

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

State-Level Complaint 2022:547
Denver Public Schools

DECISION

INTRODUCTION

On September 28, 2022, the Parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Denver Public Schools (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified four allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. § 300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from September 28, 2021 through September 28, 2022 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to properly implement Student's IEP from August of 2022 to present, specifically by:
 - a. Failing to have an IEP in place at the beginning of the school year, in violation of 34 C.F.R. § 300.323(a); and

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

- b. Failing to provide Student with all of the special education minutes required by her IEP, in violation of 34 C.F.R. § 300.323(c)(2).
2. Failed to develop, review, and revise an IEP that was tailored to meet Student's individualized needs, from August of 2022 to present, by failing to develop appropriate goals to address Student's needs in literacy and math, in violation of 34 C.F.R. §§ 300.320 and 300.324.
3. Denied Parent meaningful participation in the development, review and revision of Student's IEP from August 19, 2022 to present, in violation of 34 C.F.R. § 300.324(a)(1)(ii).
4. Failed to provide Parent with periodic reports on Student's progress from August of 2022 to present, in violation of 34 C.F.R. § 300.320(a)(3)(iii).

FINDINGS OF FACT

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

A. Background

1. Student is 10 years old and attends fourth grade at a District school ("School"). *Exhibit A*, p. 1. Student and her family reside within the boundaries of District. *Id.*
2. Student is identified as a child with a Specific Learning Disability ("SLD") and Other Health Impairment ("OHI"). *Id.*
3. Student is kind and hardworking. *Interviews with Parent, fourth grade teacher ("Teacher"), mild/moderate special education teacher ("Special Education Teacher") and Principal at School ("Principal")*. She enjoys helping and likes being a classroom leader. *Interview with Parent and Special Education Teacher*. Student is clever and great at coming up with unique ideas. *Interview with Parent and Parent's friend and advocate ("Advocate")*.
4. Student struggles with foundational math and literacy skills. *Exhibit A*, p. 88; *Interviews with Parent and Special Education Teacher*. As a result of her disabilities, Student requires explicit instruction and repetition to make progress. *Interview with Parent*. She also struggles with attention and focus. *Exhibit A*, p. 88; *Interviews with Parent and Special Education Teacher*.

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

B. May IEP

5. Student's IEP, dated May 4, 2022 ("May IEP"), was completed across several IEP team meetings in the spring of 2022. *Response*, p. 1. Student was eligible as a child with a SLD and OHI. *Exhibit A*, p. 56.
6. The May IEP is 47 pages and includes 30 pages in the Present Levels of Educational Performance Summary. *Id.* at pp. 56-102. The May IEP includes the results of formal and informal academic assessments administered by School staff as well as outside evaluators. *Id.* at pp. 58-74. The testing reveals impairments in reading, writing and math. *Id.* According to the outside evaluation, Student met criteria for a SLD in reading, written expression and math. *Id.* at p. 61. Student's grade level equivalencies on various tests ranged from a kindergarten level to late third grade. *Id.* at pp. 63-64.
7. The May IEP also reviews Student's progress on her prior academic goals. *Id.* at pp. 75-83. Student made progress on two out of three objectives in her first reading goal and all of her objectives on a second reading goal. *Id.* at pp. 77-79. She also made progress on her writing goal, although she did not meet two of three objectives. *Id.* at pp. 80-81. Finally, Student made progress on two of three objectives in her prior math goal. *Id.* at pp. 81-83.
8. The May IEP includes updates from Special Education Teacher, Student's third grade teacher, a social worker, and School's occupational therapist ("OT"). *Id.* at pp. 85-87. Student was performing "as expected in class," participating and working well with others, although she could be hesitant to share in large groups. *Id.* at p. 86.
9. Student's OHI impacts her ability to understand social situations, organization, attention span and attention to details. *Id.* at p. 88. Student's difficulties with visual attention, visual motor and sensory processing/self-regulation may make it more challenging for her to complete school activities that require "both her eyes and body to work together at the same time when performing a task." *Id.* As a result of her SLD and OHI, Student has gaps in foundational literacy skills, including "phonological awareness abilities" which limits "her ability to participate in classroom reading and writing activities," impacting her reading comprehension and work completion. *Id.* Finally, Student is also behind in math, including basic number sense and operation skills. *Id.*
10. Parent noted that Student refuses to wear her glasses at school and agreed to sign a release of information for School's OT to communicate with Student's outside OT. *Id.* Parent also enquired about teaching Student to use "speech to text" for writing. *Id.*
11. Student requires a health care plan, but no other special factors apply. *Id.* at p. 89.
12. The May 2022 IEP contains five annual goals. *Id.* at pp. 89-95. These include:

- Social\Emotional Wellness: From a baseline of 1, 1, 1, 1 “[b]y May 2023, [Student] will present positive executive functioning skills in the areas of conversation, personal space, and self-advocacy. In each of these areas, [Student] will grow from a baseline of 1/5 to 3/5 opportunities through the following objectives:
 - In counseling sessions, [Student] will increase her conversation skills to stick to the topic at hand after one reminder from 1 out of 5 opportunities to 3 out of 5 opportunities as measured by the mental health provider.
 - Given a visual check-list and fading adult supports, [Student] will organize her desk and make sure she has her colored folders organized from 1 out of (sic) of 5 days a week to 3 out of 5 days a week as measured by the mental health provider.
 - [Student] will avoid peer conflict during recess time by using strategies such as playing with students she is comfortable with, not engaging in conflict that has nothing to do with her, and seeking adult support to problem-solve from 1 day a week to 3 days a week as measured by the mental health provider.”

- Reading: From a baseline of 1, 2, 2, 2, 3, 80% “[b]y May 2023, with the use of a multi sensory (sic) approach and specially designed instruction, [Student] will improve her overall phonological awareness abilities as measured by the special education teacher through the following objectives.
 - When provided with a word and asked to say a real or nonsense word that rhymes with the provided word, [Student] will correctly identify a rhyming word from a baseline of 1/10 to 10/10 observable, measurable opportunities across 5 consecutive sessions as measured by the special education teacher.
 - [Student] will be able to accurately segment two-syllable words into their units of pronunciation (syllables) from a baseline of 2 out of 6 to 5 out of 6 times as measured by the special education teacher.
 - When provided with a multisyllabic word and asked to isolate the final sound in the word, [Student] will correctly identify the sound in 5/5 observable measurable opportunities across 5 separate sessions from a baseline of 2/5 as measured by the special education teacher.
 - In order to demonstrate her phonemic awareness abilities, [Student] will be able to manipulate (substituting and deleting) the initial, medial, and

final phonemes when read a single-syllable word from a baseline of 2/6 to 5/6 times as measured by the special education teacher.

- When given a list of 12 multisyllabic words that contain r-controlled vowels (*ar, er, ir, ur, and or*), [Student] will demonstrate her decoding skills by accurately reading them 8/12 times from a baseline of 3/12 times as measured by the special education teacher.
- When given a 2-5 (second-grade, fifth month) Easy CBM or another normed fluency assessment, [Student] will be able to read it with at least 90% accuracy from a baseline of 80% accuracy per minute as measured by the special education teacher.”
- Reading: From a baseline of 2, 50% “[b]y May 2023, [Student] will be able to demonstrate her listening and reading comprehension skills through the following objectives as measured by the special education teacher.
 - In order to support reading comprehension within the general education classroom through the use of graphics organizers and frequent checks for understanding, [Student] will be able to accurately respond to ‘wh questions-who, what, where, when, and why’ after being read a grade-level passage/story from a baseline 2/5 trials to 5/5 trials as measured by the special education teacher.
 - Prior to being read a grade-level passage/story and after being explicitly taught the definitions of lesser know (sic) words through the use of visuals and definitions, [Student] will be able to recall and define the words in order to support comprehension from baseline of 50% of the time to 70% of the time as measured by the special education teacher.”
- Writing: From a baseline of “0, forms 37/52 letters properly, moves writing to right side with each return to next line; 0” “[b]y May 2023, [Student] will increase her overall written expression skills and be able to demonstrate her knowledge of the four conventions of writing (spelling, punctuation, capitalization and grammar) in order to write complete sentences through the following objectives as measured by the special education teacher and the occupational therapist.
 - When provided with a writing prompt and a sentence stem, [Student] will be able to accurately respond to the prompt with at least two complete sentences using correct grammar, capitalization and punctuation with no more than two errors per sentence from a baseline of 0/5 times to 4/5 times as measured by the special education teacher.

- [Student] will improve her writing skills related to visual attention and visual motor from writing 37/52 alphabet letters properly when writing complete sentences within line boundaries, using writing conventions, but moves her writing slightly to the right with each return to the next line on her paper to writing sentences about an experience or event with descriptive details, using consistent proper letter formations and writing conventions and starting and staying on the left side of her paper when she returns to the next line (with or without use of an editing checklist), from 0/4 opportunities (not introduced) to given in (sic) at least 3/4 opportunities, as measured by the occupational therapist.
- When given a list of 15 words that contain single-syllable, r-controlled vowels (ar, er, ir, ur, and or), [Student] will accurately spell them 12/15 times from a baseline of 8/15 times as measured by the special education teacher.
- [Student] will be able to accurately spell single-syllable words that contain common long-vowel teams (Ex.: ai, oa, ee, ea, ay, and silent-e) 9/10 times from a baseline of 5/10 times as measured by the special education teacher.
- [Student] will be able to write two complete sentences with no more than two spelling errors (including decodable and common sight words) per sentence from a baseline of 0/5 times to 3/5 times as measured by the special education teacher.”
- Mathematics: From a baseline of 1, 3, 1, 2, 3, 3, “[b]y May 2023, [Student] will increase her basic number sense and math operation skills through the following objectives.
 - [Student] will use drawings and/or manipulatives to accurately solve two-digit addition and subtraction equations (with regrouping) from a baseline of 1/10 times to 7/10 times (90% accuracy) as measured by the special education teacher.
 - After being read 10, single-step word problems, [Student] will be able to identify the operation (addition, subtraction or multiplication) by underlining the key phrases (Ex.: more than, the difference, equal groups of) from a baseline of 3/10 to 7/10 times as measured by the special education teacher.
 - [Student] will be able to accurately solve one-digit by one-digit (ex.: 5 x 6) and one-digit by two-digit (up to 10) (Ex.: 7 x 10) multiplication problems

using skip count or loops and groups from a baseline of 1/12 to 8/12 times as measured by the special education teacher.

- In order to demonstrate her number sense abilities, [Student] will be able to count by 1s, 2s, 5s, 10s from any number within 120 in 7/10 trials from a baseline of 2/10 trials as measured by the special education teacher.
- [Student] will be able to count backwards starting from any number within 100 from a baseline of 3/10 to 8/10 times as measured by the special education teacher.
- After identifying what operation to use (addition, subtraction, or single digit x single digit multiplication), [Student] will be able to accurately solve a word problem from a baseline of 3/10 times to 7/10 times as measured by the special education teacher.”

Id. at pp. 89-94. Progress reports will be shared with Parent every semester and progress monitoring data will be shared monthly. *Id.* at p. 89.

13. There are 19 accommodations in the May IEP, including step by step instructions, visual of alphabet letters, a cheat sheet for math operations, access to sight words, and “communication with family regarding when various general education and special education instruction blocks occur as soon as possible within the year and when changes are occurring.” *Id.* at p. 95.

14. Student qualified for extended school year (“ESY”) services because she experiences severe regression on her IEP goals and objectives and requires an unreasonably long time to relearn previously learned skills. *Id.*

15. Under the May IEP, Student received the following special education and related services during the school year:

- Social Work Services:
 - 120 minutes per month (“MPM”) of direct services outside the general education classroom to address “organization, social skills and social awareness, and attention span challenges.”
 - 100 MPM of direct services provided inside the general education classroom to support Student with “setting her goals, organizing her materials, supporting her emotional regulation, and on-task behavior.”

- 40 MPM of indirect services to consult with teachers, support staff and outside providers “to assist in how best to support [Student] and to collaborate as a team.”
- Occupational Therapy Services:
 - 60 MPM of direct services outside the general education classroom to address Student’s “limitations with visual attention, visual motor, and sensory processing/self-regulation skills.”
 - 90 minutes yearly of indirect consultative services to “support [Student] during the performance/learning of functional grade level motor skills” related to Student’s writing objective.
- Specialized Instruction
 - Literacy: 450 minutes per week (“MPW”) of direct services outside the general education classroom using “multi-sensory, systematic, and prescriptive curriculum” to target phonological awareness skills.
 - Literacy: 150 MPW of direct services inside the general education classroom to assist Student in accessing grade-level content.
 - Math: 300 MPW of direct services outside the general education classroom “to target her basic number sense and operational skills.”
 - Math: 75 MPW of direct services inside the general education classroom to assist Student in accessing grade-level content.
 - Other: 60 MPM of indirect services to collaborate with team “to ensure transfer of skills across environments, monitor progress toward goals, and ensure implementation of accommodations.”

Id. at pp. 98-99.

16. Student’s least restrictive environment (“LRE”) is general education 40-79 percent of the time, with Student spending 62.3 percent of her day in general education. *Id.* at p. 100. The advantage of that LRE is more specially designed instruction in math and literacy. *Id.* Disadvantages include missing grade level content and limited opportunities to generalize social skills. *Id.*
17. The PWN notes that the IEP team chose to increase Student’s services to provide her with the direct instruction she needs after an in-depth conversation. *Id.* at p. 101. The PWN also lists

several specific requests from Parent that were rejected by the IEP team, along with a description of why those options were rejected. *Id.* The IEP team agreed to provide Parent with progress monitoring data monthly, in addition to the progress reports to be provided with report cards, so that the team could convene if Student was not making adequate progress. *Id.* at p. 102.

C. August IEP Team Meeting

18. IEP meetings at School are generally set for one hour. *Interview with Principal.* If IEP teams run out of time, they agree to reconvene at another time. *Interviews with Principal and Special Education Teacher.* However, other than for Student, Principal has never personally attended an IEP team meeting that did not finish in the hour allotted. *Interview with Principal.*
19. A virtual IEP team meeting was scheduled for 12:00 p.m. on August 22, 2022 (“August meeting”) to review and update Student’s IEP. *Exhibit D*, p. 1. The meeting was scheduled for one hour. *Interviews with Principal and Special Education Teacher.*
20. Parent and Senior Manager of Special Education for District (“Senior Manager”) had a meeting the week prior to go over Parent’s concerns for the August IEP team meeting. *Exhibit K*, p. 39. Parent had questions and concerns about curriculum, progress monitoring and service delivery, some of which were addressed during the premeeting. *Id.* Parent also sent an email the night before the August IEP team meeting outlining her agenda. *Id.* at p. 162. Parent wanted to discuss curriculum, implementation, assessment, a communication plan, accommodations, modifications of the goals in the May IEP and a question for OT about Student’s pencil grasp. *Exhibit K*, pp. 162-163.
21. Parent also started the email by sharing a recent language assessment that had been completed with Student, which she felt was relevant to some of Student’s difficulties, including her “struggles with the tenses of irregular verbs.” *Id.* Parent did not have time to bring the evaluation up at the August meeting. *Interview with Parent.* Student’s IEP team never discussed the speech evaluation in meetings or via email. *Interviews with Parent, Special Education Teacher, and Principal.* School staff were unaware of any recent language evaluations for Student. *Interviews with Principal, Special Education Teacher, and Teacher.*
22. Parent, Advocate, attorney for Parent (“Parent’s Attorney”), Principal, Special Education Teacher, Teacher, social worker at School (“Social Worker”), OT, Senior Manager, District’s Special Education Instructional Specialist over School (“SEIS”) and attorney for District (“District’s Attorney”) attended the August IEP team meeting. *Interviews with Principal and Special Education Teacher.* During the meeting, District made clear that the meeting was limited to discussing Student’s goals and objectives, not questions about curriculum. *Interviews with Principal and Special Education Teacher.* Parent’s Attorney kept trying to redirect the conversation to issues District did not want to discuss. *Interviews with Special Education Teacher and Advocate.*

23. The IEP team at the August meeting agreed that District would send Parent progress monitoring data for the academic goals every two weeks, on Tuesdays, while the related service providers would share their progress monitoring every four weeks. *Interview with Principal*. In light of Student’s history of food insecurity, the IEP team agreed to add an accommodation that food could not be used as a reward for Student. *Id.*
24. Parent wanted to change a lot of the objectives for the academic goals. *Interviews with Principal and Special Education Teacher*. With too many changes to make in the hour, the IEP team agreed to revise the goals via email, after the meeting. *Interviews with Principal, Special Education Teacher, Parent and Advocate*. However, District was amenable to Parent’s proposed changes. *Interviews with Parent and Special Education Teacher*. District did not open a new IEP during the meeting and implemented the May IEP until after the October IEP team meeting. *Interviews with Special Education Teacher, Principal and SEIS*.

D. Modification of Student’s Goals

25. Special Education Teacher sent Parent updated goals to review on August 26, 2022. *Exhibit K*, p. 140. Parent made a few comments in the Google document but determined she could not continue reviewing until after she got more information from Parent’s Attorney and Senior Manager. *Id.* Parent responded via email 10 days later, on September 7, 2022, after further prompting, with additional suggestions. *Id.* at pp. 347-351. Many of Parent’s suggestions were semantic, adding detail and definitions, like defining multisyllabic as two-syllables. *Id.*
26. She also had questions about the accuracy of the baselines and requested that all goals be adjusted to measure x out of 10 “measurable opportunities across 5 consecutive sessions as measured by the special education teacher.” *Id.* She also asked clarifying questions about the goals and suggested substantive changes like adding a reading comprehension goal that considered fluency and adding a vocabulary goal around prefixes and suffixes. *Id.* In a separate exchange with OT, Parent asked about breaking the OT objective into two objectives, one focusing on letter formation and another tracking use of writing conventions. *Id.* at p. 174.
27. Parent brought up the possibility of another goals meeting to discuss the edits, which Special Education Teacher agreed was necessary to make the “final adjustments in a timely manner.” *Id.* at p. 347. The team could not find a mutually agreeable time as Parent was unavailable in the afternoons until September 20, 2022 and SEIS was only available Wednesday afternoons. *Id.* at p. 104.
28. With no meeting date set, Special Education Teacher sent an updated draft on September 12, 2022, updating baselines and responding to several of Parent’s other questions and suggestions. *Id.* at pp. 82-85. The revisions included many of the changes and new objectives

requested by Parent, although some objectives Parent had questions about were unchanged. *Compare Id.* at pp. 82-85, 347-351.

29. On Tuesday, September 13, 2022, OT sent Parent a revision, dividing her objective into two objectives, as Parent had requested. *Id.* at pp. 204-205. Parent had questions about the changes and requested further revisions. *Id.* at pp. 203-204. OT responded on September 21, 2022, explaining that it would be more important to focus on the legibility of Student's letters than their size and reviewing the skills Student was currently exhibiting at school. *Id.* at pp. 242-244. OT also revised the two objectives to reflect Parent's requests, ensuring that the writing sample takes up at least two lines on Student's paper and aiming for proper letter formation and sizing. *Id.*
30. On September 14, 2022, Parent sent additional revisions to the remaining academic objectives. *Id.* at pp. 210-213. Many of the proposed changes were adding specificity to the existing objectives, without changing the intent of the goals. *Id.* For example, she wanted to specify when things would be read out loud to Student and wanted to be very specific about what Student would be adding or subtracting in the math objectives. *Id.* She also had a few substantive revisions like working on reading comprehension using ability-level (not grade-level) text and creating timed math fluency goals. *Id.*
31. After gathering new baseline data, Special Education Teacher responded on September 20, 2022 with additional revisions. *Id.* at pp. 383-387. She explained that she does not normally include deadlines in the objectives since they are included in the overall goal, but she offered to do so if Parent preferred. *Id.* at p. 383. She added Parent's requested language about what would be read out loud to Student and made several other requested tweaks to the existing objectives. *Id.* at pp. 383-387. Special Education Teacher also made requested revisions to two of the objectives in the second reading goal. *Id.* at p. 384. She added "and define" to the final reading objective to address Parent's concern about vocabulary, although she otherwise did not address Parent's questions about that objective. *Id.* at p. 395. She also made several requested changes to the math goal, including creating addition and subtraction fluency objectives. *Id.* at p. 386-387.
32. Feeling that the team had not addressed all of her concerns, Parent asked Advocate, a former special education teacher, to weigh in on September 20, 2022. *Id.* at p. 383. Advocate reiterated Parent's concerns about the objectives in the second reading goal and offered some suggested rewrites. *Id.* at pp. 379-380. She also noted that they were still waiting for a response from OT on the OT's writing objective. *Id.* at p. 381. Advocate also made suggested revisions to the new math fluency objectives to better get at the skills Parent was concerned about. *Id.* at p. 381-382.
33. On September 22, 2022, SEIS put an end to email communications about the revisions, indicating that any further revisions would be made at an as yet unscheduled meeting in October. *Id.* at p. 241.

E. Student's Special Education Services

34. Special Education Teacher determines intervention schedules after consulting with general education teachers about when they will be providing math and literacy instruction, as she tries to avoid pulling students during those times. *Interview with Special Education Teacher*. She pulls students based on their ability levels and not their grade levels. *Id.* Students may move between groups during the year depending on their progress. *Id.*
35. Special Education Teacher keeps a spreadsheet that notes what she worked on with students each day. *Id.* The spreadsheet also includes notes of when students are absent or leave early. *Id.* Each Monday she enters the data in Enrich, District's data management system, although she only logs the times she worked with the student and not the details of what they worked on. *Id.*
36. Student's general education classroom starts the day at 8:05 a.m. with breakfast, and class starts at 8:15 a.m. *Interview with Teacher*. Initially Student went to Special Education Teacher for direct literacy instruction from 8:15-9:00 a.m. every morning. *Exhibit 9*. After Principal and Parent tried to meet one morning, they recognized how disruptive morning announcements were and adjusted Student's schedule starting September 27, 2022 so that she has direct literacy instruction from 8:30-9:00 a.m. *Exhibit K*, pp. 120 and 134; *Exhibit N*. During that first block of time, Student works one-on-one with Special Education Teacher on her IEP goals. *Interview with Special Education Teacher*.
37. When Student started her day with Special Education Teacher, she often started by reading with the support of a computer application until after announcements. *Id.* The timer on the program may have continued running if Student did not close out before moving on to other work. *Interview with Principal*. The special education classroom is set up so Special Education Teacher can always see students' computers, and students lose computer privileges if they require more than three warnings to stay on task. *Interview with Special Education Teacher*. Student has never lost computer privileges. *Id.* She may have stayed on the reading application for longer on a day when the classroom had to be cleared for another student's unsafe behaviors, but otherwise Student was not spending more than a few minutes a day on the program. *Id.*
38. On Wednesdays, Student goes to a social skills group with Social Worker. *Exhibit N*. Early versions of the schedule noted that the group started at 8:45 a.m., but Student always joined at 9:00 a.m., after her time with Special Education Teacher. *Exhibit 9; Interview with Principal*.
39. Special Education Teacher pushes into Student's general education class from 9:30-10:00 a.m. during whole group literacy instruction. *Interviews with Teacher and Special Education Teacher*. During that time, she supports Student with whatever skill they are working on in class. *Id.*

40. At 10:00 a.m., Special Education Teacher takes Student and three others back to her room for more direct literacy instruction. *Id.* For 30 minutes, the four students work with Special Education Teacher on the day's *Really Great Reading* lesson. *Interview with Special Education Teacher.* At 10:30 a.m., the other students return to general education and another group comes to work with Special Education Teacher. *Id.* For the next 30 minutes, Student works independently on anything left over from the 8:30 a.m. session or on assignments Teacher provides that Student can access independently on paper or on her computer. *Interview with Special Education Teacher.* Student initially only stayed for an additional 15 minutes, until 10:45 a.m., but Special Education Teacher added another 15 minutes after they agreed to start Student's morning 15 minutes later on September 27. *See Exhibit 9; Exhibit N; Exhibit K, p. 122.*
41. OT initially pulled Student for direct services at 10:30 a.m. on Wednesdays. *Exhibit 9.* As of September 27, 2022, OT agreed to pull Student at 11:00 a.m. on Wednesday, after her time with Special Education Teacher. *Exhibit N; Exhibit K, pp. 124-125.* Student was absent and did not have OT services on September 14, 2022. *Exhibit 14, pp. 7 and 20.* The SCO finds that on August 24, August 31, September 7 and September 21, Student missed 15 minutes of literacy instruction, resulting in a combined hour of missed literacy instruction.
42. Student participates in general education math instruction from 12:00-1:45 p.m. daily. *Interview with Teacher.* Special Education Teacher pushes into the general education classroom from 12:15-12:30 p.m. daily, and often starts earlier. *Interviews with Teacher and Special Education Teacher.* During that time, Special Education Teacher works with five students, including Student, to support them in completing work assigned by Teacher. *Interview with Special Education Teacher.*
43. Special Education Teacher pulls Student and two other students for direct math instruction from 1:45-2:45 p.m. daily. *Exhibit N.* Before adjustments were made to Student's schedule, Special Education Teacher provided direct math instruction from 2:00-3:00 p.m. daily. *Exhibit 9.* From 1:45-2:30 p.m. students do a warmup, a daily *Do the Math* lesson and a grade level worksheet together with Special Education Teacher. *Interview with Special Education Teacher.* From 2:30-2:45 p.m., when another group comes in, Student works independently on a packet Special Education Teacher puts together to target the skills in Student's IEP goals. *Id.* Once Student completes the packet, which may take a few days, they review it and work through anything she got wrong. *Id.*
44. From 2:45-3:00 p.m., Student stays in the special education classroom and does 15 minutes on a computer application aligned with the reading curriculum. *Id.* Most days Student chooses to return to her general education classroom at 3:00 p.m., but if she missed any services earlier in the day, she stays and works with Special Education Teacher until 3:10 p.m. *Id.*

45. Previously, when students met certain expectations in Special Education Teacher's classroom, they would get a gumball before returning to class. *Id.* After Parent requested that food not be used as a reward for Student due to her history of food insecurity, Special Education Teacher looked for a new reward system so Student would not feel left out. *Id.* Students who met expectations initially earned free time. *Id.* Student, a rule follower, always earned her preferred time. *Id.* After Parent indicated concerns about that practice on September 26, 2022, Parent and Special Education Teacher worked out a new system where Student gets rewarded at home if she meets expectations in the special education classroom. *Id.*

F. Progress Monitoring

46. District has a standard operating procedure ("SOP") "Progress Reporting" to guide schools in sharing progress reports. *Exhibit J*, p. 38. The Progress Reporting SOP directs schools to send progress reports home with the same frequency as they send home report cards. *Id.* When progress reports are shared, teams should also be reviewing the data to determine if the IEP team needs to convene to address the student's goals or progress. *Id.* The Progress Reporting SOP also notes that students have a year to meet the expectations in annual goals, but objectives should have clear timelines that may or may not be a year. *Id.* at p. 39. Progress reports must also include progress monitoring data "so that parents are able to see how the assessment of progress was made." *Id.*

47. District has another SOP "Progress Monitoring" to guide schools in documenting progress monitoring. *Id.* at pp. 29-37. According to the Progress Monitoring SOP, data should be collected at least every two weeks, assuming five to eight hours of instruction. *Id.* at p. 29. Data may be taken more or less frequently depending on the amount of instruction a student is receiving. *Id.* The Progress Monitoring SOP advises that teams generally need four to six data points to assess whether appropriate progress is being made and reiterates the importance of assessing the appropriateness of progress at least as often as progress reports are sent home. *Id.* at p. 30.

48. Special Education Teacher records student progress monitoring in a Google document and transfers the data to Enrich about every other week. *Interview with Special Education Teacher*. Progress Reports are sent to parents twice a year, with report cards. *Id.* If students have multiple objectives, sometimes they work on all the objectives at the same time, but they usually focus on one objective at a time. *Id.*

49. Special Education Teacher measures Student's progress every Monday morning during a one-on-one session. *Id.* For objectives that need to be monitored over multiple sessions, she puts together daily warmup exercises to measure Student's progress. *Id.*

50. School sent Parent a bi-weekly academic progress report on September 13, 2022 stating that specific data would be collected after the IEP team finished amending Student's IEP. *Exhibit H*, p. 15. The report notes that in lieu of progress on current goals, School had collected new

baseline data points for the recommended revisions, which were shared with Parent. *Id.* School did not know how to give Parent updates on goals that were still being revised. *Exhibit K*, p. 97.

51. In response to the September 13 Progress Report, Parent requested updates on the May IEP goals until revisions were finalized. *Id.* at p. 54. While waiting on guidance from District, School decided it would send progress reports in line with the existing goals for the period until September 27, 2022 and then make adjustments as needed if the goals were modified. *Id.* p. 103.
52. Student's detailed progress on objectives for her academic goals in the May IEP was shared with Parent on September 15, 2022. *Id.* at p. 475; *See Exhibit H*, pp. 19-23. The progress update included both qualitative and quantitative updates for Parent. *Exhibit H*, pp. 19-23. At least some of the data was gathered after September 13. *Id.* at pp. 21-22.
53. Progress was shared again on September 27, 2022. *Id.* at pp. 24-28. Student appeared to make progress on several objectives of the first reading goal. *Id.* at pp. 19, 24. Student appeared to regress on the objectives of the second reading goal. *Id.* at pp. 20-21, 25. She made progress on some objectives of her writing goal. *Id.* at pp. 21-22, 26-27. Student also made progress on some of her math objectives. *Id.* at pp. 23, 27-28.
54. Additional progress was recorded on October 12, 2022. *Id.* at pp. 28-31. Student continued to struggle with some reading objectives while making progress on several others. *Id.* at pp. 24-25, 28-29. Student also made progress on three of her four writing objectives and three of her five math objectives. *Id.* at pp. 26-31.
55. Parent is concerned that some math objectives are being inappropriately monitored because one or two objectives are skipped in a given progress report and Student does not appear to be counting from any number (e.g., Student is always counting 2, 4, 8 and never 3, 5, 7). *Reply*, pp. 6-7. However, even excluding those two objectives, the SCO finds that Student made at least some progress on 12 of 18 objectives Special Education Teacher was tracking bi-weekly.

G. October IEP

56. The IEP team was scheduled to meet, with attorneys, on October 31, 2022. *Exhibit K*, p. 276. Parent agreed to meet on October 3, 2022, without attorneys, to finalize the IEP goals. *Exhibit K*, p. 74; *Interviews with Parent and SEIS*.
57. Senior Manager, SEIS, Principal, Special Education Teacher, Teacher, Social Worker, OT, Advocate and Parent attended the October IEP team meeting. *Interviews with Parent and Special Education Teacher*. During the meeting, they agreed to modify most of Student's academic goals. *Interview with Parent and Special Education Teacher*. Parent focused on the things they had been unable to reach agreement on via email and did not bring up changes

she believed had already been agreed to, like dividing the OT objective into two. *Interview with Parent; See Exhibit K*, pp. 204-205.

58. During the virtual meeting, Principal shared her screen so everyone could see the edits as they were made. *Interview with SEIS*. District made all the changes Parent requested during the meeting. *Interviews with Parent, Advocate, Teacher, Special Education Teacher, and Principal*. District agreed to get new baseline data for the changed objectives and send Parent the new IEP by the end of the week. *Interview with Advocate*.

59. The October IEP still contains the same five annual goals, with modified objectives. *Id.* at pp. 34-40. The following changes were made:

- Social\Emotional Wellness: The second objective was removed from this goal and the baseline for the first objective was increased from one to three. *Id.* at pp. 34-35, 89-90.
- Reading: Specificity was added to the first five objectives in the first reading goal, defining multisyllabic as two-syllable for example, and the IEP team agreed to measure those five objectives out of 10 opportunities, which necessitated adjusting some baselines. *Id.* at pp. 35-36, 90-91. The final objective was changed, as follows, to measure how many correct words Student could read in a minute instead of percent accuracy in an unknown timeframe, with a new baseline:
 - When given a 2-5 (second-grade, fifth month) Easy CBM or another normed fluency assessment, [Student] will read 45 CWPM (correct words per minute) from a baseline of 29 CWPM as measured by the special education teacher.”

Id. at p. 36.

Reading: The two existing objectives in the second reading goal were clarified without changing the meaning, and the baselines were unchanged. *Id.* at pp. 36-37, 91-92. The following two objectives and corresponding baselines were added:

- After reading a CBM or another normed passage at her current reading level, [Student] will be able to verbally recall 4 out of 5 ‘wh questions’ (who, what, where, when, and why) within the story from a baseline of 2 out of 5 questions.
- From a previously defined list of 20 prefixes and 20 suffixes, [Student] will define and recognize specific prefixes 15/20 times and 15/20 suffixes in context from a baseline of 7/20 times assessed by the special education teacher.”

Id.

- Writing: The first two writing objectives were unchanged. *Id.* at pp. 38, 93. The third objective focused on spelling r-controlled vowels was replaced by an objective, included below, about the “plural -es” spelling rule. *Id.* The IEP team clarified that the fourth objective would be measured over five separate sessions. *Id.* Decodable and common sight words was defined in the fifth objective and the IEP team agreed to measure out of 10 instead of five. *Id.* Finally, a sixth objective, included below, was added to work on writing sentences. *Id.* Baselines were added for the new objectives, but baselines for existing objectives did not change. *Id.*
 - [Student] will be able to accurately spell single-syllable words that contain common long-vowel teams (Ex.: ai, oa, ee, ea, ay, and silent-e) 9/10 times from a baseline of 5/10 times over 5 separate sessions as measured by the special education teacher.
 - In response to a given prompt, [Student] will be able to write three sentences utilizing a graphic organizer that contains a main idea sentence and 2 supporting details aligned to the main idea from a baseline of 2 out of 4 times to 4 out of 4 times over 5 separate sessions as measured by the special education teacher.”

Id. at pp. 37-38, 92-93.

- Mathematics: Two fluency objectives, below, for which new baselines were added, replaced the first computation objective. *Id.* at pp. 39-40, 94. Multiplication was removed from both word problem objectives, and they were limited to sums or differences from zero to 20. *Id.* The IEP team added “using all numbers including numbers not a multiple of the factor” to the counting objective because Parent wanted to ensure Student learned to skip count and was not just memorizing factors of 10. *Id.; Interview with Parent.* The following objective was added to work on grouping objects and then counting. *Exhibit A*, pp. 39-40 and 94. The goal for counting backwards was increased from 8/10 to 10/10. *Id.*
 - In order to demonstrate her ability to fluently add, [Student] will accurately solve, one to two-digit addition equations using numbers 20 and below with an addend (sic) from 0-5 within 2:00 minutes from a baseline of 4 correct in two minutes to 8 correct in two minutes as measured by the special education teacher.
 - In order to demonstrate her ability to fluently subtract, [Student] will subtract numbers 0-3 from numbers 20 and below within 2:00 minutes

from a baseline of 1 correct in two minutes to 7 correct in two minutes as measured by the special education teacher.

- [Student] will be able to count groups of single objects, up to 120, by grouping them in groups of 10's, 5's and 1's, and then counting by 10's, 5's and then 1's and write the total amount, 9/10 times, from a baseline of 2/10, measured across 5 sessions.

60. Progress reports will be shared with Parent every semester and progress monitoring data will be shared monthly. *Id.* at p. 34.
61. The team did not have time to talk about accommodations during the October meeting, so Special Education Teacher emailed Parent the list of accommodations later, on October 3, 2022. *Interview with Parent; Exhibit K*, p. 137. Parent asked to add two accommodations, use of a graphic organizer and not using food as a reward. *Id.*
62. Five accommodations were added to the October IEP. *Id.* at pp. 40-41, 95. This includes the two requested by Parent, as well as “[a]ccess to adaptive paper,” “[a]ccess to pencil grips and support from the mental health provider to help with organizing Student’s materials and locker.” *Id.*
63. The IEP was finalized on October 6, 2022 and sent to Parent on October 7, 2022. *Exhibit 14*, p. 1. Special Education Teacher started implementing and measuring the new objectives on Monday, October 10, 2022. *Id.* Only the goal objectives and accommodations changed. *Compare Exhibit A*, pp. 1-48 and 56-102.

H. Cancelled October 31 IEP Team Meeting

64. At the end of the October IEP team meeting, Parent still wanted to meet as scheduled on October 31, 2022 to discuss accommodations. *Interviews with Parent, Principal and Senior Manager*. Without an opportunity to consult with Parent’s Attorney, Parent was not sure what all still needed to be discussed at another meeting, but she was not comfortable cancelling the meeting. *Interview with Parent*.
65. Parent, concerned that the objectives for the math goals were incorrect, requested that they be updated on October 6, 2022. *Exhibit 2*, p. 49. She followed up 12 days later and, on October 19, 2022, Principal indicated that the objectives would not be revisited for at least six weeks, unless Student met the goal. *Id.*
66. On October 18, 2022, District issued a PWN cancelling the October 31 IEP team meeting because Parent requested the meeting to discuss accommodations and the IEP team reached agreement on accommodations via email on October 3, 2022. *Exhibit 12*.

67. On October 28, 2022, after less than three weeks of implementation, Student met two of the math objectives, including one Parent had raised concerns about. *Exhibit 15*, pp. 1-2. Special Education Teacher proposed two new objectives to replace those she had met. *Id.*
68. That evening, Parent emailed School about eight concerns, including updating the baselines and targets for Student's math objectives, tracking Student's receipt of services, and discussing the private speech evaluation completed in August. *Id.* at pp. 3-4. On October 31, 2022, Principal offered to meet regarding the two math objectives Student had met. *Id.* at p. 3. She planned to have School's Speech Pathologist present to consider the private evaluation. *Id.* However, Principal noted that the team would not revisit any other objectives until District had the opportunity to collect 6-8 weeks of data on the existing goals. *Id.*
69. On November 8, 2022, Parent received updated service logs which did not include entries for several of Student's scheduled daily services with Special Education Teacher. *Exhibit 16*, pp. 1-43. Of particular note, after September 29, 2022, there was no record of Student receiving pull out literacy instruction from 10:30-11 a.m. or 2:45-3 p.m. daily. *Id.* at pp. 1-22. This is Special Education Teacher's first year using Enrich, as well as a Google document, to log the services she provides. *Interview with Special Education Teacher*. Student's schedule required Special Education Teacher to make seven separate entries each day. *Id.*; Exhibit N.
70. Entries in Enrich are 30 minutes by default, and users must use a drop-down menu to increase or decrease the length of services. *Interview with Special Education Teacher*. Enrich also allows users to copy and paste prior entries if services are being provided on a consistent schedule. *Id.* Special Education Teacher accidentally entered pull out services from 10-10:30 a.m. instead of 10-11 a.m. and copied that mistake over until November 4, 2022. *Id.* Although services were provided from 2:45 -3:10 p.m. daily during the same period and recorded in her Google document, those services were never entered into Enrich. *Id.* Despite the clerical errors in the service log, the SCO finds that Student was in Special Education Teacher's classroom from 10:30-11 a.m. and 2:45-3 or 3:10 p.m. daily.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District had an IEP in place for Student at the beginning of the school year, consistent with 34 C.F.R. § 300.323. However, District failed to implement all of Student's minutes of special education instruction, in violation of 34 C.F.R. § 300.323. The failure to implement was material and resulted in a denial of FAPE.

A. IEP at the Start of 2022

Parent's first concern is that District did not have a finalized IEP in place for Student at the start of the 2022-2023 school year.

An IEP is “the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982)). To ensure the delivery of a FAPE, “[a]t the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in 34 CFR 300.320.” 34 CFR § 300.323(a).

Here, Student’s May IEP was in effect at the start of the 2022-2023 school year. (FF # 24.) Although Parent and District were considering revisions to the May IEP at the start of the school year, District did not open a new IEP at the August meeting. (*Id.*) Even though Special Education Teacher was briefly confused about how to progress monitor goals that were being rewritten, District continued implementing the May IEP while those conversations were ongoing. (FF #s 49 and 50.) The SCO thus finds and concludes that District had an IEP in place at the beginning of the 2022-2023 school year, and there was no violation of 34 CFR § 300.323(a).

B. Implementation of Special Education Minutes

Parent’s concern is that District was not implementing all of Student’s minutes with a special education teacher because of overlaps in Student’s proposed schedule and because Student was accessing various websites and computer programs during scheduled services.

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is “the centerpiece of the statute’s education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student’s IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

An IEP must identify the special education and related services necessary to allow the student to advance appropriately towards annual goals, to be involved in the general education curriculum, and to be educated and participate with other nondisabled children. *Id.* at § 300.320(a)(4). A school district must ensure that “as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child’s IEP.” 34 C.F.R. § 300.323(c)(2). To satisfy this obligation, a school district must ensure that each teacher and related services provider is informed of “his or her specific responsibilities related to implementing the child’s IEP,” as well as the specific “accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.” *Id.* § 300.323(d).

Knowledge of Student's IEP

As a preliminary matter, the SCO must determine whether District satisfied its obligation under 34 C.F.R. § 300.323(d). Here, the findings demonstrate that Special Education Teacher, Teacher, Social Worker and OT participated in IEP team meetings for Student in August and October and were aware of their responsibilities under Student's May IEP and then her October IEP. (FF #s 22 and 57.) As a result, the SCO finds and concludes that District complied with 34 C.F.R. § 300.323(d).

Overlapping Services

Parents first concern is that District was not implementing all of Student's minutes with a special education teacher because the schedule of her services showed that related service providers were pulling her from scheduled time with the special education teacher.

Student's May IEP called for 450 MPW, or approximately 90 minutes per day, of direct literacy instruction outside the general education setting using a "multisensory, systematic, and prescriptive curriculum" to target phonological awareness skills. (FF # 15.) It also included 300 MPW, or an hour a day, of direct math instruction outside the general education setting "to target her basic number sense and operational skills." (*Id.*) Student was also to receive direct special education services inside the general education setting, 150 MPW for literacy support and 75 MPW for math support. (*Id.*) Student was also to receive direct social work services for 120 MPM outside of the general education classroom and 100 MPM inside the general education classroom. (*Id.*) Finally, Student's IEP included 60 MPM of direct OT services outside the general education classroom. (*Id.*) Student's initial schedule indicated that OT and Social Worker were each pulling Student from direct literacy instruction for 15 minutes, once per week. (FF #s 38 and 41.)

Although the initial schedule indicated an overlap between Student's literacy instruction and Student's time with Social Worker, Student went to Social Worker's group after literacy instruction. (FF # 38.) However, before the schedule was changed on September 27, Student missed 15 minutes of literacy instruction on four Wednesdays, when she was pulled for OT. (FF # 41.) This overlap was resolved after five weeks. (FF #41.)

Thus, the SCO finds and concludes that as a result of overlaps in Student's services District did not implement Student's IEP in its entirety, resulting in a violation of 34 C.F.R. § 300.323(c)(2).

Use of Independent Work

Parent's next concern is that Student was not receiving all of her minutes with Special Education Teacher because computer activity showed that Student was logging in to general education websites during time she was supposed to be working with Special Education Teacher.

During her second block of direct literacy instruction, Student is spending time working independently while Special Education Teacher supports other students. (FF #s 40, 69 and 70.) Student worked independently for 15 minutes per day until September 27, 2022, and for 30 minutes per day since then. (*Id.*) For the first five weeks of school, until September 27, 2022, Student was working independently for 75 MPW. (*Id.*) In the more than six weeks since September 27, she has been working independently for 150 MPW. (*Id.*) However, during that same period, Student has been spending 525 MPW working on literacy in the special education classroom because of the additional 15 minutes she is spending from 2:45-3:00 p.m. daily. (FF #s 36-44, 69 and 70.)

During that independent work time, Student often works on general education assignments provided by the general education teacher, explaining why she has been accessing general education websites during that time. (FF # 40.) The SCO finds, in consultation with CDE Content Specialist 1, that working independently on general education activities is not direct instruction on a multisensory, systematic, and prescriptive curriculum. Thus, the SCO finds that Student has received 375 MPW of direct literacy instruction outside the general education curriculum since the start of the school year. The SCO finds and concludes that District failed to implement Student's IEP in its entirety, resulting in a violation of 34 C.F.R. § 300.323(c)(2).

During Student's direct math instruction, she works independently on a packet Special Education Teacher puts together to target the skills identified in Student's IEP goals. (FF #43.) When Student finishes the packet, she gets immediate feedback and support from Special Education Teacher. (*Id.*) Because the work is individually and directly tied to Student's goals and Student gets immediate feedback from Special Education Teacher, the SCO, in consultation with CDE Content Specialist 1, finds that the independent work can be part of direct services "to target her basic number sense and operational skills." Thus, the SCO finds and concludes that District did not violate 34 C.F.R. § 300.323(c)(2) in this respect.

As evidenced by the preceding analysis, the SCO cautions District that special education services are more than minutes in a classroom. Indeed, "[s]pecial education means specially designed instruction, at no cost to the parents, to meet *the unique needs* of a child with a disability." 34 C.F.R. § 300.39(a)(1) (emphasis added). Specially designed instruction must meet the child's unique needs and ensure the child's access to the general education curriculum by adapting "as appropriate to the needs of an eligible child under this part, the content, methodology or delivery of instruction." *Id.* at § 300.39(b)(3).

Use of Free Time

Parent's final concern is that Student was not getting all of her minutes with a special education teacher because Student was spending a portion of her time with Special Education Teacher on earned free time.

To accommodate Student, Special Education Teacher stopped offering gum to students as a reward and started allowing them to earn free time at the end of instruction. (FF # 45.) When Parent expressed concern about the use of free time during Student’s direct instruction on September 26, 2022, Special Education Teacher stopped using it. (*Id.*) The SCO, in consultation with CDE Content Specialist 1, acknowledges that free time is a commonly used reward, but cautions District that there could be a situation where the use of too much free time, without consideration of students’ individual needs, could result in a violation of 34 C.F.R. § 300.323(c)(2). However, in this case, free time was only briefly used as a reward while Special Education Teacher sought to implement one of Student’s accommodations. The SCO thus finds and concludes that the limited use of free time in this case did not result in a violation of 34 C.F.R. § 300.323(c)(2).

C. Materiality of Failure to Implement

Where the definition of a FAPE specifically references delivery of special education and related services consistent with an IEP, the failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19. However, not every deviation from an IEP’s requirements results in a denial of a FAPE. *See, e.g., L.C. and K.C. v. Utah State Bd. of Educ.*, 125 Fed. App’x 252, 260 (10th Cir. 2005) (holding that minor deviations from the IEP’s requirements which did not impact the student’s ability to benefit from the special education program did not amount to a “clear failure” of the IEP); *T.M. v. Dist. of Columbia*, 64 IDELR 197 (D.D.C. 2014) (finding “short gaps” in a child’s services did not amount to a material failure to provide related services). Thus, a “finding that a school district has failed to implement a requirement of a child’s IEP does not end the inquiry.” *In re: Student with a Disability*, 118 LRP 28092 (SEA CO 5/4/18). Instead, “the SCO must also determine whether the failure was material.” *Id.* Courts will consider a case’s individual circumstances to determine if it will “constitute a material failure of implementing the IEP.” *A.P. v. Woodstock Bd. of Educ.*, 370 Fed. App’x 202, 205 (2d Cir. 2010).

“A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard “does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” *Id.*

Overlapping Services

In this case, the overlap in Student’s service schedule resulted in a loss of 15 MPW of literacy instruction for four weeks, or less than four percent of Student’s weekly literacy instruction. The SCO thus finds and concludes that this small discrepancy did not result in a material failure to implement Student’s IEP.

Use of Independent Work

As a result of independent work, Student has been receiving only 375 of her 450 MPW of her direct literacy instruction since the start of the 2022-2023 school year. About 17% of her specialized literacy instruction has been replaced with independently working on general education activities. This is more than a minor discrepancy between the services provided and the services included in Student's IEP, and the violation is ongoing. *Van Duyn ex rel. Van Duyn*, 502 F.3d at 822. Therefore, the SCO finds and concludes that this constitutes a material failure to implement Student's IEP, resulting in a denial of FAPE.

Compensatory Education

Compensatory education is an equitable remedy intended to place a student in the same position he would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education need not be an "hour-for-hour calculation." *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child, and ensuring children receive the services to which they are entitled. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010). The SCO now explains a compensatory education package in order to help place Student in the same position with respect to making progress on IEP goals if not for the violation.

As the violation is ongoing, the SCO cannot determine exactly how many minutes have been missed. The SCO also notes that despite the violation, Student has continued to make at least some progress on her goals. (FF #s 52-55.) The SCO, in consultation with CDE Content Specialist 2, notes that a student who qualifies for ESY because she experiences regression and difficulty recouping skills would be expected to make slower progress in the first six weeks of school. (FF # 14.) Considering Student's already extensive schedule of daily intervention and Student's progress to this point, the SCO finds that an award of all the minutes she has missed would be unnecessary and overly burdensome. Instead, the SCO finds an award of 90 minutes of one-on-one direct literacy instruction to be appropriate.

Conclusion to Allegation No. 2: District developed, reviewed, and revised an IEP that was tailored to meet Student's individualized needs, consistent 34 C.F.R. §§ 300.320 or 300.324. There is no IDEA violation.

Parent's concern is that neither the May IEP nor the October IEP have been appropriate because they lacked academic goals tailored to Student's individualized needs.

The IDEA requires a school to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v.*

Rowley, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with the IDEA's procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Id.* Taken together, these two prongs assess whether an IEP is procedurally and substantively sound.

An IEP is "the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 181 (1982)). In developing an IEP, the IEP Team must consider the strengths of the child, the parent's concerns, evaluation results, and "the academic, developmental, and functional needs of the child." 34 C.F.R. § 300.324(a). Along with a statement of the special education and related services to be provided to the student, an IEP must include measurable goals designed to "[m]eet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum" and any other educational needs that result from the child's disability. *Id.* at § 300.320(a)(2). To allow for the evaluation of a student's progress, IEP goals must be clear and objectively measurable. *Kuszewski v. Chippewa Valley Schs.*, 34 IDELR 59 (E.D. Mich. 2001), *aff'd*, 38 IDELR 63 (6th Cir. 2003, *unpublished*). Appropriate goals should be clear enough that a stranger, or person unfamiliar with the IEP, would be able to implement the goal, monitor student's progress on the goal and determine whether that progress was satisfactory. *Mason City Cmty. Sch. Dist.*, 46 IDELR 148 (SEA IA 2006).

As long as the goals are objectively measurable, they do not have to be written in the specific manner that a parent would prefer. *See Bridges v. Spartanburg County Sch. Dist. Two*, 57 IDELR 128 (D.S.C. 2011) (ruling that the use of percentages tied to the completion of discrete tasks is an appropriate way to measure student progress). As long as the goals accurately identify the skill areas in which the student requires specialized instruction, they do not have to use specific words or the most expansive phrasing. *See Benjamin A. v. Unionville-Chadds Ford School District*, 70 IDELR 150 (E.D. Pa. 2017) (holding that goals that addressed executive functioning skills was not deficient because it failed to use the term "executive functioning.")

The IDEA does not promise a particular educational or functional outcome for a student with a disability, but it does provide a process for reviewing an IEP to assess achievement and revising the program and services, as necessary, to address a lack of expected progress or changed needs. 34 C.F.R. § 300.324(a)(2). Thus, whether an IEP is reasonably calculated to allow a student to make appropriate progress is determined prospectively, based on what was known when the IEP was drafted, and not determined by the student's actual progress. *Fuhrmann v. East Hanover Bd. of Educ.*, 19 IDELR 1065 (3d Cir. 1993), *reh'g denied*, 110 LRP 65930 (3d Cir. 06/08/93); and *Adams v. State of Oregon*, 31 IDELR 130 (9th Cir. 1999).

IEP Development Process

Here, the May IEP was developed outside of the window of this Complaint, so the SCO will not consider whether it was developed by a properly constituted IEP team. The May IEP contains annual goals to address Student's academic and functional needs and a statement of the services to be provided. (FF #s 12 and 15.) It also includes a statement of the impact Student's disability has on her ability to access the general education curriculum and notes that she qualifies for ESY and needs a health plan. (FF #s 9, 11 and 14.) Thus, the SCO finds and concludes that the development process for the May IEP complied with IDEA's procedures. *Rowley*, 458 U.S. at 206.

The October IEP was developed through revisions to the May IEP at a meeting on October 3, 2022 with a properly constituted IEP team. (FF # 57.) The October IEP is identical to the May IEP except for the modified objectives and the added accommodations. (FF # 63.) Like the May IEP, it includes all the required components. The SCO thus finds and concludes that the development process for the October IEP complied with IDEA's procedures. *Rowley*, 458 U.S. at 206.

The SCO turns next to the second question of whether the May and October IEPs were substantively appropriate. *Rowley*, 458 U.S. at 207.

Substantive Adequacy of the May IEP

The May IEP included four academic goals with 19 separate objectives. (FF # 12.) The majority of Parent's requested revisions changed the wording of the objectives without changing their intent or the skills targeted. (FF #s 25 and 30.) The SCO finds, in consultation with CDE Content Specialist 1, that Student's academic goals were clear and measurable and appropriately tailored to Student's identified needs. With 19 objectives tailored to Student's identified needs, the May IEP was reasonably calculated to enable Student to make appropriate progress, even if the objectives were not written in exactly the manner Parent would have preferred. *See Bridges v. Spartanburg County Sch. Dist. Two*, 57 IDELR 128. The fact that District agreed to many of Parent's requested revisions in October does not mean the May IEP was not appropriate. Although it is not determinative, the fact that Student was making progress on the majority of the objectives suggests that the May IEP was appropriate in light of Student's circumstances. Therefore, the SCO finds and concludes that the May IEP was reasonably calculated to enable Student to receive an educational benefit and did not violate the IDEA's substantive requirements related to the development of an IEP at 34 C.F.R. § 300.320(a)(1), (a)(2) and 300.324(a).

Substantive Adequacy of the October IEP

Although District's progress monitoring indicated Student was making progress in the first six weeks, District convened an IEP team in October of 2022 to consider Parent's requested revisions. (FF # 27 and 57.) After revisions to the May IEP, the October IEP contained four academic goals with 23 objectives, the majority of which were also included in the May IEP. (FF # 59.) After Parent's requested revisions, the already measurable goals included even more

precise language. (*Id.*) The SCO finds, in consultation with CDE Content Specialist 1, that the goals in the October IEP were clear and measurable and appropriately tailored to Student's identified needs and the proposed services. The SCO cautions District that writing such specific objectives, such as "[Student] will subtract numbers 0-3 from numbers 20 and below within 2:00 minutes" could necessitate meeting more frequently to revise the IEP if Student meets objectives sooner than anticipated. (FF # 59.) However, considering Student's progress to that point, maintaining most of Student's objectives and all of Student's services was reasonably calculated to allow Student to continue making progress. Therefore, the SCO finds and concludes that the October IEP was reasonably calculated to enable Student to receive an educational benefit and did not violate the IDEA's substantive requirements related to the development of an IEP at 34 C.F.R. § 300.320(a)(1), (a)(2) and 300.324(a).

Conclusion to Allegation No. 3: Parent meaningfully participated in the development, review and revision of Student's IEP, consistent with 34 C.F.R. § 300.324(a)(1)(ii). There is no IDEA violation.

Parent's concern is that District ignored her input regarding Student's goals.

The IDEA's procedural requirements for developing a child's IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Systema v. Academy School District No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008). To that end, the IDEA requires that parental participation be meaningful, to include carefully considering a parent's concerns for enhancing the education of his or her child in the development of the child's IEP. 34 C.F.R. §§ 300.321(a)(1), 300.322, and 300.324(a)(1)(ii).

Meaningful parent participation occurs where the IEP team listens to parental concerns with an open mind, exemplified by answering questions, incorporating some requests into the IEP, and discussing privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of the student. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 703 (10th Cir. 1998). Meaningful participation does not require that a district simply agree to whatever a parent has requested. *Jefferson County School District RE-1*, 118 LRP 28108 (SEA CO 3/22/18). But parental participation must be more than "mere form." *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014). "It is not enough that the parents are present and given an opportunity to speak at an IEP meeting." *Id.* Evidence that a district "was receptive and responsive at all stages" to the parents' position, even if it was ultimately rejected, is illustrative of parental participation. *Id.*

Parents do not have veto power over IEP team decisions. An IEP meeting "serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child." *Letter to Richards*, 55 IDELR 107 (OSEP 2010). "The IEP Team should work towards a general agreement, but . . . [i]f the team cannot reach agreement, the public agency must determine the appropriate services . . ." *Id.*

Here, in the first three months of school, Parent participated in two IEP team meetings for Student. (FF # 22 and 57.) She also provided feedback on Student's goals via several emails and a Google document. (FF #s 20, 21, 25, 26, 29, 30 and 32.) Through both the Google document and several emails, Parent requested a multitude of changes. (*Id.*) District agreed to most of Parent's proposed changes and made every change she requested in the October IEP team meeting. (FF #s 28, 29, 31 and 58.) Parent's concern is that District did not make every change she requested or explicitly explain why it was not making every change she requested. To the extent District failed to respond to individual requests, the SCO finds that it was an oversight resulting from the volume of edits and not an intentional effort to ignore Parent's input. At every stage Parent was made aware of the changes District proposed making and given an opportunity to provide further feedback. (FF #s 20, 21, 25, 28-32 and 58.)

Parent is also concerned that District did not consider the private speech evaluation she provided before the August IEP team meeting. (FF # 21.) Parent attached the evaluation to a lengthy email but did not bring up the evaluation in that meeting or any other point. (*Id.*) Although Parent emailed the evaluation to staff, District was unaware of any recent language evaluations. (*Id.*) As soon as Parent resent the evaluation in October, District offered to meet to discuss it. (FF # 68.) The SCO finds that District's oversight did not hinder Parent's participation in the development of Student's IEP.

Parents are members of IEP teams, and they do not have veto power over decisions. If an IEP team cannot reach consensus, it is District's responsibility to make the final determination and then notify Parent of that decision. *Letter to Richards*, 55 IDELR 107 (OSEP 2010). For these reasons, the SCO finds and concludes that Parent had ample opportunity to participate in the development of Student's IEP and there was no violation of 34 C.F.R. § 300.324(a)(1)(ii).

Conclusion to Allegation No. 4: District monitored Student's progress throughout the first semester, consistent with 34 C.F.R. § 300.320(a)(3)(iii). There is no IDEA violation.

Parent's concern, based on the September 13, 2022 progress update, was that District was not adequately monitoring Student's progress. IEPs must include a description of how a child's progress towards their annual goals will be measured and school districts must provide periodic reports on the progress a student is making toward the student's annual goals. 34 C.F.R. § 300.320(a)(3).

Here, District agreed to share progress reports at the end of every semester and progress monitoring data monthly. (FF #s 12 and 60.) District then went a step further and agreed to send Parent progress monitoring data for the academic goals every two weeks. (FF # 23.) District's initial progress report did not contain any data because Special Education Teacher was unsure how to handle the proposed edits. (FF # 50.) However, progress monitoring data was provided two days later, on September 15, 2022. (FF # 52.) The semester has not ended yet, but District has sent Parent progress monitoring data on Student's goals every two weeks. (FF #s 50-54.) Even

if Student did not work on one or two objectives during a given two-week period, the SCO finds that District was still monitoring her progress on the four academic goals. (*Id.*) Similarly, Parent raised concerns about the monitoring of two math objectives where she believes special education teacher is only tracking whether Student can count up or down from numbers that are a factor of two, five or ten and not monitoring Student's ability to count from any number. (FF # 55.) Regardless of whether Parent's concerns are accurate, the SCO finds that District still monitored Student's progress on the math goal by monitoring her progress on three other objectives.

For these reasons, the SCO finds and concludes that District has consistently monitored Student's progress and there was no violation of 34 C.F.R. § 300.320(a)(3)(iii).

Systemic IDEA Violations: This investigation does not demonstrate violations that are systemic and will likely impact the future provision of services for all children with disabilities in District if not corrected.

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

Here, there is no evidence that the violation is systemic or has impacted other students. Nothing in the evidence suggests that District has a practice of having students work independently on general education materials while they are meant to be receiving specialized instruction. The SCO finds that the issue in this case stems from Special Education Teacher's efforts to provide Student's substantial services while continuing to meet the needs of other Students. For these reasons, the SCO finds and concludes that the violation is not systemic in nature.

REMEDIES

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

- a. Failing to implement Student's IEP, in violation of 34 C.F.R. § 300.323(c)(2).

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

1. Corrective Action Plan

- a. By **Tuesday, January 6, 2023**, District shall submit to the CDE a corrective action plan ("CAP") that adequately addresses the violation noted in this Decision. The

CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom District is responsible. The CAP must, at a minimum, provide for the following:

- i. Director, Senior Manager over elementary schools, SEIS assigned to School in August and September of the 2022-2023 school year, Principal and Special Education Teacher must review this decision, as well as the requirements of 34 C.F.R. § 300.323(c)(2). This review must occur no later than **Friday, February 3, 2023**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Friday, February 10, 2023**.
- b. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm District's timely correction of the areas of noncompliance.

2. Compensatory Education Services for Denial of a FAPE

- a. Student shall receive **90 minutes of specialized literacy instruction**. This instruction must be provided one-on-one by an appropriately licensed special education teacher. These hours must be completed by **Monday, July 31, 2023**.
- b. **By Friday, January 6, 2023**, District shall schedule compensatory services in collaboration with Parent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. District shall submit the schedule of compensatory services to the CDE no later than **Friday, January 13, 2023**. If District and Parent cannot agree to a schedule by January 6, 2023, the CDE will determine the schedule for compensatory services by **Tuesday, January 31, 2023**.
 - i. The parties shall cooperate in determining how the compensatory services will be provided. If Parent refuses to meet with District within this time, District will be excused from delivering compensatory services, provided that District diligently attempts to meet with Parent and documents such efforts. A determination that District diligently attempted to meet with Parent, and should thus be excused from providing compensatory services, rests solely with the CDE.
- c. Monthly consultation between the provider(s) delivering compensatory services and Director or Senior Manager shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote

progress on IEP goals. District must submit documentation that these consultations have occurred **by the second Monday of each month**, once services begin, until compensatory services have been completed. Consultation logs must contain the name and title of the provider and the date, the duration, and a brief description of the consultation.

- d. To verify that Student has received the services required by this Decision, District must submit records of service logs to the CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service must be included in the service log.
- e. These compensatory services will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. If for any reason, including illness, Student is not available for any scheduled compensatory services, District will be excused from providing the service scheduled for that session. If for any reason District fails to provide a scheduled compensatory session, District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent and notify the CDE of the change in the appropriate service log.
- f. These compensatory services must be provided to Student outside of the regular school day to ensure Student is not deprived of the instruction Student is entitled to receive during the school day (including time in general education).

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

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

NOTE: Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the CDE. **Given the current circumstances surrounding the COVID-19 pandemic, the CDE will work with District to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13. If either party disagrees with this Decision, the filing of a Due Process Complaint

is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶13; *See also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 27th day of November 2022.



Rachel Dore
State Complaints Officer

APPENDIX

Complaint, pages 1-11

Response, pages 1-6

- Exhibit A: IEPs
- Exhibit B: Evaluations
- Exhibit C: None
- Exhibit D: Meeting Notices
- Exhibit E: None
- Exhibit F: Service Logs
- Exhibit G: Attendance
- Exhibit H: Progress Monitoring
- Exhibit I: District Calendar
- Exhibit J: District Policies and Procedures
- Exhibit K: Correspondence
- Exhibit L: Staff with Knowledge
- Exhibit M: Verification of Delivery to Parent
- Exhibit N: Student Service Schedule

Reply, pages 1-7

- Exhibit 1: Browser History with Commentary
- Exhibit 2: Correspondence
- Exhibit 3: Progress Data from September 13, 2022
- Exhibit 4: Progress Data from September 27, 2022
- Exhibit 5: IEP Amendments with Commentary
- Exhibit 6: Epic Data
- Exhibit 7: Inconsistencies
- Exhibit 8: Student's Schedule from September 27, 2022
- Exhibit 9: Student's Schedule from September 13, 2022
- Exhibit 10: Private Evaluation
- Exhibit 11: Private Evaluation
- Exhibit 12: PWN
- Exhibit 13: Draft Goals
- Exhibit 14: Progress Data from October 25, 2022
- Exhibit 15: Correspondence

Telephone Interviews

- Parent: October 26 and 27, 2022
- Teacher: October 26, 2022

- Special Education Teacher: October 26, 2022
- Principal: October 26, 2022
- Advocate: October 27, 2022
- SEIS: October 28, 2022
- Senior Manager: October 28, 2022