strategy in both the May BIP and the 2021 BIP was daily communication with family to see how Student’s morning went. *Id.* at p. 91; *Exhibit B*, p. 3. For antecedent strategies, the May BIP replaced a visual schedule with a clear list of expectations for each activity and contact with a “highly preferred activity” after each task was completed. *Id.* Both plans required a consistent positive reinforcement system for desired behaviors. *Id.*
71. Two to four “non-contingent attention breaks” that would be earned and then decreased as problem behaviors decreased was replaced with two to four “non-contingent attention breaks” with a preferred adult, without further stipulations. *Exhibit N*, pp. 92-93; *Exhibit B*, p. 3. Both BIPs required social stories or role-playing of desired behaviors. *Id.* The May BIP no longer required providing simple, one-step verbal directions. *Id.*
72. The behavior teaching strategies were also the same in both BIPs, requiring Student to carefully follow four steps, including looking at the person, waiting calmly and “clearly explain[ing]” the help needed. *Exhibit N*, pp. 91-92; *Exhibit B*, p. 3. The strategies for gaining adult attention and asking for a break are identical to the two related goals in the May IEP. *Exhibit B*, p. 3; *Exhibit A*, pp. 52-54. There are no strategies for teaching coping skills or helping Student to regulate once escalated. *Exhibit B*, p. 3.
73. The reinforcement strategies in the 2021 BIP and the May BIP are also mostly the same, requiring immediate and frequent reinforcement for desired behaviors and the same strategies for responding if Student is seeking adult attention or escape. *Exhibit N*, pp. 91-92;

Exhibit B, pp. 3-4. For instance, the May BIP recommends ignoring all behaviors and waiting until Student has a calm body and voice before engaging. *Exhibit B*, p. 3. The only difference is that the 2021 BIP described how to respond to dangerous or destructive behaviors while limiting adult attention and the May BIP described how to respond to inappropriate language without providing desired adult attention. *Exhibit N*, pp. 91-92; *Exhibit B*, pp. 3-4.

74. The 2021 BIP included a detailed crisis plan with step-by-step instructions for responding to behaviors in various environments. *Exhibit N*, pp. 93-94. The crisis plan in the May BIP was shorter. *Exhibit B*, p. 4. The May BIP required use of Crisis Prevention Intervention (“CPI”) protocols if Student engaged in unsafe behaviors. *Id.*
75. The SCO finds that the minimal changes to the May BIP, as compared to the 2021 BIP, described above, are not commensurate with the described increase in the frequency and intensity of Student’s behavior. *Interview with CDE Content Specialist 1*. Given Student’s behavior challenges in spring 2023, the SCO finds further that District should have had an appropriate BIP reviewed by the IEP team and in place by the start of the 2023-2024 school year. *Id.*

L. First Week of 2023-2024 School Year

76. The 2023-2024 school year started on Monday, August 21, 2023. *Exhibit I*, p. 2. Student had a good first day, which was reported to Parents through a “glows and grows report” after school. *Interviews with Parents and Case Manager 2; Exhibit K*, p. 276-277. He was absent on Tuesday for a doctor’s appointment. *Id.* He also had a good day on Wednesday, although he had a hard time focusing and needed lots of breaks in math. *Id.*
77. Parents do not recall getting a daily report on Thursday and the report created did not follow the same “glows and grows” format. *Interview with Parents; Exhibit K*, pp. 278-281. Instead, there were updates for various times, describing staff actions and Student behavior. *Exhibit K*, pp. 278-281. Student was disruptive in class, needing several breaks. *Id.* He was also aggressive towards staff, including biting hard enough to leave a mark. *Id.* Staff attempted to ignore, distract with preferred topics, offer breaks, and use funny language to model more appropriate interactions. *Id.* Staff also offered opportunities to hunt for bugs outside and heavy work breaks. *Id.* Friday’s report followed a similar format. *Id.* at pp. 281-282. Although Student still struggled with focus, no aggression or significant dysregulation was reported. *Id.* Student was also able to complete some work. *Id.*
78. During this time, District was implementing the May BIP along with some of the strategies recommended by Evaluator and IEE SLP. *Interview with Case Manager 2; Exhibit K*, p. 417. For instance, they used bug smashing to demonstrate subtraction and attempted to re-direct Student with novel activities like bug dances. *Id.; Exhibit K*, p. 280. Student and Case Manager 2 also set up a space for Student with sensory tools. *Interview with Case Manager 2*.

79. Parents were surprised by the detailed descriptions of Student's challenges and how he spent his time on Thursday and Friday. *Interview with Parents*. Parents were concerned that School was not responding to Student's underlying needs, like anxiety. *Id.* As a result, Parents decided to keep Student home until there was a new behavior and crisis plan in place. *Id.*

M. September 2023 IEP Meetings

80. On September 1, 2023, a "small team" consisting of Case Managers 1 and 2, School Psychologist 2, Evaluator, IEE SLP and Advocate met to update Student's behavior plan. *Interviews with Case Manager 2 and Evaluator; Exhibit K*, p. 352. Evaluator again shared an escalation management plan that offered a new way to think about Student's behaviors and staff responses. *Interview with Case Manager 2; Exhibit N*, pp. 30-31. The team had a productive conversation but did not have a final plan at the end of the meeting. *Interview with Evaluator*.

81. School Psychologist 2 shared a draft BIP with Case Manager 1, Case Manager 2, and Evaluator on September 5, 2023. *Exhibit K*, p. 103. She shared a new draft with a larger School team on September 11, 2023. *Id.* at p. 40.

82. On September 18, 2023, an IEP team including Parents, School Psychologist 2, Teacher, Director, Principal, Case Managers 1 and 2, Advocate and Evaluator met to review a behavior plan for Student. *Exhibit E*, p. 34. School Psychologist 2 used Evaluator's escalation management plan as a base for the new BIP. *Id.* at p. 24. Parents, Advocate, and Evaluator asked questions about the proposed plan and offered ideas. *Id.*

83. School Psychologist 2 proposed focusing on learning to follow a routine and schedule instead of academics. *Id.* Advocate requested that this focus be documented in Student's plan, which it was. *Id.*; *Exhibit B*, p. 8. Evaluator recommended including suggested language for responding to Student in the BIP so that staff could understand and implement the BIP without misunderstanding. *Exhibit E*, p. 25.

84. The IEP team was unable to finish developing a BIP for Student and agreed to reconvene. *Id.* The same team, plus District's SLP, reconvened on September 21, 2023. *Id.* at p. 38.

85. School Psychologist 2 reviewed the proposed crisis plan. *Id.* at p. 28. Parents had questions and concerns about the crisis plan but did not have further questions about the setting event, antecedent, behavior teaching and reward strategies. *Id.* However, Evaluator suggested pre-teaching to help Student deal with his anxiety about returning. *Id.*

86. The IEP team discussed potential schedules and agreed that Student would only attend half days when he returned. *Id.* They also agreed they would reevaluate the schedule after Student attended for five continuous days. *Id.* The meeting ended with an agreement that Student would return on September 25, 2023. *Id.*

N. September 2023 BIP

87. The September IEP meetings resulted in a new BIP (“September BIP”), dated September 5, 2023. *Exhibit B*, pp. 7-10. The September BIP was written based on a 2021 FBA, current interviews and observations, and input from Parents, Evaluator, and IEE SLP. *Id.* at p. 7.
88. According to the September BIP, Student enjoyed attention from and interaction with adults of choice. *Id.* He also liked independence, deep pressure, and oral input. *Id.* He liked being outside and doing hands-on activities including science experiments and Legos. *Id.* He liked being read books of interest and math, vehicles, and climbing. *Id.*
89. The FBA summary indicated that Student “[might] hit, kick, spit and/or bite” when kept away from peers or other staff. *Id.* Additionally, he “[might] throw objects at peers and/or staff” when asked to do tasks he does not want to do. *Id.* The SCO finds that this is not a summary statement, as it identifies the antecedent rather than proposing a function for the target behaviors. *Interview with CDE Content Specialist 2.*
90. The September BIP included three setting event strategies: (1) daily communication between School and Parents to understand Student’s morning and any afternoon activities that should be added to his visual schedule; (2) a “soft start” routine in his classroom that might be adjusted over time; and (3) a gradual re-introduction to the special education room to address Student’s reported anxiety. *Id.* at pp. 7-8.
91. Antecedent strategies included a detailed visual schedule, broken down in 10-minute increments and alternating between preferred and less preferred activities. *Id.* Less preferred activities would start less academic. *Id.* at p. 8. Staff would use timers to show Student when a preferred activity was coming and give him choices “as much as possible,” such as having him choose which less-preferred activity to do first. *Id.* Social narratives would be used to teach expected behaviors. *Id.* He could use words or cards to request help or a break. *Id.* Breaks would also be built into his schedule and would be playful but “not too enticing.” *Id.* at pp. 8-9.
92. Behavior teaching strategies included showing Student how to use his visual schedule and help and break cards. *Id.* at pp. 7-8. He would also spend time working on “social skills, building stamina, and expected behavior.” *Id.* at p. 8. Instruction would focus on learning to follow a schedule and ask for help/breaks. *Id.* Initial academic tasks would not be demanding, and more rigorous demands would be slowly built into his day. *Id.* Staff would also pre-teach how and when different spaces in School could be used. *Id.*
93. Reinforcement strategies indicated that requests for help or breaks would be immediately granted and met with verbal and visual praise. *Id.* at pp. 7-8. Student would have unlimited access to help and breaks during less preferred activities but would not be able to move on to preferred activities until the less preferred activity was completed. *Id.* at p. 8. Inappropriate

language or gestures would be met with planned ignoring, and verbal and visual reinforcement would be used once Student was using appropriate language. *Id.* Novelty, but not changes in routine, would be “attempted.” *Id.* The September BIP included a crisis plan. *Id.*

O. Enrollment with Shortened Day

94. His first week back, ending September 29, 2023, included successes as well as some challenges (such as negative social interactions and evidence of fatigue by 11 a.m.). *Exhibit K*, p. 142. Parents and School decided it would be best to do another week of the same shortened schedule. *Id.* at p. 143.
95. Student continued to show growth and have some success the second week, ending October 6, 2023, with shorter escalation periods and some positive peer interactions. *Id.* at p. 172. However, he also had similar challenges and continued to appear tired by 11:00 a.m. *Id.* Towards the end of the week, on October 5, 2023, Case Manager 2 shared a summary of the week with Parents, Director, SLP, School Psychologist 2, Case Manager 1 and Principal, asking for opinions about extending Student’s day. *Id.* Parents chose to pick Student up at the same time. *Id.* at p. 573.
96. Week three, ending October 13, 2023, was similar, although Student missed three days due to illness *Id.* at pp. 534, 570-572. Student had positive peer interactions at recess but struggled with negative interactions in the classroom. *Id.* at p. 534. He had an office referral for hitting a peer and continued to get tired around 11 a.m. *Id.* at pp. 534, 575.
97. Parents and District agreed to have Student increase his day by 30 minutes on Monday, October 16, 2023. *Id.* at p. 534-536. Student successfully communicated his needs and was able to complete some speech assessments. *Id.* However, he struggled with physical aggression towards peers and got three office referrals. *Id.* at p. 536, 582.
98. Student was brought to the special education room for speech evaluations. *Id.* at pp. 580, 581. Student completed some testing but took several bathroom breaks and was aggressive towards peers in the hallway. *Id.* at p. 581. He became increasingly dysregulated during testing and attempted to bite and hit staff. *Id.* He then ran towards the classroom door. *Id.* When staff blocked the door it closed on Student’s arm. *Id.* Staff did not observe any swelling or impaired function, and Student was offered ice. *Id.* However, he continued to complain that his arm hurt and was unwilling to go to lunch or recess. *Id.* at pp. 581-582.
99. Student did not return to School that week. *Id.* at pp. 576-579. Ultimately, after keeping Student home for three days, Parents withdrew Student from District, with the intent to homeschool, effective October 20, 2023. *Interview with Parents; Exhibit K*, pp. 274, 299, 488, 489.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District had parental consent to evaluate Student, consistent with 34 C.F.R. § 300.300. No IDEA violation occurred.

Parent's concern is that they did not consent to have Student evaluated for Center Program.

A. Legal Requirements for Parental Consent for Evaluations

"Evaluation" refers to the procedures used to determine whether a child has a disability and the nature and extent of the special education and related services the child needs. 34 C.F.R. § 300.15. The IDEA requires parents to provide informed consent before a school district performs evaluations or reevaluations pursuant to developing an IEP. 34 C.F.R. § 300.300(c)(1)(i). Informed consent requires, in part, that the parent is fully informed of all information relevant to the activity for which consent is sought, in his or her native language, and that the parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent describes that activity and lists the records that will be released and to whom. 34 C.F.R. § 300.9(a)-(b). For consent to be "informed" a parent does not need to know "the precise nature of all...services or activities" their consent would authorize. *See Letter to Johnson*, 56 IDELR 51 (OSEP 2010). Parental consent is not required before a school district reviews existing data as part of an evaluation or a reevaluation or administers a test or other evaluation that is given to all children unless, before administration of that test or evaluation, consent is required of all children. 34 C.F.R. § 300.300(d)(1).

B. Was the Referral to Center Program an Evaluation

Here, on February 16 and 21, District staff received a referral and Student's behavior reports to review. (FF #s 24, 25.) On April 19, 2023, Center Program staff observed Student at School as part of the process to decide about placement. (FF #s 26, 27.) They used the observation to provide School with strategies for addressing Student's behavior, like offering alternative means to get adult attention. (FF # 27.) Because the purpose of the referral and observation was to make recommendations about the individualized nature and extent of Student's services, the SCO finds and concludes that it was an evaluation. (FF #s 24-27.); 34 C.F.R. § 300.300(d)(1).

C. Did District Have Consent for the Observation

In this case, on February 9, 2023, Parents signed consent for a reevaluation of Student. (FF # 11.) They agreed to a reevaluation in the areas of academic performance, social and emotional status, motor abilities and health. (FF # 10.) The reevaluation was being conducted to determine Student's eligibility and identify the functions of his behaviors for a possible BIP. (FF # 11.) The reevaluation would consider a variety of data, including "classroom observations." (*Id.*)

Parents did not know that District had referred Student to Center Program or was considering a change of placement. (FF # 24.) However, parents do not have to understand the exact nature of services that might be provided to their child to provide informed consent. *See Letter to Johnson*, 56 IDELR 51 (OSEP 2010). Here, Parents consented to an evaluation of Student’s social emotional status, to include potential classroom observations. This referral and observation were conducted to determine the nature and extent of Student’s behavioral needs, and thus the SCO finds that it falls within the scope of an evaluation of Student’s social and emotional status.

District completed its evaluation on March 3, 2023. (FF # 12.) That same day, a MDT, including Parents, reviewed the March Evaluation and concluded it was sufficiently comprehensive to determine Student’s continuing eligibility. (FF #s 21-22.) The MDT then determined that Student was eligible as a child with SED and OHI, but they ran out of time to review and IEP or BIP for Student. (FF # 23.) District did not complete an IEP and BIP for Student until August 7, 2023. (FF #s 47, 55, 67.) Because Parents consented to a reevaluation for the purposes of determining Student’s eligibility *and* developing a potential BIP, the SCO finds and concludes that the February Consent covered evaluations in the specified areas through the development of the IEP and BIP.

For all these reasons, the SCO finds and concludes that this evaluation of Student was conducted with parental consent, consistent with 34 C.F.R. §§ 300.300(c)(1)(i).

Conclusion to Allegation No. 2: District evaluated Student in all areas of suspected disability, consistent with 34 C.F.R. § 300.304. No IDEA violation occurred.

Parent’s concern is that District did not evaluate Student in the area of ASD.

The IDEA requires an evaluation to assess students “in all areas related to the suspected disability.” 34 C.F.R. § 300.304(c)(4). Evaluations must be sufficiently comprehensive to identify all of the child’s special education needs, whether or not commonly linked to the disability category with which the child has been identified. *Id.* at § 300.304(c)(6). The evaluation must also gather all relevant information that may assist in determining “the content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum.” *Id.* at § 300.304(b)(1)(ii). Evaluations are required before any change in eligibility. 34 C.F.R. § 300.305(e).

In this case, prior to determining Student’s eligibility, the March Evaluation included formal and informal academic data, a review of Student’s behavior needs and current supports, behavior rating scales and sensory and motor evaluations. (FF #s 12-18.) The March Evaluation did not include ASD specific testing. (FF # 19.) At the time District was conducting the March Evaluation, Parents suspected that Student had autism. (FF # 6.) However, the Private Diagnostic Evaluation had recently considered that diagnosis and determined that Student did not meet the criteria. (FF # 5.) District was aware of and considered that outcome, as well as Parents’ concerns with the accuracy of the Private Diagnostic Evaluation, at the time it conducted the March Evaluation. (FF # 06.) District then considered his pragmatic language needs prior to developing an IEP. (FF #

28.) When Parents disagreed with this speech evaluation, they were granted an IEE in the summer of 2023. (FF # 44.) This all occurred prior to District completing the IEP for Student. (FF # 55.)

Even if District had conducted its own ASD assessments, it would not be able to diagnose Student. (FF # 19.) It also did not need a diagnosis to consider eligibility under the ASD category. (*Id.*) Again, a district's obligation is to evaluate a student in *all areas related to suspected disability* to identify all the student's special education needs. 34 C.F.R. § 300.304(c)(4), (6). Student here struggled with emotional regulation, transitions, sensory processing and communicating his needs. (FF #s 5, 20.) That profile can be consistent with a range of disabilities, including ASD, ADHD, and SED. (FF # 20.) Although there were some signs pointing towards an ASD diagnosis, particularly sensory needs, the SCO, in consultation with CDE Content Specialist 1, finds District's decision not to conduct any ASD specific evaluations was reasonable. (*Id.*)

For all these reasons, the SCO finds and concludes that District evaluated Student in all suspected areas of need, consistent with 34 C.F.R. § 300.304.

Conclusion to Allegation No. 3: District failed to develop an IEP that included appropriate behavior strategies and supports from August 7 through September 21, 2023 in violation of 34 C.F.R. § 300.324(a)(2)(i). This violation resulted in a denial of FAPE.

Parent's concern is that Student's 2023 IEP, including the May and September BIPs, did not appropriately address Student's behavior needs.

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

A. IEP Development Process

Parents did not raise concerns regarding the IEP development process under the first prong, so the SCO turns directly to consider the second prong of whether the 2023 IEP was substantively adequate. *Rowley*, 458 U.S. at 207.

B. Substantive Adequacy of the IEP

For a student whose behavior impedes their learning, the IEP must, among other things, also “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. § 300.324(a)(2). IEPs must address any behaviors that are impeding learning, including by causing student to miss instruction or avoid work. *Id.*

The regulations do not require an IEP Team to use a particular tool or assessment when considering positive behavioral support; however, “conducting a functional behavioral assessment typically precedes developing positive behavioral intervention strategies.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46,683 (Aug. 14, 2006). Development of a BIP is an “acceptable way of considering a child’s behavioral needs”, though not required. *Coleman v. Wake Cnty. Bd. of Educ.*, 120 LRP 4253, at *9 (E.D. N.C. 2020). To be effective, a BIP should detail the target behaviors and the motivation behind these target behaviors. *CDE IEP Procedural Guidance Manual*, p. 121.

i. May BIP

Here, Student exhibited behaviors that were disruptive to the learning environment of others and that disrupted his learning, as they required removing him from the classroom. (FF #s 7, 8.) These behaviors increased in frequency and intensity in January 2023, to the point where he was removed from general education 94% of his day and unable to complete work after 11:45 a.m. each day. (FF # 9.)

In response, District conducted a reevaluation and drafted a new IEP and BIP in March 2023. (FF #s 12, 55, 67.) The March IEP was discussed and revised over several IEP team meetings in May and August. (FF #s 31-33, 35-39, 47-58.) It included a review of District’s March Evaluation, five goals, 12 accommodations, and services from a special education teacher, a school psychologist, and an OT. (FF #s 59-66.) At the point the May BIP was drafted in March 2023, behaviors—including physical aggression towards staff and peers—were so severe he was being educated in a 1:1 setting for 94% of his day. (FF #s 7, 8, 9, 67.) However, the BIP District drafted in March 2023 is substantially similar to the prior BIP. (FF #s 68-75.) It does not include new setting event strategies and adds only one new antecedent strategy of providing contact with a “highly preferred activity” after each assignment. (FF #s 70-71.) The behavior teaching strategies and most of the reinforcement strategies are the same. (FF #s 72-73.) The primary change was to remove the reinforcement strategy for responding to dangerous behaviors and removing detail from the crisis plan. (FF # 73, 74.)

The SCO recognizes that a BIP need not always change from year to year, but, at a minimum, a BIP must accurately identify a student’s problem behaviors and adequately address individualized needs. It was not reasonable to assume that a substantially similar plan, with fewer strategies, would adequately address the increased need Student was displaying. For instance, Student was easily upset and had difficulty regulating once escalated. (FF # 16.) However, the

May BIP does not include teaching any coping or co-regulation strategies to help him calm down. (FF #s 72, 73.) Instead, the May BIP directs staff to ignore Student or leave him alone until he can demonstrate safe body for three to five minutes. (FF # 73.)

District also did not conduct an updated FBA to understand the function of Student's behavior or determine if it had changed. (FF # 15.) Instead, the May BIP carries forward the same target behaviors and hypotheses. (FF # 69.) By August 2023, before finalizing the draft BIP, District had additional substantive recommendations from both IEE SLP and Evaluator. (FF # 46.) For instance, both the Private Neurodevelopmental Evaluation and the Speech IEE reiterated Student's need for sensory supports, but neither the 2023 IEP nor the May BIP includes any specific accommodations or strategies to address those needs. (FF #s 43, 45, 64, 70, 71.) In fact, no strategies were added to the May BIP in consideration of these evaluations. (FF # 67.) Although districts are not required to accept all the information and recommendations in a publicly funded IEE or a privately obtained evaluation, the results of such evaluations must be considered by the district in any decisions about the provision of FAPE. 34 C.F.R. § 300.502(c); *T.S. v. Bd. of Educ. of the Town of Ridgefield*, 10 F.3d (2d Cir. 1993); *G.D. v. Westmoreland Sch. Dist.*, 17 IDELR 751 (1st Cir. 1991).

In addition, the draft BIP was not substantively reviewed and revised by any IEP teams in May or August. (FF #s 23, 34, 39, 54, 58, 67.) Nevertheless, the May BIP was finalized on August 7, 2023, without change from the March 2023 draft, to be implemented when Student started school on August 21, 2023. (FF #s 67, 76, 78.) Overall, the SCO finds the May BIP did not include new supports and strategies that were commensurate with Student's increasingly disruptive behavior that was seen during the 2022-2023 school year or reflective of the additional concerns identified in the publicly funded Speech IEE and the Private Neurodevelopmental Evaluation.

For these reasons, the SCO, in consultation with CDE Content Specialist 1, finds and concludes that the May BIP did not include sufficient or appropriate behavior supports and strategies to address Student's needs when he returned to school in August 2023. Thus, the May BIP was not reasonably calculated to address his behavior needs, as required by 34 C.F.R. § 300.324(a)(2)(i). This resulted in a denial of FAPE. *See D.S. v. Bayonne Bd. Of Ed.*, 602 F.3d 553, 565 (3d Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA's procedural requirements).

i. September BIP

In September 2023, District drafted the September BIP with the support of Evaluator and IEE SLP. (FF #s 80-87.) It failed to identify the functions of Student's behaviors. (FF # 89.) However, it included various new strategies, including starting with less academic demands and giving Student as much choice as possible. (FF # 91.) It allowed Student to request a break with just a card and required teaching him how to use the new supports. (FF #s 91, 92.) The September BIP also calls for teaching Student various skills, including expected behaviors and how to ask for help. (FF # 92.)

The September BIP was only implemented for 13 days. (FF #s 94-99.) Although Student was only attending for half days, he appeared to make some progress. (*Id.*) For instance, he had shorter escalation periods and some positive peer interactions. (FF #s 95, 96.) Even with an appropriate behavior plan, students will still experience bad days and challenging behaviors. Student's difficulties on October 16, 2023, alone are not enough to conclude that the new plan was not appropriate. (FF # 98.) For these reasons, the SCO finds and concludes that the September BIP, with its substantial increase in strategies, was reasonably calculated to address Student's behavior needs, as required by 34 C.F.R. § 300.324(a)(2)(i).

C. Compensatory Education

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

Here, District should have had an appropriate BIP in place for Student by August 21, 2023. (FF #s 75, 76.) Despite multiple IEP meetings and Evaluator and IEE SLP's efforts to help District develop an appropriate plan for Student, District did not have appropriate behavior supports for Student when school started in August 2023. (FF #s 31, 35, 46-49, 56, 58.) However, District only implemented this plan for four days before Parents' unilateral decisions to keep Student home. (FF #s 76-79.) Indeed, a district is not responsible for a failure to provide services required by a student's IEP when the parents' actions prevent the district from providing all the services required by the IEP. *Montgomery County Public Sch.*, 111 LRP 54915 (Md. SEA 2011). Additionally, although not reflected in the 2023 IEP or May BIP, District was implementing additional strategies during this time, like sensory tools, using funny language, and heavy work breaks. (FF #s 77, 78.) Because Student only attended School for one week under the May BIP and staff was implementing additional strategies, the SCO finds he is not entitled to compensatory services.

Conclusion to Allegation No. 4: Student's placement was unchanged, and all placement decisions were made at IEP team meetings with Parents. No violation of 34 C.F.R. §§ 300.116(a), 300.321, 300.322, 300.324, 300.327, and 300.501(c) and ECEA Rule 4.03(8) occurred.

Parent's concern is that District decided to move Student to a center-based program outside of a properly convened IEP team meeting and without including them.

Placement decisions must be made by a group of persons, including the parents. 34 C.F.R. §§ 300.116(a)(1), 300.327, 300.501(c), ECEA Rule 4.03(8). Placement must be determined annually, be based on the child's IEP and be as close as possible to the child's home. *Id.* at § 300.116(b).

Parents must be part of any IEP team meeting or amendment process. *Id.* at §§ 300.321(a), 300.322, 300.324.

The IDEA's procedural requirements for developing a child's IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Systema v. Academy School District No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008). To that end, the IDEA requires that parental participation be meaningful, to include carefully considering a parent's concerns for enhancing the education of his or her child in the development of the child's IEP. 34 C.F.R. §§ 300.321(a)(1), 300.322, and 300.324(a)(1)(ii). That does not preclude districts from meeting in advance or otherwise discussing their preferences or recommendations outside of the IEP meeting, as long as they have an open mind in IEP meetings with parents. *See, e.g., T.P. v. Mamaroneck Union Free Sch. Dist.*, 51 IDELR 176 (2d Cir. 2009); *Schoenbach v. District of Columbia*, 46 IDELR 67 (D.D.C. 2006); and *M.C.E. v. Board of Educ. of Frederick County*, 57 IDELR 44 (D. Md. 2011).

Meaningful parent participation occurs where the IEP team listens to parental concerns with an open mind, exemplified by answering questions, incorporating some requests into the IEP, and discussing privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of the student. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 703 (10th Cir. 1998). Meaningful participation does not require that a district simply agree to whatever a parent has requested. *Jefferson County School District RE-1*, 118 LRP 28108 (SEA CO 3/22/18). However, parental participation must be more than "mere form." *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014). "It is not enough that the parents are present and given an opportunity to speak at an IEP meeting." *Id.* Evidence that a district "was receptive and responsive at all stages" to the parents' position, even if it was ultimately rejected, is illustrative of parental participation. *Id.*

In this case, District considered changing Student's placement to Center Program. (FF # 24.) After staff from Center Program observed Student, they met with School staff on May 1, 2023, to decide about Student's placement. (FF #s 26, 27.) Then, at the IEP meeting on May 5, District proposed a placement at Center Program. (FF # 33.) Parents were caught off guard by this recommendation and left the meeting before an IEP was finalized. (FF #s 33, 34.) Ultimately, the IEP team agreed that Parents needed more information about Center Program and the IEP team needed the information from Evaluator's assessment. (FF # 34.) Although another IEP team met on May 19, 2023, they still did not reach a decision about Student's placement and did not finalize an IEP. (FF #s 35, 39.)

When the IEP team reconvened on August 7, 2023, it determined that Student would stay at School and finalized the 2023 IEP. (FF #s 54, 55.) This was the first, and only, finalized IEP during this period. (*Id.*) Although District staff proposed Center Program in May after meeting without Parents, they never changed Student's placement. (FF #s 33, 37-39, 54.) Instead, District considered Parents' concerns and the outside evaluations before deciding to not change placement. (FF # 54.) Parents participated in the May 5, May 19 and August 7 IEP team meetings

that ultimately led to the decision to keep Student at School. (FF #s 31, 35, 47, 54.) Thus, the SCO finds and concludes that Student’s placement was not changed, and Parents participated in the IEP team meetings that determined Student’s placement, consistent with 34 C.F.R. §§ 300.116(a), 300.321, 300.322, 300.324, 300.327, and 300.501(c) and ECEA Rule 4.03(8) occurred.

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

Pursuant to its general supervisory authority, CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in District. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the state complaint procedures are “critical” to the SEA’s “exercise of its general supervision responsibilities” and serve as a “powerful tool to identify and correct noncompliance with Part B.” Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46601 (Aug. 14, 2006).

Nothing in the Records suggests that the violation in this investigation was systemic in nature. Instead, the SCO finds and concludes that the problems related to developing appropriate behavior supports for Student are related to the intensity of his needs, coupled with his young age and unique presentation. (FF #s 8, 20, 40, 42, 48.)

REMEDIES

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

- a. Failing to develop an IEP that was appropriately tailored to Student’s needs, in violation of 34 C.F.R. § 300.324(a)(2)(i).

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

1. Corrective Action Plan

- a. By **Tuesday, May 7, 2024**, District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom District is responsible. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm District’s timely correction of the areas of noncompliance.

2. Final Decision Review

- a. Director, Behavior Specialist, Case Managers 1 and 2 and School Psychologist 2 must review this decision, as well as the requirements of 34 C.F.R. § 300.324(a). If these individuals are no longer employed by District, District may substitute individuals occupying identical roles to demonstrate compliance with this remedy. This review must occur no later than **Friday, June 7, 2024**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Friday, June 13, 2024**.

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

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

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

CONCLUSION

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

Dated this 7th day of April, 2024.



Rachel Dore
Senior State Complaints Officer

APPENDIX

Complaint, pages 1-8

- Exhibit 1: Correspondence

Response, pages 1-20

- Exhibit A: IEPs
- Exhibit B: BIPs
- Exhibit C: Evaluations
- Exhibit D: PWNs
- Exhibit E: Meeting Documentation
- Exhibit F: Behavior Records
- Exhibit G: Attendance Records
- Exhibit H: Progress Data
- Exhibit I: School Calendars
- Exhibit J: District Policies
- Exhibit K: Correspondence
- Exhibit N: Additional Documents

Reply, pages 1-16

- Exhibit 2: Correspondence
- Exhibit 3: Resources
- Exhibit 4: Resources
- Exhibit 5: Draft Evaluation
- Exhibit 6: Draft IEP
- Exhibit 7: Behavior Data
- Exhibit 8: Evaluation
- Exhibit 9: Evaluation
- Exhibit 10: Correspondence
- Exhibit 11: Correspondence

CDE Exhibits

- CDE Exhibit 1: Recommendations
- CDE Exhibit 2: Draft BIP

Telephone Interviews

- Parents: March 5, 2024
- Director: March 6, 2024

- Teacher: March 6, 2024
- School Psychologist 1: March 6, 2024
- Case Manager 2: March 7, 2024
- Program Psychologist: March 7, 2024
- Evaluator: March 12, 2024