

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

State-Level Complaint 2015:522
Mesa County Valley School District 51
DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on December 14, 2015, by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

Based on the written Complaint, the State Complaints Officer (SCO) determined that the Complaint identified three allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

COMPLAINT ALLEGATIONS

The Complaint raised three allegations, summarized as follows:

1. On October 22, 2015, Parents were denied a meaningful opportunity to participate in the development of Student's educational program and placement, resulting in a denial of a free appropriate public education (FAPE). Specifically,
 - a. Placement at the District's Therapeutic Day Program (TDP) was predetermined and not based on consideration of reevaluation, parent concerns that Student may have Autism Spectrum Disorder (ASD), or the results of a recent evaluation in the area of ASD; and
 - b. Parents did not timely receive prior written notice (PWN).
2. Beginning October 23, 2015, to present, the District has not provided Student with the specialized instruction and related services in accordance with his September 2015 IEP, as amended in October, resulting in a denial of FAPE. Specifically,

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

² Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

- a. Student has been provided with only 150 minutes of specialized instruction each day at TDP, i.e., 750 minutes per week, whereas his IEP requires 1050 minutes of specialized instruction be provided weekly; and
 - b. Student has not been provided with special transportation to access related services, i.e., speech language services, as required by his IEP.
3. The District's TDP has a policy/practice that violates IDEA because it requires all students eligible for special education to earn access to the specialized instruction and related services identified on their IEPs.

FINDINGS OF FACT

After thorough and careful analysis of the entire record,³ the SCO makes the following FINDINGS:

Background:

1. At all times relevant to the Complaint, Student was in the [grade level] and resided with his Parents within the District's boundaries. Student has been identified as eligible for special education and related services in the disability categories of Serious Emotional Disability (SED) and Speech or Language Impairment (SLI).
2. Student is bright, physically active, creative, and has a "big imagination."⁴ For example, Student is able to tell entertaining stories with rich detail about topics that interest him, such as the Titanic. Student also has mechanical aptitude and enjoys building and fixing things. Although Student has difficulty in social/emotional skills, he does demonstrate empathy and enjoys helping others, particularly those he perceives as more vulnerable.⁵
3. Student's primary disability is identified as SED and his needs in this area have had a significant and increasing impact on his ability to access instruction. Student's most recent IEP, dated September 2015, describes his needs and impact of disability in the area of social/emotional skills as "recognizing and responding to his emotions, resolving peer conflicts, and increasing engagement in learning activities." Consistent with this description, both Parents and educators state that Student struggles significantly with self-regulation, understanding social cues and classroom expectations, and maintaining appropriate peer relationships.⁶

³ The appendix, attached and incorporated by reference, details the entire record.

⁴ Exhibit 1, p. 4.

⁵ Interviews with Parents, School Principal, School Special Education Teacher, and School Psychologist.

⁶ Interviews with Parents, School Principal, School Special Education Teacher, School Psychologist, General Education Teacher 1, General Education Teacher 2, and TDP Special Education Teacher.

4. Student began attending Elementary School in April of 2015 and was initially placed in the Severe Needs Behavior (SNB) program due to incidents of inappropriate behavior, including running, minor property damage, pushing/kicking chairs, and verbal threats to adults and peers.⁷ The SNB program is a classroom staffed by Special Education Teacher and two paraprofessionals, and is also equipped with manipulatives and various furniture designed to provide therapeutic benefits. The SNB program utilizes a level system where students move from level one, a centralized program, through level five, the general education classroom with support, based on their individual needs and progress. Consequently, students receiving services through the SNB program may receive some or all academic instruction and social skills instruction in the SNB classroom, or utilize the classroom to take sensory breaks, deescalate, or refocus. During the spring of 2015, Student was receiving centralized services through the SNB program.⁸

2015-16 School Year:

5. At the beginning of the 2015-16 school year, Student began attending the general education classroom with adult support from the SNB program. From August 3 to September 11, Student demonstrated good rapport with peers and adults in his classroom, the ability to problem solve quickly with adult support, and had been recognized as a good role model for younger students. Although there were no significant behavioral incidents reported during this time, Student still struggled at times to respond appropriately when redirected, when requested to perform a non-preferred activity, or when faced with changes to his routine.⁹

6. On September 11, 2015, Student's IEP Team changed Student's placement from being in the general education classroom less than 40% of the time to being in the general education classroom 40-79%, based on improvements in Student's classroom behavior. The IEP Team determined that Student had "improved his ability to comply with adult requests," and "increased his stamina to participate in the general education classroom with support" to the extent that he was "able to participate in his general education classroom" and would "benefit from increased access to typical peers."¹⁰

7. Although the IEP Team recognized that Student had demonstrated recent improvements in classroom behavior and participation, Parents expressed concerns about Student's anxiety and potential "sensory sensitivities" that may still be impacting him in the educational setting. Parents informed the IEP Team that Student had a medical diagnosis of Autism Spectrum Disorder (ASD) and requested additional assessment in this area to determine whether Student should be identified as having ASD for educational purposes. In response, the District proposed to conduct an additional assessment in this area that included use of the

⁷ Exhibit 1, p. 5; Interviews with School Special Education Teacher and School Psychologist.

⁸ Interview with School Special Education Teacher.

⁹ Exhibit 1, p. 5; Interviews with School Special Education Teacher and School Psychologist.

¹⁰ Exhibit 1, p. 14.

Autism Diagnostic Observation Schedule (ADOS).¹¹ Parent signed consent for the evaluation on October 14, 2015.¹²

Behavioral Challenges Preceding Change of Placement to the TDP:

8. Shortly after the September IEP meeting, Student began exhibiting behavior that threatened his own safety as well as the safety of others. As described in detail below, the frequency and dangerousness of this behavior resulted in Student spending an ever increasing amount of time in the SNB classroom as School staff attempted to address the dangerous behavior and ensure the safety of both Student and others.

9. On September 21, 2015, Student displayed physical aggression against peers and teachers in his general education classroom in response to General Education Teacher's request that he begin work on math. Student's behavior included pushing and attempting to throw his desk at another student, and hitting, kicking, and attempting to stab one of his teachers with a pencil. Student was escorted to the SNB classroom and Special Education Teacher was able to successfully deescalate Student.¹³

10. On September 24, 2015, Student displayed physical aggression against two peers in his general education classroom and School Special Education Teacher, and ran off School grounds. Student's aggressive behavior included twisting a peers arm until she cried out, and throwing his desk at another peer, causing her finger to be pinched between two desks. Following this incident, Student ran off school grounds and was pursued by School Special Education Teacher and others, including School Principal and a School behavior specialist. Once caught, Student punched, kicked, and bit School Special Education Teacher, and ran again after she released him. Student's Parents were eventually able to catch Student and return him safely home.¹⁴

11. On September 28, 2015, Student displayed physical aggression against staff and again attempted to run off School grounds. During this incident, Student was having lunch with School Special Education Teacher in the SNB classroom when he began to lift desks and punch walls. When Special Education Teacher asked him to stop, Student replied that he wanted to go home. Although Special Education Teacher tried to redirect him, Student repeated that he wanted to go home and attempted to run out a side door. When Special Education Teacher blocked his attempt, Student punched and kicked her. Student was suspended for this incident for 1.5 days.¹⁵

¹¹ The ADOS is considered the "gold standard" tool for direct observation of Autism Spectrum Disorder symptoms. See CDE's Guidelines for the Educational Evaluation of Autism Spectrum Disorder (June 2015), available at http://www.cde.state.co.us/cdesped/guidelines_autismdid.

¹² Complaint; Exhibit 1, p. 7; Exhibit 7, pp. 1-3.

¹³ District Exhibit 19; Interview with School Special Education Teacher and General Education Teachers 1 and 2.

¹⁴ Exhibit 19; Interview with School Special Education Teacher, School Principal, and General Education Teachers 1 and 2.

¹⁵ Exhibit 19; Interview with School Special Education Teacher, School Principal, and School Psychologist.

12. On October 12 and 13, Student again displayed physical and verbal aggression, threw objects, and attempted to leave the classroom. His behavior included swinging at others, kicking, hitting, biting, and throwing objects at staff.¹⁶

13. On October 14, 2015, Student displayed physical aggression that resulted in injuries to School Special Education Teacher and a paraprofessional. During this incident, Student stomped on School Special Education Teacher's foot; kicked, punched and bit both educators as they attempted to prevent him from leaving the classroom; threw chairs; threw soap at both educators with the stated intent to make their eyes burn; and made stabbing motions towards them with a screw Student had previously grabbed from School Special Education Teacher's desk.¹⁷ Student did not demonstrate calm and safe behavior until Parent arrived in the classroom. As a result of this incident, Student was suspended for five days.

14. Between September 21 and October 14, Student spent an increasing amount of time in the SNB classroom due to the aggressive behavior described above. During this time, Student's behavior significantly interfered with his ability to benefit from academic instruction. Consistent with the summary statement from the functional behavioral assessment (FBA) conducted in September of 2015, the incidents of physical aggression described above were most often in response to a teacher's request that Student move from a preferred activity or break to a non-preferred activity.

15. Although Parents assert that Student's increasingly aggressive behavior was the result of the School not properly implementing the behavioral intervention plan (BIP), the SCO does not find credible evidence to support such a finding. Special Education Teacher was familiar with Student's BIP and was providing the identified support and reinforcement strategies. In addition, School Principal, School Psychologist, and Behavior Specialist were consulting with School Special Education Teacher in an effort to better support Student. The SCO notes that School Principal, who has an extensive professional background dedicated to serving students with emotional and behavioral challenges, was directly and consistently involved in providing professional support to Student and School Special Education Teacher in an effort to help Student succeed at School.¹⁸ Despite increasing support from the SNB program through School Special Education Teacher, School Principal, and behavior specialist, Student was spending less and less time in the general education classroom due to behavioral incidents.¹⁹ Moreover, Student was also exhibiting this behavior in the SNB classroom.

¹⁶ Exhibit 19; Interview with School Special Education Teacher and School Principal.

¹⁷ District Exhibit 12; Interview with Special Education Teacher.

¹⁸ School Principal has a Master's in the area of affective needs and behavior disorders. During most of her 21 years in education, School Principal has worked with students with emotional disabilities as well as Autism. Interview with School Principal.

¹⁹ Exhibit 1, pp. 16-17; Interviews with General Education Teachers 1 and 2, Special Education Teacher, School Principal, and School Psychologist, and Parents.

16. On October 15, 2015, Parent Advocate emailed Special Education Coordinator and other members of Student's IEP Team to request an IEP meeting to discuss concerns about Student's behavior and frustrations with the implementation of Student's current behavioral program. In this email, Parent Advocate indicated that Parents were open to discussing the services offered at the District's Therapeutic Day Program (TDP) and further inquired whether Parents should visit TDP.²⁰

17. On October 19, 2015, School Psychologist and Assistant Principal contacted Father to discuss a re-entry meeting for Student following his suspension. During this conversation, School Psychologist mentioned the possibility that Student may need an increased level of support and proposed that Parents consider the services provided at the TDP. Father indicated that he was willing to consider TDP as an option as long as it could appropriately meet Student's needs and would be able to implement Student's IEP.²¹ As a result of this conversation, the District convened an IEP meeting in lieu of a re-entry meeting for the purpose of considering a change in placement.²²

October 2015 IEP Meeting:

18. In their Complaint, Parents alleged that they did not have a meaningful opportunity to participate in the development of Student's educational program because Student had not yet been reevaluated for suspected ASD and they did not timely receive prior written notice of the change in placement.²³ Although the SCO agrees that Parents did not receive timely prior written notice, Parents did have a meaningful opportunity to participate in the meeting on October 22, 2015.

19. Parents attended the IEP meeting with an Advocate and actively participated in the discussion by providing input and asking questions. Specifically, Parents expressed concerns with what had been happening at School, particularly the suspensions and involvement of the School Resource Officer, and actively questioned whether Student's needs could be met at School. In addition, Parents and Advocate actively questioned the TDP staff present about their program and whether they would be able to implement Student's IEP. In response, TDP Special Education Teacher and TDP Principal offered detailed explanations about the program and assured Parents that the TDP could serve Student's needs. Parents expressed specific concerns about the TDP policy concerning transition to full days, a concern that will be addressed in more detail below. Although Parents remained concerned about the transition plan, they

²⁰ District Exhibit 9, p. 3.

²¹ Interviews with Parents, School Psychologist, and Assistant Principal; Exhibit 8.

²² Exhibit 8, p. 1; Interviews with Parents, School Psychologist and Assistant Principal.

²³ In their Reply, Parents for the first time raised new allegations concerning notice and constitution of the IEP team. These new allegations were outside of the scope of this complaint investigation. Parents may request mediation, file a state complaint, and/or file a due process complaint to address these additional concerns.

otherwise agreed that placement at TDP would be appropriate as long as Student received the services on his IEP.²⁴

20. In their Complaint, Parents specifically asserted that their ability to participate in the placement discussion was impeded by the lack of evaluation data concerning ASD, resulting in predetermination. The SCO disagrees. At the September 2015 IEP meeting, Parents requested that the District evaluate Student for ASD. In response, the District requested, and Parents provided, written consent for such an evaluation on October 14, 2015. Due to Student's behavioral challenges and recent suspension, the evaluation had not yet been given when the IEP team met on October 22, 2015 to discuss a change in placement. The District agreed to conduct the evaluation as soon as practicable once Student was more stable behaviorally and convene an IEP meeting to discuss the results of the evaluation. The evaluation was completed on December 2, 2015, and the District and Parents have agreed to convene an IEP meeting on February 16, 2016, to discuss the evaluation and determine changes, if any, to Student's educational program and placement.²⁵

21. Parents also alleged that their participation in the development of Student's educational program was impaired because the District failed to provide prior written notice (PWN) of the change in placement. The SCO agrees.

22. The District's practice, as described in its own policy manual, is to provide PWN to parents before it proposes to change the student's placement at the IEP meeting at which placement is being considered, or no later than 72 hours following the meeting.²⁶ Parents did not receive PWN until they requested a copy of Student's special education file on November 24, 2015. Parents also received a copy of Student's IEP, as amended on October 22, 2015, for the first time when they requested Student's records on November 24, 2015.²⁷

23. The District concedes that it failed to provide Parents with PWN.²⁸ In addition, the SCO notes that the PWN was written prior to the IEP meeting on October 22, not following it. School Psychologist drafted the PWN on October 19, 2015, to document the conversation with Parent and to confirm that a proposed placement at TDP would be discussed at the IEP meeting on October 22, 2015. Consequently, the SCO finds that the District failed to timely and adequately provide Parents with PWN of the change in placement. Because the SCO finds that the failure to implement Student's IEP resulted in a denial of FAPE, as discussed more fully

²⁴ Interviews with Parents, Advocate, School Psychologist, TDP School Psychologist, School Special Education Teacher, TDP Special Education Teacher, School Principal, and TDP Principal.

²⁵ Although multiple meeting dates were offered in December and January, Parents' request to include a specific District staff members and the private medical provider who had diagnosed Student with Autism have delayed the meeting date. Interviews with Special Education Director, Special Education Coordinator, and Parents.

²⁶ District Exhibit 8, p. 63.

²⁷ Although Parents signed a copy of the IEP Amendment to document their attendance at the meeting, they were not provided with a copy at that time. Interview with Parents, Advocate, and School Psychologist.

²⁸ Response, p. 4.

below, she does not need to address whether this procedural violation resulted in a denial of FAPE.

Implementation of the October 2015 IEP at TDP:

24. Student began attending the TDP on October 24, 2015. Parents alleged that Student has not received the specialized instruction in accordance with his IEP since being placed at TDP. Based on the findings below, the SCO agrees.

25. The SCO begins with the services identified on the October IEP amendment. Although Student's October IEP Amendment is captured in two different documents, one handwritten and one typed, both versions state that Student will receive 1050 minutes per week of specialized instruction in academics provided outside the general education classroom by a special education teacher.²⁹ The Service Delivery Statement in Student's September 2015 IEP describes specialized instruction for academic access as services that include "supporting his understanding of newly taught skills and work completion. These services were to be provided "inside or outside the general education classroom in a small group or with adult support as needed based on [Student's] needs and progress in the general education classroom."³⁰

26. In addition to specialized instruction in academics, Student' IEP was amended to provide 420 minutes each week for social/emotional support provided by a special education teacher, and an additional 330 minutes each week for social/emotional support provided by a social worker. Because social skill training is woven into academic instruction at the TDP, the SCO finds that the 420 minutes provided in social skills training provided by Special Education Teacher contemplated that these service minutes would be counted simultaneously with the service minutes for academic instruction. This means that only the 330 minutes provided by the Social Worker would count as additional and separate from the academic instruction.³¹

27. All services combined, Student's IEP provided approximately 23 hours each week of specialized instruction in academic and social/emotional support.³² Student also receives 90 minutes of direct instruction each by an SLP and 30 minutes of direct instruction each month by an OT. To receive these services in accordance with his IEP, Student would have to attend the TDP for approximately 24 hours each week. TDP operates from 9:00 AM to 2:45 PM, Monday through Friday, for a total of approximately 28 hours and 45 minutes each week. Consequently,

²⁹ District Exhibit 1, p. 15 and 2, pp. 3-4.

³⁰ District Exhibit I, p. 11.

³¹ District Exhibit 1, p. 15 and 2, pp. 3-4. Interviews with TDP Special Education Teacher and TDP Principal.

³² District Exhibit 1, p. 15 and 2, pp. 3-4. As discussed above, this figure allows for the 420 minutes of direct instruction in social emotional skills provided by Special Education Teacher to be counted with academic instruction.

the services identified on Student's IEP could be provided at TDP, as long as Student attended TDP on a full day schedule.³³

28. Parents assert that Student has not been provided with the services on his IEP because he has not been allowed to attend the TDP for full days. In response, the District asserts that Student's IEP did not require 1050 minutes at the beginning of the program. According to the District, Student's IEP Team determined that Student's needs required "placement in the TDP with a tiered level approach beginning at one hour per day."³⁴ The District essentially argues that this transition plan was clearly described in the IEP and Student would not be attending full days until he had met the transition criteria.

29. Although both versions of the IEP identify the same services, each one differs in how access or transition to full day programming at the TDP is described. The handwritten version states that services would "start with one hour and increase time as [Student] meets criteria of the program," defined by three safe days of 50 points or more. As evidenced below, the typed version provides more detail, stating that:

[Student] will attend the TDP for one hour until he has earned 50 points or above for 3 days in a row to ensure safety and to gain rapport with his teacher. As he demonstrates these behaviors, he will increase his time on campus. The program is designed to be completed, reaching Level 4, within one quarter of a school year; however, on average, students have been able to reach Level 4 within about a year to a year and a half.³⁵

30. The criteria identified above and incorporated into Student's IEP applies to all students who attend the TDP. The October IEP does not identify behavioral goals or benchmarks based on Student's unique needs that would be used to determine when he would transition. Moreover, the measures used to determine whether Student has made behavioral progress and can increase the time that he is allowed to attend the TDP are also standardized and apply to all students. For example, there are no identified behavioral goals or benchmarks based on Student's unique needs that would be used to determine when and at what intervals he would transition.

31. At the IEP meeting on October 22, 2015, Parents raised specific concerns about this policy. Parents were primarily concerned that Student would not have timely access to the services on his IEP because it would take him a long time to meet the criteria. In response, Parents were informed that all students who attend the TDP must meet the same criteria.

³³ Parents also raised discrimination based claims regarding the TDP hours of operation that do not fall within the jurisdiction of the IDEA dispute resolution processes. The U.S. Department of Civil Rights has jurisdiction to investigate disability-related discrimination in education.

³⁴ Response, p. 6.

³⁵ Exhibit 2, p. 3.

Because the criteria described on Student's IEP is based on TDP program criteria that applies to all students, the SCO finds that the transition plan described in Student's IEP was not based on Student's individualized needs.

32. The application of the TDP policy significantly and inappropriately delayed access to the special education and related services to which Student was entitled. For example, Student was only allowed to attend the TDP for one hour each day for the first fourteen days, i.e., between October 26 and November 11. For the next four school days, November 13 through 18, Student was allowed to attend TDP for 1.5 hours each day. For the next seven school days, November 19-December 8, Student attended TDP for 2 hours each day. For the next four school days, December 9 -14, Student attended TDP for 2.5 hours each day. For the next three days, December 15-17, Student attended TDP for three hours a day. For the next six school days, December 18 through January 11, Student attended TDP for four hours a day. Student finally was allowed to attend TDP for full days on January 12, 2016, 38 school days after his first day.³⁶ Because Student would have to attend TDP for full days to access the services identified on his IEP, the transition described above demonstrates a significant difference between the services required by Student's IEP and the services actually provided.

33. Parents have also alleged that Student has not been provided with transportation to access his speech language services. Student's IEP provides 90 minutes of direct speech language therapy each month provided by a speech language pathologist.³⁷ The District admits that it failed to provide transportation to SLP services on November 17 and 18, and has agreed to reimburse Parents for mileage for those days. Since November 18, 2015, Student has received SLP services at the TDP, and therefore, no longer requires transportation from TDP to receive SLP services. Because Student is receiving SLP services at TDP and the District has agreed to reimburse Parents for mileage on November 17 and 18, the SCO finds that this violation has been remedied. Most importantly, the District has provided SLP services to compensate for services missed in November and Student has therefore received services in accordance with his IEP.³⁸

34. In addition to transportation for SLP services, the SCO finds that the IEP provides that Student is to receive specialized transportation from home to TDP each day. The District agrees that the IEP require transportation to the TDP and will provide such transportation directly or reimburse Parents for mileage on a daily, round-trip basis. Consequently, the SCO considers this violation remedied.

³⁶ Exhibit 5. Although the SCO specifically requested Student's attendance records, the District failed to submit the records with its Response. Consequently, the SCO based the number of hours missed on the days the TDP was open according to the calendar available at <https://www.mesa.k12.co.us/schools/calendars/opportunitycenter.pdf>.

³⁷ Exhibit 1, p. 13.

³⁸ Exhibit 6.

TDP Policy/Systemic Allegation:

35. Parents have alleged that the TDP policy of requiring all students attending the TDP to earn 50+ points for three consecutive days before advancing to full days violates the IDEA because it requires that all students earn access to the specialized instruction and related services identified on their IEPs. For the reasons explained below, the SCO agrees.

36. The TDP is a Therapeutic Day Program operated by the District in collaboration with a large mental health provider and “designed to meet the intensive needs of youth struggling with behavioral/emotional and family issues.”³⁹ The TDP offers small classes and a high teacher-student ratio in a structured, supported environment where “behavioral learning and counseling are woven into a student’s educational program.”⁴⁰

37. Students are referred to the TDP from neighborhood schools by their IEP teams. All students who attend the TDP have been identified with a disability and receive special education services. Students at the TDP do not have any access to typical peers during the school day, including lunch, recess, or specials. Based on these characteristics, the SCO finds that the TDP is a separate school.

38. The goal of the TDP is to stabilize a student’s behavior, address academic barriers and successfully transition students back to their home school.⁴¹ To achieve this goal, the TDP employs a “model of behavior shaping or modification with a token reinforcement economy or incentive based structure that uses a point/level system.”⁴²

39. As part of this model, students must demonstrate sufficient progress meeting specific behavioral expectations before being allowed to increase time and attend school for full days. Specifically, all students attending the TDP must “earn 50+ points” for three consecutive days before advancing to full days.⁴³ This policy is described in the TDP manual as follows:

Your first three days in the program will be an Orientation Phase. It will consist of three partial days in which you must earn 50+ points per day (for three consecutive days) before advancing to full days.⁴⁴

40. In general, a student must demonstrate safe and appropriate behavior with minimal prompts and respond to redirection and requests from staff to earn 50-59 points. Specifically, a student must demonstrate the following behaviors: tries to practice skills; exhibits good

³⁹ District Exhibit 7, p.1.

⁴⁰ Response, p. 7.

⁴¹ Response, p. 8.

⁴² Response, p. 7. In their Reply, Parents invite the SCO to challenge the District’s assertion that token economy and level systems are successful. The SCO does not have the authority to make such a determination.

⁴³ District Exhibit 7.

⁴⁴ Exhibit 3, p. 14.

manners and etiquette with prompts; demonstrates appropriate boundaries with prompts; follow staff directions upon second request; uses time wisely with frequent encouragement; and is safe.⁴⁵ TDP Principal indicated that most students meet the criteria in their first week of attendance and begin attending full days, almost immediately.

41. Each day is divided into 8 separate evaluation periods during which students are expected to demonstrate specific behavioral characteristics to earn points. The behavioral characteristics, RROC, are identified as responsible, respectful, optimistic, and capable. Each characteristic is further defined by describing expected behavior during each part of the day. For example, during arrival time, students are expected to demonstrate responsibility by arriving on time, well groomed, demonstrating safe behavior, and ready to work on goals. During first block, students are expected to demonstrate responsibility by maintaining appropriate boundaries and demonstrating self-regulation and safety.⁴⁶

42. The purpose of this “orientation phase” is to ensure that students are stable and able to demonstrate safe behavior before increasing time in an effort to avoid circumstances that may trigger “episodes of violence, aggression, or other unsafe behaviors.”⁴⁷ In addition, TDP Principal explained that most students attending the TDP have experienced significant disciplinary problems, including suspension, and have not felt successful in school. The orientation phase allows students to experience educational success, build confidence, and begin to enjoy being in school.⁴⁸

43. In its Response, the District stated that this standard policy applies to all students who attend the TDP and modifications to this system have been made in only a “handful” of cases.⁴⁹ Because the policy regarding full day attendance is applied to all students who attend the TDP and defines success based on standardized criteria, the SCO finds that the policy is not based on the individualized needs of students attending TDP. Consequently, the policy violates IDEA’s requirement that special education and related services be individually tailored to meet the student’s unique needs and provided in conformity with an individualized education program developed according to the Act’s requirements. Because all students attending the TDP are eligible for special education and related services under IDEA, the TDP policy constitutes a systemic violation of IDEA.

⁴⁵ District Exhibit 7, p. 28.

⁴⁶ District Exhibit 7, p. 15.

⁴⁷ Response, p. 7.

⁴⁸ Interviews with TDP Principal and TDP School Psychologist.

⁴⁹ Response, p. 7.

CONCLUSIONS OF LAW

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

Allegation One: Although the District failed to provide prior written notice, placement at TDP was not predetermined.

1. Parents allege that the District denied them a meaningful opportunity to participate in the IEP meeting on October 22 because the District failed to consider their concerns that Student had ASD and failed to provide PWN of the change in placement. Further, Parents allege that these failures resulted in predetermination. For the reasons explained below, the SCO concludes that Parents had a meaningful opportunity to participate in the IEP meeting on October 22, and that placement at TDP was not predetermined. The District did, however, fail to provide Parents with prior written notice.

2. The IDEA's procedural requirements for developing a student's IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Sytsema v. Academy School District No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008). Meaningful parent participation is prevented when an educational agency has made its determination prior to the IEP meeting, including when the agency presents one placement option at the IEP meeting and is unwilling to consider others. *See Ms. S. ex. rel. G. v. Vashon Island School Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003) ("A district may not enter an IEP meeting with a 'take it or leave it' position."). When parents are prevented from meaningful participation because an aspect of their child's IEP, such as educational methodology or placement, has been predetermined, the resulting procedural violation denies the student a free appropriate public education. *Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109 (6th Cir. 2004), *cert denied*, 546 U.S. 936 (2005); *see also Harrison Sch. Dist.*, 2, 114 LRP 46713 (CO SEA 2014); *Larimer County Sch. Dist.*, 115 LRP 36469 (CO SEA 2015).

3. In this case, Parents specifically allege that the District's failure to conduct a reevaluation prior to changing placement from School to the TDP, a separate school, violated their right to meaningful participation in the IEP meeting. ECEA Rules establish specific requirements concerning changes in placement. A significant change in placement, i.e., a change from attending some regular education classes with typical peers to a separate school, shall "be made upon consideration of reevaluation." ECEA Rule 4.03 (8) (b) (ii). Further, "such change shall be made only by an IEP Team with the addition of those persons conducting such evaluation unless the parent and the administrative unit or state-operated program mutually agree to change the IEP after the annual IEP meeting in a school year consistent with 34 CFR § 300.324 (a)(4)." *Id.*

4. The SCO does not agree that the failure to have this evaluation completed prior to changing placement impeded Parents right to participate in the IEP meeting. In this case, the IEP Team did consider reevaluation and agreed to it in conjunction with ongoing assessment of

a new placement. First, the District responded to Parents' concerns that Student may have ASD by agreeing to conduct an assessment in the area of concern and had requested Parents' consent to do so. Because Student was demonstrating significant and quickly escalating behavioral challenges that required immediate attention due to safety concerns, the reevaluation could not be completed prior to the IEP meeting. During the meeting, Parents were assured that Student would be evaluated as soon as Student could be appropriately observed at TDP and that another IEP meeting would then be held to discuss the evaluation and determine any necessary changes to Student's educational program. Student was reevaluated in early December and an IEP meeting to discuss the reevaluation has been scheduled. Based on these facts, the SCO concludes that the District met the requirement that a significant change in placement be made upon "consideration of reevaluation."

5. Moreover, the change of placement was made via an IEP meeting at which Parents agreed to the change. Although Parents had concerns about the transition to full days, a concern that will be addressed below, they agreed to the change of placement at the IEP meeting itself. This change in placement was based on the behavioral and safety concerns Student was currently presenting, rather than concerns Parents had expressed in the area of "sensory sensitivities." During the meeting, no member of the IEP Team, including Parents, expressed the opinion that Student could be appropriately served by remaining at School.

6. Also essential to a parent's ability to participate in the development of her child's educational program is the procedural requirement that the school district provide sufficient notice before it makes substantial changes to the student's educational program. 34 CFR § 300.503(a). In this case, Parents have alleged that the District denied them a meaningful opportunity to participate in the development of Student's educational program by failing to provide prior written notice of the change in placement.

7. A school district must give a parent prior written notice a reasonable time before it proposes or refuses to change the educational placement of a child. 34 CFR § 300.503(a). Here, Parents were not provided with prior written notice of the change in Student's placement, effective October 24, 2015, until they requested a copy of Student's educational records on November 24, 2015, a month after Student had been attending the TDP. In addition, the content of the notice was inadequate because it simply documented that a possible change in placement would be discussed at the upcoming IEP meeting rather than documenting the change of placement actually proposed. In its Response, the District admitted that it failed to provide timely prior written notice. The SCO concludes that the District violated 34 CFR § 300.503(a) by failing to provide timely and adequate PWN. Because the SCO concludes that the District denied Student a free appropriate public education, as discussed below, she does not need to determine whether the failure to provide PWN resulted in a denial of FAPE.

Allegations Two: The District failed to timely implement Student's IEP, as amended in October, resulting in a denial of FAPE.

8. Parents allege that Student was denied access to the services identified on his IEP, including direct instruction in academics, because he was not allowed to attend TDP on a full day basis until January 12, 2016. In response, the District essentially argues that the services identified on the October IEP amendment were conditioned upon Student meeting the TDP attendance policy, as described or incorporated on the IEP itself. For the reasons explained below, the SCO concludes that the application of this policy prevented timely implementation of Student's IEP, resulting in a denial of FAPE.

9. Under IDEA, local education agencies are required to provide eligible students with disabilities a free appropriate public education (FAPE) by providing special education and related services individually tailored to meet the student's unique needs and provided in conformity with an individualized education program developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. A public agency, here the District, must implement a student's IEP in its entirety. 34 CFR § 300.323(c).

10. In addition, the District must make available the special education and related services identified in each student's IEP as soon as possible following the development of the student's IEP. 34 CFR § 300.323(c). Based on the District's own policy and procedure manual, a Student's IEP should be implemented within 10 days of the IEP meeting unless there is a good reason to implement the IEP sooner. District Exhibit 8, p. 90.

11. In this case, the application of the TDP attendance policy denied timely access to the services identified on Student's IEP. According to the October 2015 IEP, Student was entitled to receive 1050 minutes of direct instruction by a special education teacher in academics, 420 minutes of direction instruction by a special education teacher in social skills, and 330 minutes of direct instruction by a social worker in social skills each week. In addition, the IEP required 90 minutes of direct instruction by an SLP and 30 minutes of direct instruction by an OT each month. To receive services in accordance with his IEP, Student would need to attend the TDP for approximately 24 hours each week. This means that Student would need to attend TDP full days. Student was not allowed to attend full days, however, until January 12, 2016, thirty-eight school days after the IEP was implemented. Notably, Student was allowed to attend only one-hour a day for the first fourteen days.

12. The District argues that it did not fail to implement the IEP because the IEP does not require immediate access to the full services described above. According to the District, the IEP included a transition plan for determining how Student's time at the TDP would increase and that services were provided in accordance with the transition plan. Indeed, the October IEP stated that services at TDP would start with one hour and increase as Student met the criteria of the program, defined as earning 50 points or more for three consecutive days.

13. There is no dispute that the transition plan described in Student’s IEP was based on the TDP policy, as stated in its handbook, and that it applied to all students who attended the TDP. Although a gradual transition plan or modified schedule may be appropriate for a particular student, the transition plan described in Student’s IEP was not based on individualized need. For example, no individualized benchmarks or measures were described for determining behavioral needs, goals, or progress that would be used to guide his transition. Instead, the criteria used to determine whether Student had earned 50 points were standard and uniformly applied to all students to determine transition to full day attendance. Although Parents raised specific concerns about this policy at the IEP meeting, including concerns about how long it would take for Student to attend full days, they were told that there were no exceptions to the policy. Based on these facts, the SCO concludes that the transition plan described in the IEP was not individualized to Student’s needs and therefore runs counter to IDEA’s fundamental requirement that special education and related services be individually tailored to meet the student’s unique needs. Consequently, the District cannot rely on this provision to delay access to the services described on Student’s IEP.

14. Moreover, the application of the TDP policy to Student effectively placed the onus on him, a student with a disability, to demonstrate appropriate and safe behavior without adequate access to specialized instruction in social skills, and support through individualized behavioral interventions. Notably, Student has been identified as SED and his disability directly impacts his ability to demonstrate appropriate and safe classroom behavior as well as access learning. Student’s most recent IEP described his unique needs in this area as “recognizing and responding to emotions, resolving peer conflicts, and increasing engagement in learning activities.” To address his disability related needs, Student requires specialized instruction in social/emotional skills and behavioral supports. In other words, Student must be explicitly taught how to interact and socialize appropriately with educators and peers. During the first fourteen days, Student was allowed to attend TDP for only one hour a day because he could not satisfy the requirements of the TDP policy. Consequently, Student was expected to demonstrate appropriate classroom behavior with significantly limited access to the very supports and services intended to help him to do just that. This further supports the conclusion that the TDP policy impermissibly denied Student access to the services required to provide FAPE.

15. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to implement an IEP can result in a denial of FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19. Not every deviation from an IEP’s requirements, however, results in a denial of FAPE. *E.g., L.C. and K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005)(minor deviations from IEP’s requirements which did not impact student’s ability to benefit from special education program did not amount to a “clear failure” of the IEP); *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. 2007). To incur liability under IDEA, the failure to implement IEP must be material as minor discrepancies between the services provided and the services called for do not give rise to an IDEA violation. *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. 2007). This means that a finding that a school district has failed

to implement a requirement of a child's IEP does not end the inquiry. Rather, the SCO must also determine whether the failure was material.

16. The District argues that Student's behavior has consistently improved and that he has not suffered educational harm as the result of any alleged failure to implement his IEP. A showing of educational harm is not required to demonstrate that the failure to implement the IEP was material. Rather, it is sufficient to compare the services required by the IEP to the services actually provided. *Holman v. District of Columbia*, LRP 3907 (D.D.C. 2016)(stating that "[t]he 'crucial measure' under the materiality standard is the 'proportion of services mandated to those provided' and not the type of harm suffered by the student."). In this case, the District's failure to timely implement Student's IEP was material. By applying the TDP policy to Student's transition, the District delayed providing full access to the services on his IEP for thirty-eight school days. For the first fourteen days, Student was only allowed to attend the TDP for one hour a day. Comparing the services required to those provided, the SCO easily concludes that the failure to implement Student's IEP was material and resulted in a denial of FAPE.

17. Because Student was denied a FAPE, he is entitled to compensatory services. Compensatory education is an equitable remedy intended to place a student in the same position they would have been, if not for the violation. *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Calculating compensatory education is not an hour-for-hour calculation. Instead, compensatory services should be calculated to help Student make the progress he would have made, if not for the violation. In this case, the SCO concludes that Student is entitled to 30 hours of one-to-one tutoring in academics and 10 hours of direct instruction in social skills.

Allegation Three: The TDP policy violates IDEA's requirement that Students receive special education and related services individually tailored to meet their unique needs.

18. The IDEA requires that students eligible for special education receive a free appropriate public education (FAPE) by providing special education and related services individually tailored to meet the student's unique needs and provided in conformity with an individualized education program developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. In this case, the TDP, a separate school operated by the District, has an orientation policy that requires all students to earn 50+ points for three consecutive days before they can attend the program for full days. This policy applies to all students and successful fulfillment of the orientation phase is determined using standardized criteria. Although it may be appropriate to modify a school day or gradually increase a student's day, this must be done using benchmarks or objectives that are based on individualized needs and goals rather than a standardized policy.

19. As demonstrated in allegation two, the application of the TDP policy has the potential to deny IDEA eligible students the individualized supports and services to which they are entitled

under IDEA. Although the policy, a component of the level system employed at TDP, is designed to ensure safety and promote student success in school, it is not based on individualized need. Acknowledging that a level system can provide “a basic structure in which a variety of interventions can take place,” this decision reminds school districts that individualized interventions and supports remain an “essential part of any effective educational program for students with [SED].” Edward Cancio and Jesse W. Johnson, *Level Systems Revisited: An Important Tool for Educating Students with Emotional and Behavioral Disorders*, Int. Journal of Behavioral Consultation and Therapy, 520, 512-526 (2007). Because every student who attends the TDP is IDEA eligible, the SCO concludes that this policy constitutes a systemic violation of IDEA’s fundamental requirement that special education and related services be individually tailored to meet the unique needs of each student. Consequently, the TDP must remove this policy from its handbook and ensure that any transition plan or modified schedule is based on a student’s individualized needs, as determined by a properly constituted IEP team in accordance with IDEA’s procedural requirements.

REMEDIES

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

- a) Failure to timely and adequately provide prior written notice, in violation of 34 CFR § 300.503(a)
- b) Failure to implement Student’s IEP, in violation of 34 C.F.R. § 300.17; and
- c) Failure to provide special education and related services individually tailored to meet the student’s unique needs by applying a standard attendance policy uniformly to all students, in violation of 34 CFR § 300.17.

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

- 1) **By March 1, 2016**, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
 - a) Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violation, no later than **April 1, 2016**. This includes removal of the TDP orientation policy identified in this Decision from its handbook and procedure manual.
 - b) Effective training must be conducted for all special education administration staff, including any staff who serve as the District’s special education designee and/or work at the TDP, concerning the policies and procedures, to be provided no later than **June 1, 2016**.

- c) Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to CDE no later than June 16, 2016.

2) Review and monitoring of IEPs for all students attending the TDP.

- a) Within in ten days of receiving this Decision, the TDP must review the IEPs of all students attending its program to ensure that students are receiving the services in accordance with their IEPs. Modified school days or transition plans must be based on individualized need and not former TDP policy described as an “orientation phase.”
- b) For students who are not currently attending the TDP on a full time basis as a result of the TDP orientation policy, the District must convene a properly constituted IEP Team to determine a transition plan or modified schedule based on individualized need, as soon as possible but no later than 10 days following the date the IEP was reviewed pursuant to section (a) immediately above.
- c) By March 1, 2016, the District must upload the files for all students attending the TDP into the CDE Data Management System (DMS) and notify CDE of the specific file numbers. CDE will review the files through the DMS to determine compliance.
- d) By September 1, 2016, the District must upload the files for all students attending the TDP into the CDE Data Management System (DMS) and notify CDE of the specific file numbers. CDE will review the files through the DMS to determine compliance.

3) Compensatory Education Services for Failure to Provide Student with a FAPE.

- a) At the IEP meeting scheduled for February 16, 2016, the District must review Student’s IEP, including any changes determined by the IEP team, to ensure that Student will receive all of the services identified on the IEP. The District shall provide documentation that this has occurred no later than February 26, 2016.
- b) The District shall provide documentation that Student is receiving transportation services in accordance with his IEP to CDE by the second Monday of each month until February 9, 2017. Transportation may be provided directly or the District may reimburse Parents for mileage on a daily round-trip basis.
- c) The District shall provide Student with 30 hours of direct, one-to-one tutoring in academics. The tutor must be licensed and highly qualified. In addition, the District shall provide Student with 10 hours of direct instruction in social skills by a special education teacher, school psychologist, or social worker. To document the provision of these services, the District must submit service logs to CDE by the second Monday of each month until services have been completed.

- d) The compensatory education service providers must consult with Student's special education teacher each month to evaluate progress on IEP goals and coordinate lesson plans. Documentation that this consultation has occurred, including specific recommendations and changes to lesson plans, shall be provided to CDE by the second Monday of each month until services have been completed.
- e) Within 10 days of receipt of this Decision, the District must meet with Parent to schedule compensatory services. If Parents refuse the ordered compensatory education, Parents must notify the Department of the refusal in writing no later than February 19, 2016. If Parent refuses to meet with the District within this time period, the District will be excused from providing compensatory services, provided that the District diligently attempts to meet with Parent and documents its efforts. The determination that the District has diligently attempted to meet with Parent and should therefore be excused from providing these services rests solely with the CDE.
- f) These compensatory services shall begin immediately and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student towards IEP goals and objectives. The Parties shall cooperate in determining how the compensatory education services will be provided, with special consideration to Student's needs and stamina. All compensatory services must be completed within one year from the date of this Decision. The District must submit the schedule to the Department no later than March 1, 2016.
- g) If for any reason, including illness, Student is not available for any scheduled compensatory services, the District will be excused from providing the service scheduled for that session. If for any reason, the District fails to provide a tutor for a scheduled compensatory education session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent, as well as notify the Department of the change in the monthly service log.

The Department will approve or request revisions to the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance.

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

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Beth Nelson
1560 Broadway, Suite 1175
Denver, CO 80202-5149

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

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to 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 State Complaints Officer.

Dated this 9th day of February, 2016.

Candace Hawkins, Esq.
State Complaints Officer

Appendix

Because the District used the same numbers to refer to its exhibits as did Parents, Exhibits submitted by Parents are referenced simply by number and Exhibits submitted by the District are referenced as the District Exhibits.

Complaint, pages 1-7.

Exhibit 1: September 2015 IEP.

Exhibit 2: IEP amendment dated October 2015.

Exhibit 3: TDP Handbook.

Exhibits 4-6: Correspondence.

Exhibit 7: Signed consent for evaluation.

Exhibit 8: Prior written notice dated October 2015.

Exhibit 9: Summary of autism evaluation dated December 2015.

Response, pages 1-9.

District Exhibit 1: IEPs in effect for the 2015-16 school year, including October amendment.

District Exhibit 2: Prior written notices issued during 2015-16 school year.

District Exhibit 3: Notice of meeting and BIP.

District Exhibit 4: ADOS.

District Exhibit 5: TDP daily point sheets.

District Exhibit 6: Progress notes and service logs for SLP and OT services.

District Exhibit 7: TDP Handbook.

District Exhibit 8: Relevant provisions of District Policy Handbook.

District Exhibit 9-10: Correspondence.

District Exhibits 11: TDP referral form.

District Exhibit 12: Behavior Reports.

District Exhibit 13: Progress monitoring.

District Exhibits 14-17: Agency Decisions referenced in District's Response.

District Exhibit 18: Additional copy of the ADOS requested by SCO because copy submitted with Response was illegible.

District Exhibit 19: Additional documentation requested by the SCO concerning behavioral incidents and assessments from the fall of 2015.

Reply, pages 1-11.

Exhibit 10: Advocate's notes from IEP meeting in October of 2015.

Exhibit 11: Email correspondence.

Exhibit 12: Clinical log.

Exhibit 13: District calendar for 2015-16 school year.

Exhibit 14: IEP dated April 2015.

Exhibit 15: Schedules for area elementary schools.

Exhibit 16: Licensure information.

Exhibits 17-20: Articles on token-economy systems.

Exhibit 21: Out-of-school suspension notices.

Exhibit 22: Notices of meeting and daily point sheet.

Interviews with:

- Parents
- Advocate
- Special Education Director
- Special Education Coordinator
- School Principal
- School Assistant Principal
- TDP Principal
- School Psychologist
- TDP School Psychologist
- TDP Special Education Teacher
- Speech Language Pathologist
- Occupational Therapist
- School Special Education Teacher
- General Education Teacher 1
- General Education Teacher 2