

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

State-Level Complaint 2009:507

Denver Public Schools

Decision

INTRODUCTION

This Complaint was brought pursuant to the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. §§ 300.151 through 300.153.¹ The undersigned State Complaints Officer (SCO) has determined that the SCO has the jurisdiction to resolve the Complaint pursuant to those same regulations.

The Complaint was dated June 26, 2009 and was received in the office of the SCO on June 30, 2009. The Complaint was filed by the Education Director (Complainant) of an Eligible Facility (Facility). The Facility is a Day Treatment Program licensed by the Colorado Department of Human Services (CDHS). The Facility also has an on-grounds facility school that is approved by the Colorado Department of Education (CDE) to receive reimbursement for providing educational services to students placed in the facility pursuant to Colo. Rev. Stat. §§ 22-2-402(1).

A Complaint Notification letter was sent to the District via Federal Express/Overnight delivery on July 1, 2009. Delivery confirmation established that the District received the Complaint Notification letter on July 2, 2009.

The SCO contacted the District on July 20, 2009 about the status of the District's Response which was due on July 17, 2009. The District requested and was granted an extension to respond no later than July 21, 2009. The District's Response was received on July 21, 2009.

The Complainant's Reply to the District's Response was received on July 31, 2009.

August 6-7, 2009, the SCO telephoned the District for additional documentation and to schedule on-site interviews. The SCO also telephoned the Complainant for additional documentation and to schedule on-site interviews. The telephone calls were followed up by an email to the Complainant and the District on August 7, 2009.

The SCO conducted on site interviews with personnel at the Facility on August 14, 2009. The Complainant provided additional information as a result of the interviews on August 14 and August 17, 2009. The SCO conducted on site interviews with District personnel on August 19, 2009. The District submitted additional information during the interviews on August 19, 2009.

The SCO closed the record on August 19, 2009.

¹ Hereinafter IDEA regulations will be referred to by regulation number, e.g., § 300.000.

The original due date for the decision was August 29, 2009. Due to exceptional circumstances existing with respect to this Complaint—i.e., the number of students (20) involved in the investigation, the volume of documents requiring review, the necessity for on-site investigations, and the novelty of the issues raised—the SCO extended the decision due date to September 18, 2009 in conformity with § 300.152(b)(i). On August 28, 2009, the SCO notified the parties of the time extension by phone and by faxed letter.

ISSUES

The issues raised in the Complaint that are subject to the jurisdiction of the SCO are as follows:

1. Whether the District has denied the Student a free appropriate public education (FAPE) by withholding funding to the [Facility] for special education services to which the Student is entitled contrary to §§ 300.17 and 300.101 through 300.103 of the Individuals with Disabilities Education Improvement Act (IDEA).
2. Whether the District has systematically denied other similarly situated students a FAPE by having in place policies and procedures to withhold funding for special education services to similarly situated students, contrary to §§ 300.17 and 300.101 through 300.103 of the IDEA.

COMPLAINANT'S ALLEGATIONS

The Complainant's allegations are summarized below:

1. The District is violating the Individuals with Disabilities Education Act (IDEA) and Exceptional Children's Educational Act (ECEA) by not providing Student and several other similarly situated students with a FAPE by withholding [tuition costs]² funding and thereby withholding access to services for these students.
2. The District was notified of the Student's court ordered placement at the Facility on September 4, 2008 and subsequently signed a contract with the Facility for the Facility to provide services to the Student on November 24, 2009.
3. Under the contract, the District continued to participate in the development of the Student's Individualized Education Program (IEP) by involving the District's Child Find team.
4. Under the contract, the District was to pay [tuition costs] for the Student up until April 1, 2009.
5. In early May 2009, the District notified the Facility that it would no longer pay [tuition] costs for students in the Facility who were working toward obtaining a "Graduate

² Both the Facility and the District refer to excess costs. The term "excess costs" has a very specific definition under §§ 300.16 and 300.202 which is distinct from the amount that the District paid to the Facility each month. The correct term pursuant to the definition in ECEA Rule 9.01(8) is "tuition costs" which will be used throughout this decision.

Equivalency Diploma”³ (GED), and that the decision was retroactive to April 2009. This decision affected the Student and all other students of the District attending the Facility who have a goal of receiving a GED in their IEP. The District communicated to the Facility that the rationale behind this decision was that it was the District’s opinion that the Student and all other students similarly situated were no longer entitled to FAPE.

6. The District discontinued paying [tuition] costs for Student and [similarly situated] students at Facility who had any mention of GED preparation in their IEP at that time.

7. The District’s policy of not paying [tuition] costs for students working toward obtaining a GED violated § 20 U.S.C. 1412(a)(1)(a), since all students with a disability must receive a FAPE, including students who are suspended or expelled.

8. The District’s policy of not paying [tuition] costs for students working toward obtaining a GED violated § 20 U.S.C. 1402(9), which provides that a FAPE requires services that conform to a student’s IEP.

9. The District’s policy of not paying [tuition] costs for students working toward obtaining a GED violated the FAPE limitations set out in § 300.102(a)(3)(ii) which ends the obligation to provide a FAPE to students who have received a regular high school diploma or who have reached age 21.

10. The District’s website and parent/student handbooks make no mention of the policy of no longer providing FAPE to students with disabilities in GED preparation programs or who have GED referenced in their IEPs.

11. Development of IEP goals consistent with obtaining a GED may be in the best interest of students and that such a choice indicated in their IEP should not preclude them from receiving a FAPE. The District’s decision eliminated a choice that is afforded regular education students and is contrary to the intent of State and federal special education laws.

THE DISTRICT’S RESPONSE

The District’s Response is summarized as follows:

1. The District did not deny a FAPE to Student when it discontinued paying excess costs to the Facility.

2. The District did not systematically deny a FAPE to [similarly situated] students by withholding payment of tuition costs for students pursuing a GED course of study.

3. The Facility was “funneling” incoming students into the GED program by primarily offering the GED program to those students. The Facility routinely changed students’ placements upon admission to the day treatment program. A GED was not an appropriate course of study for each student entering the Facility. Because students were primarily being placed into the GED course of study, it would be unlawful and irresponsible to

³ “General educational development tests or GED means the battery of tests given at an authorized testing center, which tests are designed and published by the GED testing service of the American council on education to measure the major outcomes and concepts generally associated with four years of high school education.” Colo. Rev. Stat. § 22-33-102(4.5).

continue to support such a practice by paying [tuition] costs intended to support educational programming at the Facility.

4. The Facility's GED program was inappropriate for Student because Student was identified with a perceptual communicative disability (PCD) which is characterized by "significantly impaired achievement" in areas such as pre-reading, reading and reading comprehension. The District's Instructional Superintendent reported that a GED course of study should not be selected unless students have a seventh grade reading level. The GED course of study was not an appropriate educational placement for the Student or any students who received special education and related services from the Facility.

5. The Student's IEP developed by the Facility identified GED preparation as the Student's course of study and the District would not pay tuition costs for students with IEP goals that suggested the GED course of study. The withdrawal of tuition cost payments to the Facility as students pursue a GED is not a denial of FAPE. However, there would be a continuing obligation of FAPE to students who chose to pursue a diploma as an educational program.

6. The Facility's GED program was inappropriate because it was not aligned with State academic standards and did not provide students with any diploma recognized by federal reporting standards. The term "regular high school diploma" does not include an alternative degree that is not fully aligned with the State's academic standards such as a GED. § 300.102(a) (3)(iv).

7. In support of its position, the District cited *Attleboro Public Schools*, 106 LRP 32326 (SEA MA 2005) which held that a GED was not a FAPE for a student.

8. The Facility's GED program was not appropriate individualized education programming required by State and federal law because a GED, by definition, provides a generalized course of study which was contrary to the letter and spirit of individualized educational programming required by the IDEA.

9. The Facility did not provide appropriate special education and related services in its GED program; therefore Part B funds cannot be used to support the Facility's program. Such support would violate IDEA regulation § 300.202, which governs an LEA's use of Part B funding and restricts the expenditure of funds to the payment of excess costs of providing special education and related services.

10. The students in the Facility's GED program were considered dropouts. The District asserted that the students were dropouts because of the federal Office of Special Education Programs (OSEP) reporting categories. Students who have dropped out of school were identified as exiting special education. The OSEP reporting category of "dropouts" included *GED recipients* and *other exiters from special education* (emphasis from original), therefore these students fell under the umbrella of "dropped out." The District therefore asserts that it did not have a continuing obligation to provide special education and related services to those students during the period the students were dropped out. The percentage of students who drop out is monitored by the Department and an increased dropout rate could be the basis for a compliance citation.

THE COMPLAINANT'S REPLY

The Complainant's Reply is summarized as follows:

1. The Facility served as a transition program for students who have been incarcerated, have had prolonged exposure to Denver Juvenile Court proceedings, and who have also had significant mental health needs and/or drug or alcohol related treatment needs. The average age of students referred to the Facility was 17 years of age. Due to gaps in formal schooling, disability and/or other treatment needs, many students came to the program with few credits toward high school graduation. Because the Facility was a transition program, it offered a number of options to students rather than pursuing a one-size fits all approach. The educational program provided GED preparation, accrual of academic seat hours toward a diploma, and a focus on post-secondary opportunities.

2. The Facility did not funnel students into the GED program. The Facility evaluated the credentials of every student who enters the Facility regardless of whether the student has a disability. This evaluation included a review number of credits earned toward a regular diploma, a vocational assessment, a review of records and an interest inventory. The students placed in the Facility and their IEP teams had a history of developing varied and individualized secondary and post secondary goals specific to the students' needs.

3. In the past school year, 29 students enrolled in the Facility did not have GED reflected in their IEPs. Several students listed a return to public school as a goal that they wanted to pursue and the Facility submitted transcripts to the District for review for sufficiency of credits toward graduation. Further, students in the GED program could simultaneously accrue seat hours toward a diploma because GED preparation did not preclude the ability to obtain a regular diploma at a later date.

4. Placement in the day treatment setting was often considered a significant change in placement, and it was typical for IEP meetings to be held within thirty (30) days of a student's arrival in the program. Further, because the program served older children, IEP meetings included discussion of transition considerations.

5. The District was afforded every opportunity to participate in placement and IEP meetings, and in some instances, chose not to exercise its rights. The District child find team was involved in any disability determination meetings (e.g., triennial or initial determinations). The District did not raise any complaint to the Facility regarding the placement of students at the Facility or regarding any of the students' IEP goals and objectives until May 2009 when District staff notified the Facility that the District was no longer paying for students who were working on their GED. The District's decision was a broad stroke that disregarded the decisions of students, their families and the IEP teams that developed the IEP goals and determined that GED preparation was a valid postsecondary outcome.

6. The District's assertion that the GED was not aligned with state standards was a moot point because a GED serves as a gateway to many other post-secondary goals. A GED was a viable IEP goal because it involved improving the academic and functional achievement of the child and facilitates the child's movement from school to post-school activities including postsecondary education.

7. Most community colleges required a GED as a minimum [entrance] requirement. A GED could be the only option for attaining a postsecondary goal for students nearing the age of [21] who did not have enough credits to graduate and had no possibility of attaining the credits necessary for high school graduation prior to reaching the age of [21]. When a student's IEP team determined that attending community college would be a valid and appropriate post secondary goal and that a GED was Student's best option to achieve that goal, denying the student services would violate the IDEA. An IEP team decision to list GED preparation on an IEP did not constitute a denial of FAPE in itself.

8. Students who prepared to take GED assessments at the Facility did not engage in a separate curriculum and were not subjected to differing methods and techniques from students who wished to obtain their diploma unless it was outlined in their IEP. The Facility utilizes the following curriculum as a basis for its academic program:

- Math – Algebra Readiness (SRA)
- Science – Earth Science, (AGS)
- Reading – Read to Work, Cambridge
- Social Studies – [District] Course of Curriculum
- Transitions – [District] Course of Curriculum

There were no [separate] GED courses offered at the Facility and students who were interested in obtaining a GED were offered core content in compliance with CDE Facility Quality Standards.

9. The Facility had qualified staff with a wealth of special education knowledge.

- Education Director – Doctorate in special education
- Program Director – Masters Degree in special education
- Teacher – Bachelors degree in special education
- Education Coordinator – Professional Principal's License

10. The assertion that GED preparation was inappropriate for students identified with perceptual and communicative disability (PCD) who were assessed as reading below a seventh grade level was a blanket declaration that disregarded the postsecondary needs of an entire group of students. This assertion discounted the individual nature of each student's program of study and had the effect of denying educational attainment of postsecondary goals that were otherwise available to students in regular education. The blanket assertion that a GED was an inappropriate goal for students identified as PCD contradicted IEP team decisions.

11. The fact that an IEP lists a GED as a postsecondary goal did not mean that students gave up their right to special education nor suggested that a student abandoned special education services. GED attainment and special education services were mutually exclusive of one another.

12. Although the *Attleboro* case cited by the District has some similarities, in *Attleboro* [the student's] mother sought a simple one on one GED tutorial program. However [in the instant case], the Facility offered a comprehensive treatment program accompanied by significant special education supports.

13. A policy that directed the payment of [tuition] costs only for students pursuing a diploma course of study would exclude a countless number of students who are placed at facilities (e.g., students who have severe cognitive disabilities) because under such a policy

many of these students would no longer be entitled to a FAPE which would contradict State and federal law.

FINDINGS OF FACT

After thorough and careful analyses of the entire record,⁴ the SCO makes the following findings:

A. The Facility and the District

1. There was no dispute that Facility was an eligible facility and had a day treatment program licensed through CDHS and an approved facility school through CDE. Complainant was the Director of Education for Facility. The Facility served students who have been referred by courts, department of human services, and local education agencies (i.e., Colorado administrative units). The highest source of referrals was Juvenile Probation in comparison to a lower rate of referrals by administrative units.
2. The Facility had an average of 45 students in its educational program each month. The number of students and the length of time the students attended the program was varied based on the students' legal constraints and/or progress. Students placed at the Facility remained there for an average period of six months.
3. Students who attended the program were residents of various metro area school districts. However, the majority of students placed in the Facility are residents of the District.
4. For the Student and similarly situated students, the placing public agencies were Denver County Court (County Court), Denver County Human Services (DHS), and the Division of Youth Corrections (DYC).
5. Not all of the students who are placed in the Facility were eligible to receive special education. However, the majority of students had an Individualized Education Program (IEP) and received special education and related services.
6. The Facility's Day Treatment Program served all students placed in the Facility and was the umbrella for the educational programming components which included GED preparation, work study, and diploma/transition back to high school.⁵
7. When a student was placed at the Facility, the referring agency specified on the referral form whether the student was GED or Diploma program. The Facility then notified the District of the student's placement and the student's educational program. The Facility then assessed the student, and met with the student and parent to consider which educational program was preferred and would be most appropriate. This determination sometimes involved a student's DHS caseworker or probation officer.
8. The District contracted with 56 eligible facilities and had approximately 700-1000 students who were placed in eligible facilities. The District was unaware whether any other eligible facility that they contracted with offered GED programs.

⁴ Decision Appendix A details the record from which the findings were developed in this case.

⁵ *Hereinafter* the education program components will be referred to as GED program and Diploma program.

9. Although the District articulated a process for students placed in eligible facilities, the District did not provide the SCO with written policies or procedures for the placement of District students in eligible facilities by other public agencies.

10. The District and the Facility had a governing contract for students placed by the District in the Facility. For District students placed by other public agencies an individual contract was executed between the Facility and the District for each student. Each contract specifically provided for educational services for students with disabilities. Neither the governing nor the individual contracts referenced the Facility's GED or Diploma program.

11. Relevant provisions in the individual contracts for students placed by other public agencies included:

- The District will be sent prior written request for IEP reviews, annual reviews, and meetings to determine ESY eligibility and transition services.
- Copies of current IEPs and reports/assessments will be sent to the district within 30 days of the IEP date.
- Billing for educational services will be sent to the District monthly based on membership and will include the CDE approved tuition cost rate.
- The educational program meets the requirements of all applicable federal and state statutes and regulations.
- In the event the provider wishes to initiate a change in educational programming or placement, the provider will notify the appropriate social services agency and the school districts involved.
- Triennial [IEP reevaluations] will be set up collaboratively by the District and the provider.
- If a District representative cannot attend, he/she may request the [special education] staffing be rescheduled at a mutually agreeable time, or delegate district representation to a member of the staffing team, and the District will abide by the decision.
- Either party may terminate this contract with 30 days of written notice, upon mutual agreement, or when the student is discharged from the program.

12. The District ensured the Facility's compliance with special education laws by reviewing the students IEPs submitted by the Facility. Both the District and the Facility confirmed that the District contacted the Facility if there were issues with IEP content.

B. The Billing Issue

1. The Facility submitted a bill for special education tuition costs to the District each month for the District students who attended the educational programs at the Facility. There was no issue with billing for students in the GED program prior to the billing submitted by the Facility to the District for April 2009.

2. According to the District, in the spring 2009, it came to the attention of the District that the Facility was placing students primarily into the GED course of study, regardless of the students' IEP requirements. The District did not offer an explanation of how it became aware of this alleged practice nor did it provide any specific evidence that the Facility was engaging in such practice.

3. In May 2009, the Facility submitted an invoice for tuition costs for District students in the Facility during April 2009 which included students assigned to the GED program. The

billed amount was for \$22,851.76. On May 4, 2009, District staff emailed the Facility that the District would no longer pay tuition costs for students who are working on obtaining a GED. The email indicated that the District did not consider students working on their GED to be in a special education setting. This was the only notice the Facility received about the District's policy of not paying for students enrolled in the GED program. Consequently, the District discontinued paying for Student and all similarly situated students enrolled in the GED program at the Facility. Additionally, the District did not pay \$1,254.06 for a nonspecial education student billed by the Facility. The District remitted \$4,319.54 to the Facility.

4. On May 4, 2009, the District's Out of District Manager emailed the Facility that "[The District has its] own GED program. The courts/DDHS needs (sic) to talk to [the District] first. The students are considered a (sic) drop-outs which means [the District doesn't] get any funding for them."

5. The Facility submitted an invoice to the District in June 2009 which included students assigned to the GED program in May 2009 for \$25,220.54 for which the District remitted \$2,508.12. Also in June 2009, the Facility submitted an invoice to the District which included students assigned to the GED program for the remainder of the school year for \$10,450.50 for which the District remitted \$1,393.40.

6. The District did not pay tuition costs for students assigned to the GED program invoiced by the Facility for the months of April, May and June 2009. The total amount outstanding for students assigned to the GED program was \$49,047.68.

7. The District was the only administrative unit to discontinue payment of tuition costs to the Facility for students assigned to the GED program.

8. The SCO finds the District did not challenge or object to the Facility's GED program prior to May 4, 2009.

9. The District continued to execute contracts for students in the Facility through April 2009. Although, the District did not sign or return the contracts for individual students submitted by the Facility in May 2009, the District continued to participate in IEP meetings for students in the Facility through June 10, 2009. The IEPs developed in these meetings continued to incorporate GED as a completion document and course of study. The SCO finds that the District's continued participation in the development of these IEPs constituted sanction of the assignment of students to the Facility's GED program.

10. The District Special Education Director stated that there were no concerns raised with regard to the special education services being provided to District students in the diploma program in the Facility. The District's School Psychologist, who evaluated students in the Facility, reported no concerns with the special education services provided by the Facility. Additionally, there was no dispute that the teachers at the Facility held Colorado teaching licenses with appropriate special education endorsements. The SCO finds that the Facility provided appropriate special education services to the District students placed at the Facility.

11. The Facility requested a meeting with the District in June in an attempt to resolve the billing issue. The meeting was held June 9, 2009. The meeting included the Facility Executive Director, Facility Program Director, Facility Education Director, the District Special Education Director, the District Director of Operations for Student Services, and the Out of District Manager. The District Special Education Director was not aware of the

discontinuation of payment of tuition costs to the Facility until just prior to this meeting. There is no dispute that in this meeting the District reiterated that it would no longer pay tuition costs for students assigned to the Facility's GED program and that the District provided the Facility with a copy of the page from the Federal Register that included § 300.102(a)(3).⁶

12. Despite the fact that the District did not pay the Facility, the Student and similarly students who were placed by other public agencies in the Facility during the months of April and May 2009 continued to receive special education services from the Facility.

C. The Student and Similarly Students

1. There was no dispute that the Student and similarly situated students were residents of the District. There was no dispute that the Facility was located within the boundaries of the District. With respect to the Student and all similarly situated students, the District was the district of residence, the administrative unit of residence and the administrative unit of attendance (i.e., the administrative unit in which the Facility is located).

2. The Student named in the Complaint was seventeen years old and in the eleventh grade. Student was placed in the Facility by County court on September 22, 2008. The District was notified of the placement by the Facility on September 24, 2008.

- a. The notification to the District specified that the Student was enrolled in the Facility's GED program.
- b. The District and the Facility executed a contract for the student on November 18, 2008.
- c. An IEP triennial review meeting was held on November 11, 2008. A representative of the District attended the meeting and participated in the IEP development.
- d. Transitional Planning Inventory and Work Keys transition assessments were conducted to identify the post secondary transition outcomes.
- e. The IEP indicates the projected year of graduation/completion to be 06/2009 and the type of completion document to be a GED. The Statement of the Planned Course of Study stated that the "Student will focus on reading, writing, science, social studies and math GED preparation in order to receive [a] GED so [Student] can enter a community college."
- f. Of the four annual goals on the Student's IEP, one annual goal was "[Student] will pass all five GED subtests." The progress measurement criteria for this goal were passing scores on the GED subtests.
- g. Student was not expected to return to the program for the 2009-2010 school year.
- h. The Student was appropriately billed on the April 2009 invoice as being in the GED program for which the District did not remit payment.

3. Affected Student #9⁷ was seventeen years old and in the ninth grade. Student #9 was placed in the Facility by Social Services on January 8, 2009. The District was notified by the Facility of Student #9's placement on January 26, 2009. Shortly after

⁶ IDEA regulation § 300.102(a)(3) provides that the obligation to provide FAPE ends when the student graduates with a regular high school diploma; however, an alternative degree such as a GED that is not fully aligned with the State's academic standards does not constitute a regular high school diploma.

⁷ Hereinafter individual similarly situated students will be referred to by random numbering, 9-27 assigned by the SCO.

placement in the Facility, Student #9 was detained in a Juvenile Detention Facility. Student #9 returned to Facility in March and April 2009.

- a. The notification to the District specified that Student #9 was enrolled in the Facility's GED program.
 - b. Although Student #9's IEP did not reference GED, the Facility explained that the placing agency referred Student #9 to the GED program.
 - c. The District and the Facility executed a contract for Student #9 on March 4, 2009.
 - d. Student #9's IEP dated October 15, 2008 had District [High School] and "Withdrawn School" as schools of attendance. The IEP was developed while Student #9 was in Juvenile Detention.
 - e. The October 15, 2008 IEP indicated Student #9's projected year of completion as 2011 with a completion document of Diploma.
 - f. Student #9 left the Facility in April 2009 and was not expected to be returning for the 2009-2010 school year.
 - g. Student #9 was appropriately billed on the April and May 2009 invoices as being in the GED program for which the District did not remit payment.
4. Affected Student #10 was seventeen years old and in the ninth grade. Student #10 was placed in the Facility by the County Court on January 6, 2009. The Facility notified the District of Student #10's placement on January 26, 2009.
- a. The notification to the District specified that Student #10 was enrolled in the Facility's GED program.
 - b. The District and the Facility executed a contract for Student #10 on March 4, 2009.
 - c. Student #10 had not been previously identified as eligible for special education and was referred to the District for child find while Student #10 was in [Previous Facility]. The IEP was developed in [Previous Facility] and was based on Student #10's initial evaluation for eligibility for special education services. The District participated in the IEP meeting at the [Previous Facility].
 - d. On January 6, 2009, the Facility adopted Student #10's IEP that had been developed by the Previous Facility. Student #10's IEP dated 11/14/2008 indicated Student #10's school of attendance as "Withdrawn School" and "Tuition Out".
 - e. In the IEP's present levels of academic achievement, functional performance, and educational needs, it is stated that "[Student #10] would like to get out of [Previous Facility] as quickly as possible so that [Student] can get [Student's] GED and get a job." It also states that Student #10's plans for the future were to get a GED and go onto college to become a probation officer.
 - f. Career Interest Inventories and GED pre-testing were transition assessments used for developing Student #10's post secondary outcomes. Student #10's planned course of study included vocabulary enrichment, general information, and GED preparation. Student #10's projected year of completion was 05/2010 and the type of completion document was GED.
 - g. Of Student #10's three IEP goals, one objective included "[Student #10] will continue to earn credits towards a diploma or obtain/pass [the] GED" with a measurement criteria of minimum credits for diploma or passing scores. The baseline for the criteria were that Student #10 had zero (0) credits and had less than a passing score on the GED pretests.

- h. Student #10 attended the education program in the Facility in March and April 2009. Student #10 was anticipated to be returning to the Facility for the 2009-2010 school year.
 - i. Student #10 was appropriately billed on the April and May 2009 invoices as being in the GED program for which the District did not remit payment.
- 5. Affected Student #11 was nineteen years old. There are several discrepancies in Student #11's educational records with regard to grade level due to the gaps in Student #11's education. Student #11 was placed in the Facility by DHS on December 1, 2008. The Facility notified the District of Student #11's placement on December 3, 2008.
 - a. The notification to the District specified that Student #11 was enrolled in the Facility's GED program.
 - b. The District and the Facility executed a contract for Student #11 on March 4, 2009.
 - c. Student #11's IEP was developed by the Facility in conjunction with Student #11's triennial reevaluation on June 10, 2009. The District was involved in the reevaluation and participated in the IEP development.
 - d. The TPI, Independent Living Inventory, and Learning Style Inventory were transition assessments used to develop Student #11's post school outcomes.
 - e. Student #11's projected date of completion was 6/2010 with a completion document of GED. Student #11's planned course of study included "GED preparation and Day treatment program components including affective and post-secondary and vocational job readiness education."
 - f. Of the three goals in Student #11's IEP, none referenced obtaining a GED as a goal, however the progress measurement criteria for objectives under two goals included performance on official GED practice tests as well as in-class assignments and observation.
 - g. It was anticipated that Student #11 will be returning to the Facility's education program for the 2009-2010 school year.
 - h. Student #11 was appropriately billed on the April, May and June 2009 invoices as being in the GED program for which the District did not remit payment.
- 6. Affected Student #12 was seventeen years old. Student #12's IEP indicates Student #12 is in "grade GED." Student #12 was placed in the Facility by DHS (Workforce Development) on April 22, 2009. The Facility notified the District of Student #12's placement on April 22, 2009.
 - a. The notification to the District specified Student #12 was enrolled in the Facility's GED program.
 - b. The Facility submitted a contract to the District for Student #12, but as of the closing of the record on August 19, 2009 the District had not yet signed or returned the contract.
 - c. A triennial reevaluation was conducted for Student #12 and an IEP was developed by the Facility in a meeting on June 10, 2009. The District was involved in the reevaluation and IEP development. However, the Facility did not receive the full evaluation report prior to the end of the school year because the District's child find team reportedly was not in place in the summer.
 - d. According to the evaluation report by [District Speech/Language Therapist], the last time Student #12 was in a traditional school was in eighth (8th) grade.

- e. The TPI was a transition assessment used for developing Student #12's post-school outcomes. The evaluation report by [District Psychologist] noted that Student #12 is in the GED program and that Student #12 "appears to be motivated to pursue [a] GED."
 - f. Student #12's projected date of completion was June 2010 with a completion document of GED. Student #12's planned course of study includes "completing a GED" and enrolling in college.
 - g. Of the four annual goals on Student #12's IEP, none specifically referenced obtaining a GED as a goal, however the progress measurement criteria for objectives under three of the goals included performance on official GED practice tests as well as in-class assignments and observation.
 - h. As of the date of the interview with the Facility on August 14, 2009, the Facility was attempting to contact Student #12 to determine if Student #12 would be returning for the 2009-2010 school year.
 - i. Student #12 was identified on the May and June 2009 invoices as being in the GED program for which the District did not remit payment. There were discrepancies between Student #12's records and the invoice.
7. Affected Student #13 was seventeen years old and in eighth grade. Student #13 was placed in the Facility by County Court on April 16, 2009. The Facility notified the District of Student #13's placement on April 20, 2009.
- a. The notification to the District specified Student #13 was enrolled in the Facility's GED program.
 - b. The Facility submitted a contract to the District for Student #13, but as of the closing of the record on August 19, 2009 the District had not yet signed or returned the contract.
 - c. A triennial reevaluation was conducted and Student #13's IEP was developed on November 12, 2008 when Student #13 was at Juvenile Detention Center. The District was involved in the evaluation and IEP development. The Facility adopted the IEP dated November 12, 2008 developed at the Juvenile Detention Center.
 - d. According to the IEP evaluation report, "when [Student #13] became involved with probation in 2007, [Student] was referred to the Facility in order to work on obtaining [a] GED." The report states, "[Student #13] has expressed an interest in getting [a] GED. This is probably going to be the best path for [Student #13] since [Student #13] has no credits."
 - e. Interviews and surveys were used as transition assessments.
 - f. Student #13's projected year of graduation/completion was May 2010 with a completion document of GED. Student #13's planned course of study is to take courses to help improve Student #13's skills so Student can take the GED. The statement of planned course of study reiterates that Student #13 had no credits toward graduation.
 - g. Of the three annual IEP goals, one objective was for Student #13 to locate a GED program within the community and enroll and another objective was for Student #13 to attend a daily GED class.
 - h. The Facility reported that Student #13 would not be returning to the educational program for the 2009-2010 school year.
 - i. Student #13 was identified on the April, May and June 2009 invoices as being in the GED program for which the District did not remit payment. The invoice for April 2009 was improperly calculated from the date of Student #13's placement in the Facility.

8. Affected Student #14 was nineteen years old and in the tenth grade. Student #14 was placed in the Facility by NYC on April 16, 2009. The Facility notified the District of Student #14's placement on May 4, 2009.
 - a. The notification to the District specified Student #14 was enrolled in the Facility's GED program.
 - b. The Facility submitted a contract to the District for Student #14, but as of the closing of the record on August 19, 2009 the District had not yet signed or returned the contract.
 - c. A triennial reevaluation was conducted on Student #14 and an IEP was developed by the Facility in a meeting on June 10, 2009. The District was involved in the reevaluation and IEP development.
 - d. The TPI and Learning Style Inventory were used as transition assessments.
 - e. Student #14's projected year of graduation/completion was August 2009 with a completion document of GED. Student #14's planned course of study included "GED preparation and day treatment program components including affective and post-secondary/vocational /job readiness education."
 - f. Of the three IEP goals, none of the goals specifically referenced obtaining a GED. However, several objectives had progress measurement criteria which included performance on official GED practice tests.
 - g. The Facility anticipated that Student #14 would be returning to the Facility's education program for the 2009-2010 school year.
 - h. Student #14 was identified on the April, May and June 2009 invoices as being in the GED program for which the District did not remit payment. The invoices submitted for April 2009 and May 2009 were improperly calculated from the date of Student #14's placement in the Facility.

9. Affected Student #15 was seventeen years old and in grade (GED). Student #15 was placed in the Facility by NYC on April 13, 2009. The Facility notified the District of Student #15's placement on April 20, 2009.
 - a. The notification to the District specified that Student #15 was enrolled in the Facility's GED program.
 - b. The Facility submitted a contract to the District for Student #15, but as of the closing of the record on August 19, 2009 the District had not yet signed or returned the contract.
 - c. A triennial reevaluation was conducted on Student #15 and an IEP was developed by the Facility in a meeting on June 10, 2009. The District was involved in the reevaluation and IEP development.
 - d. The TPI was used as a transition assessment.
 - e. Student #15's projected date of graduation/completion was June 2012. Student #15's planned course of study included "GED preparation and day treatment program components including affective and post-secondary/vocational /job readiness education." The statement of needed transition services included special education services within the GED classroom.
 - f. Of the three IEP goals, none specifically referenced obtaining a GED. However, several objectives had progress measurement criteria which included performance on official GED practice tests.
 - g. The Facility anticipated that Student #15 would be returning to its educational program in the 2009-2010 school year.
 - h. Student #15 was identified on the April, May and June 2009 invoices as being in the GED program for which the District did not remit payment. The invoice

for April 2009 was improperly calculated from the date of Student #15's placement in the Facility.

10. Affected Student #16 was seventeen years old and in tenth grade. Student #16 was placed in the Facility by NYC on April 16, 2009. The Facility notified the District of Student #16's placement on April 20, 2009.
 - a. The notification to the District specified Student #16 was enrolled in the Facility's GED program.
 - b. The Facility submitted a contract to the District for Student #16, but as of the closing of the record on August 19, 2009 the District had not yet signed or returned the contract.
 - c. Student #16 had an IEP that had been developed by Youth Detention Center in an annual review. The IEP was amended by [Previous Facility]. On May 11, 2009, the Facility adopted the IEP dated August 14, 2008. GED was not referenced throughout the IEP. The only reference to GED was in the Facility's notification to the District.
 - d. The Facility explained that the referring agency opted for the GED program. The Facility acknowledged that it amended Student #16's IEP without a meeting. The Facility explained that when the IEP was developed, obtaining a GED was not available to Student #16 because of Student #16's age. As Student #16 was seventeen years old upon placement at the Facility, Student was then eligible to enter the GED program.
 - e. The District did not participate in the development of the IEP during Student #16's annual review at the Youth Detention Center.
 - f. The Facility anticipated that Student #16 would be returning to its educational program in the 2009-2010 school year.
 - g. Student #16 was identified on the April, May and June 2009 invoices as being in the GED program for which the District did not remit payment. The invoice for April 2009 was improperly calculated from the date of Student #16's placement in the Facility.

11. Affected Student #17 was eighteen years old and in the twelfth/GED grade. Student #17 was placed in the Facility by County Court on January 22, 2009. The Facility notified the District of Student #17's placement on January 26, 2009.
 - a. The notification to the District specified Student #17 was enrolled in the Facility's GED program.
 - b. The Facility submitted a contract to the District for Student #17, but as of the closing of the record on August 19, 2009 the District had not yet signed or returned the contract.
 - c. A triennial reevaluation was conducted and an IEP was developed for Student #17 on June 10, 2009. The District participated in the evaluation and review.
 - d. The TPI, Independent Living Inventory, and Learning Style Inventory were used as transition assessments.
 - e. Student #17's projected date of completion was August 2009 with a completion document of GED. The statement of planned course of study included "GED preparation and day treatment program components including affective and post-secondary/vocational/job readiness education."
 - f. Although neither of Student #17's two IEP goals were to obtain a GED, the objectives for one of the goals had progress measurement criteria which included performance on official GED practice tests.

- g. Student #17 obtained [Student's]GED in May and will not be returning to the Facility's educational program in the 2009-2010 school year.
 - h. Student #17 was identified on the May and June 2009 invoices as being in the GED program for which the District did not remit payment. There were discrepancies between Student #17's records and the invoices.
12. Affected Student #18 was sixteen years old and in the ninth grade. Student #18 was placed in the Facility by NYC on May 2, 2009. The Facility notified the District of Student #18's placement on May 13, 2009.
- a. The notification to the District specified Student #18 was enrolled in the Facility's GED program.
 - b. The Facility submitted a contract to the District for Student #18, but as of the closing of the record on August 19, 2009 the District had not yet signed or returned the contract.
 - c. Student #18 had an IEP developed by District High School dated November 13, 2008. The IEP's present levels of academic achievement, functional performance and educational needs noted "Student #18 has been a non-attender for the past three (3) years of high school. [Student #18] has 7.5 credits and is 17 years old." The Facility adopted the IEP developed by District High School.
 - d. The IEP for Student #18 indicated a projected year of graduation/completion of May 2012 with a "Combined" completion document. However, the Facility was unaware of what comprised a "combined" completion document. The two annual goals from the IEP dated November 13, 2008 did not reference GED.
 - e. The Facility received consent from Student #18's parent for reevaluation for the triennial IEP on June 3, 2009. As of the closing of the record on August 19, 2009, an evaluation had not been conducted.
 - f. The Facility reported Student #18 will not be returning to the educational program for the 2009-2010 school year.
 - g. Student #18 was identified on the May and June 2009 invoices as being in the GED program for which the District did not remit payment. The invoice for May 2009 was improperly calculated from the date of Student #18's placement in the Facility.
13. Affected Student #19 was seventeen years old and in the tenth grade/GED. Student #19 was placed in the Facility by County Court on April 2, 2009. The Facility notified the District of Student #19's placement on April 10, 2009.
- a. The notification to the District specified Student #19 was enrolled in the Facility's GED program.
 - b. The Facility submitted a contract to the District for Student #19, but as of the closing of the record on August 19, 2009 the District had not yet signed or returned the contract.
 - c. Student #19 had an IEP developed by the Facility in an annual IEP review on June 8, 2009. The District did not attend the IEP review meeting.
 - d. The IEP for Student #19 had a projected year of graduation/completion of June 2010 with a completion document of GED. The plan course of study included "GED preparation and day treatment program components including affective and post-secondary/vocational/job readiness education."
 - e. Although none of Student #19's four IEP goals were to obtain a GED, one goal had several objectives with progress measurement criteria which included performance on official GED practice tests.

- f. The Facility anticipated that Student #19 will return to the educational program for the 2009-2010 school year.
 - g. Student #19 was identified on the May and June 2009 invoices as being in the GED program for which the District did not remit payment. There were discrepancies between Student #19's records and the invoice.
14. Affected Student #20 was sixteen years old. Student #20's anticipated grade level is unknown as the IEP records for the student were from October 2004. Student #20 was placed in the Facility by DHS on May 4, 2009. The Facility notified the District of Student #20's placement on May 13, 2009.
- a. The notification to the District specified Student #20 was enrolled in the Facility's GED program.
 - b. The Facility submitted a contract to the District for Student #20, but as of the closing of the record on August 19, 2009 the district had not yet signed or returned the contract.
 - c. The IEP for Student #20 was from October 2004 from District Middle School when Student #20 was in the sixth grade. The IEP did not address transition, post school outcomes or indicate a completion date or completion document.
 - d. The Facility provided Student #20's parent with a prior written notice and consent for evaluation on June 2, 2009. As of the closing of the record on August 19, 2009, it was unknown whether the parent had given written consent to evaluate. The Facility reported that the District does not conduct reevaluations during the summer and that Student #20's IEP development was pending a reevaluation.
 - e. As of the date of the interview with the Facility on August 14, 2009, the Facility was checking to see whether Student #20 would be returning to the educational program for the 2009-2010 school year.
 - f. Student #20 was identified on the May and June 2009 invoices as being in the GED program for which the District did not remit payment. The invoice for May 2009 was improperly calculated from the date of Student #20's placement in the Facility.
15. Affected Student #21 was sixteen years old and in the ninth grade. Student #21 was placed in the Facility by NYC on March 12, 2009. The Facility notified the District of the placement on March 16, 2009.
- a. The notification to the District specified Student #21 was enrolled in the Facility's GED program.
 - b. The District and the Facility executed a contract for Student #21 on April 16, 2009.
 - c. Student #21 had an IEP that was developed by District High School on September 16, 2008. The Facility Adopted the IEP on May 12, 2009, however the Facility modified the special education and related services and specified Student #21 as being in the GED program. The transfer student IEP form completed by the Facility had parental agreement for Student #21 to receive special education and related services.
 - d. The IEP adopted by the Facility makes no mention of a GED as a course of study or IEP goal.
 - e. The Facility reported that Student #21 will not be returning to the educational program in the 2009-2010 school year.

- f. Student #21 was appropriately billed on the April, May and June 2009 invoices as being in the GED program for which the District did not remit payment.
16. Affected Student #22 was sixteen years old and in the tenth grade. Student #22 was placed in the Facility by Social Services on December 8, 2008. The Facility notified the District of Student #22's placement on December 8, 2008.
- a. The notification to the District indicated Student #22 was enrolled in Diploma component of the Facility's program.
 - b. Consent was obtained by the Facility to conduct an initial evaluation of Student #22 on December 8, 2008. Student #22 had an IEP developed by the Facility in an IEP meeting on February 2, 2009. The District conducted evaluation assessments. The District Psychologist was indicated on the IEP meeting participant page, but the District Psychologist did not initial or sign the page as participating in the IEP. The SCO finds that the District did not participate in development of the IEP.
 - c. The District and the Facility executed a contract for Student #22 on April 16, 2009.
 - d. In the IEP present levels of academic achievement, functional performance and educational needs, it was noted that Student #22 had attended several schools and facilities. The same section noted that Student #22 is court ordered to attend school and that Student #22 wanted to get [Student's]diploma and join the service.
 - e. Based on the recommendation of the DHS Caseworker and a subsequent meeting with the Student and the parent, Student #22 transferred from the work study program to the GED program because of being so far behind in credits. The Facility admitted that it did not provide the District with notification of Student #22's change to the GED program and did not change Student #22's IEP to reflect that change.
 - f. It was expected that Student #22 would not be returning to the educational program in the 2009-2010 school year.
 - g. Student #22 was appropriately billed on the April, May and June 2009 invoices as being in the GED program for which the District did not remit payment.
17. Affected Student #23 was eighteen years old and in grade GED. Student #23 was placed in the Facility by County Court on March 5, 2009. The Facility notified the District of Student #23's placement on March 16, 2009.
- a. The notification to the District specified Student #23 was enrolled in the Facility's GED program.
 - b. The District and the Facility executed a contract for Student #23 on April 16, 2009.
 - c. An additional IEP meeting was held on May 11, 2009 for the purpose of the Student #23's transfer which was a significant change in placement. The Facility explained that the District did not attend this meeting because it was not a triennial reevaluation.
 - d. In the IEP present levels of educational performance and needs it is noted that "[Student #23] has hopes for [a] GED and secondary education. The statement of planned course of study indicated that "[Student #23] will pursue completion of [a] GED certificate." One IEP annual goal was "[Student #23] will study for and pass the five GED tests." The criteria for progress on the goal indicated passing scores on the GED tests.

- e. After the IEP meeting in May, the Facility reported that Student #23 decided to enroll in the diploma track in the fall. The Facility reported that Student #23 would be transitioning to a District High School for the 2009-2010 school year.
 - f. Student #23 was appropriately billed on the April, May and June 2009 invoices as being in the GED program for which the District did not remit payment.
18. Affected Student #24 was sixteen years old and in the ninth grade. Student #24 was placed in the facility by Juvenile Probation on February 20, 2009. The Facility notified the District of Student #24's placement on February 26, 2009.
- a. The notification to the District specified Student #24 was enrolled in the Facility's GED program.
 - b. The District and the Facility executed a contract for Student #23 on March 11, 2009.
 - c. The only IEP records submitted to the SCO were the IEP progress reports from an IEP dated October 3, 2007. Every goal on the progress report indicated Student #24 had made zero progress because "[Student #24] refuses to attend school." GED was not referred to in the IEP records. No other educational records were provided.
 - d. The Facility did not expect Student #24 to return to the educational program for the 2009-2010 school year.
 - e. Student #24 was appropriately billed on the April 2009 invoice as being in the GED program for which the District did not remit payment.
19. Affected Student #25 was sixteen and in the eleventh grade. Student #25 was referred to the Facility by Juvenile Probation on March 12, 2009. It was not known when the Facility notified the District of Student #25's placement.
- a. The referral form from the placing public agency to the Facility specified GED program for Student #25. The SCO finds the Facility placed Student #25 in the GED program based solely on the referral of the placing agency.
 - b. The District and the Facility executed a contract for Student #25 on April 16, 2009.
 - c. Student #25 had an IEP dated November 26, 2008. The IEP had been developed by District Alternative High School. The IEP shows the school of attendance as Alternative High School in one section, then "Tuition Out" in the subsequent sections. The IEP present levels of academic achievement, functional performance, and educational needs notes that as of the end of the trimester, Student #25 had not completed any of the projects for [Student's] classes and that a major contributing factor was the lack of consistent attendance.
 - d. The IEP indicated a projected year of graduation/completion of 06/2010 with a completion document of diploma. The transition assessment used was "reviewing [Student's]goals." The post school outcome for the student's two IEP goals stated Student #25 will earn a high school diploma.
 - e. The Facility reported that Student #25 had been in the Facility a short period and left before the Facility had received the educational records. The SCO finds that the Facility did not have an opportunity to adopt Student #25's IEP or to convene an IEP meeting before Student #25 left the Facility.
 - f. The Facility did not expect that Student #25 would return to the educational program in for the 2009-2010 school year.

- g. Student #25 was identified on the April 2009 invoice as being in the GED program for which the District did not remit payment. However, the record did not have sufficient information to confirm the appropriateness of the invoice.
20. Affected Student #26 was seventeen and in an unknown grade. Student #26 was placed in the Facility by Social Services on January 8, 2009. It was not known when the Facility notified the District of Student #26's placement.
- a. The documentation supplied by the Facility did not include the notification to the District, however the District and the Facility executed a contract for Student #26 on March 4, 2009.
 - b. The most recent IEP for Student #26 was dated June 1997. The Facility was unsuccessful in its efforts to confirm special education eligibility and obtain current records for Student #26. The Facility attempted to obtain consent to reevaluate Student #26, but the parent and Student #26 refused to provide consent to evaluate.
 - c. The Facility has not submitted sufficient documentation of Student #26's eligibility for special education. The SCO finds no basis for ordering payment of tuition costs for Student #26.
 - d. The Facility reported that the Student #26 would not be returning to the educational program for the 2009-2010 school year.
 - e. Student #26 was identified on the April 2009 invoice as being in the GED program for which the District did not remit payment. The invoiced amount was \$1,393.40.
21. Affected Student #27 was sixteen and in the tenth grade. Although documentation of the placement was not provided, a DHS Caseworker is identified as a participant in the IEP meeting. It was not known when the Facility notified the District of Student #27's placement.
- a. The documentation supplied by the Facility did not include the notification to the District, however the District and the Facility executed a contract for Student #27 on September 11, 2008.
 - b. An IEP review meeting was held for Student #27 on April 18, 2008. The IEP was developed by the Facility. The District did not participate in the IEP review meeting.
 - c. The IEP had a projected date of graduation/completion of June 2009 with a completion document of GED. The statement of planned course of study indicated GED preparation within the Facility's GED and Day Treatment programs.
 - d. One of the IEP goals for Student #27 was to attend pre-GED/GED prep classes in order to earn a GED and enroll in a vocational school. Other IEP goals in reading, math, and writing do not specifically refer to GED. The IEP provided to the SCO included an undated handwritten notation on each of these goals indicated that Student #27 had passed the GED test in that particular area. In the IEP justification for placement decision, it notes that [the placement] is the most appropriate placement due to Student #27's age and the likelihood that Student #27 will not complete the necessary credits required for high school graduation.
 - e. The Facility reported that Student #27 had obtained a GED. Student #27 left the Facility and would not be returning to the program for the 2009-2010 school year.

- f. Student #27 was identified on the April 2009 invoice as being in the GED program for which the District did not remit payment. However, the record did not have sufficient information to confirm the appropriateness of the invoice.
22. The SCO finds a variety of factors influenced the determination of whether a student would be assigned to the GED program. Both the Facility and the District agreed that factors as to the appropriateness of the GED program for an individual student included the student's age and the number of credits the student has obtained toward graduation. The review of student records established that —
- Several students wanted to obtain a GED and/or had been working toward a GED in their previous placement.
 - Several students had significant deficit in credits towards graduation which would jeopardize their ability to obtain a high school diploma prior to reaching the age eligibility limits under IDEA.
 - Students were referred to the GED program by the placing agency; yet the Facility still considered individual factors in determining the GED or Diploma program based on the student's unique circumstances and desires of the student and/or his or her parents.

The records showed no pattern of the Facility "funneling" students into the GED program. The SCO finds that the assignment of these students to the Facility's GED program was appropriate based on the factors cited above.

23. Although the District maintained that the Facility's GED program was inappropriate for students receiving special education, the District offered GED programs to District students, including students receiving special education. Further, the District not only participated in IEP meetings for students in the Facility which resulted in references to GED on the IEPs, but also raised no objection to GED programming. As such, the SCO declines to make a finding that the GED program was inappropriate for Student and similarly situated students receiving special education services in the Facility.
24. It is undisputed that a District representative was invited to and would attend initial and triennial reevaluation IEP meetings for District students at the Facility. However, the District Out of District Manager informed the SCO that a District representative would not attend IEP annual review meetings of students in eligible facilities unless there were significant issues and the Facility explained that it did not send notice of annual review meetings for that reason. The SCO finds that the District condoned the Facility's practice of not sending notice of IEP annual review meetings. Therefore, the District cannot now complain of insufficient notice of IEP meetings
25. Of the 20 District student records reviewed, 17 students had current IEPs. Of the remaining three records, the IEPs were out of date (development of two IEPs was pending until reevaluations could be conducted by the District and one parent and student refused consent for evaluation).
26. Of the 17 students with current IEPs, 10 of the IEPs were developed by the Facility and seven were transfer IEPs.
- a. Of the 10 IEPs developed by the Facility,
- Nine IEPs specified GED, in some manner, within the IEP document and one IEP did not indicate GED on the IEP in any manner.

- Of the nine IEPs referenced above, the District participated in the development of six of the IEPs, some of which were developed subsequent to the policy of not paying for students in the GED program. The District did not object to the appropriateness of the GED program for these IEPs.
 - As was its practice, the District did not participate in three IEP meetings which were designated as annual IEP reviews and an additional IEP meeting that resulted in IEPs that referred GED.
- b. Of the seven transfer IEPs,
- Two of the IEPs already listed GED within the IEP and were adopted by the Facility. The District participated in the development of those IEPs.
 - One IEP was for a student who was at the Facility for only brief period of time which prevented the Facility from adopting or developing a new IEP for the student.
- c. The Facility did change the educational program from Diploma to GED for a total of 5 students with IEPs (four transfer IEPs and one IEP developed by the Facility). Each of these changes was made based on referrals from the placing public agency or subsequent recommendations from DHS caseworkers. Conversely, during the same period, one student transferred from the GED program to the Diploma program. The SCO finds that although such changes occurred outside of the IEP process, the changes did not alter students' eligibility for special education nor the special education services provided to the students.

Based on the District's participation in the IEP development of eight of the seventeen IEPs and the District's practice of not participating in IEP annual reviews, the SCO finds that the District had ample opportunity to object to the assignment of individual students to the Facility's GED program through the IEP process, but failed to do so.

27. As no evidence was supplied to demonstrate otherwise, the SCO finds the Student and similarly situated students received special education services in conjunction with instruction in the GED program. The special education services were individualized to each student and were appropriate.
28. Because the students who were placed in the Facility were moving to or from a more restrictive setting, students' placement in the Facility constituted a change in placement under the IDEA.⁸ However, a change from GED program to Diploma program and vice versa does not constitute a change in placement.
29. The District failed to provide any specific evidence to establish that the content and curriculum used in the Facility's GED program was not aligned to State academic standards. Therefore, the SCO declines to make such a finding.
30. The SCO finds that from May 4, 2009 to the close of the record on August 19, 2009, the District implemented the decision to not pay tuition costs to the Facility for Student and similarly situated students enrolled in the GED program. The District's unilateral decision was not based on consideration of the unique circumstances or needs of the individual students.

⁸ See Analysis of Comments and Changes 2004 IDEA Part B regulations, 71 Fed. Reg. pp.46587-88 (*hereinafter* Preamble) discussion on the continuum of alternative placements. See also Preamble, p.46630 and ECEA Rule 4.03(8)(a) "placement means provision of special education and related services."

31. The SCO finds that the District's refusal to pay tuition costs for Student and similarly situated students resulted in a denial of FAPE.
32. The SCO finds that the invoices for Students #13, #14, #15, #16, #18, and #20 were improperly calculated because the invoices included billing for days preceding notification to the District. Additionally, the invoices for Student #12, #17, #19, #25, and #27 had discrepancies between student records and the invoice. The SCO further finds that there was insufficient evidence of Student #26's eligibility for special education services, therefore the submission of an invoice for Student #26 for tuition costs was inappropriate. The specific billing details for the Student and each similarly situated student are summarized in Decision Attachment 1, page 28, which is incorporated into this finding.

ANALYSIS AND CONCLUSIONS OF LAW

Having carefully considered all information in the record, the SCO makes the following conclusions of law which are specifically limited to the facts of this case.

Generally, the IDEA requires that a FAPE be made available to children with disabilities between the ages of 3 and 21. § 300.101(a). A FAPE is specifically defined as special education and related services that (1) are provided at public expense under public supervision and direction and without charge; (2) meet the standards of the Department; (2) include an appropriate preschool, elementary school, or secondary school education in the state; and (4) are provided in conformity with an individualized education program (IEP) that meets the IEP content, development, review and revision requirements. § 300.17.

Under the IDEA, the obligation to provide a FAPE to a child with disabilities ends with graduation from high school with a regular high school diploma. However, children with disabilities who have not graduated with a regular high school diploma still have an entitlement to FAPE until reaching the age of 21. The 2004 IDEA amendments clarify that a high school diploma does not include an alternative degree that is not fully aligned with the state's academic standards, such as a certificate or GED. However, nowhere in the IDEA or its regulations is it stated that a student enrolled in a GED preparation program is not receiving or is no longer entitled to receive a FAPE.

The *Attleboro*⁹ decision cited by the District is distinguishable. In *Attleboro*, the student was identified as having multiple disabilities and was not attending *any* educational program. The hearing officer in *Attleboro* found that, given the student's unique needs, a comprehensive special education program in a private non-profit day school was appropriate, and the parent's request for tutorial support for the student to obtain a GED would not provide a FAPE. Here, the Facility was a day treatment program with a CDE approved facility school and qualified special education staff [Finding of Fact:¹⁰ A(1), B(10)], not merely a "tutorial support."

A GED preparation program may well provide FAPE so long as the student receives special education and related services in conjunction with an appropriate secondary school education. The Student and similarly situated students received appropriate special education services [FF: B(10), C(27)]. As no evidence was presented to the contrary, the Student and similarly situated students received an appropriate secondary education [FF:

⁹ *Attleboro Public Schools*, 106 LRP 32326 (SEA MA 2005).

¹⁰ *Hereinafter* FF.

C(29)]. However because the District did not pay tuition costs for the Student and similarly situated students, the District failed to provide a *free* appropriate public education.

The IDEA requires that each State have in effect a method for ensuring appropriate services to children with disabilities. §300.154. Under IDEA, the State must ensure that children with disabilities receive a FAPE when they are placed in or referred to private schools or facilities by public agencies.¹¹ Colorado's "method" for ensuring appropriate services to children with disabilities placed in eligible facilities by noneducational public agencies is established by the Exceptional Children's Education Act (ECEA) and its implementing rules.¹² Specific to this Complaint, when a child has been placed in an eligible facility, the district of residence is responsible for the payment of tuition costs. ECEA Rules 8.03(1), and 9.03(2)(a)(i). Tuition costs are expenditures for *special education services* for a child with a disability who receives such services in an eligible facility. ECEA Rule 9.01(8).

Additionally, the IDEA provides that meetings to review and revise the IEP for a child with a disability may be conducted by a facility, but the public agency must ensure that an agency representative is involved in any decision about the child's IEP. The agency representative must agree to any proposed changes in the IEP before prior to implementation. § 300.325(b)(2). Under the ECEA, the eligible facility is responsible for IEP planning, in collaboration with the responsible administrative unit, and also for the delivery of special education services. ECEA Rule 8.01(2)(e). The administrative unit of attendance (i.e., the administrative unit in which the facility is located) is responsible for meetings in which the initial IEP is developed, and the *administrative unit of residence* (i.e., the administrative unit of the child's residence) *is responsible for IEP review meetings*. ECEA Rule 8.06(1)(c). If in disagreement with the child's placement in an eligible facility, the administrative unit of residence may disapprove the placement due to unavailability of appropriate educational services but must do so in writing within 15 calendar days of the date that the administrative unit of residence was notified of the placement. If the administrative unit of residence disapproves the placement, it must assure that the child receives a FAPE until an appropriate placement can be determined. ECEA Rule 9.03(2)(a)(ii). In this case, the District failed to comply with Colorado's mechanism for ensuring services to students placed in eligible facilities. Specifically, the District –

- Failed, as a matter of unwritten policy and practice, to ensure that a District representative attended IEP annual review meetings for which it was responsible in violation of §300.325(b)(2) [FF: C(24), C(26)].
- Failed to timely provide sufficient written disapprovals for the students involved based on each student's unique needs [FF: B(8)]. The May 4, 2009 emails were blanket in their breadth and disclose other reasons for the District's discontent that have little to do with the appropriateness of the Facility's GED program or the students' unique needs [FF: B(3), B(4), C(30)]. Indeed, contrary to its claim that the Facility's GED program was inappropriate, the District's actions sanctioned students' assignment to the program [FF: B(9)]. Based on the facts of this case, the District's concern that students enrolled in non-district GED programs are reported as dropouts is irrelevant to its obligation to pay tuition costs for the Student and similarly situated students placed at the Facility.
- Refused to pay tuition costs for the affected students for April 2009 through June 2009 [FF: B(6)].

¹¹ § 300.146 and Preamble, p. 46607.

¹² See, Colo. Rev. Stat. § 22-20-108(7) to (8); Colo. Rev. Stat. § 22-20-109(1)-(3); ECEA Rule 8.00; ECEA Rule 9.02; and ECEA Rule 9.03(2).

The record demonstrates that the Facility continued to: (1) provide special education and related services to the Student and similarly situated students even though the District discontinued paying the tuition costs for the enrolled students with disabilities; (2) receive District students placed by other agencies; and (3) proceed with obtaining consent for evaluation and IEP development [FF: B(12), C(8-9), C(13-14)]. However, because the District withheld the tuition costs from the Facility for the Student and similarly situated students it effectively denied the students a *free* appropriate public education.

For the reasons set forth above, as to Allegation 1, the District denied the Student a free appropriate public education (FAPE) by withholding funding to the Facility for special education services to which the Student was entitled and were delivered, contrary to §§ 300.101 through 300.103.

As to Allegation 2, the District systematically denied other similarly situated students¹³ a FAPE by withholding funding for special education services to which they were entitled and did receive, contrary to §§ 300.101 through 300.103 of the IDEA.

REMEDY

1. The SCO hereby orders the District to promptly pay tuition costs of \$31,630.18 which includes:
 - a. The total amount of \$19,646.94 that was appropriately billed April through June 2009 but not paid for the Student and similarly situated students who were enrolled in the Facility's GED program; and
 - b. The amount of \$11,983.24 for students for whom the District was not promptly notified of the students' placement in the Facility.¹⁴ The amount of \$11,983.24 equals \$14,421.69 billed for students who were placed in the Facility in April and May 2009, less \$2,438.45 representing the amount billed for days that elapsed from the students' placement until notification was provided to the District.¹⁵ As to the \$2,438.45, any reimbursement of this amount must be sought from the placing public agency (i.e., the Court or DHS) that failed to comply with the notification requirements of Colo. Rev. Stat. § 22-20-108(4).

The District shall make the payment to the Facility on or before end of business on October 5, 2009. The District shall submit evidence of payment to the SCO no later than October 8, 2009.

2. The District shall meet with the Facility no later than September 30, 2009 to confirm information for individual similarly situated Students #12, #17, #19, #25, #27 for which invoices and student records reflect discrepancies. The date of placement, date of notification, and the days of attendance at the Facility shall be confirmed for each of these students. The District shall then pay the Facility, no later than October 14, 2009, the tuition costs owed for each of these five students calculated from the date

¹³ Except Student #26 for whom there was insufficient evidence of special education eligibility (FF C(20)(c)).

¹⁴ An administrative unit of residence is not responsible for tuition costs for a student placed in an eligible facility until the administrative unit has received the required notification. Colo. Rev. Stat. § 22-20-108(8).

¹⁵ See Decision Attachment 1, Billing Finding.

the District was notified of the student's placement. The District shall submit supporting documentation and evidence of payment to the SCO no later than October 17, 2009.

3. The District shall also pay to the Facility tuition costs calculated from the date the District was notified of the student's placement for any special education student subsequent to the filing of this Complaint, for whom—
 - a. the Facility submitted an invoice to the District from the date of the Complaint to the date of this Decision;
 - b. the District has refused to pay tuition costs because of the student's assignment to the Facility's GED program; and
 - c. the District did not submit an individualized written disapproval.

The District shall make the payment to the Facility on or before end of business on October 5, 2009. The District shall submit evidence of payment and supporting documentation to the SCO no later than October 8, 2009.

4. The District shall develop a corrective action plan (CAP) to ensure students placed in eligible facilities receive a FAPE. The CAP must specify policies, procedures and staff training:
 - a. To ensure District attendance at IEP meetings for students placed in eligible facilities;
 - b. To ensure prompt and proper processing of transfer IEPs for students placed in facilities for short time periods;
 - c. Regarding the payment of tuition costs to eligible facilities; and
 - d. Regarding proper District disapproval of student placements in eligible facilities by noneducational public agencies.

The CAP shall be submitted to the undersigned SCO no later than the end of business on November 2, 2009. The Department will review the District's proposed CAP. Following such review, the Department will either approve or request revisions of the proposed CAP. The enclosed sample templates provide suggested formats for the CAP and include sections for "improvement activities" and "evidence of implementation and change."

Please submit the CAP and other required documentation above as follows:

Ms. Stephanie Lynch
State Complaints Officer
Exceptional Student Leadership Unit
Colorado Department of Education
1560 Broadway, Suite 1175
Denver, Colorado 80202- 5149

FAILURE BY THE DISTRICT TO MEET ANY OF THE TIMELINES SET FORTH, ABOVE, WILL SUBJECT THE DISTRICT TO ENFORCEMENT ACTION BY THE DEPARTMENT.

CONCLUSION

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

Dated this 18th day of September, 2009.

Stephanie D. Lynch, Esq.

Billing Finding
2009:507

		Date of Placement	Date District Notified	Tuition Cost Rate	School Days elapsed	Elapsed Amt	Days Billed April 2009	Days Billed May 2009	Days Billed June 2009	Amt Due	
Student		9/22/2008	9/24/2008	\$ 69.67	N/A		20			\$ 1,393.40	
Student #9		1/8/2009	1/26/2009	\$ 69.67	N/A		20	4		\$ 1,672.08	
Student #10		1/6/2009	1/26/2009	\$ 69.67	N/A		20	8		\$ 1,950.76	
Student #11		12/1/2008	12/3/2008	\$ 69.67	N/A		20	18	10	\$ 3,344.16	
Student #22		12/8/2008	12/8/2008	\$ 69.67	N/A		20	18	10	\$ 3,344.16	
Student #21		3/12/2009	3/16/2009	\$ 69.67	N/A		20	18	10	\$ 3,344.16	
Student #23		3/5/2009	3/16/2009	\$ 69.67	N/A		20	18	10	\$ 3,344.16	
Student #24		2/20/2009	2/26/2009	\$ 69.67	N/A		18			\$ 1,254.06	
Total: Appropriately Billed										\$ 19,646.94	

Student #13		4/16/2009	4/20/2009	\$ 69.67	2	\$ 139.34	10	18	10	\$ 2,647.46	
Student #14		4/16/2009	5/4/2009	\$ 69.67	12	\$ 836.04	10	18	10	\$ 2,647.46	
Student #15		4/13/2009	4/20/2009	\$ 69.67	5	\$ 348.35	13	18	10	\$ 2,856.47	
Student #16		4/16/2009	4/20/2009	\$ 69.67	2	\$ 139.34	10	18	10	\$ 2,647.46	
Student #18		5/2/2009	5/13/2009	\$ 69.67	7	\$ 487.69		15	10	\$ 1,741.75	
Student #20		5/4/2009	5/13/2009	\$ 69.67	7	\$ 487.69		17	10	\$ 1,881.09	
Total: Students billed with lapses in notifications						\$ 2,438.45				\$ 14,421.69	

Student #12		4/22/2009	4/22/2009	\$ 69.67	0			25	10	\$ 2,438.45	
Student #17		1/22/2009	1/26/2009	\$ 69.67	2	\$ 139.34		76	10	\$ 5,991.62	
Student #19		4/2/2009	4/10/2009	\$ 69.67	5	\$ 348.35		37	10	\$ 3,274.49	
Student #25		3/12/2009		\$ 69.67			20			\$ 1,393.40	
Student #27				\$ 69.67			7			\$ 487.69	
Total: Additional Information Required						\$ 487.69				\$ 13,585.65	

Student #26		1/8/2009		\$ 69.67			20			\$ 1,393.40	FF: 20(c)
Total: Insufficient evidence of eligibility -No tuition costs										\$ 1,393.40	

Total Billed

\$ 49,047.68