

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

**State-Level Complaint 2022:514
El Paso County School District 20**

DECISION

INTRODUCTION

On April 6, 2022, the parent (“Parent”) 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 El Paso County School District 20 (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified seven 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. 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 April 6, 2021 through April 6, 2022 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to properly implement Student’s IEP, in violation of 34 C.F.R. § 300.323, specifically by:
 - a. Failing to provide Student the mental health services required by his IEP between September 14, 2021 and December 9, 2021;

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.

- b. Failing to follow Student’s Behavior Intervention Plan (“BIP”) on December 9, 2021.
2. Failed to develop, review, and revise an IEP that was tailored to Student’s individualized needs from September 9, 2021 to present, in violation of 34 C.F.R. § 300.324, specifically by:
 - a. Failing to include behavioral strategies and supports that adequately addressed Student’s behavioral needs.
3. Improperly determined that Student’s behavior was not a result of the District’s failure to implement his IEP during the manifestation determination review (“MDR”) held on January 4, 2022, in violation of 34 C.F.R. § 300.530(e)(1).
4. Failed to either conduct a functional behavioral assessment or review Student’s behavior intervention plan (“BIP”) and modify it as necessary to address Student’s behavior, after determining that Student’s conduct was a manifestation of his disability during the MDR held on January 4, 2022, in violation of 34 C.F.R. § 300.530(f)(1).
5. Failed to conduct manifestation determinations within ten school days of the District’s decisions on or about January 26, 2022 and March 1, 2022 to change Student’s placement, in violation of 34 C.F.R. § 300.530(e).
6. Failed to properly determine Student’s eligibility for special education and related services under the disability category of Autism Spectrum Disorder in February 2022 because the District failed to conduct a comprehensive reevaluation in all areas of suspected disability, in violation of 34 C.F.R. §§ 300.304-305, specifically by:
 - a. Failing to consider existing evaluation data, including classroom-based observations, observations by teachers, and information provided by Parent, in violation of 34 C.F.R. § 300.305(a).
7. Failed to make an individualized determination, when reviewing Student’s IEP, of Student’s need for compensatory mental health services on or around March 2, 2022, in violation of 34 C.F.R. § 300.324, specifically by:
 - a. Failing to consider parental input or student-specific data.

FINDINGS OF FACT

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

A. Background

1. Student attended seventh grade at a District middle school (“School”) for the majority of the 2021-2022 school year, before transferring to another District middle school (“New School”) in March 2022. *Interview with Parents.*
2. During the 2021-2022 school year, Student qualified for special education and related services under the disability category of Serious Emotional Disorder (“SED”). *Exhibit A, p. 2.*
3. Student is a smart, personable young man with a great sense of humor. *Interviews with Affective Needs Teacher, Paraprofessional, and Parents.* He enjoys creative activities, drama, and video games. *Id.* Student struggles to regulate his emotions, often becoming frustrated during transitions or when he was feeling embarrassed. *Id.* Though Student is very outgoing, building ongoing relationships with peers is challenging for Student. *Interview with Parents.*

B. Student’s IEP and BIP

4. At the beginning of the 2021-2022 school year, Student’s IEP dated April 7, 2021 (“IEP”) was in effect. *See Exhibit A, pp. 2-23.*
5. The section of the IEP regarding present levels of performance indicated that Student had made progress on his prior IEP annual goals (though he had not yet met those goals) and was receiving A’s and B’s in his academic classes. *Id.* at p. 5.
6. According to the IEP, Student’s struggles with emotional regulation as a result of his disability affected his ability to make progress in general education. *Id.* at pp. 6-7.
7. The IEP contained two annual goals:
 - **Emotional Regulation:** “By the end of the IEP year, when [Student] becomes upset, frustrated, or angry, he will use self-regulation and coping strategies (fidgets, movement breaks (when safe), deep breathing, quiet space break, cognitive exercises, etc.) to avoid engaging in an unexpected behavior, with two reminders, on 4 out of 5 opportunities, as measured by observations and documentation.”

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

- Mental Health: “In counseling sessions, by the end of the IEP year, [Student] will increase his emotional vocabulary and awareness by accurately identifying multiple feelings and appropriate coping strategies when presented with real or imagined situations with 80% accuracy on 4 out of 5 trials.”

Id. at p. 13.

8. The IEP did not indicate that Student needed a modified curriculum but listed numerous accommodations, such as use of short breaks, access to a safe space to express his feelings, and clear and consistent expectations. *Id.* at p. 14.
9. The IEP required Student to receive the following special education and related services:
 - Specialized Instruction: 425 minutes per week of support in the affective needs classroom for academic, emotional, and behavioral needs provided by the affective needs teacher or paraprofessional;
 - Mental Health Services: 200 minutes per month of direct mental health services provided by the school mental health provider outside the general education classroom; and
 - Special Transportation: 60 minutes per day of special transportation to and from School.

Id. at p. 17.

10. Under the IEP, Student spent at least 40-79% of his time in the general education environment. *Id.* at p. 18.
11. The IEP contained Student’s Behavior Intervention Plan (“BIP”) *Id.* at pp. 10-11. The BIP was based on a functional behavior assessment (“FBA”) from 2017, as well as input from Student’s sixth grade teachers and classroom observations from sixth grade. *Id.* at p. 10.
12. The BIP targeted the emotional dysregulation Student experienced when he became overwhelmed, noting:
 - “When [Student] is overwhelmed he will engage in task avoidance behaviors (i.e. saying unkind words to self or others, scratching self, crying, unresponsive to adult directions, eloping) in order to escape the environment.”
 - “[Student] can become overwhelmed due to sensory needs, misunderstanding of social cues, difficult[] academic tasks (writing), or from perceived injustice. Once

de-escalated, [Student] is able to clearly articulate why he demonstrated avoidan[ce] behaviors and quickly process through the scenario; extra or long process conversations tend to re-escalate him.”

- “When [Student] is overwhelmed he will sometimes make unsafe statements; i.e. ‘I wish I were dead’, ‘I’d be better off dead’, ‘I want to kill myself’. These statements are recognized to be part of his disability but should be addressed appropriately taking the setting and environment into consideration when [Student] does make these statements.”

Id. at p. 10.

13. The BIP outlined setting event strategies, such as use of visuals, flexible seating, and access to breaks, designed to reduce the impact of setting events. *Id.*
14. Listed antecedent strategies designed to reduce the likelihood of the target behaviors included use of when/then statements, allowing processing time for difficult tasks, and offering choices (both for classroom work and for coping strategies). *Id.*
15. The BIP also included behavior teaching strategies, such as modeling instruction in social skills, self-regulation, and conflict resolution and use of daily point sheets. *Id.*
16. As reinforcement strategies, the BIP identified rewards from daily points, increase in positive adult/peer relationships, and increase in classroom participation. *Id.*
17. At the beginning of the 2021-2022 school year, a safety plan dated April 30, 2021 was in effect. *Exhibit S*, pp. 17-19. The safety plan required Student to be supervised at all times and to be escorted to and from all classes. *Id.* at p. 17. Under the safety plan, Student was prohibited from using a computer or accessing the internet at School. *Id.* at p. 18. This prohibition stemmed from Student’s response to use of computers during sixth grade. *Interviews with Affective Needs Teacher and Parents*. Student struggled to stay on task on the computer and became dysregulated when transitioning away from the computer. *Id.* This behavior persisted during the 2021-2022 school year. *Id.*
18. Despite Student’s disability, the safety plan required Student to agree that he would “not engage in any threatening or acting out behaviors either verbally or physically.” *Id.* at p. 18.
19. The District utilizes safety plans for both general education and special education students. *Interview with Director of Special Education (“Director”)*. A safety plan seeks to ensure the safety of the student, his or her classmates, and District staff. *Id.* The District reviews safety plans at regular intervals, although the length of the interval depends on the individual student. *Id.*

20. Student also had an escalation cycle management plan outlining how staff should respond when Student became escalated. *Exhibit S*, p. 20. The escalation cycle management plan, dated March 3, 2021, identified four events that regularly triggered escalation:

- When asked to stop computer use based on expectations not being followed;
- When asked to do a non-preferred task;
- When Student perceived that peers do not like him or are being mean to him; and
- When Student was dysregulated at home prior to the school day.

Id. The plan described Student's behaviors at various levels of escalation and outlined how staff should respond to Student's escalation. *Id.* Once Student was escalated, staff should decrease their verbal and physical engagement with Student and, instead, engage in off-topic conversations. *Id.*

C. Student's Mental Health Services

21. The 2021-2022 school year began on August 17, 2021. *Exhibit L*, p. 2. All of Student's teachers and service providers had access to his IEP, BIP, safety plan, and escalation cycle management plan in the District's data management system. *Interview with Affective Needs Teacher*. Additionally, Affective Needs Teacher provided Student's teachers and service providers with a printout of Student's IEP at-a-glance. *Id.*

22. As noted above, Student's 2021 IEP required him to receive 200 minutes per month of direct mental health services. *Exhibit A*, p. 17. When the 2021-2022 school year began, School did not have a mental health provider due to a staffing shortage. *Interviews with Affective Needs Teacher and Director*. As a result, Student was not receiving the mental health services required by his IEP. *Id.*

23. On September 14, the District sent a letter to Parents informing them of the impact of the staffing shortage. *Exhibit Y*, p. 2. The letter assured Parents that: "Once the District is able to hire adequate staff, the IEP team, with your input, will review data and determine individualized service needs for the time your child missed." *Id.*

24. Around November 15, the District contracted with Social Worker to provide virtual mental health services to students at School, including Student. *Exhibit G*, p. 3. Student was scheduled to meet with Social Worker and another student from the affective needs program for one hour every Monday and Friday. *Id.* at pp. 3-4.

25. Student refused to participate in the virtual services from mid-November through mid-December, when first semester ended. *Interview with Affective Needs Teacher*. As a result, Student did not receive any mental health services between August and December

2021. *Interviews with Affective Needs Teacher, Director, and Parents*. During this time period, Student missed 800 minutes of mental health services. *See Exhibit A, p. 17*.

26. The District made the decision to offer Student virtual mental health services based on staff availability and not based on Student's individualized needs. *Interviews with Affective Needs Teacher, Parents, and School Psychologist*. Parents were not involved in any discussions about offering Student virtual services and only learned about the services after Student refused to participate. *Interview with Parents*.
27. Though they were not consulted, Parents question whether virtual services would have been effective for Student. *Id.* Student feels uncomfortable meeting people online, and Parents believe Student needs in-person interaction to build trust with an individual and make progress on his mental health goals. *Id.*
28. School Psychologist began providing mental health services to Student in January 2022. *Interview with School Psychologist; Exhibit F, p. 2*. School Psychologist performed assessment services at School during Fall 2021 but providing service minutes to students was not part of her role. *Id.*
29. Because Student did not receive any mental health services in Fall 2021, he did not work on his mental health goal, and the District did not monitor his progress on that goal. *Exhibit A, pp. 13-14*. Though School Psychologist indicated she started monitoring Student's progress on this goal in January, no progress monitoring data was produced during the investigation, and School Psychologist did not have an explanation as to the status of that data. *Interview with School Psychologist*.
30. Affective Needs Teacher worked with Student on his emotional regulation goal in Fall 2021. *Interview with Affective Needs Teacher*. His first quarter progress report, dated October 15, stated that Student "used self-regulation and coping strategies 67% of the time." *Exhibit A, p. 13*. His daily point cards indicated Student "demonstrated respectful behavior 74% of the time during the first quarter." *Id.*
31. By his second quarter progress report on December 17, Student was using self-regulation and coping strategies only 50% of the time. *Id.* Similarly, Student demonstrated respectful behavior only 65% of the time during the second quarter. *Id.*
32. The District did not provide Student's baseline for either goal. *See Exhibit J, pp. 2-25*.

D. Fall 2021 Behavior Incidents

33. In early September, Student began experiencing his first behavioral challenges of the 2021-2022 school year. *Exhibit E, pp. 2-5*. Student became upset and threw desks and

drawers at Affective Needs Teacher on September 9. *Id.* at pp. 4-5. Student received one day of in-school suspension (“ISS”) for this incident. *Id.*

34. On September 17, Student made the shape of a gun with his hand and pointed it at the floor. *Id.* at p. 4. Later that day, he eloped from the building and tried to run into oncoming traffic. *Id.* Student received one-half day of out-of-school suspension (“OSS”) for these incidents. *Id.* The District conducted a threat assessment and reviewed Student’s safety plan on September 20. *Id.* During a re-entry meeting on September 20, an SRO indicated that Student’s behavior was “escalating and spiraling.” *Exhibit O*, p. 455. In front of Student, the SRO said that, if Student’s behavior continued it “could result in ticketing from law enforcement and then [Parent] and [Student] would have to go to court and talk to judge.” *Id.*
35. Affective Needs Teacher, Assistant Principal, Counselor, Parent, Student, and two SROs revised Student’s safety plan to indicate that he could only take breaks with adult supervision on a schedule set by Affective Needs Teacher. *Exhibit S*, p. 14. The prior safety plan required breaks to be supervised by adults but did not require that they be on a set schedule. *Id.* at p. 16. No other changes were made to Student’s safety plan. *Id.* at p. 14. His safety plan continued to require that he “not engage in any threatening or acting out behaviors either verbally or physically” and indicated that Student was receiving support from a school psychologist (even though he was not). *Id.*
36. Student eloped again on September 27 and, once again, tried to run into oncoming traffic. *Exhibit E*, p. 3. He served one and one-half days of OSS for this incident. *Id.*
37. Affective Needs Teacher, Assistant Principal, Parent, Student, and an SRO met to review Student’s safety plan on November 15, 2021. *Exhibit S*, pp. 10-11. No significant changes were made to Student’s safety plan. *Id.*
38. On December 3, Student received a three-day OSS for defiant behavior. *Exhibit E*, p. 3. Following this incident, Affective Needs Teacher, Assistant Principal, Parent, Student, and an SRO met on December 8 to review Student’s safety plan. *Exhibit S*, pp. 7-8. The team did not make any changes to Student’s safety plan. *Id.* During the meeting, “Student was advised that if he assaults a staff member that charges would be filed. Student was provided details on what that looks like.” *Exhibit O*, p. 274.
39. In addition, Student had numerous behavioral incidents throughout Fall 2021 that did not warrant discipline but still impacted his learning and that of his classmates. *See Exhibit V*, pp. 1-164. A few of these incidents are detailed below:
 - September 8: Student threw chairs and metal desk drawers at staff. *Id.* at p. 6.
 - September 16: Student refused to work and was drawing instead. Staff stated expectations for Student and set a time for Student to transition to his work. When

he still refused, staff took his drawings and pencil. Student started swearing and throwing items at staff. Student then tipped over the table. *Id.* at p. 7.

- September 27: When Student was told that he could not go to the affective needs room to get a computer, he started banging his head on the desk, screaming and crying. The classroom was cleared, and Affective Needs Teacher was called. *Id.* at p. 5.
- October 26: A general education teacher helped Student work on a difficult problem. When the teacher walked away, Student said “I want to die in [inaudible]” and “Does anyone have a knife? Because I really want to kill myself.” *Id.* at p. 104.
- December 2: Student kicked a staff member, threw a radio at her, grabbed her lanyard, and pushed a desk at her. *Id.* at p. 5.

E. December 9 Behavior Incident

40. On December 9, Student had a behavioral incident that is the subject of this investigation. *Exhibit E*, p. 3; *Exhibit D*, p. 7; *Exhibit 9*, p. 1. Immediately before the incident, Student was reading a play aloud with Paraprofessional in the affective needs classroom. *Interviews with Affective Needs Teacher and Paraprofessional*. Affective Needs Teacher complimented Student on his reading. *Id.* Student felt embarrassed about reading the play aloud and went into the adjoining classroom. *Interviews with Affective Needs Teacher and Parents*. Student often used this space to calm down or talk. *Interview with Affective Needs Teacher*.
41. In the adjoining classroom, Student got a rubber ruler out of his cubby. *Id.* Affective Needs Teacher asked Student to give her the ruler. *Id.* When he refused, Affective Needs Teacher tried unsuccessfully to physically take the ruler from Student. *Id.* At that point, Affective Needs Teacher asked Paraprofessional to come document the incident. *Id.* Paraprofessional then entered the classroom with her clipboard. *Interview with Paraprofessional*.
42. Student proceeded to try to unlock a cabinet in the classroom using the ruler. *Interview with Affective Needs Teacher*. Affective Needs Teacher positioned herself between Student and the cabinet. *Interview with Paraprofessional; Exhibit D*, p. 7. Student then tried to push Affective Needs Teacher out of the way. *Interviews with Affective Needs Teacher and Paraprofessional*. Affective Needs Teacher reminded Student not to touch staff members. *Exhibit D*, p. 7.
43. Student started hitting Affective Needs Teacher with the ruler. *Interviews with Affective Needs Teacher and Paraprofessional*. Paraprofessional then firmly said “No!” *Interview with Paraprofessional*. Student turned toward Paraprofessional and charged at her. *Id.* Paraprofessional’s hands were full with her clipboard and water bottle, so she defended against Student by lifting her leg to block Student, causing Student to fall. *Interviews with*

Affective Needs Teacher and Paraprofessional. Both staff members radioed to request additional help. *Id.*

44. Teacher arrived to provide additional support. *Interviews with Affective Needs Teacher*. Teacher positioned a desk between herself and Student and told him to stop. *Id.* Student pushed the desk at Teacher and hit her with the ruler. *Id.* Student then retreated to the corner crying. *Id.* 5
45. Following the December 9 incident, Teacher pressed charges against Student. *Interview with Parents*.
46. Student received three days of OSS for the incident on December 9. *Exhibit E*, pp. 2-3. In total, Student served one day of ISS and eight days of OSS by December 14, 2021. *Id.* at pp. 2-5.
47. District staff did not consider revising Student's BIP at any time during Fall 2021. *Interview with Affective Needs Teacher*. Instead, staff felt the BIP was "appropriate" and "was addressing the issues." *Id.*
48. Student did not return to School following completion of his suspension; instead, Parents and Student opted for him to finish the last four days of the semester online. *Interview with Parents*.
49. When Student returned in January, he only attended half-days of School. *Id.* Student attended ABA therapy in the afternoons (though District staff expressed concern that Student did not start ABA therapy until after he had been attending half-days for a while). *Interviews with Affective Needs Teacher and Parents*.

F. Manifestation Determination Review

50. On January 5, 2022, the District held an MDR, even though Student not yet been removed for ten school days. *Exhibit D*, pp. 2-3. In a PWN, the District noted that "it would be best not to delay a review of the IEP, observed behaviors and intervention to address those." *Exhibit M*, p. 7.
51. First, the MDR team determined that Student's behavior had a direct and substantial relationship to his disability. *Exhibit D*, p. 3.
52. Next, the MDR Team found that Student's behavior was *not* the direct result of the District's failure to implement Student's 2021 IEP or BIP. *Id.* The team reached this conclusion because District staff felt "everything was done in accordance with his IEP and BIP." *Interviews with Affective Needs Teacher and School Psychologist*. The team did not discuss the fact that Student had not been receiving the mental health services required

by his IEP. *Id.* Staff felt that discussion was unnecessary because Student had been offered those services but refused. *Interview with School Psychologist.*

53. Parents and a family friend indicated they thought the BIP was too vague and that the District did not follow Student's BIP on December 9. *Interviews with Affective Needs Teacher and Parents.* Specifically, Parents felt the District failed to adhere to Student's BIP in the following ways:

- Physically trying to take the ruler from Student when he was not harming anyone or anything with the ruler. Parents believe this caused Student to escalate further.
- Using language that was not helpful, such as "No!" or "Stop!".
- Not removing the ruler from Student *once* he became physically aggressive.

Interview with Parents.

54. Regardless, as a result of the first determination, the MDR found that Student's behavior was a manifestation of his disability. *Exhibit D*, pp. 3-4.

55. Following the MDR, Affective Needs Teacher, Assistant Principal, Parent, School Psychologist, and Student reviewed Student's safety plan. *Exhibit S*, pp. 2-3. The team listed alternate strategies Student agreed to use when escalated. *Id.* at p. 3. The new strategies included: "re-enforcement of point card, swing, trampoline, walks, . . . weighted blanket, use of cubby." *Id.* The safety plan also indicated Student would work towards earning lunch with a preferred staff member; two consecutive days of meeting his goal would earn Student one lunch with this individual. *Id.* Student's BIP was not revised following this meeting to incorporate any of these strategies. *Interview with Affective Needs Teacher.*

56. Following the MDR, Parents provided consent for the District to reevaluate Student and conduct a new FBA. *Id.*; *Exhibit M*, pp. 8-9.

G. Continued Behavioral Incidents

57. Student's behavioral challenges continued in January 2022. *Exhibit E*, p. 1. On January 26, Student was suspended after he tried to elope from School and was physically aggressive with Affective Needs Teacher. *Id.* at p. 2. Student received three and one-half days of OSS for this incident. *Id.*

58. Following this suspension, Student had served one day of ISS and 11 ½ days of OSS. *Id.* at pp. 2-5.

59. Student also received one day of OSS following an incident on March 1, in which he was physically aggressive towards School staff. *Id.* at p. 2.

60. The District did not conduct an MDR following either of these suspensions. *Response*, pp. 28-30; *Interview with Director*. The District was not sure why MDRs were not held following these suspensions. *Interview with Director*. The District does not currently have any procedures regarding the MDR process but plans to develop some. *Id.*

H. Reevaluation and FBA

61. The District completed Student's reevaluation on February 9, 2022. *Exhibit G*, p. 2. The purpose of the reevaluation was to update Student's FBA and BIP. *Id.* Student was evaluated in the areas of academics, autism, communication, health, and social-emotional/behavioral. *Id.*

62. Speech Language Pathologist ("SLP") administered the Clinical Evaluation of Language Fundamentals 5 ("CELF-5") to evaluate Student's pragmatic language abilities. *Id.* at p. 6. Student scored in the superior range on three of the subtests and average on one subtest. *Id.* Application of these scores to the Colorado Communication Rating Scale indicated that Student's speech-language functioning had minimal to no impact on his functioning in the general education classroom. *Id.* Specifically, Student's receptive and expressive language had no impact on his functioning, while his pragmatic language had minimal impact. *Id.*

63. SLP also had three of Student's teachers complete a questionnaire on his speech. *Id.* at pp. 5-6. The questionnaire asked the teachers to rate the impact of Student's pragmatic skills and, separately, his language skills. *Id.* All three teachers expressed concern over Student's pragmatic skills. *Id.* The teachers did not have the same concern with Student's language skills. *Id.* Two of his teachers indicated Student's language skills "minimally negatively impacted" his educational progress and social interactions. *Id.* at p. 6. The third teacher rated Student's language skills as having no negative impact on his educational progress or social interactions. *Id.*

64. School Psychologist assessed Student's behavioral and emotional functioning using the Behavior Assessment System for Children, Third Edition ("BASC-3"). *Id.* at pp. 7-11. Affective Needs Teacher, Math Teacher, Parent, and Student completed the ratings scales. *Id.* All raters—with the exception of Student—scored Student in the elevated range (at risk or clinically significant) on the externalizing problems composite, internalizing problems composite, behavioral symptoms index, and adaptive skills composite. *Id.*

65. School Psychologist also administered the Behavior Rating Inventory of Executive Functioning, Second Edition ("BRIEF-2") to evaluate Student's executive functioning skills. *Id.* at p. 11. Affective Needs Teacher and Parent completed the ratings scales. *Id.* at p. 17. Affective Needs Teacher noted concerns regarding Student's ability to resist impulses, adjust to changes, react to events appropriately, and keep his materials organized. *Id.*

Parent shared these concerns, while also questioning Student's ability to function in social settings, get going on tasks, sustain working memory, plan and organize his approach to problem solving, and be appropriately cautious in problem solving. *Id.*

66. The Autism Spectrum Rating Scales ("ASRS") were used by School Psychologist to measure behaviors associated with autism spectrum disorder ("ASD"). *Id.* at p. 12. Affective Needs Teacher, Math Teacher, and Parent completed the ASRS ratings scales. *Id.* All raters indicated Student, among other stereotypical behaviors, had difficulty using appropriate verbal and non-verbal communication for social contact; engaged in unusual behaviors; had problems with inattention or impulse control; had difficulty relating to adults and children; had difficulty providing appropriate emotional responses in social situations; and had difficulty focusing attention. *Id.* at p. 17.
67. The reevaluation summarized the Autism Diagnostic Observation Schedule ("ADOS-2") completed by the District in 2017. *Id.* at p. 15. The ADOS-2 identifies characteristics and features commonly found in individuals with ASD. *Id.* At that time, Student's combined total score of 12 placed him above the cutoff score for ASD as defined by the ADOS-2. *Id.* A private autism evaluation obtained by Parents in 2019 was referenced in the reevaluation. *Id.*
68. Members of the District autism team also observed Student in class on three occasions between January 19 and February 7. *Id.* at p. 15. During the observations Student transitioned well with the support of a paraprofessional, followed direction to work in a group, and initiated conversations with peers in a group. *Id.* Student, however, had difficulty transitioning from preferred to non-preferred tasks. *Id.*

I. Eligibility Determination

69. On February 9, a multidisciplinary team met to consider Student's eligibility for special education and related services in light of his recent reevaluation. *Interviews with Affective Needs Teacher and School Psychologist.* The team reviewed Student's eligibility under SED and ASD. *Exhibit H*, pp. 2-6. The team concluded that Student remained eligible under SED. *Id.*
70. However, the team found that Student did not qualify for special education under ASD. *Id.* at p. 2. Even though Student had difficulty with verbal and nonverbal social interaction, the team felt the data demonstrated that Student's communication challenges did not significantly affect Student or prevent him from benefiting from general education. *Interviews with Affective Needs Teacher and School Psychologist.*
71. When Student was regulated, he demonstrated typical language and communication skills. *Id.* However, Student's language skills declined once he became dysregulated. *Id.*

Based on this information and Student's evaluation data, the team felt that Student's ability to access general education was affected by his SED, not ASD. *Id.*

72. Parents disagreed with the team's conclusion, arguing that the District's failure to recognize his ASD resulted in Student becoming more dysregulated at School. *Interview with Parents.*

J. Compensatory Mental Health Services

73. In March, the District convened Student's IEP Team to review his IEP and BIP in light of the updated FBA and reevaluation. *Interview with Affective Needs Teacher.*

74. After the IEP Team meeting concluded, Affective Needs Teacher and School Psychologist approached Parents to discuss Student's eligibility for compensatory mental health services as a result of the staff shortage in Fall 2021. *Interview with Parents.* Other members of the IEP Team had already left the room. *Id.*

75. Affective Needs Teacher and School Psychologist referenced Student's daily point sheets to argue that Student had not shown any regression on his mental health goals. *Id.* School Psychologist also considered Student's absences in second semester for ABA therapy in determining whether he had shown regression. *Interview with School Psychologist.* Though Parents disagreed, Affective Needs Teacher and School Psychologist concluded that Student had not shown regression and, therefore, did not need compensatory services.

76. The District subsequently issued a PWN indicating that Student's IEP Team determined Student's need for compensatory services "based on significant regression of mental health goals." *Exhibit M*, p. 12. The PWN noted that the team considered Student's classroom data and progress reports from the first quarter to determine whether there was significant regression. *Id.* Ultimately, "Student [did] not qualify for compensatory mental health minutes as data shows that he did not demonstrate regression on their [sic] mental health goals from August-October." *Id.*

77. The District does not have any procedural guidance for staff regarding how to determine a student's need for compensatory education services. *Interview with Director.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: The District failed to properly implement Student’s IEP, in violation of 34 C.F.R. § 300.323. The violation resulted in a denial of FAPE.

In her Complaint, Parent alleged the District failed to implement Student’s IEP in two ways:

1. By failing to provide Student the mental health services required by his IEP during Fall 2021; and
2. By failing to follow Student’s BIP during the incident that occurred on December 9.

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is “the centerpiece of the statute’s education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student’s IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

A school district must ensure that “as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child’s IEP.” *Id.* § 300.323(c)(2). To satisfy this obligation, a school district must ensure that each teacher and related services provider is informed of “his or her specific responsibilities related to implementing the child’s IEP,” as well as the specific “accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.” *Id.* § 300.323(d).

A. Student’s Mental Health Services

Student’s 2021 IEP required the District to provide Student 200 minutes per month of mental health services. (FF # 9.) As detailed in the Findings of Fact, Student did not receive any mental health services during Fall 2021. (FF #s 22, 24, 25.) This failure was not due to Student’s teachers and service providers being unaware of their responsibilities under the IEP. (FF # 21.) Indeed, all of Student’s teachers and service providers had access to Student’s IEP, including his BIP, safety plans, and escalation cycle management plan, in the District’s data management system. (*Id.*) Affective Needs Teacher also provided printouts to Student’s teachers and service providers. (*Id.*) Therefore, the SCO finds and concludes that the District complied with 34 C.F.R. § 300.323(d).

Due to a staffing shortage, the District did not provide Student mental health services for three months between August 17 and November 15. (FF #s 22, 24, 25.) Beginning in mid-November, the District offered Student virtual mental health services. (FF # 24.) Student refused to

participate in the virtual services. (FF # 25.) As a result, Student did not receive any mental health services in November and December either. (FF # 25.)

The District places blame on the Student for not receiving services between November 15 and December 15. (See FF # 75.) However, the SCO finds this blame misplaced. The District unilaterally determined that Student should receive virtual mental health services based on available staff without considering Student's individualized needs. (FF # 26.) Parents were not involved in this decision and, instead, only learned of the virtual services after Student refused to meet with Social Worker. (*Id.*)

The District's decision-making process contradicts the principles of the IDEA. An IEP Team must determine a child's need for special education and related services on an individual basis, given the child's unique needs. *Id.* § 300.320. This obligation continues even when a staffing shortage impacts the delivery of a student's services. During the COVID-19 pandemic, CDE guidance made clear that school districts must develop IEPs on an individualized basis and not develop IEPs based on COVID-19 restrictions:

A student's initial or annual IEP should be developed based on the student's individualized needs in contemplation of the full instructional options, special education, supplementary aids/services, and related services that are available during normal operating conditions. An IEP based on restrictions or changes in service delivery that are necessary to protect health and safety during the pandemic, rather than one based on a student's individualized needs, would be inconsistent with IDEA.

Special Education & COVID-19 FAQs at www.cde.state.co.us/cdesped/special_education_faqs ("*CDE FAQs*"). The IDEA simply does not permit development of an IEP based on staff availability under any circumstances. Nor does the IDEA excuse a district's failure to implement an IEP based on staff shortages. See, e.g., *In re: Student with a Disability*, 121 LRP 38674 (SEA KS 10/20/21) (finding an ongoing obligation to provide FAPE pursuant to a student's IEP during a staffing shortage).

Here, the SCO finds error in the way the District altered the format of Student's mental health services due to a staffing shortage. When School no longer had an available service provider, the District determined that Student should receive his mental health services virtually. (FF # 26.) This determination was made outside the scope of an IEP Team meeting and without involving Parents. (*Id.*) In doing so, the District altered Student's FAPE solely based on staff availability and not on Student's unique needs. Even after Student repeatedly refused to participate in the virtual services, the District did not pivot and seek other available options but, instead, began to blame Student. (FF #s 25, 75.)

The SCO understands the staffing shortage may have been out of the District’s control. But the IDEA does not permit the District to unilaterally change the delivery method of a student’s services without considering the student’s needs or involving the student’s parents.

Because the District failed to provide Student with 800 minutes of mental health services during Fall 2021, the SCO finds and concludes that the District did not fully implement Student’s IEP. This resulted in a violation of 34 C.F.R. § 300.323.

B. December 9 Incident

Student’s BIP directed staff to offer Student choices for coping strategies. (FF # 14.) Indeed, School Psychologist indicated Student had an index card portfolio which provided Student visual choices for coping strategies. (FF # 14.) Under the BIP, staff should use “when/then statements” and allow Student access to safe spaces when overwhelmed. (FF #s 13, 14.) Once Student became escalated, staff should decrease verbal and physical engagement and, instead, engage in off-topic conversation. (FF # 20.)

On December 9, Student became embarrassed after reading a play aloud and went into the adjoining classroom. (FF # 40.) Student got a rubber ruler from his cubby. (FF # 41.) Affective Needs Teacher asked Student to give her the ruler; when he refused, she tried unsuccessfully to take the ruler from Student’s hands. (*Id.*) Student started hitting Affective Needs Teacher with the ruler. (FF # 43.) Paraprofessional then firmly stated “No!” (*Id.*) Student became further escalated, charging at Paraprofessional. (*Id.*) Teacher arrived to provide additional support and positioned a desk between herself and Student. (FF # 44.) Student hit Teacher with the ruler and pushed a desk at her before retreating to the corner crying. (*Id.*)

Per their recount and recollection, neither Affective Needs Teacher nor Paraprofessional offered Student choices—either visual or verbal—for coping strategies. (FF #s 40-44.) Affective Needs Teacher and Paraprofessional did not use when/then statements. (*Id.*) Even though Student was escalated, staff did not decrease their engagement with Student and, instead, further engaged with Student by physically trying to take the ruler from him and firmly stating “No!” (*Id.*) These actions by staff contradicted Student’s BIP. Though Student was using the ruler to try to unlock a cabinet, Student was not harming anyone or anything. Per the BIP, staff should have decreased their verbal and physical engagement with Student once he became escalated. (FF # 20.) Instead, staff continued to engage with Student—both verbally and physically—which caused Student to escalate further. For these reasons, the SCO finds and concludes that the District failed to follow Student’s BIP during the incident on December 9. This resulted in a second violation of 34 C.F.R. § 300.323.

C. Materiality of Failures to Implement

The failure to implement a “material”, “essential”, or “significant” provision of a student’s IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d

811, 822 (9th Cir. 2007) (concluding consistent with “sister courts . . . that a material failure to implement an IEP violates the IDEA”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an “essential element of the IEP” denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the “significant provisions of the IEP” denies a FAPE). “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard “does not require that the child suffer demonstrable educational harm in order to prevail.” *Id.* But a child’s educational progress, or lack thereof, may indicate whether there has been more than a “minor shortfall in the services provided.” *Id.*

Mental Health Services

Under his IEP, Student received support in an affective needs classroom, mental health services, and special transportation. (FF # 9.) By not providing Student with mental health services, the District failed to implement one of the key components of Student’s IEP. The District’s failure denied Student the opportunity to make appropriate progress on his IEP goals, as evidenced by his progress reports. (FF #s 30, 31.) At the same time, Student’s behaviors continued to escalate, resulting in numerous suspensions. (FF # 33-46.) For these reasons, the SCO finds this implementation failure to be material. This failure resulted in a denial of FAPE to Student. Given the degree to which a FAPE was denied, “Student is entitled to compensatory services.” *Colo. Dep’t of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

BIP

A BIP is an essential element of an IEP for any student eligible under SED. A BIP seeks to ensure that the student and his or her classmates can access their education. *See* 34 C.F.R. § 300.324(a)(2). As a result of the incident on December 9, Student served three days of OSS and faced criminal charges. (FF # 46.) Since the incident, Student fears becoming dysregulated at school and facing additional criminal charges for behavior related to his disability. (FF # 48.) Even though Student is only attending half days, his grades have declined even in the classes that he has been attending. (FF # 49.) For these reasons, the SCO finds this second implementation violation to be material. This failure also resulted in a denial of FAPE to Student.

D. 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. School District of Philadelphia, 612 F.3d 712, 717-18 (3d Cir. 2010). The SCO now explains a compensatory education package in order to help place Student in the same position with respect to making progress on IEP goals if not for the violation.

Here, the District failed to provide Student 800 minutes of mental health services over a four-month period. (FF # 25.) By any measure, this mistake is significant. Over the same time period, Student made no progress towards his IEP goals and struggled to stay regulated at School. (FF #s 30, 31, 33-40.) Student's IEP permitted the services to be provided one-on-one or in a small group. (FF # 9.) As a result, the SCO finds an award of 540 minutes (or 9 hours) of compensatory mental health services appropriate.

Conclusion to Allegation No. 2: The District failed to develop, review, or revise an IEP tailored to Student's individualized needs, in violation of 34 C.F.R. § 300.324. This violation resulted in a denial of FAPE.

In the Complaint, Parent alleged Student's IEP was not tailored to his individualized needs, because the IEP did not provide adequate behavioral supports.

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.

Where a student's behavior impedes his learning or the learning of others, the IEP Team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.324(a)(2)(i). 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. 46683 (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. If a student displays unsafe behaviors, a BIP should also include a crisis intervention plan to address positive intervention and de-escalation strategies. *Id.*

Here, the BIP embedded in the IEP contained positive behavioral interventions and supports. (FF #s 12-16.) Under the first prong of the *Rowley* standard, the SCO finds and concludes that the IEP

development process complied with IDEA's procedures. However, the sufficiency of those behavioral interventions and supports must still pass the second prong of *Rowley*.

Under the second prong of *Rowley*, the SCO finds and concludes that the IEP was not substantively appropriate, because it was not tailored to adequately meet Student's unique behavioral needs. Student's IEP Team reviewed his BIP in April 2021, as part of his annual review. (FF # 4.) The BIP, however, was identical to Student's BIP from 2020. (FF # 11.) The SCO recognizes that a BIP need not always change from year-to-year. But, at a minimum, a BIP must identify Student's problem behaviors. Student's BIP relied on an FBA completed in 2017, when Student was in second or third grade. (*Id.*) During sixth grade, one of Student's biggest challenges related to computer usage. (FF # 17.) Student struggled to stay on task when using a computer and to transition away when the computer time was over. (*Id.*) This behavior was noted in Student's Escalation Cycle Management Plan as early as March 2021, yet this behavior did not appear in Student's BIP developed in April. (FF #s 12, 20.)

By the end of September, Student had already been suspended three times. (FF #s 33, 34, 36.) An SRO described Student's behavior as "escalating and spiraling" in a meeting on September 20. (FF # 34.) Despite this, the District took no steps to review Student's BIP or to complete a new FBA. (FF # 34, 47.) The District held regular safety meetings, in which Student agreed not to act out verbally or physically or else face increased discipline, but staff took no action to try to better support Student's behavior. (FF #s 35, 38, 47.) For these reasons, the SCO finds and concludes that the District violated the IDEA's substantive requirement related to the development of the 2021 IEP at 34 C.F.R. § 300.324(a)(2)(i). *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). Ordinarily, the SCO would order the District to convene Student's IEP Team to review his BIP to remedy the District's violation. However, in February and March 2022, the District completed a new FBA and revised Student's BIP. (FF # 61.)

Conclusion to Allegation No. 3: The District improperly found that Student's behavior was not a direct result of the District's failure to implement Student's IEP during the MDR, in violation of 34 C.F.R. § 300.530(e)(1). The violation did not result in a denial of FAPE.

Parent's Complaint asserted that the District improperly determined that Student's behavior was *not* a result of the District's failure to implement Student's IEP during the MDR held on January 4.

Discipline of a student with a disability may result in a change to the child's placement and entitle the student to procedural protections under the IDEA. *See* 34 C.F.R. §§ 300.530, 300.536. Within ten school days of a disciplinary change in placement, an MDR must be held to determine whether the behavior at issue was a manifestation of the student's disability. *Id.* § 300.530(e)(1). The student's behavior must be determined to be a manifestation of the student's disability if: (1) the behavior in question was "caused by, or had a direct and substantial relationship to" the

student's disability, or (2) the behavior in question was a direct result of the school district's failure to implement the student's IEP. *Id.*

Here, the MDR team found that Student's behavior on December 9 was caused by, or had a direct and substantial relationship to, Student's disability. (FF # 51.) Next, the team concluded that Student's behavior was *not* a direct result of the District's failure to implement Student's IEP. (FF # 52.) In reaching this conclusion, District staff asserted they acted in accordance with Student's BIP during the December 9 incident. (*Id.*) However, as detailed above, District staff did not adhere to Student's BIP during the incident on December 9. For this reason, the SCO finds and concludes that the MDR team's conclusion was improper, resulting in a procedural violation of 34 C.F.R. § 300.530(e)(1).

A. Procedural Violation

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation: (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent's opportunity to participate in the IEP process).

Here, the District erred in properly determining whether Student's behavior was a result of the District's failure to implement Student's IEP. However, because the MDR team separately concluded that Student's behavior was a result of his disability, the outcome of the MDR was the same as it would have been if the District had not erred. (FF # 54.) Therefore, the District's violation did not negatively impact Student. As a result, the SCO finds and concludes that the violation did not result in a denial of FAPE.

Conclusion to Allegation No. 4: The District conducted an FBA and reviewed Student's BIP following the MDR, as required by 34 C.F.R. § 300.530(f)(1). No violation of the IDEA occurred.

The fourth allegation in Parent's Complaint concerns whether the District conducted an FBA and revised Student's BIP following the MDR.

An MDR team's determination that a student's behavior was a manifestation of his or her disability triggers additional obligations for the school district. 34 C.F.R. § 300.530(f). If the district has not previously completed an FBA, the student's IEP Team must conduct an FBA and implement a BIP for the student. *Id.* Alternatively, where a BIP has already been developed, the IEP Team must review the BIP "and modify it, as necessary, to address the behavior." *Id.*

Here, the MDR’s team’s determination obligated the District to review and revise, as necessary, Student’s BIP. Immediately following the MDR, the District obtained Parent’s consent to reevaluate Student to complete a new FBA and revise Student’s BIP. (FF # 56.) The District completed the FBA in February and revised Student’s BIP, as necessary, in March. (FF #s 61, 73.) For these reasons, the SCO finds and concludes that the District conducted an FBA and reviewed Student’s BIP, consistent with 34 C.F.R. § 300.530(f)(1).

Conclusion to Allegation No. 5: The District failed to conduct an MDR within 10 school days of a disciplinary change of placement, in violation of 34 C.F.R. § 300.530(e). This violation did not result in a denial of FAPE.

Parent’s Complaint also asserted that the District failed to conduct MDRs following additional behavior incidents on January 26 and March 1, 2022.

As noted above, a school district must hold an MDR within ten school days of a disciplinary change in placement. 34 C.F.R. § 300.530(e)(1). A disciplinary change of placement occurs if: (1) a student has been removed from his current educational placement for more than 10 consecutive school days, or (2) a student has been subjected to a series of short-term removals that total more than 10 school days and constitute a pattern. *Id.* § 300.536(a). Such a pattern exists where the removals involve “substantially similar” behavior and where other factors—such as the length of each removal, total amount of time removed, and the proximity of removals—support the existence of a pattern. *Id.* § 300.536(2)(i)-(iii). The school district must determine whether a series of removals constitutes a pattern on a case-by-case basis; this determination is inherently subjective. *Id.* § 300.536(b)(1); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46729 (Aug. 14, 2006).

Here, the District conducted an MDR on January 5, 2022, before Student’s short-term suspensions totaled 10 school days. (FF # 50.) Holding an MDR early does not relieve a school district of its obligation to hold an MDR after a disciplinary change of placement or cure the later failure to hold an MDR. *See Weld Cty. Sch. Dist. 6*, 77 IDELR 84 (SEA CO 6/22/20). In its Response, the District conceded that it failed to conduct MDRs, as required by 34 C.F.R. § 300.530(e), following the incidents on January 26 and March 1. (FF # 60.) Therefore, no analysis is required by the SCO. The SCO finds and concludes that the District violated 34 C.F.R. § 300.530(e) when it failed to conduct an MDR within 10 school days of a disciplinary change of placement.

A. Procedural Violation

As noted above, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation: (1) impeded the child's right to a FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause

substantive harm where it seriously infringes upon a parent’s opportunity to participate in the IEP process).

Here, the District’s failure to conduct an MDR within 10 school days of a disciplinary change of placement did not result in a denial of FAPE. Because the District held an MDR earlier in January that found Student’s behavior to be a manifestation of his disability, the protections provided to the Student by the MDR process—such as conducting an FBA and reviewing a BIP—were already in process. But for the earlier MDR, the District’s failure would have denied Student a FAPE.

Conclusion to Allegation No. 6: The District properly determined Student’s eligibility for special education and related services under the disability category of ASD, as required by 34 C.F.R. §§ 300.304-305. No violation of the IDEA occurred.

In the Complaint, Parent asserted that the District erred when it determined that Student was not eligible for special education and related services under the ASD disability category.

To be eligible for special education under the IDEA, a child must: (1) have one of the listed disabilities, and (2) need special education and related services because of that disability. 34 C.F.R. § 300.8; *see also* ECEA Rule 2.08 (“*Children with Disabilities* shall mean those . . . persons who, by reason of one or more of the following conditions, are unable to receive reasonable benefit from general education.”) Thus, a qualifying disability alone does not make a child eligible for special education. 34 C.F.R. § 300.8; ECEA Rule 2.08. As a matter of policy, the CDE will not declare a student to be IDEA-eligible through a state complaint decision. Instead, if a state complaint investigation were to conclude that a school district’s eligibility determination was inconsistent with the IDEA, the CDE would instruct the school district to remedy the deficiencies and concerns noted in the decision and then reconsider the student’s eligibility.

An analysis of the appropriateness of an eligibility determination involves two steps. First, the SCO examines whether the school district followed relevant standards and procedures in making the determination. *See Questions and Answers on IDEA Part B Dispute Resolution Procedures*, Question B-6 (OSERS 2013). Under the second step, the SCO determines whether the eligibility decision was consistent with the data in the record. *Id.*

A. Adherence to Standards and Procedures

Accordingly, the SCO will begin by examining whether the District adhered to applicable IDEA procedures regarding reevaluations and eligibility determinations. The IDEA has specific and extensive procedural requirements governing how school districts reevaluate students and determine ongoing eligibility. *See* 34 C.F.R. §§ 300.304-306. The procedures detailing the scope of a reevaluation are relevant here.

The IDEA requires a reevaluation to be sufficiently comprehensive to determine whether a student needs specialized instruction as a result of his disabilities. 34 C.F.R. § 300.304(c)(6). As part of a reevaluation, an IEP team must:

- (1) Review existing evaluation data on the child, including—
 - (i) Evaluations and information provided by the parents of the child;
 - (ii) Current classroom-based, local, or state assessments, and classroom-based observations; and
 - (iii) Observations by teachers and related service providers.

Id. § 300.305(a)(1). To determine a student’s eligibility for special education, a school district must “[d]raw upon information from a variety of sources” and “ensure that information obtained from all of these sources is documented and carefully considered.” *Id.* § 300.306.

For students with autism, school districts should collect information using multiple methods (such as interviews, observations, and formal assessments) and from multiple sources (such as family members, teachers, and childcare providers). *Guidelines for the Educational Evaluation of Autism Spectrum Disorder* at p. 20 (CDE Aug. 2020) (hereinafter “*Guidelines*”), available at https://www.cde.state.co.us/cdesped/asd_guidelines. “Which assessments and the amount of information collected will be determined on a case-by-case basis.” *Id.* at p. 21. The Guidelines identify assessments and tools that may be used to collect information. *See Id.* at pp. 44-50.

Here, Parent’s concerns focus on the District’s interpretation of the reevaluation data during the eligibility meeting and not necessarily on the comprehensiveness of the evaluation itself. Nonetheless, the record evidences that, as part of Student’s reevaluation, the District collected data using teacher questionnaires, observations, and formal assessments. (FF #s 61-68.) School Psychologist gathered information from multiple sources, including three of Student’s teachers and Parent. (FF #s 64-66.) The reevaluation also referenced data from prior private assessments, as well as a prior assessment performed by the District. (FF # 67.) As a whole, the SCO finds the reevaluation to be sufficiently comprehensive. Many of the tools used in the reevaluation—such as the CELF-5, BASC-3, BRIEF-2, and ASRS—are recommended by the Guidelines. *See Guidelines*, at pp. 44-50. Additionally, the IEP Team itself determined that the evaluations were sufficiently comprehensive, noting as much on the eligibility checklist. (FF # 69.) Nothing in the record suggests that Parents were not permitted to participate in the eligibility determination meeting.

Overall, the SCO finds and concludes that the District adhered to IDEA procedural requirements regarding a reevaluation and an eligibility determination.

B. Consistent with Student-Specific Data

The SCO next considers whether the eligibility determination was consistent with the data in the record. Though District staff and Parents agreed that Student demonstrated some characteristics

of ASD, they disagreed whether those characteristics significantly impacted Student's educational performance.

Under the ECEA Rules, a child with ASD is:

a child with a developmental disability *significantly* affecting verbal and non-verbal social communication and social interaction, generally evidenced by the age of three. Other characteristics often associated with ASD are engagement in repetitive activities and stereotyped movements, resistance to environmental changes or changes in daily routines, and unusual responses to sensory experiences.

ECEA Rule 2.08(1) (emphasis added). This definition limits special education eligibility to only students whose ASD significantly impacts their significant verbal and non-verbal communication. *See id.* If a student's communication is significantly impacted, the student still must show: (1) significant difficulties in interacting with or understanding people and events; (2) significant difficulties which extend beyond speech and language to other aspects of social communication; *and* (3) significant rigidity in routines and marked distress over changes in routine, and/or a significant preoccupation to objects or topics. ECEA Rule 2.08(1)(a); see also *Guidelines*, p. 12 (noting that a student's ASD-related "impairments must make an observable impact on the student's functioning in the educational setting to the degree that specialized instruction is needed.").

Here, Student's multidisciplinary team considered the reevaluation data and determined that, though Student demonstrated some impairment in his communication, Student's impairment did not significantly impact his functioning in the general education environment. (FF # 70-71.) For example, though Student had some challenges with social interaction, Student still followed direction to work in a group and initiated conversations with his peers in a group. (FF # 68.) District staff indicated Student's communication skills appeared mostly typical when he was regulated but markedly declined when Student was dysregulated. (FF # 71.) Indeed, during their interview, Parents described Student as outgoing and willing to talk to anyone and ask them to play. (FF # 3.) Parents acknowledged, however, that Student had difficulty maintaining ongoing relationships. (*Id.*)

The observations and data in the reevaluation support the decision by the multidisciplinary team. Student's reevaluation simply did not indicate that he was a student with a developmental disability that significantly affected his verbal and non-verbal social communication and social interaction, as required by ECEA Rule 2.08(1). For this reason, the SCO finds and concludes that the District's determination of Student's eligibility under ASD was consistent with 34 C.F.R. §§ 300.304-305. No violation of the IDEA occurred.

Conclusion to Allegation No. 7: The District failed to make an individualized determination of Student’s need for compensatory mental health services, in violation of 34 C.F.R. § 300.324. This violation resulted in a denial of FAPE.

In her Complaint, Parent also asserted that the District improperly determined Student’s need for compensatory mental health services when the District failed to consider Parent’s input or Student-specific data.

As indicated above, compensatory education is an equitable remedy intended to place a student in the same position he would have been but for a school district’s failure or inability to provide FAPE. *Reid v. Dist. Of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005); *see also Return to School Roadmap* (EDU 2021) (“Roadmap”). Both school districts and the CDE have historically used compensatory services to remedy a denial of FAPE caused by a staffing shortage. Though staffing shortages are not novel, the COVID-19 pandemic has significantly exacerbated staffing shortages.

An IEP Team must determine a child’s need for special education and related services on an individual basis. 34 C.F.R. § 300.324. The U.S. Department of Education has indicated that “IEP Teams are the appropriate vehicle for addressing the need for, and extent of, compensatory services to address the child’s needs based on any failure or inability to provide appropriate services.” *Roadmap* at Question D-7; *see also CDE FAQs*. Guidance from the CDE states that IEP Teams must “make an individualized determination that includes input and involvement from parents as to whether a student needs compensatory education services.” *CDE FAQs*. To determine whether a student needs compensatory services, IEP Teams should consider: (1) the student’s present levels of academic achievement and functional performance, (2) the student’s previous rates of progress; and (3) the frequency and duration of special education and related services. *Roadmap* at Question D-5. The *CDE FAQs* also direct IEP Teams to review: (1) concerns from parents, the student, and other service providers; (2) input from parents on student’s performance during the disruption of services; and (3) the difference between progress monitoring data before the disruption of services and data collected shortly after student resumed services. *CDE FAQs*.

Here, the District determined Student’s need for compensatory education services outside of an IEP Team meeting and without considering the appropriate factors. First, Affective Needs Teacher and School Psychologist approached Parents to discuss Student’s need for compensatory mental health services *after* the IEP Team meeting concluded. (FF # 74.) By that point, several of the IEP Team members had left, leaving only Affective Needs Teacher, Parents, and School Psychologist. (*Id.*) These individuals did not comprise a proper IEP Team under 34 C.F.R. § 300.321(a).

Second, Affective Needs Teacher and School Psychologist did not consider the appropriate factors to determine whether Student needed compensatory services. Affective Needs Teacher indicated that Student must show significant regression on his IEP goals to be eligible for

compensatory services. (FF # 75.) This standard was incorrect and contradicted guidance from both the U.S. Department of Education and the CDE.

Affective Needs Teacher and School Psychologist asserted to Parents that Student had not significantly regressed on either of his IEP goals as a result of his missing mental health services. (FF # 75.) As support, District staff referenced Student's daily point sheets. (*Id.*) These assertions by District staff directly contradicted Student's progress reports. (FF #s 29-31.) Those reports indicated that Student did not work on his mental health goal from mid-August to mid-December. (FF # 29.) During this investigation, the District did not provide any baseline data for Student's mental health goal (either from April 2021 when his IEP was developed or from when School Psychologist began providing his mental health services in January 2022). (FF # 32.) However, it is difficult to imagine that Student was in the same position he would have been if he had received four months of mental health services.

As for Student's emotional regulation goal, the progress reports showed regression. (FF #s 30, 31.) In first quarter, Student used coping strategies 67% of the time; yet, during second quarter, Student was using coping strategies only 50% of the time. (*Id.*) Similarly, Student demonstrated respectful behavior 74% of the time during first quarter but only 65% of the time during second quarter. (*Id.*)

Under the relevant factors, Student's functional performance diminished (as evidenced by his escalating behaviors), his rate of progress decreased (given that he could not even work on one of his goals), and he received none of the required services. All three factors support Student's need for compensatory mental health services. The District's determination of Student's need for compensatory services was not made by a proper IEP Team and was not supported by Student-specific data. For these reasons, the SCO finds and concludes that the District violated 34 C.F.R. § 300.324.

B. Procedural Violation

As noted above, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation: (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent's opportunity to participate in the IEP process).

Here, the District's failure to properly determine Student's need for compensatory services undoubtedly impeded Student's right to a FAPE and deprived Student of an educational benefit. The data in the record indicated that Student had regressed on his annual goals while he was not receiving mental health services. (FF #s 29-31.) If the District had properly considered Student's progress reports in making its determination, Student would have been eligible for at least some

compensatory mental health services. For this reason, the SCO finds and concludes that the procedural violation resulted in a denial of FAPE.

However, the SCO has not awarded Student any additional compensatory education to remedy the District's violation. Earlier, the SCO awarded Student compensatory mental health services as a result of the District's failure to implement Student's IEP during Fall 2021. Any further award of compensatory services would be duplicative.

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 in the District if not corrected.

Pursuant to its general supervisory authority, the CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the 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).28

Here, nothing in the record indicates that the District's violations are systemic in nature. The District's failure to provide Student his mental health services was caused by a staffing shortage, while the remaining violations appear to stem from mistakes made by District staff. For these reasons, the SCO finds and concludes that the violations are not systemic in nature.

REMEDIES

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

- a. Failing to properly implement an IEP, in violation of 34 C.F.R. § 300.323;
- b. Failing to tailor an IEP to a student's individualized needs, in violation of 34 C.F.R. § 300.324;
- c. Failing to properly determine that a student's behavior was a direct result of the District's failure to implement the student's IEP during an MDR, in violation of 34 C.F.R. § 300.530(e)(1);
- d. Failing to conduct an MDR within 10 school days of a disciplinary change of placement, in violation of 34 C.F.R. § 300.530(e); and
- e. Failing to make an individualized determination of a student's need for compensatory education services, in violation of 34 C.F.R. § 300.324.

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

1. Corrective Action Plan

- a. By **Wednesday, July 6, 2022**, the District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
 - i. Attendance and completion of training provided by CDE on manifestation determinations. This training will address, at a minimum, the requirements of 34 C.F.R. §§ 300.530 and the related concerns addressed in this decision. Director of Special Education and CDE Special Education Monitoring and Technical Assistance Consultant will determine the time, date, and format of the training. This training may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast. This training is mandatory for Director of Special Education, Executive Director of Special Education, Special Education Facilitator, School Psychologist, and Assistant Principal. Such training shall be completed no later than **Friday, August 12, 2022**.
 - ii. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to the CDE no later than **Friday, August 19, 2022**.
- b. 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. District Policies and Procedures

- a. The District must develop written procedures regarding conducting MDRs, in accordance with 34 C.F.R. § 300.530. Such procedures should outline when an MDR is required and provide guidance on making determination decisions, as well as the related concerns addressed in this decision. The District must develop these procedures and submit them to the CDE for approval by **Wednesday, August 3, 2022**.

- b. The District must develop written procedures regarding determining the need for compensatory education services, in accordance with 34 C.F.R. § 300.324, the Roadmap, and CDE guidance. Such procedures should outline who should determine the need for services and how such determinations should be made. The District must develop these procedures and submit them to the CDE for approval by **Wednesday, August 3, 2022**.

3. Compensatory Education Services for Denial of a FAPE

- a. Student shall receive **nine hours of mental health services** provided by a District mental health provider. These services must target Student's current annual IEP goals. All nine hours must be completed by **Friday, December 16, 2022**.
- b. Monthly consultation between the provider(s) delivering compensatory services and Director of Special Education shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. The District must submit documentation that these consultations have occurred **by the second Monday of each month**, once services begin, until compensatory services have been completed. Consultation logs must contain the name and title of the provider and the date, the duration, and a brief description of the consultation.
- c. To verify that Student has received the services required by this Decision, the District must submit records of service logs to the CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log.
 - i. **By Wednesday, August 3, 2022**, the District shall schedule compensatory services in collaboration with Parent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. If the District and Parent cannot agree to a schedule by August 3, 2022, the CDE will determine the schedule for compensatory services by **Wednesday, August 17, 2022**. The parties shall cooperate in determining how the compensatory services will be provided. If Parent refuses to meet with the District within this time, the District will be excused from delivering compensatory services, provided that the District diligently attempts to meet with Parent and documents such efforts. A determination that the District diligently attempted to meet with Parent, and should thus be excused from providing compensatory services, rests solely with the CDE.

- ii. The District shall submit the schedule of compensatory services to the CDE no later than **Wednesday, August 10, 2022**. If for any reason, including illness, Student is not available for any scheduled compensatory services, the District will be excused from providing the service scheduled for that session. If for any reason the District fails to provide a scheduled compensatory session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent and notify the CDE of the change in the appropriate service log.

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

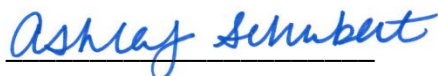
Colorado Department of Education
Exceptional Student Services Unit
Attn.: Special Education Monitoring and Technical Assistance Consultant
1560 Broadway, Suite 1100
Denver, CO 80202-5149

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. **Given the current circumstances surrounding the COVID-19 pandemic, the CDE will work with District to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

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 5th day of June, 2022.



Ashley E. Schubert
State Complaints Officer

APPENDIX

Complaint, pages 1-12

- Exhibit 1: Grade reports
- Exhibit 2: Grade reports
- Exhibit 3: Social History Form
- Exhibit 4: Letter from District
- Exhibit 5: Response to document request
- Exhibit 6: Email correspondence
- Exhibit 7: Email correspondence
- Exhibit 8: Police report
- Exhibit 9: Student's summary of the incident
- Exhibit 10: Notice of Suspension
- Exhibit 11: MDR
- Exhibit 12: Private Evaluation
- Exhibit 13: Juvenile Diversion Agreement
- Exhibit 14: Restraint Form
- Exhibit 15: Notice of Suspension

Response, pages 1-39

- Exhibit A: IEPs
- Exhibit B: BIPs
- Exhibit C: Threat Assessments
- Exhibit D: MDR documentation
- Exhibit E: Discipline records
- Exhibit F: Service logs
- Exhibit G: Evaluations and assessments
- Exhibit H: Eligibility determinations
- Exhibit I: Compensatory education determinations
- Exhibit J: Progress monitoring
- Exhibit K: Attendance records
- Exhibit L: District calendar
- Exhibit M: PWNs
- Exhibit N: Notice of Meetings
- Exhibit O: Correspondence
- Exhibit P: District policies
- Exhibit Q: List of staff
- Exhibit R: Verification of delivery
- Exhibit S: Safety plans
- Exhibit T: Release of Information
- Exhibit U: Special Education contact log

- Exhibit V: Observation Notes
- Exhibit W: Restraint reports
- Exhibit X: Work example
- Exhibit Y: Letter to Parents
- Exhibit Z: Student's summary of incident
- Exhibit AA: Social History Form

Reply, pages 1-7

Telephone Interviews

- Affective Needs Teacher: May 11, 2022
- Assistant Principal: May 17, 2022
- Director of Special Education: May 17, 2022
- Executive Director of Special Education: May 17, 2022
- Paraprofessional: May 11, 2022
- Parents: May 20, 2022
- School Psychologist: May 17, 2022
- Special Education Facilitator: May 17, 2022