

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

**State-Level Complaint 2020:514
Douglas County School District RE-1**

DECISION

INTRODUCTION

The parent (“Parent”) of a child (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Douglas County School District RE-1 (“District”) on March 12, 2020.

The State Complaints Officer (“SCO”) extended the 60-day investigation timeline due to exceptional circumstances arising from the COVID-19 pandemic, consistent with 34 C.F.R. § 300.152(b)(1).

The SCO determined that the Complaint identified three allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.152. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

The Colorado Department of Education (“CDE”) has authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, this investigation will consider only events that occurred not earlier than March 12, 2019 to determine whether or not a violation of IDEA occurred. *Id.* Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. Findings of non-compliance, if any, shall be limited to one year prior to the date the Complaint was filed.

SUMMARY OF COMPLAINT ALLEGATIONS

Whether the District denied Student a FAPE because the District:

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.

1. Failed to conduct an initial evaluation to determine if Student qualified as a child with a disability under the IDEA from March 12, 2019 to August 27, 2019, after Parent requested an evaluation, consistent with 34 C.F.R. § 300.301;
2. Failed to evaluate Student in all areas of suspected disability from March 12, 2019 to present, consistent with 34 C.F.R. § 300.304(c)(4); and
3. Failed to develop and implement an IEP in the area of reading to provide special education and related services based on peer-reviewed research to the extent practicable from September 2019 to present, consistent with 34 C.F.R. §§ 300.320(a)(4) and 300.323(c)(2).

FINDINGS OF FACT

After thorough and careful analysis of the entire record,² the SCO makes the following FINDINGS OF FACT (“FF”):

A. Background

1. Since kindergarten, Student has attended a school (“School”) within the District. *Interview with Parent*. Student is currently in third grade. *Id.*
2. Student is eligible for special education and related services under the disability categories of Speech or Language Impairment and Specific Learning Disability (“SLD”). *Exhibit A*, p. 1. This investigation relates only to Student’s eligibility under SLD and services for SLD.
3. Student is described as a friendly, loving, positive child. *Interviews with Parent, Second Grade Teacher, and Third Grade Teacher*. She is intelligent and enjoys building Legos. *Id.* In the classroom, Student struggles with reading and speaking in front of the class. *Id.*

B. Student’s Second Grade Year

4. In August 2018, Student began Second Grade at School. *Interview with Parent*. In the beginning of the school year, Parent expressed concern to Second Grade Teacher that Student might be dyslexic. *Interviews with Parent and Second Grade Teacher; Exhibit J*, p. 5.
5. At home, Parent—who has experience with dyslexia—noticed that Student disliked reading and struggled with spelling. *Interview with Parent*.
6. At the beginning of the school year, Student completed a developmental reading assessment (“DRA”) and a reading assessment on i-Ready. *Interview with Second Grade*

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

Teacher. Both of these assessments are standard for second grade students. *Id.* The DRA, administered by Second Grade Teacher, determines a student's reading level. *Id.* i-Ready "is a computerized test that . . . adapts to the student's performance and achievement." *Exhibit A*, p. 5. When a student answers a lower level question correctly, i-Ready moves on to more difficult questions. *Interview with Second Grade Teacher*. School uses i-Ready to "assess a student's growth over time." *Exhibit A*, p. 5.

7. Both assessments indicated that Student was reading well below a second grade level. *Interview with Second Grade Teacher; Exhibit A*, p. 6. On i-Ready, the range for typical second grade scores is 489-560. *Exhibit A*, p. 6. Student scored a 406, which placed her at a kindergarten reading level. *Id.* Student's scores, however, were above the cutoff for a plan under the Colorado Reading to Ensure Academic Development Act ("READ Act"). *Interview with Second Grade Teacher*.

8. At that point, Student was still recovering from a surgery on her ear drum, so Parent and Second Grade Teacher were unsure whether Student's reading difficulty stemmed from hearing loss or dyslexia. *Interviews with Parent and Second Grade Teacher*. Student's surgeon indicated that it would take approximately six months—or until December 2018—for Student's eardrum to fully heal, so Parent and Second Grade Teacher agreed to revisit the issue at the end of the semester. *Id.*

9. Regardless, both Parent and Second Grade Teacher proceeded as if Student were dyslexic. *Id.* Parent began to use the Barton Reading and Spelling System (the "Barton Program")—an Orton Gillingham influenced program—with Student at home. *Interview with Parent; Exhibit J*, p. 5. According to Second Grade Teacher, the Barton Program teaches different sequences of words and word patterns. *Interview with Second Grade Teacher*. Corresponding texts reinforce these teachings. *Id.*

10. Second Grade Teacher required her students to read a book each night and log their reading activity. *Id.* Parent requested Student be permitted to replace her reading time with work in the Barton Program; Second Grade Teacher readily agreed. *Interviews with Parent and Second Grade Teacher; Exhibit J*, pp. 5, 7.

11. Second Grade Teacher used interventions and provided Student accommodations in the classroom. *Interview with Second Grade Teacher*. Specifically, Second Grade Teacher used manipulatives and word tiles with Student to help her build phonics skills. *Id.* Student was permitted to use below grade level texts during independent reading in the classroom. *Id.* Additionally, Second Grade Teacher gave Student additional time on her work, did not penalize her for spelling on assignments, read texts and instructions aloud to Student, and provided Student access to audio books. *Id.*

12. Second Grade Teacher placed all of her students in small groups for reading based on ability. *Id.* Student's ability placed her in the lowest level small group. *Id.* That small group

met each day of the school year for 15 to 20 minutes. *Id.* Second Grade Teacher’s other small groups did not meet as frequently as Student’s small group, giving Student access to additional reading instruction. *Id.*

13. During the small group, Student—and her peers in that group—focused on one book each week. *Id.* Over the course of the week, the members read the book as a group, with a partner, and independently with the teacher; pulled out words based on a phonics pattern they were studying; and completed writing projects based on the book. *Id.*

14. Over the course of the fall semester, Second Grade Teacher saw Student’s reading skills progress and grow. *Interview with Second Grade Teacher.*

15. Student completed a second i-Ready assessment on December 4, 2018. *Exhibit A*, p. 6. Student’s score improved from 406 to 413, showing some growth though less than expected for that time period. *Id.* However, i-Ready flagged Student’s assessment, questioning the reliability of the data based on the speed at which Student completed the assessment. *Id.*; *Interview with Case Manager.*

16. Student’s December i-Ready score fell one-point below the cutoff for a READ plan. *Interview with Second Grade Teacher; Exhibit B*, p. 2. So, on January 15, 2019, Second Grade Teacher created a READ plan for Student and emailed it to Parent. *Exhibit B*, pp. 1-5; *Exhibit J*, p. 30.

C. Dyslexia Diagnosis

17. By January 2019, Student’s ear drum had fully healed. Parent remained concerned about Student’s difficulty reading, so on January 13, Parent took Student for private dyslexia testing. *Interview with Parent.*

18. On January 23, 2019, Parent informed Second Grade Teacher that Student had been diagnosed with dyslexia. *Exhibit J*, p. 32. Parent did not yet have a copy of the report from Clinical Psychologist but indicated she would provide Second Grade Teacher a copy upon receipt. *Id.* In her email, Parent stated: “I think you are already accommodating [Student] in many of the ways [Clinical Psychologist] is recommending, and we are very appreciative of that, especially in the homework arena.” *Id.*

19. In her January 31, 2019 report (“Report”), Clinical Psychologist diagnosed Student with moderate dyslexia following administration of certain tests. *Exhibit B*, pp. 6-14. At the conclusion of the Report, Clinical Psychologist made recommendations to Student’s teachers. *Id.* at pp. 12-14. The recommendations included:

- Communicating regularly with Parent regarding appropriate literacy interventions;
- Providing Student extra time on tests;

- Offering Student audiobooks;
- Teaching Student word processing skills and providing her other assistive technologies to help with reading and writing;
- Not penalizing Student for spelling on assignments and tests;
- Providing Student extra assistance on math assignments and tests;
- Reading Student instructions and test questions orally; and
- Modifying homework assignments.

Id.

20. Parent emailed the Report to Second Grade Teacher on February 19, 2019. *Exhibit J*, p. 41. Parent asked Second Grade Teacher: “Can you please forward this on to whomever else needs a copy?” *Id.* With regard to Clinical Psychologist’s recommendations, Parent stated: “[Clinical Psychologist] has made some specific recommendations for her. The wonderful thing, is that many of the accommodations, you have already been providing.” *Id.* During her interview, Second Grade Teacher indicated she was already providing all of the accommodations recommended by Clinical Psychologist. *Interview with Second Grade Teacher.*

21. Second Grade Teacher could not access the version of the Report sent by Parent, so Second Grade Teacher responded that day asking Parent to resend the Report. *Exhibit J*, p. 43. Once she received the Report, Second Grade Teacher said she would pass the Report on to Student's other teachers and “start making a plan.” *Id.*

22. On February 21, 2019, Parent resent the Report to Second Grade Teacher. *Id.* at p. 46. This time Second Grade Teacher was able to access the Report. *Id.*

23. On February 26, 2019, Second Grade Teacher sent the report to the School’s Learning Support Services Team (“LSST”), which oversees special education. Second Grade Teacher noted:

I have a student who has been on MTSS this year, and her parents had her independently evaluated for dyslexia. Her results are attached. I am not sure what the next steps are for any sort of school formal documentation. I have been making accommodations in class throughout the year.

Id. at p. 55.

24. That same day, Second Grade Teacher forwarded the Report to all of Student’s teachers and directed them to the teacher recommendations section of the Report. *Id.* at p. 48.

25. Case Manager—a member of the LSST—was responsible for determining whether students should be evaluated for special education. *Interview with Case Manager*. After she received the Report, Case Manager reviewed Student’s assessment data and discussed Student with Second Grade Teacher and the LSST. *Id.* Based on this information, Case Manager determined that Student should be evaluated for special education. *Id.*; *Exhibit J*, p. 74; *Exhibit G*, p. 1.
26. Case Manager prepared a Consent to Evaluate, proposing to evaluate Student in the areas of general intelligence, communicative status, academic performance, social and emotional status, and health. *Exhibit G*, p. 2-3.
27. On March 16, 2019, Case Manager emailed a copy of the Consent to Evaluate to Parents for their signature and let them know that testing would begin as soon as Parents returned a signed copy of the form. *Exhibit J*, p. 106.
28. Parents provided consent to evaluate two weeks later on March 29, 2019. *Id.* at p. 111.
29. Parent never previously requested District evaluate Student for special education and related services, because Parent did not realize it was an option. *Interview with Parent*.
30. In the period between Student’s private dyslexia evaluation and receiving consent to evaluate, Middle School Learning Specialist (“MS Learning Specialist”) provided Second Grade Teacher a copy of the Barton Program and taught Second Grade Teacher how to use the Barton Program with Student in the classroom. *Interview with Second Grade Teacher*. Second Grade Teacher worked with Parent to ensure she and Parent were using the same Barton lessons in the classroom and at home. *Id.*
31. Additionally, School installed the Google Read&Write extension on Student’s computer. *Id.* This extension allowed Student to access grade level texts when working on subjects other than reading. *Id.* For example, when working on a biography project, the Read&Write extension allowed Student to access higher level biographical texts. *Id.*

D. Special Education Evaluation

32. During April and early May 2019, District evaluated Student in the areas identified in the Consent to Evaluate. *Interview with Case Manager*.
33. Elementary Learning Specialist (“Learning Specialist”) performed Student’s academic evaluation by administering certain reading subtests of the Woodcock-Johnson Test of Achievement IV. *Interview with Learning Specialist*. The results of the Woodcock-Johnson indicated that Student’s comprehension, writing, and phonemic awareness were relatively strong compared to her overall reading score. *Id.* Student’s Broad Reading score—which is a comprehensive measure of her reading achievement—placed Student at a first grade level. *Exhibit B*, pp. 5-6.

34. Student's evaluation also considered a third i-Ready assessment Student completed on April 30, 2019. *Id.* at p. 9. On the April assessment, Student scored 439—up from her scores of 406 in August 2018 and 413 in December 2018. *Id.* Student's overall i-Ready score placed her at a first grade level, though some of the subsections, including phonics, remained at a kindergarten level. *Id.*

E. Eligibility Meeting and Development of IEP

35. District scheduled Student's eligibility meeting for May 17, 2019 and intended to complete the evaluation in advance of the eligibility meeting. *Exhibit J*, p. 108; *Interview with Case Manager*. But, on May 7, 2019, a traumatic event occurred at School. *Interview with Case Manager*. As a result, the District was unable to complete Student's evaluation until Fall 2019. *Id.* Case Manager informed Parents that the eligibility meeting would need to be postponed until Fall 2019. *Exhibit J*, pp. 108-109. Parent responded: "That is completely understandable in light of our circumstances. Hope you and all the staff are okay. We are happy to get back together and regroup in August." *Id.* at pp. 109.

36. Students did not receive any academic instruction from School following the events of May 7. *Interviews with Parent and Case Manager*. Instead, School focused on helping students and staff with re-entry and social/emotional wellness. *Id.*

37. On May 26, 2019, Case Manager emailed a Prior Written Notice to Parents regarding the rescheduling of the eligibility meeting. *Id.* at p. 150. The Prior Written Notice indicated that the District was postponing Student's eligibility meeting from May 2019 to Fall 2019: "Due to events that occurred May 7, 2019 and [School's] current focus with re-entry into [School] for students and teachers, the team with parents agree that this meeting can wait until the fall, 2019, so that [Student] can focus on social/emotional well-being." *Id.*

38. Parent responded: "Thanks, we will look forward to meeting with you this Fall." *Id.*

39. Student began third grade on August 7, 2019. *Exhibit M*, at p. 2.

40. On August 9, Learning Specialist asked Parent to provide available dates to reschedule Student's eligibility meeting. *Exhibit J*, p. 153. Parent indicated she was available on August 20, 27, or 28. *Id.* at p. 155. Based on Parent's response, Learning Specialist scheduled the eligibility meeting for August 27 and issued a proper Notice of Meeting. *Id.* at p. 157; *Exhibit G*, p. 3.

41. Learning Specialist sent Parents a copy of the draft evaluation report on August 22, 2019, in advance of the scheduled eligibility meeting. *Exhibit J*, p. 163. As of August 22, Student's evaluation was not yet complete. *Interview with Learning Specialist*. In her email, Learning Specialist said: "I have a couple of smaller assessments to put in but have not had a chance to get [Student] to give them. . . . I will work on getting these completed before we meet on Tuesday." *Exhibit J*, p. 165. Parent replied, stating: "I've read through the report, and it looks very accurate to me." *Id.*

42. Student's evaluation was completed on August 27, 2019, just before the scheduled eligibility meeting. *Exhibit B*, p. 15-33. Unfortunately, Parent forgot about the meeting on August 27, so the eligibility meeting was rescheduled for September 4 and another Notice of Meeting was issued. *Interview with Learning Specialist; Exhibit H*, p. 1.
43. On August 28, 2019, Learning Specialist issued a Prior Written Notice indicating that, as a result of Student's evaluation, the LSST determined that Student would benefit from speech and academic services in the area of Reading Fluency. *Exhibit G*, p. 5.
44. On September 4, 2019, the District convened a properly constituted multi-disciplinary team to consider Student's eligibility for special education and related services. *Interview with Learning Specialist*. After considering the evaluation results, the multi-disciplinary team found Student eligible under the disability categories of Speech or Language Impairment and SLD. *Interview with Learning Specialist; Exhibit N*, p. 1-4.
45. As the multi-disciplinary team began to complete the Determination of Eligibility Form, the first question asks whether "the evaluation is sufficiently comprehensive to appropriately identify all of the child's special education and related services needs, whether or not commonly linked with the disability category." *Id.* at p. 1. At that time, Parent questioned—for the first time—the sufficiency of the evaluation.
46. Parent indicated that the evaluation did not address the possibility that Student might have high-functioning autism. *Exhibit A*, p. 18. Parent suspected Student might have autism based on Student's social interaction with peers. *Interview with Parent*. According to Parent, Student can be "really intense and obsessed with one person" and struggles with non-verbal social cues. *Id.* Student does not understand when peers tell her to give them space. *Id.*
47. During her interview, Parent conceded that—other than Student's health history form—she never "mentioned" her concerns with autism to anyone at School. *Id.* On August 26, Parent returned the completed health history form to School Nurse. *Id.* at pp. 170-172. One portion of the form inquired about Student's health status, asking whether Student had ever or was currently experiencing any of the identified health conditions. *Id.* at p. 172. Next to "Autism/Asperger's Syndrome" Parent checked "no" but wrote that Asperger's might be a possibility, "Need testing." *Id.*
48. A child with an autism spectrum disorder ("ASD") "is a child with a developmental disability significantly affecting verbal and non-verbal social communication and social interaction." ECEA Rule 2.08(1). "Other characteristics often associated with ASD are engagement in repetitive activities and stereotyped movements, resistance to environmental changes or changes in daily routines, and unusual responses to sensory experiences." *Id.*
49. Neither Second Grade Teacher nor Third Grade Teacher observed any of these ASD characteristics in Student. *Interviews with Second Grade Teacher and Third Grade Teacher*.

50. At the eligibility meeting, the multi-disciplinary team noted that the evaluation did not address autism “due to [Parent] just recently realizing this concern. Team agreed that this can be addressed at a later time if concerns are still present.” *Exhibit A*, p. 18. No one recalls Parent specifically requesting an evaluation for autism. *Interviews with Learning Specialist and Third Grade Teacher*.

51. The multi-disciplinary team ran out of time on September 4 to finish Student’s eligibility determination and develop Student’s initial IEP. *Interview with Learning Specialist*. As a result, the multi-disciplinary team agreed to reconvene on September 10, and a corresponding Notice of Meeting was issued. *Id.*; *Exhibit G*, p. 4.

52. On September 10, the District convened a properly constituted multi-disciplinary team to finish Student’s eligibility determination and develop Student’s initial IEP. *Interview with Learning Specialist*.

53. During discussions regarding Student’s IEP, Parent disagreed with the amount of proposed reading instruction. *Response*, p. 13. The District proposed providing Student 240 minutes per month—or 60 minutes per week—of pull-out reading instruction. *Id.* Parent, however, felt Student needed at least 30 minutes per day of pull-out reading instruction. *Id.*

54. Parent also expressed concern about the lack of a designated reading curriculum designed specifically for students with dyslexia. *Interview with Parent*. Learning Specialist explained that she would be using a variety of materials for Student’s reading instruction, instead of following a single curriculum, and discussed how she would monitor Student’s progress. *Interviews with Learning Specialist and Special Education Coordinator*.

55. Ultimately, the IEP Team decided on Student’s services, and Student’s IEP was finalized the following day, September 11. *Interview with Learning Specialist; Exhibit J*, p. 186.

56. With regard to reading, the IEP Team concluded that Student’s needs in the area of reading fluency were impacting her ability to access grade level texts. *Exhibit A*, p. 9.

57. Student’s IEP contains two communication goals and one reading goal. *Id.* at pp. 10-11. Under her reading goal:

[Student] will by September 9, 2020 apply decoding skills and sight word knowledge to improve her ability to access leveled texts by increasing her fluency from 89% accuracy using a third grade passage to 98% accuracy using a fourth grade level passage as monitored by the special education teacher using an untimed running record.

Id. at p. 11. Learning Specialist indicated the baseline should have been an 89% accuracy at a second grade level given that Student’s IEP was created at the beginning of third grade. *Interview with Learning Specialist*.

58. In addition to speech/language services, Student receives 240 minutes per month of specialized reading instruction. *Exhibit A* at p. 13. Learning Specialist provides Student 60 minutes per week of pull-out services. *Interview with Learning Specialist*. During the fall semester, Student received 60 minutes of one-on-one services per week. In January 2020, Learning Specialist began providing Student 30 minutes in a small group and 30 minutes one-on-one. *Interview with Learning Specialist; Exhibit D*, p. 5.

59. The IEP Team placed Student in the general education classroom at least 80% of the time to provide Student with access to grade level curriculum and her peers, while still providing her specialized instruction to address her needs. *Exhibit A* at p. 14.

60. Following the eligibility meeting, Parent continued to have concerns about the reading curriculum proposed for Student, so she contacted School's Director of Curriculum and Accountability ("Director of Curriculum") to encourage School to consider use of the Barton Program. *Exhibit J*, p. 193. Parent even offered to purchase the Barton Program for School. *Id.* Director of Curriculum told Parent she would share Parent's recommendation with the "learning service department" and declined Parent's offer to pay for the Barton Program. *Id.* at p. 197.

F. Implementation of IEP and Student's Third Grade Year

61. Student began receiving services under her IEP on September 18, 2019. *Exhibit D*, at p. 10.

62. In October—the first full month of IEP implementation—Student received all 240 service minutes. *Exhibit B*, pp. 2-10. But Student received only 60 minutes of specialized reading instruction in November and only 45 minutes in December. *Id.* In January, Student received only 225 minutes, before receiving all 240 minutes in February. *Id.* In total, Student missed 390 minutes of specialized reading instruction between October 2019 and February 2020. *Id.*

63. Learning Specialist's service log indicates why instruction was missed on certain dates but not all of the dates. *Id.* Nothing in the record identifies why instruction was missed at other times. *Id.; Interview with Learning Specialist*. For the dates with available information, Learning Specialist provided the following reasons (with the indicated frequency) for the missed instruction:

- "Curriculum Based Measurements" being performed on another student during Student's allocated time: 2 occasions;
- Student absence: 2 occasions;
- Professional development: 1 occasion;
- Learning Specialist absence: 1 occasion;

- Learning Specialist “working on schedule”: 1 occasion; and
- Classroom party: 1 occasion.

Exhibit B, pp. 2-10; Interview with Learning Specialist.

64. Learning Specialist neither uses a specific curriculum nor curricula designed specifically for students with dyslexia. *Id.* Instead, Learning Specialist draws on her experience from a range of curricula and pulls lessons from a variety of sources, including, but not limited to, i-Ready, Really Great Reading’s Phonics Boost and Blast Foundations, and LETRs Phonics Program. *Id.*

65. All of these programs (except LETRs) are on CDE’s Advisory List of Instructional Programming that have been reviewed and approved to meet the criteria of evidence-based instruction under the Colorado READ Act.³

66. During the small group sessions, Student works on phonics skills. *Id.* Learning Specialist uses the one-on-one time to focus on Student’s fluency. *Id.* Student reads a text, and when she struggles to decode a word, Learning Specialist uses that as an opportunity to remind Student of the phonics skills from the small group. *Id.*

67. Like Second Grade Teacher, Third Grade Teacher places her students in small groups for reading. *Interview with Third Grade Teacher.* Student is in the lowest level reading group. *Id.* The small group meets for 15 minutes a day five days a week. *Id.* During small group, the students read books based on their reading level. *Id.* Students highlight difficult words and work on decoding those words. *Id.*

68. Third Grade Teacher has been integrating the Barton Program texts into Student’s language arts. *Id.* Student often uses the Barton texts in her small group and in the classroom for reading and writing assignments. *Id.*

69. During third grade, Student’s reading ability improved and she is closer to reading on grade level than she was at the beginning of the school year. *Id.*

70. Student’s December 31, 2019 progress report indicated that Student was reading a third grade level text with 95% accuracy, up from 89% on a second grade passage at the beginning of the school year. *Exhibit D, pp. 11-12.* Student’s December 2019 i-Ready scores showed minimal improvement over her i-Ready score from the beginning of third grade. *Id.* at pp. 13-14.

71. The most recent data available—from February 21, 2020—has Student reading a third grade level passage at a 97% accuracy level. *Id.* at 15. However, given that Student’s goal

³ See Advisory List of Instructional Programming (2020), at <https://www.cde.state.co.us/coloradoliteracy/advisorylistofinstructionalprogramming2020>.

requires a 98% accuracy on a fourth grade level passage, Student remains far from her goal. *Id.* Exhibit A, p. 11.

72. Student has received some private tutoring in the Barton Program during third grade. *Interview with Parent.* Parent could not recall the date of the first tutoring session but guessed it might not have been until spring semester. *Id.* The SCO requested Parent provide details regarding the frequency and length of Student's private tutoring; however, Parent did not provide the information.

73. Parent says she mentioned her concerns about Student being autistic during the parent-teacher conference in Fall 2019. *Interview with Parent.* Third Grade Teacher told Parent that she had not observed Student to demonstrate any characteristics associated with autism. *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: Parent never requested an evaluation of Student to determine her eligibility for special education and related services. The District referred Student for an initial evaluation but failed to complete the evaluation within the 60-day timeframe, resulting in a procedural violation of the IDEA.

Either a parent or a school district may request an initial evaluation to determine a child's eligibility for special education and related services. 34 C.F.R. § 300.301(b); ECEA Rule 4.02(3)(a). After a parent requests an initial evaluation, the school district must either (1) obtain parental consent to evaluate the student, or (2) provide parents with a prior written notice explaining the school district's basis for refusing to evaluate the student. *Id.* §§ 300.300 and 300.503. Once a school district obtains parental consent, the evaluation must be completed within 60 days of the consent. *Id.* § 300.301(c)(1)(i).

The outcome of this allegation turns on what a parent must do to request an evaluation. In the past, CDE has signaled that school districts should not be expected to treat any parent request for assistance or concern about academic performance as a request for a special education evaluation. *See CO State-Level Complaint Decision 2018:543; Weld RE-4 Sch. Dist.*, 119 LRP 5662 (SEA CO 01/02/19). These decisions by CDE align with decisions by courts construing the term "request" narrowly under the IDEA. In *D.K. v. Abington School District*, the Third Circuit Court of Appeals found that "expressions of concern" to school officials did not constitute a request for an evaluation under the IDEA. 696 F.3d 233, 248 n.5 (3d Cir. 2012). The Eleventh Circuit Court of Appeals reached a similar conclusion when it held that a parent's request for "help" or "to test [the child] for something" did not amount to a request for an evaluation. *Durbow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1181, 1193 (11th Cir. 2018); *see also A.B. through K.B. v. Abington Sch. Dist.*, Case No. 19-1914, 2020 WL 1126298, at *5, 120 LRP 7024 (E.D. Pa. Feb. 24, 2020). The IDEA does not require parents to use specific language when requesting an evaluation for

special education but the parents must do more than express concerns without asking for action. *See, e.g., Renaissance Acad.*, 115 LRP 9496 (SEA OH Feb. 11, 2015) (finding parent’s letter amounted to a request for evaluation where parent indicated student suffered from a disability which made her eligible for special education services). Using this legal framework, CDE analyzes the facts of each case to determine whether the parent’s communication amounted to a request for an evaluation. *See CO State-Level Complaint Decision 2018:543; Weld RE-4 Sch. Dist.*, 119 LRP 5662 (SEA CO 01/02/19).

To be clear, both the IDEA and Colorado law require districts to develop and implement procedures for locating, identifying and evaluating all children who may have a disability and are eligible for special education and related services, even though such children are advancing from grade to grade. 34 C.F.R. § 300.111(a); ECEA Rule 4.02(1)(a). This affirmative, ongoing obligation, known as “Child Find,” is triggered when a district has reason to suspect a child residing within its jurisdiction has a disability and is in need of special education and related services. *Id.* A district’s Child Find obligation exists independent of any request from a parent.

Here, the SCO finds that Parent never requested an evaluation of Student either for SLD or autism. Parent concedes that she never expressly asked the District to evaluate Student for special education and related services. (FF # 29.) Instead, Parent expressed concerns to Second Grade Teacher about Student’s reading difficulties, but Parent did not ask that the District take any action. (FF # 4.) Even though Second Grade Teacher did not initiate an evaluation of Student—perhaps because, at that point, it was unclear whether Student’s ear drum was causing or contributing to Student’s reading difficulties—Second Grade Teacher began to use interventions and make accommodations for Student in the classroom. (FF #s 8-13.)

Even after Student’s dyslexia diagnosis, Parent’s communications did not amount to a request for evaluation. On February 19, 2019, Parent provided Second Grade Teacher a copy of the Clinical Psychologist’s Report and requested that Second Grade Teacher forward the Report to anyone who needed a copy. (FF # 20.) Given the extensive teacher recommendations in the Report (FF # 19), it is plausible that Parent intended those recommendations to be shared with all of Student’s teachers and nothing more. Within three school days of receiving the Report, Second Grade Teacher not only forwarded the Report to all of Student’s teachers but she also brought it to the attention of the LSST. (FF #s 23, 24.) Second Grade Teacher’s action resulted in the Report reaching the appropriate personnel and ultimately led to Student’s evaluation.

Similarly, Parent never requested an evaluation for autism. On August 22, 2019, Learning Specialist sent Parent a copy of the draft evaluation report. (FF # 41.) Instead of asking why the report did not address autism, Parent responded that the report looked accurate to her. (*Id.*) Parent first “mentioned” her concerns regarding autism on Student’s health form on August 26, 2019. (FF # 47.)

In the eligibility meeting on September 4, Parent raised her concerns to the multi-disciplinary team. (FF # 46.) The multi-disciplinary team noted that the evaluation did not address autism “due to [Parent] just recently realizing this concern” and agreed to address it at a later time if needed. (FF # 50.) Other than asking why autism was not included in the initial evaluation, no one at the eligibility meeting recalls Parent asking for an autism evaluation. (*Id.*)

During the parent-teacher conference in Fall 2019, Parent says she re-urged her concerns to Third Grade Teacher regarding autism. (FF # 73.) At that time, Third Grade Teacher indicated she had not observed any signs of autism in Student. (*Id.*) Nothing in the record indicates that Parent did anything more than express her concerns. Though Parent says she did not know it was a possibility to request an evaluation, the SCO questions this assertion given Parent’s recent participation in the initial evaluation process. As a result, the SCO finds that Parent did not request an evaluation for autism.

The SCO would be remiss, however, not to address the 60-day evaluation timeline. The IDEA requires the initial evaluate be completed within 60 days of Parent’s consent (even where the District refers Student for an evaluation). 34 C.F.R. §§ 300.301(c)(1)(i).

The District failed to complete the evaluation within 60 days. Parent provided consent for the evaluation on March 29, 2019, making the evaluation due on May 28, 2019. (FF # 28.) Because of the tragic event, Student’s evaluation was not completed until Fall 2019. (FF #s 35, 41, 42.) Because the District did not complete the initial evaluation within the required timeframe, the District procedurally violated 34 C.F.R. § 300.301(c)(1)(i).

Additionally, the ECEA Rules require a student’s initial IEP to “be developed within 90 calendar days of the date that parental consent was obtained to conduct the initial evaluation.” ECEA Rule 4.03(1)(d)(i). To comply with this rule, the District needed to develop Student’s IEP by June 27, 2019. Student’s IEP was not completed until September 11, 2019—well beyond the 90-day deadline. (FF # 55.) Therefore, the District violated ECEA Rule 4.03(1)(d)(i).

The United States Supreme Court has stressed the importance of complying with the IDEA’s procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural 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); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent’s opportunity to participate in the IEP process).

The District’s failure to comply with the evaluation timeline undoubtedly could have impeded Student’s right to a FAPE and deprived Student of an educational benefit. Including the summer holiday, 151 days elapsed between Parent’s consent and the completion of Student’s

evaluation. However, under the circumstances here, the SCO finds that this delay neither impeded Student's right to a FAPE nor deprived Student of an educational benefit. The delay had no impact on Parent's opportunity to participate in the decision-making process.

The IDEA's 60-day timeline required Student's evaluation to be complete on May 29, 2019—six calendar days after the end of the academic year. Even if Student's evaluation had been completed on time, Student would not have received special education services until third grade.

Student began third grade August 7, and her evaluation was completed on August 27. (FF #s 39, 42.) On August 9, Learning Specialist asked Parent to provide available dates for the eligibility meeting. (FF # 40.) Parent provided August 20, 27, and 28 as options, and School selected August 27. (*Id.*) Unfortunately, Parent forgot the meeting on August 27, causing School to reschedule the meeting for September 4. (FF # 42.) The meeting ran over time and finally concluded on September 10. (FF # 51.)

Once Student's IEP was finalized on September 11, she began receiving services on September 18. (FF #s 55, 61.) The delays in August and September are attributable more to Parent than to the District. And these delays caused Student to miss some services. However, in the end, Student missed only a few weeks of services. This did not deprive her of an educational benefit or deny her a FAPE. Indeed, during third grade Student has made some progress, although her progress has been less than would be expected. As discussed in Conclusion to Allegation No. 3, Student's progress has been most impacted by the District's failure to fully implement her IEP.

Conclusion to Allegation No. 2: The District evaluated Student in all areas of suspected disability, consistent with the IDEA's requirements.

Parent contends the District failed to evaluate Student in all areas of suspected disability by not evaluating Student for autism.

During the course of an evaluation, the IDEA requires students to be assessed "in all areas related to the suspected disability." 34 C.F.R. § 300.304(c)(4). Other than autism, there is no dispute that the evaluation here otherwise considered all areas of suspected disability (namely the concerns related to dyslexia based on the Report and additional concerns related to Student's hearing and speech). Nothing in the record indicates that autism was a suspected disability either at the time the District obtained parent's consent for an evaluation or by the time the evaluation was concluded in September 2019.

Neither Student's Second Grade Teacher nor her Third Grade Teacher observed Student demonstrating any behavior consistent with autism or suspected Student was autistic. (FF # 49.) Parent, herself, conceded that she did not suspect Student was autistic until shortly before the eligibility meeting in September 2019. (FF # 50.) Though Parent expressed her concerns

about autism during the eligibility meeting, Parent did not request an evaluation for autism. (*Id.*) Based on the record, the SCO concludes that autism was not a suspected area of disability—either at the time of the initial evaluation or the time this Complaint was filed. The District did not violate 34 C.F.R. § 300.304(c)(4) when it did not evaluate Student for autism.

Conclusion to Allegation No. 3: The IEP developed and implemented by the District provides Student specialized reading instruction using evidence-based curricula, consistent with the IDEA’s requirements. However, the District failed to fully implement Student’s IEP, resulting in a denial of a FAPE.

A. Suitability of Reading Curriculum

Parent alleges that—by not using a curriculum designed specifically for students with dyslexia—School is not providing Student appropriate special education and related services pursuant to her IEP. Parent’s frustration appears to stem from the fact that, even after development of an IEP, Student’s reading level remains below grade level.

The IDEA requires an IEP to contain—among other components—a “statement of the special education and related services and supplementary aids and services, *based on peer-reviewed research to the extent practicable . . .*” 34 C.F.R. § 300.320(a)(4) (emphasis added). As this section makes clear, special education and related services must be based on peer-reviewed research only to the extent practicable. Moreover, the IEP is not required to identify specific curriculum or methodology for instruction. “[P]arents, no matter how well-motivated, do not have a right under the [IDEA] to compel a school district to provide a specific program or employ a specific methodology . . .” *Lachman v. Ill. State Bd. of Ed.*, 852 F.3d 290, 297 (7th Cir. 1988).

Here, Student’s IEP does not identify a special reading curriculum. (FF # 54.) Instead, Learning Specialist draws from a variety of curricula—including, but not limited to, i-Ready, Really Great Reading’s Phonics Boost and Blast Foundations, and LETRs Phonics Program—for Student’s specialized reading instruction. (FF # 64.) All of these programs (except LETRs) are on CDE’s Advisory List of Instructional Programming that have been reviewed and approved to meet the criteria of evidence-based instruction under the Colorado READ Act. (FF # 65.)

Parent believes the Barton Program to be the best option for Student because that program was specifically designed for students with dyslexia. (FF # 9.) Parent undoubtedly has good intentions and even generously offered to purchase the Barton Program for School. (FF # 60.) Unfortunately, under the law, Parent simply does not have the right to specify the method of instruction used with Student. Third Grade Teacher has at least attempted to incorporate some of the Barton Program texts into the classroom. (FF # 68.)

Even though School is not using the curriculum Parent prefers, Student has made progress since implementation of her IEP. (FF #s 70-71.) Parent may understandably be frustrated with the

speed of that progress, but Student is improving, showing the benefit of the curricula employed by Learning Specialist.

For these reasons, the SCO finds that the District provided special education and related services for reading to Student based on peer-reviewed research to the extent practicable.

B. District's Implementation of Student's IEP

Under the IDEA, a school district is required to provide eligible students with disabilities a FAPE by providing special education and related services individually tailored to meet the student's unique needs, in conformity with an IEP that meets the IDEA's requirements. 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 Educ. v. Rowley*, 458 U.S. 176, 181 (1982)). To that end, the U.S. Supreme Court concluded that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at p. 999.

The "purpose of an IEP is to embody the services and educational placement or placements that are planned for the child." *N.E. ex rel. C.E. v. Seattle Sch. Dist.*, 842 F.3d 1093, 1096-97 (9th Cir. 2016). A school district must implement a child's IEP with all required components. 34 C.F.R. § 300.323(c).

Here, the District failed to fully implement Student's IEP. Though not specifically alleged by Parent, the documents produced by the District during the course of this investigation make clear that the District did not provide Student all of the specialized reading instruction required by her IEP. Specifically, the District failed to deliver 240 minutes of specialized reading instruction during the months of November 2019, December 2019, and January 2020. (FF # 62.) Over these three months, Student received 390 minutes less than required by her IEP. The SCO cannot simply ignore such a significant shortfall. The District's failure to fully implement Student's IEP resulted in a violation of 34 C.F.R. § 300.323(c).

1. Materiality of Failure to Implement IEP

The failure to implement a "material", "essential", or "significant" provision of a student's IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with "sister courts . . . that a material failure to implement an IEP violates the IDEA"); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an "essential element of the IEP" denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the "significant provisions of the IEP" denies a FAPE). "A material failure

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

Here, the District failed to implement the key component of Student's IEP. Indeed, Student's difficulty with reading and diagnosis of dyslexia were the very reasons why Second Grade Teacher referred Student for an evaluation. Between October 2019 (the first full month of IEP implementation) and February 2020 (the last full month for which the SCO has data), the District should have provided Student 1,200 minutes of specialized reading instruction. Instead, the District delivered only 810 minutes or roughly 68% of the reading services required by the IEP. The District's failure to implement Student's IEP denied Student the opportunity to make appropriate progress in the area of reading fluency. For these reasons, the SCO finds the District's failure to implement Student's IEP to be material. This failure resulted in a denial of a FAPE to Student. Given the degree to which a FAPE was denied, "Student is entitled to compensatory services." *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

C. Compensatory Education

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

Here, the District failed to provide Student 390 minutes of specialized instruction over a 5 ½ month period. Given that Student receives 240 minutes of specialized instruction a month, this error is significant. Over the same time period, Student made minimal progress towards her IEP reading goal. The deficiency in service minutes likely impacted Student's ability to make progress. Most of the missed service minutes were from Fall 2019, when Student was receiving only one-on-one instruction; Student began participating in the small group in January 2020. (FF #s 58, 62.) Specifically, all 180 minutes missed in November and all 195 minutes missed in December were one-on-one minutes. Because the records for January are unclear as to whether Student missed group or one-on-one instruction, the SCO will assume that one-half of the minutes missed in January were for one-on-one instruction. In total, approximately 383 of the

390 missed minutes were for one-on-one instruction. The SCO gives the District credit for the two days it attempted to provide instruction when Student was absent. As a result, the SCO finds an award of 293 minutes of compensatory specialized reading instruction appropriate. Student's reading skills remain below grade level; these compensatory services will help Student continue her growth and work towards reading at grade level.

REMEDIES

The SCO finds and concludes that the District has violated the following IDEA requirement:

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

To remedy this violation, the District is ORDERED to take the following actions:

1. By **June 15, 2020**, District shall submit to CDE a corrective action plan ("CAP") that adequately addresses the violation in 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 the District is responsible. The CAP must, at a minimum, provide for the following:
 - a. Training with Learning Specialist, in addition to any other School staff member deemed appropriate by the District, on the requirements of 34 C.F.R. § 300.323(c) in accordance with this Decision, specifically ensuring that a student's IEP is fully implemented in a timely manner. Such training shall be provided no later than **Friday, September 4, 2020**.
 - b. Evidence that this training has occurred must be documented (i.e. training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets, with roles noted) and provided to CDE no later than **Friday, September 18, 2020**. This training may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast. If the individual identified in paragraph 1(a) is no longer employed by the District when the training occurs, the District may train staff occupying identical roles in order to demonstrate compliance with this remedy.
 - c. Training materials for the above-described training must be submitted to CDE for review and approval **at least 14 days prior to the delivery of training**.
 - d. CDE will approve or request revisions to the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to confirm District's timely correction of the areas of noncompliance.

2. Compensatory Education Services for Denial of a FAPE

- a. The District shall provide Student with **293 minutes of direct specialized reading instruction** outside of the general education setting by **Thursday, December 17, 2020**. This specialized instruction must be provided by a reading specialist with proper endorsement. Given the COVID-19 crisis and temporary suspension of in-person instruction/learning, these services may be provided remotely. To document the provision of these services, District must submit records of service logs to CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log.
 - i. The reading specialist delivering compensatory education services shall monitor and assess Student's progress on her IEP goal in the area of reading to support Student's fluency needs.
 - ii. Progress monitoring shall occur each month until the last scheduled compensatory service has been provided.
 - iii. District shall submit regular reports of Student's progress on IEP goals and objectives in the area of reading by the **second Monday of each month** until the last scheduled compensatory education services have been provided.
- b. **By June 15, 2020**, District shall schedule compensatory services in collaboration with Parents. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. These compensatory services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory services will be provided. If Parents refuse to meet with District within this time period, District will be excused from delivering compensatory services, provided that District diligently attempts to meet with Parents and documents its efforts. A determination that District diligently attempted to meet with Parents, and should thus be excused from providing compensatory services, rests solely with CDE.
- c. District shall submit the schedule of compensatory services to CDE no later than **Monday, June 22, 2020**. If for any reason, including illness, Student is not available for any scheduled compensatory services, District will be excused from providing the service scheduled for that session. If for any reason District fails to provide a scheduled compensatory session, District will not be excused from providing the

scheduled service and must immediately schedule a make-up session in consult with Parents, as well as notify CDE of the change in the appropriate service log.

Please submit the documentation detailed above to CDE as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Michael Ramirez
1560 Broadway, Suite 1100
Denver, CO 80202-5149

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

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, the aggrieved party may 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 CFR § 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 SCO.

Dated this 15th day of May, 2020.



Ashley E. Schubert
State Complaints Officer

Appendix

Complaint, pages 1-11

- Exhibit 1: Email Correspondence with School
- Exhibit 2: Email Correspondence with School
- Exhibit 3: Clinical Psychologist Report
- Exhibit 4: Special Education Referral
- Exhibit 5: Prior Written Notice
- Exhibit 6: Evaluation Report
- Exhibit 7: IEP

Response, pages 1-23

- Exhibit A: IEP and meeting notes
- Exhibit B: READ Plan, Clinical Psychologist Report, and Evaluation Report
- Exhibit C: Blank
- Exhibit D: Service Logs and Progress Monitoring Information
- Exhibit E: Curricula Information
- Exhibit F: Prior Written Notices
- Exhibit G: Requests for Parental Consent
- Exhibit H: Notices of Meetings
- Exhibit I: Grade Reports and Progress Reports
- Exhibit J: Email Correspondence
- Exhibit K: District Policies and Procedures
- Exhibit L: Identification of District Witnesses
- Exhibit M: School Calendars
- Exhibit N: Determination of Eligibility

Telephonic Interviews:

- Second Grade Teacher: April 29, 2020
- Parent: April 30, 2020
- Learning Specialist: April 30, 2020 and May 4, 2020
- Third Grade Teacher: April 30, 2020
- Case Manager: May 1, 2020
- Special Education Coordinator: May 1, 2020
- CDE Consultant: May 1, 2020