



Wyoming Department of Education

Cindy Hill, Superintendent of Public Instruction

320 West Main

Riverton, WY 82501-3450

Phone: 307-857-9250 Fax: 307-857-9256 Website: edu.wyoming.gov

800-228-6194

WYOMING DEPARTMENT OF EDUCATION SPECIAL PROGRAMS DIVISION SPECIAL EDUCATION COMPLAINT INVESTIGATION

Complainant #1:

Complainant #2:

Respondent:

Case #: C-0175-11
and
C-0176-11

COMPLAINT DECISION AND ORDER FOR CORRECTIVE ACTION

Date of Decision: January 6, 2012

On November 9, 2011 the Wyoming Department of Education (WDE) received a letter of complaint and supporting documentation filed by _____, (hereinafter "School Psychologist"), and on November 14, 2011 a second complaint was filed by _____, (hereinafter "Parent"), alleging violations of special education law with respect to _____ (hereinafter "Student"), by Respondent _____ (hereinafter "District"). The allegations in both complaints arose from the same circumstances and were nearly identical. With the consent of the School Psychologist and the Parent, the investigation was combined, resulting in WDE issuing a single decision. This complaint decision addresses the allegations in both complaints.

Pursuant to 34 C.F.R. §§300.151 through 300.153 of the Federal Regulations implementing the Individuals With Disabilities Education Act (IDEA), WDE conducted an investigation into the allegations raised in both complaints. Consistent with the IDEA, Federal Regulations, and the Wyoming Department of Education Rules, Chapter 7, WDE issues the following Findings of Fact, Conclusions, Decision, and Order for Corrective Action.

Complaint Issues:

Issue #1

Whether the Student was denied a Free Appropriate Public Education (FAPE) pursuant to 34 C.F.R. §§300.17 and 300.101 as follows:

- a. Whether the Student's IEP was reasonably calculated to meet the Student's unique educational and behavioral needs, including, but not limited to, the implementation of a behavior intervention plan pursuant to 34 C.F.R. §300.324.
- b. Whether the District failed to provide special education and related services to the Student in accordance with the Student's Individualized Education Plan (IEP) pursuant to 34 C. F.R. §§300.34, 300.39, and 300.320 through 300.324.
- c. Whether the Student was denied the opportunity to participate in nonacademic and extracurricular activities, including meals, in violation of 34 C.F.R. §§300.107 and 300.117.

Issue #2

Whether the District violated W.S. §21-3-110(a)(xxxi) or the Department of Education Chapter 42 Emergency Rules, Seclusion and Restraint in Schools, and pursuant to the WDE authority to investigate violations of Wyoming Law in Department of Education Chapter 7 Rules, Section 7(b).

Investigatory Process:

- Review of records consisting of the following:
 - Original letters of complaint and supporting documents.
 - Documentation provided by the District.
 - On site record reviews.
 - On site observation of time out space and restraint chair.
- Follow up inquiries with the Complainants, including interviews.
- Follow up inquiries with the District including questionnaires and interviews with 12 District staff.
- Follow up inquiries and an interview with Child Development Center Coordinator (hereinafter "Preschool").
- The District and Complainants were given the opportunity to submit additional information to WDE for consideration during the investigation of this complaint.

Applicable Legal Authority:

34 C.F.R. §300.17	Free Appropriate Public Education (FAPE)
34 C.F.R. §300.22	Individualized Education Program
34 C.F.R. §300.101	Free Appropriate Public Education (FAPE)
34 C.F.R. §§300.320 through 300.324	Individualized Education Programs

W.S. §21-3-110(a)(xxxi)

Wyoming Department of Education Rules, Chapter 7

Wyoming Department of Education Emergency Rules, Chapter 42

Relevant Time Period:

Pursuant to 34 C.F.R. §300.153(c), WDE has the authority to investigate allegations of violations that occurred not more than one year prior to the date the complaint was received. In this case, two complaints were received within one week. The first complaint commenced the investigatory timeline in this matter. Therefore, the investigation and any findings of noncompliance will be limited to the period commencing November 10, 2010 to November 9 2011. However, in order to fully understand the needs of the Student, the concerns of the Complainants, and the position of the District, the Student's special education history, including services in the Preschool setting, were thoroughly reviewed.

Findings of Fact:

1. At all times relevant to this complaint, the Student was a resident of the District.
2. At the time of this complaint, the Student was five (5) years old and attending kindergarten in the District.
3. The Student had been identified in Preschool as a learner with speech/language and cognitive impairments. was determined eligible for special education and related services under the IDEA, and an IEP was implemented for the Student in the Preschool setting.
4. Conflicting information exists with respect to the transition activities that took place for the Student to prepare for enrollment in the District's kindergarten program.

5. As part of this investigation, the District was asked to respond in a questionnaire describing the transition activities that took place between the Preschool and the District regarding the Student. The District provided varying responses, as reproduced below:
 - a. Special Education Director: Student was not transitioned. [Preschool] believed that mom was going to keep in their program another year so they did not share their data with the district until after child enrolled at [District] Elementary.
 - b. Principal: A meeting was held at [Preschool] regarding the transition of [Student] from [Preschool] to kindergarten. At the time of the meeting (May 2011) [Parent] was not sure if [Student] would attend kindergarten or stay at [Preschool].
6. The Special Education Director was interviewed during the investigation. She indicated that the Student was not transitioned from the Preschool, and that the Student was enrolled at the last minute. After enrollment, the District initiated efforts to obtain the Student's file from the Preschool. However, it was a "couple of weeks" before the records were received.
7. The Principal was also interviewed during the investigation. The Principal indicated that he participated in a meeting in the spring, in April or May, held at the Preschool to discuss the Student's transition. The Principal does not recall whether the Student's behavior was addressed at the transition meeting.
8. An Occupational Therapist indicated during an interview conducted as part of this investigation that she, too, had participated in a transition meeting in the spring at the Preschool regarding the Student.
9. The Preschool Coordinator was interviewed regarding the transition. She indicated that a transition meeting occurred on May 18, 2011 to discuss the Student's transfer to the District's kindergarten program. Several Preschool staff members were in attendance, as well as the Principal, the Special Education Director, and an Occupational Therapist from the District. The discussion at the transition meeting focused on the Student's disability and need for services, skill level, the District's staggered kindergarten start times, transportation, and concerns with independence in various settings like the lunchroom. The District raised the possibility of the assistance of a paraprofessional for the Student. The Parent inquired about visiting the kindergarten classroom prior to school starting. Preschool staff recalled that the decision was made to transition the Student to the District in the fall to start kindergarten.
10. Documentation provided by the Preschool confirms that a meeting was convened on May 18, 2011. A document entitled "Minutes for Transition Meeting" memorializes the discussion

that took place regarding the Student's transition into the District. In relevant part, the written "Minutes" from the meeting indicate that the following was discussed:

- a. Mom asked about visiting the school before it starts.
- b. Discussed transportation, special transportation.
- c. Lunchroom – concerns
- d. School talked about a para [paraprofessional].

11. During an interview with the Parent, the transition from Preschool to the District was reviewed. The Parent indicated that she asked if the Student could stay at the Preschool for one more year. However, the team decided it was not in the Student's best interest. The Parent requested to visit the District's kindergarten program. The team, including the District, made the decision at the transition meeting to transfer the Student to the District's kindergarten program in the fall.
12. In his written responses to a questionnaire, the Principal stated that he called the Parent several times in August to find out if the Student would be attending kindergarten. He did not get a response. The Principal reported going to the Parent's workplace a couple of days prior to the start of school, where the Parent indicated the Student would attend kindergarten and that she would fill out the paperwork. He stated that the Parent completed the paperwork the day before the start of school.
13. The Parent acknowledged that in spite of the team's decision to transition the Student to the District in the fall, the Parent did not actually complete the enrollment forms until August 22nd or 23rd, 2011, the day prior to school starting. The Parent reported that the delay was due to illness, not indecision about whether to enroll the Student in the District.
14. There was also a delay in the physical transfer of the Student's educational records from the Preschool to the District.
15. The District's Special Education Administrative Assistant was asked when the District first received records regarding the Student's transition. The Administrative Assistant indicated that the Student's records were not included in the initial transfer of records from the Preschool, prompting her to speak with Preschool staff on August 11, 2011. The Administrative Assistant indicated that the Preschool needed to obtain the Parent's consent prior to releasing the records to the District. She confirmed that the records were hand-delivered by Preschool staff on the first day of school, approximately August 22nd or 23rd, 2011. The records delivered included the Student's most recent IEP and the eligibility determination paperwork.

16. Preschool staff affirms that the Student's records were not initially transferred, but were later hand delivered to the District on or about August 23, 2011. It was the practice of the Preschool to transfer only the most recent IEP and the eligibility determination paperwork rather than the entire Student record.
17. The Student started kindergarten in the District in the fall of 2011.
18. The most recent IEP in effect at the time of the transition of the Student into kindergarten was drafted by the Preschool on February 8, 2011.
19. The Student's IEP goals as planned by the Preschool IEP team in February 2011 are summarized as follows:

Measurable Goal	Benchmarks or Objectives
<p>[Student] will increase the variety of sentence structures by spontaneously producing 5 different sentence types (i.e., "and" between two subjects, "and" between two actions) while participating verbally in the preschool classroom.</p>	<ul style="list-style-type: none"> • When given a visual (i.e., illustration from a picture book, observing a peer in a preschool activity) and an indirect model, [Student] will create sentences with infinitives (i.e., to go, to see). • When given a visual (i.e., illustration from a picture book, observing a peer in a preschool activity) and asked a question, [Student] will create sentences with 20 different subjects (i.e., he, Isalah, they). • When given a visual (i.e., illustration from a picture book, observing a peer in a preschool activity) and asked a question, [Student] will create sentences with 20 different direct objects (i.e., him, Jessica, the car). • When given a visual (i.e., illustration from a picture book, observing a peer in a preschool activity) and an indirect model, [Student] will create 20 sentences using "and" to combine subjects. • When given a visual (i.e., illustration from a picture book, observing a peer in a preschool activity) and an indirect model, [Student] will create 20 different sentences using "and" to combine actions/verbs.
<p>[Student] will relate a familiar, routine event to include age-appropriate story grammar markers (main character, setting, actions) on 6/10 trials.</p>	<ul style="list-style-type: none"> • When given a visual cue, [Student] will include a main character (i.e., peer name, herself, teacher) when retelling a familiar routine (i.e., handwashing, preparing snack, circle time) from the classroom on 9/10 trials. • When given a visual cue, [Student] will include the setting/location (i.e., bathroom, bus, desk, centers) when retelling a familiar routine (i.e., handwashing, preparing snack, circle time) from the classroom on 9/10 trials. • When given a visual cue, [Student] will include 3 actions (i.e., turn on water, get coat, eat, sit) when retelling a familiar routine (i.e., handwashing,

Measurable Goal	Benchmarks or Objectives
	preparing snack, circle time) from the classroom on 9/10 trials.
[Student] will increase verbal skills for self-advocacy by requesting help independently (i.e., permission, assistance, access) 3 times in one school week.	<ul style="list-style-type: none"> • [Student] will indicate a response to a question with a visual cue whether or not is able to do a preschool task (i.e., color, get a book, zip coat) independently with 90% accuracy. • When given a direct model and a visual script (i.e., "I need help", "Help me please", "Please _____"), [Student] will request help on 9/10 discrete trials (i.e., construction task, opening a container). • In response to a visual script (i.e., "I need help", "Help me please", "Please _____") and verbal coaching ("Let's see if Teacher can help you" or "Can you do this independently?"), [Student] will request help on 9/10 attempts in the classroom.
Currently [Student] will tantrum in the classroom when doesn't understand directions. [Student] will follow one to two step directions within classroom routine with 1 verbal cue on three separate data sessions as observed and recorded by preschool staff.	
[Student] will answer two questions related to a story or activity on three separate occasions observed over a month as recorded by preschool staff.	
[Student] will name the letters in name on three data occasions as observed and recorded by the preschool staff.	
[Student] will count sets of objects to ten with 100% accuracy over five data sessions as observed and recorded by preschool staff.	
[Student] will independently manipulate clothes fasteners during activities of daily living such as toileting and putting coat on/off, one observation a week for three weeks.	<ul style="list-style-type: none"> • [Student] will donn/doff (sic) coat and zip independently, 2/3 trials. • [Student] will snap/unsnap clothing independently during activities of daily living, 3/4 observations.
[Student] will complete visual-motor	<ul style="list-style-type: none"> • [Student] will imitate drawing a cross (+), square, X,

Measurable Goal	Benchmarks or Objectives
<p>activities presented to during small groups; skills to include prewriting strokes, writing first name, drawing simple pictures, and imitating building more complex designs and patterns, as observed one time a week for three weeks.</p>	<p>diagonal lines (/\) prewriting strokes with correct form and orientation, 2/3 trials each design.</p> <ul style="list-style-type: none"> • [Student] will imitate drawing a simple picture with ten or more parts/details with verbal cues as needed, 3/4 opportunities. • [Student] will write first name, upper case, visual model if needed, 3/4 opportunities. • With imitation, [Student] will complete 5-6 piece block designs and 12-15 piece whole picture puzzles, 2-3 verbal cues, 3/4 opportunities.
<p>[Student] will catch a large playground ball from five feet by corralling the ball and no expressions of fear, during reciprocal ball play with peer, 5-6 exchanges, as observed once a week for three weeks.</p>	

20. The February 2011 IEP contains the following services:

SERVICES	FREQUENCY	AMOUNT	LOCATION	START DATE
Preacademic/Engagement Skills	4x/week 2x/month	15-20 minutes 10 minutes each	Classroom Preacademic Lab	2/15/2011
Speech-Language	2x/week	20 minutes each	1x/Classroom 1x/Speech Lab	2/15/2011
Transportation	4x/week	30 minutes	To and from preschool	2/15/2011
Occupational Therapy	2x/week	20 minutes each	1x/Classroom 1x/Motor Room	2/15/2011
Provide social stories/visual supports/demonstrations	daily	as needed	school-wide	2/15/2011
Preteach and provide repeated practice of concepts	daily	as needed	school-wide	2/15/2011
State directions in simple terms (three words or less) and make sure [Student] understands	daily	as needed	school-wide	2/15/2011
Provide individual/small group instruction	daily	as needed	school-wide	2/15/2011
Provide verbal praise	daily	as needed	school-wide	2/15/2011

SERVICES	FREQUENCY	AMOUNT	LOCATION	START DATE
Provide a regular schedule and verbal prompts to use the restroom	daily	as needed	school wide	2/15/2011

21. The Preschool issued a Prior Written Notice on February 8, 2011 documenting that the Student's eligibility was changing from Speech-Language Impairment to Cognitive Disability. The Student's IEP was also revised to add Occupational Services. The Preschool documented: "[Student] has made slow progress for the last three years in school. will be attending kindergarten this fall of 2011."
22. The Preschool did not provide a copy of the February 8, 2011 Prior Written Notice to the District when transferring the Student's records.
23. A Prior Written Notice from the Preschool documents that the Student's IEP was amended on May 31, 2011 to add extended school year services during the summer in the areas of Motor and Language. The Prior Written Notice indicates, "[Student] is attending the Public School Pre Kindergarten Program which should provide reinforcement of these skills." It was also noted: "[Student] is transitioning to Kindergarten at the Public School in the fall."
24. The Preschool did not provide a copy of the May 31, 2011 Prior Written Notice to the District when transferring the Student's records. Further, no record exists that the Student attended the Public School Pre Kindergarten Program as noted in the Prior Written Notice.
25. The Student started school in the District in August 2011. On August 24, 2011 the District issued a Prior Written Notice and sought the Parent's consent for a reevaluation of the Student. The documentation completed by the District indicates that the team determined additional assessment data was needed, and proposed conducting a comprehensive evaluation to determine the Student's educational needs.
26. There is no evidence in the Student's file that the team met or sought the Parent's input into the team's determination regarding the evaluation. The District's Administrative Assistant stated that the Director of Special Education plans the special education evaluations after consent is received, rather than having the team plan them prior to obtaining consent. The School Psychologist confirmed that the Director of Special Education unilaterally plans the special education evaluations outside of the team process.
27. The District's Administrative Assistant indicated that the Prior Written Notice and Consent for Evaluation form was mailed to the Parent on August 24, 2011. Receiving no response, the form was mailed again on September 16, 2011. Again receiving no response, the Student's

Special Education Teacher met with the Parent at work and obtained the Parent's written consent for the evaluation on October 10, 2011.

28. When interviewed, the Parent stated that she was unaware of the District's decision to proceed with another evaluation of the Student, as she had not had any opportunity for input into the decision, and as a result, did not recognize the evaluation paperwork sent to her. When the Special Education Teacher explained the paperwork in person, the Parent offered her consent.
29. District staff described the Student as having good days and bad days. The Student would refuse to do work, be "mean" to other students, not follow directions, and be noncompliant on bad days. In general, the Student was described as presenting significant behavioral challenges in the kindergarten classroom, escalating over time. However, both Occupational Therapists and the School Counselor who had worked with the Student described the Student as easily redirected without significant behavioral problems.
30. A full time Paraprofessional was assigned to work specifically with the Student commencing on August 29, 2011 as a result of the Student's behavior. The IEP was not amended to reflect this change.
31. The Paraprofessional stated several times that she had never seen the Student's IEP and was not aware of any behavioral intervention plan. When interviewed on December 6, 2011, the Paraprofessional confirmed that, to date, she had still never seen the Student's IEP.
32. The Kindergarten Teacher also stated that she had never seen the IEP. What she knew about the Student was limited to what others told her.
33. The School Psychologist also stated she had never seen the IEP, and that she was unable to locate the Student's file when searching for it.
34. At the time she was assigned to work full time with the Student, the Paraprofessional had no training in de-escalation techniques or the safe use of restraint. When interviewed on December 6, 2011, the Paraprofessional indicated that she had received the Crisis Prevention Institute (CPI) training "only a couple of weeks ago." Prior to that, the Paraprofessional had no training or instruction in working with behaviorally challenging students, and no specific guidance with respect to this Student.
35. According to a copy of a CPI training certificate, the Special Education Teacher completed the CPI training on September 14, 2011.
36. The Paraprofessional, Kindergarten Teacher, and Special Education Teacher described a swift increase in the amount of time the Student spent away from the general kindergarten classroom.

classroom, typically with the Paraprofessional in a special education setting. At the time the complaints were filed, the Student was educated the majority of day outside of the general kindergarten classroom. The IEP was not amended to reflect these changes.

37. The Paraprofessional indicated that when the Student was removed from the regular kindergarten classroom, the subject matter content missed as a result of the removal was either not taught, or instruction was provided by the Paraprofessional. At the time of the complaints, the Paraprofessional stated that most of the Student's academic instruction was provided outside of the regular kindergarten in a special education setting by the Paraprofessional. The Student's IEP was not amended to reflect this change.
38. In response to the behavioral challenges presented by the Student, the District utilized a series of interventions. As described by District staff, the interventions typically involved removal to the Principal's office or one of two seclusion areas in the special education classroom (The District uses "time-out" to describe the behavioral intervention used with the Student. However, Consistent with WDE Emergency Chapter 42 Rules, the intervention is appropriately described as seclusion.) One seclusion area was described as a "kitchen" between two classrooms with a stove, sink, etc. The other seclusion area was a small room, approximately 72 by 82 inches, with carpet/padding extending approximately half way up the interior walls and the interior of the door. The handle on the inside of the door had been removed, preventing egress in the event that the door was closed. There was a small, narrow window in the door, approximately 4 by 23 inches.
39. Although conflicting descriptions were provided, several staff indicated the Student was typically transported to time-out either by carrying or by use of a Rifton Chair. The Rifton Chair is a chair on wheels with safety straps and a tray that locks in place, keeping the occupant in the chair. The District staff stated that the straps were not used, but that the tray was sometimes used to keep the Student in the chair or at Student request.
40. There is no evidence in the Student's file that the Rifton Chair had been prescribed for use with the Student by an appropriately trained professional. Some staff described its use with other students as well as this Student.
41. In its response to the complaints, the District submitted an unsigned, undated document that states, in relevant part:

The student was asked to get in a chair with wheels. (Rifton Chair). complied. The chair was wheeled down the hallway to the special education room. The child was not restrained in the chair.

The student was placed in a room in the special education [room] due to violent crisis behaviors (i.e. throwing items, hitting another student, pinned another

student's arm between a desk and chair, screaming, kicking, biting, running around room uncontrollably.

42. In contrast to the District's written response, when asked to describe the types of behavior that resulted in use of time-out, District staff responded that noncompliance, not following directions, refusing to work, being mean, hitting, screaming, hurting others, kicking, and running around could all result in the use of the Rifton Chair and/or time-out.
43. Consistent with the interviews, in a written questionnaire the Special Education Teacher stated, in relevant part:

Specifically a time out is used for [Student] when is being non compliant in general education classroom, special education classroom, PE, not coming in from recess, being aggressive toward other students or staff, running around the classroom, not accepting redirection, verbal outbursts.
44. Also in contrast to the District's written submission, when asked during the interview how the Student was placed in the Rifton Chair, the Special Education Teacher responded that the Student was asked to get in the chair, but if noncompliant, either she or the Principal picked the Student up and placed in the chair. Typically, the tray was used to keep the Student in the chair. The Paraprofessional provided a similar description.
45. The Principal acknowledged that the tray was used on the Rifton Chair, but he explained that the Student could get the tray off herself. He, as well as some other staff members, did not consider the chair as a form of restraint.
46. The Parent was not aware that the District was utilizing a seclusion room or the Rifton Chair with the Student. She explained belief that the "chair" being used was a regular chair where the Student was placed for time-out, in a manner similar to what might be used at home.
47. The Special Education Teacher and Paraprofessional indicated that at times either the Special Education Teacher or the Principal carried the Student to seclusion. Both staff members stated that they had observed the Student being carried.
48. It is unclear if the Parent was notified of each use of seclusion or restraint with the Student. Several staff members indicated that there were occasions when the student was in seclusion when the Parent was not notified. The Principal indicated that he might not be aware of each instance that seclusion or restraint was utilized. Further, he stated the Parent was not notified if the District did not consider the intervention a form of seclusion or restraint.
49. Several District staff members reported that the Parent was frequently called to the school to either intervene and address the Student's behavior, or to remove the Student from school

due to behavior. Frequency estimates of the Student's removal from school varied, ranging from one time as reported by the Principal to "at least three times, maybe more," as reported by the Special Education Teacher, who provided a copy of a handwritten calendar documenting when the Student was in seclusion and when was sent home.

50. On November 3, 2011, an incident occurred, as described by the School Psychologist, the Special Education Teacher, the Kindergarten Teacher, and other staff members. The following, in relevant part, is an amalgamation of all written descriptions regarding the incident:

An incident occurred in the kindergarten classroom where the Student was noncompliant, refused to come out from under a desk after hurting another student, and threw crayon box, the Special Education Teacher was called and took the Rifton Chair to the classroom. The Kindergarten Teacher stated that the Special Education Teacher "held on to feet that were still up in the air and removed from under the table and placed in the chair." The tray was then attached to the Rifton Chair. The Special Education Teacher wheeled the Student down the hallway to the special education classroom. The Student was not protesting and seemed calm. The Student was wheeled directly into the small time-out room while still restrained in the Rifton Chair.

The door to the time out room was closed, and a timer was set for five minutes. The Special Education Teacher moved away from the observation window in the door. The School Psychologist moved to a position to see the Student, who was "struggling against the restraint of the Rifton Chair."

The School Psychologist inquired about the need for the Student to be in the restraint chair while in the seclusion room. Both the School Psychologist and Special Education Teacher described frustration with one another over the manner in which the incident was handled. The Special Education Teacher then opened the door to the time-out room and took the Student out of the Rifton Chair without comment. The door was again closed and the timer set for five minutes. The Special Education Teacher walked away from the time-out room and out of visual contact with the Student. The School Psychologist and Special Education Teacher again disputed the manner in which the incident should be handled.

After five minutes, the Special Education Teacher returned to the time-out room, opened the door and told the Student could not come out yet. had been yelling. The timer was set for another five minutes, and the time-out room door was closed again. The Special Education Teacher then left the classroom. The School Psychologist remained in visual contact with the Student.

The Student was screaming, "Let me out." was also pounding on the door. Another paraprofessional in the classroom assigned to other students opened the time-out room door and allowed the Student to exit the room. The paraprofessional told the Student would go and get lunch. The School Psychologist remained in the room with the Student, who was not calm. The paraprofessional returned with the Student's lunch, which began eating.

The Special Education Teacher returned to the classroom. She asked if the Student had been calm for the entire five minutes. When the Special Education Teacher learned that the Student had not been calm the entire time, she directed the Student back into the seclusion room and again left the classroom. The paraprofessional took the Student into the room and sat on the floor with the door open.

After a few minutes, the Special Education Teacher returned and directed the paraprofessional out of the seclusion room, closed the door, and reset the timer for three minutes. The lunch remained on the table where the Student had previously been eating. The School Psychologist reported no one was at the door, so she positioned herself to observe the Student. After three minutes, the Student was allowed to exit the seclusion room and finish eating lunch.

51. The complaints were filed on November 9th and November 14th, 2011 in response to the November 3, 2011 seclusion and restraint incident and other related concerns.
52. Since the complaint was filed, the primary behavior intervention utilized by the District with the Student is to call the Parent to deal with the Student's behavior.

Conclusions:

Issue #1

1. The Student is identified as a learner with Speech-Language Impairments and a Cognitive Disability under the Individuals with Disabilities Education Act (IDEA).
2. The District is obligated to ensure that the Student receives FAPE by providing special education and related services reasonably calculated to provide the Student educational benefit. See 34 C.F.R. §§300.17 and 300.101.
3. The most authoritative view is that a child's educational benefit must be more than de minimus – there must be some tangible gain in abilities. One of the leading cases interpreting Rowley's "some educational benefit" to mean more than "de minimus" is *Polk v. Central Susquehanna Intermediate Unit 16*, 441 IDELR 130 (3rd Cir. 1988). There, the court held that IDEA "calls for more than a trivial educational benefit" and requires an IEP to provide "significant learning" and confer "meaningful benefit."
4. The unique needs of a student with a disability encompass more than a mastery of academic subjects. Unique needs are broadly construed to include academic, social, health, emotional, physical and vocational needs, all as relating to the provision of preschool, elementary and secondary education services. See *County of San Diego v. California Special Educ. Hearing Office*, 24 IDELR 756 (9th Cir. 1996).

5. It is the obligation of the District to provide special education and related services reasonably calculated to result in some educational benefit as measured by progress toward IEP goals, or to take steps to address the lack of progress.
6. The District's obligation to provide FAPE was initially complicated by the lack of current information regarding the Student from the Preschool setting. The fact that the Preschool provided only the most recent IEP and evaluation to the District at the time of the transition resulted in the District missing critical information regarding the Student's special education history, and essentially culminated in the District needing to reevaluate the Student in order to determine current educational and behavioral needs. The missing information also contributed to the confusion regarding whether the Student would transition to the District in the fall.
7. In spite of the lack of transition information, the District was on notice that the Student presented behavioral challenges by virtue of the fact that the February 8, 2011 IEP contained a goal to address the Student's tantrums that resulted when did not understand instructions.
8. Despite this information, the District failed to proactively address the Student's maladaptive and inappropriate behaviors, develop a behavioral intervention plan, or amend the IEP to address the lack of expected behavioral or academic progress.
9. Even though the IEP was received contemporaneously with the start of school, the District was obligated to provide FAPE according to the existing IEP or amend the IEP to meet the Student's current needs. This obligation commenced upon the Student's enrollment in the District or a reasonable amount of time thereafter to ascertain the Student's needs.
10. The Federal Regulations require that a child's IEP be revised to address any lack of expected progress. *34 C.F.R. §300.324(b)(1)(ii)*. In this case, the Student was not successful. The Student was literally removed from most regular education opportunities due to behavioral concerns, yet the IEP was not revised to address this lack of expected progress. Despite a near total lack of success in the regular education classroom, the Student's IEP team never reconvened, and the IEP was never revised.
11. It is also the responsibility of the District to provide special education and related services in conformity with the Student's IEP. *34 C.F.R. §300.17*.
12. It is clear that the District did not implement the February 8, 2011 IEP as written. The Student was removed from regular education opportunities in excess of the time documented in the IEP. A Paraprofessional was assigned to the Student, a service not addressed in the Student's IEP. And, the Student's instruction was delivered, in large part,

by Paraprofessional, a service delivery arrangement not addressed in current IEP and contrary to education standards mandating that instruction be delivered by a highly qualified teacher. Several critical District staff had never seen the Student's IEP. It is evident from a thorough review of the Student's records and interviews with District staff that special education services were not delivered consistent with the Student's current IEP.

13. These types of major amendments are contrary to the District's duty to provide services consistent with the IEP. See *Van Duyn v. Baker Sch. Dist.*, 47 IDELR 182 (9th Cir. 2007) (Minor failures to implement the IEP exactly as written did not constitute a denial of FAPE because implementation failures were not material.) See also *Sumter County Sch. Dist. v. Heffernan*, 56 IDELR 186 (4th Cir. 2011) (Material implementation failure and a denial of FAPE was found because the district did not provide all IEP services.)
14. The District's failure to implement the Student's IEP is more problematic because the District did not make reasonable efforts to revise the IEP in a timely manner to address the lack of progress. This failure rises to the level of a substantive denial of FAPE. The Student was denied the opportunity to receive meaningful educational benefit.
15. With respect to nonacademic services and activities, the Student must be afforded an equal opportunity as nondisabled students to participate in nonacademic and extracurricular services and activities. Meals are included in the nonacademic activities and settings listed in the federal regulation. If necessary, the District must provide supplementary aids and services to maximize participation. 34 C.F.R. §§300.107 and 300.117.
16. There is nothing in the record to support a conclusion that the District denied the Student the opportunity to participate in meals on a regular basis. It is equally evident that the Student's meal was delayed on November 3, 2011 so could finish a staff imposed seclusion in the isolation room. Although delaying the Student's regular mealtime on this occasion may not rise to the level of a denial of FAPE, it must be reviewed in light of Wyoming's statutes and rules on seclusion and restraint. It will be addressed further under Issue #2.

Issue #2

17. The Wyoming Legislature enacted legislation in February 2011 to define and regulate the use of seclusion and restraint in schools. See W.S. §21-3-110(xxxi). Wyoming defines *restraint* and *seclusion* as follows:

"Restraint" means the use of physical force, with or without the use of any physical device or material, to restrict the free movement of all or a portion of the Student's body. "Restraint" does not include comforting or calming a student, holding the hand or arm of a student to escort the student if the student is complying,

intervening in a fight or using an assistive or protective device prescribed by an appropriately trained professional or professional team.

"Seclusion" means removing a student from a classroom or other school activity and isolating the student in a separate area. "Seclusion" does not include a student requested break or in-school suspension, detention or other appropriate disciplinary measures.

18. As mandated by the Wyoming Statute, the Wyoming Department of Education promulgated Emergency Rules to implement the Statute. The Emergency Rules were effective June 27, 2011 and remained in effect during the period of time relevant to this complaint.
19. The definition of *restraint* in Wyoming Rule is consistent with the statutory definition with one addition: "The term does not encompass any of the prohibited practices described in this rule." *Wyoming Department of Education Emergency Rules, Chapter 42, Section 6(k)*.

20. The definition of *seclusion* in Wyoming Rule is consistent with the statutory definition, but also provides further detail:

"Seclusion" means removing a student from a classroom or other school activity and isolating the student in a separate area. Seclusion occurs when a student is placed in a room or location by school personnel, purposefully separated from peers, and prevented from leaving that location. Separation in an area where the student is prevented from leaving is always considered seclusion. There are two distinct categories: i) Seclusion from the Learning Environment, or ii) Isolation Room. The term does not include a student requested break or in-school-suspension, detention or other appropriate disciplinary measure.

- i) "Seclusion from the Learning Environment" means visually or auditorally isolating the student from the classroom or other school activity, away from peers in an area that obstructs the student's ability to participate in regular classroom or school activities. The student is prevented from rejoining the learning environment or school activity until directed by staff.
- ii) "Isolation Room" means purposefully placing the student in an enclosed room built in compliance with all relevant health and safety codes. The student is not released from the Isolation Room and permitted to rejoin the learning environment or school activity until directed by staff. An Isolation Room is not the same as locked seclusion, which is a prohibited practice.

Wyoming Department of Education Emergency Rules, Chapter 42, Section 6(n).

21. "Prohibited Practices" means that certain activities or objects are prohibited from being utilized with students under any circumstances. Prohibited elements include:

- i. "Aversives" means an intervention that is intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors.
- ii. "Locked Seclusion" means a seclusion room with a locking device that is engaged by leverage of an inanimate object, key, or other mechanism to keep the door closed without constant human contact. The term does not include a securing mechanism requiring constant human contact, which upon release immediately permits the door to be opened from the inside.
- iii. "Mechanical Restraints" include devices or equipment designed or utilized to restrict the free movement of all or a portion of a student's body. The term does not include devices or equipment prescribed by an appropriately trained professional or professional team that are used for the specific and approved purposes for which such devices or equipment were designed or prescribed.

Wyoming Department of Education Emergency Rules, Chapter 42, Section 6(j).

22. Based on the definitions in Wyoming statute and rule, some of the behavioral interventions utilized by the District constituted the use of seclusion and restraint.
23. Carrying the Student in any capacity in response to behavior (as opposed to illness or other medical emergency) meets the definition of "Restraint" in that the adults are using physical force to restrict the free movement of the Student's body. In addition, there were likely other types of restraint that were utilized with the Student based on the descriptions of the interventions used by staff, i.e., holding the Student or cradling the Student to restrict movement.
24. As a restraint, the practice is regulated by Wyoming statute and rule. At a minimum, each use of restraint must be documented, and the Parent must be notified. See *W.S. §21-3-110(xxxi) and Wyoming Department of Education Emergency Rules, Chapter 42, Section 7(c) and (d).*
25. Based on the record, it is reasonable to conclude that scant documentation of the use of restraint with the Student actually exists, and that the Parent was not notified of each use.
26. Further, only trained, certified staff are permitted to utilize restraint as part of a planned behavior intervention unless a bona fide emergency constituting an imminent risk to health or safety exists. *Imminent Risk* is defined as "an immediate and impending threat of a person causing substantial physical injury to self or others." See *Wyoming Department of Education Emergency Rules, Chapter 42, Section 6(e) and (h).* Verbal outbursts, lack of work completion, not following directions, and noncompliance would not constitute an

emergency, defined in Wyoming Emergency Rule as a "situation constituting imminent risk to health or safety."

27. In light of the fact that the Special Education Teacher was untrained and uncertified until September 14, 2011, the Paraprofessional was untrained and uncertified until mid-November 2011, the use of non-emergency restraint was contrary to Wyoming Emergency Rule.
28. With respect to the other interventions utilized, the practice of placing the Student in the kitchen room meets the definition of seclusion. (Within the District, it was more commonly referred to as "time-out," but that is a mischaracterization of the intervention as explained above.) The kitchen room is an area that is visually and auditorally separate from the classroom, and the Student was not free to leave until released by staff. Used in that manner, placing the Student in the kitchen room as a behavioral intervention is a regulated practice. As such and at a minimum, each use of seclusion must be documented, and the Parent must be notified. See *W.S. §21-3-110(xxxi) and Wyoming Department of Education Emergency Rules, Chapter 42, Section 7(c) and (d)*.
29. Further, some practices utilized by the District meet the definition of "Prohibited Practices."
30. Use of the Rifton Chair to control or contain the Student's behavior and transport constituted use of a restraint. However, because the Rifton Chair meets the definition of a "Mechanical Restraint," and appropriately trained professionals did not prescribe the Rifton Chair for use with the Student, its use as a behavioral intervention is prohibited.
31. The practice of using the small room for time-out is considered seclusion. Further, the use of the small seclusion room as a behavioral intervention is also a prohibited practice because it meets the definition of "Locked Seclusion." Removal of the door handle on the inside of the room prevents egress. The door does not automatically open without constant human contact. It remains locked from the inside, and does not automatically unlock immediately upon the release of the security mechanism held in place by constant human contact. Therefore, use of the small seclusion room as it is currently configured is prohibited in Wyoming. See *Wyoming Department of Education Emergency Rules, Chapter 42, Section 6(j) and Section 7(b)(ii)(F)(5)*.

Decision:

Issue #1

Whether the Student was denied a Free Appropriate Public Education (FAPE) pursuant to 34 C.F.R. §§300.17 and 300.101 as follows:

- a. Whether the Student's IEP was reasonably calculated to meet the Student's unique educational and behavioral needs, including, but not limited to, the implementation of a behavior intervention plan pursuant to 34 C.F.R. §300.324. **WDE determines that the IEP was not reasonably calculated to meet the Student's unique educational and behavioral needs. This is most readily evidenced by the conclusion that the District had literally disregarded most aspects of the Student's current IEP without the benefit of IEP revision or amendment. WDE finds the District in violation. However, the denial of FAPE was caused, at least in part, by the lack of information and records provided to the District by the Preschool. The Preschool's portion of the Decision will be addressed under separate cover.**
- b. Whether the District failed to provide special education and related services to the Student in accordance with the Student's Individualized Education Plan (IEP) pursuant to 34 C. F.R. §§300.34, 300.39, and 300.320 through 300.324. **WDE determines that the special education services were not delivered in conformity with the Student's IEP. WDE finds the District in violation.**
- c. Whether the Student was denied the opportunity to participate in nonacademic and extracurricular activities, including meals, in violation of 34 C.F.R. §§300.107 and 300.117. **WDE determines that the Student was denied the opportunity to participate in lunch while in a seclusion room. WDE finds this to be a violation, but it does not rise to the level of a denial of FAPE.**

Issue #2

Whether the District violated W.S. §21-3-110(a)(xxxi) or the Department of Education Chapter 42 Emergency Rules, Seclusion and Restraint in Schools, pursuant to the WDE authority to investigate violations of Wyoming Law in Department of Education Chapter 7 Rules, Section 7(b).

WDE determines that the District utilized seclusion and restraint practices in violation of Wyoming Statute and the Department of Education Emergency Rules, Chapter 42. WDE finds the District in violation.

Corrective Action Plan:

1. The District shall immediately cease the use of utilizing locked seclusion and mechanical restraints with all students.
2. The District shall immediately convene the IEP team to revise the Student's IEP to reflect services and measurable annual goals based on current needs. The IEP team shall be convened within ten (10) days of the date of this decision. Confirmation of the IEP team meeting and a revised IEP shall be submitted to WDE within fourteen (14) days of the date of this decision.
3. The District shall fund and provide an independent expert to conduct functional behavioral assessment of the Student's behavior and develop interventions to be utilized with the Student. This requirement includes:
 - a. The District shall submit a list of three (3) independent and appropriate evaluation sources to the Parent with a copy to WDE within fifteen (15) days of the date of this decision;
 - b. The Parent shall choose the evaluator from the list provided by the District within ten (10) days of receipt from the District;
 - c. The District shall notify WDE within five (5) days of receiving notice of the Parent's choice the specific details and dates for the independent evaluation;
 - d. If the District and Parent are unable to reach consensus within ten (10) days as directed in paragraph b. above, WDE shall request that the Parent submit the names of three (3) independent and appropriate evaluators. WDE shall then select the evaluator from the list of sources provided by both the Parent and the District within five (5) days of the impasse;
 - e. The evaluation shall be conducted and the IEP team reconvened to address the results of the evaluation within ninety (90) days of the date of this decision;
 - f. Confirmation of the evaluation results and the IEP team's determination shall be submitted to WDE within ten (10) days of the conclusion of the IEP team meeting as directed in paragraph e. above; and
 - g. The Parent must sign all necessary consents and releases in order to facilitate the evaluation according to the steps above. Failure of the Parent to sign

necessary consents and releases shall constitute a waiver of this independent evaluation requirement.

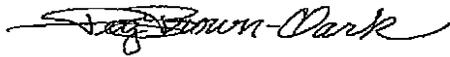
4. The District shall provide at least eight (8) hours of inservice training to all special education staff regarding the development and revision of IEPs, addressing lack of expected progress, and the IEP team planning process. The requirements include:
 - a. The inservice training must be completed by March 15, 2012. The District shall provide WDE with the following documentation:
 - i. The date, time, location, agenda and presenters ten (10) days prior to the training, and no later than February 1, 2012; and
 - ii. Copies of any materials or handouts used, in addition to sign-in sheets documenting the attendance of special education staff within ten (10) days of completion of the mandatory inservice training.
5. The District shall offer to provide one hundred (100) hours of compensatory education services delivered by a highly qualified teacher to the Student as follows:
 - a. The location of the services is to be mutually agreed upon by the Student, the Parent, and the District. The location may include the Student's home.
 - b. The schedule of services is to be mutually agreed upon by the Parent, and the District, taking into account the Student's interests, attention levels and stamina.
 - c. A schedule signed by all parties detailing the dates and locations for the compensatory service shall be submitted to Diana Currah, Dispute Resolution Coordinator at WDE no later than February 1, 2012.
 - d. If the Parent does not make the Student available at the scheduled time and location, that day's service is considered waived by the Parent. The only exception to this waiver provision is a bona fide physical illness of the Student or Teacher, in which case, the missed service must be rescheduled.
 - e. District special education service providers must maintain accurate service logs to be submitted to WDE at the conclusion of the service. Special education service providers must be highly qualified.
 - f. Any compensatory education service not utilized by December 31, 2012 shall be deemed waived by the Parent.
6. All required submissions must be sent to WDE to the attention of Diana Currah, with a copy to both Complainants (or verification that a copy has been previously provided).

RECOMMENDATION: It is strongly encouraged that all District special education staff and Preschool special education staff participate jointly in a two (2) hour inservice training on the transition of students from the Preschool to the District setting.

A redacted copy of this decision shall be provided by WDE to the Preschool to facilitate the joint efforts of both entities to improve the transition process.

Please direct questions regarding this complaint investigation to the Wyoming Department of Education, Special Programs Division at 307-857-9285 or 800-228-6194.

Sincerely,



Peg Brown-Clark
State Director of Special Education
Special Programs Division Director

cc:

Superintendent
Board Chair
Cindy Hill, Superintendent of Public Instruction
John Masters, WDE Legal Counsel

