

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

State-Level Complaint 2009:509

Jefferson County School District R1

Decision

INTRODUCTION

This Complaint was brought pursuant to the Individuals with Disabilities Education Act (IDEA) and its implementing regulations 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 properly filed in the office of the SCO on 10/2/2009 by the parent (Complainant) of the child (Student).

The SCO sent the District a Complaint Notification letter with a copy of the Complaint and all attachments via Federal Express/Overnight delivery on 10/5/2009. Delivery confirmation established that the District received this packet on 10/6/2009.

The District's Response was received electronically on 10/21/2009 followed by a hard copy which was received by the SCO on 10/22/2009.

The Complainant's Reply to the District's Response was due on 11/2/2009, but was untimely received on 11/5/2009.

The SCO conducted on-site interviews with District personnel on 11/3/2009. The SCO requested that the District submit additional documentation of questionnaires used in the 11/13/2008 evaluation and Student's progress reports by 11/13/2009. The District's documentation was received by the SCO on 11/12/2009.

The SCO conducted an interview with the Complainant on 11/10/2009. The SCO requested additional information regarding the Student's assignments completed at home and Student's progress reports to be submitted by the Complainant by 11/13/2009. The SCO received the information on 11/13/2009.

The SCO submitted additional questions via email to the District regarding the Complainant's homeschooling the Student. The District responded to the inquiries on 11/17/2009.

The SCO closed the record on 11/17/2009.

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

ISSUES

The issues raised in the Complaint from the time period of 10/2/2008 to 9/30/2009 that are subject to the jurisdiction of the SCO are as follows:

1. Whether the District failed to appropriately conduct evaluations that were sufficiently comprehensive to identify all of Student's educational needs in accordance with §§ 300.304 through 300.305.
2. Whether the District failed to appropriately identify the disabling condition under which the Student was identified as a child with a disability pursuant to § 300.8 and the Exceptional Children's Educational Act (ECEA) Rule 2.08.
3. Whether the District failed to appropriately develop an IEP in accordance with §§ 300.320 and 300.324(a) that would confer educational benefit for the Student.
4. Whether the District failed to appropriately determine the Student's placement in the Least Restrictive environment (LRE) in accordance with §§ 300.114 through 300.116.

COMPLAINANT'S ALLEGATIONS

The Complainant's allegations were for all evaluations conducted and IEPs that were in effect from 10/2/2008 through 9/30/2009. Complainant's allegations are summarized below:

1. The District failed to appropriately conduct evaluations that were sufficiently comprehensive to identify the Student's educational needs. Specifically, the District –
 - Failed to evaluate the Student in all areas of suspected disabilities;
 - Did not use assessment tools and strategies to gather relevant functional, academic and developmental information to assist in determining appropriate IEP content; and
 - Did not conduct a functional behavior assessment or speech language assessment.
2. The District failed to identify the Student with the correct disabling condition. Specifically, the District failed to identify the Student as having a specific learning disability.
3. The District failed to develop an appropriate IEP that would confer educational benefit because the District did not consider general and special IEP factors and the resulting IEP did not include the required content. Specifically, the District –
 - a) Failed to consider –
 - i. The Student's present levels of academic achievement, and functional and developmental needs;
 - ii. The Student's strengths such as being a strong visual learner; and
 - iii. The concerns of [Complainant] regarding the Student's lack of grade level achievement in reading, writing, math, and language; and
 - b) Did not include –
 - i. Objective, functional and academic IEP goals for all areas of disability including speech-language;

- ii. Goals and objectives that had curriculum based measurements that would facilitate Student's progress in meeting grade-level standards; and
 - iii. Goals and objectives in writing, math, and speech language.
4. The District failed to place Student in the LRE. Specifically, the District placed the Student in restrictive settings that –
 - Did not allow Student to access general education classrooms and prevented Student from being educated with non-disabled peers; and
 - Focused primarily on behavior without addressing Student's unique learning needs and academic deficits in reading, writing, and math.

THE DISTRICT'S RESPONSE

The District denies all allegations and its Response is summarized as follows:

1. The District conducted a procedurally compliant and sufficiently comprehensive reevaluation of the Student in November 2008. Specifically, the District's evaluation –
 - Appropriately involved the parent in identifying the areas to be assessed in the evaluation;
 - Used a variety of assessment tools and strategies;
 - Provided data which enabled the team to confirm that the Student continued to be eligible for special education services; and
 - Provided sufficient information to determine the Student's educational needs.

The District conducted all additional assessments that had been requested by the Complainant. In March, April, September and October 2009, the District tested the Student in the areas of math, reading, speech language, occupational therapy, executive functioning, assistive technology, auditory processing and conducted a functional behavior assessment.

2. The District appropriately identified Student under the disability classification of significant identifiable emotional disability (SIED). The District notes that the Complainant does not argue that SIED is not an appropriate classification for Student. The District does not serve students according to disability classification, but according to identified needs. However, in an IEP meeting held subsequent to the filing of this Complaint on 10/14/2009, the District considered and added the specific learning disability classification to the Student's IEP.

3. The District developed IEPs designed to meet Student's educational needs. The IEPs in effect from 10/02/2008 to 9/30/2009 reflect the required content pursuant to § 300.320 and include consideration of general and specific factors pursuant to § 300.324(a). The Student's lack of educational progress was not due to a failure to include the required IEP content, but was due to the Student's poor attendance and refusal to participate or complete academic work. Even if a procedural defect in the Student's IEP was found, it has been remedied through the development of the Student's 10/14/2009 IEP.

4. The District placed the Student in a placement consistent with the IDEA requirement that students be educated in the least restrictive environment (LRE) appropriate to meet

their educational needs. The Student has exhausted all less restrictive alternatives available in the District. Further, even with a modified school day, the Student continues to demonstrate a need for a structured setting of a separate school to meet the Student's educational needs. Although the Complainant objected to the Student's placement in a day treatment program in the fall of 2008, the Complainant has agreed that the Student's current placement at an alternative high school is appropriate.

THE COMPLAINANT'S REPLY

The Complainant's Reply was not timely received and was not considered by the SCO in resolving the Complaint.

FINDINGS OF FACT

After thorough and careful analyses of the entire record,² the SCO makes the following FINDINGS of Fact:

Background

1. In order to properly investigate the Complaint, the SCO examined the Student's background.
2. At the time of the Complaint, Student was [age] years old and a resident of the District.
3. Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), bipolar disorder, and social phobia/anxieties. Student also had a sleep disorder that affected [Student's] attendance, as well as longstanding learning difficulties.
4. In the fall of 2000 when Student was in the [grade], Student was initially identified with a learning disability³ and placed into special education. The Student continued to be identified as having a learning disability until 2005. Between 2005 and the close of the Record, Student has continuously been identified with a significant identifiable emotional disability (SIED).
5. The Student's behavior quickly became a primary concern after initially being placed in special education in the fall of 2000. At the time of the Complaint, the Student's reported behaviors included being verbally abusive to staff and peers, leaving the classroom without permission, engaging in conflicts with peers, and refusing to work or participate in academics. The Student was extremely sensitive about and had strong reactions to Student's academic deficiencies. Student also has a history of attendance problems.
6. The Student's placement history demonstrates that Student was placed in increasingly restrictive settings after being determined eligible for special education:

² Decision Appendix A which is attached and incorporated by reference details the record (Record) from which the Findings were determined in this case.

³ Identified as perceptual communicative disability (PCD) in the Student's IEP. This disability classification was renamed "specific learning disability" (SLD) in the 2004 IDEA reauthorization and the 2006 amendments of the ECEA.

- a. Student was placed in a special class called a communication academic cognitive (CAC) lab shortly after being placed in special education.
 - b. Student's behaviors prompted placements in a self contained SIED class from [grade] through [grade].
 - c. Student was then placed in three separate day treatment programs from [grade] to the [grade].
 - d. Student attended a traditional middle school (Middle School) in the fall of 2007 for approximately one month. Student's placement at the Middle School was changed due to behavioral issues.
 - e. Student was then placed on homebound instruction from January through April 2008.
7. In August 2008, the District placed Student in an eligible facility (Facility) outside of the District. The SCO finds the Facility where Student was placed was a less restrictive setting for Student than homebound instruction because Student was being educated with peers, including nondisabled peers.

11/30/2007 IEP

8. The SCO examined all IEPs that were in effect for the Student between 10/2/2008 and 9/30/2009 in order to determine whether the IEPs had been developed to confer an educational benefit.
9. When the Student was placed in the Facility in August 2008, the Student had an IEP dated 11/30/2007 which was developed in an annual review when the Student was at Middle School. The 11/30/2007 IEP was in effect during the Facility placement, from August 2008 until a new IEP was developed on 11/13/2008.
10. The 11/30/2007 IEP had a section for describing the Student's present levels of academic achievement and functional performance (PLAAFP). However, the IEP contained no such information. The PLAAFP section of the IEP did list concerns about Student's attendance and behavior. The PLAAFP also included a recommendation for placement in a more restrictive setting because Student was not responding to the interventions provided at the Middle School.
11. The 11/30/2007 IEP had the following goals and objectives in the areas of math, behavior, and functional language:
- a. The math goal was "Student will develop number sense and use number and number relationships to solve problems." The math goal had the following objectives:
 - i. "Student will independently make change for up to a \$10.00 purchase with 75% accuracy." The measurement criteria for the objective were "three out of four" and the method of measurement was work samples.
 - ii. "Student will successfully complete large sum addition and subtraction with regrouping 80%." The measurement criteria were

"80%." The objective was vague as it did not specify what would be considered large sum (e.g. three or four digits).

iii. "Student will be able to write a simple addition or subtraction math problem from a word problem with 75% accuracy." The objective was vague as it did not describe what would be considered a "simple" addition or subtraction problem.

b. The behavior goal was "Student will improve [Student's] emotional regulation/coping/problem solving skills." The behavior goal had the following objectives:

i. "Student will identify a safe adult and space in school structure [Student] may access during times of distress." The measurement criteria for the objective were 100%. It was unclear whether this objective would be achieved by simply identifying or by actually accessing a safe adult and space in the school.

ii. "Student will identify a nonverbal/verbal cue to use when feeling distressed (to alert adult staff to (sic) the need for a brief cooling-off/processing time)." The measurement criteria were 80%. The objective had no basis for measurement (e.g. based on trials).

c. The functional language goal was "Student will improve [Student's] functional language skills." The functional language goal had the following objectives:

i. "Given a topic, Student will write 2-3 sentences independently 8/10 times." The measurement criteria for the objective were 80%. The objective did not specify the length or complexity of the sentences.

ii. "Student will correctly identify all consonant sound and symbols with 90% accuracy (in isolation)." The measurement criteria for the objective were 90%.

iii. "Student will correctly pronounce short vowel sounds in one syllable words (cat, put, pin)." The measurement criteria for the objective were 70%. As this objective was identified under the functional language goal, it was unclear whether the objective related to speech language articulation or reading.

12. The SCO finds that the goals and several objectives in the 11/30/2007 IEP were not measurable and some of the objectives were vague as to what the Student was supposed to accomplish.

13. Further, the 11/30/2007 IEP did not specify Student's present levels of academic achievement and functional performance. Therefore, the SCO was unable to determine if the IEP goals were appropriately designed to meet Student's needs to enable Student to make progress in the general education curriculum or to meet Student's other educational needs.

14. According to the progress report for the 11/30/2007 IEP dated 11/13/2008, the Student made little to no progress on the 11/30/2007 IEP goals and objectives. The progress report indicated that the Student made progress on one objective under the

behavioral goal. However, the SCO finds insufficient evidence of progress on this objective because the progress report did not describe how such progress was measured. The progress reported for the rest of the goals and objectives indicated “no progress” or “regression.” The SCO specifically finds that the progress Student made under the 11/30/2007 IEP was negligible.

11/13/08 Triennial Reevaluation

15. On 10/25/2008, the Facility provided the Complainant with a *Notice/Permission – Reevaluation* form that listed assessments in the areas of cognitive, social/emotional, physical, educational, and life skills that would be administered to [Student]. The form indicated no assessment would be conducted in the area of communication. The Complainant initialed the form denoting agreement with District staff regarding the reevaluation, but also checked the box requesting that evaluations be completed in the area of education. The form was signed and dated by the Complainant on 10/25/2008.
16. The Student’s reevaluation was conducted by the District’s Central Assessment Team (CAT). Members of the CAT involved in the reevaluation included the School Psychologist (Psychologist), the Educational Diagnostician (Diagnostician) and a Speech Language Pathologist (SLP). All members of the CAT were qualified to administer the assessments they used in the evaluation.
17. The members of the CAT reviewed existing evaluation data. Specifically, they reviewed the Student’s special education records from the time the Student was placed in special education in 2000 up to the time of the reevaluation in 2008 with a particular focus in their individual disciplines. The SCO finds no evidence that the members of the CAT reviewed the Student’s classroom-based, local or State assessments.
18. The Psychologist conducted the cognitive assessments. The cognitive assessments included the Weschler Intelligence Scale for Children – Fourth Edition Integrated (WISC-IV-I) and the Bender Visual-Motor Gestalt Test – Second Edition (Bender II). Relevant information from the cognitive assessments included:
 - a. The Student had a significant discrepancy between the Student’s highest and lowest index score on the WISC-IV-I.
 - b. The Student knew more about words than [Student] was able to express, an area of weakness. Other areas of weakness included working memory and the processing of written information.
 - c. The Student needed a considerable amount of “think-time” when asked to respond verbally to questions.
 - d. Based on the assessments, the Psychologist observed that [Student’s] reluctance to respond to questions could be due to a lack of knowledge, understanding, or an inability to recall information or directions. The Psychologist recommended that others not assume that the Student’s lack of response was due to noncompliance.

- e. The Psychologist recommended strategies for instruction including: presenting material visually instead of verbally, repeating new concepts, simplifying information into smaller segments, and encouraging the Student to incorporate drawing skills into classroom projects.
19. The Diagnostician conducted the educational assessment. The formal educational assessment consisted of the Woodcock-Johnson III Test of Achievement (WJ-III). The Diagnostician also obtained information about the Student through a classroom performance survey completed by Student's teacher. Relevant information from the educational assessment included:
- a. Based on a classroom screening tool, the Wide Range Achievement Test (WRAT), the Student performed at a 2.8 grade level in reading and a 1.7 grade level in spelling. According to the classroom teacher (Teacher), the Student refused to complete the sentence and reading comprehension section and math portion of the WRAT. In an interview with the SCO, the District's Reading Specialist (Reading Specialist) stated that the WRAT often reports higher levels of performance than a child's actual level of functioning. The SCO finds that the results of the WRAT did not accurately identify the Student's level of academic achievement.
 - b. Teacher observations noted that the Student's speech was mumbled. Further, the Student would become frustrated when asked to speak up or repeat [him\herself]. The Diagnostician stated that during the educational assessment, the Student was barely audible a good part of the time.
 - c. The Diagnostician remarked that the Student needed repetition on almost every item of a subtest in the assessment; appeared to be focused on other things; frequently stated "I don't know" or did not respond to items on the assessment.
 - d. The Diagnostician discontinued the assessment when the Student became frustrated. The Diagnostician stated in the evaluation report that results of the educational assessment may not be valid estimates of the Student's academic abilities. The SCO finds that the results of the formal educational assessment were not reliable.
 - e. In an interview with the SCO, the Diagnostician stated that she did not attempt to conduct any further assessments with Student because of "[Student's] lack of engagement."
 - f. The Diagnostician attributed the Student's behavior during the assessment to the Student's lack of concern with [Student's] performance and minimal effort.
 - g. The Diagnostician opined that Student's history of learning difficulties, behavioral issues, attendance problems and refusal to engage in academics impeded Student's ability to access the curriculum and to improve academic skills. The Diagnostician concluded that the Student's learning problems appear to be primarily the result of emotional and behavioral difficulties.

20. The SLP reviewed the Student's past special education records and an informal teacher checklist completed by Student's classroom teacher. Based solely on this review the SLP determined that formal speech-language testing of the Student was not warranted for the reevaluation.
- a. The SLP concluded that because the Student's past special education records indicated no history of speech/language problems, formal testing was not needed.
 - b. However, the SLP acknowledged in an interview with the SCO, that results of the cognitive testing conducted for the 11/13/2008 triennial IEP suggested issues with expressive language that could be a result of speech language difficulties.
21. The Psychologist conducted social, emotional, adaptive assessments for the evaluation. The assessments used included the Behavior Assessment for Children-2nd Edition (BASC-2) and questionnaires completed by the Teacher and the Complainant. The relevant information from this assessment noted that:
- a. According to the questionnaire completed by the Complainant, the Student has a short attention span, lacks self-control, has fears or anxiety, overreacts to situations or problems, has trouble calming down, displays excessive anger, and is aggressive or dangerous when uncomfortable in a situation.
 - b. The BASC-2 includes Teacher Ratings Scales and Student observations. The scores of the BASC-2 are categorized into several different adaptive and clinical classifications. The "at risk" classification may signify potential or developing behavior problems that should be monitored carefully. The "clinically significant" classification denotes a high level of maladaptive behavior or absence of adaptive behavior.⁴
 - c. The BASC-2 Teacher Report scores indicated that the Student had behaviors in the 'clinically significant' range including aggression, conduct problems, atypicality, withdrawal, study skills, and functional communication. The Student also had behaviors that were in the 'at-risk' range including hyperactivity, depression, attention problems, adaptability, social stress and leadership.
22. The SCO finds that the information obtained from the Psychologist's assessments provided data that assisted in determining whether the Student continued to have a disability. Based on the assessment, the Psychologist recommended that the IEP team continue Student's placement in a "highly structured setting with affective support." However, the information was not used to identify specific supports or strategies to address the Student's particular behaviors noted in the assessment.
23. The SCO specifically finds that:
- a. A variety of assessment tools and strategies were used in the reevaluation conducted for the Student. The assessment tools and strategies gathered relevant information that assisted in determining whether the Student

⁴ Cecil R. Reynolds and Randy W. Kamphaus, BASC-2: Behavior Assessment System for Children 2nd Ed. Manual., AGS Publishing 2004.

continued to have a disability. The assessments used in the reevaluation were technically sound and were administered by trained and knowledgeable personnel.

- b. The CAT team conducted a review of existing evaluation data on the Student, and obtained information from the Complainant and observations by teachers. However, the SCO finds that the CAT team did not review the Student's current classroom-based assessments, or local or State assessments.
- c. The reevaluation was not sufficiently comprehensive to identify all of Student's special education needs. Specifically, the educational assessment did not provide valid results concerning the Student's then current levels of academic performance. Further, a formal speech language assessment was not conducted although other assessments identified deficits in the area of expressive language.

11/13/2008 Disabling Condition

- 24. At the IEP meeting held on 11/13/2008, the team discussed the disabling condition under which the Student was eligible to receive special education and related services. The team reviewed the Student's reevaluation information supporting the Student's eligibility under the SIED condition.
- 25. The Student did have significant learning deficits in all academic areas. However, the Student also had several mental health diagnoses (See Finding of Fact⁵ 3). Further, the record demonstrated –
 - a. That the Student's social/emotional dysfunction was to a marked degree as demonstrated by the Student's BASC-2 scores (FF 21c).
 - b. That the Student's social emotional dysfunction was pervasive and had been observed across settings (FF 21a, FF 21c).
 - c. That the Student's social/emotional dysfunction had existed over a lengthy period of time (FF 5).
 - d. That the Student's social/emotional dysfunction adversely affected the Student's ability to obtain benefit from general education (FF 5).

Therefore, the SCO finds no error in the team's determination of the Student's disabling condition.

11/13/2008 IEP

- 26. The IEP meeting was held at [Facility]. The Complainant, District's Special Education Director (Director), Diagnostician and Facility representatives attended the meeting. However, the Diagnostician left the meeting after providing her evaluation report. The Facility representatives developed the Student's IEP goals and objectives and behavior support plan.

⁵ Hereinafter FF.

27. The PLAAFP in the 11/13/2008 IEP listed: a review of the Student's evaluation and placement history; the raw scores from the formal assessments conducted for the triennial reevaluation; and [Teacher's] observations of the Student's behavior. The PLAAFP listed Student's areas of strength and weakness and included recommendations for accommodations and instructional strategies. Although the PLAAFP included levels of Student performance in the areas of reading and spelling based on the WRAT, these levels were inaccurate (see FF 19a above). The PLAAFP did not indicate the Student's present levels of academic performance in math, writing or any other academic area.
28. The 11/13/2008 IEP listed the following goals and objectives in the areas of literacy, behavior, and math:
- a. The literacy goal was "Student will improve literacy skills as measured by the following objectives to meet Student's post school transition outcomes." The literacy goal included the following objectives:
 - i. "Given ten vocabulary goals at Student's instructional level, Student will give the correct spellings with 60% accuracy." The measurement criteria included student work samples, staff observation, formal and informal assessments. The objective's measurement criteria was specific, however the instructional level was not defined for this objective.
 - ii. "Given one writing prompt at Student's instructional level, Student will write two to three summary sentences independently with 50% accuracy." The measurement criteria included student work samples, staff observation, formal and informal assessments. The objective did not describe what would be measured for accuracy (e.g. grammar or summarization) and the Student's instructional level was not defined.
 - iii. "Given a text at Student's instructional reading level, Student will read passages with 65% accuracy." The objective did not define the Student's instructional level.
 - b. The behavioral goal was "Student will improve social skills and classroom behaviors as measured by the following objectives to meet [Student's] post school transition outcomes." The behavioral goal objectives included:
 - i. "When feeling frustrated, Student will appropriately verbalize academic needs as well as social needs rather than become (sic) verbally or physically assaultive towards staff and peers 60% of the time." The measurement criteria included daily logs, staff observation, and self report. The objective did not describe what would be an "appropriate" verbalization. Because the verbalization was for two different needs, it was unclear how the measurement would occur.
 - ii. "When feeling frustrated or angry, Student will identify two appropriate coping skills and utilize said coping skills rather than become (sic) verbally or physically assaultive towards peers and staff 60% of the time." The measurement criteria included daily logs, staff observation, and self report. The objective did not describe what would

be an "appropriate coping skill." Because the goal involved two different contexts (frustrated or angry), it was unclear how the measurement would be applied.

- iii. "Given a direction, Student will follow the direction with no more than two prompts rather than display physically and verbally threatening behavior toward staff and peers 60% of the time." The measurement criteria included daily logs, staff observation, and self report.
- c. The math goal was "Student will improve [Student's] ability in rational numbers and practical applications of mathematics as measured by the following objectives to meet post school transition outcomes." The math goal objectives included:
- i. "Given the prices of items on a grocery list, Student will add up the cost of items with 70% accuracy." The measurement criteria were student work samples, staff observation, formal and informal assessments. The objective did not describe the length of the grocery list or complexity of numbers (e.g. 2 or 3 digits, with or without decimals).
 - ii. "Given a budget and three to four examples of household expenses, Student will create a budget with 80% accuracy." The measurement criteria were student work samples, staff observation, formal and informal assessments.
 - iii. "Given a set of time tables, Student will accurately solve problems with 50% accuracy." The measurement criteria were student work samples, staff observation, formal and informal assessments. The objective did not describe the complexity of the problems (e.g. solving multiplication problems for numbers 0-9).
29. Similar to the Student's previous goals, each goal was stated in broad terms and listed several objectives. Individual objectives were stated in measurable terms. However, some objectives continued to refer to undefined terms such as "instructional level" or "appropriate."
30. Further, the 11/13/2008 IEP did not include Student's accurate information on the Student's current levels of academic achievement and functional performance. Therefore, the SCO was unable to determine if the IEP goals were appropriately designed to meet Student's needs to enable Student to make progress in the general education curriculum or to meet Student's other educational needs.
31. The 11/13/2008 IEP had a Post Secondary Transition Outcome of "Student will explore careers that involve physical movements, such as construction, delivering, sorting, etc. Student will take a vocational inventory to narrow down interests." The SCO finds that this postsecondary goal was neither measurable nor based on age appropriate transition assessments.
32. The 11/13/2008 IEP goals indicated that the objectives were to assist the Student in meeting the post school transition outcomes. However, none of the objectives had any relationship to the post secondary outcome listed.

33. The Student's 11/13/2008 IEP included a behavior support plan (BSP). The Student's BSP generally described behaviors, supports and strategies applicable to all students at the Facility and included the following provisions:
- a. Description of behaviors of concern: "At-risk behaviors in a manner and form that is excessive and detrimental to his/her ability to function in a less restrictive environment."
 - b. Why does the behavior occur: "Students at the Facility typically are seeking attention, attachment, and/or control."
 - c. Plan for providing instruction and supporting new behaviors:
 - i. "Facility will provide services and education consistent with the Therapeutic Crisis Intervention Model."
 - ii. "Staff will use non-punitive behavior management techniques such as re-directing, prompting, or encouraging a student to take space, before initiating a behavioral sequence."
 - iii. "The classroom will provide at least three social skills lessons per week."
 - iv. "Staff will structure, implement and monitor the Student's progress through a classroom-based level system."
 - d. Follow-up activities: "This plan is effective upon admission to Facility. If the Student is not making progress, it will be re-evaluated and edited according to the Student's individual needs."
34. The Student's BSP in the 11/13/2008 IEP neither described the Student's specific behaviors of concern nor identified specific strategies and supports needed to address the Student's behavior. Given the Student's behaviors of concern identified in the PLAAFP, the SCO specifically finds that individualized behavior supports and strategies to address those behaviors were critical in order for the Student to receive a free appropriate public education (FAPE).
35. According to the Student's 11/13/2008 IEP, the Student was to receive 30 hours per week of services from a special education teacher to be provided through small group instruction.
36. Despite requests to both the Complainant and the District, neither party supplied evidence of the Student's progress under the 11/13/2008 IEP. As no evidence was provided, the SCO finds that the Student made no progress under the 11/13/2008 IEP.

11/13/2008 Placement in the Least Restrictive Environment

37. The Student's placement in the LRE was discussed at the IEP 11/13/2008 IEP meeting. The Complainant was involved in the placement decision. While the Complainant disagreed with the Student's placement at Facility, the Complainant was not in disagreement with the Student's need for a small structured setting. The SCO concludes that the dispute between the Complainant and the District was in fact, not

over the *LRE* for the Student, but rather the *location* where the Student would receive services.

38. The IEP indicated that the Student would be placed in a separate school with the rationale that Student needed the structure of a self-contained facility with emotional support. [Facility], although a separate school, had both students with and without disabilities in attendance. Therefore, the Student had access to nondisabled peers.
39. The Record demonstrated that Student had no success when attending a traditional District school. Although Student struggled even when [Student] was receiving services in a small structured setting, this setting was less restrictive than the Student's previous homebound placement. The small structured setting, as provided by the Facility, was an appropriate placement in the least restrictive environment for the Student. The SCO finds no error in the determination of the Student's placement in the LRE.

Implementation of the 11/13/2008 IEP

40. The Student's attendance at Facility was inconsistent and the Student was frequently absent. However, the Facility's attendance report contained numerous inaccuracies. For example, the attendance report showed Student as attending full days and did not reflect early departures or the Student's modified schedule. [Student's] attendance on the Labor Day holiday was reflected as an absence for hospitalization. The attendance report also shows the Student was in attendance at the Facility in December when, according to both the District and the Complainant, the Student was completing assignments at home. Although the SCO finds that the Student was frequently absent, the extent of the Student's absences cannot be confirmed because the Facility's attendance report did not accurately reflect the Student's attendance.
41. Prior to the 11/13/2008 IEP, the Student attended Facility on a modified school day due to anxiety and behavioral issues. The Facility and Complainant were in agreement with the modified schedule which was properly documented in IEP addenda dated 10/6/2008 and 10/27/2008 as a change in placement. The IEP addenda reflected a decrease in the hours of special education services from 30 to 21 hours per week.
42. The Student's 11/13/08 IEP listed 30 hours per week of services from a special education teacher. However, the Student continued to attend the Facility on the modified school day schedule of 2.5 hours per day and did not receive any additional special education services outside of the modified school day. Consequently, the SCO finds that the Student's 11/13/2008 IEP was not implemented as written.
43. Because of Student's poor attendance, the Facility had the Complainant attend school with the Student in November 2008. There is no dispute that the Complainant also worked 1:1 with the Student on the Student's assignments at the Facility during this time period.
44. At some point in time in November 2008, the Student stopped attending classes at the Facility with the Complainant's consent. Instead, the Facility provided the Complainant with the Student's assignments to work on at home. Although Student stopped attending classes, the District continued to hold Student's seat at the Facility until 12/19/2008. The Complainant continued to receive assignments from

the Facility up until the winter break in December. The SCO finds that because the Student was still receiving assignments from the Facility that the Student remained enrolled at the Facility through 12/19/2008.

45. From 12/19/2008 through 1/30/2009, it was disputed as to whether the Student was enrolled in the District or being homeschooled. The District contended that the Complainant verbally informed them that she was going to homeschool the Student. The Complainant denied telling the District she intended to homeschool and maintained that the District made no contact regarding Student's attendance until 1/15/2009. The District acknowledged that it did not receive from the Complainant any formal request to withdraw the Student or the required written notification of the intent to homeschool Student.⁶ As there was no evidence to support the District's contention that the Complainant homeschooled the Student, the SCO finds that between 12/19/2008 and 1/30/2009 the Student was not homeschooled.
46. The District contacted Student's probation officer regarding Student's nonattendance. As a result, the County Department of Social Services convened a meeting on 1/15/2009. Both the Complainant and the District were at the meeting. The outcome of the meeting was an action plan to enroll the Student in a District Alternative School [Alternative School].
47. Alternative School is a small structured program for at-risk students. The program has approximately 55 students with and without disabilities. All students in the program receive small group and individualized instruction. The program uses the District's core curriculum in academic subjects.
48. On 1/21/2009, the Complainant and Student met with Alternative School Social Worker (Social Worker) to complete the intake paperwork for the Student to begin attending the Alternative School. The intake was not completed because the Student had an [unprintable verbal] behavioral outburst. On 1/27/2009, the Complainant, Student and Social Worker completed the intake paperwork and Student began attending Alternative School on 2/2/2009. It is unclear from the record why the Student did not begin attending Alternative School until 2/2/2009. However, the SCO finds that between 1/21/2009 and 1/27/2009, the Student refused to access any special education services available in the 11/13/2008 IEP.
49. The SCO finds that the 11/13/2008 IEP had never been implemented as written because the Student never received the number of hours of special education services as indicated in the IEP. Further, from 12/19/2008 through 1/21/2009, the Student no longer had a seat at the Facility; was not receiving any special education services; and was not homeschooled. Consequently, the SCO finds the District completely failed to implement the Student's IEP between 12/19/2008 and 1/21/2009. These failures to implement the IEP resulted in a denial of FAPE for the Student.

4/29/2009 Special Evaluation

⁶ Pursuant to Colo. Rev. Stat. § 22-33-104.5(3)(e) "[A]ny parent establishing a nonpublic homebased educational program shall provide written notification of the establishment of said program to a school district within the State fourteen days *prior* to the establishment of said program." However, it is the *obligation of the parent* to ensure that his or her child attends the public school in which the child is enrolled. *See* Colo. Rev. Stat. § 22-33-104(5)(a).

50. On 2/9/2009, the Complainant, through an advocate, requested that the District conduct an additional evaluation for the Student in the areas of reading, writing, spelling, math, central auditory processing, visual processing, motor skills, executive functioning, and assistive technology as well as a functional behavior assessment (FBA).
51. In March and April 2009, the District administered assessments to the Student in the areas of reading, spelling, communication, visual processing, executive functioning, and fine motor skills. An IEP meeting was held on 4/29/2009 to discuss the evaluation results. No assessments were conducted in the areas of math, central auditory processing, or assistive technology. The District did not conduct a FBA.
52. There is no dispute that a variety of assessment tools and strategies were used in the special evaluation. Further, the special evaluation was conducted by qualified personnel including a Reading Specialist, Psychologist, SLP and a Registered Occupational Therapist (OTR).
53. The SLP administered the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4). However, the assessment was not completed because Student became agitated and refused to complete the subtests of the assessment. Based on the SLP's attempts to assess Student, the SLP identified additional accommodations, modifications and instructional strategies for Student that were included in the IEP. Although the communication assessment was not completed, the SCO finds that sufficient information was obtained to identify the Student's communication needs.
54. The Reading Specialist reviewed all of the educational records in Student's file as part of the assessment. The reading assessments identified that Student had memorized some common words, but was unable to decode unfamiliar words. The assessments also identified instructional strategies specific to Student's reading needs. In an interview with the SCO, the Reading Specialist stated that Student was reading and spelling at approximately a first grade level.
55. The executive functioning assessment identified that Student had weaknesses in activities involving symbols. However, Student demonstrated strengths in visual-spatial tasks as well as in good categorization and problem-solving. The executive functioning assessment also identified instructional strategies specific to Student's educational needs.
56. The assessment of Student's fine motor skills identified weaknesses in the area of visual motor integration, visual perception and motor coordination. In the evaluation report, the OTR remarked that Student had difficulty producing a writing sample because Student did not know how to spell the words. The assessment identified several other educational needs in the area of writing. Based on the assessment, the OTR recommended an assistive technology evaluation for Student.
57. Although the 4/29/2009 special evaluation did not assess the Student in *all* requested areas, the evaluation did identify several areas of educational need. However, the SCO finds that the special evaluation was not sufficiently comprehensive to identify all of the Student's special education needs. Specifically, there was no assessment in the area of behavior, clearly a critical Student need.

5/27/2009 IEP

58. An IEP meeting, initiated 4/29/2009 to discuss evaluation results, was continued to 5/27/2009. The IEP developed in these meetings was intended to replace the 11/13/2008 IEP.
59. The 5/27/2009 IEP had goals in the areas of writing, behavior, reading, and spelling. Although several of the goals were stated in broad terms, some goals were stated in specific and measurable terms. Each goal had objectives. Some objectives, especially those in the areas of reading and spelling, were very specific and measurable. For example, the writing goal was "Student will increase fine and visual motor skills for successful participation in classroom tasks." The goal and the following objectives:
- a. "Complete classroom written assignments using technology as appropriate." This objective did not describe what would be appropriate.
 - b. "Will learn how to produce a cursive signature." This objective had no measurement.
60. The 5/27/2009 IEP continued to have the same Post Secondary Transition Outcome as the 11/13/2008 IEP. For the same reasons previously stated in FF 25 above, the SCO finds that this postsecondary goal was not measurable nor based on age appropriate transition assessments.
61. The 5/27/2009 IEP continued to have the same inadequate behavior support plan that had been included in the 11/13/2008 IEP (*See* FF 27). Specific behavior supports and strategies individualized to address the Student's needs were critical in order for the Student to receive a free appropriate public education (FAPE). The SCO finds that no such behavior supports or strategies were evident in the 5/27/2009 IEP.
62. The 5/27/2009 IEP did not include a statement of special education and related services the Student was to receive. The IEP did not include a description of the Student's placement or an explanation of the extent the Student would not be educated with nondisabled peers.
63. Both the Complainant and the District agreed that the Student made progress under the 5/27/2009 IEP. Despite the procedural flaws in the 5/27/2009 IEP, the SCO finds that the IEP conferred an educational benefit to the Student.

4/29/2009 – 5/27/2009 Disabling Condition

64. For the same reasons stated in FF 25, the SCO finds no error in the District's identification of the disabling condition under which the Student was eligible for special education.

4/29/2009 - 5/27/2009 Placement in the LRE

65. Other placement options for the Student were discussed in the 4/29/2009 IEP meeting including: a traditional high school; another District alternative program; and the District vocational education program. The IEP team, including the Complainant agreed that the Student should remain at the Alternative School.

66. The Student's modified school day was also discussed with a goal to increase instructional time.
67. In an interview with the SCO, the Complainant acknowledged that the Alternative School provided appropriate programming and that Student was gradually increasing the number of hours [Student] was attending school each day. At the close of the record, the Student had increased the length of [Student's] school day from two and half hours to four hours.
68. The Alternative School, although a separate school, has both disabled and nondisabled students in attendance. For the same reasons stated in FF 38 above, the SCO finds no error in the IEP team's determination of the LRE for the Student.

Implementation of the 5/27/2009 IEP

69. From the time Student entered Alternative School in February 2009, the Student received special education services based on [Student's] modified schedule. The services Student received included 1:1 and small group instruction as well as school social work services.
70. After the 4/29/2009 IEP meeting, the Student began receiving direct reading instruction. Additionally, the District provided the Complainant with reading software to enable the Student to work on reading at home after the 5/27/2009 IEP meeting. Further, Student also received extended school year (ESY) services of direct reading instruction from 06/01/2009 through 06/24/09.
71. Although the Student was receiving the above services, the service delivery page on the 5/27/2009 IEP listed no services or placement for the Student. Because the investigation revealed that these services were in fact delivered, the SCO concludes that the District provided a FAPE to the Student from 4/29/2009 to 9/30/2009.

10/14/2009 IEP

72. Although beyond the scope of the Complaint, the District supplied the SCO with the Student's current IEP developed on 10/14/2009 subsequent to the filing of this Complaint. The SCO reviewed this IEP to determine whether remedies were still needed to correct the deficiencies identified in the 5/27/2009 IEP. The 10/14/2009 IEP –
- a. Detailed additional assessments in the areas of math and audiology that were conducted to identify additional educational needs of the Student. These assessments provided additional information on the Student's academic levels and educational needs. Although a FBA had not been conducted, data on the Student's behavior had been collected.
 - b. Included specific statements of post secondary outcomes in the areas of post secondary education, career and employment and independent living that were based on an age appropriate transition assessment.
 - c. Had goals in the areas of reading, spelling, written language, math, and behavior. The goals were still stated in broad terms, but most objectives were specific and measurable.

- d. Included a behavior support plan for the Student that identified the Student's specific behaviors and listed individualized interventions and teaching strategies to address Student's behaviors.
 - e. Identified the special education and related services that Student was to receive and accurately reflected that the Student was attending school on a modified school day.
 - f. Identified the Student's placement in the LRE and included an explanation of the extent Student would not be educated with nondisabled peers.
73. In the 10/14/2009 IEP meeting, the team considered whether the Student met the eligibility requirements of SLD at the request of the Complainant. The team determined that although the Student had a primary disability of SIED, the Student also met the criteria for SLD.

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:

1. As a preliminary matter the SCO analyzes which entity was responsible for the Student's IEP because during the period of the Complaint the District placed the Student in an out-of-district Facility.
2. The IDEA provides that when a public agency has placed a child in a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency. 34 CFR § 300.325(b)(2). However, even if a private school or facility implements a child's IEP, responsibility for compliance with the Part B IDEA requirements remains with the public agency and the State education agency (SEA). 34 CFR § 300.325(c). The ECEA is in alignment with the IDEA in that the responsibility for IEP review meetings and eligibility redeterminations are the responsibility of the Administrative Unit of residence. 1 CCR 301-8, 2220-R-8.06(1)(c).⁷ Further, the Administrative Unit of residence is responsible for reevaluation of students at an eligible facility. ECEA Rule 8.04(1)(c)
3. The District is the Student's Administrative Unit of residence (FF 2) and placed the Student in the out-of-district Facility (FF 7). Therefore, the Student's IEP review, reevaluation and eligibility redetermination were the responsibility of the District from 10/2/2008 through 9/30/2009. This includes the period of time when the Student was placed at the Facility outside the District.

Issue 1. Whether the District failed to appropriately conduct evaluations that were sufficiently comprehensive to identify all of Student's educational needs in accordance with §§ 300.304 through 300.305.

⁷ Hereinafter, the ECEA Rules will be referred to by Rule number only (e.g., ECEA Rule 1.00)

4. Under the IDEA, each child with a disability is entitled to a free appropriate public education (FAPE). A FAPE is tailored to the unique needs of the child by means of an IEP. *Hendrick Hudson Central Sch. Dist. V. Rowley*, 553 IDELR 656, (Jun. 28, 1982, Sup. Ct. US).
5. The IDEA provides that a public education agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311. See 34 C.F.R. § 300.303(a). The evaluation procedures relevant to this complaint are as follows:
 - As part of a reevaluation, the IEP team and other qualified professionals must first review existing evaluation data on the child including:
 - (1) Evaluations and information provided by the parents;
 - (2) Current classroom-based, local, or State assessments;
 - (3) Classroom-based observations; and
 - (4) Observations by teachers and related services providers.
 - (5) Based on that review and input from the parents, the multidisciplinary team must decide whether any additional evaluative information is necessary.

34 CFR § 300.305(a)(1)

- A variety of assessment tools and strategies must be used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining:
 - (1) Whether the child is a child with a disability; and
 - (2) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum.

34 CFR § 300.304(b)(1).

- Technically sound instruments must be used in order to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 CFR § 300.304(b)(3).

- The assessments must be administered by trained and knowledgeable personnel.

34 CFR § 300.304(c)(1)(iv).

- The child must be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities.

34 CFR § 300.304(c)(4).

- The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

34 CFR § 300.304(c)(6).

- The assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child must be provided.

34 CFR § 300.304(c)(7).

- The child must be assessed in all areas related to the suspected disability. If a child's behavior is of concern, evaluation addressing this area must be conducted.⁸

34 CFR § 300.304(b)(1).

6. Here, the SCO concludes that the District complied with many evaluation procedures for both the 11/13/2008 triennial reevaluation (FF 16, FF 23a) and the 4/29/2009 special evaluation (FF 52, FF 54, FF 55, FF 56). The SCO also concludes that the District failed to comply with other evaluation procedures. The specific violations follow:

11/13/2008 Triennial Reevaluation

7. The IEP team and other qualified staff failed to review current classroom-based, local or State assessments (FF 17) in violation of § 300.305(a)-(b). This was a procedural error that has been cured by the thorough review of existing data conducted during the 4/29/2009 special evaluation (FF 54).
8. The triennial reevaluation failed to provide relevant academic information and was not sufficiently comprehensive to identify all of the Student's special education needs (FF 19a, FF 19d, FF 20b, FF 23c), all in violation of §§ 300.304(b)(1), 300.304(c)(4), 300.304(c)(6), and 300.304(c)(7).

4/29/2009 Special Reevaluation

9. The 4/29/2009 special evaluation was not sufficiently comprehensive to identify all of the Student's special education needs because there was no assessment of the Student's behavior (FF 57) in violation of § 300.304(b)(1).
10. The SCO notes that, subsequent to the filing of the Complaint, additional assessments of the Student were conducted in math and audiology (FF 72a) on 9/30/2009, 10/8/2009 and 10/9/2009. Further the District collected data on the Student's behavior from 8/31/2009 through 10/12/2009, that were incorporated into the Student's behavior support plan (FF 72d) dated 10/12/2009. Therefore, the SCO concludes that the deficiencies in the 11/13/2008 triennial reevaluation and the 4/29/2009 special evaluation have been cured.

⁸ See Analysis of Comments and Changes 2004 IDEA Part B regulations, 71 Fed. Reg. p. 46643 (*hereinafter* Preamble) discussion on assessing a child in all areas related to the suspected disability.

11. The SCO concludes that deficiencies in the 11/13/2008 triennial evaluation denied the Student a FAPE because it did not provide sufficient information about the Student's unique educational needs (FF 23c) for the development of the Student's 11/13/2008 IEP (FF 27, FF 30) which was in effect until 5/27/2009.
12. Although there were deficiencies in the 4/29/2009 special evaluation (FF 57), the information obtained about the Student's educational needs was used for the IEP under which the Student otherwise made meaningful progress (FF 63). Therefore, the SCO concludes that the deficiencies in the 4/29/2009 special evaluation did not rise to the level of a denial of FAPE as between the dates of 4/29/2009 to 10/13/2009.

Issue 2. Whether the District failed to appropriately identify the disabling condition under which the Student was identified as a child with a disability pursuant to § 300.8 and the Exceptional Children's Education Act (ECEA) Rule 2.08.

13. The IDEA defines a child with a disability as a child who has been evaluated in accordance with §§ 300.304 through 300.311 as having one of several conditions, and who by reason thereof, needs special education and related services. 34 CFR § 300.8. The ECEA is aligned with the IDEA and specifies the conditions for which a child may be eligible to receive special education and related services. ECEA Rule 2.08. A child may be eligible for special education if they have *one or more* of the specific disabling conditions. ECEA Rule 2.08.
14. Relevant to this Complaint, a significant identifiable emotional disability (SIED) means a child has social or emotional functioning that prevents the child from receiving reasonable educational benefit from regular education. Emotional or social functioning means:
 - Excessive fear and anxiety.
 - Exhibits withdrawal, avoidance of social interaction and/or lack of personal care to an extent that maintenance of satisfactory interpersonal relationships is prevented.
 - Displays consistent pattern of aggression toward objects or persons to an extent that development or maintenance of satisfactory internal relationships is prevented.
 - Pervasive oppositional, defiant or noncompliant responses.
 - Significantly limited self-control, including an impaired ability to pay attention.
 - Persistent patterns of bizarre and /or exaggerated behavior reactions to routine environments.

ECEA Rule 2.08(5)(a)(i)-(xii)

- Additionally, the child's SIED must prevent the child from receiving reasonable educational benefit due to the presence of at least one of the following characteristics:

(1) Academic functioning: an inability to receive reasonable educational benefit from regular education which is not primarily the result of

intellectual, sensory or other health factors, but due to the identified emotional condition.

- (2) Social/emotional functioning: an inability to build or maintain interpersonal relationships which significantly interferes with the child's social development. Social development involves those adaptive behaviors and social skills which enable a child to meet environmental demands and assume responsibility for his/her own and others' welfare.

ECEA Rule 2.08(5)(b)(i)

- Additionally, all four of the following qualifiers shall be documented for either of the above characteristics demonstrated:
 - (1) A variety of instructional and/or behavioral interventions were implemented within regular education and the child remains unable to receive reasonable educational benefit from regular education or his/her presence continues to be detrimental to the education of others (may not be applicable for triennial reviews).
 - (2) Indicators of social/emotional dysfunction exist to a marked degree; that is, at a rate and intensity above the child's peers and outside of his/her ethnic and cultural norms and outside the range of normal developmental expectations.
 - (3) Indicators of social/emotional dysfunction are pervasive, and are observable in at least two different settings within the child's environment, one of which shall be school.
 - (4) Indicators of social/emotional dysfunction have existed over a period of time and are not isolated incidents or transient, situational responses to stressors in the child's environment.

ECEA Rule 2.08(5)(b)(ii)

15. In Colorado, the criteria for specific learning disability had been based on the determination of a discrepancy between intellectual ability and actual performance (discrepancy model). The ECEA allowed administrative units to continue to use the discrepancy model through 8/14/2009. As of 8/15/2009, all administrative units were required to use the criteria under the Response to Intervention (RTI) model. ECEA Rule 2.08(6)(b).

16. Under the discrepancy model, the criteria for SLD that prevents a child from receiving reasonable educational benefit must include documentation that the child has:

- A disorder in the psychological process which affects language and learning as evidenced by:
 - (1) Significant discrepancy between estimated intellectual potential and actual level of performance, and
 - (2) Difficulty with perceptual, cognitive and/or language processing; and
- Significantly impaired achievement in one or more of the following areas:
 - (1) Prereading and/or reading skills.
 - (2) Reading comprehension.
 - (3) Written language expression, such as problems in handwriting, spelling, sentence structure, and written organization.
 - (4) Comprehension, application and retention of math concepts.

ECEA Rule 2.08(6)(b)(i)

17. Under the RTI model, the child must meet the following criteria:

- The child does not achieve adequately for the child's age or to meet state-approved grade-level standards in one or more of the following areas, when provided with appropriate learning experiences and instruction:
 - (1) Oral expression;
 - (2) Listening comprehension;
 - (3) Written expression;
 - (4) Basic reading skill;
 - (5) Reading fluency skills;
 - (6) Reading comprehension;
 - (7) Mathematical calculation;
 - (8) Mathematics problem solving; and
- The child does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the areas described above when using a process based on the child's response to scientific, research-based intervention as determined by a body of evidence demonstrating:
 - i. Academic skill deficit(s); and
 - ii. Insufficient progress in response to scientific research-based intervention.

18. Classification of the precise impairment listed in the IDEA is not critical. Rather, the focus of the mandate is on the needs of the child and adequacy of services. *Pohorecki v. Anthony Wayne Local Sch. Dist*, 53 IDELR 22, (N.D. OH 2009)

19. The SCO concludes that the Student met the criteria for SIED (FF 25) as well as SLD under both the discrepancy and RTI models (FF 18a, FF 18b, FF 25, FF 73). Identifying both of the Student's disabling conditions was not critical because placement and services for the Student were based on the Student's identified educational needs (FF 69, FF 70, FF 72d, FF 72e). Therefore, the SCO concludes there was no error in the determination of the Student's disabling condition.

Issue 3. Whether the District failed to appropriately develop an IEP that would confer educational benefit for the Student that considered general and special IEP factors in accordance with § 300.324(a) and included the IEP content required in § 300.320.

20. In reviewing an IEP, it must be first determined whether or not the IEP development process complied with IDEA procedures. Secondly, it must be determined whether the substance of the IEP provided a FAPE. *Rowley*. However, a procedural error in the IEP does not necessarily entitle a child to relief. Procedural errors amount to substantive failures only where the procedural inadequacy results in an effective denial of FAPE. *Sytsema v. Academy Sch. Dist* 20, 50 IDELR 213, (10th Cir. 2008).

21. The substance of an IEP provides a FAPE if it provides the child with a basic floor of opportunity that consists of access to specialized instruction and related services which are individually designed to provide educational benefit. *Rowley*. This educational benefit must be more than de minimis. *Urban by Urban v. Jefferson Co. Sch. Dist. 1*, 24 IDELR 465, (10th Cir. 1996).

22. The IEP is a program consisting both of the written IEP document, and the subsequent implementation of that document. *O' Toole by O'toole v. Olathe Dist. Sch.*, 28 IDELR 177, (10th Cir. 1998). The adequacy of the IEP is evaluated from the perspective of the time it is written. However, the implementation of the program is an on-going dynamic activity which must be evaluated as such. *J.P. v. Enid Public Sch.*, 53 IDELR 112, (W.D. Okla. 2009)

23. The IDEA has several procedures for IEP development.

- The IEP team must consider—
 - (1) The strengths of the child;
 - (2) The concerns of the parents for enhancing the education of their child;
 - (3) The results of the initial or most recent evaluation of the child; and
 - (4) The academic, developmental, and functional needs of the child.

34 CFR § 300.324(a)(1)

- The IEP Team must also consider special factors including –
 - (1) The use of positive behavioral interventions and supports, and other strategies, to address the behavior of a child whose behavior impedes the child's learning or that of others.
 - (2) Consider whether the child needs assistive technology devices and services.

34 CFR §§ 300.324(a)(2)(i) and (v)

24. The IDEA has several requirements for IEP content. An IEP must contain:

- A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. Academic achievement generally refers to a child's performance in academic areas such as reading, language arts, math, science, and history; but may vary depending on the child's circumstance or situation.⁹

34 CFR § 300.320(a)(1).

- A statement of *measurable* annual goals, including academic and functional goals designed to:
 - (1) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum. The statement of a child's present levels of academic achievement directly corresponds with the requirement that the IEP goals are designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum.¹⁰
 - (2) Meet each of the child's other educational needs that result from the child's disability.

34 CFR § 300.320(a)(2)

⁹ See Preamble, p.46662 discussion of present levels of academic achievement and functional performance.

¹⁰ *Id.*

- A description of —
 - (1) How the child's progress toward meeting the annual goals will be measured; and
 - (2) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

34 CFR § 300.320(a)(3)
- A statement of the special education and related services and supplementary aids and services to be provided to the child or on behalf of the child.

34 CFR § 300.320(a)(4)
- An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.

34 CFR § 300.320(a)(5)
- The projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications.

34 CFR § 300.320(a)(7)
- Transition planning for students beginning with the first IEP developed when the child is age 15, but no later than the end of 9th grade. For the purpose of transition planning, the IEP must include—
 - (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
 - (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 CFR § 300.320(b), ECEA 4.03(6)(d)(i)

11/30/2007 IEP

25. The SCO concludes the Student's 11/30/2007 IEP that was in effect from 10/2/2008 until 11/13/2008 (FF 9) had many procedural flaws (FF 10-13) in violation of 34 CFR §§ 300.320(a)(1)-(3). The SCO further concludes that the procedural violations resulted in a denial of FAPE because the Student made negligible progress under the 11/30/2007 IEP.

11/13/2008 IEP

26. The SCO concludes the 11/13/2008 IEP developed by the Facility (FF 26) also had many procedural violations (FF 27-FF 34) in violation of 34 CFR §§ 300.320(a)(1), 300.320(a)(2), 300.320(a)(7), and 300.324(a)(2)(i). The record demonstrated that the Student made no progress under the 11/13/2008 IEP (FF 36). Further, the District failed to implement the IEP (FF 42, FF 49). The SCO concludes the District's failure to implement the 11/13/2008 IEP denied the Student a FAPE.

5/27/2009 IEP

27. Although the IEP completed on 5/27/2009 addressed many deficiencies of the previous IEPs (FF 59), the SCO concludes that the 5/27/2009 IEP continued to have deficiencies (FF 59a, FF 60 – FF 62) in violation of 34 CFR §§ 300.320(a)(3), 300.320(a)(4), 300.320(a)(7), and 300.324(a)(2)(i). Despite these deficiencies, the Student was provided services (FF 71) and the parties agree that the Student made progress under this IEP (FF 63). The SCO concludes that the Student's progress under the 5/27/2009 IEP demonstrates the IEP conferred an educational benefit.
28. The SCO concludes that the District failed to appropriately develop an 11/13/2008 IEP (see Conclusion of Law 26 above). However, the SCO was unable to determine whether the IEP conferred educational benefit because the IEP was never implemented as written (FF 42). The failure to implement the 11/13/2008 IEP resulted in a denial of FAPE from 11/13/2008 through 4/29/2009, except for the period of 1/21/2009 through 1/27/2009 when Student refused to access any special education services (FF 48).

Issue 4. Whether the District failed to appropriately determine the Student's placement in the Least Restrictive environment (LRE) in accordance with §§ 300.114 through 300.116.

29. Under the IDEA, each public agency must ensure that:
- To the maximum extent appropriate, children with disabilities are educated with children who are nondisabled.
 - Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 CFR § 300.114.

- A continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services including:
 - (1) The alternative placements listed in the definition of special education under § 300.38 (e.g., instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
 - (2) Supplementary services (such as resource room or itinerant instruction) provided in conjunction with regular class placement.

34 CFR § 300.115.

30. In determining the educational placement of a child with a disability, the placement decision must be —
- Made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.
 - In conformity with the LRE provisions.
 - However, placement does not mean a specific place, such as a specific classroom or specific school. Decisions regarding the location in which a

child's IEP will be implemented are made by the Director of Special Education or his or her designee.

34 CFR §§ 300.116(a)-(b), ECEA Rule 4.03(8)(a).

31. "Placement" refers to points along the continuum of placement options available for a child with a disability, and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. However, a public agency has the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.¹¹ Accord *Murray v. Montrose County Sch. Dist.*, 22 IDELR (10th Cir. 1995) (although the LRE mandate provides that children with disabilities must be educated, to the maximum extent appropriate, with children who are not disabled, the IDEA does not speak to the location where that education will take place).
32. The SCO concludes that the determination of Student's placement was in conformity with 34 CFR §§ 300.114 through 300.116 (FF 37-39, FF 65, FF 68). While there was disagreement about the location of services, there was agreement with regard to the Student's placement in the LRE (FF 37). Therefore, the SCO finds no violation in the determination of the Student's placement in the LRE.

REMEDY

1. Because the Student was denied a FAPE between 11/13/2008 and 4/29/2009, the SCO hereby orders the District to provide 50 hours of compensatory education to the Student for the failure implement the Student's IEP. The compensatory services provided to the Student shall be focused in the areas of reading, spelling, writing, and math. The compensatory services must be provided to the Student no later than 11/15/2010. **It is up to the Complainant to ensure the Student is available to take advantage of the compensatory services. If the Student fails to attend scheduled compensatory services due to unexcused absences (e.g., absence without a Doctor's excuse), the Student will forfeit the compensatory services missed. If the Student misses 5 sessions of compensatory services due to unexcused absences, the remaining compensatory services will be forfeited.**
 - a. The District shall develop a plan with the Complainant on how, where and when the compensatory services will be provided. The District shall provide the SCO with the plan to provide compensatory services no later than **1/04/2010**.
 - b. The District shall provide evidence to the SCO of Student's attendance and that the compensatory services were provided to the Student no later than **11/30/2010**.
2. The District shall submit to the SCO its current special education evaluation policies and procedures and documentation as to how these practices are implemented on or before **1/04/2010**. The SCO will review the evaluation policies and procedures to

¹¹ Preamble, p.46588.

ensure compliance with the IDEA. Specifically, the SCO will review such policies for the evaluation requirements to ensure —

- a. The District reviews existing evaluation data consistent with § 300.305(a);
- b. Based on the review of existing evaluation data and input from the parents, the District identifies what additional evaluation data are needed for individual student reevaluations to determine—
 - i. Whether the child continues to be a child with a disability;
 - ii. Whether the child continues to need special education and related services;
 - iii. The educational needs of the child;
 - iv. The present levels of academic achievement and related developmental needs of the child; and
 - v. Whether any additions or modifications to the special education and related services are needed to enable the child to meet the annual goals set out in the IEP and, as appropriate, to participate in the general education curriculum;
- c. The District assesses children in *all* areas related to suspected disability consistent with § 300.304(c)(4); and
- d. The District conducts evaluations that are sufficiently comprehensive to identify *all* of a child's special education and related services needs whether or not commonly linked to the disability category in which the child has been classified consistent with § 300.304(c)(6).

Based on the foregoing information, the SCO will determine whether this area requires corrective action plan inclusion.

3. The District shall develop a corrective action plan (CAP) to address —

- a. IEP procedures for children who are placed in Facility Schools to approved pursuant to Colo. Rev. Stat. § 22-2-407 ensure that –
 - i. IEPs include a child's present levels of academic achievement and functional performance (PLAAFP);
 - ii. The PLAAFP includes how the child's disability affect's the child's involvement in the general curriculum;
 - iii. IEPs include a statement of measurable annual goals that are designed to:
 1. Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
 2. Meet each of the child's other educational needs that result from the disability; and

- iv. IEPs include a statement of how the child's progress toward annual goals will be measured and when periodic progress reports will be provided to the parents;
 - v. IEPs include a statement of the special education and related services and supplementary aides and services, to be provided to a child or on behalf of the child;
 - vi. IEPs for students of transition age include measurable post school outcomes based on age appropriate assessments; and
 - vii. Behavior support plans, when attached to IEPs for children whose behavior impedes their learning or that of others, are individualized to the child and address the child's specific behaviors.
- b. Specifically, the CAP must address:
- i. How the District ensures that the IEPs for students in Facility Schools are developed in accordance with its policies and procedures for IEP development and IEP content;
 - ii. How the policies and procedures will be communicated to the staff who participate in the development of IEPs for children in Facility Schools; and
 - iii. How the District will monitor the IEPs of children in Facility Schools for compliance with the IDEA.

The CAP shall be submitted to the undersigned SCO no later than the end of business on **February 1, 2010**. 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 1st day of December, 2009.

Stephanie D. Lynch, Esq.

Appendix A

Complaint

Attachment 1 (Att. 1)	Student IEP dated 11/13/2008
Att.2	DHS Team Decision Making Summary 1/15/2009
Att.3	Student IEP dated 4/29/2009
Att.4	Student IEP dated 5/11/2009
Att.5	Complainant correspondence with District 2/2009
Att.6	Complainant correspondence with District 3/2009
Att.7	Complainant correspondence with District 4/2009
Att.8	Complainant correspondence with District 7/2009
Att.9	Complainant correspondence with District 8/2009
Att.10	Complainant correspondence with District 9/2009

Complainant Supplement to the Record Received 11/13/2009

Att. 11	Student IEP dated 11/30/2007 Services Page
Att. 12	Student Goal Sheet from Alternative School
Att. 13	Student Assignments from Facility

Complainant Interview 11/10/2009

District Response

Document A (Doc. A)	District Exhibit A: Student IEP 11/30/2007
Doc. B	District Exhibit B: IEP Addendum 8/28/2008 CIP
Doc. C	District Exhibit C: IEP Addendum 10/6/2008 CIP
Doc. D	District Exhibit D: IEP Addendum 10/27/2008 CIP
Doc. E	District Exhibit E: Consent to Evaluate 10/25/08
Doc. F	District Exhibit F: Student Tri - IEP 11/13/2008
Doc. G	District Exhibit G: Human Svcs TDM Summary 1/15/2009
Doc. H	District Exhibit H: Student IEP Special Request 4/29/2009
Doc. I	District Exhibit I: Student IEP Special Request 5/27/2009
Doc. J	District Exhibit J: Student IEP Annual/Reeval 10/14/2009
Doc. K	District Exhibit K: Complainant/District correspondence
Doc. L	District Exhibit L: District Resource Team Referral
Doc. M	District Exhibit M: Alternative School Intake Notes
Doc. N	District Exhibit N: Facility Attendance Report
Doc. O	District Exhibit O: Alternative School Attendance Report
Doc. P	District Exhibit P: Alternative School Social Worker Daily Notes 8/25/09-10/26/09
Doc. Q	District Exhibit Q: Alternative School Teacher Daily Notes 8/24/09-10/24/09
Doc. R	District Exhibit R: Certificate of mailing

District Supplement to the Record received 11/13/2009

Doc. S	District Exhibit S: Blank CAT Classroom Performance Survey
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Doc. T District Exhibit T: Blank Teacher Input Communication
Checklist/Student Communication Interview
Doc. U District Exhibit U: Blank Student Progress Report

District Interviews 11/3/2009

Interviewees: Special Education Director, Reading Specialist, Educational
Diagnostician, Speech Language Pathologist, School Psychologist, Special Education
Coordinator, Alternative School Social Worker

SCO supplement to the Record

Phone Interviews:

Interviewees: Facility School Principal 11/12/2009, Probation Officer 11/12/2009

Email to the District:

Questions regarding Homeschooling