

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

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**State-Level Complaint 2024:602**  
**Pueblo School District 60**

**DECISION**

**INTRODUCTION**

On October 17, 2024, the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> filed a state-level complaint (“Complaint”) against Pueblo School District 60 (“District”). The Colorado Department of Education (“CDE”) determined that the Complaint identified four allegations subject to its jurisdiction for the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.

The CDE’s goal in state complaint investigations is to improve outcomes for students with disabilities and promote positive parent-school partnerships. A written final decision serves to identify areas for professional growth, provide guidance for implementing IDEA requirements, and draw on all available resources to enhance the quality and effectiveness of special education services.

**RELEVANT TIME PERIOD**

The CDE has the authority to investigate alleged noncompliance that occurred no earlier than one year before the date the Complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, findings of noncompliance shall be limited to events occurring after October 17, 2023. Information prior to October 17, 2023 may be considered to fully investigate all allegations.

**SUMMARY OF COMPLAINT ALLEGATIONS**

The Complaint raises the following allegations subject to the CDE’s jurisdiction under 34 C.F.R. § 300.153(b)<sup>2</sup> of the IDEA:

1. The District did not properly determine Student’s educational placement from October 17, 2023 to present because it:

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<sup>1</sup> 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.

<sup>2</sup> The CDE’s state complaint investigation will determine if the District complied with the IDEA, and if not, whether the noncompliance resulted in a denial of a free appropriate public education (“FAPE”). 34 C.F.R. §§ 300.17, 300.101, 300.151-300.153.

- a. Did not base Student’s educational placement on Student’s Individualized Education Program (“IEP”), as required by 34 C.F.R. § 300.116(b) and ECEA Rule 4.03(8)(a); and
  - b. Did not place Student as close as possible to Student’s home, as required by 34 C.F.R. § 300.115(b).
2. The District did not develop, review, and revise an IEP that was tailored to meet Student’s individualized needs from October 17, 2023 to present because it:
  - a. Did not consider the use of positive behavioral interventions and supports to address behavior impeding Student’s learning, as required by 34 C.F.R. § 300.324(a)(2)(i); and
  - b. Did not properly consider Student’s need for extended school year services (“ESY services”), as required by 34 C.F.R. §§ 300.106, 300.320-300.324.
3. The District did not fully implement Student’s IEP from October 17, 2023 to present because it:
  - a. Did not provide Student the specialized instruction, occupational therapy, or speech/language services required by her IEP, as required by 34 C.F.R. § 300.323(c); and
  - b. Did not monitor Student’s progress on annual IEP goals consistent with the IEP, as required by 34 C.F.R. §§ 300.320(a)(3)(i), 300.323(c).
4. The District did not properly respond to Parent’s August 29, 2024 request to inspect and review Student’s educational records because it:
  - a. Did not comply without unnecessary delay, as required by 34 C.F.R. § 300.613(a); and
  - b. Did not provide or permit Parent to inspect email communications, as required by 34 C.F.R. §§ 300.501 and 300.613.

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire Record,<sup>3</sup> the CDE makes the following findings of fact (“FF”):

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<sup>3</sup> The appendix, attached and incorporated by reference, details the entire Record.

### **A. Background**

1. Student attends sixth grade at a District middle school (“Middle School”). *Interview with Special Education Teacher 1 (“Teacher 1”)*. During the 2023-2024 school year, Student was in fifth grade at a District elementary school (“Elementary School”). *Interview with Special Education Teacher 2 (“Teacher 2”)*. Student was in the SSN classroom at both schools. *Interviews with Teacher 1 and Teacher 2*.
2. Student qualifies for special education and related services under the multiple disabilities category. *Exhibit A*, p. 57. Student’s disabilities include Autism Spectrum Disorder, Speech-Language Impairment, and Intellectual Disability. *Id.*
3. Student can be very loving and sweet. *Interview with Teacher 1*. She likes music, drawing and painting. *Interviews with Parent and Teacher 1*. This school year, Student has enjoyed reciting the Pledge of Allegiance and learning the names of the presidents. *Id.* Changes in Student’s schedule cause Student to become upset and, at times, aggressive towards her peers. *Interviews with Teacher 1, Teacher 2, and Elementary School Principal (“Principal”)*.

### **B. Student’s Partial Schedule**

4. At the beginning of the 2023-2024 school year, Student’s IEP dated October 20, 2022 (“2022 IEP”)—from her fourth-grade year—was in effect. *Exhibit A*, pp. 1-19. That IEP noted that Student attended a partial school day from 8:30 a.m. to 11:30 a.m. to allow Student to receive private ABA therapy in the afternoon. *Id.* at pp. 2, 17.
5. As a new principal, Principal worked to familiarize herself with students in the SSN classroom, including Student, before the 2023-2024 school year began. *Interview with Principal*. When Principal saw that the 2022 IEP called for a partial schedule, she scheduled a meeting with Parent. *Id.*
6. Parent invited Student’s private therapist (“Therapist”) to the meeting. *Id.* Parent and Therapist indicated that Student was having some significant behavioral concerns at home, and they felt that Student needed to attend therapy in the afternoon to manage those behaviors. *Id.* Principal empathized with Parent but expressed concern about Student being able to meet her annual IEP goals without attending a full schedule. *Id.* All attendees agreed that they would try to gradually lengthen Student’s time at school. *Id.*
7. Following the meeting, Student began fifth grade attending school from 8:30 a.m. to 11:30 a.m. *Interviews with Principal*.

### **C. Development of Student’s 2023 IEP**

8. On October 12, 2023, the District convened Student’s IEP Team to complete her annual review. *Exhibit A*, pp. 19-36. During the meeting, Teacher 2 recalled Elementary School School

Psychologist stating that the IEP written for a full schedule and that Student attending therapy in the afternoon was a decision being made by Parent. *Interview with Teacher 2.*

9. The IEP Team meeting resulted in an IEP dated October 12, 2023 (“2023 IEP”). *Id.* During the relevant portions of the 2023-2024 school year, the 2023 IEP was in effect. *Exhibit A*, pp. 19-36.
10. The 2023 IEP reviewed Student’s present levels of performance, noting that Student’s academic performance was “well below the 5th grade level.” *Id.* at p. 22. While Student enjoyed reading, she strongly disliked math. *Id.* The IEP acknowledged that Student did “not tolerate busy, noisy, or larger groups of children or peers” and became aggressive in such settings. *Id.* Student also became “very upset (volatile) when she [didn’t] want to do something.” *Id.*
11. Due to her disability, Student had a “propensity to wander, to elope, to be aggressive, and to self-injure (biting self, banging head).” *Id.* at p. 25. As a result, Student needed continuous safety monitoring while at school and support with sensory regulation. *Id.* The impact of disability portion of the 2023 IEP addressed Student’s shortened school day:

[Student] attends school from 7:45 a.m. to 11:30 a.m. She attends her ABA therapy in the afternoon. The team discussed that previously the IEP was written for [Student] to be attending school half days, but the IEP [T]eam indicated that the offer of FAPE is for full days and the IEP will be written that way. Mom did not have any concerns at this time.

*Id.*
12. Despite the cautions about Student’s aggressive and volatile behavior, the 2023 IEP indicated that Student did not require a BIP. *Id.*
13. The 2023 IEP contained four annual goals in the areas of communication, reading, fine motor skills, and math. *Id.* at pp. 27-31. The IEP promised that Parent would receive written progress reports on a quarterly basis and that Student’s progress would be discussed during any IEP Team meetings. *Id.*
14. The 2023 IEP included over a dozen accommodations, including, in part, movement/sensory breaks, a consistent routine, and use of an interactive visual schedule. *Id.* at p. 31. Student’s curriculum was modified. *Id.* at p. 31.
15. The 2023 IEP noted that Student was eligible for ESY services generally without providing any other specific information. *Id.* at pp. 31-32.
16. Under the 2023 IEP, Student received the following special education and related services:

- Specialized Instruction: 1,700 minutes per week of direct specialized instruction and support provided by a special education teacher outside the general education classroom.
- Occupational Therapy: 60 minutes per month of direct occupational therapy provided by an occupational therapist outside the general education classroom.
- Speech/Language Services: 90 minutes per month of direct speech/language services provided by a speech language pathologist outside the general education classroom.

*Id.* at p. 34.

17. Per the 2023 IEP, Student spent less than 40% of her time in the general education environment. *Id.* at p. 35. This placement allowed Student to receive more one-on-one instruction and was necessary “due to her volatile behavior and her need for specialized instruction.” *Id.*
18. On March 21, 2024, the District amended the 2023 IEP to add the dates and minutes of Student’s ESY services. *Id.* at p. 37. As amended, the 2023 IEP indicated Student would receive “academic support in math and reading and social skill/behavior development” during ESY. *Id.* Student’s ESY services would also include speech/language services and occupational therapy. *Id.*

#### **D. Concerns Regarding Student’s Behavior**

19. Elementary School’s SSN classroom experienced significant staff turnover between the 2022-2023 and 2023-2024 school years. *Interview with Principal.* All the staff members in the classroom were new except for one paraprofessional. *Id.* To further complicate things, the special education teacher in the SSN classroom left shortly after the school year began, and the District hired Teacher 2—a first-year special education teacher—as a replacement. *Id.* Student generally struggled with change, so this much changed proved to be even more difficult. *Id.*
20. Student relied on her actions to show staff how she felt. *Id.* When Student felt overwhelmed or did not like something (such as the assigned work or whom she was seated next to), she acted out. *Id.* If staff did not notice her behavior right away, the behavior would escalate quickly and become aggressive. *Id.*
21. During Fall 2023, Student’s behavior continued to escalate. *Interview with Teacher 2.* Student was aggressive towards her male teacher and male classmates. *Interviews with Principal and Teacher 2.* For example, Teacher 2 once looked over Student’s shoulder to see a fidget she was playing with in the Principal’s office, and, without warning, Student threw the fidget at Teacher 2 so hard that it cut his head. *Interview with Principal.* Student chased, hit, and scratched the boys in the class. *Id.*

22. Over time, staff identified that males were triggering for Student. *Interviews with Principal and Teacher 2*. When Student became escalated, Teacher 2 started to rely on the female paraprofessionals to talk softly to Student to try to calm her down and ascertain what was wrong. *Id.*
23. After first semester, Student became aggressive with her classmates with more frequency. *Interview with Teacher 2*. Principal and Teacher 2 met with Parent and Therapist to strategize how to respond to Student's behavior. *Interview with Principal*. At that time, Therapist mentioned that Student had been arriving at therapy very escalated, and staff were having to work to calm Student before she could begin her therapy. *Id.* Therapist asked Teacher 2 what time Student was becoming escalated at school each day and suggested she start leaving school before then to avoid the escalation. *Id.* Principal reiterated that Elementary School could not meet Student's educational needs if they further decreased Student's time at school. *Id.* Therapist indicated it was everyone's goal to increase Student's time at school and said that Student's behaviors needed to be under control to maximize the impact of her time at school. *Id.* Everyone agreed to this change. *Id.*
24. Following the meeting, Student started leaving school around 9:40 each day. *Interview with Teacher 2*. Student remained on this schedule for the remainder of the school year. *Id.*
25. Student did not have a BIP in effect at any point during the 2023-2024 school year. *Id.* Teacher 2 recalled working with Principal and School Psychologist to develop a BIP for Student during Spring 2024; however, the BIP was never completed. *Id.*

#### **E. Implementation of Student's 2023 IEP and Progress Monitoring**

26. In her Complaint, Parent asserts that Student did not receive all the specialized instruction and related services required by her IEP due to her partial schedule. *Complaint*, p. 3.
27. The District acknowledged that Student's partial schedule, as well as her absences, impacted the District's ability to provide Student with all the special education and related services required by the 2023 IEP. *Response*, p. 4. Student missed some specialized instruction, as well as some speech/language services and occupational therapy, during the school year. *Exhibit E*, pp. 1-8.
28. However, the service logs produced by the District evidence the District's efforts to work around Student's partial schedule. *Id.* Though staff tried to schedule Student's services during the time she was at school, sometimes this was not possible. *Interview with Teacher 2*.
29. Parent's Complaint also alleges that the March 2024 amendment to the 2023 IEP lacked any information regarding the progress Student had made on her annual IEP goals since October 2023. *Complaint*, p. 4. While the amendment addressed only Student's ESY services, the District prepared progress reports in December 2023 and March 2024 detailing Student's progress on her annual goals. *Exhibit F*, pp. 2-7. The December 2023 reports indicated that

Student had made adequate progress toward her goals. *Id.* at pp. 2-4. However, the March 2024 reports were mixed. *Id.* at pp. 5-7. Teacher 2 indicated he could not “properly assess” Student’s progress due to her partial schedule and behavioral concerns. *Id.* at p. 5. Both reports showed Student advanced towards her communication and fine motor skills goals. *Id.* at pp. 6-7.

#### **F. Parent’s Preferred Middle School**

30. One of the allegations in Parent’s Complaint relates to Student’s enrollment at Middle School. *Complaint*, pp. 2-3. On August 5, 2024, Parent applied for Student to attend Preferred Middle School, a choice-only program in the District. *Exhibit D*, p. 1; *Response*, p. 5.
31. However, the District’s choice enrollment process began in mid-January 2024. *Response*, p. 5. Applications received within the first four weeks were entered into a lottery, and students were selected for Preferred Middle School from that lottery. *Id.* Though the choice enrollment process remained open through early August, applications received after the first four weeks were only considered based on remaining availability. *Id.*
32. At the time of Parent’s application—nearly eight months after the process began—Preferred Middle School’s sixth grade class was full. *Exhibit D*, p. 1; *Interview with Assistant Director of Exceptional Student Services (“Assistant Director”)*. As a result, the District placed Student on a waitlist for admission (along with many other students) and enrolled her in Middle School, her neighborhood school. *Response*, p. 5; *Interview with Assistant Director*.
33. This action was in accordance with District Policy JFBA-R, which provides that “Students will attend the district school determined by their residence unless a request to attend another school or program is approved.” *Response*, p. 5. Student’s placement on the waitlist had nothing to do with her or her disability; it was a result of the timing of Parent’s application. *Interview with Assistant Director*.
34. Parent selected Preferred Middle School over Student’s neighborhood Middle School because Preferred Middle School was two miles closer to Student’s home. *Complaint*, p. 3. This extra distance placed an “undue burden” on Parent. *Id.*

#### **G. 2024-2025 School Year**

35. After Student did not attend sixth grade orientation, Teacher 1 reached out to Parent via telephone. *Interview with Teacher 1*. Parent was considering homeschooling Student but said she would try Middle School. *Id.* Parent told Teacher 1 that Student attended a shortened school day, because she had therapy in the afternoons. *Id.*
36. Student began the 2024-2025 school year attending sixth grade from 8:30 a.m. to 12:00 p.m. *Id.*

37. During the October 2024 IEP Team meeting, Teacher 1 recommended lengthening Student's school day. *Id.* Parent questioned whether Student could do it, but, after brainstorming, the attendees agreed that they would extend Student's day in January and spend the next couple of months preparing Student for that transition. *Id.*
38. Student remains on a partial schedule. *Id.* In her Complaint, Parent contends the District "strongly suggested" Student attend ABA therapy in the afternoon and has not allowed Student to attend a full schedule. *Complaint*, pp. 2-3.
39. Teacher 1 said she did not consider developing a BIP for Student, because she likes to watch new students for a while to see if a change in schools helps them. *Interview with Teacher 1.*

#### H. 2024 IEP

40. The District convened Student's IEP Team to conduct her annual review on October 10, 2024. *Exhibit I*, p. 3. That meeting resulted in an IEP dated October 10, 2024 ("2024 IEP"). *Exhibit A*, pp. 57-78.
41. The 2024 IEP reviewed Student's present levels of performance, noting that Student was making progress on her annual goals. *Id.* at pp. 60-61. Though Student still did not like math, she had begun to "participate minimally" in math. *Id.* Student's struggles with all areas of communication persisted. *Id.*
42. Due to her disability, Student required continuous safety monitoring and support with sensory regulation. *Id.* at p. 63. Student's disability caused her "to wander, to elope, to be aggressive[,] and to self-injure (biting self, banging head)." *Id.* The 2024 IEP acknowledged that Student was currently attending school half days and leaving at noon to attend ABA therapy; however, Student's current schedule did not dictate the offer of FAPE in the IEP:

The team discussed that previously the IEP was written for [Student] to be attending school half days, but the IEP team indicated that the offer of FAPE is for full days and the IEP will be written as such.

*Id.*

43. Like the 2023 IEP, the 2024 IEP also indicated that Student did not require a BIP. *Id.* at p. 64.
44. The 2024 IEP contained seven annual goals in the areas of communication, reading, fine motor skills, math, writing, and social/emotional skills. *Id.* at pp. 66-71. Under the social/emotional goal, Student would "demonstrate how to express her emotions in healthy ways by the end of this IEP cycle [in] 2025." *Id.* at p. 70.
45. The IEP promised that Parent would receive written progress reports on a quarterly basis and that Student's progress would be discussed during any IEP Team meetings or parent-teacher conferences. *Id.*



46. The 2024 IEP included fifteen accommodations, including, in part, use of headphones in noisy settings, prompting Student to use her words and take deep breaths, and having an adult nearby when Student was antsy to ensure Student did not harm someone or herself. *Id.* at p. 71. Student's curriculum was modified. *Id.* at p. 72.

47. Under the 2024 IEP, Student received the following special education and related services:

- Specialized Instruction: 1,200 minutes per day of direct specialized instruction provided by a special education teacher outside the general education classroom.
- Occupational Therapy: 15 minutes per month of indirect occupational therapy provided by an occupational therapist outside the general education classroom.
- Speech/Language Services: 90 minutes per month of direct speech/language services provided by a speech language pathologist outside the general education classroom.

*Id.* at p. 76. The IEP stated that Student's schedule would "lengthen in January as she can tolerate it" and that she would "end up with 1,440 minutes a week when she comes to school full time by the end of the school year." *Id.*

48. Per the 2024 IEP, Student spent less than 40% of her time in the general education environment. *Id.* Advantages of this placement included allowing Student access to a quiet, structured environment for her sensory needs and access to constant adult supervision. *Id.* at p. 77. The IEP indicated Student currently attended school from 8:30 a.m. to 12:30 p.m. to attend private therapy in the afternoon and noted the District's plan for the school year:

The district is offering full day FAPE, the plan will be to move [Student] into full day at school as her need for therapy changes, which we will begin expanding her day in January, [sic] 2025 when we get back from break. We will increase her day by an hour and a half to include an elective. When she gets comfortable with that, we will increase by another hour and so on until she is in school full time. Outside therapy will be on Fridays all day beginning in spring of 2025.

*Id.*

49. An embedded PWN stated that "full day FAPE" was "offered and rejected at this time due to [Student's] outside therapy needs." *Id.* at p. 78.

### **I. Parent's Records Request**

50. On August 29, 2024, Parent submitted a letter to the District requesting copies of Student's educational records from October 2016 to present. *Exhibit M*, pp. 80, 84. The letter specifically asked for Student's cumulative file and special education file, as well as records related to behavior, discipline, and use of restraint. *Id.*

51. The District sent responsive records to Parent electronically on October 2, 2024, in advance of Student’s IEP Team meeting scheduled for October 10, 2024. *Id.* at p. 131; *Response*, p. 6. In her Complaint, Parent alleges the District’s response did not comply with the IDEA, because it did not include all email correspondence related to Student. *Complaint*, p. 5.
52. The documents provided to Parent included in part, Student’s IEPs, behavior documentation, contact logs, notices of meeting, progress reports, transportation records, evaluation reports, and grade/attendance records. *Id.* at pp. 132-476. The records included only a couple of emails. *Id.* at pp. 133-34.
53. Although certain emails may be saved at times, the District does not have a policy or practice of routinely adding email correspondence to individual student files or records. *Interview with Assistant Director*.

#### **J. Development of BIP**

54. On November 18, 2024, the District convened Student’s IEP Team to develop a BIP for Student. *Exhibit P, Part 2*, p. 1. Parent and Therapist participated in the meeting. *Id.* at p. 2. The BIP was finalized that day and added to the 2024 IEP. *Id.* at pp. 13-15.

#### **CONCLUSIONS OF LAW**

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

**Conclusion to Allegation No. 1: The District determined Student’s placement consistent with 34 C.F.R. §§ 300.115(b) and 300.116(b) and ECEA Rule 4.03(8)(a). District complied with the law.**

The first allegation in Parent’s Complaint relates to Student’s placement. Parent contends the District erred in two ways: (1) by not basing Student’s placement on her IEPs; and (2) by not placing Student in the school closest to home.

A student’s placement—a term used to denote the provision of special education and related services—is determined by the IEP Team, including parents, and must be individualized, as well as based on the IEP. 34 C.F.R. § 300.116; ECEA Rule 4.03(8)(a); *Questions and Answers on Endrew F. v. Douglas Cty. Sch. Dist.*, 71 IDELR 68 (EDU 12/07/17). The placement must be “as close as possible” to the student’s home. 34 C.F.R. § 300.116(b).

#### **A. Placement Based on Student’s IEPs**

Parent’s concern arises from the seeming contradiction between the full day offer of FAPE included in Student’s IEPs and her partial schedule. Specifically, Parent contends the District did not allow Student to attend a full school day but, instead, strongly suggested she attend ABA therapy in the afternoons. (FF # 38.)

Here, the Findings of Fact do not support Parent’s perspective. The Findings of Fact consistently show that Parent has chosen to prioritize Student’s private therapy over her attending School full time. (FF #s 4-7, 8, 11, 35, 37.) Before the 2023-2024 school year, Principal met with Parent and Student’s therapist to discuss Student’s partial schedule. (FF # 5.) Despite Principal’s concerns, Parent and Student’s Therapist argued that the partial schedule was necessary due to Student’s behaviors. (FF # 6.)

During Student’s annual IEP review in October 2023, District staff felt the IEP Team made clear that it was Parent’s decision for Student to attend a partial schedule. (FF # 8.) If Parent wanted Student to attend a full school day, she could have made that decision. (*Id.*) The 2023 IEP reflected this by indicating that “the offer of FAPE is for full days and the IEP will be written that way.” (FF # 11.) The 2023 IEP stated that “Mom did not have any concerns at this time.” (*Id.*) When Student transitioned to Middle School, she continued to attend a partial schedule. (FF # 33-36.) Even when Teacher 1 spoke with Parent before the beginning of the 2024-2025 school year, Parent never requested Student attend a full schedule. (FF # 35.)

Simply put, nothing in the Record shows that Student’s partial schedule was anything but Parent’s choice. (FF #s 4-7, 35-38.) There is no language in the Parent Input portion of Student’s IEPs where Parent expressed disagreement, and there is no email correspondence between Parent and District staff arguing over the length of Student’s school day. Parent’s Complaint is the only place she disagrees with Student’s partial schedule.

For these reasons, the CDE finds and concludes that determined Student’s placement consistent with her IEP, as required by 34 C.F.R. § 300.115(b) and ECEA Rule 4.03(8)(a).

## **B. Placement in School Closest to Home**

Under the IDEA, a student’s placement must be “as close as possible” to the student’s home. 34 C.F.R. § 300.116(b). Unless the IEP requires another arrangement, a student must be “educated in the school that he or she would attend if nondisabled.” *Id.* § 300.116(c). These two provisions ensure students with disabilities have access to their neighborhood school.

Here, Parent contends the District acted inconsistent with the IDEA by refusing to enroll Student at Preferred Middle School. (FF # 30.) However, Parent’s reliance on the IDEA is misguided. Student currently attends Middle School, which is her neighborhood school. (FF # 1, 32.) Preferred Middle School is a choice-only program, meaning it is not a neighborhood school for Student (or any other students). (FF # 30.) All students enrolled at Preferred Middle School must go through the choice application process. (FF #s 30-31.)

Though the choice application process began in January, Parent did not apply until August. (FF #s 31-32.) As a result, Preferred Middle School’s sixth grade class was full, and Student was placed on a waitlist. (FF # 32.) Once Student was waitlisted, the District enrolled Student in her neighborhood school in accordance with District policy. (*Id.*)

The District acted consistent with its obligations under the IDEA. While the IDEA emphasizes a student’s access to her neighborhood school, it provides no entitlement to a choice-only program. Student currently attends her neighborhood school, which is the closest non-choice school to her home. The CDE finds and concludes that the District complied with 34 C.F.R. §§ 300.116(b)-(c).

**Conclusion to Allegation No. 2: The District did not develop IEPs that contained appropriate behavioral supports and strategies and did not review and revise Student’s IEPs to address her behavior, as required by 34 C.F.R. §§ 300.324(a)(2)(i), 300.324(b). This noncompliance resulted in a denial of FAPE.**

Parent’s concerns regarding IEP development are twofold. First, Parent argues that Student’s IEPs did not adequately address Student’s behavioral needs. Second, Parent asserts that the District erred in determining Student’s need for ESY services.

#### **A. Substantive Adequacy of the IEPs**

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.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). The IDEA requires districts to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Id.* at 999.

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 answer to the question under each prong is yes, then the IEP is appropriate under the law. *Id.* Taken together, these two prongs assess whether an IEP is procedurally and substantively sound. *Id.*

Parent’s allegation challenges the substantive nature of the IEPs and not the IEP development process; as such, this Decision addresses only the second prong of the *Rowley* standard.

##### *i. Behavioral Supports*

Parent has questioned the lack of behavioral supports and strategies in Student’s IEPs.

Under the IDEA, an IEP must consider the use of positive behavioral interventions and supports whenever a student’s behavior interferes with the student’s ability to benefit from her educational programming. 34 C.F.R. § 300.324(a)(2)(i). This includes where the consequences of a child’s behavior, including “violations of a school’s code of student conduct, classroom

disruptions, disciplinary removals, and other exclusionary disciplinary measures,” impede the child’s learning. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions*, 122 LRP 24161 (OSERS 07/19/22).

Here, both of Student’s IEP Teams understood that Student’s behavioral needs impacted her ability to receive a FAPE. The 2023 IEP itself acknowledge that Student became aggressive in noisy, crowded classrooms and became volatile when presented with a non-preferred activity. (FF #s 10, 11.) Similarly, the 2024 IEP stated that Student’s disability caused her “to wander, to elope, to be aggressive[,] and to self-injure (biting self, banging head).” (FF # 42.)

Yet, despite their knowledge of Student’s behavior, both IEPs included only the most basic behavioral supports and strategies. For example, both IEPs included accommodations such as consistent routine and expectations and use of headphones in noisy situations. (FF #s 11, 14, 42, 46.) Additionally, the 2023 IEP (and the 2024 IEP) required continuous safety monitoring by an adult in student’s line of sight. (*Id.*) These accommodations, however, were insufficient to address Student’s volatile and aggressive behaviors. The behavioral strategies and supports did nothing to teach Student—now a middle-schooler—about her behavior and ways to respond to triggering situations, such as a change in her routine.

The lack of action taken by the District between IEP Team meetings also causes concern. Although the IDEA does not promise a particular educational or functional outcome for a student with a disability, it does provide a process for reviewing an IEP to assess achievement and revising the program and services, as necessary, to address a lack of expected progress or changed needs. *Andrew F.*, 580 U.S. at 400. To that end, school districts have—in addition to the duty to develop an adequate IEP—an affirmative duty to review and revise a student’s IEP at least annually, and more frequently as needed to address changed needs or a lack of expected progress. 34 C.F.R. § 300.324(b).

Here, though District and Elementary School staff knew that Student exhibited challenging behaviors, including physically harming staff and classmates, the District never convened Student’s IEP Team to review and revise her IEP to include additional behavioral supports and strategies. (FF #s 19-25.) Teacher 2 discussed development of a BIP with Elementary School staff; however, the BIP was never finalized. (FF # 25.) Even as Student’s behavior continued to escalate, the District defaulted to the inadequate strategies and supports it already had in place.

For these reasons, the CDE finds and concludes that the District did not develop IEPs that adequately addressed Student’s behavioral needs, as required by 34 C.F.R. § 300.324(a)(2)(i). Additionally, the District did not review and revise Student’s IEP to address her ongoing behavioral issues, as required by 34 C.F.R. § 300.324(b). This resulted in a denial of FAPE. *See D.S. v. Bayonne Bd. of Ed.*, 602 F.3d 553, 565 (3d. Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA’s procedural requirements).

Ordinarily, the CDE would order the District to conduct a functional behavioral assessment and develop a BIP for Student. However, the IEP Team developed a BIP for Student during the pendency of this Complaint, rendering such a remedy unnecessary.

*ii. ESY Services*

Parent’s concern is that the District determined Student only qualified for speech/language services and occupational therapy as ESY services.

A school district must provide ESY services when a child’s IEP team determines on an individual basis that the services are necessary for the provision of FAPE to the child. 34 C.F.R. § 300.106(a)(2). ESY services cannot be limited to a particular category of disability or unilaterally limited in the type, amount, or duration of those services. 34 C.F.R. §300.106(a)(3). ESY services are not intended or required to maximize a student’s educational benefit. *Cordrey v. Euckert*, 17 IDELR 104 (6th Cir. 1990). Instead, ESY services are appropriate when the body of evidence demonstrates that the student will experience a severe loss of skills or knowledge that will significantly jeopardize the educational benefit gained during the regular school year. *Johnson v. Indep. Sch. Distr. No. 4 of Bixby, Tulsa Cty.*, 921 F.2d 1022 (10th Cir. 1990); *Colorado Springs Dist. 11*, 110 LRP 22639 (SEA CO 2010).

Here, Student’s IEP Team determined in October 2023 that she qualified for ESY services. (FF # 15.) In March, the District amended the 2023 IEP to specify the type of ESY Student would receive and include the date and time of the ESY program. (FF # 18.) As amended, the 2023 IEP clearly stated that Student was eligible for ESY services in the areas of reading, math, social skill/behavioral development, speech/language services, and occupational therapy. (*Id.*) As such, Student’s ESY services matched the specialized instruction and related services she received under her IEP during the school year. (See FF # 16.) For that reason, the CDE finds and concludes that the District appropriately determined Student’s need for ESY services, consistent with 34 C.F.R. §§ 300.106, 300.320-300.324. No noncompliance with the IDEA occurred.

**Conclusion to Allegation No. 3: The District implemented Student’s IEP, consistent with 34 C.F.R. § 300.323. District complied with the law.**

The third concern in Parent’s Complaint relates to implementation of Student’s IEPs. Parent contends the District did not provide Student with all the specialized instruction and related services required by her IEPs due to her partial schedule. Additionally, Parent asserts that the amendment to the 2023 IEP did not contain updated progress monitoring information.

**A. IEP Implementation Requirements**

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. 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." *Andrew F.*, 137 S. Ct. at 994 (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Rowley*, 458 U.S. 176, 181 (1982)). A student's IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

However, a parent whose actions prevent a school district's ability to fully implement an IEP cannot complain that the IEP has not been implemented as written. *Montgomery County Public Sch.*, 111 LRP 54915, (Md. SEA 2011). A school district can be held accountable to implement only so much of the IEP as it reasonably can within the constraints imposed by the parent's actions. *Id.*; *accord D.O. v. Escondido Union Sch. Dist.*, 59 F.4th 394, 412-13 (9th Cir. 2023); *Dougall v. Copley-Fairlawn City Sch. Dist. Bd. of Educ.*, 2020 WL 435385, at \*28 (N.D. Ohio Jan. 28, 2020).

### **B. Student's Specialized Instruction and Related Services**

Here, the 2023 IEP required Student to receive 1,700 minutes per week of specialized instruction, 60 minutes per month of occupational therapy, and 90 minutes per month of speech/language services. (FF # 16.) By having Student leave early every day for private therapy, Parent limited the District's ability to provide the specialized instruction and related services required by the IEP. Indeed, it would have been impossible for the District to fulfill all its obligations under Student's IEP. There simply were not enough minutes when Student was at school.

The District made its offer of FAPE based on Student attending a full day of school. (FF # 11.) Because Parent's actions—having Student attend a partial day—prevented the District from providing a full offer of FAPE, Parent cannot now allege that the District did not comply with its obligations under the IDEA. *See Montgomery County Public Sch.*, 111 LRP 54915. The CDE finds and concludes that the District implemented Student's 2023 IEP to the best of its ability within the restraints imposed by Parent, consistent with 34 C.F.R. § 300.323. No noncompliance with the IDEA occurred.

### **C. Progress Monitoring**

IEPs must include a description of how a child's progress towards their annual goals will be measured, and school districts must provide periodic reports on the progress a student is making toward the student's annual goals. 34 C.F.R. § 300.320(a)(3).

Here, the 2023 IEP indicated that the District would provide Parent with quarterly reports on Student's progress and updates at IEP Team meetings. (FF # 13.) Parent alleges that the District failed to include updated progress monitoring information in the March 2024 amendment to the 2023 IEP. (FF # 29.) This amendment addressed only the date, time, and type of Student's ESY services and did alter the remaining contents of the 2023 IEP. (FF #s 18, 29.) As a result, no updated progress monitoring was included (nor was any required). However, the District issued quarterly progress reports in December 2023 and March 2024, consistent with its obligation in the 2023 IEP. (FF # 29.) For this reason, the CDE finds and concludes that the District monitored

Student's progress on her annual goals consistent with the 2023 IEP, as required by 34 C.F.R. §§ 300.320(a)(3)(i), 300.323(c).

**Conclusion to Allegation No. 4: The District timely produced Student's education records in response to Parent's records request, consistent with 34 C.F.R. § 300.613. District complied with the law**

The final concern in Parent's Complaint relates to both the timeliness and the comprehensiveness of the District's response to Parent's August 29, 2024 records request.

**A. Parent's Right to Inspect Records**

One of the procedural safeguards afforded to parents under the IDEA is the right to inspect and review their child's education records. 34 C.F.R. § 300.613(a). Accordingly, a school district "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency." *Id.* A district must comply with a request from a parent to review his or her child's education records "without unnecessary delay and before any meeting regarding an IEP" and in no case more than 45 days after the request. *Id.* The right of parents to inspect education records includes a "right to a response from the participating agency to reasonable requests for explanations and interpretations of the records." 34 C.F.R. § 300.613(b).

The IDEA borrows the definition of "education records" from the Family Educational Rights and Privacy Act ("FERPA"). *Id.* § 300.611(b). Under FERPA, "education records" are "those records, files, documents, and other materials which: (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution . . ." *Id.* § 99.3. Neither the IDEA nor FERPA indicates whether email correspondence about a student constitutes an education record. However, the U.S. Supreme Court has held that "[t]he word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled." *Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 534 U.S. 426 (2002). Lower courts that have considered the issue have found that ordinary emails are not education records. *See Burnett v. San Mateo-Foster City Sch. Dist.*, 739 F. App'x 870 (9th Cir. 2018) (holding that only emails that were printed and added to student's physical file or maintained in a secure database constituted education records under FERPA); *S.A. v. Tulare Cnty. Office of Ed.*, 53 IDELR 143 (E.D. Cal. Oct. 6, 2009) ("[E]mails that are in not in Student's permanent file are not 'maintained'" by the school district for purposes of FERPA).

Past decisions by the CDE have relied on these court decisions to find that email correspondence only constitutes an education record where the school district takes some action to maintain that record. *See Adams 12 Five Star Schs.*, 124 LRP 15414 (SEA CO 05/02/24); *Denver Pub. Schs.*, 124 LRP 34401 (SEA CO) 02/09/24); *Pueblo Sch. Dist. 60*, 124 LRP 34371 (SEA CO 09/30/23). In a 2023 decision, the CDE explained:



An email left in the inbox of a recipient or sender has not been maintained for purposes of FERPA or the IDEA. Indeed, such an email could be deleted by a user in a cursory cleaning of their inbox unbeknownst to the district. However, if a district actively adds an email to a student's file—either in hard copy or electronically—that email may constitute an education record under FERPA and the IDEA.

*Pueblo Sch. Dist. 60, 124 LRP 34371 (SEA CO 09/30/23).*

### **B. The District's Response to Parent's Request**

Here, Parent requested Student's cumulative educational file and special education file on August 29, 2024. (FF # 50.) Parent also specifically asked for records related to behavior, discipline, and use of restraint. (*Id.*) The District provided the requested documents on October 2, 2024, only 35 days after Parent's request and eight days before Student's IEP Team meeting. (FF # 51.) For that reason, the CDE finds and concludes that the District timely responded to Parent's request, consistent with 34 C.F.R. § 300.613.

The records produced by the District contained only a couple of emails regarding Student. (FF # 52.) During this investigation, the District indicated it does not consider its email correspondence to have been maintained, as envisioned by FERPA. (FF # 53.) The District does not routinely add email correspondence—either in hard copy or electronically—to any student's file (including Student). (*Id.*) Therefore, such email correspondence does not qualify as an education record under FERPA or the IDEA. Accordingly, the District was not required to produce all email correspondence related to Student when it responded to Parent's records request. As such, the CDE finds and concludes that the District's response complied with 34 C.F.R. § 300.613. No noncompliance occurred.

**Systemic IDEA Noncompliance: This investigation does not demonstrate noncompliance that is systemic and likely to impact the future provision of services for other children with disabilities in the District if not corrected.**

Pursuant to its general supervisory authority, the CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the district. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the State Complaint Procedures are "critical" to the SEA's "exercise of its general supervision responsibilities" and serve as a "powerful tool to identify and correct noncompliance with Part B." *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46601 (Aug. 14, 2006).

Here, the Findings of Fact indicate that separate mistakes contributed to the District's noncompliance. Teacher 2—a first-year special education teacher—had little familiarity with Student at the time the 2023 IEP was developed. (FF # 19.) Though he later discussed a BIP with

Elementary School staff, it was never completed. (FF # 25.) At Middle School, Teacher 1 indicated she wanted to observe Student for a while before developing a BIP to see if the change in schools improved her behavior. (FF # 39.) These separate decisions by staff resulted in the District's noncompliance and are not indicative of a systemic problem in the District. For these reasons, the CDE finds and concludes that the District's noncompliance is not systemic.

### **REMEDIES**

The CDE concludes that the District did not comply with the following IDEA requirement:

1. Did not develop, review, and revise Student's IEP to include appropriate behavioral supports and strategies, as required by 34 C.F.R. § 300.324(a)-(b).

To demonstrate compliance, the District is ORDERED to take the following actions:

1. **Corrective Action Plan**

- a. By **Monday, January 27, 2025**, the District shall submit to the CDE a corrective action plan ("CAP") that adequately addresses the noncompliance 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. Executive Director of Exceptional Student Services, Assistant Director of Exceptional Student Services, Principal, Elementary School School Psychologist, Middle School School Psychologist, Teacher 1, and Teacher 2 must each read this Decision in its entirety, as well as review the requirements of 34 C.F.R. § 300.324(a)-(b), by **Monday, February 24, 2025**. If these individuals are no longer employed by the District, the District may substitute individuals occupying identical roles to demonstrate compliance with this remedy. A signed assurance that this information has been read and reviewed must be provided to the CDE no later than **Friday, February 28, 2025**.

3. **Training**

- a. Exceptional Student Services Coordinator for Middle School, Principal, Elementary School School Psychologist, Middle School School Psychologist, Teacher 1, and Teacher 2 must attend and complete training provided by the CDE on developing, reviewing, and revising IEPs with appropriate behavioral supports and strategies.

If these individuals are no longer employed by the District, the District may substitute individuals occupying identical roles to demonstrate compliance with this remedy. This training will address, at a minimum, the requirements of 34 C.F.R. § 300.324, as well as any related concerns in this Decision.

- b. Program Manager and CDE Special Education Monitoring and Technical Assistance Consultant will determine the time, date, and format of the training. This 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 must be completed no later than **Monday, March 24, 2025**. Evidence that this training occurred must be documented (i.e. training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to the CDE no later than **Friday, March 28, 2025**.

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  
201 E. Colfax Avenue  
Denver, CO 80203

**NOTE:** If the District does not meet the timelines set forth above, it 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 CDE 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 State Complaints Officer ("SCO").

Dated this 16<sup>th</sup> day of December, 2024.



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Ashley E. Schubert  
State Complaints Officer

## APPENDIX

### **Complaint, pages 1-7**

- Exhibit 1: Miscellaneous documents

### **Response, pages 1-16**

- Exhibit A: IEPs
- Exhibit B: Blank
- Exhibit C: Documents related to partial schedule
- Exhibit D: Documents related to choice enrollment
- Exhibit E: Service logs
- Exhibit F: Progress monitoring
- Exhibit G: Schedules
- Exhibit H: Attendance and grades
- Exhibit I: Notices of Meeting
- Exhibit J: Prior Written Notices
- Exhibit K: District and school calendars
- Exhibit L: Policies and Procedures
- Exhibit M: Correspondence
- Exhibit N: Blank
- Exhibit O: Verification of delivery
- Exhibit P: Additional documents
- Exhibit P, Part 2: Additional documents
- Exhibit P, Part 3: Additional documents

### **Telephone Interviews**

- Assistant Director of Exceptional Student Services: December 5, 2024
- Parent: December 12, 2024
- Principal: December 5, 2024
- Special Education Teacher 1: December 5, 2024
- Special Education Teacher 2: December 5, 2024