

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

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**State-Level Complaint 2020:517  
Weld County School District 6**

**DECISION**

**INTRODUCTION**

The parent (“Parent”) of a child (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> filed a state-level complaint (“Complaint”) against Weld County School District 6 (“District”) on April 16, 2020.

The State Complaints Officer (“SCO”) extended the 60-day investigation timeline for seven days due to exceptional circumstances arising from the COVID-19 pandemic, consistent with 34 C.F.R. § 300.152(b)(1).

The SCO determined that the Complaint identified four allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.152. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**RELEVANT TIME PERIOD**

The Colorado Department of Education (“CDE”) has authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, this investigation will consider only events that occurred not earlier than April 16, 2019 to determine whether a violation of the IDEA occurred. *Id.* Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. Findings of non-compliance, if any, shall be limited to one year prior to the date the Complaint was filed.

**SUMMARY OF COMPLAINT ALLEGATIONS**

Whether the District denied Student a FAPE because the District:

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

1. Failed to conduct a manifestation determination review (“MDR”) within ten school days of the District’s decision to change Student’s placement during the fall semester of the 2019-2020 academic year, in violation of 34 C.F.R. § 300.530(e);
2. Determined Student’s behavior was not a manifestation of his disability during an MDR held during the 2019-2020 academic year, in violation of 34 C.F.R. § 300.530(e);
3. Failed to place Student in an appropriate interim alternative education setting during the fall and spring semesters of the 2019-2020 academic year, in violation of 34 C.F.R. §§ 300.530(g) and 300.531; and
4. Failed to provide educational services to Student after his tenth day of removal during the 2019-2020 academic year to enable Student to participate in the general education curriculum and progress toward meeting his IEP goals, in violation of 34 C.F.R. § 300.530(b)-(d).

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire record,<sup>2</sup> the SCO makes the following FINDINGS OF FACT (“FF”):

#### **A. Background**

1. During the 2019-2020 academic year, Student attended a middle school in the District (“School”). *Interview with Parent*. Student completed seventh grade in May 2020. *Id.*
2. Student is eligible for special education and related services under the disability categories of Other Health Impairment (“OHI”) and Serious Emotional Disability (“SED”). *Exhibit A*, p. 49.
3. In elementary school, Student was diagnosed with attention deficit hyperactivity disorder (“ADHD”). *Interview with Parent*. Around fifth or sixth grade, Student received diagnoses of reactive attachment disorder (“RAD”) and oppositional defiant disorder (“ODD”). *Id.*
4. Student is described as a kind, outgoing young man with a good sense of humor. *Interviews with Parent, Case Manager, and School Psychologist*. He enjoys creative activities and is always the first to volunteer as a classroom helper. *Id.* Student struggles to maintain friendships and control his emotions. *Id.* Academically, reading poses the biggest challenge for Student. *Id.*

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<sup>2</sup> The appendix, attached and incorporated by reference, details the entire record.

## **B. Student's IEP and BIP**

5. Student's May 6, 2019 IEP ("May 2019 IEP") was in effect at the beginning of his seventh-grade year. *Exhibit A*, pp. 180-200. At that point, Student was eligible for special education and related services only under OHI. *Id.* at pp. 180, 185.
6. The May 2019 IEP indicated that—as a result of his disabilities—Student had “difficulty remaining focused, completing quality work, following directions, keeping up with peers in the general education setting and controlling his impulsive behaviors.” *Exhibit A*, p. 187. He also struggled to follow directions and school rules. *Id.*
7. The May 2019 IEP contained four goals targeting mathematics, reading, writing, and social emotional wellness. *Id.* at pp. 188-191.
8. Under the May 2019 IEP, Student received 825 minutes per week of direct special education instruction outside the general education classroom. *Id.* at p. 195. These minutes were used to provide Student small group instruction in the areas of math, language arts, and social-emotional wellness. *Interview with Case Manager*. In addition, Student had 275 minutes per week of direct special education instruction inside the general education classroom. *Exhibit A*, p. 195. During this time, a paraprofessional provided Student with support in his science and social studies classes. *Interview with Case Manager*. Additionally, Student received 90 minutes per month of psychological services. *Exhibit A*, p. 195. School Psychologist had scheduled meetings with Student every week or every other week. *Interview with School Psychologist*. In addition to the 90 minutes per month, School Psychologist saw Student when he came to her office to take a break. *Id.*
9. Student spent 40% to 79% of his time in the general education classroom. *Id.* at p. 196.
10. Student's Behavior Intervention Plan (the “July 2019 BIP”) in effect at the beginning of seventh grade was dated July 29, 2019. *Exhibit B*, p. 1. That BIP identified three target behaviors which were impeding Student's learning:
  - Non-compliance/Defiance: Student refusing to follow adult directives and arguing with School staff about the directive. As defined, this behavior included stealing from School staff and peers.
  - Work refusal: Student refusing to start or complete schoolwork.
  - Elopement: Student leaving the classroom or designated area without adult permission.

*Id.* The BIP hypothesized that the function of the target behaviors was escape/avoidance of a non-preferred task, situation, person, or feelings. *Id.* at p. 3. “The behaviors are more likely to occur when he is angry, has gotten into trouble and is being redirected, if he is getting consequences for his behavior and when he believes the consequences are unjust.” *Id.*

11. Instead of resorting to the target behaviors, the July 2019 BIP envisioned Student asking for a break before he became escalated or School staff offering Student a break, either verbally or through a visual prompt (such as a break card). *Id.* at p. 3. The breaks would be in a predetermined location for a predetermined amount of time. *Id.*

12. If the target behaviors recurred, Student's teachers should offer him choices or redirect him and then walk away to give him processing time and time to comply. *Id.* at p. 4. His teachers should prompt Student to take a break but should not engage Student when he is angry. *Id.*

13. At the beginning of the school year, Case Manager informed Student's teachers of his IEP and BIP and provided them an electronic copy of his IEP snapshot to reference. *Interview with Case Manager.*

### **C. Disciplinary Incidents in August and September 2019**

14. Student began seventh grade at School on August 15, 2019. *Exhibit H*, p. 1.

15. Student's first suspension of seventh grade occurred one week into the academic year on August 22. *Exhibit G*, p. 12. That day, Student refused to complete his work and left the classroom without permission. *Id.* As a result of this behavior, Student received a one and one-half day out-of-school suspension. *Id.*

16. On August 27, Student received a three-day out-of-school suspension for stealing markers from a teacher and for non-compliant behavior. *Id.* at pp. 11-12.

17. Student received a one day in-school suspension on September 9 for work refusal and non-compliant behavior. *Exhibit G*, pp. 10-11. School has a classroom designated for students serving in-school suspensions. *Interview with Case Manager.* Because Student received special education services under his IEP, he received support from a paraprofessional while serving in-school suspensions. *Id.* During his in-school suspension, Student refused to do his work and, instead, shredded the work that was handed to him. *Id.* As a result, Student received an additional three day out-of-school suspension. *Id.*

18. On September 20, School issued Student a one day out-of-school suspension for possession of a vape pen. *Id.*

### **D. Disciplinary Incidents in October 2019**

19. On October 2, Student prevented a substitute paraprofessional from entering the classroom by holding the door closed with his foot. *Id.* at pp. 8-9. Student eventually released the door and went to the back of the classroom. *Id.* Student declined to do his work and began to swing a wire he had removed from a spiral notebook. *Id.* Teachers and other students asked Student to stop swinging the wire, but Student refused. *Id.*

20. At 4:00 p.m. on October 2, the District conducted a manifestation determination review (“MDR”) regarding Student’s behavior earlier that day. *Exhibit F*, pp. 3-8; *Exhibit K*, p. 1. The District held the MDR even though Student’s suspensions did not cumulatively total ten days. *Response*, p. 5. On occasion, the District conducts an MDR before it is required to do so if, for example, the School feels like an MDR would be helpful or if a student has several suspensions early in the school year. *Interview with Director of Special Education (“Director”)*.
21. The District issued a notice of meeting the day of the MDR. *Exhibit K*, p. 1. The short notice caused Parent and Advocate to attend by phone. *Exhibit F*, pp. 1-2; *Interview with Parent*.
22. During the MDR, the MDR team reviewed the information in Student’s file, including his IEP and BIP. *Interviews with Assistant Director of Special Education (“Assistant Director”) and School Psychologist*. The MDR team consulted Student’s eligibility categories, his impact of disability statement, and details in his behavior plan to determine whether his behavior was a manifestation of his disability. *Id.*
23. After reviewing this information, the MDR team concluded that Student’s behavior on October 2 was not a manifestation of his disability. *Id.*; *Exhibit F*, pp. 1-8. Specifically, the MDR team determined that Student’s behavior was neither caused by nor had a substantial relationship to his disability because Student “was very calm when asked to leave the room with an administrator.” *Id.* at p. 6; *Interviews with Assistant Director and School Psychologist*. Additionally, the MDR team found that Student’s IEP and BIP had been properly implemented. *Exhibit F*, p. 6; *Interview with Assistant Director and School Psychologist*. The SCO finds that the District followed Student’s BIP.
24. Parent and Advocate disagreed with this conclusion. *Interview with Parent*. Both felt Student’s behavior had a substantial relationship to his disabilities. *Id.* According to Parent, School had not followed Student’s BIP because Student needed a break from the classroom but had not been offered one because his behavior was unsafe. *Id.*
25. Student received two days of in-school suspension for his behavior on October 2. *Exhibit G*, p. 2. A paraprofessional provided Student support during this in-school suspension. *Interview with Case Manager*.

#### **E. Student’s October Reevaluation**

26. At Parent’s request, the District reevaluated Student in September and October 2019 (“Fall 2019 evaluation”). Along with a variety of academic assessments, the District administered the Behavior Assessment Scale for Children, Third Edition (“BASC-III”) to evaluate Student’s social and emotional functioning. *Exhibit C*, pp. 35-50. Ratings scales for the BASC-III were provided to Student, Parent, General Education Teacher, and Special Education Teacher. *Id.* at p. 38. The ratings by Parent and both teachers fell within the “Clinically Significant”

category in the areas of hyperactivity, aggression, conduct problems, externalizing problems, and attention problems. *Id.* at pp. 38-40.

27. The District also evaluated Student using the Conners, Third Edition (“Conners-3”). *Id.* at pp. 40-42. Student’s overall scores on the Conners-3 fell within the “Very Elevated” range, indicating that Student has more attention/inattention and behavioral concerns than typical, same-age peers. *Id.*

28. Based on the Fall 2019 evaluation, Student’s IEP team met on October 7. At that time, the IEP team determined that Student was eligible for special education services under SED in addition to OHI. *Exhibit C*, pp. 4-7.

29. The impact of disability statement in Student’s October 7 IEP (“October 2019 IEP”) indicated, generically, that Student’s disabilities “may impact his ability to learn in the general education classroom at the same rate as his peers without accommodations and additional supports.” *Id.*, p. 102. The October 2019 IEP contained no other description of how Student’s disabilities impact his functioning at School. *Id.* at pp. 94-112.

30. The October 2019 IEP replaced Student’s prior IEP goals with five new goals in the areas of mathematics, reading, writing, self-determination, and social/emotional wellness. *Id.* at p. 103-104.

31. Student’s October 7 IEP (“October 2019 IEP”) decreased Student’s service minutes to 800 minutes per week of direct special education instruction outside the general education classroom and 200 minutes per week of direct special education instruction inside the general education classroom (from 825 minutes and 275 minutes respectively). *Exhibit A*, p. 109. Student continued to receive 90 minutes per month of psychological services. *Id.* The BIP was amended to include some additional specificity, but the majority of the information—including all of the key components of the BIP—remained unchanged from the July 2019 BIP. *Exhibit B*, pp. 17-20. Though the description of the target behaviors was reworded, the target behaviors themselves remained the same. *Id.*

#### **F. Disciplinary Incidents in November 2019**

32. On November 4, Student hit another student on the head during class. *Exhibit G*, p. 2. When asked why, Student told the other student that he hit him “just cause.” *Id.* Student later stated that he was “just playing around.” *Id.*

33. At 3:00 p.m. that day, the District held an MDR meeting. *Exhibit K*, p. 11; *Exhibit F*, pp. 9-14. Once again, the District issued a notice of meeting the day of the MDR. *Exhibit K*, p. 11. Despite the short notice, Parent, Advocate, Outside Provider and Wraparound Facilitator were able to attend the meeting. *Exhibit F*, p. 14. Student also attended. *Id.*

34. During the MDR, the MDR team reviewed the information in Student's file, including his IEP and BIP. *Interviews with Assistant Director and School Psychologist*. The MDR team consulted Student's eligibility categories, his impact of disability statement, and details in his behavior plan to determine whether his behavior was a manifestation of his disability. *Id.*
35. After reviewing this information, the MDR team concluded that Student's behavior on November 4 was not a manifestation of his disability. *Id.*; *Exhibit F*, pp. 9-14. Specifically, the MDR team determined that Student's behavior was neither caused by nor had a substantial relationship to his disability because Student "explained that he was trying to play around a little bit but [other student] didn't seem like he wanted to." *Exhibit F*, p. 11.
36. When questioned by Assistant Director during the meeting, Student conceded that he should not have been out of his seat and should not have hit the other student. *Interview with Assistant Director*. Based on Student's acknowledgment of the inappropriateness of his behavior, the MDR team concluded that Student's behavior was a conscious choice. *Id.*; *Interview with School Psychologist*.
37. Additionally, the MDR team found that Student's IEP and BIP had been properly implemented. *Exhibit F*, p. 11; *Interview with Assistant Director and School Psychologist*. The MDR team noted that Student was asked to take two breaks, was using drawing as a coping strategy, and was working in a small group setting. *Exhibit F*, p. 11.
38. Parent disagreed with the MDR team's findings. *Interview with Parent*. In Parent's view, Student's behavior was a classic representation of Student's struggles with impulse control as a result of his disabilities. *Id.*
39. Following the manifestation determination, the MDR team assigned Student one day of in-school suspension and one-day of out-of-school suspension for his behavior on November 4. *Id.* at p. 12.
40. On November 13, Student threatened to pull a knife on another student. *Exhibit G*, p. 1. When Principal searched Student, she located a "camping knife" in Student's boot. *Id.*; *Interview with Parent*. According to Parent, the knife was a butter knife from a camping utensil set. *Interview with Parent*.
41. The District convened an MDR team meeting at 2:00 p.m. that afternoon. *Exhibit K*, p. 13; *Exhibit F*, pp. 15-20. A notice of meeting was issued the day of the meeting. *Exhibit K*, p. 13. Student attended the meeting, and, despite the short notice, Parent, Outside Provider, Advocate, and Wraparound Facilitator were able to attend. *Exhibit F*, p. 20.
42. The MDR team reviewed the information in Student's file, including his IEP and BIP. *Interviews with Assistant Director and School Psychologist*. The MDR team consulted Student's eligibility categories, his impact of disability statement, and details in his behavior plan to determine whether his behavior was a manifestation of his disability. *Id.* The MDR form

indicates that Student's behavior was associated with the special circumstances outlined in 34 C.F.R. § 300.530(g).

43. After reviewing this information, the MDR team concluded that Student's behavior on November 13 was not a manifestation of his disability. *Id.*; *Exhibit F*, pp. 15-20. Specifically, the MDR team determined that Student's behavior was neither caused by nor had a substantial relationship to his disability because Student "reported that he knows knives are not allowed at school and that he shouldn't have brought it." *Exhibit F*, p. 20. Student said he brought the knife to School to protect himself from the "weirdos" in his neighborhood. *Interviews with Case Manager and Parent*. Because Student "was able to articulate that [the knife] was not allowed, we determined it was not a manifestation of his disability." *Interview with Case Manager*.

44. Additionally, the MDR team found that Student's IEP and BIP had been properly implemented. *Exhibit F*, p. 6; *Interview with Assistant Director and School Psychologist*. At the time of the incident, Student had taken two breaks earlier in the class period. *Exhibit F*, p. 15. Student was denied a third break, because another student had already requested a break and—given some turbulent history between the two students—the teacher denied Student's request. *Id.*

45. Parent, again, disagreed with the MDR team's conclusions. *Interview with Parent*. At the time of the incident, Student's father—the "only constant in his life"—had been out of town on a temporary assignment. *Id.* This left Student feeling very insecure. *Id.* Student's residence is near a business which often attracts individuals who are intoxicated or homeless. *Id.* Student, from time to time, encountered these individuals while waiting for the bus stop, and it made him feel unsafe. *Id.* Parent disputed the District's contention that Student was not escalated at the time of the incident. *Id.* To Parent, Student's need for two breaks during that class period indicated that he was escalated to a certain extent. *Id.*

46. After determining that Student's behavior on November 13 was not a manifestation of his disability, the MDR team decided Student should receive a five-day out-of-school suspension. *Exhibit F*, p. 18.

### **G. Initial Threat Assessment**

47. That same day, School Psychologist and Counselor completed a threat assessment screen. *Exhibit E*, p. 64. The threat assessment screen found that a full team threat assessment ("TA") was warranted. *Id.*

48. In response, the District convened a full threat assessment team ("TA team") on the same day Student brought the knife to School. *Exhibit E*, pp. 48-55. Per District policy, neither Student nor Parent were allowed to participate in the TA meeting. *Interview with Assistant Director*. Student was interviewed prior to the meeting; however, Parent was unaware the meeting was being held until after the fact. *Interviews with School Psychologist and Parent*.



49. The TA team found that Student posed a “medium degree of concern.” *Id.* p. 53. Under the District’s guidelines, a medium degree of concern exists where “[a] threat could be carried out, although it may not appear entirely realistic. The team has moderate, ongoing concerns about the student’s motivation to carry out the threat warranting district consultation and/or request for external support resources in addition to school-based interventions.” *Id.* at p. 54. The TA team agreed to develop a safety plan for Student before he returned to School. *Interview with School Psychologist.*

50. On November 20—the day before Student was to return from his suspension—Parent sent School Psychologist, Counselor, and Principal a copy of Student’s drawings that Parent found in the garage. *Exhibit M*, p. 219. The papers were sorted into envelopes labeled: not to see, caution, for cops only, and the big one. *Id.* One of the drawings depicted a person shooting another person with the label “not good.” *Id.* at p. 221. Another page has a sad face with a bulleted list containing “killing,” “drinking,” “shooting,” and stealing. *Id.* at p. 224. The drawings did not reference a plan of action or identify any targets. *Id.* at pp. 219-229.

51. When asked about the drawings, Student told Parent that he used the drawings “to cope.” *Interview with Parent.* Parent forwarded the drawings to School, because Student was about to return from his suspension. *Id.*

52. Later that day, Student told Parent he was having unsafe thoughts and wanted to be taken to the emergency room. *Id.* Student was admitted for homicidal ideation and spent approximately the next week receiving inpatient care in the hospital. *Id.* During his hospitalization, Student’s doctors adjusted the medications Student took for anxiety, depression, and ADHD. *Id.* After Student’s discharge, Parent noticed that Student was sleeping and regulating his emotions much better than before. *Id.*

53. Student’s hospitalization and the District’s Thanksgiving holiday (from November 25-29) delayed Student’s return to School. *Id.*; *Exhibit H*, p. 1.

54. On December 2, the District extended Student’s out-of-school suspension by six days to allow the District time to re-evaluate Student’s threat level based on the papers Parent submitted on November 20. *Response*, p. 6.

55. During Student’s extended suspension, School prepared hard copy materials for Student, but Parent was unable to pick them up due to her work schedule. *Exhibit M*, p. 1459. School also provided Student with access to online resources; however, Student was unable to access those resources while Parent was at work. *Id.*

#### **H. Updated Threat Assessment and Change of Placement**

56. The TA team reconvened on December 4. *Exhibit E*, pp. 56-63. Based on the knife Student brought to School and the drawings provided by Parent, the TA team determined that Student now posed a “high degree of concern.” *Id.* at p. 62. In the District, a high degree of

concern exists where a threat “appears to pose an imminent and serious danger to the safety of others and requires a district directed response in cooperation with building administration.” *Id.* The TA team recommended that Student be placed on homebound instruction. *Interview with School Psychologist.*

57. On December 9, Student’s IEP team met to consider the TA team’s recommendation. *Id.* Based on the TA, Student’s drawings, and his hospitalization, the IEP team felt Student could not safely return to School but wanted Student to have access to the curriculum. *Interviews with Case Manager and School Psychologist.* Therefore, the IEP team accepted the TA team’s recommendation and changed Student’s placement to homebound instruction. *Id.* Though District attendees indicated the IEP team considered other placement options, no witness recalled any specific options considered. *Interviews with Assistant Director and Case Manager.*

58. The District did not produce a copy of the December 2019 IEP during the investigation. According to Director, the December 2019 IEP was not finalized within the District’s IEP management system and, as a result, was inadvertently saved over when the IEP team developed the February 2020 IEP. *Interview with Director.* As a result, the SCO cannot address specific points of the IEP documentation (such as Student’s impact of disability) or determine whether the change in placement was made upon consideration of reevaluation consistent with ECEA Rule 4.03(8)(b)(ii)(B).

59. During the December 9 meeting, the IEP team agreed that Student should receive ten hours per week of homebound instruction. *Interview with Case Manager.* The IEP team declined to include any psychological services, believing that the services Student was receiving from outside providers were adequate. *Interviews with Case Manager and School Psychologist.*

60. The IEP team intended Student’s homebound instruction to be temporary. *Interview with Assistant Director.* As such—and in accordance with District policy—the IEP team agreed to reconvene within 45 days to reevaluate Student’s placement. *Id.; Interview with Director.*

61. During the IEP team meeting, Parent advocated for placing Student in a setting with a higher level of care, such as day treatment. *Interview with Parent.* Based on the results of the MDRs, the District members of the IEP team did not agree that Student’s behavior was related to his disability. *Interview with Director.* As a result, the IEP team found no basis for placing Student in day treatment. *Id.* Instead, the District suggested Parent have Student evaluated by an outside Mental Health Provider. *Id.* If Mental Health Provider agreed that Student required a higher level of care, the IEP team could revisit the issue. *Id.*

62. The District has a pool of instructors it uses for homebound instruction. *Id.* Here, the District located an instructor for Student but that instructor had a personal issue just before she was scheduled to begin, leaving the District scrambling to find another instructor. *Id.* As a result, Student did not receive homebound instruction until December 18, 2019. *Id.; Exhibit R,*

p. 1. Six school days elapsed between the time Student was placed on homebound instruction and when he began to receive such instruction. Response, p. 6; *Exhibit R*, p. 1.

63. The District’s winter break began on December 20, 2019 and continued through January 6, 2020. *Exhibit H*, p. 1. When classes resumed on January 7, 2020, Student also resumed home instruction. *Id.*; *Exhibit R*, p. 1.

64. To the extent possible, homebound instruction follows the curriculum of the Student’s home school. *Interviews with Director*. This allows a student to more easily transition back to his regular placement when homebound instruction ends. *Id.*

65. According to her service logs, Homebound Instructor provided Student instruction in reading, writing, and math. *Exhibit R*, pp. 1-6. He did not have access to the remainder of the curriculum that an ordinary seventh grader would at School. *Id.*; *Interview with Case Manager*.

### **I. Second Updated Threat Assessment**

66. On January 8, 2020, Counselor contacted Advocate, Wraparound Facilitator, and Outside Provider to gather information for the upcoming TA meeting. *Exhibit E*, pp. 3, 19-22. Advocate responded, indicating that her interactions with Student had “been very positive.” *Id.* Advocate acknowledged that Student “need[ed] a little redirecting” but felt “that [Student] has gained some personal growth and . . . would benefit with more structure in his day.” *Id.* at p. 3.

67. Counselor asked Wraparound Facilitator and Outside Provider to answer specific questions targeting Student’s recent behaviors, safety, and personal growth. *Id.* at p. 19; *Exhibit M*, p. 726. When asked whether Student was a risk to other students, Wraparound Facilitator indicated that “[t]his depends on how he is being treated by other students and what kind of day he is having. If he is being bullied or feels that he is being bullied . . . by other student’s [sic], he would be a risk to them.” *Exhibit E*, p. 19. Though Student had shown some aggression towards his sibling, Wraparound Facilitator indicated that Student had generally been making progress in self-regulation and had not made any comments about hurting other students or himself. *Id.* at pp. 19-20.

68. Outside Provider—who was providing in-home counseling to Student at the time—indicated that she “[had] not observed violent behavior in the home environment. This clinician is not able to assess [Student’s] in-school behavior due to prolonged absence from school and scope of practice.” *Exhibit M*, p. 726. Outside Provider similarly declined to assess Student’s safety in School. *Id.* However, Outside Provider indicated that Student had made “significant progress” in self-regulation at home. *Id.*

69. Counselor emailed Parent on January 13—the day of the TA meeting—asking Parent to provide any information that Parent “thought would be beneficial” for the TA team to consider. *Id.* at p. 4. Parent responded, stating that:

- Student would need one-on-one supervision for School.
- Student did not feel safe returning to School and wanted an alternative placement by the end of the 45-day homebound instruction period.
- Student did not have access to weapons at home—everything, including scissors, was locked up.
- Student did not have a criminal record (in contrast to what was stated in the December 13 TA).

*Id.* Parent also sent copies of the November 13 and December 4 threat assessments, annotated with her concerns. *Id.* at pp. 5-18. Notably, Parent expressed concern that Student’s motive in bringing the knife to School—protection from the “weirdos” in his neighborhood— was omitted and that the knife was vaguely described as a “camping knife” instead of a “camping butter knife.” *Id.*

70. On January 13, the TA team reassessed Student’s level of concern. *Id.* at pp. 24-31. Even though Student had not made any new threats, the TA team found that Student remained a high level of concern and recommended continued homebound instruction. *Id.*; *Interview with School Psychologist.* The information received from Parent and Wraparound Facilitator was “too vague” and did not demonstrate that Student was no longer a threat at School. *Interview with School Psychologist.*

#### **J. Student’s February Reevaluation**

71. In January and February, the District reevaluated Student using the BASC-III and the Emotional Disturbance Decision Tree (“EDDT”), as well as other academic assessments. See *Exhibit C*, pp. 9- 32. Parent, General Education Teacher, and Special Education Teacher completed the BASC-III ratings scales. *Id.* at pp. 22-24. The ratings for all three individuals fell in the “Clinically Significant” category in the areas of hyperactivity, aggression, conduct problems, externalizing problems, and attention problems. *Id.* The same individuals completed the ratings scales for the EDDT. *Id.* at p. 25. All the ratings fell within the moderate to very high clinical range in all indexes. *Id.*

72. On February 3, the IEP team considered the results of the reevaluation and determined that Student remained eligible under both OHI and SED. *Exhibit C*, pp. 1-3. The District did not perform a functional behavior assessment and made only minor, insignificant changes to Student’s BIP. *Exhibit B*, pp. 7-20

73. Throughout January and February, Parent worked to have Student placed in a day treatment facility. *Interview with Parent.* An evaluation by an outside Mental Health Provider recommended that Student be placed in a day treatment program. *Id.* But, in order to place

Student in Outside Provider's day treatment program, the District had to initiate the referral or, at least, approve the referral. *Exhibit M*, pp. 1421, 1495, 1511-1512.

### **K. Third Updated Threat Assessment**

74. On February 14, School Psychologist asked Outside Provider to answer questions regarding Student's recent behaviors and safety. *Exhibit M*, p. 277. At that point, Student had been discharged by Outside Provider, so Outside Provider responded, indicating that she was unable to contribute to an assessment after discharge. *Id.* at p. 276. School Psychologist then requested the discharge information from Parent but did not ask Parent to provide any other information for the upcoming meeting. *Id.* at pp. 276, 288.

75. The TA team met again on February 24 to reassess the threat posed by Student. *Exhibit E*, pp. 32-39. Once again, the TA team found that Student continued to present a "high level of concern" and suggested Student remain on homebound instruction. *Id.*

76. School Psychologist contacted Parent on March 3, again requesting the discharge paperwork from Outside Provider. *Exhibit M*, pp. 275-76. Parent responded that, as she had previously indicated, "the discharge paperwork was irrelevant to the questions you guys were asking. Instead you should be taking into account that [Student] has been discharged by both [Outside Provider] in home counseling and in home [Trust Based Relationship Intervention] coaching meaning he is doing better with his coping skills at home." *Id.* at p. 275.

77. Parent also stated:

"[Student] has been much better at using his coping skills at home and is able to recognize when he is getting upset and verbalize it better to his brother. The district is unable to provide consistent homebound teaching for Student . . . . If [School] feels they cannot create a . . . transition plan to bring him back . . . then we need to look at a change of placement . . . ."

*Id.*

78. On March 9, Student's IEP team met and agreed to continue homebound instruction. *Exhibit A*, p. 67.

79. Parent provided the District the discharge summary from Outside Provider on March 13. *Exhibit M*, pp. 738-747. That summary indicated that Student had not experienced homicidal ideation or assaultive ideation since his hospitalization in November. *Id.* at p. 745. It further noted that Outside Provider recommended Student be placed in a day treatment program versus returning to School. *Id.*

80. At some point in early to mid-March, Student was accepted into Outside Provider's day treatment program. *Interview with Parent*. However, COVID-19 prevented Student from

beginning the program. *Id.* Parent intends for Student to attend Day Treatment Program once the program resumes normal operations. *Id.*

#### **L. Transition to Remote Learning**

81. Meanwhile, Student's last meeting with Homebound Instructor was on February 27. *Exhibit R*, p. 5. On March 2, Homebound Instructor informed School that she would no longer be able to teach Student due to a personal emergency. *Exhibit M*, p. 1217. At that point, the District started looking for a replacement instructor. *Id.*

82. However, due to COVID-19, it quickly became clear that the District was not going to be able to find a replacement instructor. *Interview with Director*. The District's spring break—scheduled for March 16-21—was extended through March 27 while the District transitioned to remote instruction. *Id.*

83. Student began participating in remote instruction with his School classmates on March 31. *Exhibit P*, p. 1. During remote learning, Student received small group special education instruction in the areas of math and language arts. *Interview with Case Manager*. A paraprofessional provided Student support during his science and social studies classes by using a breakout room in the virtual classroom. *Id.* From March 31 to May 21, Student completed approximately 3.5 hours per day of remote instruction. *Exhibit P*, p. 1. School Psychologist and Student scheduled time to meet during remote instruction so Student could receive his psychological services. *Id.*; *Interview with School Psychologist*. However, except for a couple of occasions, Student did not attend these sessions. *Exhibit P*, p.1; *Interview with School Psychologist*.

#### **M. Fourth Updated Threat Assessment**

84. On April 17, Principal requested Parent provide updated information for the TA team and sent Parent specific questions regarding Student's progress and behaviors, the mental health services Student was receiving, and safety concerns. *Exhibit M*, p. 296. Of note, Parent indicated that she did not believe Student was a safety risk and that Student was receiving individual counseling and weekly neurofeedback sessions. *Id.*

85. The TA team met on May 22, 2020 to re-evaluate the level of threat posed by Student. *Exhibit E*, pp. 65-72. Based on the lack of new information available, the TA team concluded that Student still presented a high degree of concern and recommended he remain on homebound instruction. *Id.*

#### **N. Student's Progress During Seventh Grade**

86. Student completed seventh grade on May 21, 2020. *Exhibit H*, p. 1.

87. While Student was receiving homebound instruction, Case Manager communicated regularly with Homebound Instructor to discuss Student's progress and any curriculum needs. *Interview with Case Manager.*

88. Student's most recent progress report identifies Student's progress on his IEP goals for third and fourth quarter. *Exhibit S*, pp. 1-4. For third and fourth quarter, the progress report indicates the following:

Mathematics: Student "will improve his math problem solving skills by increasing his ability to apply his knowledge of basic math facts (+, -, x, /) to *word problems* from 58% accuracy as measured by classroom assessments, assignments, and other curriculum based measurement by December 2020.

- 03/06/2020-3rd Quarter – 2019/2020: Student did not work on this goal.
- 05/21/2020-4th Quarter – 2019/2020: Progress Made

Student "has improved his accuracy of math problem solving skills from 58% to 75% while using online curriculum from March 31 to May 21."

Reading: "Given ability level text, [Student] will improve his reading comprehension skills by increasing his ability to recall information from the text from 75% accuracy on [a] 3rd grad[e] level text to 75% at 4th grade level [text] as measured by classroom assessments, assignments, and other curriculum based measures by December 2020."

- 03/06/2020-3rd Quarter – 2019/2020: Student did not work on this goal.
- 05/21/2020-4th Quarter – 2019/2020: Progress Made

Student "has been increasing his reading skills using 6th grade curriculum on StudySync texts and questions. He can recall information after re-reading materials and using his understanding of the material answer questions with evidence from the text. He is at 70% accuracy at 6th grade level with online materials."

Writing: Student "will improve his written expression by independently using graphic organizers to create a 5 sentence paragraph using a structured format to include restating the question, citations, and transition words and paraphrasing related to either narrative or expository text at ability level with proper punctuation and capitalization as measured by student work samples and observation by December 2020."

- 03/06/2020-3rd Quarter – 2019/2020: Student did not work on this goal.
- 05/21/2020-4th Quarter – 2019/2020: Student did not work on this goal.

“Online assignments for ELA did not include a five sentence paragraphs [sic]. [Student] did write one and two sentences to answer comprehension questions.”

Self-Determination: Student “will improve his work ethic by increasing his time on task to 60 minutes with no more than 2-3 redirects as measured by classroom observations and other classroom teacher feedback by February 2021.”

- 03/06/2020-3rd Quarter – 2019/2020: [Blank]
- 05/21/2020-4th Quarter – 2019/2020: [Blank]

Social/Emotional Wellness: Student “will be able to utilize 2 out of 5 coping strategies (asking for a break, taking deep breaths, using a fidget, etc.) when he becomes upset/frustrated in the classroom in 8 out of 10 opportunities presented as measured by teacher.”

- 03/06/2020-3rd Quarter – 2019/2020: Student did not work on this goal.  
“Student has been on homebound service so this goal was not worked on.”
- 05/21/2020-4th Quarter – 2019/2020: Student did not work on this goal.

*Id.*

89. The progress report indicates that Student “did not work” on any of his IEP goals during third quarter, which ran from January 7 to March 6. *Id.* Case Manager clarified that Student was, indeed, working on his IEP goals with Homebound Instructor. *Id.* The progress report indicates that Case Manager did not have any data by which to measure Student’s progress. *Id.* Because Student had not completed third quarter at the time Homebound Instructor resigned, Case Manager did not have an opportunity to gather data assessing Student’s progress. *Id.*

90. The progress report suggests Student made some progress on his IEP goals during remote instruction. *Id.* Upon questioning from the SCO, Case Manager indicated that Parent was supervising Student’s remote learning and expressed some skepticism that Student’s progress during remote learning would translate back to the classroom. *Interview with Case Manager.*

### **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 conduct a manifestation review within 10 school days of Student’s disciplinary change of placement during the fall semester of the 2019-2020 academic year, in violation of 34 C.F.R. § 300.530(e). Additionally, the District**



**committed a procedural violation by failing to provide Parent with adequate notice of the MDRs.**

### **Disciplinary Change of Placement**

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, a school district must perform an MDR. *Id.* § 300.536(a). 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 result of the school district's failure to implement the student's IEP. *Id.* § 300.530(e)(1). Such a determination triggers additional obligations for the school district. *Id.* § 300.530(f). On the contrary, if the behavior is *not* a manifestation of the student's disability, the school district may discipline the student in the same manner as a non-disabled student. *Id.* § 300.530(c). The district must, however, ensure the student continues to receive educational services as specified in 34 C.F.R. § 300.530(d).

Before analyzing whether the District timely conducted an MDR, the SCO must determine whether a disciplinary change of placement occurred and, if so, the date the change of placement happened.

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 SCO finds that Student's disciplinary change of placement occurred on December 6, 2019. On August 22, August 27, and September 9, Student was suspended for general non-compliance and work refusal. (FF #s 15-17.) These three removals involve substantially similar behavior but total only 7 ½ school days. (*Id.*) Therefore, these removals do not constitute a disciplinary change in placement as a pattern.

Student was suspended twice in November for unsafe behavior. On November 4, Student received a one-day out-of-school suspension for hitting another Student (in addition to a one-day in-school-suspension). (FF #s 32, 39.) And, on November 13, Student received a five-day

out-of-school suspension for bringing a knife to School. (FF #s 40, 46.) The SCO finds that these two removals constitute a pattern under 34 C.F.R. § 300.536(a). *See CO State-Level Complaint Decision 2019:508*. Both removals involve substantially similar behavior and occurred in very close proximity to one another. Coupled with the six-day extension of Student’s suspension on December 2, these removals exceed 10 days. (FF #s 32, 39, 40, 46, 54.) Under this pattern, Student’s disciplinary change of placement occurred on his eleventh day of removal on December 6, 2019.

By December 6, the District had already conducted MDRs on October 2, November 4, and November 13. (FF #s 20, 32, 40.) The MDRs were timely, even if unnecessary. Yet the District failed to conduct an MDR within ten school days of the disciplinary change of placement on December 6.

On December 2, the District tacked an additional six days onto Student’s suspension. (FF # 54.) The District’s concerns over Student’s drawings—not ongoing concerns over the knife Student brought to School—prompted the extension. (*Id.*) The extension effectively disciplined Student for the drawings. The District should have treated this extension as a separate incident and conducted an MDR to determine whether the drawings were a manifestation of Student’s disability.

Under 34 C.F.R. § 300.530(e), an MDR must be conducted within 10 school days of any disciplinary change in placement; the District’s preemptive MDRs neither relieved the District of this obligation nor cured the District’s failure to conduct such an MDR. For this reason, the SCO finds that the District violated 34 C.F.R. § 300.530(e) by not timely conducting an MDR.

### **Use of Discipline**

As noted above, the District essentially disciplined Student for his drawings when it extended his suspension. The IDEA disfavors disciplining a child for behavior that results from his or her disability. *CDE Guidance Memorandum* found at: [http://www.cde.state.co.us/sites/default/files/documents/cdesped/download/pdf/guidance\\_disciplineofchildren.pdf](http://www.cde.state.co.us/sites/default/files/documents/cdesped/download/pdf/guidance_disciplineofchildren.pdf) (“[C]hildren should not be penalized for conduct that is the result of a disability.”); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46720 (Aug. 14, 2006) (providing that “a child with a disability may display disruptive behaviors characteristic of the child’s disability and . . . should not be punished for behaviors that are a result of the child’s disability”).

Implicit in the IDEA’s disciplinary provisions is a “principle that disfavors [using] discipline to make changes in the educational placement of a child with a disability. Rather, where a child with a disability has issues with behavior or self-control, [IDEA] shows a preference for dealing with those issues via the IEP process rather than via the disciplinary process.” 71 Fed. Reg. 46720. Accordingly, for a student with a disability, the IDEA requires school districts to “take a

careful look at any possible relationship between the misconduct in question and the child's disability (or disabilities), and to proceed cautiously with disciplinary action." *Id.*

Here, the District effectively disciplined Student for his drawings without conducting an MDR to determine whether his drawings were the result of his disability. This action by the District undermined the intent of the IDEA.

### **Notice of MDR Meetings**

Additionally, the SCO finds that the District committed a procedural violation of the IDEA by failing to provide Parent with adequate notice regarding the MDR meetings. Parents have a right, under the IDEA, to invite additional participants to an MDR. 34 C.F.R. § 530(e)(1). This right necessitates that school districts notify parents early enough to ensure that parents and their invited attendees will have an opportunity to attend and participate. *Id.* Failing to adequately inform parents of an MDR may result in a violation of the IDEA. *See CO State-Level Complaint Decision 2019:563; Cherry Creek School District #5*, 56 IDELR 149 (SEA CO 01/24/11).

Here, the District provided Parent with inadequate notice of the MDRs on October 2, November 4, and November 13. (FF #s 21, 33, 41.) Each time Parent received notice of the MDR the day of the meeting, meaning Parent received *less than 24 hours'* notice. (*Id.*) This untimely notice constitutes a procedural violation of the IDEA.

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).

Parent, Advocate, Outside Provider, and Wraparound Facilitator were able to attend the MDRs—either in person or by phone—despite the short notice. As a result, the SCO finds that the procedural violation did not impede Parent's opportunity to participate in the decision-making process, although it certainly could have.

Pursuant to its general supervisory authority, 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).

In this case, it is clear that the District’s failure to provide Parent adequate notice of MDR meetings was not unique to Student but, rather, is systemic in nature. The District conducted all three MDRs the same day as a disciplinary incident. As a result, Parent received less than 24 hours’ notice of each MDR meeting. The District’s reliance on MDRs to determine discipline motivates the District to conduct MDRs quickly. In doing so, the District neglected its obligation to ensure Parent—and anyone Parent wants to attend—has an opportunity to attend. The SCO, therefore, finds that the evidence supports a systemic violation regarding the notice of the MDRs and, thus, sets forth remedies consistent with the IDEA.

**Conclusion to Allegation No. 2: The District failed to consider all relevant information in Student’s file when it determined whether his behavior was a manifestation of his disability, in violation of 34 C.F.R. § 300.530(e).**

When determining whether a student’s behavior is a manifestation of his or her disability, the MDR team must “review all relevant information in the student’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); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46719 (Aug. 14, 2006) (noting that the list of relevant information is not exhaustive and *any* relevant information may be considered). “[D]ecisions regarding the manifestation determination must be made on a case-by-case basis.” 71 Fed. Reg. 46720.

Here, the SCO finds that the District failed to consider all relevant information in Student’s file when it determined that Student’s behavior was not a manifestation of his disability at the MDRs held on October 2, November 4, and November 13. Each report indicates that the respective MDR team reviewed the relevant material in Student’s file, including his IEP and BIP. (FF #s 22, 34, 42.) District witnesses agreed. (*Id.*) But nothing in the record indicates that the MDR teams actually *considered* this information. “Review”, as used in § 300.530(e), necessarily means to consider and give thought to that information, not simply review it for purposes of checking a box on a form. And, indeed, the materials in Student’s file—at least those produced during this investigation—lack meaningful descriptions of Student’s disabilities and the characteristics of those disabilities in Student. (*See* FF #s 6, 29.)

During interviews, it became clear that the outcome of each MDR turned on whether the District staff felt Student was escalated at the time of the incident and whether Student was able to identify or acknowledge the inappropriateness of his behavior afterwards. (FF #s 23, 35, 36, 43.) No explanation by a District witness referenced the characteristics of Student’s disabilities—either generally or as seen in Student. (*Id.*) The MDR form contains space for the MDR teams to articulate a basis for the determination that Student’s behavior was not caused

by or had a direct and substantial relationship to Student's disabilities. (*See id.*) The explanations on the MDR forms are inadequate. Once again, the explanations do not even reference Student's disabilities but, instead, focus on whether Student exhibited choice behavior. (*See id.*)

The SCO finds that the District violated 34 C.F.R. § 300.530(e) by failing to meaningfully review the information in Student's file when determining whether Student's behavior was a manifestation of his disabilities.

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).

In this case, the violation resulted in the District conducting three MDRs inconsistent with the IDEA. As a result, the SCO finds that the violation resulted in a denial of FAPE. If the MDR teams had properly considered the materials in Student's file, Student's behavior could have potentially been found to be a manifestation of his disabilities. If so, Student should not have been removed from his placement at School. An improper removal would have undoubtedly deprived Student of an educational benefit.

As a matter of policy, CDE will not overturn an MDR through a state complaint decision. Indeed, the IDEA mandates that MDRs be completed by an MDR team, including District staff, IEP team members, and the parents, who know the student best. 34 C.F.R. § 300.530(e). In the past, CDE has directed school districts to conduct a new MDR that remedies the deficiencies identified in state complaint decisions. *See, e.g., CO State-Level Complaint Decision 2019:563; Cherry Creek Sch. Dist.*, 119 LRP 437679 (SEA CO 6/22/18). Here, however, given Student's acceptance and placement by the District into Day Treatment Program, such action seems unhelpful and unnecessary. Instead, the SCO will impose remedies which focus on preventing recurrence of a similar situation in the future.

As explained above, under its general supervisory authority, 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). In this case, the District's failure to determine whether Student's behavior was a manifestation of his disability was not unique to Student but, rather, is systemic in nature. The District committed the same error in each of the three MDRs conducted for Student. Assistant Director—who oversees special education in District's secondary schools—attended the MDRs. During interviews, the District witnesses recognized no error in the methodology of the determination. The SCO, therefore, finds that the evidence supports a systemic violation regarding the conduct of MDRs and, thus, sets forth remedies consistent with the IDEA.

**Conclusion to Allegation No. 3: By relegating Student to homebound instruction for nearly four months, the District failed to place Student in an appropriate interim alternative education setting during the fall and spring semesters of the 2019-2020 academic year, in violation of 34 C.F.R. §§ 300.530(d) and (g).**

### **Interim Alternative Educational Setting**

The IDEA allows a school district to remove a student to an interim alternative educational setting (“IAES”) “without regard to whether the behavior is determined to be a manifestation of the child’s disability” if the student carries a weapon on school premises (or commits another act identified in the regulation). 34 C.F.R. § 300.530(g). A removal under § 300.530(g) may not exceed 45 days. *Id.* However, if a school district conducts an MDR and finds that the student’s behavior was *not* a manifestation of his or her disability, the district may remove a student to an IAES placement for more than 45 days. *Letter to Bachman*, 29 IDELR 1092 (OSEP 1997); *C.C. v. Hurst-Eules-Bedford Indep. Sch. Dist.*, 67 IDELR 254 (5th Cir. 2016) (unpublished).

The IEP team determines the appropriate IAES for the student. *Id.* §§ 300.531, 300.530(d)(5). “What constitutes an appropriate IAES will depend on the circumstances of each individual case.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46722 (Aug. 14, 2006) (noting also that a student’s home may be an appropriate IAES depending on the circumstances). An appropriate IAES allows the student to continue to receive educational services “so as to enable the child to continue to participate in the general education curriculum, although in another setting and to progress toward meeting the goals set out in the child’s IEP.” *Id.* § 300.530(d)(1). Additionally, where appropriate, the student should receive a functional behavioral assessment and “behavioral intervention services . . . designed to address the behavior so that it does not recur.” *Id.* § 300.530(d)(1)(ii).

A school district is not required to provide all services in a student’s IEP when the student has been removed to an IAES. However, “[i]f a student whose placement has been changed under 34 C.F.R. § 300.530(c) or (g) is not progressing toward meeting the IEP goals then it would be appropriate for the IEP Team to review and revise the determination of services and/or the IAES.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46722 (Aug. 14, 2006)

Here, the District removed Student to an IAES for possession of a weapon on December 9. (FF #s 56, 57.) The IEP team determined that homebound instruction was the appropriate IAES for Student. (FF # 56.) While on homebound instruction, Student was to receive ten hours of homebound instruction per week. (FF # 58.) Prior to placement in the IAES, Student received 90 minutes per month of psychological services. (FF # 29.) Yet the IEP team decided not to provide Student any psychological services or behavioral intervention services, reasoning that Student was receiving adequate services from outside providers. (FF # 59.)

Homebound instruction *may* be an appropriate IAES under some circumstances; however, the SCO finds that it was not an appropriate IAES for Student—at least not for the duration imposed here. Based on Homebound Instructor’s timesheets, Student received instruction in reading, writing, and math. He did not have access to the remainder of the curriculum that an ordinary seventh grader would at School.

Additionally, the evidence in the record does not indicate that the IAES permitted Student to make progress on his IEP goals. (FF #s 88, 89.) Though Case Manager indicated she received favorable reports from Homebound Instructor, Case Manager was unable to demonstrate that Student made progress on his IEP goals during third quarter. (*Id.*) Though this failing may be due to a lack of data, the responsibility for tracking Student’s progress lies with the District, and the District simply has not been able to document progress in this case.

While participating in remote instruction in April and May, Student demonstrated some progress on his IEP goals. (FF # 88.) However, the SCO questioned the reliability of this data given that Parent was supervising Student’s participation in remote learning; Case Manager, too, expressed some skepticism that Student’s progress during remote learning would translate back to the classroom. (FF # 90.)

While on homebound instruction, the District provided Student with *no* behavioral intervention services. (FF # 59.) The District took *no* action to address Student’s behavior so that it did not recur. Meanwhile, the District continued to hold TA meetings to determine the risk posed by Student. (FF #s 70, 75, 85.) Though the District continually deemed Student to be too unsafe to return to School, the District provided neither Student nor Parent with *any* resources to mitigate the District’s concerns. Instead, the District left Student and Parent to sort out the situation on their own, while trying to meet an undefined burden of proof showing that Student was safe to return to School. The lack of behavioral intervention services—combined with the isolation of homebound instruction—prevented Student from making any progress on his social/emotional IEP goals. See *Marengo Cmty. High Sch. Dist. #154*, 113 LRP 43754 (SEA IL 09/20/13) (finding that a placement on homebound instruction violated the IDEA by failing to address the behavior that resulted in the IAES and failing to provide student services to permit progress on IEP goals).

For these reasons, the SCO finds that Student’s placement on homebound instruction violated 34 C.F.R. §§ 300.530(d) and (g). Because Student’s placement denied him the ability to make progress on his IEP goals and receive appropriate behavioral interventional services, the SCO finds that Student was denied a FAPE. 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).

## Compensatory Education

Compensatory education is an equitable remedy intended to place a student in the same position he or she would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education need not be an “hour-for-hour calculation.” *Colo. Dep’t of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child and ensuring children receive the services to which they are entitled. *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010). The SCO now explains a compensatory education package, crafted with CDE Consultant and in consideration of this legal framework, designed to help place Student in the same position with respect to making progress on IEP goals but for the violation.

Here, the District failed to provide Student with any behavioral intervention services from the time he was placed on homebound instruction on December 9, 2019, until he began remote instruction on March 31, 2020. (FF #s 57, 83.) Prior to being placed on homebound instruction, Student was receiving 90 minutes per month of psychological services. (FF # 31.) The SCO uses this as a baseline for the services that should have been provided while Student was on homebound instruction. Therefore, over this nearly four-month period, the District failed to provide Student approximately 360 minutes of psychological services. The SCO finds an award of 225 minutes of in-home therapy from Day Treatment Program to be appropriate.

Given that Student plans to begin Day Treatment Program in the fall, the SCO wanted to ensure any compensatory education was aligned with the services Student would be receiving at Day Treatment Program. Both the SCO and CDE Consultant were concerned that combining compensatory services with the services provided by Day Treatment Program could overwhelm Student and diminish the benefit of the compensatory services for Student. Having a District-staff member provide compensatory services runs the risk that those services contradict the services provided by Day Treatment Program. For these reasons, the SCO and CDE Consultant agreed that in-home therapy from Day Treatment Program had the best possibility of placing Student in the position he would have been but for the District’s violation. In-home therapy would reinforce the skills being taught at Day Treatment Program without adding to Student’s school day.

## Repeated Threat Assessments

Moreover, the SCO has additional concerns about the District’s repeated use of TAs for a single incident and decision to leave Student on homebound instruction for nearly four months as a result of that incident.<sup>3</sup> During this time, Student made no additional threats. The District

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<sup>3</sup> Student technically remains on homebound instruction. However, it is impossible to predict how the District would have responded in the absence of the COVID-19 pandemic. Therefore, the SCO is only considering Student’s placement on homebound instruction through March 2020.



received information from his outside providers that Student had not experienced any further homicidal ideation or assaultive ideation and was making progress with self-regulation and coping skills. (FF #s 66-68, 74, 79, 84.) Yet Student remained on homebound instruction. Though Student's mother repeatedly requested District consider a day treatment placement, the District indicated that Student did not warrant that level of services, while simultaneously refusing to allow Student to attend school whatsoever. (FFs # 61, 73.) This contradiction seems inconsistent with the IDEA.

**Conclusion to Allegation No. 4: The District provided Student educational services after his tenth day of the removal during the 2019-2020 academic year, consistent with 34 C.F.R. § 300.530(b)-(d).**

Once a student has been removed from his or her educational placement for ten days, the IDEA requires a school district to provide educational services during any subsequent days of removal. 34 C.F.R. § 300.530(b)(2). Such educational services must allow the student "to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." *Id.* § 300.530(d)(1)(i). If the removals resulted in a change in the student's placement—as happened here—the IEP team must determine what services are necessary for the student to progress toward meeting his or her IEP goals. *Id.* § 300.530(d)(5).

In this case, the disciplinary change of placement occurred on Friday, December 6, 2019. At that point, the District became obligated to provide educational services to Student on subsequent days of removal. The SCO addressed the suitability of Student's placement in homebound instruction above, so, here, the SCO addresses only the interim time period between the change of placement on December 6 and the beginning of homebound instruction on December 18.

Evidence in the record indicates that the District attempted to provide education services to Student during this interim time period. The District prepared hard copy materials for Student, but Parent was unable to pick them up due to her work schedule. (FF # 55.) Additionally, School provided Student with access to online resources that Student was only able to access when Parent was home. (*Id.*) Because the District attempted to provide Student materials in both hard copy format and online, the SCO finds that the District satisfied its obligation under 34 C.F.R. § 300.530(b)(2).

**Conclusion regarding December 2019 IEP: The District failed to appropriately document and/or retain a copy of Student's December 2019 IEP, in violation of ECEA Rule 7.01(1)(b)(viii).**

During this investigation, the District failed to produce a copy of Student's December 2019 IEP. Upon inquiry, Director determined that the December 2019 IEP had not been finalized within

the District's IEP management system. (FF # 59.) As a result, the IEP was written over while Student's IEP team was working on his February 2020 IEP. (*Id.*) No copy of the December 2019 IEP remains.

ECEA Rule 7.01(1)(b)(viii) requires school districts to maintain individual student records that contain a variety of documentation, including a copy of all IEPs. The District violated Rule 7.01(1)(b)(viii) by failing to maintain a copy of Student's December 2019 IEP, regardless of the cause of such failure. An IEP "embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP." *M.C. v. Antelope Valley Union High School District*, 858 F.3d 1189, 1197 (9th Cir. 2017). "A failure to include the required specificity as to the programming offer would render 'the IEP useless as a blueprint for enforcement' and infringe on parental participatory rights which include the development and the enforcement of an IEP." *Pittsburg Unified School District*, 118 LRP 35364 (SEA CA 8/13/18) (quoting *M.C.*, 858 F.3d at 1199). Here, without a finalized IEP in hand, Parent cannot monitor what and how Student's services were provided. On its face, the District's mistake appears minor; however, it had the potential to lead to additional problems. That said, this appears to be an isolated incident and not a systemic problem within either the District or School. As a result, the SCO has not imposed any remedies related to this violation.

### **REMEDIES**

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

- a. Failing to conduct an MDR within ten days of a disciplinary change of placement, in violation of 34 C.F.R. § 300.530(e);
- b. Failing to provide Parent with adequate notice of the MDR meetings to ensure Parent's participation, in violation of 34 C.F.R. § 300.530(e);
- c. Failing to review all relevant information in Student's file when it determined whether his behavior was a manifestation of his disabilities, in violation of 34 C.F.R. § 300.530(e);
- d. Failing to place Student in an appropriate interim alternative education setting, in violation of 34 C.F.R. §§ 300.530(d) and (g); and
- e. Failing to maintain a copy of all of Student's IEPs, in violation of ECEA Rule 7.01(1)(b)(viii).

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

1. By **July 24, 2020**, District shall submit to 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:

- a. Training for Director, all Assistant Directors of Special Education, Principals, Assistant Principals, Special Education Case Managers, Special Education Teachers, and any other District staff who regularly participate in or are likely to participate in MDRs on the requirements of 34 C.F.R. § 300.530(e), specifically when an MDR should be held and how an MDR team should determine whether a student's behavior was a manifestation of his or her disability, and the contents of this Decision. This training should also address the selection of an appropriate interim alternative education setting and monitoring a student's progress in such a setting, in accordance with this Decision. Such training shall be provided no later than **September 30, 2020**.
  - i. Evidence that this training has occurred must be documented (i.e. training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets, with roles noted) and provided to CDE no later than **October 14, 2020**. This training may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.
  - ii. Training materials for the above-described training must be submitted to CDE for review and approval **at least 14 days prior to the delivery of training**.
- b. The District must develop written procedures to guide manifestation determinations. Such procedures should specify how a manifestation determination will be conducted and should give District staff clear guidance on how to determine whether a student's behavior is a manifestation of his or her disability. The procedures must also address providing reasonable notice to parents in advance of a manifestation determination. The District must develop these procedures and submit them to CDE for approval by **August 24, 2020**.
- c. CDE will approve or request revisions to the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to confirm District's timely correction of the areas of noncompliance.

## 2. Compensatory Education Services for Denial of a FAPE

- a. Student shall receive **225 minutes of in-home therapy** provided by Day Treatment Program at District's expense. Parent shall schedule compensatory services in collaboration with Day Treatment Program. All 225 minutes must be completed

by December 31, 2020, though Parent and Day Treatment Program are free to allocate the services however they see fit (i.e. weekly sessions, monthly, etc.). If the compensatory services are not completed by December 31, 2020, the District will be excused from providing such services.

- b. Once all compensatory services have been furnished, the District shall provide CDE with documentation indicating that Student received 225 minutes of in-home therapy at the District's expense. If the compensatory services are not completed by December 31, 2020, the District shall provide CDE with documentation by **January 15, 2021**, indicating the number of minutes of in-home therapy Student received prior to the deadline.

Please submit the documentation detailed above to CDE as follows:

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

Failure by District to meet any of the timelines set forth above may adversely affect District's annual determination under the IDEA and subject District to enforcement action by CDE. **Given the current COVID-19 pandemic, 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. If either party disagrees with this Decision, the aggrieved party may file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. See 34 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 22nd day of June, 2020.



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Ashley E. Schubert  
State Complaints Officer

## Appendix

### **Complaint, pages 1-3**

- Exhibit 1: Email Correspondence with School
- Exhibit 2: Threat Assessment
- Exhibit 3: Threat Assessment

### **Response, pages 1-7**

- Exhibit A: IEPs and meeting notes
- Exhibit B: BIPs
- Exhibit C: Determination of Eligibility, Evaluations and Assessments
- Exhibit D: Service Logs and Progress Monitoring Information
- Exhibit E: Threat Assessments
- Exhibit F: MDRs
- Exhibit G: Discipline Reports
- Exhibit H: School Calendar
- Exhibit I: Prior Written Notices
- Exhibit J: Consents for Evaluation
- Exhibit K: Meeting Notices
- Exhibit L: Grade Report
- Exhibit M: Email Correspondence
- Exhibit N: District Policies
- Exhibit O: Identification of District Witnesses
- Exhibit P: Home Instruction Log
- Exhibit Q: Decision in Case No. 2016-0003
- Exhibit R: Home Instruction Timesheets and Session Logs
- Exhibit S: Additional Progress Monitoring Information
- Exhibit T: Audio Recordings of IEP Meeting
- Exhibit U: Audit Logs for December 2019 IEP

### **Telephonic Interviews:**

- Director of Special Education: May 27, 2020, June 10, 2020
- Assistant Director of Special Education: May 28, 2020
- Case Manager: May 28, 2020 and June 4, 2020
- School Psychologist: May 28, 2020
- Parent: June 1, 2020