

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

State Complaint 2013: 508
El Paso County, Falcon School District #49

DECISION

INTRODUCTION

This pro-se, state-level complaint (Complaint) was received by the Colorado Department of Education (CDE) on May 16, 2013 by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

To comply with the federal privacy laws (i.e., Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA))² and to protect the anonymity of the parents and their child, hereafter, the persons and locations identified in conjunction with the Complaint investigation and Decision will be labeled as follows and redacted prior to publication:

- [Mother], Mother of Child, (“Mother” or jointly as “Parents”);
- [Father], Father of Child, (“Father” or jointly as “Parents”);
- [Student], Child of Parents, (“Student,” “he,” “his” or “him”);³
- Student’s age of [Age], [Age];
- [Private SLP], Private S-L Pathologist, (“Private SLP”);
- El Paso County, Falcon School District #49, (“District”);
- [Special Education Director], Special Services Executive Officer, (“Special Education Director”);
- [Assistant Special Education Director], Assistant Special Education Director, (“Assistant Special Education Director”);
- [AT Technician], District Assisted Technology Technician, (“AT Technician”);

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

² FERPA, codified at 20 U.S.C. § 1232g, was enacted in 1974, to protect a parent’s access to education records and to protect the privacy rights of students and their parents. The IDEA regulations are found at 34 CFR § 300.1, *et seq.*

³ Although Student’s gender may be either male or female, in order to preserve anonymity, the SCO has arbitrarily elected to identify Student as a male in this Decision.

- [Former School], (“Former School”);
- [Present School], (“Present School”);
- [Principal], Former School Principal, (“Principal”);
- [Special Education Teacher], Former School Special Education Teacher, (“Special Education Teacher”);
- [General Education Teacher], Former School General Education Teacher, (“General Education Teacher”);
- [Paraprofessional #1], Former School Paraprofessional #1, (“Paraprofessional #1”);
- [Paraprofessional #2], Former School Paraprofessional #2, (“Paraprofessional #2”);
- [Paraprofessional #3], Former School Paraprofessional #3, (“Paraprofessional #3”);
- [Paraprofessional #4], Former School Paraprofessional #4, (“Paraprofessional #4”); and
- [SLP], Former School Speech-Language Pathologist, (“SLP”).

A State Complaint, signed by both Parents, was received on May 16, 2013. After carefully reviewing the Complaint and interviewing Mother on May 20, 2013, the State Complaints Officer (SCO) determined that the Complaint identified one allegation and 11 claims subject to the jurisdiction of the state-level complaint process and its implementing regulations at 34 CFR §§ 300.151 through 300.153.⁴ The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.⁵

The overriding issue and, therefore, the scope of the investigation identified by the SCO is:

Whether the District committed procedural violations of the IDEA and, if so, whether the procedural violations resulted in Student being denied a free appropriate public education (FAPE).

On May 20, 2013 and June 6, 2013 the SCO interviewed Mother by telephone.

On June 4, 2013 the District’s Response and Exhibits 1-11 were timely received.

On June 6, 2013 the District responded in writing to SCO’s request for additional information which was marked as Exhibits 12 and 13.

⁴ Hereafter, only the IDEA regulation and any corresponding Exceptional Children’s Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

⁵ The remainder of Parents’ Complaint allegations (e.g., discrimination, Section 504 of the Rehabilitation Act, District personnel actions and deliberate indifference claims) are matters that are not protected under the IDEA and were therefore rejected.

On June 10, 2013 the District supplied the SCO with amended responses to Exhibit 12.

On June 14, 2013 Parents' Reply, pgs. 1-4, and Exhibits GG through II and KK were timely received.

On June 18, 2013 Parents' Supplement to the Reply, pg. 5, and the May 15, 2012 IEP (marked as Exhibit JJ) were received.

On June 19, 2013 the SCO conducted a face-to-face interview with Private SLP

On June 20, 2013 the SCO conducted face-to-face interviews with AT Technician, General Education Teacher and Paraprofessional #1.

On June 26, 2013 the SCO conducted a telephone interview with SLP.

On June 27, 2013 the SCO conducted a telephone interview with Paraprofessional #2.

On July 9, 2013, 2013 the SCO closed the Record.

COMPLAINT, RESPONSE AND REPLY

Parents' Complaint allegation and claims, the District's Response and Parents' Reply are summarized as follows:

Allegation: On five dates (i.e., October 9, 2012; October 11, 2012; October 30, 2012; November 1, 2012; and November 2, 2012) the District failed to properly implement Student's IEP. Specifically:

Claim (a): The District failed to provide Student with extra explanations for schedule changes.

Response: The District denied the claim arguing that, consistent with the November 29, 2011 (Triennial) IEP, "see [Exhibit] 8,"⁶ Student was provided with paraprofessional support throughout the day, including transitions such as schedule changes.

Reply: Paraprofessional failed to inform Student of schedule changes. Parents noted that Exhibit 8, the November 29, 2011 (Triennial) IEP, was not in effect during the 2012-2013 school year.

Claim (b): The District failed to provide Student with facilitated interaction with peers.

Response: The District denied the claim arguing general education activities and Paraprofessional support provided Student with inclusion into the mainstream. The District noted "please see [Exhibit] 7 for supporting documentation."

⁶ Exhibit 8 (the November 29, 2011 (Triennial) IEP is not relevant since it was not the IEP in effect during the Complaint dates.

Reply: Student developed no relationships with other general education students, could not fully participate because he was not in the general education classroom from the beginning to the end of activities and was treated as a visitor rather than as a member of the class.

Claim (c): The District failed to ensure that Student was repositioned every two hours.

Response: The District denied the claim arguing that service logs and transcripts indicated Student was repositioned every two hours. The District noted “please see [Exhibits] 9 and 10 for additional documentation.”

Reply: Red marks on Student’s skin provided evidence to the contrary.

Claim (d): The District failed to provide Student with consistent verbiage for reminders on expectations on participation and behavior by all staff working with him.

Response: The District denied the claim arguing that the transcripts (Exhibit 10) provided evidence to the contrary.

Reply: If Student was loud, he was removed from the classroom without explanation.

Claim (e): The District failed to provide Student with access to properly functioning assistive technologies (i.e., auditory scanning device #1 (the ASD #1) or the ASD #2).⁷

Response: The District denied the claim arguing that access to the ASD #2 was not specifically mentioned in Exhibit #8, pg. 10 (the November 29, 2011 (Triennial) IEP). The District provided a functioning ASD #1 which Parents chose to discontinue. Without timely forewarning, Parents replaced the ASD #1 with the ASD #2. Mother provided some instruction on use of the ASD #2. Additionally, the District provided prompt training on the device. Furthermore, Student had access to his low tech communication cards on all days listed in the Complaint. The District noted “please see [Exhibit] 11 for additional supporting documentation.”

Reply: The October 9, 2012 IEP was the IEP in effect during the dates listed in the Complaint and not the November 29, 2011 (Triennial) IEP which the District cited. The device was referred to in various ways in the October 9, 2012 IEP (i.e., “the personal communication device,” “the ASD #1,” “communication device,” “[his] device” and the “auditory scanning device”). Although Student started the 2012-2013 school year using the ASD #1, the device had functional problems and District staff had many complaints. (e.g., see Exhibit 11, pg. 754). The change to the ASD #2 was discussed with Assistant Special Education Director during a meeting on September 9, 2012 meeting (Exhibit II, pg. 211) and also in telephone conversations with AT Technician (see Exhibit 11, pg. 742). During the seven hours when the ASD #2 was not working (i.e., on November 1st and 2nd, 2013), neither Parents nor AT Technician were contacted to remedy the malfunction. During this time periods, Student had no access to communication cards.

⁷ Student used two automatic scanning devices (ASDs) during the 2012-2013 school year. Rather than identify the manufactures of each device, the devices will be identified as “the ASD #1” and “the ASD #2.”

Claim (f): The District failed to provide Student with extra support in [assistive] technologies to participate in General Education.

Response: The District denied the claim arguing that it had provided considerable technical support and noted “see [Exhibit] 7.”

Reply: Parents reply was not relevant to the Claim or the Response.

Claim (g): Ensure that Special Education Teacher and General Education Teacher consulted on a weekly basis concerning lesson plans and vocabulary for the communication device (i.e., the ASD #1 or the ASD#2).

Response: The District denied the claim and noted “see [Exhibit] 7.”

Reply: Transcriptions of staff communications on November 1st and November 2nd provide evidence to the contrary. (See Exhibit EE, pgs. 139, 141 and 182).

Claim (h): Ensure that Special Education Teacher and General Education Teacher modified Student’s curriculum according to grade level.

Response: The District denied the claim and noted “see [Exhibit] 7.”

Reply: Parents cited conversations documented in Exhibit 10, pgs. 453 to 457, as an example of the District’s failure to modify the General Education curriculum so that Student could participate.

Claim (i): Ensure that Student received instruction 40-79% of the time in the general education environment.

Response: The District denied the claim arguing that with paraprofessional support Student was substantially mainstreamed noting “see [Exhibits] 7 and 10.”

Reply: Students attendance in General Education classes was consistent with the Current IEP (Exhibit #A) on only two of the five dates cited in the Complaint. Parents argued that specific pages of the transcript of the tape recordings (e.g., Exhibit 10, pgs. 507-509 and Exhibit 11, pg. 732) buttressed their claim that Student frequently had unstructured time in the SN classroom when he should have been in the General Education classroom.

Claim (j): Ensure that Student received the special education and related services consistent with the daily schedule (i.e., Exhibit N, pg. 79).

Response: The District denied the claim arguing that the Triennial IEP (Exhibit 8) specifies only the amount of service time and location rather than delivery according to a specific schedule.⁸ The District argued that service logs supplied evidence of the services having been delivered and noted “see [Exhibit] 9”.

Reply: At the beginning of the school year Parents were supplied with the schedule (Exhibit N, pg. 79) and, therefore, it was reasonable for them to expect that the schedule would be followed.

⁸ As previously noted, Exhibit 8 (the November 29, 2011) Triennial IEP is not relevant since it was not the IEP in effect during the Complaint dates.

Claim k: Ensure that District staff received ongoing training in assistive technologies (i.e., the ASD #1 or the ASD #2).

Response: The District denied the claim noting “see [Exhibit] 11,” and argued that District staff received ongoing training in assistive technologies.

Reply: The monthly meetings were not staff trainings and had only one topic concerning Student (e.g., Exhibit 11, pg. 819). There was one ASD #1 training at the beginning of the school year that was very helpful. Paraprofessional #1 expressed frustration concerning the lack of training (e.g., see Exhibit EE, pg. 186). Parents noted that Paraprofessional #2 did not receive “eye gaze” training prior to beginning to work with Student (citing Exhibit 10, pg. 627).

Proposed Remedies: Parents’ proposed that Former School staff be trained on the appropriate implementation of IEPs and on how to provide support and services to children having significant needs.

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,⁹ the SCO makes the following FINDINGS:

Factual Background:

1. At all times relevant to the Complaint, Student, [age] years of age, was a resident of the District.
2. There is no dispute that, since August, 2005, Student has been identified as being eligible for special education (i.e., having multiple disabilities and being in need of special

⁹ Appendix A, attached and incorporated by reference, details the entire Record. As previously noted, the Complaint concerns claims that allegedly occurred over five school days (i.e., October 9, 2012; October 11, 2012; October 30, 2012; November 1, 2012; and November 2, 2012) based on evidence gathered as a result of surreptitious tape recordings on those five school days. In conjunction with its Response, the District submitted 851 pages of documentation in [Exhibits] 1-11. None of the pages in the exhibits were numbered. Furthermore, the District’s Response only made to reference to an exhibit without citing any specific page numbers. (See Response, pgs. 1-3). Much of the District’s documentation in Exhibits #s 7-9 and 11 concerned IEPs, emails, correspondence, medical records, contact forms, etc. that had no relevance to the dates or claims in Parents’ Complaint. In conjunction with a Complaint investigation, the SCO carefully reviews documentation submitted in support of the Complaint, Response and Reply. However, the District is not well served by submitting a Response that does not provide relevant documentation in support of its position or which fails to specify the page number(s) of voluminous documentation (e.g., “see [Exhibit] 7” consisting of 350 pages or “see [Exhibit] 10” consisting of 254 pages). The SCO needed to conduct face to face interviews with some interviewees (i.e., General Education Teacher, Paraprofessional #1, AT Technician, Special Education Teacher and Private SLP) in order to discuss the contents of some exhibits. At the time of the investigation, Special Education Teacher was in Indiana and, thereafter, resigned from her position with the District. Consequently, Special Education Teacher was not interviewed. Interviews of District staff were complicated by the fact that the investigation occurred over the summer break and, consequently, many staff were not available.

education and related services). Student's multiple disabilities include microcephaly, spastic quadriplegic cerebral palsy (CP) and a cortical visual impairment (CVI) that is neurologically based. The CVI causes diminished visual acuity to such an extent that he is considered legally blind.¹⁰ Student must be tube fed. Due to significant physical disabilities associated with the CP, Student has no fine motor movements and requires supportive adapted equipment (i.e., a wheelchair, gait walker and stander) for mobility. Although Student has an electric wheelchair at home, he cannot propel the wheelchair he uses at school. Therefore, at school, Student is totally dependent on the assistance of an aide for any wheelchair mobility as well as for any transfers in or out of the wheelchair. For example, Student must be lifted on and off of a toilet chair. Additionally, Student has no speech although he can use head and eye gaze movements to communicate "yes" or "no."¹¹ Student has an intellectual disability. However, because of severe communication limitations, the extent of his intellectual disability is unclear.¹²

3. During the 2012-2013 school year, Student attended Former School from August 6, 2012 through November 2, 2012. Parents requested and the District agreed that Student should be immediately transferred to Present School. Student attended Present School from November 6, 2012 until the end of the school year.¹³

4. **Communication devices.** For the past several years Student has used an auditory scanning device (ASD) as a primary means of communicating. During the first two to three years, Student used the ASD #1. However, the ASD #1 battery only stayed charged for three hours. To fully recharge the device, Student's wheelchair had to be positioned near an electrical outlet for at least three hours. If the battery was dead, Student could operate the device only if it was plugged into an electrical outlet. The ASD #1 also had a programming glitch which, from time to time, caused the device's volume, speed or scan pattern to malfunction. On several occasions, Parents sent the ASD #1 back to the manufacturer to be repaired but the programming glitch continued to occur. When Student's ASD #1 was being repaired, the District provided a loaner ASD #1. However, because the glitch was in the device's program file, the malfunction was transferred to the loaner when Student's program file was downloaded.¹⁴

5. Student used the ASD #1 at Former School from August 6, 2012 until October 12, 2012. During the 2012-2013 school year, no other student at Former School used the ASD #1. In the fall of 2012, Private SLP supplied Parents and Student with the ASD #2, a new prototype scanning device, at no cost. Student began using the ASD #2 at Former School on October 29, 2012 and continued to use that device throughout the remainder of the school year.¹⁵

¹⁰ CVI is often seen in children with severe CP.

¹¹ Interviews of Mother and Private SLP and Exhibits A, pg. 29 and EE, pg. 137.

¹² Interviews of Mother, Private SLP and General Education Teacher.

¹³ Interview of Mother. As a result of a May 20, 2013 meeting, Parents and the District agreed that Student would continue to attend Present School during the 2013-2014 school year.

¹⁴ *Id.*

¹⁵ Interviews of Mother, Private SLP and AT Technician. Complaint, pg. 1.

6. **Operation of the ASDs.** Operation of the two ASDs is basically the same although the procedures that can be taken to remedy device malfunctions are very different. Additionally, the ASD #2 has expanded categories, expanded words and phrases within a category as well as different icons and pictures of the categories.¹⁶ In order to operate either device, Student must be seated in his wheelchair in order access the device's head switch and speaker. The speaker is near his ear. When Student wishes to communicate, he scans the device listening as the speaker enunciates the various categories (e.g., "questions," "about me," "emotions," "manners," "test answers," "math," "science," etc.) from which he can choose. When Student locates the category where he knows a word or phrase is located, he presses the head switch which activates the button for that category. The speaker then begins playing all of the words that are contained in that category. When Student hears the particular word or phrase he is looking for, he presses the head switch and the word or phrase is enunciated from the device loud enough to be audible to a bystander. For example, if a person asked Student what he likes to do, Student would go to his home page and audibly scan the various categories. When Student hears the "about me" category, he presses his head switch to activate that category. The device then begins audibly scanning all of the words and phrases in that category. When Student hears the phrase "I like to listen to music" he presses the head switch again and the device enunciates "I like to listen to music" loud enough for the other person to hear. If Student misses the word or phrase he is searching for in a category, he must finish scanning through all of the words in that category before he can return to the top of the category (or change categories) and rescan for the word/phrase he is looking for. The categories and the words and phrases within the categories are constantly changing, depending on Student's current circumstances, the particular topic being covered in a school class at the time, etc.

7. In summary, to communicate using either of the ASDs, Student must have sufficient memory of the various categories available to him as well as the words and phrases contained within each category. He must locate and then press the appropriate button to enunciate the appropriate word or phrase. Student must also have a good attention span and concentration. Additionally, both Student and the person with whom he is communicating must have a great deal of patience since it can take Student 5-15 minutes to process (i.e., understand the question and what he needs to do, find the appropriate category and word or phrase in the ASD, and then press the button to enunciate the word/phrase). Special Education Teacher and Paraprofessional #1 expressed frustration at the length of Student's processing time.¹⁷ If Student unintentionally presses the head switch on a category or a word/phrase, the scanning

¹⁶ Interviews of Mother and Private SLP. Exhibit EE, pg. 186. The paraprofessionals and teachers would need to be very familiar with the new icons/pictures as well as the contents of each category in order to provide Student with partner assisted THE ASD access in going to the appropriate page of the either THE ASD #1 or THE ASD #2.

¹⁷ Interview of AT Technician.

time is extended or the word/phrase enunciated is not appropriate to the content of the conversation.¹⁸

8. Student was very familiar with how to operate the ASD #1 and became more proficient on the ASD #2 as he progressed through the school year. Private SLP estimated Student's proficiency on the ASD #1 to be 65-70% in August 2012. She estimated Student's proficiency on the ASD #2 to be 65% at the end of the 2012-2013 school year (i.e., May 20, 2013).¹⁹ However, several District staff opined that they had not observed Student to exhibit the level of proficiency on the ASDs that Mother claimed to see outside of school.²⁰ SCO's review of the District transcripts revealed that Student had many coherent and appropriate conversations while he was using either ASD.²¹

9. **Surreptitious tape recordings and transcript.** Parents were frustrated alleging that, contrary to an IEP accommodation, Special Education Teacher was not sending home examples of Student's school work on a weekly basis. As a result, Parents were concerned that Student was not receiving instruction in the General Education Classroom 40-79% of the time or receiving accommodations and a modified curriculum consistent with the October 9, 2012 (Current) IEP. Consequently, "on five random days," (i.e., October 9, 2012; October 11, 2012; October 30, 2012; November 1, 2012 and November 2, 2012) Parents taped a digital recorder to the bottom to Student's wheelchair.²² The digital recorder ran continuously throughout each of the five school days that were recorded. The recorder captured conversations with Student while he was seated in his wheelchair as well as conversations in the vicinity of Student's wheelchair even when it was unoccupied. The tape recorder also captured all enunciations made by the ASD that Student was using on a given day.²³

10. After listening to the tape recordings, Parents filed a personnel complaint with the District against two Former School employees (i.e., Special Education Teacher and Paraprofessional #1). In conjunction with the personnel Complaint, Parents supplied the District with complete copies of the digital recordings. Two District staff from the Human Resources department transcribed the tapes. Parents were supplied with a copy of the District's transcription.²⁴ Mother does not believe that the District's transcription is completely

¹⁸ Interviews of Mother, Private SLP and AT Technician. Private SLP opined that Student's auditory memory "is amazing" and pointed out that operating the THE ASD is one of the only things in Student's life that he can independently control.

¹⁹ *Id.*

²⁰ Interviews of AT Technician, Paraprofessional #1 and SLP.

²¹ For example, see Exhibit 10, pgs. 470-472, 492-493, 525, 565-566, 574-575, 617-618, 662-663 and 675-676.

²² Interview of Mother. When Student was in his walker, gait trainer or receiving services outside of his wheelchair, Student did not have access to the ASD and had to rely on other forms of communication (e.g., eye gaze, iPod, etc.).

²³ Interview of Mother and Exhibit 10.

²⁴ *Id.*

accurate and, consequently, Parents supplied documentation with what they characterized as some of the District's transcription inaccuracies.²⁵

11. Parents also filed this Complaint, believing that the District's failure to ensure that the Student's IEP was properly implemented resulted in Student being denied a FAPE on the dates of the surreptitious recordings (i.e., October 9th, October 11th, October 30th, November 1st and November 2nd 2013).²⁶

12. In conjunction with the Complaint investigation, SCO listened to several portions of the recordings from each of the dates listed in the Complaint. The SCO also carefully reviewed the District's entire transcript. The SCO notes that, due to multiple persons speaking simultaneously or muffled communications, the transcribers appropriately indicated "garbled" in several places throughout the transcript. In some places in the transcript, the transcribers summarized conversations.²⁷ In those rare instances, the SCO relied on Mother's transcription. However, the District's transcription, Exhibit #10, provided sufficient accuracy to address most if not all of the claims raised in the Complaint.

13. **The October 9, 2013 (Current) IEP.**²⁸ This was the IEP in effect during the dates listed in the Complaint. The SCO notes that the Current IEP was crafted as a result of an IEP meeting held on October 9, 2013 which is also the first of five dates listed in Parents' Complaint. Due to Student's multiple disabilities and needs, the Current IEP contains over 25 accommodations, modifications and a detailed service delivery statement.²⁹ Because Student's Current IEP was readily accessible to staff, the SCO finds credible District staff who stated that they were familiar with Student's Current IEP goals, accommodations, etc.³⁰ The provisions of the Current IEP relevant to the Complaint are as follows:

...

Accommodations. What type(s) of accommodation(s) if any is (are) necessary for the student to access the general curriculum and/or appropriate activities to make effective progress?

....

*access to scanning software;

*access to assistive technology such as, switches, Touch Screen computer, [Student's ASD], interactive multi-media, and talking word processor program;

²⁵ Interview of Mother and Exhibit EE.

²⁶ Interview of Mother and Complaint.

²⁷ For example, see Exhibit 10, pgs. 693-694 and 697.

²⁸ Exhibit A. The IEP in effect at the beginning of the 2012-2013 school year was dated May 15, 2012 (Exhibit JJ). On October 9, 2012 Student's IEP was amended. It was also amended on December 18, 2012 in conjunction with the annual review (Exhibit B). However, in this Decision, the October 9, 2012 IEP is been identified as the "Current" IEP since this was the IEP in effect on all of the dates listed in the Complaint.

²⁹ The May 15, 2012 IEP (Exhibit JJ) accommodations, modifications, service delivery statement and placement are identical to those listed in the Current IEP.

³⁰ Interviews of Paraprofessional #1, Paraprofessional #2 and SLP.

- *ongoing training for staff on assistive technology;
extra support with technology to participate in General Education (access to curriculum, presenting work);
- *extra explanations for schedule changes and transitions;
- *facilitated interactions with peers both socially and participating in class;
- *repositioned every two hours for comfort and skin integrity;
- *consistent verbiage for reminders on expectations on participation and behavior by all staff working with [Student];
- *[ASD] on/plugged in whenever [Student] is seated in wheelchair;

...

Modifications. What standards, if any, *need to be modified*, expanded, and/or prioritized *for the student to access the general curriculum* and/or appropriate activities to make effective progress?

- *Special Education Teacher will consult with General Education Teacher a minimum of weekly to get lesson plans for the week and vocabulary for communication device.

- *Curriculum to be modified according to grade level Colorado Academic Standards by Special Education Teacher and/or General Education Teacher.

...

Service Delivery Statement:

...

- *[Student] will receive direct service in the Severe Needs [SN] for 988 minutes per week by the Special Education Service Provider. [Student] will also receive direct service from Special Education staff (student based/(1:1) paraprofessional) in the General Education setting for 1000 minutes per week (for the entire time he is in the General Education setting).

...

Special Education service providers will be provided with/attend specialized training to support [Student's] specific needs to include Assistive Technology. Parents will provide staff with resources.

...

Recommended Placement in Least Restrictive Environment:

...

(LRE) (Special Education Setting): General education class 40% to 79% of the time.

...

Due to his needs, [Student] requires specialized instruction and staff support throughout the entire school day . . . He benefits from social interactions and active academic participation in the General Ed. Setting. [Student] is usually very vocal in the General Education setting (laughing, screaming, and making other vocalizations), he frequently requires staff support (e.g., prompts) and *may need to be removed from the GE classroom if he becomes too disruptive with the intent to address the behavior and*

return to GE classroom. Currently, [Student] has improved in usage of his [the ASD #1] to participate in class.³¹

...

State Wide Assistive Technology, Augmentative and Alternative Communication (SWAAAC) reports of January 27, 2012 and February 24, 2012. (These reports were attached to Parents' copy of the Current IEP. However, the copy that District supplied did not include the SWAAAC reports.³² Investigation revealed that the two SWAAAC reports were intended to be attached to and part of the Current IEP).³³

Allegation: On five dates (i.e., October 9, 2012; October 11, 2012; October 30, 2012; November 1, 2012; and November 2, 2012) the District failed to properly implement Student's IEP.³⁴

Claim (a): The District failed to provide Student with extra explanations for schedule changes.

14. Due to Student's very limited visual acuity, the IEP team determined that Student needed advance notice of where he was being taken and why or what activity would be occurring next.³⁵

15. "Extra explanations . . ." is an accommodation in Student's Current IEP.³⁶

16. A review of the transcript revealed that, in the vast majority of transitions (e.g., Student being taken to or from a class, a special, another school location or being removed from class due to loud vocalizations, etc.), Student was not told where he was being taken or why.³⁷ Additionally, when, using his ASD, Student asked "what's going on?" or "what are my choices?" or similar questions, he was often ignored.³⁸

17. The SCO finds that the IEP accommodation was not consistently implemented.

³¹ Exhibit A, pgs. 5, 15-16 and 18-19 (Emphasis added).

³² Exhibits A, pgs. 21-24 and #1.

³³ Interview of AT Technician.

³⁴ Interview of Mother and Complaint, pgs. 1 & 3. As noted in a May 20, 2013 letter to Special Education Director, Parents alleged that the IEP was not properly implemented on the *five dates listed in the Complaint*. Parents did not claim that the District failed to properly implement the IEP on any other dates.

³⁵ Interview of Mother and Exhibit A, pg. 5.

³⁶ *Id.*, pg. 16.

³⁷ Exhibit 10, (e.g., pgs. 453, 458, 463, 465, 499, 503-507, 521, 525, 575 693 and 698).

³⁸ *Id.*, (e.g., pgs. 454-460, 507, 512-513, 520, 692).

Claim (b): The District failed to provide Student with facilitated interaction with peers.

18. The IEP team had determined that Student needed facilitated interaction with peers both socially and to participate in class.³⁹ This is an accommodation that is listed in Student's Current IEP.⁴⁰

19. As noted in Finding of Fact (FF) #7, above, it may take 5-15 minutes for Student to process and communicate an appropriate word or phrase using either ASD device. District staff (e.g., Paraprofessional #1, General Education Teacher and Special Education Teacher) expressed frustration concerning the processing time Student required using the ASD.⁴¹

20. A review of the transcript reveals that interactions with peers were not facilitated. Occasionally a peer might say "hi" or ask Student what he was doing. However, rather than asking the peer to wait and encouraging Student to respond appropriately, the paraprofessional would frequently answer the peer's question and converse with the peer.⁴² Frequently, when District staff asked Student a question, either socially or in conjunction with a classroom topic, they did not wait for a response or did not provide him with sufficient time to reply to the question.⁴³

21. The SCO finds that this accommodation was not properly implemented.

Claim (c): The District failed to reposition Student every two hours.

22. "Repositioning" means either adjusting Student's wheelchair up or down (e.g., from a flat to sitting position) or moving him out of the wheelchair to a toilet chair, stander or gait trainer.⁴⁴

23. The IEP team determined that Student needed to be repositioned every two hours for comfort and skin integrity.⁴⁵

24. This is an accommodation that is listed in Student's Current IEP.⁴⁶

25. Parents did not believe Student was being repositioned since he was coming home with red marks on various body pressure points after school.⁴⁷

³⁹ Exhibit A, pg. 5.

⁴⁰ *Id.*, pg. 16.

⁴¹ Interviews of AT Technician, Paraprofessional #1.

⁴² Exhibit 10, (e.g., pgs. 461, 466-467, 473-476, 513 and 547).

⁴³ Interview of Private SLP. *Id.*, e.g., pgs. 479-480, 501, 517 and 520.

⁴⁴ Interview of Mother.

⁴⁵ Exhibit A, pg. 5.

⁴⁶ *Id.*, pg. 16.

⁴⁷ Interview of Mother.

26. Review of the transcript revealed that Student was frequently repositioned throughout each school day although the SCO could not determine whether this was done precisely at two hour intervals.⁴⁸

27. The SCO finds that this accommodation was properly implemented.

Claim (d): The District failed to provide Student consistent verbiage on expectations, participation and behavior.

28. The IEP team determined that Student needed “to have consistent verbiage for reminders on expectations on participation and behavior by all staff working with [him].”⁴⁹

29. This is an accommodation that is listed in Student’s Current IEP.⁵⁰ The SCO concludes that the accommodation was intended to address Student’s loud vocalization behaviors which are described in FF #31, below.

30. General Education Teacher had Student in her classroom for Math, Social Studies, Language and Reading. Student also attended the “Special” of the day (i.e., Art, Music, Technology, Library or Physical Education were rotated on a daily basis each week) and Recess with the General Education Class.⁵¹ As a result, Student was typically included in General Education classes and activities about 3 ½ hours each day.

31. **Loud vocalization behaviors.** Student frequently makes loud vocalizations or squealing noises on a daily basis throughout the school day although the most vocalizations occurred in the General Education classroom setting.⁵² The frequency of the vocalizations in a particular class varied from 3 to 12 times per class period. The loud vocalizations were of particular concern in General Education classes since the noise disrupted the other students.⁵³ The IEP team noted that Student was “usually very vocal in the General Education setting (laughing, screaming, and making other vocalizations) . . . and may need to be removed from the GE classroom if he becomes too disruptive with the intent to address the behavior and return to GE classroom.”⁵⁴

⁴⁸ Exhibit 10, (e.g., pgs. 505, 518, 519, 541, 552, 562, 572 and 693).

⁴⁹ Exhibit A, pg. 5.

⁵⁰ *Id.*, pg. 16.

⁵¹ Interviews of General Education Teacher and Paraprofessional #1.

⁵² Interview of Paraprofessional #1 and January 27, 2012 and SWAAAC report, Exhibit A, pg. 22.

⁵³ Interviews of AT Technician, General Education Teacher and Paraprofessional #1. Exhibit A, pg. 22.

⁵⁴ Exhibit A, pg. 19.

32. The Current IEP did not indicate the cause of the loud vocalizations although Private SLP attributed the vocalizations to Student being excited or seeking attention.⁵⁵ When Student's ASD was malfunctioning Student frequently exhibited vocalizations.⁵⁶

33. District staff reported that when Student vocalized or squealed, he was asked to stop and was redirected. When Student could not be settled down, Student was removed from the classroom. The removals might be as brief as five minutes or, on other occasions, for the duration of the class.⁵⁷ Typically, Student was removed from the General Education Teacher's classroom three to four times each day.⁵⁸

34. However, the transcript was replete with evidence that Student frequently made several loud vocalizations before any attempt was made to redirect him or before he was removed from the General Education classroom.⁵⁹ Nor was it uncommon for his vocalizations to simply be ignored for extended periods of time. Alternatively, he might be removed from a classroom without any explanation whatsoever.⁶⁰ Often times, Student was simply told to "shush."⁶¹

35. The District staff failed to consistently employ the procedures described in FF #33, above. Nor did documentation in the Record provide credible evidence that District staff who worked with Student, including all Paraprofessionals, received specific training on how to consistently respond to Student's vocalizations.

36. When Student made a loud vocalization, contrary to the accommodation, he was not provided with consistent verbiage on expectations, participation and behavior. Furthermore, Student's frequent and loud vocalizations were behaviors that disrupted the learning environment of the other students and also interfered with Student's ability to access special education and related services.⁶² The SCO finds it troubling that, despite his frequent and loud vocalizations, the IEP team concluded that Student did not need a Behavior Intervention Plan.⁶³ This is particularly true, inasmuch as, because of his behaviors, Student was being removed from the General Education classroom at least three to four times each day.⁶⁴

⁵⁵ Interviews of Private SLP. Private SLP sees Student once a week for one hour and estimated the loud vocalizations to occur in her setting anywhere from 0 to 3 times per hour.

⁵⁶ Exhibit 10, pgs. 565-566, 574-575, 604 and 609.

⁵⁷ Interviews of General Education Teacher and Paraprofessional #1.

⁵⁸ Interview of General Education Teacher.

⁵⁹ Exhibit 10, pgs. 477, 557, 598-599 and 602.

⁶⁰ *Id.*, pgs. 455-459, 466-467, 472-473, 477-478, 499-500, 508-514, 565-566, 609, 685, 687, 689 to 692.

⁶¹ *Id.*, pgs. 514, 528, 575, 598-599, 657, 660 and 686-687.

⁶² Interviews of AT Assistant and General Education Teacher.

⁶³ Exhibit A, pg. 6. However, Paraprofessional #1 recalled that during the 2011-2012 school year, a Behavior Specialist came to Former School to observe Student and collect data on the length and frequency of his loud vocalizations/squeals. Paraprofessional #1 did not know what had been done with the data.

⁶⁴ Interview of General Education Teacher.

Claim (e): The District failed to provide Student with access to properly functioning assistive technologies (i.e., the ASD #1 or the ASD #2).

37. Student's ASD is referred to in various ways throughout the Current IEP (e.g., "[the ASD #1]," "scanning software," "personal communication device," etc.).⁶⁵ The IEP team determined that Student needed to have his ASD "on or plugged in" whenever he was seated in his wheelchair.⁶⁶

38. An accommodation with the specific wording "the ASD #2" is not contained in Student's Current IEP. However, the IEP accommodations do include: (i) "access to scanning software;" (ii) "access to assistive technology such as . . . [his] personal communication device;" and (iii) "needs to have [his] personal communication device on/plugged in whenever [he] is seated in [his] wheelchair."⁶⁷ The SCO finds that use of an ASD was included in Student's IEP. It follows that, regardless of the ASD being used (i.e., the ASD #1 or the ASD #2), Student needed access to a *properly functioning* scanning device.

39. Student used the ASD #1 as the primary method of communicating from the beginning of the school year until the fall break, October 12, 2012. There is no dispute that the ASD #1 frequently malfunctioned and, from time to time, it had to be sent to the manufacturer for repair. Whenever the ASD #1 was being repaired, the District supplied Student with a loaner ASD #1 which was downloaded with Student's software.⁶⁸

40. On October 29, 2012, the District permitted Parents to switch the ASD #1 with the ASD #2. Contrary to the District's Response, Parents' notified the District well in advance of their intention to replace the ASD #1 with the #2. Mother notified Assistant Special Education Director of this plan during a meeting on October 9, 2012.⁶⁹ Mother also showed the ASD #2 to Paraprofessional #1 on Thursday, October 11, 2012. However, the persuasive evidence in the Record also reveals that Parents did not notify anyone in the District of a specific date when they planned to have Student begin using the ASD #2 until Saturday, October 27, 2012, two days before Mother brought Student to Former School with the ASD #2.⁷⁰ On October 29, 2012 Mother briefly showed Paraprofessional #1 how to operate and reset the ASD #2 when malfunctions occurred.⁷¹

41. The ASD #2 stopped functioning properly for several hours on November 1, 2012 and November 2, 2012.⁷² There is no evidence in the transcript suggesting that Student was offered

⁶⁵ *Id.*, pgs. 4-5.

⁶⁶ *Id.*, pg. 5.

⁶⁷ *Id.*, pg. 16.

⁶⁸ Interviews of Mother and AT Technician.

⁶⁹ Interview of Mother and Exhibit II, pgs. 210-212.

⁷⁰ Interviews of Mother and AT Technician.

⁷¹ Interviews of Mother and AT Technician. Exhibit 10, pgs. 523 & 525.

⁷² Interview of Mother. Complaint, pg. 1 and Exhibit 10, pgs. 596-663 and 695-702.

any alternate methods of communicating (i.e., eye gaze, touch screen, low technology communication cards, etc.) when the ASD #2 was malfunctioning. During the three days that Paraprofessional #2 worked with Student, she never offered him the low tech communication cards.⁷³

42. Contrary to the IEP accommodation, the District failed to ensure that the ASD #2 was properly functioning for several hours on November 1st and November 2nd.

Claim (f): The District failed to provide Student with extra support in [assistive] technologies to participate in General Education (access to curriculum, presenting work).

43. This is an accommodation that is listed in Student's Current IEP.⁷⁴ To this end, Student was to receive direct, one-to-one Paraprofessional services whenever he in the General Education setting (i.e., 1000 minutes per week or about 3 ½ hours each day).⁷⁵

44. During the 2012-2013 school year, AT Technician was responsible for training staff on Student's communication needs and supports. However, on October 29, 2012, AT Technician did not know how to operate the ASD #2.⁷⁶

45. Mother briefly showed Paraprofessional #1 some of the ASD #2 basic functions on October 29th and October 30th. However, Paraprofessional #1 did not feel that Mother's explanations supplied her with sufficient training on operation of the ASD #2.⁷⁷ Nevertheless, Paraprofessional #1 then showed Paraprofessional #2 and Special Education Teacher some of the ASD #2 functions that Mother had shown her.⁷⁸

46. The District failed to properly implement the accommodation, particularly as it related to the ASD #2. There is no evidence in the Record indicating that any Former School staff received any District training on how to operate the ASD #2 while Student was attending Former School. Although Student was assigned one-to-one Paraprofessional assistance during all General Education classes and activities, the Paraprofessionals did not have sufficient training on the ASD #2 to permit Student to participate in General Education classes on November 1st and November 2nd. Furthermore, when District staff did become aware that the ASD #2 was not functioning (and had not been functioning for several hours), they did not know how to remedy the malfunctions.⁷⁹

⁷³ Interview of Paraprofessional #2.

⁷⁴ Exhibit A, pg. 16.

⁷⁵ Interviews of Paraprofessionals #1 and #2. Exhibit A, pg. 18.

⁷⁶ Interview of AT Technician.

⁷⁷ Interview of Mother and Exhibit 10, pgs. 593, 461-463, 523, 525, 693, 698-700.

⁷⁸ Interview of Paraprofessional #2 and Exhibit 10, pgs. 524, 546-548, 645-646, 697-698.

⁷⁹ *Id.*

Claim (g): The District failed to ensure that Special Education Teacher and General Education Teacher consulted on a weekly basis concerning lesson plans and vocabulary for the communication devices.

47. Weekly consultations between the teachers are listed as a modification in Student's Current IEP.⁸⁰ During the 2012-2013 school year, while Student was attending Former School, Special Education Teacher met with General Education Teacher on a weekly basis to discuss the curriculum topics and basic vocabulary that would be covered in General Education classes the following week.⁸¹ These consultations were consistent with the Current IEP accommodation. Information on the classroom topics and vocabulary were then supplied to Mother so she could include the vocabulary in Student's ASD.⁸²

Claim (h): The District failed to ensure that Special Education Teacher and General Education Teacher modified Student's curriculum according to grade level.

48. The IEP team noted that Student needed to "continue working on Reading, Writing and Math skills . . . and to be *actively engaged with the grade level curriculum.*"⁸³ Student did not perform at grade level in any of the General Education classes that he attended. Because Student could not write, his abilities in that area could not be established. Student did have some Math abilities but, due to his physical and communication limitations, the extent of his Math abilities was unclear.⁸⁴

49. The "Modifications" section of the Current IEP provides that the General Education "curriculum [is] to be modified to grade level, Colorado Academic Standards, by *Special Education Teacher and/or General Education Teacher.*"⁸⁵

50. The January 27, 2012 and February 24, 2012 SWAAAC Reports were attached to the Current IEP.⁸⁶ In the February 24, 2012 report, it was recommended that specific District staff assume specific responsibilities:

- The *General Education Teacher*: provide key content aligned with general education material that Student should focus on;
- The *Special Education Teacher*: use the information provided by the General Education Teacher to determine how the key core content would be taught and which form of technology would be used; and

⁸⁰ Exhibit A, pg. 16.

⁸¹ Interview of General Education Teacher and Exhibit 7, pgs. 43-50.

⁸² Interviews of Mother and General Education Teacher.

⁸³ Exhibit A, pg. 5 (Emphasis added).

⁸⁴ Interview of General Education Teacher.

⁸⁵ Exhibit A, pg. 16 (Emphasis added).

⁸⁶ *Id.*, pgs. 21-25. AT Technician was identified as the SWAAAC Coordinator in these reports.

- The *Paraprofessional* working directly with [Student] would receive information from the Special Education Teacher, take the directions and implement the assigned tasks.⁸⁷

51. Special Education Teacher and General Education teacher met weekly, (see FF #45, above). However, neither Special Education Teacher nor General Education Teacher used the information gleaned from those meetings to modify the curriculum to meet Student's needs.⁸⁸ General Education Teacher might tell Paraprofessionals what she was going to cover in a particular class and supply a copy of worksheets that the class would be working on, however, neither Special Education Teacher nor General Education Teacher modified the curriculum to meet Student's needs.⁸⁹ At times, Student was given no activities or Paraprofessional interactions.⁹⁰ In fact, SCO could only find one instance in the transcript where Special Education Teacher worked directly with Student. This work occurred in the SN Classroom and was constantly interrupted by side conversations Special Education Teacher had with other staff.⁹¹

52. The credible evidence in the Record reveals that, on the dates in the Complaint (i.e., October 9, 2012; October 11, 2012; October 30, 2012; November 1, 2012; and November 2, 2012¹) any tasks or activities that Student received in the General Education classroom were those that Paraprofessionals put together during the class.⁹²

Claim (i): The District failed to ensure that Student received instruction 40-79% in the general education environment.

53. The IEP team determined that Student's least restrictive environment and appropriate educational setting was 40-79% of the time in the General Education classroom.⁹³ However, General Education Teacher opined that Student should not have been in the General Education classroom as much as the IEP placement called for.⁹⁴

54. In the General Education classroom, Paraprofessional #1 "let the [General Education] teacher teach and [Student] was expected to listen." But when the other students were doing a

⁸⁷ *Id.*, pg. 25.

⁸⁸ Interviews of General Education Teacher, Paraprofessional #1 and Paraprofessional #2. Exhibit 7, pgs. 43-50.

⁸⁹ See Exhibit 10, pgs. 461, 464-465, 478-481, 483, 489, 517-518, 527, 546-548 and 659.

⁹⁰ *Id.*, pgs. 454-458, 516-517 and 528-531.

⁹¹ *Id.*, pgs. 611-618.

⁹² Interviews of General Education Teacher, Paraprofessional #1 and Paraprofessional #2. For example, see Exhibit 10, pgs. 478-482.

⁹³ Exhibit A, pg. 19.

⁹⁴ Interview of General Education Teacher. Nor did General Education Teacher feel that she was the most qualified person to provide for Student's educational needs.

Math activity, Paraprofessional #1 had Student “stay on a Math page or do something related to what the class was talking about.”⁹⁵

55. The SCO specifically finds:

- On the Complaint dates (i.e., October 9th, October 11th, October 30th, November 1st and November 2nd) when he was sitting in the General Education classroom, Student was not provided with any *Teacher modified instruction*;
- As noted in FF #52, above, any modified educational activities that Student was offered were those that Paraprofessionals thought of during the General Education classes; and
- As noted in FF #s 16, 34 & 51, above, frequently, his communications/vocalizations were ignored or he sat without any activities/Paraprofessional interactions.

Claim (j): The District failed to ensure that Student received special education and related services consistent with the daily schedule.

56. Parents based their claim on a daily schedule that was supplied at Mother’s request sometime during the 2012-2013 school year.⁹⁶ That document lists the daily class schedule for the General Education students at Student’s grade level. On the left side of the schedule are hand written notes and highlights indicating times during the day when Student was to have a snack, use the bathroom or be tube fed in the SN Classroom.⁹⁷

57. Student’s Current IEP includes a detailed service delivery statement describing all of the direct and indirect services that Student is to receive on a weekly basis. However, the Current IEP does not include a daily schedule to which the District is required to adhere.⁹⁸

58. Student did follow a basic schedule each day that tracked but did not include all of the activities listed on the General Education class schedule. For example, at the beginning of each day, Student was taken to the SN Classroom. When the bell rang, Student was taken to General Education Teacher’s classroom where the class was reciting the Pledge of Allegiance. Student remained in the classroom during Math. Before Recess, at approximately 9:45 a.m., Student left the General Education classroom early in order to use the bathroom and have a snack. He then joined the class on the playground for Recess which was held from 10:00 -10:10 a.m.⁹⁹ General Education schedule deviations also occurred when Student had pullout services (i.e., Adapted P.E., Physical Therapy or SLP services) or when he was removed from the General Education classroom due to loud vocalizations.

⁹⁵ Interview of Paraprofessional #1.

⁹⁶ Interview of Mother and Exhibit N, pg. 79.

⁹⁷ Exhibit N, pg. 79.

⁹⁸ Exhibit A, pgs. 18-19.

⁹⁹ Interview of General Education Teacher and Exhibit 10, pgs. 454 to 460.

59. The District staff adhered to a basic daily schedule.

Claim (k): The District failed to ensure that District staff received ongoing training in assistive technologies (i.e., the ASD #1 or the ASD #2).

60. “Ongoing training for staff on assistive technology” is listed as an accommodation in Student’s IEP.¹⁰⁰

61. As previously noted in FF #5, above, during the 2012-2013 school year, Student was the only student at Former School who used the ASD #1.¹⁰¹

62. During the 2012-2013 school year, AT Technician was responsible for training Former School staff on Student’s communication needs and supports. The Record indicates that the following SWAAAC meetings/trainings were conducted and or scheduled by AT Technician:

- **August 17, 2012:** A one hour SWAAAC meeting to review all Former School students using AT devices (including Student) and to discuss Mother’s reset instructions for the ASD #1. According to AT Technician, the following persons attended the monthly SWAAAC meetings: Special Education Teacher, General Education Teacher, SLP and unidentified paraprofessional(s) (there were no sign in sheets substantiating who attended). One of the Parents also attended each of each of these meetings.¹⁰²
- **September 21, 2012:** A 30 minute SWAAAC meeting at Former School to discuss Student’s AT needs and his ASD #1.¹⁰³
- **October 9, 2012:** An IEP meeting was held in lieu of the October AT meeting.¹⁰⁴
- **November 16, 2012:** A SWAAAC training on the ASD #2 was scheduled but, because Student stopped attending Former School after November 2, 2012, this training did not occur.¹⁰⁵

63. The SCO specifically finds:

- SWAAAC training to address Student’s specific AT needs and operation of the ASD #1, was not conducted until September 21, 2012, *34 school days after the start of the school year;*¹⁰⁶

¹⁰⁰ Exhibit A, pg. 16.

¹⁰¹ Interview of AT Technician.

¹⁰² Interview of AT Technician and Exhibit # 11, pgs. 747-750. The District’s Response included documentation concerning weekly meetings that Special Education Teacher conducted with paraprofessionals. However, none of the meeting agendas make mention of a presentation by AT Technician, AT equipment or AT training. See Exhibit #11, pgs. 770-823.

¹⁰³ Exhibit 11, pgs. 733-738.

¹⁰⁴ Id., pg. 723.

¹⁰⁵ Id., pg. 744.

¹⁰⁶ Interview of Mother and Exhibit #6, pg. 39.

- During the 2011-2012 school year at Former School, at least four paraprofessionals worked with Student: Paraprofessional #1, Paraprofessional #2, Paraprofessional #3, and Paraprofessional #4;
- The Record offers no credible evidence that any of the Paraprofessionals received SWAAAC training from AT Technician;
- The District knew that Parents intended to replace the ASD #1 with the ASD #2 and allowed the switch to occur October 29, 2012 prior to Former School staff being trained on the device;
- On that date, AT Technician did not know how to operate the ASD #2;¹⁰⁷
- When Mother brought Student to Former School with the new device, she only spent a brief period of time showing Paraprofessional #1 and Special Education Teacher some of the ASD #2 basic functions.¹⁰⁸
- Paraprofessional #1 did not believe that the brief training with Mother provided her sufficient training to even navigate the ASD #2;¹⁰⁹
- Paraprofessional #1 passed on to Paraprofessional #2 what Mother had shown her regarding the ASD #2;¹¹⁰
- On November 2, 2012 when District staff did become aware that the ASD #2 was not functioning (and had not been functioning for several hours), they did not know how to remedy the malfunction;¹¹¹ and
- While Student was attending Former School, August 6, 2012 through November 2, 2012, the District failed to ensure that District staff (i.e., Special Education Teacher, General Education Teacher, SLP and Paraprofessional #s 1-4) received timely and ongoing training in assistive technologies (i.e., the ASD #1 or the ASD #2).

CONCLUSIONS OF LAW

Based on the foregoing FFs, the SCO enters the following CONCLUSIONS OF LAW:

Allegation:

The District failed to properly implement Student’s IEP on October 9, 2012, October 11, 2012, October 30, 2012, November 1, 2012 and November 2, 2012.

64. One of the purposes of the IDEA is to ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE). § 300.1(a). Local education

¹⁰⁷ Interview of AT Technician.

¹⁰⁸ Interviews of Mother and Paraprofessional #1. Exhibit 11, pg. 708.

¹⁰⁹ Exhibit 10, pgs. 523, 525, 593, 604 and 693. If Paraprofessional #1 could not navigate the THE ASD #2, she could not provide Student with IEP accommodation “partner assisted auditory scanning.” See Exhibit A, pg. 16.

¹¹⁰ Interview of Paraprofessional #2.

¹¹¹ Exhibit 10, pgs. 695-702.

agencies such as District are required to provide eligible students with a FAPE by providing special education and related services, tailored to the student's unique needs, in conformity with *the student's IEP*. § 300.17(d) and Rule 2.19.

65. **Extra explanations.** The Current IEP provided that, due to Student's very limited visual acuity, he was to be provided with extra explanations for schedule changes. (FF #s 2 & 14-16). The District failed to consistently implement this accommodation. (FF #17). The accommodation was not provided in conformity with the IEP, in violation of § 300.17(d).

66. **Facilitated interaction with peers.** The Current IEP provided this accommodation due to Student's need for facilitated interaction with peers in social and classroom situation. (FF #18). The District failed to properly implement this IEP accommodation. (FF #21). Because Student had no speech, he uses an ASD as his primary method of communicating. (FF #4). Typically, using either the ASD #1 or the ASD #2, it takes Student anywhere from 5 to 15 minutes to process and to then communicate an appropriate word or phrase. The delay in Student's ASD communications frustrated Special Education Teacher and Paraprofessional #1. Instead of facilitating interactions, District staff would usually answer questions that peers posed to Student. (FF #s 7 & 19-20). Additionally, when District staff asked Student a question, they frequently failed to provide Student with sufficient time to process and respond to the question/communication. (FF #34). The accommodation was not provided in conformity with the IEP, and thus violated § 300.17(d).

67. **Repositioning of Student every two hours.** Due to Student's severe disabilities and immobility, the IEP provided that Student was to be repositioned every two hours. (FF #s 23-24). The District did ensure that this IEP accommodation was properly implemented. (FF #s 26). The accommodation was provided in conformity with Student's IEP. There being no violation of § 300.17(d), no remedy is ordered.

68. **Consistent verbiage on expectations, participation and behavior.** This IEP accommodation was intended to address Student's frequent loud vocalizations or squealing noises. (FF #s 29 & 31-32). Student's placement was in the General Education classroom 40-79% of the school day however, he made frequent loud vocalizations in that setting. (FF #s 13 & 31). When Student made loud vocalization he was supposed to be told to stop and then be redirected. If the loud vocalizations continued, he was to be removed from the classroom. The removal might be brief or it might be for the duration of a class. Typically, Student was removed from the General Education classroom three to four times each day. (FF #s 31 & 33).

69. The District staff failed to employ clear and consistent positive behavioral interventions each and every time Student made a loud vocalization. (FF #s 35 & 36). Consequently, Student might make several loud vocalizations before attempts were made to redirect his behavior or before he was removed from the classroom. Alternatively, his vocalizations were simply ignored for extended periods of time or he was told to "shush." (FF #34). Student's loud

vocalizations disrupted other students in the General Education classroom and also interfered with his ability to access special education. (FF #36). The accommodation was not implemented consistently (FF #s 33-34 & 36) and, therefore, was not provided in conformity with Student's IEP in violation of § 300.17(d).

70. Access to properly functioning assistive technologies (i.e., the ASD #1 or the ASD#2).

The IDEA defines "assistive technology service" to mean:

. . . [A]ny service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes –

The evaluation of the needs of a child with a disability, including a functional evaluation of the child;

. . .

Selecting, designing, fitting, customizing, adapting, applying, *maintaining*, repairing, or replacing assistive technology devices;

. . .

Training or technical assistance for professionals (including individuals providing education or rehabilitation services), . . . or other individuals who provide service to, employ, or are otherwise substantially involved in the major life functions of the child.

Section 300.6 (a), (c) and (f). (Emphasis added).

71. "Access to properly functioning assistive technologies" was not an accommodation that was specifically listed in Student's Current IEP. However, "access to scanning software" and other assistive technology accommodations in the IEP necessarily infer that Student was to be provided with properly functioning ASDs. (FF #s 37-38).

72. The ASD was Student's primary method of communicating. (FF #s 4 & 39). The District permitted Parents to switch out the ASD #1 with the ASD #2 but then failed to ensure that the device functioned properly (i.e., was maintained) for several hours on November 1st and 2nd, 2012. (FF #s 40-42). The District's actions violated § 300.17(d).

73. **Extra support in [assistive] technologies to participate in General Education.** The District failed to properly implement this IEP accommodation. (FF #s 43 & 46). There is no credible evidence that the four Paraprofessionals assigned to work with Student on a one to one basis received appropriate training on the ASD #1. (FF #s 62 & 63). Nor did they receive appropriate training on the ASD #2 prior to the device being introduced at Former School. Because of the Paraprofessional's lack of training, they could not provide the support necessary for Student to participate in the General Education classroom on November 1st and 2nd, 2012. (FF #63). The District's actions violated § 300.17(d).

74. **Weekly consultations concerning lesson plans and vocabulary for communication device.** Consistent with the Current IEP, the Special Education Teacher and General Education Teacher conducted weekly consultations concerning lesson plans a vocabulary for the ASD. (FF # 47). The weekly consultations were *provided in conformity with the child’s IEP.* § 300.17(d).

75. Under the IDEA:

Personnel qualifications.

(a) General. The SEA [state educational agency] must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of [the IDEA] are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to service children with disabilities.

(b) Related services personnel and paraprofessionals. The qualifications under paragraph (a) . . . must include qualifications for . . . paraprofessionals that –

. . .

(2)(iii) Allow paraprofessionals and assistants *who are appropriately trained and supervised* in accordance with State law, regulation or written policy . . . to be used to *assist in the provision of special education and related services*

Section 300.156(a) and (b)(2)(iii). (Emphasis added). In comments to the regulations, the Office of Special Education Programs (OSEP) explains that:

[Section 300.156(b)(2)(iii)] should not be construed to permit or encourage the use of paraprofessionals as a replacement for teachers . . . who meet State qualification standards. To the contrary, using paraprofessionals and assistants as teachers . . . would be inconsistent with the State’s duty to ensure that personnel necessary to carry out the purpose of Part B of the Act are appropriately and adequately prepared and trained. Paraprofessionals in public schools are not directly responsible for the provision of special education and related services to children with disabilities; rather, these aides provide special education and related services to the child . . . only under the supervision of special education and related services personnel However, it is critical that States that use paraprofessionals and assistants to assist in providing special education and related services . . . do so in a manner that is consistent with the rights of children with disabilities to FAPE under Part B.

71 Fed. Reg. 46612 (August 14, 2006). (Emphasis added).

76. “Special education” means *specially designed instruction* to meet the child’s unique needs, including instruction conducted in the classroom. § 300.39(a)(1)(i). (Emphasis added). “Specially designed instruction” means adapting the content, methodology, or delivery of instruction (i) to address the unique needs of the child; and (ii) to ensure access of the child to the general education curriculum. § 300.39(b)(3)(i)-(ii).

77. **Modified curriculum according to grade level.** The District failed to implement this IEP provision. On the dates in the Complaint, the District failed to ensure that Student's curriculum was modified by a classroom Teacher. (FF #s 49 & 51). The only "curriculum modifications" were activities that the Paraprofessionals thought of and offered to Student during a given class. (FF #52). The District's actions violated § 300.17(d).

78. **Instruction 40-79% of the time in the general education environment.** Contrary to the placement in the Current IEP, the District failed to insure that Student received *Teacher modified instruction* on the dates listed in the Complaint. (FF #s 53 & 55). Student may have been sitting in the General Education environment 40-79% of the time but the only "instruction" that Student received in that setting was activities that Paraprofessionals thought of during the class. (FF #55). Often Student had no peer interactions, Paraprofessional interactions, or activities to work on. (FF #18-21, 34 & 55). The District's actions violated § 300.17(d).

79. Furthermore, because of Student's frequent loud vocalizations, he had to be removed from the General Education classroom at least three to four times each day. (FF# 31 & 33). Student's frequent loud vocalizations impeded his learning and the learning of others in the General Education classroom. (FF #36).

80. **Special education and related services consistent with the daily schedule.** District staff did adhere to a basic daily schedule. (FF #s 56-59). Consequently, no violation of § 300.17(d) occurred.

81. **District staff training in assistive technologies (i.e., the ASD #1 or the ASD #2).** Any training that District staff received on the ASD #1 was untimely since it occurred well into the school year. (FF #s 46 & 63). The District permitted Parents to switch from the ASD #1 to the ASD #2 without first ensuring that staff who would be working with Student had received training on the new device. The District failed to supply Former School staff with any training on the ASD #2. (FF #63). The District failed to properly implement this accommodation, in violation of § 300.17(d).

82. Procedural violations such as "the failure to provide special education and related services in conformity with the IEP" can result in a denial of FAPE. § 300.17 and Rule 2.19. Yet not every deviation from the IEP provisions constitutes a denial of FAPE mandating remedies. *E.g., L.C. and K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005)(minor deviations from IEP's requirements which did not impact student's ability to benefit from special education program and did not amount to a "clear failure" of the IEP); *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. 2007)(failure to implement IEP must be material to incur liability under IDEA, and minor discrepancies between the services provided and the services called for do not give rise to an IDEA violation); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir.

2003)(failure to implement “essential” element of IEP denies FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000)(*de minimis* failure to implement IEP does not deny FAPE).

83. However, on the dates listed in the Complaint, the District failed to implement eight accommodations and modifications in conformity with the Current IEP, thus committing multiple procedural violations of § 300.17(d). (FF #s 13-17, 18-21, 31, 33-36, 37-42, 46, 51-53, 55, & 62-63). The District’s violations did not constitute minor deviations from the Current IEP. Rather, the violations resulted in material and essential elements of the IEP not being properly implemented or not being implemented at all (e.g., extra explanations; access to properly functioning assistive technologies; and a curriculum modified by Teachers to ensure that Student received instruction 40-79% of the time in the General Education environment). Accordingly, on the dates listed in the Complaint, the District’s multiple procedural violations resulted in Student being denied a FAPE.

REMEDIES

The District has committed multiple violations of the following IDEA requirement: § 300.17(d).

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

1) Corrective Action Plan. To ensure that violations do not recur:

No later than August 9, 2013, the District shall submit to the Department a proposed Corrective Action Plan (CAP) that addresses each and every violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities enrolled in Former School. Furthermore, **the CAP must also include specific information on how Former School staff hired subsequent to September 20, 2013 will receive the mandatory training described below.** The CAP must, at a minimum, provide for the following:

a) District Policies and Procedures.

- **By August 23, 2013** submission of compliant, District wide written policies, procedures, forms, notices and website information, consistent with the IDEA and this Decision.

b) Training.

- At a minimum, the following staff must be included in the training: All Former School General Education (classroom) Teachers, all Special Education Teachers, all Paraprofessionals (both full and part-time), Principal, the District Special Education Director and Assistant Special Education Director.
- **By August 23, 2013**, submission of the name and title of all proposed trainers and a complete copy of all proposed written training materials consistent with

the IDEA and this Decision. (NOTE: CDE stands ready, willing and able to supply technical assistance in the form of trainers and training materials for each of the mandated trainings described below.)

- **By September 20, 2013**, conduct a training which shall include, *at a minimum*, training and discussion consistent with the IDEA and this Decision concerning §§ 300.6(f); 300.17(d); 300.39(a) and (b)(3)(i)-(iii); 300.156(a) and (b)(2)(iii); and 300.324(a)(2)(i).
- **By September 27, 2013**, submission of evidence that such training has occurred (i.e., complete copies of training schedule(s), agenda(s), curriculum/training materials, the name and title of each trainer, and legible attendee sign-in sheets which lists each attendee's printed name and job title).

2) **Compensatory Education Services for failure to provide Student with a FAPE on the five dates listed in the Complaint.**

- The District shall provide Student with **15.0 hours** of compensatory education services as follows: direct, 4th grade level General Education curricula which has been modified to Student's skills and abilities using age appropriate materials. The compensatory services are to be delivered on a one to one basis by a Certified Teacher for no longer **than 30 minutes each day**. At a minimum, **the 15.0 hours of compensatory services must consist of 5.0 hours in each of the following subjects: Math, Reading and Social Studies**. These compensatory services shall be in addition to any services Student currently receives or will receive during regular school hours in the 2013-2014 school year that are designed to advance Student toward IEP goals and objectives.
- **NOTE:** Parents have the choice of accepting or declining the ordered compensatory education services. Parents must notify, in writing, the District Special Education Director and Department Consultant Joyce Thiessen-Barrett no later than 5:00 p.m. on **July 31, 2013** as to whether they accept or decline the ordered compensatory education services. If Parents fail to so notify the District and Ms. Thiessen-Barrett, the District will be excused from providing any compensatory education services.
- The parties shall cooperate in determining how the compensatory education services will be provided. **By August 9, 2013**, the District shall convene a meeting with Parents to determine the schedule for delivering the compensatory education services described above. In scheduling this meeting, the District must follow the parent participation regulation at § 300.322.
- The District must provide the Department with a copy of the schedule for compensatory services **by August 19, 2013**.
- If Parents do not make Student available for scheduled compensatory education services, (i.e., Parent cancels a scheduled session or Student fails to attend a scheduled session) the District will be excused from providing the services that were scheduled for that session and will not be required to schedule a make-up session.

- By **July 18, 2014**, the compensatory education services must be completed. To document compliance with this remedy, the District must record the compensatory education provided on service logs that include the following information: the date and duration of each day of service; a brief description, by date, of the service; the name and title of the Teachers (i.e., Special Education Teacher and General Education Teacher) who modified the curriculum to meet Student's needs for the service; the name and title of the provider; and verification that the services were compensatory services and not special education services offered during regular school hours in the 2013-2014 school year. The District should also use this log to document date(s) when Parents cancelled or Student failed to attend scheduled services.
- By **July 25, 2014**, a legible copy of the services logs described above and written verification that the District has fully complied with the compensatory education remedy.

Please submit the CAP and all other documentation detailed above to the Department as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Joyce Thiessen-Barrett, Senior Consultant
1560 Broadway, Suite 1175
Denver, CO 80202-5149

NOTE: Failure by the District to meet any of the timelines set forth above will adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the Department.

The enclosed sample template provides suggested formats for the CAP and includes sections for "improvement activities" and "evidence of implementation of change."

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. See, 34 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Dated this 18th day of July, 2013.

Jeanine M. Pow, Esq.
State Complaints Officer

Appendix A

Parent's Complaint, pages 1 through 12.

Exhibit A: 10/09/2012 (Current) IEP.

Exhibit B: 12/18/2012 IEP.

Exhibit C: 04/30/2012 OAC Resolution Agreement.

Exhibit D: 02/19/2013 Letter to Acting CEO for District.

Exhibit E: 03/22/2013 Letter from District Legal Counsel.

Exhibit F: 04/11/2013 Letter to Special Education Director

Exhibit G: 07/18/2012 email re: [Student's] ESY progress report.

Exhibit H: Children's Hospital Speech-Language Services Treatment Plan and Progress Summary

Exhibit I: 12/12/2012 email string re: Academic goals.

Exhibit J: 03/09/2013 Progress Report.

Exhibit K: 05/11/2012 Parent Concerns for Student's school supports.

Exhibit L: 06/05/2013 email string re: Follow up.

Exhibit M: 08/27/2012 email string re: Checking in about classroom.

Exhibit N: Daily schedule – [then current] grade.

Exhibit O: Communication Log re days of Complaint.

Exhibit P: 11/04/2012 email string re: Vocabulary and Core Concepts for [Student].

Exhibit Q: 09/09/2010 District Board of Education Agenda Item.

Exhibit R: Transcription of recess conversations during Complaint time period.

Exhibit S: 03/05/2013 email string re: Presented policy on unauthorized recordings.

Exhibit T: 12/07/2012 email string re: [Student].

Exhibit U: 11/07/2012 email string re: Copy of recordings.

Exhibit V: 11/08/2012 email re: Copy of recordings.

Exhibit W: 11/08/2012 email string re: [Student] and follow-up meeting.

Exhibit X: 11/13/2012 email string re: Notes on recording from Oct. 30th.

Exhibit Y: 11/30/2012 email string re: Recording dates.

Exhibit Z: 11/30/2012 email string re: Recordings.

Exhibit AA: 12/20/2012 email string re: Former School.

Exhibit BB: 12/20/2012 email string re: Follow up to requested training.

Exhibit CC: 02/26/2013 email re: Policy presentation to BOE.

Exhibit DD: 11/07/2012 Student transfer w/l state and 05/03/2013 email string.

Exhibit EE: Parent background information and partial transcriptions (done by Mother and District) of select portions of tape recordings done on the five dates listed in the Complaint.

Exhibit FF: Jump drive containing digital recordings of five school days in Complaint.

Parent's Reply, pgs. 1-4.

Supplement to Reply, pg. 5.

Exhibit GG: Re claim(1)(a), Parents' citations to Record.

Exhibit HH: Teacher communications 8/7/12 to 8/8/12; 8/13/2012 to 8/15/2012 & 10/29/12 to 10/31/2012.

Exhibit II: Jump drive containing digital recording of 10/09/2012 meeting w/Assistant Special Education Director.

JJ: 05/15/2012 IEP.

KK: Reset instructions for the ASD #1

District's Response, pgs. 1-3.

Exhibit 1: IEP in effect between 10/09/2012 and 11/02/2012 (i.e., 10/09/2012 [Current] IEP).

Exhibit 2: Meeting notice for each IEP meeting conducted during the 2012-2013 school year.

Exhibit 3: Sign-in sheets and typed list of attendees at each IEP meeting during the 2012-2013 school year.

Exhibit 4: Copies of all written notices supplied to parents during the school year.

Exhibit 5: A list of all District and Former School staff having knowledge of facts relevant to the allegation and claims.

Exhibit 6: District calendar for the 2012-2013 school year.

Exhibit 7: A mishmash of assorted memos, emails, unidentified longhand notes and agendas (350 pages in length) none of which are referenced by topic or a page number in the Response.

Exhibit 8: Triennial (11/29/2011) IEP.

Exhibit 9: Assorted medical/Medicaid documentation (40 pages).

Exhibit 10: District transcriptions 10/9/2012 to 11/2/2012 (254 pages).

Exhibit 11: A mishmash of assorted emails, employee timesheets (without explanation) (148 pages)

Additional Documentation:

Exhibit 12: District's 6/5/2013 answer to SCO's 06/05/2013 letter AND District's amended answer to pgs. 1-2 of Exhibit 12 (yellow highlighted information).

Exhibit 13: Persons who attended four IEP meetings during the 2012-2013 school year.

Interviews of:

Mother, Private SLP, AT Technician, Paraprofessional # 1, General Education Teacher, Paraprofessional #2 and SLP.