

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

State-Level Complaint 2023:625
Arapahoe County School District 5

DECISION

INTRODUCTION

On December 21, 2023, the foster parent (“Foster Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Arapahoe County School District 5 (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified four allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

The SCO extended the 60-day investigation timeline twice due to exceptional circumstances, consistent with 34 C.F.R. § 300.152(b)(1).

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. § 300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from December 21, 2022 to the present for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

1. Whether the District denied Student a Free Appropriate Public Education (“FAPE”) because the District:

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

- a. Conditioned delivery of Student’s FAPE on Foster Parent signing a liability waiver for nursing services from August 2023 to present, in violation of 34 C.F.R. §§ 300.1, 300.101(a).
 - b. Failed to develop an IEP that was tailored to Student’s individual needs from August 2023 to present, specifically by:
 - i. Failing to include school health services and school nurse services designed to enable Student to receive a FAPE, in violation of 34 C.F.R. §§ 300.34(c)(13); 300.320(a)(4)(ii)-(iii); and
 - ii. Failing to consider the concerns of Foster Parent related to delegation of Student’s school health services or school nurse services to unlicensed assistive personnel, in violation of 34 C.F.R. § 300.324(a)(1)(ii).
2. Whether the District systematically denied similarly situated students a FAPE because the District:
- a. Conditioned delivery of students’ FAPE on parents or guardians signing a liability waiver for nursing services from August 2023 to present, in violation of 34 C.F.R. §§ 300.1, 300.101(a).
 - b. Failed to develop IEPs that were tailored to students’ individual needs from August 2023 to present, specifically by:
 - i. Failing to include school health services and school nurse services designed to enable students to receive a FAPE, in violation of 34 C.F.R. §§ 300.34(c)(13); 300.320(a)(4)(ii)-(iii); and
 - ii. Failing to consider the concerns of parents related to delegation of students’ school health services or school nurse services to unlicensed assistive personnel, in violation of 34 C.F.R. § 300.324(a)(1)(ii).

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,² the SCO makes the following FINDINGS:

A. Background

1. Student is a third grader who resides with Foster Parent in the District’s boundaries. *Interview with Foster Parent*. Though she enrolled in a District elementary school (“School”) for the

² The appendix, attached and incorporated by reference, details the entire Record.

2023-2024 school year, Student has yet to attend school in the District. *Id.* She currently participates in an online charter school offered by another district. *Id.*

2. Student qualifies for special education and related services under the disability category of Multiple Disabilities. *Exhibit A*, p. 1. Specifically, she is eligible under the categories of Intellectual Disability, Orthopedic Impairment, Other Health Impairment, and Speech or Language Impairment. *Id.*
3. Student was born with spina bifida and is paralyzed below the waist. *Exhibit C*, p. 1. She relies on a wheelchair for mobility. *Id.* Due to her paralysis, Student needs to be catheterized on a regular schedule. *Id.* Student depends on a gastrostomy tube (“G-Tube”) for hydration and nutrition. *Id.* At an early age, Student had hydrocephalus and had a shunt placed to relieve the pressure on her brain. *Id.*
4. Student’s medical history includes numerous other surgeries, as well as several chronic urinary tract infections (“UTIs”). *Id.*; *Interview with Foster Parent*. These UTIs damaged Student’s kidneys, and she now has chronic kidney disease. *Exhibit C*, p. 1; *Interview with Foster Parent*. Further damage to Student’s kidneys could result in her needing dialysis. *Complaint*, p. 5; *Interview with Foster Parent*.
5. Despite these health challenges, Student is a happy young lady with a big smile. *Id.* She loves being around people and enjoys playing with dolls. *Interview with Foster Parent*. Academically, Student performs significantly below grade level. *Id.*; *Exhibit A*, p. 5. Student’s education has been inconsistent due to her medical needs and the COVID-19 pandemic. *Interview with Foster Parent*.
6. The Department of Human Services from a neighboring state has custody of Student and placed her in the care of Foster Parent. *Interviews with Caseworker and Foster Parent*. At all times relevant to the Complaint, Foster Parent served as Student’s parent under the IDEA and held educational decision-making authority. *Id.* The Department of Human Services retained medical decision-making authority. *Id.*

B. Student’s Prior District

7. During the 2022-2023 school year, Student lived with different foster parents and went to school in another district (“Prior District”). *Interview with Foster Parent*. Student attended her prior school (“Prior School”) in person. *Id.*; *Response*, p. 5.
8. Her IEP included an Individual Healthcare Plan (“IHP”) to ensure Student’s medical needs were met during the school day. *Interview with Foster Parent*; *Exhibit C*, p. That IHP identified three medical needs at school: safety care for Student’s spina bifida (including catheterization as required), monitoring of Student’s shunt, and avoiding latex exposure. *Exhibit B*, pp. 1-3.

9. At Prior School, Student's then-foster parents performed her catheterization. *Interview with Foster Parent; Exhibit C*, p. 1. At times, the procedure was completed by a parent of another student with spina bifida whom Student's prior foster parents trusted. *Interview with Foster Parent*. Student's medical services were not delegated to Prior District staff members. *Id.; Exhibit C*, p. 1.
10. In March 2023, Student underwent a Mitrofanoff procedure. *Interview with Foster Parent*. During this procedure, surgeons created a channel from outside Student's abdomen to her bladder. *Id.; Complaint*, p. 5; *Interview with CDE Consultant; see also CDE Exhibit 1*. A catheter can be placed through this channel—which looks like an extra belly button—to drain Student's bladder. *Interviews with CDE Consultant and Foster Parent; CDE Exhibit 1*. Previously, a catheter had to be placed in Student's urethra several times a day. *Interview with Foster Parent*.
11. Student's recovery from this procedure kept her from returning for the remainder of the 2022-2023 school year. *Id.* Student went to Prior School only for a few days to say goodbye to her classmates. *Id.*

C. Student's Enrollment in the District

12. In June 2023, Student began residing with Foster Parent. *Interview with Foster Parent*. No later than August 3, 2023, the District knew Student would be attending school in the District during the 2023-2024 school year. *Exhibit H*, p. 145; *Interview with Foster Parent*. On that day, Foster Parent forwarded a copy of Student's IHP from Prior District to District staff. *Exhibit H*, p. 145.
13. At the time Student enrolled in the District, her most recent IEP was dated March 20, 2023 and her IHP was from February 7, 2022. *Exhibit A*, pp. 1-19; *Exhibit B*, pp. 1-3. The existing IHP was developed before Student had the Mitrofanoff and, therefore, did not address her current needs. *Interviews with Director of Health Services and Foster Parent; Exhibit H*, p. 128. At that time, the District began to gather more information regarding Student's health needs. *Interview with School Nurse*.
14. Student's existing IEP—which was later adopted by the District—required her to receive the following special education and related services:
 - Specialized Instruction: 1,128 minutes per week of direct specialized instruction provided by a special education teacher outside the general education classroom.
 - Physical Therapy: 60 minutes per month of direct physical therapy provided by physical therapist outside the general education classroom.

- Speech/Language Services: 240 minutes per month of direct speech/language services provided by a speech language pathologist outside the general education classroom.
- Occupational Therapy: 120 minutes per month of direct occupational therapy provided by an occupational therapist outside the general education classroom.

Exhibit A, p. 31.

D. Development of IHPs in the District

15. An IHP is a plan for a child—with or without a disability—developed by a nurse employed or contracted by the child’s school in conjunction with the child and parent or guardian and based on a practitioner’s medical orders. 3 Colo. Code Regs. § 716-1.13(B)(10).
16. Once the District becomes aware that a student has medical needs, the assigned school nurse gathers information on the student’s specific needs and seeks medical orders from the student’s providers. *Interview with Director of Health Services*. Depending on the parent’s preference, either District staff or the parent may contact the student’s practitioner. *Id.*
17. Because school nurses do not have prescriptive authority, the District cannot create an IHP without orders from a practitioner. *Id.* Physicians and physician assistants (among other medical professionals) have prescriptive authority in Colorado. *Interview with CDE Consultant*.
18. The practitioner may submit written medical orders in any format. *Id.* For example, the orders may be on a practitioner’s letterhead or on a District form. *Id.* Typically, school nurses send the District’s Permission for Nursing Procedures form (“Form”) to providers for convenience. *Id.*; *Interview with School Nurse*; see *Exhibit 1*, p. 2. That Form has space for a practitioner to write the medical orders for any procedure a student needs performed at school. *Id.*
19. Below the practitioner section, the Form states:

The school nurse is required by Colorado State Law to have this form signed by the parents and the physician of a student before nursing procedures can be provided at school. This information will also be used to develop an IHP (Individual Health Plan) for this student.

Id. at p. 2. A line for the practitioner’s signature follows. *Id.* During this investigation, the SCO asked the District to identify which “Colorado State Law” the Form referenced. See *Exhibit L*, pp. 1-2. The District cited the *Medication Administration Guidelines in the School and Child Care Settings*, published by the CDE, as well as C.R.S. §§ 12-255-131, 12-244-131, and 22-1-

119.3. *Id.* Both CDE’s *Guidelines* and the statutes concern *only* administration of medication and do not address performing nursing procedures whatsoever. *Id.*

20. Next, the Form contains the following waiver of liability:

I authorize this procedure to be performed by the school nurse or the nurse’s delegatee as directed above. I agree to provide the needed supplies for the procedure and understand that new forms must be completed annually or with any changes in the student’s health status. By signing this document, I give permission for the nurse or nurse designee to administer this procedure as prescribed and give my permission for this Health Care Provider to share information about this procedure with the Registered Nurse or nurse designee. *The undersigned parent(s) or guardian(s) hereby agree(s) to exempt and release [the District] and its directors, officers, employees, volunteers and agents, from any and all liability, claims, demands or actions whatsoever arising out of any damage, loss, or injury that my child or I/we might sustain or which they now have or may hereafter have arising out of the administration of this procedure.*

Id. (emphasis added). When questioned during this investigation, the District cited C.R.S. § 22-1-119 as the statutory basis for the liability waiver. *Exhibit L*, pp. 1-2. That statute, titled “Students—dispensing of drugs to—liability” states:

Any school employee who dispenses any drug, as such term is defined in section 12-280-103(16), to a student in accordance with written instructions from a parent or legal guardian shall not be liable for damages in any civil action or subject to prosecution in any criminal proceedings for an adverse drug reaction suffered by the student as a result of dispensing such drug.

C.R.S. § 22-1-119. As used in this part, “drug” includes “[s]ubstances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in individuals.” *Id.* § 12-280-103(16). The definition of “drug” does not extend to medical procedures. *See id.*

21. Throughout this investigation, the District indicated that practitioners are not required to submit medical orders on the Form. *Interviews with Director of Health Services and School Nurse*. Indeed, it is clear from the documentation in this case that the District accepted medical orders from Student’s practitioners that were not on the District’s Form. *See Exhibit D*, pp. 2-5.

22. Even if a practitioner submits medical orders on letterhead, the District “asks” parents to sign the Form. *Interview with Director of Health Services*. The parent’s signature serves as a double check that the orders are correct, as practitioners sometimes make mistakes. *Id.* If a parent does not sign the Form, the District will not perform the nursing procedures. *Id.*

23. Once the District has signed medical orders, the school nurse begins to develop the student's IHP. *Interview with Director of Health Services*. The school nurse reviews the medical orders and contacts the practitioner with any questions. *Id.*; *Interview with School Nurse*. Neither the Director of Health Services nor School Nurse referenced including a student's IEP Team in the IHP development process. *Interviews with Director of Health Services and School Nurse*.
24. The District has several Board policies that address student health services. *Exhibit G*, pp. 1-25. These policies relate to administration of medication, administration of first aid and emergency medical care, and anaphylaxis care. *Id.*
25. An additional Board policy—Policy JLCM—concerns access to District property for medically necessary treatment. *Exhibit G*, pp. 8-10. However, that policy relates to medically necessary treatment being performed by outside providers under contract with the District. *Id.* The policy contains a waiver which excuses the District from any liability for any medical treatment provided by the private provider. *Id.* This liability waiver applies only to outside providers and, therefore, does not provide a basis for the liability waiver contained in the Form. *See id.*; *Exhibit 1*, p. 2.

E. Delegation of Nursing Services

26. The Colorado Nurse and Nurse Aide Practice Act and its accompanying regulations governs delegation of nursing procedures in Colorado. *See* C.R.S. § 12-255-131; 3 Colo. Code Regs. 716-1.13.
27. The regulations specify the criteria for delegation:

Any nursing task delegated by the professional nurse or advanced practice nurse shall be:

- a. Within the area of responsibility of the Delegator;
- b. Within the knowledge, skills, ability, and scope of practice of the Delegator;
- c. Of a routine, repetitive nature and shall not require the Delegation to exercise nursing judgment or intervention;
- d. A task that a reasonable and prudent nurse would find to be within generally accepted nursing practice;
- e. An act consistent with the health and safety of the Client; and
- f. Limited to a specific Delegation, for a specific Client, and within a specific time frame, except for Delegation in Schools . . . as described in Section (F) of Rule 1.13.

3 Colo. Code Regs. 716-1.13(C)(1). As used in the regulations, “Delegator” refers to the school nurse, “Delegatee” refers to the individual to whom the school nurse delegates the task, and “Client” refers to the student. *Id.* §§ 716-1.13(B)-(C).

28. The school nurse is responsible for decisions regarding delegation, as well as training, evaluation, and supervision of the delegatee. *Id.* §§ 716-1.13(D)-(E).

F. Beginning of IHP Development Process

29. On August 7, 2023, School Nurse emailed Foster Parent requesting medical orders from Student’s practitioners for catheterization and care for Student’s G-Tube. *Id.* at p. 122. School Nurse attached the Form. *Id.*

30. Foster Parent immediately declined use of the Form. *Id.* As support for her position, Foster Parent stated:

Unfortunately, we can not [sic] use those forms as there will not be authorization given to delegate tasks. [Student] receives 24 hr nursing which has been ordered by her doctor and approved by the state of [C]olorado as a medical necessity. This level of care will need to be provided at school as well.

Id.

31. A couple days later, Director of Health Services contacted Foster Parent and offered to contact Student’s practitioners directly to obtain the medical orders. *Id.* at p. 121. At the same time, Director of Health Services cautioned that “[Student] is able to attend the first day of school without the medical orders, however, we will not be able to provide medical services and will be required to call you or 911 with any medical needs.” *Id.* Foster Parent did not respond to this email. *Id.* at p. 120.

32. On September 7, Student’s IEP Team convened to discuss her IEP. *Interview with Foster Parent; Exhibit E*, pp. 4-5. Foster Parent recalled discussion about Student’s medical needs and delegation of her services; however, at the time, the District had not yet received Student’s medical orders. *Interview with Foster Parent.; Exhibit D*, pp. 2-10.

33. Following the meeting, the District issued a Prior Written Notice (“PWN”) summarizing the IEP Team’s discussion of Student’s health needs. *Exhibit E*, pp. 4-5. The PWN acknowledged Foster Parent’s concern regarding delegation of Student’s nursing services. *Id.* In response, Director of Health Services indicated that “the Nurse Practice Act of Colorado allows for delegation of nursing duties by a registered nurse within the school setting and that [Student’s] needs can be met through delegation.” *Id.* at p. 5. Director of Health Services made this statement even though the District had not yet received Student’s medical orders,

and the District had no existing medical orders related to Student's Mitrofanoff. See *Exhibit D*, pp. 2-10; *Exhibit B*, pp. 1-3.

G. Student's Approval for Home Health Care

34. In Fall 2023, Student was approved for 24 hours of nursing care seven days per week through Medicaid. *Interview with Foster Parent; Exhibit 3*, pp. 2-3; *Exhibit 5*, pp. 1-13. This approval was based on a Home Health Certification and Plan of Care ("485 Plan") submitted by one of Student's physicians. *Exhibit 5*, pp. 1-13.
35. A 485 Plan sets forth all of a child's medical needs in the home setting. *Interview with CDE Consultant*. It is not limited to the care a child requires during the school day. *Id.* Depending on the child, the care identified in the 485 Plan may go beyond what is needed in a school setting. *Id.*
36. Information from medical providers—including a 485 Plan—should be considered by a child's IEP Team when developing the IHP. *Id.* However, the 485 Plan does not, alone, govern development of the IHP. *Id.*
37. Foster Parent argued the 485 Plan entitled Student to full-time nursing care while at school. *Interview with Foster Parent*. Foster Parent felt she should not have to choose between lesser care and education at School versus better care and no education at home. *Id.*

H. Student's Draft IHP and Dispute over Delegation

38. On September 7, Director of Health Services emailed copies of the Form, as well as other standard forms, to Caseworker. *Exhibit H*, p. 148-49. Director of Health Services indicated Caseworker would need to sign any orders the District received. *Id.*
39. On or around September 11, the District received copies of medical orders from Student's practitioner. *Exhibit D*, pp. 2-10. The orders were provided both on the practitioner's letterhead and the District's Form. *Id.*
40. Director of Health Services sent copies of the Form with practitioner's medical orders to Caseworker for signature on September 20. *Exhibit H*, pp. 141-42.
41. In the meantime, School Nurse began to draft an IHP for Student. *Interview with School Nurse; Exhibit B*, pp. 4-6. The draft IHP identified six health problems:

- Risk for impaired skin integrity related to paralysis and neurogenic bowel/bladder;
- Risk for infection related to neurogenic bowel/bladder and altered urinary elimination;
- Risk for injury related to shunt failure;

- Potential for impaired nutrition related to G-Tube and kidney failure;
- Potential for complications related to G-Tube feedings; and
- Risk for latex allergy response.

Id. The draft IHP delegated Student’s care to unidentified School staff. *Id.* For example, for catheterization, the IHP stated that Student needed “[c]atheterization via Mitrofanoff every 3 hours or as ordered by physician. . . . Follow student-specific delegation document as provided by RN.” *Id.* at p. 4.

42. The draft IHP was not developed by or in conjunction with Student’s IEP Team. *Interview with School Nurse.*
43. On November 1, Director of Health Services reached out to Caseworker and reiterated that she needed her to sign the Forms so Student could receive nursing procedures at School. *Exhibit H*, pp. 141-42. Caseworker’s Supervisor responded that same day, expressing concern about Student’s medical needs being met at School. *Id.* at p. 140. Supervisor asked the District to provide information about how School intended to meet Student’s medical needs: “Who will be providing care, does the school have all needed medical supplies, what training will be provided?” *Id.*
44. Director of Health Services sent another copy of the Form for signature, along with the draft IHP, to Caseworker and Supervisor on November 3. *Id.* at pp. 138-39. In that email, Director of Health Services stated: “I am also attaching again the form from our district that we need the medical guardian to sign so that we can attach it to the providers[’] orders with the ability to implement them at school.” *Id.* According to the District’s documentation, this was the first time a draft IHP was provided to Caseworker. *Id.* at pp. 1-155. Nothing in the record shows that the draft IHP was ever provided to Foster Parent, and Foster Parent asserted that she only received a copy from Caseworker. *Id.*; *Interview with Foster Parent.*
45. On November 6, Supervisor responded and declined to sign the Form. *Exhibit H*, pp. 137-38. Supervisor indicated the draft IHP did “not adequately address [Student’s] medical needs.” Specifically, she expressed disagreement with the draft IHP’s proposal to delegate Student’s care to a lay staff member. *Id.* Supervisor informed the District that Student would attend an “alternative educational program” until this dispute was resolved. *Id.*
46. The District’s Response asserted that the Caseworker only needed to sign the draft IHP. *Response*, p. 15. However, based on the email correspondence referenced above, the District insisted upon Caseworker signing the medical orders in addition to the IHP. *Exhibit H*, pp. 137-42. District staff never told Caseworker or Foster Parent that the Form was optional or that Student could receive services if they merely signed the IHP. *Interviews with Caseworker and Foster Parent; Reply*, p. 2. As late as December 6, District’s Counsel informed Foster Parent’s Counsel that Caseworker “will still need to sign those orders if the nurse is going to provide any medical services at [the District], during any part of the day.” *Exhibit 9*, p. 2.

47. On December 5, Foster Parent disenrolled Student from the District. *Response*, p. 17. At that point, Student had not attended school at all during the 2023-2024 school year. *Interview with Foster Parent*. Since December, Student has been attending an online charter school offered by another school district. *Id.* Foster Parent hopes that Student can return to School in the District once the dispute over Student’s nursing services has been resolved. *Id.*

I. Similarly Situated Students

48. The Form was used throughout the District between December 2022 and the present. *Interview with Director of Health Services*.

49. During this investigation, the District surveyed all school nurses to identify any similarly situated students who were impacted by the District’s use of the Form. *See Exhibit M*, pp. 1-9. The survey asked school nurses to recall any student whose parent, guardian, or caregiver refused to sign the Form between December 2022 and December 2023. *Id.*

50. Other than Student, the surveyed school nurses recalled only one other student whose parent refused to sign the Form. *Id.* at p. 8. That parent declined to sign the Form for reasons unrelated to this investigation. *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation Nos. 1(a) and 2(a): The District improperly conditioned Student’s FAPE on Case Worker or Foster Parent signing a liability waiver, in violation of 34 C.F.R. §§ 300.1(a) and 300.101(a). This violation resulted in a denial of FAPE. Additionally, this violation extended to similarly situated students in the District.

The first allegation in the Complaint relates to the District’s use of the Form. Foster Parent alleges that the District conditioned Student’s receipt of a FAPE on Caseworker or Foster Parent agreeing to the liability waiver contained in the Form.

A. Student’s Entitlement to Related Services

The primary purpose of the IDEA is to ensure that children with disabilities receive a FAPE that meets their individualized needs. 34 C.F.R. §§ 300.1(a), 300.17, 300.101(a). The IEP is “the centerpiece of the statute's education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. 386, 391 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)).

As used in the IDEA, “related services” refers to the services a child with a disability needs “to benefit from special education.” 34 C.F.R. § 300.34(a). School health services and school nurse services are related services. *Id.* School health services and school nurse services are both “health services that are designed to enable a child with a disability to receive FAPE as described in the child’s IEP.” *Id.* § 300.34(c)(13). While a nurse provides school nurse services, school health services may be provided by either a school nurse or other qualified person. *Id.*

The U.S. Department of Education’s Office of Civil Rights (“OCR”) previously considered whether a school district’s use of a liability waiver violated Section 504 of the Rehabilitation Act of 1973 (“Section 504”). *Berlin Brothersvalley Sch. Dist.*, 353 LRP 9134 (OCR 1988). Section 504 is a civil rights law that prohibits discrimination based on disability. *Id.* In *Berlin Brothersvalley*, a student’s parents requested that the district administer medicine to the student when needed for an allergic condition. *Id.* The district required parents to complete a “Prescription Medication Consent Form” which included a liability waiver releasing the district from liability related to the administration of medication. *Id.* The parents completed the consent form but scratched through the liability waiver. *Id.* The District refused to accept the form and indicated it would not administer the medication without parents signing the liability waiver. *Id.* OCR found that Section 504 “contains no provision permitting a recipient to make an appropriate education contingent upon a release of liability from the parent.” *Id.* Requiring the liability waiver violated Section 504. *Id.*

A hearing officer reached a similar decision in a due process complaint in New Mexico. Like *Berlin Brothersvalley*, a New Mexico school district required parents to sign a liability waiver before it would administer medication to a student with an IEP. *In re: Student with a Disability*, 103 LRP 57786 (SEA NM 5/16/03). Citing the definition of a related service, the hearing officer found that “[n]o provision within the controlling federal regulations permits a district to make provision of an appropriate related service contingent upon a release of liability from the parent.” *Id.* The required liability waiver was “contrary to IDEA.” *Id.*

Here—not unlike the school districts in *Berlin Brothersvalley* or *In re: Student with a Disability*—the District made the Form a prerequisite for Student’s receipt of related services at School. (FF #s 21-22, 29-31, 38-46.) The Form, which the District used to gather medical orders from practitioners, contained a liability waiver, relieving the District of any responsibility arising from the administration of the medical order. (FF #s 18-20.) The District repeatedly told Caseworker and Foster Parent that the District could not develop an IHP or provide Student health services until the waiver was signed. (FF #s 29-31, 38-46.) Though the District received medical orders from Student’s practitioner in early September, the District did not provide a draft IHP to Caseworker until early November. (FF #s 39-44.) The Findings of Fact imply that the District delayed developing Student’s IHP while it awaited a signature on the Form and, thus, agreement to the liability waiver. (*See id.*)

School districts are free to write their own policies and procedures; however, a district may not use those policies and procedures to avoid responsibility under the IDEA. *See El Paso Cty Sch.*

Dist. 49, 121 LRP 3227 (SEA CO 06/01/21). To the extent a school district’s policies and procedures create artificial barriers that prevent students with disabilities from accessing the special education and related services guaranteed to them by the IDEA, those policies are violative of the IDEA. *Id.* Though the District here argued that the liability waiver sought to relieve the District of liability for medical orders it did not create, this argument does not hold water. (FF # 20.) The waiver seeks to eliminate any responsibility the District may have “arising out of the *administration* of the procedure.” (*Id.*) This language goes far beyond simply releasing the District from liability based on incorrect or inadequate medical orders received from a practitioner.

In this case, District improperly relied on completion of the Form to sidestep its responsibilities under the IDEA. The Form’s liability waiver lacks support from the IDEA or its implementing regulations and contradicts the spirit of the IDEA. For these reasons, the SCO finds and concludes that the District improperly conditioned Student’s FAPE on a liability waiver, in violation of 34 C.F.R. §§ 300.1(a) and 300.101(a). As a result of its reliance on the liability waiver, the District never truly offered Student the related services she required to access her special education. Even though District staff discussed her medical needs and drafted an IHP, those services were not available to her because the liability waiver had not been signed. Therefore, the SCO finds the District’s violation to be substantive in nature. *See Singletary v. Cumberland Cty. Schs.*, No. 5:12-CV-744-FL, 2016 WL 8711336 (E.D. N.C. Feb. 12, 2016) (“Substantive violations occur when there is a deficiency in what the school system offers as services for the child, thereby preventing the child from receiving a FAPE.”)

B. Similarly Situated Students

Foster Parent’s Complaint asserted that the District systemically conditioned receipt of FAPE on parents or guardians signing a liability waiver for nursing services. The Form was utilized throughout the District during the relevant time period. (FF # 48.) Mere use of the Form—even if parents and guardians did not object—still had the effect of conditioning receipt of FAPE on signing a liability waiver. As a result, the SCO finds and concludes that the District’s violation of 34 C.F.R. §§ 300.1(a) and 300.101(a) was systemic.

However, whether any additional students were impacted is a different question. Based on the survey completed by the school nurses, no similarly situated students were denied a FAPE based on the District’s use of the Form. (FF #s 49-50.) None of the nurses recalled a student’s parent refusing to sign the Form based on the liability waiver. (*Id.*) Therefore, the SCO does not need to award any remedies for any other students in the District.

The lack of tangible impact on similarly situated students does not diminish the significance of the District’s violation. Other parents may have had concerns about the District’s use of the Form but felt compelled to sign in order for their child to receive the related services he or she needed to access their education.

Conclusion to Allegation Nos. 1(b) and 2(b): The District failed to develop an IEP that was tailored to Student’s individual needs in Fall 2023, in violation of 34 C.F.R. §§ 300.320(a)(4) and 300.324(a). This violation resulted in a denial of FAPE. Additionally, this violation extended to similarly situated students in the District.

The second allegation in the Complaint concerns the development of Student’s IEP. Foster Parent’s concerns are two-fold. First, Foster Parent argues the District failed to include school health services and school nurse services in Student’s IEP. Second, Foster Parent contends the District failed to consider her concerns regarding delegation of Student’s services when developing Student’s IEP.

The IDEA requires a school to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with the IDEA’s procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Id.* Taken together, these two prongs assess whether an IEP is procedurally and substantively sound.

A. IEP Development Process

i. Health-Based Related Services

In developing an IEP, the IEP Team must consider the strengths of the child, the parent’s concerns, evaluation results, and “the academic, developmental, and functional needs of the child.” 34 C.F.R. § 300.324(a)(1). An IEP is required to identify the related services to be provided to enable the child to: (i) advance appropriately toward annual goals; (ii) to be involved in and make progress in the general education curriculum; and (iii) to be educated and participate with other students with and without disabilities. *Id.* § 300.320(a)(4).

As noted above, related services include school health services and school nurse services. *Id.* § 300.34(a). These are “health services that are designed to enable a child with a disability to receive FAPE as described in the child’s IEP.” *Id.* § 300.34(c)(13). While a nurse provides school nurse services, school health services may be provided by either a school nurse or other qualified person. *Id.*

Here, it is undisputed that Student’s IEP never identified the school health services or school nurse services that Student needed to access her education. (FF #s 32-33, 45.) Even though her IEP Team recognized Student’s need for health-based related services, the District’s insistence on Caseworker or Foster Parent signing the liability waiver delayed development of Student’s

IHP. (FF #s 38-46.) Even after School Nurse drafted the IHP, the parties reached an impasse over which services were delegable, and Student’s IHP was never finalized. (FF #s 44-46.)

Moreover, School Nurse determined Student’s need for health-based related services outside of an IEP Team meeting and without involving Student’s IEP Team. (FF #s 41-42.) School Nurse independently reviewed Student’s medical orders and drafted the IHP. (*Id.*) Though a draft was provided to Caseworker for review, the District did not convene Student’s IEP Team to review or discuss the draft. (FF #s 41-42, 44-45.)

No authority suggests that decisions about health-based related services are exempt from the IEP Team process. Indeed, the IDEA’s requirements make clear that a Student’s related services must be determined by an IEP Team. *See* 34 C.F.R. §§ 300.320(a)(4) (requiring an IEP to identify the related services needed) and 300.320(a) (specifying that an IEP be developed in accordance with §§ 300.320-300.324, which includes the IEP Team requirements); *see also Sch. Dist. of Philadelphia*, 114 LRP 17099 (SEA PA 03/24/14) (implying that IEP Team has power to determine Student’s need for nursing services by stating that the “Student’s IEP Team may reconsider the need for a full time nurse if the Student’s placement changes in future IEPs.”)

Under the first prong of the *Rowley* standard, the SCO finds and concludes that IEP development process did not comply with the IDEA’s procedural requirements. Student’s IEP never identified the health-based related services she needed and her IHP was never finalized. Additionally, the IHP was improperly developed outside of an IEP Team meeting. Therefore, Student’s IEP did not satisfy the first prong of the *Rowley* test in this respect.

ii. *Consideration of Foster Parent’s Concerns*

An IEP Team must consider the parent’s concerns and the academic, developmental, and functional needs of the child” in developing the child’s IEP. 34 C.F.R. § 300.324(a)(1). Foster Parent argues the District’s use of the Form—which authorizes nursing procedures to be performed by a school nurse or the nurse’s delegatee—requires parents to consent to delegation before the District develops an IHP. Additionally, Foster Parent argues the District failed to consider Student’s 485 Plan and her concerns regarding Student’s medical needs when developing Student’s IHP.

Foster Parent asserts that Student’s 485 Plan—which entitles her to around the clock skilled nursing care at home—should inform Student’s IHP. (FF # 37.) By including a lesser standard of care in the IHP, Foster Parent felt she must choose between Student’s health care and her education. (*Id.*)

Though the 485 Plan should be considered in developing Student’s IHP, the 485 Plan alone does not determine which of Student’s services can be delegated. (FF # 36.) The 485 Plan specifies the level of care Student requires in a home setting and does not necessarily apply in a school setting, where a full-time nurse may be physically present to supervised delegated services. (FF # 35.)

Regardless, it is clear that Student’s IEP Team did not adequately consider Foster Parent’s concerns regarding delegation or the 485 Plan. Indeed, the IEP Team convened *before* the District had Student’s medical orders and did not reconvene to develop or even review the IHP. (FF #s 32-33, 42.) Though the District provided the draft IHP to Caseworker, nothing in the record shows that it was ever provided to Foster Parent. (FF # 44.) Instead, Foster Parent received a copy of the draft from Caseworker. (*Id.*) Foster Parent was not involved in the development of Student’s IHP. (FF #s 41-42.) For these reasons, the SCO finds and concludes that—under the first prong of *Rowley*—the development of Student’s IEP did not comply with the IDEA’s procedural requirements in this respect.

B. Substantive Adequacy of the IEP

The second prong of the *Rowley* standard considers whether the IEP was substantively appropriate by asking whether the IEP was reasonably calculated to enable the child to receive an educational benefit. Because Student’s IEP did not include health-based related services and her IEP was never finalized, her IEP was not reasonably calculated to enable her to receive an educational benefit.

For these reasons, the SCO finds and concludes that Student’s IEP was not tailored to her individual needs, resulting in a substantive violation of 34 C.F.R. § 300.320(a). *See Singletary v. Cumberland Cty. Schs.*, No. 5:12-CV-744-FL, 2016 WL 8711336 (E.D. N.C. Feb. 12, 2016) (“Substantive violations occur when there is a deficiency in what the school system offers as services for the child, thereby preventing the child from receiving a FAPE.”)

C. Similarly Situated Students

Foster Parent’s Complaint asserted that the District systemically denied other parents the opportunity to participate in development of their child’s IHP. During this investigation, both Director of Health Services and School Nurse indicated that IHPs are typically drafted by the assigned school nurse. (FF # 23.) Neither Director of Health Services nor School Nurse mentioned involving the IEP Team in the IHP development process or in decisions regarding delegation of services. (*Id.*) The Findings of Fact suggest that the District routinely develops IHPs outside of the IEP Team process and without involving parents or caregivers. (*Id.*) As noted above, no authority suggests that decisions about health-based related services are exempt, in any way, from the IEP Team process. For these reasons, the SCO finds and concludes that the District’s violation of 34 C.F.R. §§ 300.320(a)(4) and 300.324 was systemic.

Compensatory Education: This investigation demonstrates a need for compensatory services.

Compensatory education is an equitable remedy intended to place a student in the same position he would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education need not be an “hour-for-hour calculation.” *Colo. Dep’t of Ed.*,

118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child, and ensuring children receive the services to which they are entitled. *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010).

Here, the District committed several violations in developing Student's IEP and IHP that impacted Student's ability to access her education. First, the District conditioned Student's receipt of FAPE on Caseworker or Foster Parent signing a liability waiver, creating a barrier for Student to access the special education and related services to which she was entitled under the IDEA. Second, the District developed Student's IHP outside of the IEP Team process and without involving Foster Parent.

These violations completely deprived Student of access to her education between August 2023 and December 2023. (FF # 47.) During this period, Student did not receive specialized instruction or related services. (*Id.*) Thus, the SCO finds that Student is entitled to an award of compensatory services. An award of compensatory services is detailed in the Remedies section below.

REMEDIES

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

- a. Improperly conditioned Student's FAPE on Case Worker or Foster Parent signing a liability waiver, in violation of 34 C.F.R. §§ 300.1(a) and 300.101(a); and
- b. Failed to develop an IEP that was tailored to meet Student's individual needs, in violation of 34 C.F.R. §§ 300.320(a)(4) and 300.324(a).

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

1. Corrective Action Plan

- a. By **Friday, April 19, 2024**, the District shall submit to the CDE a corrective action plan ("CAP") that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm the District's timely correction of the areas of noncompliance.

2. Final Decision Review

- a. Director of Elementary Special Education, Director of Health Services, and all school nurses must review this Decision, as well as the requirements of 34 C.F.R. §§ 300.1(a), 300.101(a), 300.320(a)(4), and 300.324(a). This review must occur no later than **Friday, May 3, 2024**. A signed assurance that these materials have been reviewed must be completed and provided to the CDE no later than **Monday, May 6, 2024**.

3. Procedure Development

- a. By **Friday, May 10, 2024**, the District must submit written procedures or guidance to ensure compliance with 34 C.F.R. §§ 300.1(a), 300.101(a), 300.320(a)(4), and 300.324(a).
- b. At a minimum, these procedures must outline the process by which the District obtains medical orders from practitioners and include a revised version of the Form which removes any artificial barriers that prevent students from receiving a FAPE. Additionally, the procedures must detail how/when parents will be involved in the development of IHPs and how/when school health services and school nurse services will be discussed in an IEP Team meeting.
- c. The District must ensure that all special education case managers and school nurses receive a copy of the new procedures (including any accompanying forms) no later than **Friday, August 9, 2024**. Evidence that the procedures was shared with staff, such as a copy of the email notice sent, must be provided to the CDE no later than **Friday, August 16, 2024**.

4. Training

- a. All school nurses must attend and complete training provided by Director of Health Services on the District's procedures developed pursuant to paragraph 3 above. If Director of Health Services is no longer employed by the District, the District may substitute an individual occupying an identical role to demonstrate compliance with this remedy.
- b. The District will determine the time, date, and format of the training. The training may be conducted in person or through an alternative technology-based format, such as video conference, web conference, webinar, or webcast.
- c. Such training shall be completed no later than **Friday, August 9, 2024**. Evidence that this training occurred must be documented (i.e., training schedule(s), training materials, legible attendee sign-in sheets, or other form of documentation with

names, titles, and signed assurances that they attended the training) must be provided to the CDE no later than **Friday, August 16, 2024.**

5. IEP Team Meeting

- a. Following completion of Student's pending reevaluation but no later than **Friday, May 17, 2024,** the District must convene Student's IEP Team at a mutually agreeable date and time to determine Student's need for health-based related services and develop Student's IHP consistent with 34 C.F.R. §§ 300.320(a)(4) and 300.324(a).
 - i. If Foster Parent refuses to participate in the IEP Team meeting, the District may convene the meeting without her, provided that the District diligently attempts to secure her participation at a mutually agreeable time and place and documents such efforts. A determination that the District diligently attempted to secure the participation of Foster Parent rests solely with the CDE.
- b. By **Friday, June 7, 2024,** the District must provide notice of the IEP Team meeting, a signature page from the IEP Team meeting, and a finalized IEP and IHP to the CDE Special Education Monitoring and Technical Assistance Consultant.

6. Compensatory Education Services

- a. Student shall receive **100 hours of specialized instruction** provided by a District special education teacher, a District paraprofessional under the supervision of a District special education teacher, or through a contract between the District and a suitable provider at the District's expense. All 100 hours must be completed by **Monday, March 3, 2025.**
- b. Student shall receive **3 hours of direct physical therapy** provided by a District physical therapist or through a contract between the District and a suitable provider at the District's expense. All 3 hours must be completed by **Monday, March 3, 2025.**
- c. Student shall receive **12 hours of direct speech/language services** provided by a District speech language pathologist or through a contract between the District and a suitable provider at the District's expense. All 12 hours must be completed by **Monday, March 3, 2025.**
- d. Student shall receive **6 hours of direct occupational therapy** provided by a District occupational therapist or through a contract between the District and a suitable

provider at the District's expense. All 6 hours must be completed by **Monday, March 3, 2025**.

- e. By **Friday, June 14, 2024**, the District shall schedule compensatory services in collaboration with Foster Parent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. The District shall submit the schedule of compensatory services, to include the dates, times, and durations of planned sessions, to the CDE no later than **Monday, June 17, 2024**. If the District and Foster Parent cannot agree to a schedule by June 14, 2024, the CDE will determine the schedule for compensatory services by **Friday, June 28, 2024**.
 - i. The parties shall cooperate in determining how compensatory services will be provided. If Foster Parent refuses to meet with the District within this time, the District will be excused from delivering compensatory services, provided that the District diligently attempts to meet with Parent(s) and documents such efforts. A determination that the District diligently attempted to meet with Foster Parent, and should thus be excused from providing compensatory services, rests solely with the CDE.
 - ii. Foster Parent may opt out of some or all of the compensatory services.
- f. Monthly consultation between the provider(s) delivering compensatory services, Student's case manager, and Director of Elementary Special Education shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. The District must submit documentation that these consultations have occurred by **the second Monday of each month**, once services begin, until compensatory services have been completed. Consultation logs must contain the name and title of the provider and the date, the duration, and a brief description of the consultation.
- g. To verify that Student has received the services required by this Decision, the District must submit records or service logs to the CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service must be included in the service log.
- h. These compensatory services will be in addition to any services Student currently receives, or will receive, that are designed to advance her toward IEP goals and objectives. If for any reason, including illness, Student is not available for any

scheduled compensatory services, the District will be excused from providing the service scheduled for that session. If for any reason the District fails to provide a scheduled compensatory session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Foster Parent and notify the CDE of the change in the appropriate service log.

- i. These compensatory services must be provided to Student outside of the regular school day (such as before and/or after school, on weekends, or during school breaks) to ensure Student is not deprived of the instruction she is entitled to receive during the school day (including time in general education).

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

Colorado Department of Education
Exceptional Student Services Unit
Attn.: CDE Special Education Monitoring and Technical Assistance Consultant
1560 Broadway, Suite 1100
Denver, CO 80202-5149

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

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13. If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶13; *see also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 21st day of March, 2024.



Ashley E. Schubert
State Complaints Officer

APPENDIX

Complaint, pages 1-7

- Exhibit 1: Permission for Nursing Procedures Form
- Exhibit 2: Delegation Decision-Making Grid
- Exhibit 3: Private Duty Nurse Approval
- Exhibit 4: Healthcare Services in Schools Fact Sheet
- Exhibit 5: Home Health Certification & Plan of Care
- Exhibit 6: Draft IHP

Response, pages 1-28

- Exhibit A: IEP
- Exhibit B: IHP
- Exhibit C: Health Care Documentation
- Exhibit D: District Nursing Services Forms
- Exhibit E: PWNs
- Exhibit F: Notices of Meeting
- Exhibit G: Policies and Procedures
- Exhibit H: Correspondence
- Exhibit I: List of Staff with Knowledge
- Exhibit J: Verification of Delivery
- Exhibit K: Attendance Record
- Exhibit L: Supplemental Legal Information
- Exhibit M: Supplemental Systemic Information

Reply, pages 1-14

- Exhibit 7: OCR Decision
- Exhibit 8: Neighboring State SEA Decision
- Exhibit 9: Email Correspondence
- Exhibit 10: Verification of Delivery

CDE Exhibit 1

Telephone Interviews

- Caseworker: February 22, 2024
- Director of Elementary Special Education: February 13, 2024
- Director of Health Services: February 9, 2024
- Foster Parent: February 15, 2024
- School Nurse: February 9, 2024