

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

State-Level Complaint 2023:520
Mesa Valley 51 (Grand Junction) School District

DECISION

INTRODUCTION

On February 22, 2023, 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 (the “Complaint”) against the Mesa Valley 51 (Grand Junction) School District (“District”). The State Complaints Officer (the “SCO”) determined that the Complaint identified seven (7) 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 (“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 February 22, 2022 to the present for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to provide Parent with a copy of the procedural safeguards notice upon Parent’s March 25, 2022 request to evaluate Student, in violation of 34 C.F.R. § 300.504.
2. Failed to provide Parent with prior written notice (“PWN”) of District’s September 13, 2022 proposal to evaluate Student, in violation of 34 C.F.R. § 300.503.

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.

3. Failed to properly implement Student’s IEP, from August 14, 2022 to December 10, 2022, by failing to provide access to assistive technology, specifically speech recognition software, as required by Student’s IEP, in violation of 34 C.F.R. § 300.323.
4. Deprived Parent of meaningful participation in the development, review, and revision of Student’s IEP in the IEP Team meetings held on or about December 2, 8, and 14, 2022, in violation of 34 C.F.R. §§ 300.321(a)(1) and 300.324(a)(1)(ii).
5. Failed to develop, review, and revise an IEP tailored to Student’s individualized needs on or about December 2, 2022, in violation of 34 C.F.R. §§ 300.320 and 300.324, specifically by:
 - a. Failing to meet Student’s individualized social/emotional and math needs; and
 - b. Failing to educate Student in the Least Restrictive Environment (“LRE”), in violation of 34 C.F.R. § 300.114.
6. Amended Student’s IEP in December 2022 without agreement from Parent and outside of an IEP Team meeting, in violation of 34 C.F.R. § 300.324(a)(6).
7. Failed to provide Parent with periodic reports on Student’s progress as required by Student’s IEP during the 2022-2023 academic year, in violation of 34 C.F.R. § 300.320(a)(3)(ii).

FINDINGS OF FACT

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

A. Background

1. Student is a caring and kind twelve-year-old, who enjoys spending time with his friends and singing. *Interview with Case Manager; Exhibit A*, p. 28. Student qualifies for special education and related services under the Other Health Impairment (“OHI”) disability category, with a secondary disability of autism spectrum disorder. *Exhibit A*, p. 26.
2. During the 2021-2022 academic year, Student attended sixth grade at a District middle school (“School”). *Id.* at p. 1. On December 8, 2021, a properly constituted IEP Team met to review and revise Student’s IEP (the “2021 IEP”). *Id.* at p. 2.

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

B. The 2021 IEP

3. The 2021 IEP documented Student's strengths, preferences, and interests, including that he is curious and asks thoughtful questions during class; he enjoys baseball, swimming, and bowling; and that he likes reading but struggles with writing. *Id.* at p. 3.
4. The 2021 IEP reviewed Student's present levels of performance, summarizing his progress toward annual goals, detailed observations from teachers and service providers, and scores on assessments. *Id.* at pp. 3-7.
5. The Student Needs and Impact of Disability section documented that Student's significant medical history limits his ability to generalize skills across classes, and he lacks the ability to sustain effort or "endure throughout an activity." *Id.* at p. 8. Student benefits from pre-teaching, reteaching, rephrasing, and reminders to focus. *Id.* Student's diagnosis of autism impacts his verbal and non-verbal interactions with others, and he exhibits rigidity in routines. *Id.* To address motor deficits, Student requires adaptive physical education, occupational therapy services, and access to adaptive technology. *Id.*
6. The Parent/Student Input section documented extensive input from Parent, including information about Student's present levels of functioning, information about his outside tutoring services, and Parent's goals for Student's education. *Id.* at pp. 8-10.
7. The 2021 IEP contained annual goals in math, reading, writing, speech/language, and physical motor. *Id.* at pp. 11-16. The 2021 IEP indicated Parent would be given reports on Student's progress each quarter. *Id.* at p. 11.
8. The 2021 IEP contained accommodations to help Student access the general education environment, including regular check-ins, access to graphic organizers, and allowing oral responses to demonstrate knowledge. *Id.* at pp. 16-17. The 2021 IEP provided for a scribe or technology for writing (e.g., speech to text device/software). *Id.* at p. 16.
9. The Service Delivery of the 2021 IEP provided for the following:
 - a. 1,100 minutes per month of direct specialized literacy services outside the general education classroom;
 - b. 90 minutes per month of specialized speech/language services outside the general education classroom;
 - c. 1,300 minutes per month of direct specialized math services outside the general education classroom;

- d. 100 minutes per month of adaptive physical education services outside the general education classroom;
- e. 1,200 minutes per month of direct academic access services inside the general education classroom;
- f. 600 minutes per month of direct academic access services outside the general education classroom; and
- g. 60 minutes per month of direct occupational therapy services outside the general education classroom.

Id. at pp. 20-21.

- 10. The IEP Team determined it was appropriate for Student to be in the general education environment 40 to 79 percent of the time. *Id.* at p. 73.
- 11. The 2022 IEP was accompanied by a behavior intervention plan (“BIP”) to address Student’s behavioral needs. *Exhibit B*, pp. 1-4.

C. Parent’s March 2022 Evaluation Request

- 12. Following the development of the 2021 IEP, District implemented a communication log to communicate with Parent. *Interview with Parent*. Parent became concerned that there were, at times, reports of behavior like work refusal detailed on the communication log. *Id.* On March 15, 2022, in an email chain with Case Manager, Parent requested a functional behavioral assessment (an “FBA”) to determine what was leading to the behavior. *Exhibit 9*, p. 3. Parent’s concern is that District failed to provide her with the procedural safeguards notice or otherwise respond to her March 2022 request for an FBA. *Complaint*, p. 11.
- 13. Parent provided the SCO with an email she sent to Case Manager containing her request for an FBA. *Exhibit 9*, p. 3. In the email, Parent writes, “[b]ased off multiple reports of [Student’s] behavior, I would like to request an FBA. While I know that the function of [Student’s] behavior is mostly avoidance, I have been unclear on the antecedents (what happens before the behavior) and consequences (what happens after the behavior) based on your [Case Manager’s] reports.” *Id.* Two other District staff members were copied on the email. *Id.*
- 14. Parent acknowledges the request was embedded in a larger email chain with other requests regarding Student and therefore may have been overlooked by staff. *Interview with Parent*. Parent is employed by District and is familiar with District’s evaluation procedures. *Id.* Parent concedes that she did not follow up about her request when she did not receive a response from Case Manager. *Id.*

15. In its Response, District indicates Parent was provided with the procedural safeguards notice on October 26 and December 8, 2021, and that Parent did not request an additional copy of the procedural safeguards notice at any point during the remainder of the 2021-2022 academic year. *Response*, p. 2. District's Response does not address Parent's March 2022 request for an FBA or concern that District did not respond to her request. *See Id.* at pp. 1-7.
16. Case Manager indicated that she was unaware of Parent's request for an FBA. *Interview with Case Manager*. Case Manager added that, procedurally, if a parent requests an evaluation, the request is discussed by the District team, and the school psychologist is responsible for providing a copy of the procedural safeguards notice and PWN. *Id.* This procedure was not followed in response to Parent's March 2022 request, because Case Manager was unaware of the request. *Id.* No one from District responded to Parent's request for an FBA. *Interviews with Case Manager and Director of Special Education*.
17. Director of Special Education indicated that, following the filing of the Complaint, District found evidence of Parent's March 2022 request for an evaluation, but that District staff were previously unaware of the request. *Interview with Director of Special Education*. Director of Special Education also indicated that District does not provide the procedural safeguards notice to parents following a parent request for an evaluation. *Id.* Director of Special Education indicated that "our understanding is that we do it [provide procedural safeguards] once a year and upon discipline." *Id.*
18. The SCO accordingly finds that District failed to provide Parent with the procedural safeguards notice or a PWN following her March 2022 request for an evaluation.

D. Implementation of the 2021 IEP (August through December 2022)

19. Classes began at School for the 2022-2023 academic year on August 12. *Exhibit K*, p. 2. The 2021 IEP remained in effect at that time. *See Exhibit A*, pp. 1, 24, 26; *Interview with Case Manager*. Parent's concern is that District did not implement the 2021 IEP. *Complaint*, p. 10; *Interview with Parent*.
20. Parent helped Student complete an assignment from class on November 15, 2022, and noticed that the "speech to text" icon was "missing" from his iPad. *Complaint*, p. 10; *Interview with Parent*. Parent emailed Case Manager and the School occupational therapist, and District's State Wide Assistive, Augmentative & Alternative Communication Coordinator ("SWAAAC Coordinator") addressed the iPad issue on December 8, 2022. *Complaint*, p. 10. Parent's concern is that he was not provided with access to speech recognition software from August through December of 2022 due to the technical issue with the iPad. *Id.*

Accessibility of the 2021 IEP

21. Case Manager was Student's special education case manager during the 2022-2023 academic year, and thus, was responsible for ensuring that teachers and staff were aware of their responsibilities under the 2021 IEP. *Interview with Case Manager*. At the beginning of the 2022-2023 academic year, Case Manager met with Student's teachers and service providers to review the 2021 IEP and discuss the plan for the year. *Id.* All teachers and service providers working with Student were invited to that meeting, including paraprofessionals. *Id.*
22. Following the beginning of the year meeting, Case Manager provided all of Student's teachers and service providers with a snapshot of the 2021 IEP, along with a full copy of the IEP (Case Manager indicated she gave the snapshot in addition to the full 2021 IEP because the snapshot was "easier to glance through"). *Id.* Teachers and service providers were also given access to the 2021 IEP through District's student information system. *Id.*
23. Throughout the year, Case Manager engaged in regular communication about Student through weekly discussions with School's speech language pathologist and occupational therapist (who are in the special education classroom working with Student each week), and through monthly standing staff meetings with other teachers and service providers. *Id.* Case Manager was also available to answer questions from staff about the 2021 IEP. *Id.*

Speech Recognition Software

24. The 2021 IEP provided for a scribe or technology for writing, as well as an accommodation for "[a]daptive tools" which included the use of a "speech to text device." *Exhibit A*, p. 16.
25. Case Manager conceded that there was a technical issue with Student's iPad which Parent revealed in November of 2022. *Interview with Case Manager*. Case Manager forwarded the concern to SWAAAC Coordinator to address the issue, and the issue with the iPad was resolved quickly thereafter. *Id.* However, even though the iPad was not working, Student was never without access to speech recognition software. *Id.*
26. In addition to the iPad, District provided Student with a Chromebook at the beginning of the 2022-2023 academic year. *Id.* The Chromebook is equipped with speech recognition software which Student uses daily, and the Chromebook has been in working order since the beginning of the school year. *Id.* In addition, if Student does not have his Chromebook or the Chromebook is not charged, there is a spare Chromebook with speech recognition software in the classroom which is always available for Student. *Id.* As a result, even if there were times when the iPad's speech recognition software was not working, Student always had access to speech recognition software. *Id.*
27. Although the 2021 IEP required that Student be provided access to technology for writing, and use of a "speech to text device," it did not require that the speech recognition software

be housed on the iPad if Student had access to speech recognition software through other means. See *Exhibit A*, pp. 1-25. The SCO accordingly finds Student had access to speech recognition software as required by the 2021 IEP from August through December 2022.

E. Parent's August 2022 Request for an FBA

28. In August of 2022, following a new report of behavioral concerns at School, Parent renewed her request for an FBA. *Interview with Parent*. Parent's concern is that District failed to provide PWN and the procedural safeguards notice in response to her request. *Id.*
29. District acknowledges that Parent requested an FBA in August of 2022, but indicates that it was not required to provide PWN or the procedural safeguards notice in response to Parent's request until December of 2022, when the results of the FBA were discussed during Student's annual IEP review. *Response*, p. 2.
30. On August 26, 2022, approximately three weeks into the 2022-2023 academic year, Case Manager emailed Parent to report that there had been "a couple times" when Student exhibited work refusal behaviors at School. *Exhibit M*, p. 72. Parent was also informed there was an isolated occasion at the beginning of the year when Student hit a paraprofessional. *Interviews with Case Manager, School Psychologist, and Parent*.
31. On August 30, 2022, Parent emailed Case Manager and the principal of School to request an FBA. *Exhibit M*, p. 72. Parent expressed concern that Student was starting to exhibit a pattern of work refusal and indicated Student had not exhibited violence toward a staff member since kindergarten. *Id.* Parent asked that a new FBA be completed to better understand the patterns and functions of Student's behavior. *Id.*
32. While Student hit a paraprofessional, and sometimes exhibited work refusal, District staff did not share Parent's concerns about his behavior. *Interviews with School Psychologist, Case Manager, and Director of Special Education*. Violence or aggression was highly unusual for Student, the work refusal behaviors were infrequent, and he was usually easily redirected. *Id.* Mild work refusal behaviors are typical for middle school students, and staff did not view Student's work refusal as impacting his ability to access his education. *Id.* District nevertheless agreed to conduct a new FBA to explore Parent's concerns. *Id.* School Psychologist drafted a consent form for the FBA, and the form was sent home to Parent and signed on September 15, 2022. *Exhibit C*, p. 1.
33. The consent form indicated District was agreeing to Parent's request for an FBA, and that the FBA would include (but not be limited to) an FBA profiler, observations, file review, and data collection about Student's behavior. *Id.* The consent form further indicated the FBA would be used to develop a BIP for Student, which might include (but not be limited to) interventions to reduce and prevent problematic behaviors, teaching new appropriate/replacement

behaviors, ongoing data collection to evaluate the efficacy of the plan, and a crisis plan (if necessary). *Id.*

34. The consent form contained School Psychologist's contact information and instructed Parent to call with questions. *Id.* The consent form did not contain information about any other options considered by the IEP Team, a description of any other factors that were relevant to District's proposal, or a statement that Parent had protection under the procedural safeguards. *See id.* Parent was not provided with a copy of the procedural safeguards notice following her request for the FBA. *Interviews with Parent, Director of Special Education, Case Manager, and School Psychologist.*
35. Prior to conducting the FBA, School Psychologist spoke with Parent to discuss the process and obtain information about Parent's concerns and observations of Student's behavior. *Interviews with Parent and School Psychologist.*
36. Following the conversation, School Psychologist administered an FBA profiler, which is an assessment tool correlated with the Behavior Assessment System for Children (the "BASC"). *Interview with School Psychologist.* Using the FBA profiler, School Psychologist obtained observations and ratings from Student's teachers about his behavior as a "starting point" for the FBA. *Id.*
37. Following interviews with teachers, School Psychologist observed Student on multiple occasions at School, and reviewed Student's educational records. *Id.*; *see e.g., Exhibit M, p. 31.* On November 16, 2022, School Psychologist emailed Parent and Case Manager, indicated he finished the FBA, and asked to schedule a meeting to review the results and develop a new BIP for Student. *Id.*; *Exhibit M1, p. 71.* School Psychologist also provided Parent with a copy of the FBA. *Exhibit M2, pp. 55-57.*
38. On or about December 6, 2022, Parent, School Psychologist, Case Manager, and Student's paraprofessional met to review the results of the FBA and develop a new BIP for Student. *Interviews with Case Manager, Parent, and School Psychologist.* At the meeting, both the FBA and BIP were discussed "thoroughly," and Parent indicated that she was happy with the resulting BIP. *Id.* In an email on December 10, 2022, the following weekend, Parent confirmed to Case Manager and School Psychologist in writing that, "I think we developed a pretty good Behavior Intervention Plan." *Exhibit M2, p. 1.*

F. The October 14, 2022 Progress Report

39. On October 14, 2022, at the end of the first quarter at School, a progress report was generated detailing Student's progress toward annual goals. *Exhibit G, pp. 7-15.* Case Manager provided Parent with the progress report via email on October 24, 2022. *Exhibit M, p. 32.* The progress report indicated that at the end of the first quarter of the 2022-2023

academic year, Student was making progress or meeting all his annual goals. *Exhibit G*, pp. 7-15.

40. The SCO finds that, upon review of this information and consultation with CDE Content Specialist, the progress monitoring data and ensuing reports appropriately document Student's progress toward his annual goals, and demonstrating Student was making progress on annual IEP goals. *Consultation with CDE Content Specialist*.

G. The December 2022 IEP Meetings

41. On December 2, 8, and 14, 2022, a properly constituted IEP Team met to review and revise the 2021 IEP (the "2022 IEP"). *Exhibit D*, pp. 3-5; *Exhibit F*. Parent's concern is that she was denied meaningful participation in the 2022 IEP's development. *Complaint*, p. 5. Parent is also concerned that she was not provided with adequate notice of meeting (the "NOM") for the December 2, 2022 IEP meeting, because she did not receive the NOM until the night before the meeting. *Id.*; *Interview with Parent*.
42. District's position is that Parent was provided with the NOM "in advance" of the IEP meetings and that Parent meaningfully participated in the 2022 IEP's development, such as through incorporating several of Parent's suggestions into the 2022 IEP. *Response*, pp. 3-4.

NOM for the December 2, 2022 IEP Meeting

43. District provided the SCO with the NOM dated November 16, 2022. *Exhibit D*, p. 3. Case Manager indicated that a hard copy of the NOM went home with Student in his backpack in advance of School's Thanksgiving holiday break. *Interview with Case Manager*. However, the NOM was "updated" on December 1, 2022, to reflect that District's legal counsel would be attending the meeting. *Id.*; see *Exhibit D*, p. 3. Case Manager indicated that Parent was informed of the December 2, 2022 IEP meeting on other occasions through text, Google invite, and email, and that the Google invite would have shown that District's attorney was invited to the meeting. *Interview with Case Manager*. The SCO finds email evidence to support that while Parent was aware of the December 2, 2022 IEP meeting, she was not aware that District's legal counsel would attend.
44. Parent indicates she did not receive the NOM before December 1, 2022, and was surprised and unhappy to learn that District's legal counsel would attend. *Interview with Parent*. Parent considered asking to reschedule the meeting so she could bring counsel but decided to attend the meeting without because "it was important to have it." *Id.*
45. Case Manager emailed Parent a copy of the "updated" NOM on December 1, 2022, and indicated that the "updated NOM also went home in [Student's] homework folder." *Exhibit 1*, p. 1. Parent responded the same day and indicated that she received it, but that it was the "first and only" notice that she had received for the meeting. *Id.*

46. Director of Special Education indicated the NOM was updated to reflect that legal counsel would be attending the meeting the night prior to the meeting, but suggested during interviews that Parent was nevertheless aware that District’s legal counsel would be attending the meeting. *Interview with Director of Special Education*. When the meeting was held, there was a pending complaint filed with the Office for Civil Rights concerning Student. *Id.* District’s practice is to have legal counsel attend IEP meetings when there is pending litigation with a parent, and indicated Parent would have known about this practice as an employee of District. *Id.*
47. Parent indicated to the SCO that she was “sort of” aware that District’s legal counsel would be attending the meeting. *Interview with Parent*. Following the interview, Parent clarified via email that she was not sure if District’s legal counsel would be attending the meeting, but that the subject of legal counsel coming to the meeting did come up during conversations with Director of Special Education in October of 2022. *Exhibit 11*, pp. 1-2.
48. Parents, Parent’s advocate, Student’s outside occupational therapist, Student’s outside “fill in” speech language pathologist, Student’s adaptive physical education teacher, Case Manager, Director of Special Education, the School speech language pathologist, the School occupational therapist, District’s legal counsel, and a general education teacher attended the IEP meetings. *Exhibit M1*, p. 10.
49. District and Parent provided transcripts and audio recordings of the December 2022 IEP meetings. *Exhibit F; Exhibit 2*. Upon review, the SCO finds that the IEP Team spent significant time considering Parent’s input during the three IEP meetings.

The December 2, 2022, IEP Meeting

50. The IEP Team began by reviewing Student’s strengths, preferences, and interests; present levels; and observations from teachers and service providers regarding progress. *Exhibit F*. Each of the District members of the IEP Team discussed Student’s progress, strengths, and challenges, starting with his general education teacher. *Id.* During this time, Parent asked several questions about progress and instruction. *Id.* In each instance, the IEP Team was responsive to Parent’s questions, and responded to input that Parent provided. *Id.* For example, Case Manager discussed Student’s reading curriculum, and Parent asked if details about the curriculum could be documented in the 2022 IEP. *Id.* The IEP Team agreed to document the curriculum Student had been working on in the Present Levels section (although it was not added to the service delivery to afford flexibility in instruction). *Id.*
51. School’s occupational therapist discussed the speech to text accommodation and mentioned that Student was using it and showing progress from an occupational therapy perspective. *Id.* Parent mentioned that she had noticed issues with the iPad when she worked with Student (although during the meeting, Parent said the issue was related to the speaker and the iPad

cover rather than the absence of a “speech to text icon”). *Id.* SWAAAC Coordinator responded to Parent’s concerns, asked questions about the issues Student was experiencing, and indicated that the issue would be addressed. *Id.* Parent requested a tempered glass cover for the iPad, but District indicated that it does not use tempered glass for safety reasons. *Id.*

52. The general education teacher then gave a report about the accommodations Student was using in class. *Id.* The general education teacher noted that Student uses his iPad in class as an answering tool, and that he has been doing well in class with accommodations. *Id.*
53. Parent asked for specifics on the amount of paraprofessional/teacher support Student receives each day, and the general education teacher indicated it is variable, but that Student has been able to access the general education curriculum with support from the teacher and paraprofessional. *Id.* The general education teacher also indicated Student is becoming more independent, and he has been seeking help from peers as well, which has been decreasing Student’s frustration and helping him improve. *Id.*
54. The IEP Team then reviewed Student’s progress toward annual goals. *Id.* Case Manager indicated Student was making progress in reading. *Id.* Case Manager reviewed the progress monitoring data, and explained why some of the data points were lower based on how he was being assessed at certain points in time (e.g., the types of questions he was given in the assessment). *Id.* Parent asked several questions about Student’s progress, and the IEP Team answered her questions and appropriately responded to her input. *Id.* For instance, Parent agreed that Student was making progress in reading, but expressed concern about Student’s inferencing skills. *Id.* The IEP Team agreed to adjust the annual reading comprehension goal in the 2022 IEP to target inferencing. *Id.*
55. Case Manager indicated Student had been making significant progress in writing and meeting his writing goal (e.g., he wrote 14 sentences on a recent writing assignment, which was a significant increase compared to past writing, and that the content of the writing was detailed in comparison to past writing). *Id.* Case Manager indicated it was some of the best writing she had seen from Student, and that his writing contained details and transition words, which was an improvement over past writing. *Id.* Parent expressed concern that Student was only writing around four sentences as of September 2022, and that there were no data points that would demonstrate that Student was on track to meet the writing goal. *Id.* Case Manager discussed additional data points with Parent that showed Student was making progress as of October 2022. *Id.*
56. During discussions about progress toward annual goals, Case Manager highlighted her observations of Student’s behavior. *Id.* Case Manager indicated that there have been instances when Student has exhibited work refusal behaviors when he is given an unpreferred task or he is struggling to understand the material. *Id.* However, when he is given the opportunity for a break (e.g., go on a walk or go get a drink of water), he can refocus and get back to the task. *Id.*

57. Parent asked what type of tasks are unpreferred. *Id.* Case Manager indicated it is dependent on Student's mood, and the work refusal behaviors are not tied to a specific activity or task (although Student exhibits those behaviors more frequently when he is less comfortable or familiar with the task). *Id.* The IEP Team indicated that work refusal is not unusual for middle school, and the behavior staff were seeing was typical of someone Student's age. *Id.*
58. Following an hour and half of discussions, the IEP Team proposed to continue discussions on another date. *Id.* A second IEP meeting was scheduled for December 8, 2022. *Id.*

The December 8, 2022, IEP Meeting

59. At the start of the meeting, the IEP Team discussed a December 6, 2022, meeting between Case Manager, Parent, School Psychologist, and Student's paraprofessional to review the FBA and Student's BIP. *Id.* The IEP Team reviewed and discussed the BIP, and Parent indicated she thought the BIP was a "good plan." *Id.*
60. SWAAAC Coordinator provided an update regarding the iPad, and indicated the iPad's microphone was not working, so Student would be provided with a new iPad. *Id.*
61. The IEP Team then continued review of Student's progress toward annual goals. *Id.* Case Manager reviewed Student's progress in math, and indicated Student met both of his math goals from the 2021 IEP. *Id.* Parent expressed concern that she would not have guessed that Student would meet his math goals based on the data from first quarter and asked to see additional data points. *Id.* Case Manager reviewed additional data with Parent. *Id.* Parent asked several questions about how Student was assessed toward the annual math goals, and Case Manager showed Parent examples of problems she used to assess Student. *Id.*
62. Parent asked for specifics on what type of problems Student was struggling with in math, and the IEP Team indicated Case Manager would print off Student's assessments and provide them to Parent. *Id.*
63. The IEP Team then reviewed the BIP. *Id.* The IEP Team discussed each section of the BIP in detail and spent significant time discussing Parent's input about Student's behavior and positive behavioral strategies for Student. *Id.*
64. The IEP Team then discussed new annual goals for Student, and each of the District IEP Team members discussed the draft annual goals and discussed Parent's input about each goal. *Id.* For instance, the occupational therapist discussed one of the annual goals in motor planning, and asked Parent for input about what would be an appropriate level to set the goal (i.e., the goal targeted handwriting, and the occupational therapist sought Parent's input on how many paragraphs Student should write under the goal). *Id.*

65. During discussions around Student's annual goals, the IEP Team spent significant time addressing Parent's input and discussing Student's specific skills in reading, writing, and math. *Id.* For instance, Parent asked about Student's understanding of fractions, and the IEP Team gave a detailed report of his understanding of fractions. *Id.* Parents provided input about the math skills around fractions Parents believed were important life skills (i.e., Parents suggested learning how to calculate $7/17$ of something is not very applicable as a life skill, whereas calculating $7/20$ or $7/50$ would be more applicable as a life skill). *Id.* The IEP Team agreed to adjust Student's math goals to address Parent's concerns. *Id.*
66. The IEP Team met for approximately an hour but did not complete discussions on the 2022 IEP. *Id.* A third meeting was scheduled for December 14, 2022. *Id.*

The December 14, 2022, IEP Meeting

67. The IEP Team met again to continue discussions and finalize the 2022 IEP. *Id.*
68. At the beginning of the meeting, Parent indicated she still had questions about Student's math goals, but indicated those might be more appropriate for a discussion with Case Manager, and asked that the IEP Team start with accommodations, and "circle back" to math. *Id.*
69. The IEP Team began by discussing a social emotional goal. *Id.* Parent indicated she had emailed Case Manager before the meeting to request a social emotional goal, and indicated Student is often frustrated at School. *Id.* Parent asked if the IEP Team could develop a goal around self-regulation. *Id.* During these discussions, Case Manager indicated Student's behavior has improved over the course of the year, and he is easily redirected when he exhibits work refusal behaviors. *Id.* Nevertheless, the IEP Team agreed to develop a social/emotional goal for times when he is frustrated at School. *Id.* Case Manager indicated that, for the goal, she wanted Student to "do more" than identify that he was feeling frustrated, and that he should also identify why he was feeling frustrated, so that he "could work through that in a more productive manner." *Id.*
70. As the IEP Team reviewed the draft social/emotional goal, Parent pointed out that the goal was for Student to identify his emotions when he was frustrated, and asked if the goal could be modified to require some problem solving around the frustration or be broken down into objectives. *Id.* The IEP Team agreed to add an objective to the goal which targeted the identification of appropriate coping strategies when he felt frustrated. *Id.*; *Exhibit A*, p. 46.
71. The IEP Team then discussed accommodations and modifications. *Exhibit F.* Case Manager reviewed each of the accommodations from the 2021 IEP with the IEP Team. *Id.* During this time, Parent made several requests. *Id.* For example, Parent raised a concern with an accommodation from the 2021 IEP which provided that Student be permitted to use a key lock for his locker at school instead of a combination lock. *Id.*; *Exhibit A*, p. 16. Parent indicated

Student uses his locker before choir and was tardy on eight occasions during the 2022-2023 academic year because of the time it took to use his locker, and asked if he could be given more time. *Id.* The IEP Team agreed to add an accommodation to address these concerns. *Id.*

72. After discussing accommodations and modifications, the IEP Team discussed extended school year (“ESY”) services and determined there was not data to suggest Student qualified for ESY (although the IEP Team indicated the team would also look at data again following spring break, so the 2022 IEP indicated ESY was “TBD”). *Id.*
73. Next, the IEP Team discussed service delivery. *Id.* Case Manager provided details on the services Student was currently receiving under the 2021 IEP. *Id.* Parent asked for specifics on the time Student was spending on different academic areas, and the curriculum Student was receiving. *Id.* Case Manager was responsive to Parent’s questions and provided specifics on Student’s instruction in response to Parent’s questions. *Id.* For example, Parent indicated that she did not think the reading curriculum Student was receiving was the best program to use because of the level of the texts. *Id.* Case Manager explained that she was pulling other texts from higher grade levels into the instruction she provided Student, and that Student was not just receiving the reading curriculum program Parent referenced. *Id.* Parent indicated she agreed with the service delivery of the 2022 IEP and did not raise any concerns with Student’s service minutes at the meeting. *Id.*
74. The IEP Team then discussed LRE. *Id.* Parent indicated there was discussion during the previous year about Student spending more time in the general education environment, and asked if the team could discuss some of the advantages and disadvantages of changing Student’s LRE. *Id.* Parent indicated she wanted to explore having Student in the general education classroom for language arts and math, because Student has “progressed” in his literacy and math skills. *Id.* The IEP Team discussed whether he might be able to access some of the general education curriculum with supports (e.g., the IEP Team asked what the general education math class was working on, and members of the IEP Team expressed concern that the class was learning algebra, which was abstract and may be difficult for Student, particularly if he were to “jump in” mid-year). *Id.*
75. Parent indicated she had discussed the math instruction program Student was receiving with “other people” and that, based on those conversations, she was concerned he was not being exposed to grade level standards. *Id.* Case Manager indicated the math curriculum he currently receives has elements of geometry and algebra, but she was tailoring the instruction to his individual math skills and did not want to get into material which would be beyond his ability level. *Id.* The math program Parent referenced was also just one of several resources that were used to instruct Student in math. *Id.*
76. Case Manager indicated Student is doing well in his current LRE, is showing growth, and that putting him in the general education environment for literacy and math might adversely impact his progress and cause an increase in behavioral concerns (since he exhibits more

work refusal behaviors when he is less comfortable with the routine and when he struggles with the material). *Id.* The IEP Team spent significant time discussing possible changes to Student's LRE, but ultimately determined that he should remain in the general education environment 40 to 79 percent of the time. *Id.*

77. Parent then indicated that she still had concerns about the second math goal and the present levels section of the 2022 IEP. *Id.* The District members of the IEP Team indicated that those sections were already discussed, but Parent indicated that she still had questions about the second math goal, and wanted an explanation of how the skills Student would learn from the goal would translate into life skills. *Id.* At Parent's request, Case Manager reviewed the math goal in detail, and the IEP Team talked about how the goal aligned with what the general education math class was working on. *Id.* Parent indicated she wanted details on how the math goal would be taught, and that she was still struggling conceptually with the goal, and how she could help teach Student at home. *Id.* The IEP Team indicated that Case Manager would send work samples home as the year went on, along with progress monitoring data, so that Parent could see how Student was working on the goal. *Id.* The IEP Team then finalized the 2022 IEP and ended the meeting after an hour. *Id.*

78. Throughout the three IEP meetings, the IEP Team was responsive to Parent's questions, and the IEP Team spent extensive time discussing Parent's suggestions and requests regarding the 2022 IEP. *Id.* Although District's legal counsel attended all three IEP meetings, she was largely silent, and she seldomly provided input at the meetings. *Id.*

H. The 2022 IEP

79. The 2022 IEP documents Student's strengths, preferences, and interests, including that he works hard and is learning to ask for help when he does not understand something. *Exhibit A*, p. 28. Student has demonstrated growth in self-advocacy since entering seventh grade, and he has participated in several choir concerts and improved his singing skills. *Id.* The 2022 IEP also contained the results of an interview with Student. *Id.*

80. The 2022 IEP reviews Student's present levels of performance, summarizing his educational history, updated teacher and service provider observations, updated scores on assessments, and progress on goals. *Id.* at pp. 28-35. The 2022 IEP indicates Student made progress towards or met all his annual goals from the 2021 IEP. *Exhibit S*, pp. 5-6.

81. The Student Needs and Impact of Disability section contains the same information as the 2021 IEP, as well as updated information. *Id.* at pp. 8, 36. The updated information notes that Student needs check-ins during core classes to ensure he understands the material and completes work, and that he requires a familiar/knowledgeable adult to process his feelings in a safe and successful manner when he is frustrated or upset. *Id.* at p. 36. There is also updated information about Student's speech/language, occupational therapy, and adaptive physical education needs. *Id.*

82. The Parent/Student Input section documents extensive and detailed input which Parent asked to be included in the 2022 IEP. *Id.* at pp. 36-41. This input contained Parent's observations of Student's progress, information about Student's academic strengths/challenges, and Parent's requests/concerns regarding the 2022 IEP. *Id.*
83. The 2022 IEP contains annual goals in the areas of math, reading, writing, speech/language, physical motor, and social/emotional wellness. *Id.* at pp. 41-46; *Exhibit S*, pp. 16-22. Relevant to this investigation is the following goals and objectives:
- a. Goal No. 3 – Math: “By 12/1/2023 [sic] [Student] will be able to add and subtract fractions with mixed denominators up to 12 with 80% accuracy[.]”
 - i. Objective: “By 5/1/23 [Student] will be able to add and subtract fractions with mixed denominators up to 12 with 50% accuracy.”
 - b. Goal No. 4 – Math: “By 12/1/2023 [sic] [Student] will be able to convert a rational number up to 12, to a decimal using long division; know that the decimal form of a rational number terminates in 0 s or eventually repeats with 80% accuracy.”
 - i. Objective: “By 5/1/23 [Student] will be able to convert a rational number up to 12, to a decimal using long division; know that the decimal form of a rational number terminates in 0 s [sic] or eventually repeats with 50% accuracy.”
 - c. Goal No. 8 – Social/Emotional Wellness: “By 12/1/2023 [sic] [Student] will be able to request appropriate coping strategies when he becomes overwhelmed or frustrated 6/10 opportunities.”
 - i. Objective: “By 12/1/23 [Student] will be able to request appropriate coping strategies when he becomes overwhelmed or frustrated 6/10 opportunities.”

Exhibit 2, pp. 18-19, 22.

84. The 2022 IEP contains accommodations to help Student access the general education environment, including pre-teaching for vocabulary/content and peer supports (as available). *Id.* at p. 47. Most of the accommodations in the 2022 IEP were carried forward from the 2021 IEP. *See id.*

85. The Service Delivery of the 2022 IEP provides for the following:

- a. 1,800 minutes per month of direct specialized literacy services outside the general education classroom;
- b. 1,100 minutes per month of direct specialized math services outside the general education classroom;
- c. 100 minutes per month of adaptive physical education services outside the general education classroom;
- d. 90 minutes per month of specialized speech/language services outside the general education classroom;
- e. 30 minutes per month of indirect specialized speech/language services; and
- f. 60 minutes per month of direct occupational therapy services outside the general education classroom.

Id. at pp. 50-51.

86. The IEP Team determined it was appropriate for Student to be in the general education environment 40 to 79 percent of the time. *Id.* at p. 52.

87. The 2022 IEP was accompanied by a BIP to address behavioral needs. *Exhibit B*, pp. 5-8.

I. The December 21, 2022, IEP Amendment

88. Case Manager emailed Parent a finalized copy of the 2022 IEP on December 21, 2022. *Exhibit 1*, p. 158. Case Manager indicated that she “realized that [an] objective was not added to the IEP” but that she had added it, and it was now “complete.” *Id.* Parent responded the same day and indicated that she already received a “finalized copy” of the 2022 IEP at the December 14, 2022 IEP meeting, and she did not agree to “amending the iep [sic] without having an iep meeting.” *Id.* at p. 160. A special education coordinator responded the same day and indicated the objective was discussed at the December 2022 IEP meetings, and thus, the omission of the objective was a clerical error. *Id.*

89. The objective in question was related to Student’s social emotional goal, and targeted the requesting appropriate coping strategies when Student becomes frustrated or overwhelmed. *Exhibit A*, p. 46. Parent’s concern is that the addition of the objective was an amendment to the 2022 IEP made without Parent’s agreement and outside of the IEP process. *Complaint*, p. 9. Parent indicated to the SCO that she recalls the objective being discussed, but that the IEP Team agreed to develop the annual goal around using coping strategies, and she never agreed to that being an objective. *Interview with Parent*.

90. District’s position is that the 2022 IEP was only modified to reflect what was discussed during the development of the 2022 IEP. *Response*, pp. 5-6.

91. Upon review of the transcripts and recordings of the December 2022 IEP meetings, the SCO finds that the evidence shows the objective that was added to the 2022 IEP was discussed by the IEP Team during the development of the 2022 IEP. *Exhibit F*. The SCO also finds Parent was involved in those discussions, and that the objective was added specifically upon Parent’s input. *Id.* Contrary to Parent’s position, the SCO finds further that the IEP Team did not agree to develop the social emotional goal around requesting coping strategies as the IEP Team explicitly discussed this as an objective to the social/emotional goal. *Id.*

J. District Policy and Procedure

92. The SCO requested all District policies and procedures relevant to the Complaint allegations, and District provided a copy of CDE’s IEP Procedural Guidance. *See Exhibit L*, pp. 1-158. Director of Special Education reported to the SCO that District does not maintain a special education manual, and that District relies on CDE guidance aside from “a few guidance sheets.” *Interview with Director of Special Education*.

93. Director of Special Education indicated District has in-service dates at the beginning of the year to train staff, and all special education staff are given access to CDE guidance documents through a shared drive and District’s website. *Id.* District sends out newsletters each month with information about special education topics, and Director of Special Education and District special education coordinators are available for staff questions. *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District failed to provide Parent with a copy of the procedural safeguards and PWN upon Parent’s March 25, 2022, request to evaluate Student, in violation of 34 C.F.R. §§ 300.503 and 300.504. These violations did not result in a denial of FAPE.

Parent’s concern is that District failed to provide her with a copy of the procedural safeguards notice and PWN in response to her March 2022 request for an FBA.

A. Procedural Safeguards and Prior Written Notice: Legal Requirements

A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only one time a school year, except that a copy also must be given to the parents (1) upon initial referral *or parent request for an evaluation*, (2) upon receipt of the first due process or state complaint in a school year, (3) in accordance with discipline procedures

contained in 34 C.F.R. § 300.151, and (4) upon request of a parent. 34 C.F.R. § 300.504(a) (emphasis added).

Written notice (otherwise known as prior written notice) must be given to the parents of a child with a disability a reasonable time before the public agency (1) proposes to initiate or change the identification, evaluation, or educational placement of a child or the provision of FAPE to the child; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the provision of FAPE to a child. 34 C.F.R. § 300.503(a).

PWN must include (1) a description of the action proposed or refused by the public agency; (2) an explanation of why the agency proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) a statement that the parents of a child with a disability have protection under the procedural safeguards, and if the notice is not an initial referral for an evaluation, the means by which a copy of the procedural safeguards can be obtained; (5) sources for the parent to contact to obtain assistance in understanding the relevant provisions of IDEA; (6) a description of other options that the IEP Team considered and the reasons why those options were rejected; and (7) a description of other factors that are relevant to the agency's proposal or refusal. 34 C.F.R. § 300.503(b).

B. FBA as an Evaluation

Given that Parent's concerns center on an FBA, as a preliminary matter, the SCO must address whether an FBA is an evaluation. FBAs are "used to understand the function and purpose of a child's specific, interfering behavior and factors that contribute to the behavior's occurrence and non-occurrence for the purpose of developing effective positive behavioral interventions, supports, and other strategies to mitigate or eliminate the interfering behavior." *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSEP 2022). As such, FBAs focusing on the needs of a specific child have generally been understood to be an evaluation entitled to the procedural safeguards included in the IDEA. *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007) (advising that if an FBA focuses on the individual educational and behavioral needs of a specific child then the FBA qualifies as an initial evaluation or reevaluation and requires informed parental consent).

One appellate court has recently decided that an FBA is not an evaluation or a reevaluation under IDEA. *D.S. v. Trumbull Board of Education*, 77 IDELR 122 (2d Cir. 2020). However, opinions from the Second Circuit are not binding in this jurisdiction. No court in this jurisdiction has ruled on this issue and no other appellate court in the country has agreed with the Second Circuit. Although OSEP is reevaluating its position that an FBA is an evaluation, it has not issued a new position. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 81 IDELR 138 (OSERS 2022).

In the absence of a controlling decision or a plurality of decisions to the contrary, the SCO finds and concludes that, where used to determine whether a child has a disability or the nature and

extent of special education and related services that a child may need, an FBA is an evaluation. Accordingly, this would obligate a district to provide procedural safeguards and PWN. 34 C.F.R. §§ 300.503-504; *See Pikes Peak Board of Cooperative Educational Services*, 122 LRP 39730, (SEA CO 05/21/2022).

C. Parent's Request for an FBA

Here, Parent requested an FBA on March 15, 2022. (FF # 12). This request was for an evaluation of Student's educational and behavioral needs, as demonstrated by Parent's email in which she specifically requested an FBA and indicated that she wanted to better understand the antecedents and consequences of his behavior. (FF # 13). Although Parent was previously provided with a copy of the procedural safeguards notice in October and December of 2021, Parent's request for an FBA (i.e., an evaluation) triggered District's responsibility to provide the procedural safeguards notice to Parent, along with PWN explaining District's decision to evaluate or not to evaluate Student. 34 C.F.R. §§ 300.503(a), 300.504(a)(1); (FF # 15).

District did not provide Parent with the procedural safeguards notice or PWN in response to her March 2022 request or otherwise respond to her request. (FF # 16). The SCO accordingly finds and concludes that District failed to provide Parent with the procedural safeguards notice and PWN, resulting in a procedural violation of 34 C.F.R. §§ 300.503(a) and 300.504(a)(1).

D. Procedural Violations

Procedural violations of IDEA are only actionable to the extent that they impede the child's right to FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of FAPE or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

In this case, the SCO finds and concludes that District's procedural violation did not impede Student's right to FAPE, significantly impede Parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefit.

First, there is no evidence that District's failure to conduct an FBA in the spring of 2022 had any impact on Student's ability to access education. Indeed, when District agreed to conduct an FBA in the fall of 2022, District staff indicated that they did not observe concerns with Student's behavior. (FF # 32). Student's infrequent work refusal behaviors or feelings of frustration did not negatively impact his ability to access education. (*Id.*). Plus, Student made progress on all annual goals under the 2021 IEP. (FF #s 39, 80).

Second, although Parent was not provided with the procedural safeguards notice or PWN in response to her March 2022 request for an FBA, Parent received a copy of the procedural safeguards notice on two occasions during the 2021-2022 academic year in October and

December 2021. (FF # 15). Parent was also familiar with the content of the procedural safeguards notice and District evaluation procedures through her employment with District. (FF #s 14, 16).

Third, Parent did not pursue the evaluation further, despite not receiving a response to her request. (FF #s 14, 16). Although Parent was familiar with District's evaluation procedures, she took no additional action to pursue her request. (FF # 14). District also ultimately agreed to complete an FBA in August 2022 when Parent renewed her request. (FF # 33).

For these reasons, and in consultation with CDE Content Specialist, the SCO finds and concludes that District's procedural violations did not result in a denial of FAPE.

Conclusion to Allegation No. 2: District failed to provide Parent with the procedural safeguards notice and adequate PWN of its proposal to evaluate Student on August 30, 2022, in violation of 34 C.F.R. §§ 300.503 and 300.504. These violations did not result in a denial of FAPE.

Parent's concern is that District failed to provide the procedural safeguards notice and PWN in response to her August 2022 request for an FBA.

A. Procedural Safeguards and Prior Written Notice: Legal Requirements

The legal requirements for procedural safeguards and prior written notice under 34 C.F.R. §§ 300.503 and 300.504, and as detailed in the Conclusion to Allegation No. 1 apply here for the Conclusion to Allegation No. 2.

B. Parent's Request for an FBA

Here, Parent requested an FBA on August 30, 2022. (FF # 31). This request, like Parent's March 2022 request, was for an evaluation of Student's educational and behavioral needs, as demonstrated by Parent's email, in which Parent specifically requested an FBA and indicated that she wanted to better understand Student's behavior. (*Id.*). This triggered District's responsibility to provide the procedural safeguards notice to Parent, along with adequate PWN explaining its decision to evaluate Student. 34 C.F.R. §§ 300.503(a), 300.504(a)(1).

On September 16, 2022, in recognition that Parent was requesting an evaluation, District sought consent for the FBA, which Parent signed the same day. (FF # 32). This consent form explained that District agreed to Parent's request for an FBA, and contained a description of the procedures District would use to conduct the FBA. (FF # 33). The consent form also contained School Psychologist's contact information and instructed Parent to contact him with questions. (FF # 34). The September 16, 2022 consent form did not, however, contain a statement that Parent had protection under the procedural safeguards, a description of the other options the IEP Team considered, or a description of the other factors that were relevant to District's proposal. (FF # 34). The SCO accordingly finds that the September 16, 2022 consent did not meet the

requirements of PWN under IDEA. Parent was also not provided with a copy of the procedural safeguards notice. (*Id.*).

The SCO accordingly find and concludes that District failed to provide Parent with the procedural safeguards notice and adequate PWN, resulting in a procedural violation of 34 C.F.R. §§ 300.503(a) and 300.504(a)(1).

C. Procedural Violations

Procedural violations of IDEA are only actionable to the extent that they impede the child’s right to FAPE, significantly impede the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

In this case, the SCO finds and concludes that District’s procedural violations did not impede Student’s right to FAPE, significantly impede Parents’ opportunity to participate in the decision-making process, or cause a deprivation of educational benefit.

First, although District failed to provide adequate PWN consistent with IDEA, Parent received PWN that District was agreeing to an FBA, what procedures would be used to conduct the FBA, and who to contact with questions about the FBA process (School Psychologist). (FF #s 33-34). Parent was also previously provided with the procedural safeguards notice in October and December of 2021 and was also familiar with the contents of the procedural safeguards notice through her employment. (FF #s 14-16).

Second, an FBA was completed at Parent’s request, and Parent was meaningfully involved in the process. (FF #s 35-38). School Psychologist communicated directly with Parent at the onset of the FBA to gather information about Parent’s concerns and met directly with Parent to “thoroughly” review the FBA, along with Case Manager and a paraprofessional. (FF # 38).

Finally, Parent was meaningfully involved in the development of Student’s BIP, based on the results of the FBA. (FF #s 38, 59). The BIP was discussed with Parent at the December 6, 2022 meeting with School Psychologist, and again with the IEP Team at the December 8, 2022 IEP meeting. (*Id.*). Each section of the BIP was reviewed with Parent, and she indicated multiple times that she considered the BIP to be a “good plan”. (FF #s 38, 59).

For these reasons, and in consultation with CDE Content Specialist, the SCO finds and concludes that District’s procedural violations did not result in a denial of FAPE.

Conclusion to Allegation No. 3: District properly implemented the 2021 IEP from August 14, 2022 through December 10, 2022, consistent with 34 C.F.R. § 300.323.

A. IEP Implementation: Legal Requirements

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is “the centerpiece of the statute’s education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. 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).

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.” *Id.* § 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). 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. Appx. 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. District 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. Appx. 202, 205 (2d Cir. 2010).

B. Implementation of the 2021 IEP (August through December 2022)

Parent’s Concern

Parent’s concern is that District failed to implement the 2021 IEP from August through December of 2022. (FF # 19). The 2021 IEP was in effect during the Fall of 2022. (*Id.*). Parent’s specific concern is that Student did not have access to speech recognition software during the Fall of

2022, because technical issues related to Student's iPad were not detected and addressed until December of 2022. (FF # 20).

Accessibility to Student's Teachers

The SCO must first determine whether District satisfied its obligation under 34 C.F.R. § 300.323(d). Here, Case Manager was Student's special education case manager, and thus, was responsible for ensuring staff were aware of their responsibilities under the 2021 IEP. (FF # 21).

Prior to the start of classes at School for the 2022-2023 academic year, Case Manager met with all of Student's teachers and service providers (including paraprofessionals) to review the 2021 IEP and discuss the plan for the year. (*Id.*). Student's teachers and service providers were given a snapshot of the 2021 IEP, along with a "full" copy. (FF # 22). Teachers and service providers were also given access to the 2021 IEP through District's student information system. (*Id.*).

Following the beginning of the year, Case Manager engaged in regular weekly meetings with the SLP and occupational therapists, and in monthly meetings with general education teachers. (FF # 23). Case Manager was available throughout the 2022-2023 academic year as a resource to answer questions about the 2021 IEP. (*Id.*). Parent does not allege, and the facts do not demonstrate, concerns regarding District staff's knowledge of their responsibilities under the 2021 IEP.

For these reasons, the SCO finds and concludes that District ensured teachers and service providers working with Student during the Fall of 2022 were informed of their responsibilities under the 2021 IEP, consistent with 34 C.F.R. § 300.323(d).

Speech Recognition Software

The 2021 IEP contained accommodations which provided for access to technology for writing, and access to a speech to text device. (FF #s 8, 24). The 2021 IEP did not specify a specific technology for writing or specify a speech to text device (such as an iPad). *See (Id.)*.

Although Student's iPad lacked functional speech to text software/hardware as of November 2022, Student had access to speech to text software throughout the 2022-2023 academic year via his Chromebook, as well as a spare Chromebook if his Chromebook was unavailable. (FF #s 26-27). Despite the issue with the iPad, Student always had access to speech to text software through other means. (*Id.*). The 2021 IEP did not require the speech to text recognition software be housed on his iPad, and there is no evidence that Student was ever without access to his Chromebook at any point during the fall of 2022. (FF #s 24-27). Moreover, when Parent informed District of the iPad issue, District promptly addressed the issue and replaced the iPad. (FF # 25).

For these reasons, the SCO finds and concludes that District provided Student with access to speech to text technology as required by the 2021 IEP, consistent with 34 C.F.R. § 300.323.

Conclusion to Allegation No. 4: District provided Parent meaningful participation in the development, review, and revision of Student’s 2022 IEP in IEP meetings held on December 2, 8, and 14, 2022, consistent with 34 C.F.R. §§ 300.321(a)(1) and 300.324(a)(1)(ii). However, District failed to provide Parent with proper notice of the December 2, 2022 meeting, in violation of 34 C.F.R. § 300.322(b). This violation did not result in a denial of FAPE.

Parent’s concern is that she was denied meaningful participation in the development, review, and revision of the 2022 IEP.

A. Parent Participation: Legal Requirements

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.*

B. December 2022 IEP Meetings

Here, the IEP Team met to develop the 2022 IEP over three meetings on December 2, 8, and 14, 2022. (FF # 41). Upon review of the recordings and transcripts of the December 2022 IEP meetings, the SCO finds and concludes that Parent was afforded meaningful participation.

First, Parent invited participants, such as her advocate and Student’s outside service providers, to all three meetings, each of which lasted at least one hour. (FF #s 48, 58, 66, 77). Second, the IEP Team spent extensive time discussing Parent’s questions. (FF #s 41, 50-78). For example, when Parent asked questions about Student’s progress toward annual goals, Case Manager shared data points and observations with Parent about Student’s progress. (FF # 54). Third, the IEP Team spent extensive time considering Parent’s concerns and requests regarding the 2022 IEP. (FF #s 41, 50-78). For example, Parent expressed concern about Student’s inferencing skills

in reading, and the IEP Team agreed to adjust the annual reading comprehension goal in the 2022 IEP to target inferencing. (FF # 54).

Finally, although the IEP Team did not accept all of Parent's requests (such as for Student's reading curriculum to be added to the service delivery), many, such as for a goal around reading comprehension, were incorporated into the 2022 IEP. (*Id.*). And, in instances where the IEP Team disagreed with Parent's requests, those requests (as well as the IEP Team's reasoning for rejecting the requests), are documented in the 2022 IEP. *See* (FF # 82). Overall District was responsive to Parent's input and suggestions.

For these reasons, the SCO finds and concludes that District afforded Parent meaningful participation in the development of the 2022 IEP, consistent with 34 C.F.R. §§ 300.321(a)(1) and 300.324(a)(1)(ii).

C. Notice of Meeting

Parent identified a concern during the investigation regarding the notice for the December 2, 2022 IEP meeting. (FF # 41).

Under IDEA, school districts must notify parents of IEP Team meetings "early enough to ensure they have an opportunity to attend." 34 C.F.R. § 300.322(a)(1). Notice of the meeting must indicate: (i) the purpose, time and location of the meeting, (ii) the attendees, and (iii) inform parents that they may invite other individuals. *Id.* § 300.322(b)(i)-(ii). Although IDEA does not prohibit the presence of attorneys at IEP meetings, the Office of Special Education Programs ("OSEP") has indicated that the practice is "strongly discouraged". *See Letter to Clinton*, 37 IDELR 70 (OSEP 2001) (noting that IDEA does not prohibit school districts or parents from inviting their attorneys to an IEP meeting, but that an attorney's presence could contribute to a potentially adversarial atmosphere at the meeting, and therefore, should be "strongly discouraged").

Here, although District drafted the NOM for the December 2, 2022 IEP meeting on November 16, 2022, the NOM was "updated" the night before the December 2, 2022 IEP meeting to reflect that District's legal counsel would attend the meeting. (FF # 43). Parent was otherwise aware of the December 2, 2022 IEP meeting (e.g., she received texts, calls, and a Google Invite for the meeting), but she was not informed that District's legal counsel would be attending until the night prior to the meeting. (*Id.*). This did not notify Parent "early enough" as to the attendees. Thus, the SCO finds and concludes that District provided insufficient notice of the December 2, 2022 meeting, resulting in a procedural violation of 34 C.F.R. § 300.322(a)(1).

A procedural violation results in a denial of FAPE for a child if the violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). Here, the procedural violation had no impact on Student's education.

First, although Parent indicates she did not receive NOM for the December 2, 2022 IEP meeting until December 1, 2022, she was nevertheless aware of the IEP meeting through other means, such as a Google Invite, text, and email. (FF # 43). Despite District's insufficient notice with respect to one attendee, Parent was able to invite attendees to the meetings, attend the meetings, and participate in the meetings. (FF #s 48-49, 78).

Second, District's attorney was present at all three IEP meetings but seldom participated or provided input regarding the 2022 IEP. (FF # 78). District's attorney did not attempt to dominate the conversation or insert herself into the IEP process, and she was present because of ongoing litigation between Parent and District. (FF #s 46, 78). Plus, Parent concedes that she was "sort of" aware the attorney would be attending and was also aware of District's practices around having legal counsel attend IEP meetings when there is pending litigation. (FF #s 46-47).

Third, the IEP Team met three times and Parent did not attempt to obtain legal counsel for either the December 8 or December 14, 2022 IEP meetings, despite being aware that District's legal counsel would be attending. *See* (FF # 48). Finally, Parent meaningfully participated in the development of the 2022 IEP despite the attorney's presence. (FF # 78).

For these reasons, and in consultation with CDE Content Specialist, the SCO finds and concludes that District's procedural violation did not result in a denial of FAPE.

Conclusion to Allegation No. 5: District developed, reviewed, and revised an IEP in December 2022 that was tailored to meet Student's individualized needs, consistent with §§ 300.114, 300.320, and 300.324.

Parents' concerns regarding the 2022 IEP are twofold: (1) District failed to meet Student's individualized social/emotional and math needs, and (2) District failed to educate Student in the LRE.

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.

A. IEP Development

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). An IEP must contain a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child. 34 C.F.R. § 300.320(a)(4). An IEP must also contain a statement of measurable annual goals, including functional and academic goals, designed to meet the child's needs that result from the child's disability to enable the child to make progress in the general education curriculum and meet each of the child's other educational needs that result from the child's disability. 34 C.F.R. § 300.320(a)(2). In the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must also consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(2)(i).

As to the first prong of the *Rowley* standard, nothing in the Record indicates that the 2022 IEP did not comply with the IDEA's procedural requirements regarding IEP development. The 2022 IEP was developed at properly constituted IEP meetings, and the 2022 IEP indicated, as required, the special education and related services that were to be provided to Student. (FF #s 79-87). The 2022 IEP contained annual goals designed to enable Student to make progress in the general education curriculum, and a BIP to address Student's behavioral needs. (FF #s 83, 87).

Thus, as to the first prong of the *Rowley* standard, the SCO finds and concludes that the 2022 IEP complied the IDEA's procedural requirements regarding IEP development in this respect. The SCO turns next to the question of whether the 2022 IEP was substantively appropriate. *Rowley*, 458 U.S. at 207.

B. Substantive Adequacy of the IEP

Individualized Social-Emotional Needs

When the 2022 IEP was developed, Student was making progress toward all annual goals. (FF # 80). Although there had been infrequent reports of work refusal, and one instance of physical aggression toward staff during the 2022-2023 academic year, District staff did not have concerns about Student's behavior. (FF # 32). Nevertheless, upon Parent's request, District conducted an FBA to obtain information about Student's behavior and revised Student's BIP in collaboration with Parent. (FF #s 33, 38, 63). Parent indicated that she agreed with the BIP at the December 6, 2022 meeting, following the meeting via email, and again at Student's December 8, 2022 IEP review meeting. (FF #s 38, 59).

At Parent's request, the IEP Team developed a social/emotional goal for Student and drafted the objective of the social/emotional goal to address Parent's specific concerns about coping skills. (FF # 83). The social/emotional goal targets the identification of emotions when Student is

frustrated, and the objective targets requesting appropriate coping strategies when Student is overwhelmed or frustrated. (*Id.*). The goal/objective is measured by the number of times Student can identify his emotions and request an appropriate coping strategy when he is frustrated or overwhelmed. (*Id.*).

There is no evidence in the Record to suggest that Student's social/emotional needs were not being met, and the evidence demonstrates that the IEP Team adopted Parent's suggestions regarding the social/emotional goal contained in the 2022 IEP. (FF #s 32, 80, 83). Parent does not indicate, and the facts do not demonstrate, that Student required direct specialized social/emotional services, or that social/emotional struggles were negatively impacting Student academically.

The SCO finds, in consultation with CDE Content Specialist, that the BIP and social/emotional goal contained in the 2022 IEP were appropriately tailored to Student's needs based on the information that was available to the IEP Team, including the information about Student's social/emotional needs which was provided by Parent, and that the social/emotional services contained in the 2022 IEP were appropriately tailored to Student's individualized social/emotional needs.

For these reasons, the SCO finds and concludes that the 2022 IEP was tailored to Student's individualized needs in this respect, as required by 34 C.F.R. §§ 300.320 and 300.324.

Individualized Math Needs

When the 2022 IEP was developed, Student was making progress or meeting his previous annual goals in math. (FF # 61, 80). At the December 2022 IEP meetings, Parent expressed concern that the draft math goals contained in the 2022 IEP were not targeting "life skills." (FF # 65). Parent also asked that the IEP Team consider having Student in the general education class for math. (FF # 74). The IEP Team agreed to modify Student's math goals pursuant to Parent's requests (e.g., tailoring Math Goal No. 2 from the 2022 IEP around finding decimal forms of rational numbers at Parent's request) but rejected Parent's request to have Student attend the general education math class. (FF #s 65, 76).

The 2022 IEP provided for 1,100 minutes per month of direct specialized instruction in math outside of the general education classroom. (FF # 85). In discussions around these services, Parent expressed concern that Student was not being exposed to grade level standards. (FF # 75). Case Manager explained that Student is being exposed to grade level standards, and that Case Manager incorporates those standards into her instruction. (*Id.*). Although the IEP team considered whether it would be appropriate to move Student to a less restrictive environment for math, the IEP Team found that there were reasons why that would not be appropriate (e.g., the general education class was working on algebra, which is highly abstract and more advanced than what Student is currently working on in math). (FF # 76).

The SCO finds, in consultation with CDE Content Specialist, that, based on Student's individualized needs, the type and severity of his disability, and his rate of progress toward his goals in math, he was benefiting from the specialized math instruction he received under the 2021 IEP. The data did not suggest those services should be removed. Student was exposed to grade level standards through the specialized instruction he received from Case Manager, and the IEP Team was justified in its concern that putting Student into the general education environment in the middle of the year when the class was working on an abstract math concept that Student had never worked on previously could be detrimental to his progress.

LRE

When the 2022 IEP was developed, Parent asked that the IEP Team consider whether it was appropriate for Student to be in the general education environment for math and language arts. (FF #74). The IEP Team spent extensive time discussing the advantages and disadvantages of increasing Student's time in the general education environment, but ultimately found that he should remain in the general education environment 40 to 79 percent of the time. (FF # 76).

The SCO finds, in consultation with CDE Content Specialist, that, based on Student's individualized needs, the type and severity of his disability, and his rate of progress toward his annual goals in reading, writing, and math under the 2021 IEP, that he was benefitting from the services contained in the 2021 IEP, and there was no data to suggest that his specialized services should be decreased. The IEP Team spent significant time discussing the possible advantages and disadvantages of changing Student's LRE and determined that it was appropriate for Student to remain in his current LRE. (FF # 76). The SCO finds the IEP Team appropriately determined that the advantages of increasing Student's time in the general education environment for language arts and math would be outweighed by the disadvantages of decreasing his specialized instruction, and that Student was in the appropriate LRE.

For these reasons, the SCO finds and concludes that the 2022 IEP was tailored to Student's individualized needs in this respect, as required by 34 C.F.R. §§ 300.320 and 300.324.

Conclusion to Allegation No. 6: District did not amend Student's IEP. No IDEA violation occurred.

Parent's concern is that District amended the 2022 IEP on December 21, 2022, outside of the IEP process, and without agreement from Parent. (FF # 89).

Under the IDEA, an IEP may be amended in one of two ways: (1) by the entire IEP Team at an IEP Team meeting or (2) in a written document outside an IEP Team meeting, as long as parents and the school district agree. 34 C.F.R. § 300.324(a)(6).

Here the 2022 IEP was developed at properly constituted IEP meetings on December 2, 8, and 14, 2022. (FF # 41). During those meetings, the IEP Team developed a social-emotional goal for

Student, and the IEP Team, at Parent’s request, discussed an objective to the goal which targeted requesting appropriate coping strategies when Student was feeling frustrated. (FF #s 69-70).

Prior to sending Parent a copy of the finalized 2022 IEP, Case Manager noticed the 2022 IEP mistakenly omitted the social-emotional objective which was discussed and agreed upon during the 2022 IEP’s development, so she added an objective to memorialize what was agreed upon at the IEP meeting. (FF # 88). Parent indicated that the objective does not reflect what was agreed upon at the meeting, but the SCO finds that the recording of the meeting does not support this position. (FF # 89). Indeed, the recording demonstrates that the objective was developed in response to Parent’s request that the annual goal target coping strategies. (FF #s 69-70).

The SCO accordingly finds and concludes that the 2022 IEP was not amended, and no violation of 34 C.F.R. § 300.324(a)(6) occurred.

Conclusion to Allegation No. 7: District provided periodic reports on Student’s progress as required by the 2021 IEP, consistent with 34 C.F.R. § 300.320(a)(3)(ii).

Parent’s concern is that District failed to provide her with periodic reports on Student’s progress as required by the 2021 IEP.

A. Periodic Reports on IEP Progress: Legal Requirements

A parent’s right to participate in the development of their child’s educational program requires that they be regularly informed of progress toward IEP goals. *See M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1198 (Ninth Cir. 2017), *cert. denied*, 138 S. Ct. 556 (2017) (“[I]n enacting the IDEA, Congress was as concerned with parental participation in the *enforcement* of the IEP as it was in its *formation*.”) For that reason, school districts must periodically report a student’s progress toward meeting annual goals to parents, in accordance with the schedule described in the IEP. 34 C.F.R. § 300.320(a)(3). In light of *Andrew F.*, OSEP provided additional guidance concerning the importance of sharing progress monitoring data with parents:

Public agencies may find it useful to examine current practices for engaging and communicating with parents throughout the school year as IEP goals are evaluated and the IEP Team determines whether the child is making progress toward IEP goals. IEP Teams should use the periodic progress reporting required at 34 CFR §300.320(a)(3)(ii) to inform parents of their child’s progress. Parents and other IEP Team members should collaborate and partner to track progress appropriate to the child’s circumstances.

Questions and Answers (Q&A) on *U. S. Supreme Court Case Decision Andrew F. v. Douglas County School District Re-1*, 71 IDELR 68 (OSEP 2017).

B. Student's Periodic Progress Reports

The 2021 IEP required District to provide Parent with reports of Student's progress toward annual goals each quarter. (FF # 7). District operates on a quarter system, with the first quarter ending in October, the second in December, the third in March, and the fourth at the end of the academic year. See (FF #s 7, 39). Therefore, during the timeframe at issue in this investigation, District was required to provide Parent with progress reports in October and December 2022.

The first quarter of the 2022-2023 academic year at School ended in October of 2022. (FF # 39). A progress report detailing Student's progress toward annual goals was generated on October 14, 2022, and provided to Parent via email on October 24, 2022. (*Id.*). The progress report indicated Student was making progress toward all his annual goals. (*Id.*).

The SCO finds, upon review and consultation with CDE Content Specialist, that the progress monitoring data contained in this progress report appropriately details Student's progress toward annual goals, and that the data supported a finding that Student was making progress. (FF # 40).

The second quarter of the 2022-2023 academic year ended in December of 2022. See (FF # 39). Parent was apprised of Student's progress toward annual goals during the IEP meetings which occurred on December 2, 8, and 14, 2022. (FF #s 41, 54). During those meetings, the IEP Team reviewed Student's progress toward annual goals in detail, and the IEP Team spent extensive time responding to Parent's questions and providing details about Student's progress. (FF #s 54-62). This progress monitoring data was also documented in the 2022 IEP. (FF # 80).

The SCO finds, upon review and consultation with CDE Content Specialist, that the progress monitoring data contained in the 2022 IEP appropriately details Student's progress toward annual goals, and that the data supported a finding that Student was making progress or meeting all his annual goals.

Overall, the SCO finds and concludes that District provided Parent with periodic reports of Student's progress toward annual goals in October and December 2022 as required by the 2021 IEP, consistent with C.F.R. § 300.320(a)(3)(ii).

Systemic IDEA Violations: This investigation demonstrates violations that are systemic and will likely impact the future provision of services for all children with disabilities in District if not corrected. 34 C.F.R. § 300.151(b)(2).

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

Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46601 (Aug. 14, 2006).

Here, District committed procedural violations related to procedural safeguards, PWN, and notice of meeting. The SCO finds and concludes, upon consultation with CDE Content Specialist, that the violations are systemic, and likely to impact other students if not addressed.

First (and most importantly), District incorrectly indicated in its Response to this Complaint that it has no duty to provide the procedural safeguards notice and PWN upon a parent request for an evaluation. (FF # 15, 17). During interviews, Director of Special Education indicated that procedural safeguards notice is only required once a year and upon discipline, which is inconsistent with IDEA. See (FF # 17).

Second, although District follows CDE procedural guidance for special education, District does not maintain its own special education procedures. (FF # 92). District trains staff to follow CDE guidance, but the lack of written policies and procedures here makes it difficult for the SCO to evaluate what is taught to staff. (FF # 93). Also, District's misunderstanding of the law related to procedural safeguards and PWN raises concerns about District's interpretation of IDEA and CDE guidance.

Finally, although there is no evidence that District is in the regular practice of "updating" NOM for IEP meetings immediately prior to IEP meetings, the SCO is concerned by the way District updated the NOM immediately prior to an IEP meeting to reflect the presence of legal counsel. (FF # 43). While the facts do not demonstrate that legal counsel's presence here impacted the development of the 2022 IEP, the presence of attorneys at IEP meetings is "discouraged" by OSEP in *Letter to Clinton*, 37 IDELR 70 (OSEP 2001), and notifying a parent the night before an IEP meeting that an attorney will be in attendance is not in line with the collaborative spirit of IDEA and the IEP process. (FF # 78).

For these reasons, the SCO finds and concludes, upon consultation with CDE Content Specialist, that the violations noted in this Decision are systemic, and likely to impact other students if not addressed. The SCO will accordingly craft an appropriate remedy to ensure the appropriate provision of services to similarly situated students in the future.

REMEDIES

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

- a. Failing to provide the procedural safeguards notice, in violation of 34 C.F.R. § 300.504;
- b. Failing to provide PWN and proper PWN, in violation of 34 C.F.R. § 300.503; and
- c. Failing to provide proper notice of meeting, in violation of 34 C.F.R. § 300.322.

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

1. Corrective Action Plan

- a. By **Monday, May 29, 2023**, District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student, and all other students with disabilities for whom District is responsible. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm District’s timely correction of the areas of noncompliance.

2. Decision Review

- a. Executive Director of Special Education, Director of Special Education, Case Manager, School Psychologist, and District’s legal counsel must review this Decision, as well as the requirements of 34 C.F.R. §§ 300.322, 300.503, 300.504 and *Letter to Clinton*, 37 IDELR 70 (OSEP 2001). This review must occur no later than **Thursday, May 18, 2023**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Friday, May 26, 2023**.

3. Procedures to Address Systemic Violations

- a. By **Monday, May 29, 2023**, District shall submit to CDE Special Education Monitoring and Technical Assistance Consultant finalized, written procedures to address all systemic concerns noted in this Decision regarding the provision of the procedural safeguards notice and PWN. These procedures must be consistent with the requirements of 34 C.F.R. §§ 300.503 and 300.504. CDE will then conduct follow-up activities, if any, as appropriate.

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 District's annual determination under IDEA and subject District to enforcement action by the CDE.

CONCLUSION

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

Dated this 23rd day of April, 2023.



Ross Meyers
State Complaints Officer

APPENDIX

Complaint, pages 1-21

- Exhibit 1: Mixed Documentation (combined)
- Exhibit 2: IEP Meeting Recordings (combined)

Response, pages 1-7

- Exhibit A: IEPs
- Exhibit B: BIPs
- Exhibit C: PWN
- Exhibit D: NOM
- Exhibit E: Procedural Safeguards Notice
- Exhibit F: Meeting Recordings/Transcripts
- Exhibit G: Progress Monitoring
- Exhibit H: Service Logs
- Exhibit I: Grades and Attendance
- Exhibit J: Evaluation Report
- Exhibit K: Academic Calendar
- Exhibit L: Policies and Procedures
- Exhibit M: Correspondence
- Exhibit M1: Correspondence (cont.)
- Exhibit M2: Correspondence (cont.)
- Exhibit M3: Correspondence (cont.)
- Exhibit M4: Correspondence (cont.)
- Exhibit N: none
- Exhibit O: none
- Exhibit P: none
- Exhibit Q: none
- Exhibit R: State Complaint(s)
- Exhibit S: 2022 IEP (without missing page)

Reply, pages 1-25

- Exhibit 3: Blank Consent/PWN Form
- Exhibit 4: SWAAAC Log
- Exhibit 5: 2021 Progress Monitoring
- Exhibit 6: December 10, 2022 Email
- Exhibit 7: 2022 Progress Monitoring
- Exhibit 8: 2021 IEP (March)
- Exhibit 9: 2021 IEP (October)
- Exhibit 10: Transcripts of IEP Meetings (combined)

- Exhibit 11: Secure Message from Parent re Interview

Telephone Interviews

- Case Manager: March 28, 2023
- Director of Special Education: March 28, 2023
- Parent: March 31, 2023
- School Psychologist: April 4, 2023