

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> CASE NUMBER: EA 2021-0007
<p>[Parent], in behalf of [Student], Complainant,</p> <p>vs.</p> <p>POUDRE SCHOOL DISTRICT R-1, Respondent.</p>	
AGENCY DECISION	

On February 19, 2021, [Parent] (Complainant) filed a due process complaint with the Colorado Department of Education (CDE), Exceptional Student Services Unit, against Poudre School District RE-1 (District). On February 22, 2021, CDE referred the complaint to the Office of Administrative Courts (OAC). Krishinevsky & Raykin, Attorneys at Law, represented Complainant in this proceeding. Semple, Farrington, Everall & Case, P.C., represented the Respondent District.

A prehearing conference was conducted by the undersigned Administrative Law Judge (ALJ) on March 23, 2021. Igor Raykin, Esq. appeared for Complainant. Robert Montgomery, Esq. appeared for District. At the prehearing conference, the parties set the hearing for August 31-September 2, 2021 in Denver, Colorado and extended the decision deadline to October 4, 2021.

The original complaint contained allegations related to an incident of alleged restraint on March 3, 2020. Complainant filed her first amended due process complaint on May 4, 2021. The first amended complaint contained a new allegation related to a request for an Independent Educational Evaluation (IEE). The District filed a due process complaint on May 7, 2021. The District's complaint related to its determination to deny the requested IEE. On May 27, 2021, the ALJ denied the Complainant's motion to amend and combined the District's due process complaint into this action. Complainant filed her second amended complaint on August 18, 2021, which contained the same substantive allegations but expanded the time period through the date of filing the second amended complaint. Complainant alleges that District violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, *et. seq.*, and accompanying regulations at 34 C.F.R. Section 300, *et. seq.*, and the Colorado Exceptional Children's Educational Act (CECA), Colo. Rev. Stat. Section 22-20-101, *et. seq.*, by failing to provide [Student] (Student) with a free appropriate public education (FAPE). More specifically, Complainant alleges Student was denied a FAPE due to the incident on March 3, 2020.

District filed its response on March 1, 2021 and September 3, 2021. The District's due process complaint asserts that its evaluations conducted in January and February 2021 were adequate to determine continued eligibility and appropriate services and asserted Complainant is not entitled to an IEE at public expense.

At a pre-hearing conference on January 13, 2022, the parties requested to provide the ALJ with written closings on February 4, 2022, and the decision deadline was extended to March 18, 2022.

Hearing was held before the undersigned ALJ on January 18, 19, and 21, 2022 via Google Meet video conferencing. The proceedings were recorded and then transcribed by a court reporter provided by CDE. At hearing, Samantha Baker, Esq. represented Complainant. Robert Montgomery, Esq. represented District. At hearing the ALJ admitted into evidence Complainant's Exhibits 5 – 7, 9, 12, 14, 18, and 21 – 22 and District's Exhibits C – F, H, L – R, T – V, Z, FF – II, RR, VV – WW, YY – ZZ, BBB – CCC, FFF, JJJ – KKK, MMM, and PPP.

ISSUES PRESENTED

The ALJ must determine whether Complainant has established, by a preponderance of evidence, the incident of seclusion on March 3, 2020 resulted in a denial of a free appropriate public education (FAPE) that "(i) impeded Student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." 20 U.S.C. Section 1415(f)(3)(E) and 34 C.F.R. Section 300.513(a)(2).

Further, the ALJ must determine whether Respondent has established, by a preponderance of the evidence, the evaluation it conducted in the 2020-2021 school year was appropriate. 34 C.F.R. Section 300.502; *see also*, 34 C.F.R. Section 300.304 and 300.305. The ALJ must also determine whether Complainant has established by a preponderance of evidence, the Respondent failed to respond or file a due process complaint in response to her request for an Independent educational evaluation without undue delay, which resulted in a denial of FAPE "(i) impeded student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." 20 U.S.C. Section 1415(f)(3)(E) and 34 C.F.R. Section 300.513(a)(2).

Finally, if the ALJ determines [Student] was denied a FAPE due to the asserted violations, whether [Student] is entitled to an award of compensatory services.

FINDINGS OF FACT – STIPULATED FACTS

The following findings are drawn from the parties' stipulation of facts:

1. Student qualifies for special education and related services pursuant to the IDEA in the disability category of Autism Spectrum Disorder.
2. Student attended [Middle School] in the District during the 2019-2020 school year.
3. The Individualized Education Program (IEP) at issue in this Complaint is dated February 11, 2020.
4. Student's February 11, 2020, IEP included a Behavior Intervention Plan (BIP) which outlined specific behavior strategies. The Parent participated in the development of both the IEP and BIP.
5. The last day of in-person instruction before Spring Break during the 2019-2020 school year was March 13, 2020.
6. Student entered ninth grade during the 2020-2021 school year and enrolled in [High School]. Student remains enrolled at [High School].
7. On April 12, 2021, the Parent requested an IEE at public expense.
8. The District filed a due process complaint on May 7, 2021, pursuant to 34 C.F.R. 300.502(b)(2)(i), in order to defend its evaluation of Student.

FINDINGS OF FACT

Background

9. Student is identified with a disability. Specifically, Student is a person diagnosed with autism spectrum disorders and seizure disorders, which have affected her learning abilities.
10. Student's IEP identifies areas of impact related to her disabilities as: communication skills, social/emotional skills, and academic functioning.
11. Student is generally a happy child that loves to be around people.
12. Student most recently began her education with the District in early 2018.
13. On March 3, 2020, there was an incident at school after lunch involving Student in which the seclusion/break room was utilized. (March 3 Incident)
14. After the March 3 Incident, a red abrasion/bump was identified on Student's back. The specific origins of the red abrasion/bump are unknown.

15. Following the March 3 Incident, Student did not physically attend [Middle School] again.

16. On March 9, 2020, Complainant, two advocates for Complainant, the Principal ([Principal]), and Assistant Director of Special Education ([Assistant Director]), attended a meeting.

17. At the March 9, 2020 meeting, several options were discussed on how to move forward, including:

- a. Communication moving forward with an understanding communication home would be in writing versus text message or phone calls;
- b. Safety of Student;
- c. Nurse would be more involved with Student;
- d. Conducting a new Functional Behavior Assessment;
- e. Reviewing Student's IEP;
- f. Discussing involvement of paraprofessionals and current teacher/case manager;
- g. Discussing if current case manager/teacher was not going to be involved in the future, then Student would have to change schools since there were no other teachers available at [Middle School] to serve Student's needs; and
- h. Complainant requesting time to review options.

18. Complainant testified she informed District she did not want contact with Student's Teacher [Middle School Teacher].

19. Complainant testified she understood from the meeting that no other school in the District could accommodate Student and if she wanted another teacher, Student would have to go outside the District.

20. Advocate 1 testified Complainant expressed she was concerned for Student's safety; Complainant wanted no contact with [Middle School Teacher]; and [Assistant Director] would look into it.

21. [Principal] testified he recalled as a result of the meeting he would work with Complainant to develop a communication plan.

22. [Assistant Director] testified she understood the Complainant wanted to think about the options, discuss the options with her advocates, and would get in touch with the Principal with her decision.

23. On March 11, 2020, [Principal] communicated to [Middle School Teacher]

and [Paraprofessional] based on a telephone call with Complainant, Student would return to [Middle School] on March 23, 2020 and there was agreement the School staff would communicate with Complainant in writing.

24. The District did not hold classes due to Spring Break from March 14 to 20, 2020.

25. District began remote learning in April 2020 due to the COVID-19 pandemic.

26. [Middle School Teacher] emailed Complainant on March 20, April 2, April 7, April 8, April 9, April 14, and April 27, 2020 to arrange for Student to participate in virtual class. Exs. ZZ, BBB, CCC, FFF, JJJ, KKK, and MMM.

27. On April 27, 2020, [Middle School Teacher] offered to have Student meet with [Paraprofessional 2] instead of herself. Ex. JJJ.

28. Complainant testified she initially responded to [Middle School Teacher] with excuses why Student could not attend because she didn't want a fight with [Middle School Teacher] and then she just "blew off" the emails.

29. Complainant testified she received an email from [Paraprofessional] to attend virtual sessions.

30. Speech Language Pathologist, [Speech Language Pathologist], testified Student participated in all but three virtual speech sessions between April 2020 and May 2020.

31. [Assistant Director] emailed the Complainant May 7 and May 13 regarding virtual attendance, extended school year, and transition IEP meeting.

32. On May 5, 2020, Complainant emailed [Assistant Director] stating in part "[i]t was suggested at the [High School] meeting I had with [Principal] and Integrated coordinator that [Student] was supposed to not have contact with [Middle School Teacher]" Ex. KKK.

33. On May 13, 2020, Complainant emailed [Assistant Director] stating in part, "I do remember from the meeting it was decided to have [Student] come back but have a different staff member work with her." Ex. MMM.

34. ALJ finds as fact Complainant did not communicate to the District she did not want Student to be taught by [Middle School Teacher] until May 13, 2020. Ex. MMM.

35. On May 13, 2020, Complainant declined extended school year services for summer 2020.

36. On August 24, 2020 Student's ninth grade school year begins virtually at [High School] with a new teacher, [High School Teacher].

37. [High School Teacher] and Speech Pathologist, [Speech Pathologist 2], credibly testified Student was absent for most of the virtual sessions when school started in the Fall 2020.

38. [High School Teacher] credibly testified Student's attendance increased when in-person learning began at [High School].

Behavior Intervention plan

39. The February 12, 2020 was incorporated as part of the February 11, 2020 IEP. Ex. D.

40. Positive interventions used in the classroom to include:

- a. Visual Schedule – allowing Student to see what would be happening throughout the day;
- b. Visual Timer – providing Student with the amount of time left for a particular task, class, or activity;
- c. Fidget devices and comfort items – using stuffed animals and silly putty;
- d. Frequent planned and unplanned bathroom breaks; and
- e. Token Economy – allowing Student to earn a token at the end of each class if successful with the tasks/activities.

41. Event strategies included in the BIP are identified:

- a. Good communication between home and school;
- b. Awareness of biological needs, including, strategies to ignore escape or attention seeking behavior; and
- c. Establishing routines to address anxiety related behaviors related to changes or transitions between activities.

42. BIP included crisis intervention plan including the use of restraint in two forms:

- a. Use of physical restraint or holds by employees trained in Crisis Prevention Institute (CPI) holds; and
- b. Use of a time-out or seclusion room to prevent injury to Student, staff, and other students, but required intervention by Staff when Student injured herself.

Ex. D.

43. District policy JKA defines restraint as “means any method or device used to involuntarily limit a student’s freedom of movement, including bodily physical force, mechanical devices, chemicals and seclusion.” Ex. 21.

44. District policy JKA states

‘Restraint’ does not include the following actions, which are permissible: (1) holding of Student in a position other than a face-down position for less than five minutes by a District employee for protection of Student or other persons, including cases where Student’s abuse or destruction of property creates a probable, imminent threat of bodily injury to Student or to other persons; . . . or (5) the use of time-out as defined in this policy.” Ex. 21.

45. District policy JKA states “‘Seclusion’ means the placement of a student alone in a room from which Student’s egress is involuntarily prevented, but does not include the use of timeout as defined in this policy.” Ex. 21

46. District policy JKA states

‘Time-out’ means both non-exclusionary time-out (removal of social reinforcers such as teacher or classmate attention, physical contact or verbal interaction, or removal of materials with which student has been interacting) and exclusionary time-out at three levels: (1) CONTINGENT OBSERVATION - removal of student from current environment to another location in the room or setting from which student can observe but not participate in the ongoing instruction or other activity; (2) EXCLUSION TIME-OUT - removal of student from current environment to another location in the room or setting where student cannot observe the ongoing instruction or activity; and (3) ISOLATION TIME-OUT - isolation of student from all probable reinforcers by being placed in a different room with adequate lighting, no smaller than 6 feet x 6 feet with normal ceiling height and a noninjurious environment; under the constant supervision of a qualified employee who remains in the room at all times, or if Student is in the room alone egress is not prevented.

Ex. 21.

47. Prior to March 3, 2020, Student was involved in two documented incidents utilizing restraint techniques:

- a. August 23, 2019, Student threw a binder and hit another student; staff used a restraint hold; and when Student did not calm down, she was placed in the seclusion room holding the door closed for 1 minute. Ex. GG.
- b. September 30, 2019, Student started to bounce her leg, a known precursor of increased anxiety, and when a de-escalation technique of a walk was

offered; Student bit, hit, and scratched a staff member. After a hold technique did not calm Student, Student was placed in seclusion room holding the door closed for 1 minute 23 seconds. Ex. HH.

48. [Paraprofessional] testified Student used the seclusion room by her own choice as a place for her to collect herself and calm down on several occasions.

49. Attention seeking behavior by Student was increasing at this time, including Student yelling out “poop in pants” at times when she wanted attention or to go home from school early prior to the March 3, 2020 incident.

March 3, 2020 Incident

50. On March 3, 2020, Student was brought to her special education classroom at lunchtime by a paraprofessional due to a request to use the bathroom. The paraprofessional was also monitoring other students in the lunchroom and could not take Student to the restroom herself at that time.

51. Due to Student’s seizure disorder, Student required “line of sight” supervision at all times, although Student did not need assistance using the restroom.

52. Student soiling herself and stating “poop in pants” was a new behavior. District staff had connected the behaviors to Student’s desire to leave school or end an undesirable task.

53. [Paraprofessional] was in the process of assisting another student with tube feeding and could not stop during the feeding process.

54. [Middle School Teacher] was working with another student that had just attempted to escape the school building so as to deescalate the other student’s behavior [Middle School Teacher] asked Student to wait.

55. Student began taking her pants off in the front of the classroom.

56. [Middle School Teacher] directed/followed Student to the seclusion/break room to prevent Student from undressing in front of other students and set a visual timer for Student while she collected herself. The door was not closed.

57. The seclusion/break room has a door with a window in it. The door does not lock when shut and a button must be depressed from the outside to prevent the person inside from opening the door.

58. When [Middle School Teacher] had settled the other student, she checked on Student. [Middle School Teacher] found Student had taken her pants off and had feces in her hand.

59. Student grabbed [Middle School Teacher]’s arm with her feces covered hand causing [Middle School Teacher] to withdraw from the seclusion/break room and

briefly close the door before opening a crack in the door to maintain visual contact with Student.

60. Student preceded to hit the door with her feces covered hand, smeared feces on walls, door window, and herself.

61. [Paraprofessional] switched with [Middle School Teacher] when [Paraprofessional] was done feeding the other student. [Paraprofessional] provided wipes and instructed Student on how to start cleaning herself.

62. [Paraprofessional] attempted to go in to the seclusion/break room to help, but immediately had to leave as Student attempted to kick and bite [Paraprofessional].

63. During the time in the seclusion/break room Student was throwing feces; rolling on the ground in the feces; pacing; crying; repeating phrases; smearing feces on herself and the walls, ground, and door; and scooting herself along the floor.

64. [Middle School Teacher] and [Paraprofessional] credibly testified the door was cracked, partially open, or briefly closed but did not lock the door throughout Student's time in the seclusion/break room on March 3, 2020.

65. When Student had calmed, [Paraprofessional] asked for Student to give [Paraprofessional] her hands while [Middle School Teacher] wrapped a towel around Student.

66. Other School staff cleared the hallway from the room to the locker room while [Middle School Teacher] and [Paraprofessional] escorted Student to locker room while holding Student's hands so that she would not remove towel.

67. [Middle School Teacher] and [Paraprofessional] directed Student in the shower to clean the feces from her hair and body while noting the red mark on Student's lower back.

68. [Middle School Teacher] and [Paraprofessional] provided Student her extra set of clean clothes and Student returned to class where she stayed for the remainder of the day.

69. The entire incident lasted for approximately fifteen minutes.

70. No Restraint/Seclusion report was created as the seclusion/break room door was not held shut and Student was not prevented from leaving at any time.

71. Complainant took Student to the doctor on March 4, 2020 for the red mark.

72. A Child Protection Services investigation was initiated on March 5, 2020 and resulted in no charges filed. Ex. 6

73. A police report investigation was initiated on March 5, 2020 and resulted in

no charges filed. Ex. 5.

74. The ALJ finds as fact that the seclusion/break room door was partially open or closed without being locked for the duration of the incident.

75. The ALJ finds as fact the District's restraint and seclusion policy was followed and Student's BIP was followed.

Request for Independent Education Evaluation

76. On January 12, 2021, Complainant signed a consent form to reevaluate Student in the areas of Communicative Status, Social and Emotional Status, and Motor abilities. The proposed reevaluation is stated to be "based on formal and informal data including previous evaluations, teacher and parent reports, and current educational performance determined by observation and current grade status." Ex. E.

77. As a result of the evaluation, the District prepared an evaluation report and reviewed the information at an IEP meeting on February 5, 2021, where the IEP team, including the Complainant, determined Student remained eligible for services and no change was made to Student's identified disabilities. Ex. F and H.

78. The Evaluation report contained the following evaluation data:

- a. Expressive One Word Picture Vocabulary Test by Student's Speech Pathologist from January 13, 2021;
- b. Receptive One Word Picture Vocabulary Test by Student's Speech Pathologist from January 13, 2021;
- c. Function Communication Profile – Revised by Student's Speech Pathologist from February 2, 2021;
- d. ABAs with General Adaptive Composite and Adaptive Domain Scores from District staff and Complainant from January 27, 2021;
- e. Classroom observations from Student's Occupational Therapist on February 3, 2021;
- f. A review of goal progress by Student's teachers and service providers; and
- g. Evaluation Summary completed by Student's teachers and service providers.

79. On February 21, 2021, Complainant signed consent to evaluate regarding a Functional Behavior Assessment (FBA) for the areas of Social and Emotional Status. FBA included a parent interview, observation by a school psychologist and teacher input.

80. A new BIP was created on March 9, 2021 and signed by Student's IEP

team, including Complainant. Ex. Q.

81. Complainant participated in the IEP meetings reviewing the evaluation data and revising the IEP and BIP. Complainant also signed both IEP and BIP for 2021. Complainant did not raise any concerns regarding the evaluations, the IEP, or the BIP at either meeting.

82. On April 12, 2021, Complainant's attorney emails the following to request for an Independent Educational Evaluation (IEE). The email in its entirety is "[m]om is requesting an IEE in this matter. What is the district's position?"

83. Upon receipt of the request for the IEE, Director of Integrated Services, [Director] reviewed the evaluation materials, spoke with the staff involved, and made a determination the evaluations were appropriate and sufficient to address the specific needs of Student.

84. On April 30, 2021, the District notified Complainant's attorney that it decided to file a due process hearing request regarding the IEE request.

85. On May 7, 2021, the District filed its Due Process Request regarding the IEE request.

86. The District's IEE criteria requests parents to identify each assessment and determinations in which they disagree. Ex. VV.

87. The District's Director of Integrated Services determined the evaluations conducted for Student's reevaluation were comprehensive and sufficient and thus denied the request for IEE at the District's expense.

88. In the Complainant's pleadings file regarding the District's Due Process hearing request, she does not identify the evaluations that were not completed or insufficient and does not provide a reason for the requested IEE.

89. Complainant has not raised any concerns regarding the content to the 2021 IEP or BIP.

90. The ALJ finds as fact the District responded to the IEE request in less than two weeks and filed the Due Process hearing request within three weeks.

91. The ALJ finds as fact and concludes the District's January, February, and March 2021 evaluations were sufficiently comprehensive and tailored to the specific needs of Student.

CONCLUSIONS OF LAW AND DISCUSSION

Complainant asserts that District violated the IDEA, 20 U.S.C. Section 1400, *et. seq.*, and accompanying regulations at 34 C.F.R. Section 300, *et. seq.*, and the Colorado Exceptional Children's Educational Act (CECA), Colo. Rev. Stat. Section 22-20-101, *et. seq.*, and accompanying regulation at 1 CCR Section 301-8, *et. seq.*, by failing to provide a FAPE. More specifically, Complainant alleges that District failed to provide a FAPE by failing to implement Student's Behavior Intervention Plan, a part of Student's Individualized Education Program, and the District failed to respond to its request for an Independent Educational Evaluation without unnecessary delay.

The burden of proof in an IDEA challenge rests with the party challenging a deficiency in the school district's efforts. *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008). In this case, Complainant has the burden of proving all the alleged violations as pled in her complaint and that she is entitled to relief as provided for in the IDEA. The District has the burden of proving its request.

Free Appropriate Public Education (FAPE)

The IDEA defines a FAPE as

- special education and related services that -
- (a) Are provided at public expense, under public supervision and direction, and without charge;
 - (b) Meet the standards of the SEA, including the requirements of this part;
 - (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
 - (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

34 C.F.R. Section 300.17.

In *Board of Ed. Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 186 (1982), the United States Supreme Court held that the appropriateness of a public entity's actions under the IDEA are to be determined according to the following two-fold standard: "First, has the state complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* at 206-207. In 2017, in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 580 U.S. ___, 137 S. Ct. 988 (2017), the Supreme Court provided further guidance to determine whether an IEP is reasonably calculated to enable Student to make progress in light of his circumstances. The qualification that an IEP is "reasonably calculated" to enable progress reflects:

A recognition that crafting an appropriate program of education requires a prospective judgment by school officials [and] contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by input of the child's parents or guardians. Any review of the IEP must appreciate that the question is whether the IEP is *reasonable* not whether the court regards it as ideal.

Id. at 999 (citations omitted).

Colorado defines restraint in the Colorado Protection of Persons from Restraint Act (PPRA). Restraint means "any method or device used to involuntarily limit freedom of movement, including but not limited to bodily physical force, mechanical devices, chemicals, and seclusion." 1 CCR 301-45, 2220-R-2.00(8)(c); Colo. Rev. Stat. Section 26-20-101. The PPRA further defines a physical restraint as ". . . the use of bodily, physical force to involuntarily limit an individual's freedom of movement." 1 CCR 301-45, 2220-R-2.00(8)(c). The PPRA excludes the use of "[m]inimal physical contact for the purpose of safely escorting a student from one area to another" from the definition of physical restraint. 1 CCR 301-45, 2220-R-2.00(8)(c)(iii). "Seclusion" means "the placement of a student alone in a room from which egress is involuntarily prevented." 1 CCR 301-45, 2220-R-2.00(9).

Complainant does not argue Student's February 2020 IEP was not reasonably calculated to benefit Student and meet her specific needs, but rather Complainant alleges the incident on March 3, 2020 resulted in the failure to implement Student's BIP and consequently, resulted in Student not receiving educational services. This Court must review whether the District failed to implement the BIP and if the related actions resulted in Student not receiving educational services for the remainder of the school year following the March 3, 2020 incident and thus, denied Student a FAPE. The Court concludes Complainant has not met her burden.

Complainant argues the District failed to implement Student's BIP during the March 3, 2020 incident. Student's BIP included interventions to attempt prior to escalation of behavior. Student only recently began soiling herself and recently began stating "poop in pants" as a means to be able to leave school or end an undesirable task. On March 3, 2020, Student's behavior happened to occur when staff here involved with other students. However, the District staff still utilized the de-escalation techniques in Student's BIP and those that were regularly used in the classroom, including visual timer and requests for Student to follow staff directions. The ALJ concludes the District did not fail to follow Student's BIP. Additionally, the incident on March 3, 2020 lasted approximately fifteen minutes and Student returned to class for the remainder of the day. The ALJ concludes the incident itself did not deny Student a FAPE as the March 3, 2020 incident did not impede Student's right to FAPE, did not significantly impact Complainant's opportunity to participate in the decision making process, or did not cause a deprivation of benefit.

Additionally, Complainant argues that at the March 9, 2020 meeting, she informed the District she did not want contact with [Middle School Teacher] because she was

concerned about Student's safety and that the District agreed with her request. The evidence does not support the Complainant's argument. The evidence demonstrates that the Complainant was provided several options on how to proceed at the March 9, 2020 meeting, one of which was to change teachers, which would also require a change of school building. Additionally, less than two weeks after the March 3, 2020 incident, the entire District switched to remote learning due to the COVID-19 pandemic and thus, classroom safety would no longer have been an issue when no teachers or students were physically in the classroom. Additionally, numerous individuals, including [Middle School Teacher] and classroom paraprofessionals attempted to contact Complainant and continue educational services remotely and Complainant either failed to respond or gave an excuse as to why Student would not be available.

The District was clearly operating under the assumption that Student's educational services were continuing with Student's same teacher, [Middle School Teacher]. Additionally, Complainant's own language in emails following the March 9, 2020 meeting start with "suggested" no contact with [Middle School Teacher] to "decided" [Middle School Teacher] would not be involved with Student, thus, demonstrating Complainant impression of the involvement of [Middle School Teacher] with Student evolved over time. Finally, if [Middle School Teacher] was in fact the issue with Student attending classes for the remainder of the 2019-2020 school year, then the same non-attendance at school would not have continued as it did into the 2020-2021 school year when Student was at a new school with a new teacher. While Complainant described a number of issues with Student starting school back, the ALJ is unpersuaded by the vague descriptions of Student not wanting to attend school without context or timeframe.

The ALJ concludes District did not cause Student to not receive educational services following the March 3, 2020 incident until the end of 2019-2020 school year. The Complainant's unilateral decision that Student would not participate in virtual sessions with [Middle School Teacher] was the cause of the lost educational services and since there was no agreement to remove [Middle School Teacher] as Student's teacher was not the result of a broken agreement. Complainant choose to keep student home from March 4 through March 11, 2020 and did not connect Student to virtual learning when it started in April 2020. The ALJ concludes unilateral decisions made by the Complainant without any agreement regarding a change in teacher by the District resulted in Student not participating in most of the educational services being offered by the District from March 2020 through the end of the 2019-2020 school year. Therefore, the ALJ concludes Student's non participating in educational services was not the result of the District's actions and the District did not impede Student's right to FAPE, did not significantly impact Complainant's opportunity to participate in the decision making process, or did not cause a deprivation of benefit.

Independent Education Evaluation

The District's requests this Court to determine whether it conducted a comprehensive evaluation in 2021 and thus appropriately denied Complainant's request for IEE at public expense. Complainant asserts District failed to provide a comprehensive educational evaluation and did not respond to Complainant's request without unnecessary delay or initiate the IEE process. Complainant contends that District failed to do so, violating IDEA, 34 C.F.R. Section 300.502 and ECEA, 1 CCR Section 301-45, 2220-R-2.00 (8). The District contends it is in compliance with IDEA and ECEA regarding the evaluations and its response to the IEE request.

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either -

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

34 C.F.R. Section 300.502. The regulations do not define unnecessary delay. The ALJ concludes that less than two weeks between the request for the IEE and District responding to Complainant it intended to file a Due Process request is not unnecessary delay and three weeks before it filed its Due Process request is not unnecessary delay.

The ALJ must determine whether the evaluation conducted by the District was sufficient comprehensive to identify Student's disability and services necessary to address Student's specific needs. 34 C.F.R. Section 300.304. The evaluations that occurred in January through March 2021 were part of Student's triannual review or a re-evaluation. Complainant has not raised, nor has evidence demonstrated, that Student had new or different disabilities and thus the re-evaluation was not conducted with the intent to discover or identify any new disabilities. The re-evaluation was to assess and measure Student's current disability and needs to determine the specific services to Student's current needs and abilities. IDEA does not specify which evaluations are required during the re-evaluation process, but rather, it allows students' IEP team to determine what kinds and types of evaluations are necessary. Evaluations can include formal (scientifically based instruments measuring cognitive and behavioral functioning) or informal (observation and personal experience contributions) and must include existing data, past evaluations, parental input, and observation. See 34 C.F.R. Sections 300.304 & 300.305

The IEP team, including Complainant, met to discuss and determine appropriate evaluations to be conducted, met to review the evaluation results, and modified both Student's IEP and BIP utilizing the evaluation data. Complainant has not raised any concerns regarding the contents and services in the IEP and BIP developed as a result of the 2021 re-evaluation. The ALJ is still unclear as to whether Complainant had any specific concerns about the evaluations that were conducted or what areas of needs were not evaluated. The Court concludes District met its burden that the evaluations were sufficiently comprehensive to identify Student's disability and service needs. Thus, the Complainant is not entitled to an IEE at public's expense.

Conclusion

The ALJ concludes the District's actions did not result in the denial of Free Appropriate Public Education to Student from March 2020 through the end of the school year. The ALJ further concludes the District conducted sufficient educational evaluations tailored to the specific needs of Student and thus, the Complainant is not entitled to an Independent Educational Evaluation at the public expense. Therefore, District is not responsible for providing compensatory educational services or Independent Educational Evaluation at public expense.

ORDER

The ALJ concludes that Complainant failed to meet his burden of proof establishing that District violated the IDEA and ECEA and failed to provide Student with FAPE. The

District met its burden that its evaluation was sufficiently comprehensive and the ALJ does not order an IEE at public expense. No relief is warranted and the complaint filed by the Complainant is dismissed and the District's is founded and sustained.

This Decision is the final decision, except that any party has the right to bring a civil action in an appropriate court of law, either federal or state, pursuant to 34 C.F.R. Section 300.516.

DONE AND SIGNED this 18th day of March 2022

/s/ HEIDI L. KUTCHER
Administrative Law Judge