

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

State-Level Complaint 2019:510
Cherry Creek School District

DECISION

I. INTRODUCTION

The mother and father (“Parents”) of a student (“Student”) identified as child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ initiated this action against Cherry Creek School District (“District”) through a state-level complaint (“Complaint”) properly filed on Student’s behalf by legal counsel (“Student’s Attorney”) on Wednesday, February 20, 2019.

The State Complaints Officer (“SCO”) determined that the Complaint identified two 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. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

II. RELEVANT TIME PERIOD

The Colorado Department of Education (“CDE”) has the authority to investigate alleged violations of the IDEA that occurred not more than one year from the date the Complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, this investigation will be limited to events that transpired no earlier than February 20, 2018 to determine whether or not a violation of IDEA occurred. *Id.* Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

III. COMPLAINT ALLEGATIONS

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

1. Failed to review all relevant information in Student’s file, including the IEP, teacher observations, and relevant information provided by Parents, at a December 17, 2018

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

manifestation determination review (“MDR”), to determine whether his conduct on December 5, 2018 was caused by his disability, in violation of 34 C.F.R. § 300.530(e).

2. Failed to reevaluate Student despite knowledge of repeated and increasing behavioral challenges, since November of 2018, in violation of 34 C.F.R. § 300.303.

IV. FINDINGS OF FACT

After a thorough analysis of the Record as detailed in the appendix attached and incorporated by reference, the SCO makes the following FINDINGS OF FACT:

A. Background

1. Student, a sixteen-year-old currently eligible for special education and related services under the primary category of Intellectual Disability, with a secondary disability of Other Health Impairment and Serious Emotional Disability, is presently enrolled in a neighborhood school (“School”) within District as a sophomore. *Exhibit A*, p. 3. Currently, for reasons outlined in these findings, Student receives educational services through District’s program for expelled students (“Expulsion Program”). *Interviews with Parents and Special Education Teacher*.
2. Student is described as compassionate, charismatic, and resourceful, and by all accounts, he excelled in working with and assisting peers of lower cognitive abilities through School’s Intensive Learning Community (“ILC Program”). *Id.* Academically, he requires individualized instruction in the areas of reading, writing, and math, as well as redirection because he can be impulsive, talkative, and easily distracted. *Id.*; *Exhibit A*, p. 6. Outside of the classroom, Student is characterized by Parents as a “handful,” and thus they do not trust him enough to be unattended, and they “rarely take eyes off him for very long.” *Interview with Parents*.
3. Indeed, Student’s disciplinary record reflects multiple transgressions of District’s *Conduct and Discipline Code* (“Student Code of Conduct”). *Exhibit D*, pp. 23-25. For instance, a first offense violation of District’s *Alcohol and Other Drug Use by Students* policy (“Drug and Alcohol Policy”) on February 24, 2017 resulted in a suspension for Student under the Student Code of Conduct. *Id.* at p. 25. Most recently, District suspended Student on December 5, 2018, and recommended an expulsion review, after a third offense violation of the Drug and Alcohol Policy. *Id.* at p. 39.
4. District set an MDR for December 14, 2018, but instead convened on December 17, 2018 (the “December MDR”) at Parents’ request, and it was then determined that the behavior in question was neither a manifestation of Student’s disability nor a result of School’s failure to implement an individualized education plan (“IEP”) or behavior intervention plan (“BIP”). *Id.* at p. 8; *Exhibit I*, p. 17. An expulsion hearing ensued on February 6, 2019, and Superintendent expelled Student for one calendar year by letter dated February 12, 2019. *Exhibit D*, pp. 3-5.

5. Parents contend that the December MDR did not involve a review of all relevant documentation in Student's file, to which District answers that a full consideration was given to this information, including staff input and observations. *Complaint*, pp. 8-9; *Response*, pp. 4-5. Parents also argue that District failed to reevaluate Student despite notice of "repeated and increasing behavioral problems." *Complaint*, p. 10. District responds that Parents did not request a reevaluation, and that Student's behavior did not warrant one. *Response*, p. 6. The instant dispute thus requires an analysis of Student's behavior, and the December MDR.

B. Student's Behavior and Disciplinary Record

6. On September 10, 2018, School conducted an annual review of Student's IEP (the "September 2018 IEP") and BIP (the "September 2018 BIP"). *Exhibit A*, pp. 16-29; *Exhibit B*, pp. 5-8. The September 2018 BIP, originally based on a functional behavior assessment ("FBA") completed in September 2016, describes Student's struggles with "constant off-task behavior," to include being disruptive during discussions and talking with peers at inappropriate moments of instruction. *Exhibit B*, p. 5; *Exhibit C*, pp. 12-14. Comparable in-class challenges are noted in BIPs dated September 30, 2016 and October 2, 2017, respectively. *Exhibit B*, pp. 9-16.
7. No updates were made to Student's behavior management program as part of the September 2018 annual review, given a lack of any major behavioral changes, with the last modification occurring in February 2017. *Id.* at pp. 5-8; *Exhibit D*, p. 7. A triennial reevaluation is set for September 2019. *Exhibit A*, p. 3. Special Education Teacher, who met Student in August 2018 as a participant in her Math ILC Program, spoke with School Psychologist, who has known Student since the 2017-2018 academic year, prior to this September 2018 annual review to share observations of his behavior and "how well he was doing." *Interview with Special Education Teacher*. Special Education Teacher and School Psychologist also considered whether he still required a BIP as he was not demonstrating any "extreme behaviors." *Id.*
8. For instance, Special Education Teacher reported "very infrequent" instances of "work avoidance" conduct, only around three to four times per month. *Id.* She stated that Student never exhibited "outwardly aggressive" behavior or posed any "verbal issues" in the classroom, adding that it was always more about "getting him back onto track" in terms of focus. *Id.* The behavioral noncompliance typically manifested when Student was "getting started" with an academic task, and has involved, for example, Student standing up to sharpen his pencil and subsequently taking apart the pencil sharpener. *Id.* Student received verbal redirection, one-to-one support, and positive praise when he became distracted. *Id.*
9. Parents equally depicted Student's in-class behaviors as "trouble staying focused and on-task," indicating that he is easily distracted and that he converses with classmates to avoid completing certain academic assignments. *Interview with Parents*. A review of Student's disciplinary record, dating back to the 2016-2017 academic year, reflects just one instance of

“aggressive behavior,” on November 2, 2016, where he threw a chair across the table, hitting another student in the arm as he blocked the chair. *Exhibit D*, p. 26. While Parents’ portrayal corroborates Special Education Teacher’s observations in terms of the frequency and function of Student’s in-class behavior, the concerns raised through the instant Complaint pertain principally to disciplinary actions associated with District’s Student Code of Conduct. *Complaint*, pp. 3-5.

10. On October 1, 2018, School staff discovered Student “vaping” with peers in a bathroom, and a urinalysis returned a positive finding for marijuana. *Exhibit D*, pp. 23, 134. This culminated in a suspension for Student which, at the time, marked a third offense violation of the Drug and Alcohol Policy. *Id.* at pp. 117, 124. The first offense, an alcohol violation noted at FF #3, took place during the 2016-2017 academic year, and the second offense, possession of marijuana, occurred on March 8, 2018, during the 2017-2018 school year. *Id.* at pp. 24-25. The “vaping” conduct in question was found to be neither a manifestation of a disability nor a result of School’s failure to implement the September 2018 IEP or the September 2018 BIP. *Exhibit 5*. District then held an expulsion hearing on October 22, 2018. *Exhibit D*, p. 116.
11. On November 16, 2018, the parties entered into a Settlement Agreement (the “SA”) through which Parents waived all claims of any kind against District, whether known or unknown, through the effective date of the document. *Exhibit M*, pp. 1-2. Pursuant to paragraph five of the SA, District agreed to “revise [Student’s] records to reflect that the October 1 incident was a manifestation of [Student’s] disability because his IEP was not implemented and to assure that his records do not indicate that he was expelled as a result of his alleged conduct on October 1, 2018.” *Id.* at p. 1. Paragraph two provides that District “will conduct an FBA under the supervision of a [Board Certified Behavior Analyst],” and paragraph three reads that District “will convene an IEP team to review and revise, as appropriate, [Student’s] IEP and BIP based on current information, including the updated FBA.” *Id.*
12. To support Student’s November 19, 2018 reentry into School, his revised educational programming included placement in the ILC Program for science and social studies, and the enactment of a “strict supervision plan” to include a School staff escort for classroom transitions and trips to the ILC Program’s restroom. *Exhibit I*, pp. 3-7. Parents signed a *Prior Notice & Consent for Special Evaluation* on November 27, 2018 in order for an outside Board Certified Behavior Analyst (“BCBA”) to complete the FBA agreed upon in the SA. *Exhibit F*.
13. The BCBA arrived at School on December 5, 2018 to assess Student, however, that same morning School staff found him in possession of marijuana, drug paraphernalia, and a razor blade. *Exhibit D*, pp. 61, 79. The episode transpired after Student had requested to use the bathroom, and Paraprofessional had subsequently escorted him to the ILC Program’s self-contained restroom per the reentry plan. *Id.* at pp. 57-58. Prior to asking to use the restroom, ILC Science Teacher noted in a written statement that Student “was not upset and was happy working and helping others.” *Id.* at p. 57. This event constituted a third offense violation of

the Drug and Alcohol Policy, and ended with a suspension for Student. *Id.* at p. 39. It also necessitated the December MDR detailed earlier at FF #4, now wholly considered by the SCO.

C. The December 2018 MDR

14. Parents, Student, Student's Attorney, a second attorney for Student, Manifestation Coordinator, Special Education Teacher, School Psychologist, Dean, Assistant Principal, Director of Secondary Special Education, Speech Language Pathologist, and District's Attorney, collectively the manifestation determination team (the "MDT"), participated in the December MDR. *Id.* at p. 12. The December MDR lasted approximately three hours, and started with Manifestation Coordinator, who has twelve years of related facilitation experience, handing each MDT member a meeting agenda to guide the discussion. *Interviews with Parents and Manifestation Coordinator.*
15. The SCO finds, based on the December MDR documentation, as substantiated by Manifestation Coordinator's contemporaneously handwritten notes, that the MDT reviewed the full complement of information in Student's file. *Exhibit D*, pp. 7-9; *Exhibit N*, pp. 1-2. For instance, the MDT considered the events of December 5, 2018 which led to disciplinary action against Student. *Id.* This detailed discussion included the context of events preceding Student's behavior and a hypothesis for the behavior, as well as a review of written statements from Security Officer, Dean, ILC Science Teacher, Health Technician, Nurse, Special Education Teacher, Paraprofessional, and Student. *Exhibit D*, pp. 7-9, 13, 17, 55-62.
16. The December MDR documentation highlights specifics from December 5, 2018 in isolation, to include: Student requesting to use the ILC Program restroom; Paraprofessional escorting Student to and from the ILC Program restroom; a School nurse contacting Dean to report an odor of marijuana in the ILC Program restroom; Dean smelling an odor of marijuana in the ILC Program classroom; the search of Student's backpack uncovering two pill bottles, one containing marijuana and the other containing a razor blade, glass pipe, and remnants of a "newer form" of THC; and Student's account of what had occurred. *Id.* at p. 7. The MDT considered Student's explanation as follows: "he was given a bag from another student. He went to the bathroom and placed the bag in his backpack. He then went to his first class. He asked to use the restroom and was escorted by a staff where he opened the container." *Id.*
17. Parents allege that the MDT referred to the October 1, 2018 incident as a "third strike" and the December 5, 2018 incident as the "fourth strike," in violation of the SA. *Reply*, p. 5. However, the December MDR documentation and Manifestation Coordinator's notes classify the December 5, 2018 event as a "third offense." *Exhibit D*, pp. 7-9; *Exhibit N*, pp. 1-2. While paperwork related to an agreement for Student to complete a substance abuse assessment is titled "Fourth Offense," the SCO finds that, through a consideration of Student's disciplinary record during the December MDR, the MDT noted that the February 24, 2017 and March 8, 2018 occurrences constituted first and second offenses, respectively. *Id.*; *Exhibit 10*, p. 2.

18. Parents also assert that the MDR failed to consider paragraph five of the SA, previously outlined at FF #11, specifically that “substantially similar conduct that occurred just two months prior to the conduct at issue in the hearing was a manifestation of [Student’s] disability. . . .” *Reply*, p. 3. While Parents stated that the at-issue behavior in October and December was identical, and there was some discussion about a “pattern of behavior relevant to drug and alcohol use,” the MDT focused primarily on the most recent disciplinary removal as it did not discuss the October, 1 2018 violation in detail or use it to reach the ultimate determination. *Interviews with Parents and Manifestation Coordinator*.
19. The MDT considered the September 2018 IEP, to include Student’s disabilities, direct instruction hours, annual goals, and “adjustments . . . made to support [Student in November 2018] by having a schedule made to have [Student] in all ILC classes, having direct supervision, being escorted to classes and to use the Clinic restroom.” *Exhibit D*, pp. 7-9; *Exhibit N*, pp. 1-2. For example, the September 2018 IEP includes a goal that “[Student] will be able to analyze how decision making skills improves academic performance and social situations,” and the MDT contemplated that Student sometimes makes “poor choices.” *Id.*; *Exhibit A*, p. 23. The MDT, though, “established . . . pre-knowledge from [Student] and an intentional hiding” of the drugs and paraphernalia later found in his possession through the “multiple sequential steps” he took on December 5, 2018. *Interview with Manifestation Coordinator*.
20. Parents assert that the MDT failed to consider an IEP at all, and at the same time, that it improperly considered the September 2018 IEP. *Complaint*, pp. 6-8. Although the SA indicates the September 2018 IEP was not implemented with respect to the October violation, the SCO finds no evidence that District failed to implement the September 2018 IEP between November 16 and December 5. *Interview with Special Education Teacher*. District adjusted Student’s educational programming in November, as demonstrated in part by Paraprofessional escorting Student to the restroom on December 5, and moreover, by the December MDR, there had not been an opportunity to review and revise the September 2018 IEP as the violation occurred on the same date as the scheduled FBA. *Exhibit D*, pp. 61, 79.
21. The MDT contemplated the September 2018 BIP, as indicated by references to Student’s “off-task” and “work avoidance” behaviors, and diagnoses of anxiety and PTSD. *Id.* at pp. 7-9; *Exhibit N*, pp. 1-2. The SCO finds, based on Manifestation Coordinator’s notes, that the MDT also reviewed relevant assessment data, primarily from the most recent reevaluation of September 2016, such as Student’s intelligence quotations of “79” and “71,” in addition to a Vineland Adaptive Behavior Scales score of “80.” *Exhibit N*, p. 1; *Interview with Manifestation Coordinator*. The MDT discussed Student “making progress” in terms of behavior within the classroom, as observed by Special Education Teacher, but Parents reported “growing concerns on the home front.” *Interview with Manifestation Coordinator*.

22. Manifestation Coordinator prompted Parents for relevant information during the December MDR, and they provided knowledge on Student's PTSD and struggles with short-term memory. *Exhibit D*, pp. 7-9. Parents added that Student's "anxiety affects him . . . by wanting to self-medicate," and that Student "does not connect actions with consequences." *Id.* The MDT asked Parents questions, to include clarification of Student's current medicinal regimen used to address anxiety. *Interview with Parents*. Parents communicated to the SCO that while they have been able to provide input at "every meeting," their contributions were "disregarded" both during the December MDR and the MDR held in October 2018. *Id.* Contrarily, the SCO finds that the MDT did not ignore Parents' input at the December MDR as it was noted that they also indicated Student "lacks cause and effect, needs repeated prompts, [and] has increased frustration and anxiety." *Exhibit D*, pp. 7-9; *Exhibit N*, pp. 1-2.
23. Though not alleged in the Complaint or the Reply, Parents told the SCO that the MDT failed to consider the BCBA's FBA and final report, which they assert School had in its possession by December 8, 2018. *Interview with Parents*. Parents did not present any evidence to support this position, and the SCO finds that Speech Language Pathologist informed Parents by e-mail on November 29, 2018, prior to the events of December 5, 2018, that "we need the month of December to complete a thorough FBA . . ." *Exhibit I*, p. 15. Additionally, Student was not interviewed by the BCBA until December 11, 2018, and the FBA and corresponding final report were not issued until January 11, 2019. *Exhibit C*, pp. 1-8.
24. The MDT further considered teacher observations during the December MDR. *Id.* School Psychologist, who does "push into" the classroom for some of School's affective needs education, shared the opinion that "anxiety [was] not driving" Student's decision-making on December 5, 2018. *Id.*; *Interview with Manifestation Coordinator*. Special Education Teacher's feedback centered on "work avoidance" within the classroom, but did not include significant disciplinary or office referrals, as she noted that Student was "compliant." *Exhibit D*, pp. 7-9; *Exhibit N*, pp. 1-2. When questioned by the SCO regarding her comment that Student's "behavior had been different leading up to the [December 2018] incident," Special Education Teacher responded that he exhibited "difficulty in starting assignments" and "more distraction" but not any "extreme defiance." *Id.*; *Interview with Special Education Teacher*.
25. Special Education Teacher added that while she was aware of Student's disciplinary record at the start of the academic year, his behavior never elevated to a level requiring a reassessment. *Interview with Special Education Teacher*. Bolstered by twenty five years of experience in education, the majority of which she spent instructing students with intellectual disabilities and behavior disorders, she cited severe changes in mood or behavior, such as becoming "erratic" or "outright defiant," to include throwing objects or engaging in verbal and physical altercations, as indicators that a reevaluation may be necessary. *Id.* In Student's case, she explained, he did not display any of these behaviors, or behaviors different from those identified in the September BIP, which can also be a signal for reassessment. *Id.*

26. The MDT sought, but did not receive, input from Student. *Interviews with Manifestation Coordinator and Parents*. In a written statement from December 5, 2018, he did not articulate any anxieties experienced prior to, or during, the events leading to the disciplinary action. *Exhibit D*, p. 55. Overall, the SCO finds that the MDT used this statement, and the entirety of the aforementioned information, to consider a potential connection between Student's disability and the misconduct. Manifestation Coordinator recalled with specificity that the MDT "talked about self-medicating" and Student's "tendencies toward work avoidance and sometimes making poor choices" as they relate to the "very thoughtful sequence of events" ending in suspension here. *Interview with Manifestation Coordinator*. He reiterated that the disability in question is always "operationalized by the IEP," and that within the purview of Student's educational programming, his "IEP is largely written in the context of instruction and the classroom . . . [such as] on-task vs. off-task behavior." *Id.*
27. The MDT determined the incident was not directly and substantially caused by Student's disability, and while it considered whether his actions were "impulsive and emotionally" driven, the MDT found that he acted intentionally. *Exhibit D*, pp. 7-9; *Interview with Manifestation Coordinator*. The MDT also determined that the September IEP and the September BIP were appropriately implemented during the relevant timeframe. *Id.* Ultimately, the MDT concluded that the behavior leading to the disciplinary removal was not a manifestation of Student's disability. *Exhibit D*, p. 45. Parents received a copy of the *Procedural Safeguards* at the December MDR, and *Prior Written Notice* the following day. *Id.* at p. 9. District then provided Parents with notice of the impending expulsion review hearing for Student, initially scheduled for January 16, 2019 but later moved to February 6, 2019 to accommodate schedules, by letter dated January 18, 2019. *Id.* at pp. 37-38; *Response*, p. 3.

D. The January 2019 FBA and the Expulsion

28. As detailed at FF #4, Student's expulsion took effect on February 12, 2019, at which point District offered educational services through its Expulsion Program. *Exhibit D*, at p. 6. Prior to entering the Expulsion Program on March 27, 2019, Student received homebound educational programming. *Interviews with Special Education Teacher and Parents*. During this period, the BCBA completed an FBA and finalized its report on January 11, 2019 (the "January 2019 FBA"). *Exhibit C*, pp. 1-8. An IEP Team convened on March 8, 2019 to review the corresponding results, to review and revise the September 2018 IEP and the September 2018 BIP as needed, and to discuss Expulsion Program services. *Exhibit G*, pp. 7-8. This meeting took place in March, and not earlier, given scheduling conflicts and matters related to Student's disciplinary proceedings, to include the February 6 expulsion hearing and the March 5 expulsion appeal hearing. *Interview with Special Education Teacher; Exhibit I*, p. 22.
29. The data gathered from the January 2019 FBA shows that Student's "drug usage may be primarily maintained by automatic reinforcement in the form of sensory stimulation, and secondarily maintained by social reinforcement in the form of escape from non-preferred activities or attention/access to preferred items." *Exhibit C*, p. 3. The IEP Team used this

finding and the full January 2019 FBA, including the summary statement that Student “may engage in non-compliance” when “told to complete a non-preferred task or activity,” to amend the September 2018 BIP. *Exhibit A*, p. 1; *Exhibit B*, pp. 1-4; *Exhibit C*, p. 2; *Interviews with Special Education Teacher and Parents*. For example, the modifications include reactive procedures to target “Drug Usage and/or Possession on School Grounds.” *Exhibit C*, p. 7.

30. The IEP Team also amended the September 2018 IEP, to now include the addition of transportation and more intensive supervision. *Exhibit A*, p. 1; *Interview with Special Education Teacher*. Special Education Teacher added that, in addition to the Expulsion Program’s math and English curriculum, Student will receive science and social studies work from School staff to complete, and that Expulsion Program staff will provide mental health support and monitor Student’s behavior through the updated BIP. *Interview with Special Education Teacher*. District intends for Student, upon completion of the Expulsion Program, and if granted early readmission, to return to School on August 12, 2019. *Id.*; *Exhibit D*, p. 5.

V. CONCLUSIONS OF LAW

Based on the FINDINGS OF FACT set forth above, the SCO enters the following CONCLUSIONS OF LAW:

Conclusion to Allegation No. 1: District, Parents, and pertinent members of the MDT considered all relevant information in Student’s file, including the September 2018 IEP, teacher observations, and parental input, throughout the properly convened December 2018 MDR.

The first allegation introduced through the instant Complaint challenges the sufficiency of the documentation review performed during the December MDR. *Complaint*, pp. 8-9. Parents contend that the MDT failed to consider all relevant information in Student’s file regarding the potential relationship between the misconduct of December 5, 2018 and his disability. *Id.*

An MDR examines whether a child’s misconduct was directly and substantially related to the child’s disability, and must be performed within ten days of “any decision to change the placement of a child with a disability because of a violation of a code of student conduct” 34 C.F.R. § 300.530(e)(1). A change of placement occurs if a disciplinary removal is for more than ten consecutive school days, to include an expulsion, or if the child has been subjected to a series of disciplinary removals that constitutes a pattern. 34 C.F.R. § 300.536.

Here, having decided that the proposed disciplinary measures resulting from the December 5, 2018 incident would change Student’s placement, District scheduled an MDR for December 14, 2018, as noted at FF #4. The MDT properly conducted the December MDR on December 17, 2018, outside of the IDEA’s ten-day window but at Parents’ request. The SCO does not find, and Parents did not pose, any related procedural irregularities with respect to the December MDR.

As part of an MDR, the IDEA requires the school district, parents, and relevant members of the MDT to “review all relevant information in the [child’s] file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents” 34 C.F.R. § 300.530(e)(1). The list of relevant information that may be reviewed by the MDT at an MDR is not exhaustive. *71 Fed. Reg. 156, 467190* (August 14, 2006). “All the statute requires is that, before reaching a manifestation determination, the team must review the information pertinent to that decision” *Fitzgerald v. Fairfax Cnty. Sch. Bd.*, 556 F. Supp. 2d 543, 559 (E.D. Va. 2008).

In this case, District concluded that the conduct on December 5, 2018 was not a manifestation of Student’s disability, or a consequence of School’s failure to implement an IEP or BIP, and that Student acted with intent rather than impulsivity prior to and during the incident. As recorded at FF #14-27, a knowledgeable and properly convened MDT reached the result through a thorough review of the conduct in question and all of the relevant information in Student’s file.

The documentation and Manifestation Coordinator’s handwritten notes from the December MDR show that the MDT reviewed specifics of the incident in question, and considered the context of events preceding the conduct and a hypothesis for the behavior. For instance, Parents at FF #22 stated that Student’s “anxiety affects him . . . by wanting to self-medicate.” The MDT discussed various written statements regarding the incident, and as recounted at FF #16 and #26, found no evidence that Student was feeling anxious or overwhelmed on December 5, 2018. As detailed at FF #19 and #26-27, the MDT determined that Student’s conduct was calculated.

In considering the individual circumstances of the incident alongside Student’s disability, the MDT did not undertake “a generalized discussion about the types of behavior associated with [his] particular disability.” *Bristol Twp. Sch. Dist. v. Z.B.*, 67 IDELR 9 (E.D. Pa. 2016) (holding that an MDT violated the IDEA when it took a “global” approach to deciding whether a teenager’s ADHD played any role in his alleged physical assault of a teacher). To illustrate, the MDT here did not ignore information that would suggest Student’s disabilities could manifest in behavior inconsistent with District’s Drug and Alcohol Policy, such as explanations from Parents as to how PTSD affects Student’s anger and anxiety, noted at FF #21-22. The MDT also devoted customized consideration to Student’s specific decision-making abilities, and the frequency and intensity of related behaviors or results, as opposed to a uniform discussion about typical traits associated with Intellectual Disability, Other Health Impairment, and Serious Emotional Disability.

The MDT here, taken as a whole, had a sufficient and personal knowledge of Student’s behaviors and difficulties within the educational setting to reach its determination during the three-hour December MDR. The MDT contemplated in detail the nature of Student’s behavioral challenges, primarily manifesting as “off-task” and “work avoidance” classroom conduct, as noted at FF #21. Manifestation Coordinator at FF #18 stated the MDT considered, but rejected, the notion that the at-issue misconduct represented a pattern of similar behavior consistent with Student’s disability through the MDT’s acknowledgement of “vaping” events from October 1, 2018.

The MDT reviewed Student's September 2018 IEP, educational programming, interventions, and categories of disability, at FF #19. Again, Parents added input pertaining to diagnoses of anxiety and PTSD at FF #22, and this information helped to inform whether Student's misconduct on December 5, 2018 was "impulsive and emotionally" driven, as described by Manifestation Coordinator at FF #27. The MDT received information from Special Education Teacher and School Psychologist, and as detailed at FF #24-25, this conversation went beyond "[m]erely reading [the] reports . . . to meeting participants without discussing it or considering it as part of the determination" *In re: Student with a Disability*, 52 IDELR 239 (SEA WV 2009). School Psychologist and Special Education Teacher each delivered statements based on observations obtained over the course of the 2017-2018 and 2018-2019 academic years, per FF #7.

Parents at FF #17-18 contend that District violated the SA, and that the MDT did not consider the relevant information within the SA. The IDEA allows for parties to voluntarily engage in mediation to reach a resolution agreement, and provides for enforceability of properly executed agreements in state and district courts. 34 C.F.R. §§ 300.152(a)(3)(ii) and 300.506(b)(7). The IDEA and its implementing regulations found at 34 C.F.R. § 300.1, *et seq.*, though, do not address whether hearing officers have the authority to enforce private settlement agreements reached by parties outside of the IDEA's mediation and resolution processes. Instead, a state has the discretion to impose its own rules relating to a hearing officer's authority, or lack thereof, to review and enforce settlement agreements reached outside of the IDEA's mediation or resolution processes in the absence of controlling case law. *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Educ. Act (Part B)*, 61 IDELR 232 (OSEP 2013).

The ECEA Rules in Colorado do not establish any associated enforcement mechanisms or procedures for SCOs. Thus, to the extent Parents alleged violations of the SA here, the SCO concludes that Colorado's state-level complaint process is not the appropriate forum for any party to seek enforcement of, or assert a breach related to, a settlement agreement. Furthermore, whereas Parents here maintain that the MDT failed to consider certain provisions of the SA at FF #18, neither the ECEA Rules nor controlling case law show that the terms of a settlement agreement must be considered by an MDT in making a manifestation determination.

Even taking Parents' argument outside of the four corners of the SA, precisely that the MDT failed to consider prior implementation of Student's IEP and that he required a new FBA, as set forth at FF #20 the SCO concludes "there was an insufficient amount of time to collect data, review, and revise" Student's IEP and BIP as only nineteen days had elapsed between execution of the SA on November 16, 2018 and December 5, 2018, the date of the scheduled FBA and Student's misconduct. *See Columbus City School District*, 115 LRP 37927 (SEA OH 2015) (holding that because a school district was presently reviewing and revising a student's current BIP in the wake of an MDR when another MDR was held it could not be found in violation of the IDEA for failure to modify the BIP). Moreover, as in *Columbus City School District*, where the school district incorporated supports into the student's most recent IEP as it revised a BIP, District here amended Student's educational programming ahead of his November 19, 2018 return to School.

Finally, it is undisputed, based on FF #22, that the MDT solicited and received information from Parents during the December MDR. The documentation and Manifestation Coordinator's notes reflect that Parents, in addition to contributions regarding anxiety and PTSD, added information about Student's medications, lack of "cause and effect," and inability to "connect actions with consequences." The SCO concludes their input was not "disregarded," but instead that Parents dissented from the MDT's decision that Student's conduct was not directly and substantially related to his disability, or a result of School's failure to implement his IEP or BIP.

Consequently, the MDT having thoroughly considered all pertinent information in Student's file, to include teacher observations and Parents' contributions, the SCO concludes that District satisfied the IDEA's requirement for information to be contemplated during the December MDR.

Conclusion to Allegation No. 2: Student's behavior did not warrant a reevaluation prior to the triennial reassessment scheduled for September 2019, and District timely commenced and completed an agreed-upon FBA pursuant to terms of a November 2018 settlement agreement.

The second allegation presented through the instant Complaint raises the issue of whether Student's behavior necessitated an IDEA reevaluation, based on information known to District as early as November 2018. *Complaint*, p. 10. Parents maintain that Student's "repeated and increasing behavioral problems" placed District on notice that he should be reevaluated. *Id.*

The IDEA provides for periodic reevaluations to be performed not more frequently than once per year, unless the parent and school district agree otherwise, and requires that reevaluations be conducted at least once every three years, unless the parent and school district agree that one is not necessary. 34 C.F.R. § 300.303(b). A reassessment must be conducted if warranted by a child's educational or related service needs, or upon parental request. 34 C.F.R. § 300.303(a).

Here, FF #6 and #21 demonstrate that District most recently reevaluated Student, to include the development of an FBA, in September 2016. The SCO found no evidence that Parents requested a reevaluation between September 2016 and the filing of the instant Complaint on February 20, 2019, and thus this analysis shall focus on whether Student's behavior mandated reassessment.

In light of *Andrew F. v. Douglas County School District RE-1*, 69 IDELR 174 (U.S. 2017), it is especially important for school districts to monitor students and be alert to indications that a child needs to be reevaluated, even when a triennial evaluation is not due and even when the parent has not requested a reevaluation, to ensure an IEP continues to be reasonably calculated to enable the child to make progress that is appropriate in light of the child's circumstances. See also *Questions and Answers on Andrew F. v. Douglas County Sch. Dist. Re-1*, 71 IDELR 68 (EDU 2017). Relevant to Parents' position here, a significant escalation in a child's behavior is one such circumstance that may require a reevaluation. *West-Linn Wilsonville School District v. Student*, 63 IDELR 251 (D. Ore. 2014); See also *San Marino Unified Sch. Dist.*, 71 IDELR 138 (SEA CA 2017).

In *West-Linn Wilsonville School District*, a school district had “clear notice of the need for a reevaluation” based on a student’s increasing physically aggressive and violent behavior within the classroom. This included the child punching, shoving, and using threatening gestures. *Id.* In *San Marino Unified Sch. Dist.*, a “clear-cut deterioration” of a student’s in-school behaviors undermined a school district’s claim that it was not required to conduct a reevaluation. There, after a student underwent several brain surgeries, his “physical aggression, emotional outbursts, and inappropriate sexual conduct significantly increased in frequency and severity. . . .” *Id.*

Student’s disciplinary record in the instant matter, dating back to the 2016-2017 academic year, shows only one incident of “aggressive behavior” in November 2016, as detailed at FF #9. From that point forward, his disciplinary file is without instances of violence, physical aggression, or other threatening behavior within the classroom. Special Education Teacher and Parents, at FF #8-9, collectively described Student’s behavioral challenges as “work avoidance” and “trouble staying focused.” Special Education Teacher observed Student to be generally “compliant” within her classroom at FF #24, and his behavior management strategies since 2016, noted at FF #6, are designed to address “off-task” behavior and inattention. Student’s disciplinary history, though, details various violations of the Student Code of Conduct, with the first three set forth at FF #10.

On February 24, 2017, during the 2016-2017 academic year, Student incurred a first offense violation of the Student Code of Conduct for possession and consumption of alcohol at School. On March 8, 2018, during the 2017-2018 school year, Student received a second offense violation of the Student Code of Conduct for possession of marijuana on School grounds. On October 1, 2018, during the 2018-2019 academic year, Student earned a third offense violation of the Student Code of Conduct for marijuana use at School. District determined at an October 2018 MDR that the conduct was not a manifestation of Student’s disability, or a result of School’s failure to implement an IEP or BIP.

As detailed at FF #11, Parents and District staff signed the SA on November 16, 2018, with paragraph five therein providing that District would “revise [Student’s] records to reflect that the October 1 incident was a manifestation of [Student’s] disability” Therefore, when Student at FF #13 was discovered in possession of marijuana and related paraphernalia on December 5, 2018 at School, District addressed this situation as a third offense violation of the Student Code of Conduct. As part of the SA, at FF #11, District also agreed to “conduct an FBA under the supervision of a [BCBA].” District set the FBA for December 5, 2018, only nineteen days after execution of the SA, two of which included School’s Thanksgiving break on November 22-23, 2018. A BCBA accordingly arrived at School on December 5, 2018 to assess Student.

Given the contemporaneity of the scheduled FBA and the events leading to disciplinary action, the BCBA did not complete the FBA on the morning of December 5, 2018. Nonetheless, as reflected at FF #28, the January FBA was completed and finalized under the supervision of the BCBA. The IEP Team, at FF #28-30, reconvened on March 8, 2019 to consider the results, and to review and revise the September 2018 IEP and the September 2018 BIP for Student as necessary.

Based on the entirety of the evidence in the Record, the SCO concludes that these circumstances did not warrant a reevaluation of Student pursuant to 34 C.F.R. § 300.303(a)(1). Specifically, even over the course of the three most recent academic years, there was no significant escalation in Student's behavior within the classroom to trigger a reassessment. *West-Linn Wilsonville School District v. Student*, 63 IDELR 251 (D. Ore. 2014); *See also San Marino Unified Sch. Dist.*, 71 IDELR 138 (SEA CA 2017). Essentially, there is no indication that Student's behaviors, such as "work avoidance" and "off-task" conduct, were inconsistent with Student's diagnoses or the areas targeted by Student's educational programming. *See Bell v. Board of Educ. of Albuquerque Public Schools*, Civ. No. 06-1137 JB/ACT, 2008 WL 5991062 (D.N.M. Nov. 28, 2008) (recognizing a duty to reevaluate where confronted with evidence that behavior was inconsistent with his diagnosis).

Although the three official Student Code of Conduct violations culminated in the expulsion detailed at FF #4, these events transpired infrequently across three academic years, on February 24, 2017, March 8, 2018, and December 5, 2018, and the conduct contravening the Drug and Alcohol Policy was disconnected from behavioral noncompliance observed in the classroom. The SCO acknowledges the events of October 1, 2018, but also recognizes the relevant time period accepted for investigation requires an analysis of District's "clear notice of the need for a reevaluation" as of November 2018. *West-Linn Wilsonville School District v. Student*, 63 IDELR 251 (D. Ore. 2014).

Following entry of the SA on November 16, 2018, District expeditiously identified a BCBA and initiated the FBA, all within nineteen days. Based in large part on the timing of Student's most recent transgression of December 5, 2018, the updated FBA was not completed within the anticipated timeframe. Ultimately, it was finalized on January 11, 2019, and the IEP Team thereafter reconvened on March 8, 2019. Student received homebound educational instruction between December 5, 2018, and March 27, 2019, the date he entered the Expulsion Program. Given the state of affairs here, to also include proceedings and appeals related to Student's expulsion, and the fact that the IDEA does not set a calendar deadline for completing reevaluations, the SCO finds that District undertook and completed the January FBA within a reasonable period of time following the execution of the SA.

Thus, also finding that Student's triennial reevaluation is slated for September 2019, the SCO concludes that District here did not violate its obligations to Student under 34 C.F.R. § 300.303.

VI. REMEDIES

The SCO finds and concludes that District did not violate any requirements of the IDEA. Accordingly, there are no remedies ordered pursuant to the IDEA and my authority as an SCO.

VII. 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. *Id.*; *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 19th day of April, 2019.

Brandon Edelman, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1-13

- Exhibit 1: Psychological Evaluation
- Exhibit 2: BIPs
- Exhibit 3: IEP
- Exhibit 4: Disciplinary Record
- Exhibit 5: MDR dated October 5, 2018
- Exhibit 6: Summary of October 1, 2018 Incident
- Exhibit 7: Settlement Agreement
- Exhibit 8: Notice of Suspension/Recommendation for Expulsion dated December 5, 2018
- Exhibit 9: Statement of Manifestation dated December 17, 2018
- Exhibit 10: District Alcohol or Drug Use Violation, Fourth Offense Form

Response, pages 1-6

- Exhibit A: IEP Documentation
- Exhibit B: BIP Documentation
- Exhibit C: FBA Documentation
- Exhibit D: Disciplinary-Related Documentation
- Exhibit E: Prior Written Notice Documentation
- Exhibit F: Consent for Special Evaluation
- Exhibit G: Notice of Meeting Documentation
- Exhibit H: Grade and Progress Reports
- Exhibit I: Correspondence
- Exhibit J: District Policies
- Exhibit K: Witness/Staff List
- Exhibit L: USPS Delivery Notification
- Exhibit M: Settlement Agreement
- Exhibit N: Notes from the December MDR and SEL Rubric

Reply, pages 1-9

Telephonic Interviews

- Manifestation Coordinator: March 19, 2019
- Special Education Teacher: March 19, 2019
- Parent: March 20, 2019