



Wyoming Department of Education

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WYOMING DEPARTMENT OF EDUCATION
SPECIAL PROGRAMS DIVISION
SPECIAL EDUCATION COMPLAINT INVESTIGATION

Complainant:

Respondent:

Date of Decision: October 29, 2010

Case #: C 0115-10

**COMPLAINT DECISION
AND ORDER FOR
CORRECTIVE ACTION**

On September 1, 2010 the Wyoming Department of Education (WDE) received a letter of complaint and supporting documentation filed by _____, (hereinafter "Complainant") alleging violations of special education law with respect to _____ (hereinafter "Student"), by Respondent _____ (hereinafter "District").

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 the complaint. 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 District denied the Student a Free Appropriate Public Education (FAPE) consistent with 34 C.F.R. §§300.17 and 300.101, including:

- a) Whether the Student's IEP was reasonably calculated to meet the unique educational needs of the Student, including the need for specialized instruction to address

academics, functional skills, and behavior, and whether the IEP addressed the Student's lack of progress or regression pursuant to 34 C.F.R. §300.324.

- b) Whether the District provided special education and related services to the Student in accordance with his IEP pursuant to 34 C.F.R. §§300.34, 300.39, 300.320 and 300.324.
- c) Whether the teacher unilaterally changed the IEP resulting in a denial of FAPE contrary to 34 C.F.R. §§300.17 and 300.324.
- d) Whether the Student's IEP appropriately addressed the Student's need for instruction in Braille or instruction in the use of Braille consistent with 34 C.F.R. §300.324(a)(2)(iii).

Issue #2

Whether the Complainant was denied the opportunity to participate in the IEP process as a result of the Director and teacher predetermining the Student's placement in violation of 34 C.F.R. §§300.322 and 300.327.

Issue #3

Whether the Complainant was denied the opportunity to access the Student's special education records in violation of 34 C.F.R. §300.613.

Investigatory Process:

- Review of records consisting of the following:
 - Original letter of complaint and supporting documents.
 - Documentation provided by the District.
 - Supplementary information provided by the Complainant.
 - Audio recording of the September 1, 2010 IEP team meeting.
- Follow up inquiries with the Complainant.
- Follow up inquiries with the District.
- The District and Complainant were given the opportunity to submit additional information to WDE for consideration during the investigation of this complaint.

Applicable Federal Regulations or State Rules:

- 34 C.F.R. §300.17 Free Appropriate Public Education (FAPE)
- 34 C.F.R. §300.34 Related Services
- 34 C.F.R. §300.39 Special Education

34 C.F.R. §300.101 Free Appropriate Public Education (FAPE)

34 C.F.R. §300.320 Definition of an IEP

34 C.F.R. §300.322 Parent Participation

34 C.F.R. §300.324 Development, Review, and Revision of IEP

34 C.F.R. §300.327 Educational Placements

34 C.F.R. §300.613 Access Rights

Wyoming Department of Education Rules, Chapter 7

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 from the date the Complaint was received. In light of this limitation, the investigation and any findings of noncompliance will be limited to the period commencing September 2, 2009 and ending September 1, 2010. However, in order to fully understand the needs of the Student, the concerns of the Complainant, and the position of the District, the Student's special education history was 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 attending fourth grade in the District.
3. The Student has a complicated history of significant special education needs including cognitive, language, vision, and motor impairments.
4. In 2006, when the Student entered Kindergarten, the District conducted a thorough reevaluation of the Student. The following salient information is gleaned from the reevaluation reports of various medical and school professionals:
 - a. Vision Evaluation: The Student's treating physician from an eye clinic notes: " had an enucleation of right eye when was one year old. Since then, has been fitted with a prosthesis. . ." The Student seems to have some light perception in the left eye.
 - b. Teacher of the Visually Impaired: The Student's severe low incidence disabilities made use of standardized assessment instruments impossible. Therefore, the Student was evaluated utilizing observation and the "Assessment and Curriculum

Resource for Infants". Overall, the Student's skills were reported to be at a very basic level.

- c. Speech/Language Evaluation: The Speech/Language Clinician reported that the Student was evaluated utilizing numerous observations, The Communication Matrix, and behavioral checklists. The Student's receptive language skills were measured within the 12 to 18 month range. Expressive language skills were measure in the 6 to 12 month range. A hearing test revealed normal hearing and middle ear function.
 - d. Hearing Evaluation: A hearing professional measured the Student's hearing to be within normal limits.
 - e. Physical and Occupational Therapy Evaluation: The Student's fine motor skills were measured to be within the 6 to 9 month age level, with gross motor skills at an age level of 9 months. It was recommended that the Student continue to receive occupational and physical therapy 5 times per week.
 - f. Psychological Evaluation: During a parent interview, the Complainant reported, in relevant part, that [redacted] was impressed and excited about the school program. [redacted] only current concern was a recent increase of dramatic outbursts such as hitting [redacted] self. The Psychologist's reported noted the Student "appears to be currently progressing at an extraordinary rate especially in the areas of functional communication. [Student] is very social."
 - g. Psychological Evaluation for Waiver purposes conducted June 2006: General adaptive behavior scores were below the 0.1 percentile for the Student's age. The results conformed to earlier measures of functional skills and direct observations. The Complainant reported that the primary developmental step the Student has made is that [redacted] does not require as much holding as [redacted] did as an infant.
 - h. Teacher Interviews: The Student was described as social, favoring musical activities, and a functional rather than academic learner.
5. Based on the outcome of the 2006 reevaluation, the Student continued to meet the eligibility criteria in the Multiple Disabilities category.
 6. In November 2009, the District completed a three-year reevaluation of the Student, determining that [redacted] continued to meet the criteria of a learner with Multiple Disabilities and continued to need special education.
 7. The IEP in place during the time relevant to this complaint was drafted on November 16, 2009. The Complainant, the District's Special Education Director, the Special Education Teacher, the Student's Regular Education Teacher, the Physical Therapist, the

Occupational Therapist, and the Student's paraprofessional participated in the development of this IEP. The following is a summary of the Student's IEP:

- a. Under Consideration of Special Factors, the IEP indicated that the Student had communication needs, needed opportunities for communication and direct instruction in the Student's communication mode, was visually impaired, required orientation and mobility training, needed instruction in the use of Braille, and the Student required assistive technology devices or services.
- b. The Student's Present Levels of Academic Achievement and Functional Performance indicated that he continued to need a "carefully developed functional skills IEP". The Student demonstrated some progress from the previous IEP. Concern was expressed regarding the Student's "lack of interest in a desire to use auditory, tactile, and/or olfactory information to orient self to environment or explore surroundings".

8. The November 2009 IEP contained the following goals:

Measurable Goal	Benchmarks	Progress Reported
<p>[Student] will demonstrate quarterly increased measured progress in functional self-help skills by completing the following objectives with increased productivity as determined by observations consisting of 10 presented opportunities every school week throughout the IEP.</p>	<ul style="list-style-type: none"> • When placed on a toilet in the resource room, [Student] will successfully urinate and/or produce a bowel movement 9/10 opportunities every school week. • During lunch and snack time, [Student] will use a spoon to feed self with guided assistance without dropping spoon in 7/10 opportunities each school week. • During lunch and snack time, [Student] will assist paraprofessional or teacher with holding squeeze cup in 4/10 opportunities each school week. • When provided with an opportunity to hold a semi-filled cup of liquid, [Student] will sustain a grip on the cup for 3 seconds or longer in 6/10 opportunities 	<p>12/18/2009: [Student's] progress toward this goal and its objectives is emerging. *</p> <p>03/26/2010: [Student] has achieved some of the objectives toward the goal though continued work and focus on these objectives remains important to continued success toward the annual goal. *</p> <p>05/27/2010: (Paraphrased) [Student's] progress is emerging in many objectives, but others are extremely limited. Progress in the acquisition of language skills continues to be slow and laborious. *</p> <p><i>* The Special Education teacher provided detailed progress documentation in a supplemental narrative.</i></p>

Measurable Goal	Benchmarks	Progress Reported
	each school week.	
<p>When presented with information and school-related activities that include people, places, and/or objects, [Student] will use auditory, tactile and olfactory information in an effort to gain understanding through active exploration of the world around in 5/5 presented opportunities each school week.</p>	<ul style="list-style-type: none"> • When presented with auditory information of various sounds at varying degrees of sound frequencies, [Student] will actively attempt to locate the origin of sound by reaching with hands/arms toward different sounds in 3/5 presented opportunities each school week. • [Student] will actively participate in a Pre-Braille program by actively exploring various tactual information using one or both hands in order to explore the presented information in 3/5 opportunities each school week. • [Student] will use olfactory information during snack or lunchtime in an effort to locate spoon filled with food in 3/5 opportunities each school day. 	<p>12/18/2009: [Student's] progress is emerging regarding this goal and its objectives. *</p> <p>03/26/2010: [Student's] progress is emerging regarding this goal and its objectives though progress is slow in the Pre-Braille program. *</p> <p>05/27/2010: [Student's] progress toward goal is emerging. *</p> <p><i>* The Special Education teacher provided detailed progress documentation in a supplemental narrative.</i></p>
<p>When presented with a variety of electronic or battery-operated devices, [Student] will actively engage self in the successful use of each device by purposefully and willfully pressing the appropriate switch that activates or deactivates the device in 9/10 opportunities each school month.</p>	<ul style="list-style-type: none"> • In the resource room, [Student] will press a variety of presented switches to effectively activate and/or deactivate various mechanical devices in 5/10 opportunities each school week. • When presented with various communication board devices, [Student] will use hand(s) to press and activate various voice prompts that convey personal wants and needs 	<p>12/18/2009: [Student's] progress toward this goal is emerging. *</p> <p>03/26/2010: [Student] has done extremely well in operating and engaging certain switches/battery-operated devices independently; however, I would like to see expand interest in other presented objects that contain switches and batteries. *</p> <p>05/27/2010: [Student's] progress toward this goal is</p>

Measurable Goal	Benchmarks	Progress Reported
	in 3/10 opportunities each school week.	emerging. * * <i>The Special Education teacher provided detailed progress documentation in a supplemental narrative.</i>
[Student] will improve functional communication skills by completing 80% of objectives.	<ul style="list-style-type: none"> • [Student] will increase comprehension of names for people/objects by touching the object/symbol as instructed from a range of 1-3, 4/5 times per opportunity. • [Student] will increase sense of self-identity by touching body parts, wiping face, holding a spoon, signing/saying "me," and reaching to be held 4/5 times per opportunity. • [Student] will improve expression by imitating sounds/words, signing, switch activation and/or vocalizing when prompted 4/5 times per opportunity. 	<p>12/18/2009: [District] is currently without an SLP to provide services.</p> <p>03/26/2010: [Student] has been working on goals 2 and 3 and has been imitating sounds (m,l) at 20%. We have also been working on body parts and is able to touch shoe or foot with 40% accuracy.</p> <p>05/27/2010: [Student] has continued to make progress. has increased ability to produce /m/ and /l/ to 50% when modeled. We continue to work on body parts and is able to touch feet and toes 50% of the time.</p>
[Student] will demonstrate purposeful grasp/release patterns for more age appropriate fine motor skills.	<ul style="list-style-type: none"> • [Student] will demonstrate weight bearing through upper extremity to promote crawl pattern. • [Student] will grasp and hold a given object at midline for 2 minutes with verbal cues and 80% accuracy. • [Student] will explore surfaces, textures and objects within his reach with 80% accuracy while in a variety of positions. • [Student] will use purposeful grasp for self-feeding, drinking and functional activities with 75% accuracy in 2 out of 3 given opportunities. 	<p>12/18/2009: [Student] is more vocal and demonstrates improvement with weight bearing through upper extremity.</p> <p>03/26/2010: [Student] continues to improve strength and mobility with upper extremity.</p> <p>05/27/2010: [Student] continues to improve strength and mobility with upper extremity.</p>

Measurable Goal	Benchmarks	Progress Reported
[Student] will increase gross motor skills by a 3-6 month level.	<ul style="list-style-type: none"> [Student] will stand with UE support for 15 seconds (3/3x). [Student] will crawl with a reciprocal crawling pattern with only minimal cueing (3/3x). [Student] will maintain a quadraped position for 15 seconds with good UE and LE support (3/3x). [Student] will demonstrate appropriate equilibrium in short sitting, long sitting, tall kneeling, quadraped and standing (3/3x). 	<p>12/18/2009: [Student] has had a good quarter with an increased willingness to work on various gross motor tasks. is showing improved strength in trunk and extremities.</p> <p>03/26/2010: [Student] has worked hard over the past quarter and is on task during most sessions. remains motivated and seems to enjoy working on the various activities.</p> <p>05/27/2010: [Student] continues to remain on task during therapy sessions and works hard. is gaining strength and continues to work on gross motor milestones through the developmental sequence.</p>

9. The November 2009 IEP contains the following services:

SERVICES	AMOUNT	FREQUENCY	START DATE
Functional Self-help Skills	90 Min/Day 450 Min/Week	5 x Week	11/25/2009
Assistive Technology Devices	30 Min/Day 90 Min/Week	3 x Week	11/25/2009
Pre-Braille Program Instruction	30 Min/Day 150 Min/Week	5 x Week	11/25/2009
Occupational Therapy	30 Min/Day 150 Min/Week	5 x Week	11/25/2009
Orientation and Mobility	30 Min/Day 150 Min/Week	5 x Week	11/25/2009
Physical Therapy	30 Min/Day 150 Min/Week	5 x Week	11/25/2009
Speech-Language Pathology	25 Min/Day 125 Min/Week	5 x Week	11/25/2009
Transportation	25 Min/Day 125 Min/Week	5 x Week	11/25/2009
Para-educator support for	40 Min/Day	5 x Week	11/25/2009

SERVICES	AMOUNT	FREQUENCY	START DATE
participation in music class	200 Min/Week		
Para-educator or teacher's support for participation in lunchtime in the school lunchroom.	30 Min/Day 150 Min/Week	5 x Week	11/25/2009
Para-educator support for participation during recess.	45 Min/Day 225 Min/Week	5 x Week	11/25/2009
Para-educator and/or teacher support in regular ed class.	60 Min/Day 300 Min/Week	5 x Week	11/25/2009
Para educator support for field trips and assemblies.	As Needed	As Needed	11/25/2009

10. The IEP indicated that the Student needed extended school year services during the summer in order to receive FAPE.
11. The IEP indicated that the Student was unable to participate in the PAWS Alternate statewide assessments due to the severity of disabilities.
12. The Special Education teacher provided 20 pages of detailed progress notes to the Student's IEP team during the time this IEP was in effect. For each goal and objective, the notes reported on teaching strategies and techniques, successes and challenges, the Student's interest level and reactions, and impediments to potential future success. Relevant portions of the progress notes are summarized below:

- a. 12/18/2009: [Student's] behavior has demonstrated continued improvement since September. increasingly demonstrates a strong desire to enjoy each day and has demonstrated that is happy and content with surroundings and the people around on a daily basis. [Student] used to have significant fits of behavior in which would cry out as if in pain, thrash head, arms, and legs in an apparent effort to communicate that was upset. These behaviors have significantly decreased both in intensity and duration over the last three months. [Student] still dropped spoon on occasion though has achieved the objective of not dropping spoon in 7/10 opportunities over the course of the last two weeks. [Student] has most definitely shown significant progress regarding the goal (of actively attempting to locate the origin of sound) from my previous progress report. To my thrill and

amazement, after repeated daily lessons with [Student] that focus on this technique, [Student] now has reached the point where consistently reaches one of hands up to my lips after I have finger spelled and sounded out each letter in a word (most notably name) in an apparent effort to find the source of the sound of the individual letters. I am very pleased to report that [Student] has now regained both an interest and a sincere enjoyment in active participation of a particular switch that activates a musical melody and generates flashing lights when activated. [Student] has reached this current objective and I foresee will hopefully demonstrate an increase in desire and interest to activate other switches now as well. As I previously noted, in September, [Student] was having significant fits in which would kick legs, throw arms all around, grab peoples' hair and glasses, and loudly cry and vocalize for periods lasting no less than 10 to 15 minutes at a time. These behaviors occurred no less than 3 times a day or more. The positive atmosphere of the resource room, I believe, has significantly had a profound effect on [Student's] ability to adjust to new surroundings and care.

- b. 03/26/2010: [Student's] progress in many of newly assigned goals and objectives are in the emerging stages of progress. Progress in acquisition of language skills remains slow and laborious as I can only address so much in such a small time frame. [Student] has progress well in functional self-help skill areas of eating, drinking, and toileting needs. most certainly is a different child than the one I observed in September 2009 who was totally dependent on others for food, drinking, and exploration of the world around
 - c. 05/27/2010: [Student's] progress in many of newly assigned goals and objectives continue to be in the emerging stages of progress and progress in many of objectives has been extremely limited. [Student] has still not performed as well in functional self-help skill areas of eating, drinking and toileting needs as did in the former reporting periods.
13. The District provided documentation to evidence that daily communication logs were sent home with the Student describing activities, participation levels, successes and concerns.
14. The District and Complainant's documentation evidences that the Complainant frequently called to check on the Student during the school day, sometimes several times per day. Additionally, the Complainant or the Student's grandmother "stopped by" the school to check on the Student each day.

15. An August 28, 2009 letter from the District informed the Complainant that the District was without a speech/language clinician, and that efforts to hire one were ongoing. Services were to be made up at a later date.
16. A December 18, 2009 letter from the District informed the Complainant that a new para educator would be working with the Student commencing January 5, 2010.
17. A January 13, 2010 Notice of Team Meeting documented that the Student's IEP team was to be convened on January 25, 2010 for the purpose of reviewing or revising the IEP and determining placement.
18. Minutes from the January 25, 2010 meeting document that the team discussed the Student's participation in Physical Education class. All team members agreed that participation in Physical Education was a safety risk due to the Student's disabilities, and that the Student's motor needs were met in occupational and physical therapy.
19. A February 26, 2010 letter to the District from the Standards and Assessment Unit at WDE documented that the District's request for exemption for the Student to be omitted from the requirement for participation in the statewide testing was not granted. In spite of this notice, the District followed the Student's IEP, which indicated the Student was unable to take the PAWS Alternate statewide assessment due to the severity of disabilities.
20. An April 1, 2010 Notice of Team Meeting documented that the Student's IEP team was to be convened on April 15, 2010 for the purpose of reviewing the Student's progress at parent request.
21. Minutes from the April 15, 2010 meeting document that the team discussed the Student's progress. District staff expressed concerns that the Student was hitting self. The Complainant expressed concerns about safety. The Student was crying before leaving for school. "lost" gestures for yes and no. The Student demonstrated an increase in eye poking and thumb sucking behaviors. The Complainant questioned the documentation from the District.
22. A May 26, 2010 letter to the Complainant indicated that the District was offering compensatory speech/language services over the 2010 summer to make up for the absence of a Speech Language Clinician during the first quarter. The letter indicated that 50 hours of speech/language services were to be provided under the compensatory plan.
23. An August 30, 2010 Notice of Team Meeting documented that the Student's IEP team was to be convened on September 1, 2010 for the purpose of developing an annual IEP, determining placement and reviewing behavioral and safety concerns.

24. Minutes from the September 1, 2010 meeting documents that the team discussed the Student's escalating behavior since the commencement of the school year on August 23, 2010. The discussion focused on safety concerns, both on behalf of the Student and staff working with the Student due to aggressive behavior directed at self and others. Behavior tantrums had escalated to the point where the speech language clinician was concerned that the Student may have demonstrated some seizure activity. The school nurse was consulted regarding these concerns. No immediate health concerns were noted. The Complainant expressed frustration regarding not being notified of hitting and increased behavior concerns. described the Student's successful summer experiences with service provider who holds and cuddles the Student, calming . The Complainant described the Student as very comfortable with that provider. The occupational therapist expressed belief that the aggression has always been present to some degree, but the Student is now taller, bigger and stronger, intensifying the behavior. indicated that it is no longer safe to carry the Student in the hall due to flailing or striking out behavior. The District staff expressed concern regarding safety and recommended that the Student receive an expert evaluation for behavior. Other placement options were discussed, including and home placement. The Complainant expressed belief that the Student was not safe in the school environment, and as a result, would keep the Student home from school.
25. An audio recording provided by the Complainant was reviewed in this investigation. Much of the recording evidences the District's concerns regarding the Student's escalating behavior and the safety risks to the Student and staff. The Complainant expressed frustration with not receiving more communication regarding these issues, and not receiving prompt return phone calls when called to check on the Student, sometimes several times daily. Frustration was also expressed by the Complainant with not being able to access the classroom when stops in the school to check on the Student. District staff explained that they follow a procedure of bringing the Student, or any student, to the office rather than disrupt the learning of others in the classroom. The audio recording provided several descriptions of the Student tantrumming to the point of exhaustion, hitting self and others creating an unsafe environment. The District recommended an expert evaluation at District expense to provide insight into the behavioral difficulties. The Complainant indicated would consider the recommendation. The Complainant indicated that did not believe that the Student was safe at school due to the actions of the District. "The problem is in this building. is happy everywhere else." "We don't fit here." The Complainant stated that

the Student would not return to the school. The Director of Special Education described placement options, including _____ and homebound services in some detail. _____ stated that on homebound, the Student would be placed at home by the IEP team and get all the services on _____ IEP. If the Complainant were to refuse some or all of the services, the District would document the refusal. The District offered services at home five days per week until an outside expert evaluation was complete and the IEP team was reconvened for further IEP planning.

26. During the September 1, 2010 IEP team meeting, as evidenced by the audio recording, several references were made to a video tape of the Student created by District staff memorializing some of the difficulties the Student was experiencing. The District was unable to provide a copy of the videotape for the purpose of this investigation. In response to WDE's request, the District indicated that the videotape was destroyed.
27. The Student ceased attending school on September 1, 2010. Since that time, the Student has received OT and PT services in the home. The Complainant declined any other special education or related services.
28. The IEP was not amended to reflect these changes. No Prior Written Notice was issued to reflect the changes.
29. The Complainant filed this complaint after the meeting on September 1, 2010 in response to _____ concerns, and expressing frustration regarding the frequent staff changes and staff that did not fit well with the Student's needs.

Conclusions:

1. The Student is identified as a learner with Multiple Disabilities under the Individuals with Disabilities Education Act (IDEA) by virtue of cognitive and other impairments with vision, language, and motor delays.
2. The Student is a learner with severe and multiple disabilities. _____ educational needs are functional rather than academic, with present levels of performance consistent with developmental expectations in the 6 month to 18 month range.
3. 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.*
4. However, an IEP is not an educational contract guaranteeing that the student will achieve a certain amount of proficiency. *See Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 553 IDELR 656 (1982)* (holding that an IEP must provide a "basic floor of

opportunity"); *Coale v. State Dept. of Educ.*, 35 IDELR 149 (D. Del. 2001) (unless state law imposes a higher standard, a district must only make a "good-faith effort" to assist the child to achieve his or her IEP goals).

5. 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 (3d 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."

Issue #1

6. 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).
7. Children who have severe cognitive disabilities may not require instruction in the general-curriculum, yet they are indisputably eligible for special education and related services under the IDEA. For these students, education may consist of daily living and self-care skills. See, *Timothy W. v. Rochester, N.H. Sch. Dist.*, 441 IDELR 393 (1st Cir. 1989), *cert. denied*, 493 U.S. 983, 110 LRP 44498 (1989).
8. 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.
9. The November 2009 IEP contained measurable annual goals and short-term objectives or benchmarks, providing a "road map" of the functional skills necessary to attain the annual goals. Pre Braille activities designed to ready the Student for the introduction of Braille were included on the Student's IEP.
10. A thorough review of the Student's progress over time indicates variable interest in the tasks and variable performance of the discrete skills necessary to master the short-term objectives. The special education service providers were sensitive to the Student's variable performance, attempting to understand whether it may be related to pain, illness, frustration, overstimulation, etc. The ability to understand the Student's variability was difficult due to the Student's limited cognitive ability and severe communication deficits.

11. The progress notes of the special education teacher and other service providers, as well as daily communication logs, document the different strategies, techniques, and motivators that were introduced in an effort to help the Student meet with success on the short-term objectives, and therefore, demonstrate progress toward mastering the annual goals.
12. 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*. The Student's incremental progress and variable performance resulted in adjustments to the introduction of certain skill sets necessary to obtain the short-term objectives. This type of minor amendment does not offend 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.) The exact methodology or instructional strategies used to teach certain skills are typically left to the District. *See Carlson v. San Diego Unified Sch. Dist.*, 54 IDELR 213 (9th Cir. 2010) (The district was not obligated to utilize the parent's preferred instructional method.) Any variations in the implementation of the Student's short-term objectives were not material to the Student's overall progress toward annual IEP goals.
13. Review and revision of an IEP must occur periodically, but not less than annually, to determine whether annual goals are being achieved, and revise the IEP, as appropriate, to address any lack of expected progress **toward the annual goals**. (Emphasis added.) *See 34 C.F.R. §300.324(b)(1)*.
14. The IDEA and Federal Regulations do not require that same level of scrutiny of the short-term objectives. It is reasonable to conclude that the "road map" of skills necessary to help a student progress toward the annual goals are much smaller steps toward the ultimate goal, and as such, do not lend themselves to the same level of scrutiny. The IDEA and Federal Regulations address progress toward annual goals as the mark by which a substantively compliant IEP will be judged.
15. The Student made incremental progress in some short-term objectives at various times in this IEP, while not progressing in others. Overall, however, the Student made reasonable gains toward annual IEP goals, and the District was responsive to variable needs.
16. The Student received FAPE that was reasonably calculated to provide educational benefit. The fact that the Student did not master every objective, or that performance was variable, does not indicate that IEP was not reasonably calculated to provide educational benefit. *See M.P. v. Poway Unified Sch. Dist.*, 54 IDELR 278 (S.D. Cal. 2010) (The fact that

a student with a specific learning disability failed to achieve all of IEP goals did not mean that was denied FAPE.)

17. Although it is concluded that the Student's IEP was reasonably calculated to provide educational benefit, and that the District provided special education and related services in conformity with IEP, there are three notable exceptions:

- a. During the time that the District was without a speech language clinician, the District did not provide services in conformity with the Student's IEP, therefore denying FAPE. The District acknowledged and corrected that deficiency, proposing compensatory services to remediate the loss of FAPE.
- b. From the point of September 1, 2010 forward, the District has not provided service in conformity with the Student's IEP, nor has it amended the IEP to reflect the current service delivery model. The District is not free to propose an IEP or service delivery model that violates its duty to provide FAPE. Further, in situations where a parent disagrees with the provision of a particular special education or related service, the public agency should remove the service from the child's IEP only if FAPE (special education and related services reasonably calculated to provide educational benefit) could still be provided without the objectionable service. If the removal of the objectionable service would mean that a public agency would no longer be providing FAPE, the service cannot be removed and the parent may use the IDEA dispute resolution procedures to dispute the necessity of the service. *See 73 Federal Register 73011.* The IEP team indicated that all special education services would be delivered in the Student's home at the September 1, 2010 IEP team meeting. The Complainant declined services believed were objectionable. The actions of the Complainant do not serve as a waiver of the District's duty to provide FAPE. If the Complainant disagreed, it was incumbent upon the District to continue providing FAPE consistent with the Student's IEP until the Complainant proceeded to a due process hearing to obtain a ruling from a hearing officer that the services were not necessary. Therefore, from September 1, 2010 forward, the District has not provided the Student FAPE.
- c. Finally, during the September 1, 2010 IEP team meeting, the District emphatically and repeatedly stated that the Student needed to be evaluated before an appropriate program could be developed based on changing and possibly heretofore unknown educational needs. It was the obligation of the District to ensure that the evaluation take place, including arranging for an appropriate expert, providing transportation,

funding the evaluation, etc. In the event that a written proposal for an evaluation is presented to the Complainant, who then declines the evaluation, the District would be relieved of its responsibility to evaluate the Student. It is not sufficient for the District to place the burden for arranging the evaluation on the Complainant, or to wait indefinitely until the Complainant proposes an evaluation source. The District had the nonwaivable obligation to move forward with the evaluation it proposed. See *N.B. v. Hellgate Elementary Sch. Dist.*, 50 IDELR 241 (9th Cir. 2008) (Because the IEP team could not develop an appropriate program without evaluative data, the district's failure to ensure the evaluation took place was a procedural violation that amounted to a denial of FAPE. The district recommended that the parents obtain a general evaluation from the . The district maintained that because the parents failed to obtain the suggested evaluation, it could not develop an appropriate IEP. Although the district did not have to conduct an evaluation with its own personnel, it did have an obligation to arrange for an evaluation at no cost to the parents.) Therefore, the District has violated its duty to evaluate the Student. This violation is tantamount to a denial of FAPE.

Issue #2

18. Under the IDEA, each school district or public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. At a minimum, a meeting must be held for this purpose at least once a year. *34 CFR 300.324 (b)(1)(i)*. The changing needs of some students with disabilities may demand more frequent reviews and revisions. Generally, there should be as many meetings in a year as a student may need.
19. The IDEA and Federal Regulations guarantee parents certain procedural safeguards. One of the most important of these safeguards is a parent's right to participate in the IEP team process, including meetings, during any review or revision of the Student's IEP, and participation in all placement decisions. See *34 C.F.R. §§300.321, 300.322 and 300.327*.
20. It is the responsibility of the District to ensure that the parent of a child with a disability is present at each IEP team meeting or is afforded the opportunity to participate, including:
 - a. Notifying the parent of the meeting early enough to ensure that the parent will have an opportunity to attend; and
 - b. Scheduling the meeting at a mutually agreed on time and place.

See *34 C.F.R. §300.322*.

21. Review and revision of an IEP must occur periodically, but not less than annually, to determine whether annual goals are being achieved and revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals. See 34 C.F.R. §300.324(b)(1).
22. Convening an IEP team meeting, as occurred on three occasions during the course of the Student's annual IEP cycle, is the appropriate method described in the IDEA and Federal Regulations for addressing any IEP concerns or lack of expected progress.
23. It was reasonable for the District to convene IEP team meetings in order to share concerns with the Complainant in an effort to meet the needs of the Student, including proposing changes to the IEP, provision of FAPE or the Student's placement, if appropriate.
24. The District appropriately convened the IEP team meeting on April 15, 2010 at the request of the Complainant.
25. As noted previously, adjustments to curricula or instructional strategies does not amount to a material change in the Student's IEP.
26. Districts should consider the parents' suggestions and, to the extent appropriate, incorporate them into the IEP. See *Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109 (6th Cir. 2004) (district's predetermination of autism methodology denied student FAPE, but note that the District Court at 46 IDELR 45 subsequently determined that the district's eclectic program was substantively appropriate); and *Fuhrmann v. East Hanover Bd. of Educ.*, 19 IDELR 1065 (3rd Cir. 1993) (although the district did not agree to provide the programming and placement advocated by the parents, the parents had an opportunity to participate in the IEP formulation process in a meaningful way, where the IEP team considered parent suggestions and incorporated some of them, resulting in changes to the draft IEP). See also *J.D. v. Kanawha County Bd. of Educ.*, 48 IDELR 159 (S.D. W.Va. 2007), *aff'd*, 52 IDELR 182 (4th Cir. 2009) (Draft IEPs developed in preparation for IEP meetings are not necessarily evidence of predetermination. The district's inclusion of several goals and objectives requested by the child's parents undermined the parents' claim that the district did not consider the child's individual needs).
27. The Complainant's audio recording of the September 1, 2010 IEP team meeting evidences that the Complainant had input into the Student's special education and related services and placement. The District offered to provide services in the Student's home in response to the Complainant's belief that the Student was better served there.
28. Although the Complainant expressed a great deal of frustration with not having telephone calls returned promptly when (or on behalf) called to check on

the Student, and also with not being able to enter the Student's classroom at will throughout the school day, the IDEA, Federal Regulations, nor Wyoming Rules provide the Complainant with these rights. The IDEA's guarantee is parent participation through the IEP process. Visitation or telephone calls are left to the practices of a local school district.

29. A District is free to have pre-established and standardized policies or practices regarding school visitors, as long as the practices are equal to both students with disabilities and students without disabilities. *See Collier County Sch. Dist.*, 23 IDELR 354 (OCR 1995).
30. A recent federal court decision recognized that parents do have a constitutional right to direct their children's education, but that this right does not extend so far as to include the unfettered right of a parent to visit all areas of a school campus while students are present. *See Meadows v. Lake Travis Ind. Sch. Dist.*, No. 09-50850 (5th Cir. 2010) (unpublished).
31. As evidenced by the Complainant's participation in the team meetings, and the District's appropriate response to the Complainant's request for an IEP team meeting, and the comprehensive nature of the daily home – school communication, the Complainant was not denied an opportunity to participate in the process. Also, there is no evidence to support a conclusion that the District predetermined the Student's IEP.

Issue #3

32. The District created a videotape memorializing the Student's behavioral outbursts.
33. Pursuant to the Family Educational Rights and Privacy Act (FERPA), §99.32, incorporated into the IDEA and Federal Regulations through 34 C.F.R. §300.611(b), education records must be protected consistent with FERPA. A *Record* means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. *See 34 C.F.R. §99.31*. The record must be protected if it contains personally identifiable information. *Personally identifiable* means, but is not limited to, the student's name, the name of the student's parents or other family members, the address of the student or the student's family, a personal identifier such as a social security number, student identification number, or biometric record, other identifiers such as date of birth, place of birth, or mother's maiden name, or other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty. *See 34 C.F.R. §99.31*.

34. Upon its creation by the District, the videotape became part of the Student's educational record, as it contains images of the Student which would be considered personally identifiable information.
35. Parents must be permitted to inspect and review any education records relating to their children that are collected, maintained, or used under the IDEA. 34 C.F.R. §300.613(a).
36. By destroying or failing to produce the videotape for the Complainant's review or inspection, the District violated the Complainant's right to access the Student's education records.
37. This conclusion does not extend to any other Student records. With respect to other Student educational records, this investigation does not support a conclusion that the District failed to permit the Complainant access.

Decision:

Issue #1

Whether the District denied the Student a Free Appropriate Public Education (FAPE) consistent with 34 C.F.R. §§300.17 and 300.101, including:

- a) Whether the Student's IEP was reasonably calculated to meet the unique educational needs of the Student, including the need for specialized instruction to address academics, functional skills, and behavior, and whether the IEP addressed the Student's lack of progress or regression pursuant to 34 C.F.R. §300.324.

WDE determines that the Student's IEP was reasonably calculated to meet unique educational needs, and the IEP appropriately addressed lack of expected progress. WDE finds no violation.

However, WDE finds the District in violation of its obligation to ensure the expert evaluation of the Student's behavior in light of the fact that the IEP team, including the District, identified this evaluation as critical to meeting the Student's unique needs for the provision of FAPE.

- b) Whether the District provided special education and related services to the Student in accordance with his IEP pursuant to 34 C.F.R. §§300.34, 300.39, 300.320 and 300.324.

WDE finds no new violations through September 1, 2010. WDE determines that up until September 1, 2010, special education and related services were provided in conformity with the Student's IEP. However, WDE finds a violation of the District's obligation to provide the Student's speech language services, as was previously noted and addressed by the District. WDE accepts the District's self-correction of this deficiency.

IEP services have not been provided in conformity with the IEP since September 1, 2010. Technically, any issues beyond September 1, 2010 exceed the time limits of this investigation. Therefore, WDE cautions the District that its actions are in violation of its duty to provide FAPE, and informs the District it must remediate this denial of FAPE. Because the denial exceeds the time frame of this complaint, no corrective action is currently ordered. WDE defers any order of corrective action for this denial until the issue is properly before it. The issue will be referred to the Division's Monitoring/Compliance section for further review.

- c) Whether the teacher unilaterally changed the IEP resulting in a denial of FAPE contrary to 34 C.F.R. §§300.17 and 300.324.

WDE finds no violation.

- d) Whether the Student's IEP appropriately address the Student's need for instruction in Braille or instruction in the use of Braille consistent with 34 C.F.R. §300.324(a)(2)(iii).

WDE finds no violation.

Issue #2

Whether the Complainant was denied the opportunity to participate in the IEP process as a result of the Director and teacher predetermining the Student's placement in violation of 34 C.F.R. §§300.322 and 300.327.

WDE finds no violation.

Issue #3

Whether the Complainant was denied the opportunity to access the Student's special education records in violation of 34 C.F.R. §300.613.

WDE finds the District is in violation by destroying or failing to permit access to the videotape of the Student.

Corrective Action Plan:

1. The District shall convene the IEP team within ten (10) days of the date of this decision for the purpose of:
 - a. Finalizing the proposal for an expert evaluation of the Student's behavior as recommended at the September 1, 2010 IEP team meeting. The Complainant will have the opportunity to have input into the proposal, and then offer or withhold consent for the evaluation ultimately proposed by the District. In the event that the Complainant withholds consent, the District shall be relieved of its obligation to ensure the evaluation is conducted consistent with 34 C.F.R. §300.300(c).
 - b. Determining appropriate IEP services for the Student with the participation of the Complainant, including a placement in the Least Restrictive Environment based on the current educational needs of the Student. (In the event that the Student's IEP services may change after the expert evaluation, the IEP team should be reconvened to address the then current needs of the Student.) If the District is unable to convince the Complainant to attend the IEP team meeting, the District shall document its reasonable efforts to do so and proceed with the IEP team meeting in the Complainant's absence consistent with 34 C.F.R. §300.321(d).
2. The District shall propose, in writing, an IEP reasonably calculated to provide the Student FAPE within five (5) days of the IEP meeting.
3. The District shall submit the Notice of Team Meeting, copies of any meeting notes, a plan for the Student's evaluation, a proposed IEP, and all applicable Prior Written Notice documents within five (5) days of the conclusion of the IEP team meeting.
4. The District shall provide at least four (4) hours of inservice training to all special education staff regarding the development and revision of IEPs. The inservice training shall be completed within 45 days of the date of this decision.
5. The District shall provide at least one (1) hour of inservice training on the IDEA's confidentiality provision, including its duty to protect a student's educational record, and a

parent's right to access the educational record. The inservice training shall be completed within 45 days of the date of this decision.

6. The inservice training must be completed by December 15, 2010. The District shall provide WDE with the following documentation:
 - a. The date, time, location, agenda and presenters for the training by November 15, 2010; and
 - b. 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.
7. All required submissions must be sent to WDE to the attention of Diana Currah, with a copy to the Complainant.

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:

Dr. James McBride, Superintendent of Public Instruction
Tania Hytrek, WDE Legal Counsel