

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

State-Level Complaint 2021:502
Weld County School District RE-5J

DECISION

INTRODUCTION

On January 20, 2021, the grandmother (Guardian) of a student (Student) identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA)¹ filed a state-level complaint (Complaint) against Weld County School District RE-5J (District). The State Complaints Officer (SCO) determined that the Complaint identified two 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 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from January 20, 2020 through January 20, 2021 for the purpose of determining if a violation of the IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

Whether the District denied Student a free appropriate public education (FAPE) because the District:

1. Failed to provide an independent educational evaluation (IEE) at public expense without unnecessary delay, or file a due process complaint to show the District's evaluation was appropriate, following Guardian's request for an IEE on or about summer 2020, in violation of 34 C.F.R. § 300.502(b)(1)-(2);

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.

2. Failed to properly implement Student's IEP from September 1, 2020 to present, specifically by failing to provide Student with 90 minutes of direct, specialized math instruction per week, in violation of 34 C.F.R. § 300.323.

FINDINGS OF FACT

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

A. Background

1. Student is a thirteen-year-old eligible for special education and related services under the primary disability category Other Health Impairment (OHI) and the secondary disability category Specific Learning Disability (SLD). *Interview with Guardian; Exhibit A*, p. 27. Student attends a middle school (School) located in District. *Id.*
2. Student is described as caring and artistic, with a good sense of humor and strengths in reading and writing. *Interviews with Guardian, Special Education Teacher 1, Special Education Teacher 2, School Psychologist, and Math Teacher.*
3. This investigation concerns Guardian's allegations that District failed to provide an IEE after her request in June 2020 and that District failed to implement Student's IEP after it was finalized in September 2020. *Interview with Guardian; Complaint.*

B. Student's First Special Education Evaluation

4. On November 22, 2019, Guardian provided signed consent for a special education evaluation of Student in the areas of communicative status, academic performance, social emotional status, and health. *Interviews with Guardian and School Psychologist; Exhibit A*, pp. 7, 10-18.
5. On January 17, 2020, the District convened a properly constituted multidisciplinary team (MDT) to discuss the initial evaluation (Evaluation 1) and determine whether Student was eligible for special education and related services. *Exhibit A*, pp. 10-18.; *Exhibit Q*, p. 14.
6. Evaluation 1 included communicative assessments, such as the Clinical Evaluation of Language Fundamentals-Fifth Edition Screening; academic performance assessments, such as the Woodcock Johnson IV Test of Achievement Form A Standard and Extended

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

Batteries (WJIV); the social emotional assessment, Conners 3; and a vision and hearing screening. *Exhibit A*, pp. 10-18.

7. The MDT reviewed the results of Evaluation 1 and found that, based on the available data, Student did not meet the criteria for Speech or Language Impairment (SLI). *Id.* at pp. 19-20.
8. Student was found ineligible for special education and related services, but District created a 504 Plan based on an Attention-Deficit/Hyperactivity Disorder (ADHD) diagnosis and Student's difficulty initiating and staying on task. *Exhibit P*, pp. 1-3.

C. Guardian's First Request for an IEE

a. District Policies Regarding IEEs

9. District policies regarding IEEs outline that parents are entitled to an IEE at public expense if they disagree with an evaluation. *Exhibit R*, p. 25. The policies further provide that if District receives a request for an IEE, District must either file a request for a due process hearing to show that its evaluation was appropriate or ensure that an IEE is provided at public expense. *Id.*
10. In addition, the policies require that all parent requests for an IEE must be sent to the Director of Special Education within 24 hours of receipt, and that parents must be provided with the IEE criteria and information about where an IEE may be obtained. *Id.*

b. Guardian's First Request for an IEE

11. On June 16, 2020, Guardian emailed Director of Special Education, Assistant Principal, and School Psychologist and requested an IEE because she believed that Evaluation 1 was not "thorough" enough to provide "a clear picture of [Student's] learning disabilities." *Exhibit K*, p. 1
12. On June 19, 2020, Director of Special Education notified Guardian that the District would honor her request for an IEE. *Id.* at p. 2. Director of Special Education also inquired about the areas of Evaluation 1 with which Guardian disagreed. *Id.*
13. Guardian replied on June 23, 2020 and reiterated that she did not think Evaluation 1 was "thorough in all areas," as it did not reveal Student's learning disability. *Id.* at p. 3. Guardian added that the impact of Student's ADHD and neurocognitive disorder needed to be addressed. *Id.* Guardian also requested information about where she could obtain an IEE, specifically a list of providers authorized to complete the IEE. *Id.*
14. The following day, Director of Special Education sent Guardian the District's IEE Criteria, which outline the criteria an evaluation must meet under 34 C.F.R. 300.304, the

professional qualifications required for evaluators, cost criteria, the fee structure, and general contract information. *Id.* pp. 5-8.

15. On June 30, 2020, Guardian once again requested a list of providers who could complete the IEE, and Director of Special Education informed Guardian that the District does not keep a list of outside providers. *Id.* at pp. 4, 9. Director of Special Education referred Guardian to Advocacy Organization for recommendations. *Id.*
16. On July 21, 2020 Guardian emailed Director of Special Education and asked again for a list of providers who could complete the IEE. *Id.* at p. 10. Guardian and Director of Special Education spoke over the phone the same day, and Director of Special Education asserted that the District did not have a list of providers and was not obligated to provide one. *Interview with Director of Special Education.*
17. Toward the end of July, Director of Special Education spoke with Guardian by phone and proposed that District complete an evaluation of Student to determine if her “medical diagnosis of ADHD was impacting her educationally.” *Interviews with Guardian and Director of Special Education.* Director of Special Education reports that she made this proposal because Student’s records revealed that the MDT “did not consider OHI as a disability category,” and Guardian had shared with Director of Special Education Student’s ongoing difficulties with ADHD. *Interview with Director of Special Education.*
18. According to Guardian, Director of Special Education also told her that the proposed special education evaluation (Evaluation 2) could not be completed unless Guardian agreed to “stop” the progress of the IEE. *Interview with Guardian.* Based on her conversation with Director of Special Education, Guardian understood that the IEE could not be completed at the same time as the District’s evaluation. *Id.* Because she was having difficulty finding an evaluator to complete the IEE, Guardian agreed to Director of Special Education’s proposal. *Id.*
19. Director of Special Education reports that she never refused to grant the IEE or otherwise indicated that the IEE would need to be stopped. *Interview with Director of Special Education.* However, when Guardian expressed her desire for Student to be “assessed in all areas” because she believed Evaluation 1 was not comprehensive, Director of Special Education told Guardian, “that is not the purpose of an IEE.” *Id.* Director of Special Education explained that District would not provide an IEE “on assessments that had not been conducted yet.” *Id.*
20. Director of Special Education reports that she would have agreed to an IEE based on Guardian’s disagreement with any assessments contained in Evaluation 1. *Id.* However, because Evaluation 1 did not look at the disability category of OHI, Guardian would not be granted an IEE in that area until after the District completed its own evaluation, because the District “has the right to do [its] evaluation first.” *Id.*

21. Based on the above findings, the SCO finds that District failed to provide an IEE at public expense, or file a due process complaint to show the District's evaluation was appropriate, in response to Guardian's IEE request. Guardian was not provided with prior written notice (PWN) regarding District's refusal to provide the IEE. *Id.*
22. On August 10, 2020, Guardian emailed Director of Special Education that she would like to proceed with Evaluation 2 in the area of OHI, and on August 13, 2020, School Psychologist sent Guardian Consent for Initial Evaluation in the areas of social emotional status and health, as well as a copy of her procedural safeguards. *Exhibit 8*, pp. 5, 7; *Exhibit S*, p. 6. Guardian provided signed consent the following day. *Exhibit Q*, p. 1; *Exhibit S*, p. 7.
23. On September 2, 2020, Guardian emailed Director of Special Education to notify her that she found a provider (Private Provider) to complete the IEE, and she shared Private Provider's contact information. *Exhibit 8*, p. 22.
24. Director of Special Education responded the same day, "We are currently under evaluation. What evaluation are you disagreeing with?" *Id.* at p. 21. Guardian replied, "If we need to stop the evaluation with [Student's] medical diagnosis, that is fine. I want to proceed with this outside IEE." *Id.*
25. During their email exchange, Director of Special Education repeated her request for Guardian to identify the evaluation that she disagreed with and stated, "I thought our agreement was to consider [Student's] outside medical diagnosis and see if we have an educational impact." *Id.* Guardian explained that she was previously having trouble finding someone to perform the IEE, but now that she found Private Provider, she "want[ed] to proceed with another professional to evaluate [Student]." *Id.* at p. 3.
26. That same day by phone, Director of Special Education and Guardian continued to discuss the status of the District evaluation process and the status of Guardian's communications with Private Provider. *Id.*; *Interviews with Guardian and Director of Special Education*. Based on their discussion, Guardian understood that Evaluation 2 would be completed before the IEE, and thus, she decided to proceed with Evaluation 2 because she wanted to get help for Student as soon as possible. *Interview with Guardian*.
27. Following their phone call, Director of Special Education emailed Guardian with a summary of the discussion: "At this time, we are going to move forward with the evaluation that you have given us permission to conduct specifically in the area of OHI. We are not going to move forward with an IEE at this time with [Private Provider]." *Exhibit 8*, p. 3. Guardian replied in agreement. *Id.*
28. This is Director of Special Education's second year as director, and during her time in the position, she has received a total of three requests for an IEE, including Guardian's

request. *Interview with Director of Special Education*. Director of Special Education provided IEEs in response to the other requests she received. *Id.*

D. Student's Second Special Education Evaluation

29. Evaluation 2 was completed in August and September 2020. *Exhibit A*, pp. 41-44; *Exhibit Q*, pp. 1-12. On September 25, 2020, the District convened a properly constituted MDT to discuss Evaluation 2 and determine whether Student was eligible for special education and related services. *Id.*
30. Evaluation 2 included a review of the academic performance assessment completed in January 2020, the WJIV; social emotional assessments, including the Behavior Rating Inventory of Executive Function, Second Edition, and a review of the Conners-3 completed in January 2020; and a Physical/Motor and Physical/Health Assessment. *Exhibit Q*, pp. 3-10.
31. The MDT reviewed the results of Evaluation 2 and found that, based on the available data, Student met the criteria for OHI and SLD in mathematical calculation and problem solving. *Exhibit A*, pp. 41-44.

E. The September 25, 2020 IEP

32. On September 25, 2020, the District convened a properly constituted IEP Team to develop Student's initial IEP. *Interviews with Director of Special Education and Special Education Teacher 1; Exhibit A*, pp. 25-40. Guardian attended the meeting. *Id.*
33. At the meeting, the IEP Team discussed and developed annual goals in math and self-determination. *Exhibit A*, pp. 31-33; *Interview with Guardian*.
34. The IEP Team also discussed the Service Delivery Statement portion of the IEP, which provides for Student to receive 90 minutes per week of direct, specialized math instruction inside the general education classroom from a special education teacher or otherwise qualified personnel supervised by a special education teacher. *Interviews with Guardian, Director of Special Education, and Special Education Teacher; Exhibit A*, pp. 36, 40.
35. Additionally, the Service Delivery Statement provides for Student to receive 60 minutes per week of direct, specialized instruction in self-determination to address Student's attention, focus, and skill to succeed in academic classes. *Id.*
36. The September 25, 2020 IEP includes a prior written notice (PWN) that outlines how Student's services will be implemented during periods of remote instruction due to the COVID-19 pandemic. *Exhibit A*, pp. 38-39.

37. The PWN provides that Student “will continue to receive 150 minutes per week of direct services” in a hybrid or online model, and that services may be delivered through virtual delivery, “including but not limited to virtual meetings via zoom/google classroom, recorded lessons, and participation in independent assignments” to address goals. *Id.*
38. Additionally, the PWN describes how Student’s accommodations will be implemented in the remote setting, including but not limited to small group instruction to teach math skills, extended time, frequent checks for understanding, chunking, and shortened assignments. *Id.*

F. Guardian’s Second Request for an IEE

39. On October 19, 2020, Guardian emailed Director of Special Education, School Psychologist, Assistant Principal, and Special Education Teacher 1 with a request to proceed with the IEE. *Exhibit K*, p. 18.
40. Director of Special Education replied on October 20, 2020 and offered to send the IEE paperwork. *Id.* at pp. 23-24. On October 22, 2020, Director of Special Education emailed the District’s IEE Criteria to Guardian and requested that Private Provider contact her. *Id.*
41. On October 26, 2020, Guardian asked Director of Special Education to send the IEE contract to Private Provider. *Id.* at p. 25. The following day, Director of Special Education sent Private Provider the IEE contract to conduct assessments in the area of academics. *Id.*; *Exhibit M*, pp. 2-8.
42. On December 3, 2020, Guardian met with Private Provider and reviewed Student’s previous evaluations. *Interview with Guardian*. Private Provider shared his opinion that the previous evaluations were comprehensive, and Guardian decided not to proceed with the IEE. *Id.*

G. Implementation of the September 25, 2020 IEP

a. Knowledge of Student’s IEP

43. All District special education teachers have access to their students’ IEPs through the Enrich online program. *Interviews with Director of Special Education, Special Education Teacher 1, Special Education Teacher 2, and Assistant Principal*.
44. Case managers ensure that District staff are informed of their responsibilities in their students’ IEP by providing them with snapshots of the IEPs, which include accommodations and modifications. *Id.* Case managers review the snapshot with staff and answer questions as needed. *Id.* Then, staff members sign a Notice of Responsibility to Implement Student IEP acknowledging that (1) the accommodations and

modifications were explained to them, (2) they understand the implementation, and (3) they can contact special education personnel with further questions. *Id. Exhibit R*, p. 1.

45. Student's case manager (Special Education Teacher 1) and Special Education Teacher 2 accessed Student's IEP through the Enrich online program. *Interviews with Special Education Teacher 1 and Special Education Teacher 2*. Special Education Teacher 1 provided Student's teachers and Paraprofessional with snapshots of Student's IEP and discussed the snapshots with them. *Interviews with Math Teacher, Special Education Teacher 1, and Paraprofessional*. Special Education Teacher 1 also provided teachers with a book containing the snapshots for each of their students. *Interviews with Special Education Teacher 1 and Math Teacher*. Student's teachers signed the Notice of Responsibility to Implement Student IEP. *Interview with Math Teacher; Exhibit R*, p. 1.

b. Implementation of Student's IEP During the First Semester

46. Guardian provided signed consent for Student to receive special education services on October 9, 2020, and Student began receiving services on October 12, 2020. *Exhibit A*, p. 49; *Exhibit B*, p. 47.
47. Guardian reports that Student is not receiving specialized instruction during her general education classes, but the SCO finds, based on the evidence, that Student is receiving 90 minutes per week of direct specialized instruction in math and 60 minutes per week of direct specialized instruction in self-determination consistent with her IEP. *Interview with Guardian*.
48. In the first semester of the 2020-2021 academic year, Student received both in-person and remote instruction. *Interviews with Assistant Principal, Special Education Teacher 1, and Special Education Teacher 2*. From October 12, 2020 to November 20, 2020, Student received in-person instruction Monday through Thursday and online instruction on Fridays, except for a 10-day quarantine during which remote instruction was provided. *Id.* From November 30, 2020 to December 17, 2020, instruction was provided online. *Id.*

Student's Math Services

49. During in-person learning, Student's direct services in math were provided by Paraprofessional under the supervision of Special Education Teacher 1. *Interviews with Special Education Teacher 1 and Paraprofessional*. Paraprofessional is a retired special education teacher, and he was present in Student's general education math class four days per week for 55 minutes each day, Monday through Thursday. *Id.* On Fridays, Paraprofessional was present in class via Zoom, and during office hours in the afternoon. *Id.*

50. Paraprofessional assisted Student by listening to the math lesson and then reinforcing the lesson by supporting Student with assignments, individually or in a small group. *Id.* Student was the only one in the class on Paraprofessional's caseload. *Id.*
51. District requires all special education staff to document their service time using service logs in Enrich, and Student's math services are documented in Enrich service logs. *Interviews with Director of Special Education, Special Education Teacher 1, and Special Education Teacher 2; Exhibit B, pp. 26-47; Exhibit R, p. 13.*
52. Paraprofessional completed a check-in with Special Education Teacher 1 at the end of each school day, during which time he reported the services that he provided to Student, what they worked on, and for how long. *Interviews with Special Education Teacher 1 and Paraprofessional.* Then, Special Education Teacher 1 entered the service minutes into a service log on Enrich, documenting the date, location, and time of the services, as well as the related annual goals. *Special Education Teacher 1; Exhibit B, pp. 26-47.* In several entries, Special Education Teacher 1 also provided a description of the services, such as a description of the math lesson. *Id.* For entries where Special Education Teacher 1 did not include a description, she was able to describe the services provided. *Id.*
53. In addition to daily check-ins, Special Education Teacher 1 completed two unannounced observations in Student's math class during the approximately four weeks of in-person learning in the first semester, and each time, she observed that Paraprofessional was working with Student. *Interviews with Special Education Teacher 1 and Paraprofessional.* Special Education Teacher 1 also spoke with Student's teachers about how Student and Paraprofessional worked together. *Interview with Special Education Teacher 1.*
54. Remote instruction was provided via Zoom and Google Classroom. *Interviews with Special Education Teacher 1, Special Education Teacher 2, Math Teacher, and Paraprofessional.* Classes were shortened to 40 minutes, and students attended seven, 40-minute sessions per day. *Interview with Special Education Teacher 1.* Additionally, teachers had office hours from 1:00pm to 3:00pm daily. *Id.*
55. Paraprofessional attended the Zoom sessions for Student's math class on a daily basis, and after the lesson and assignment were explained, Paraprofessional joined a breakout session with Student to provide support. *Interviews with Special Education Teacher 1 with Paraprofessional.* Paraprofessional also had daily office hours from 1:00pm to 3:00pm to provide further support. *Id.*

Student's Self-Determination Services

56. Student's direct service minutes in self-determination were provided by Special Education Teacher 1 during Student's Enrichment class, four days per week, for 15 minutes each day. *Interview with Special Education Teacher 1.* Special Education

Teacher 1 supported Student through check-ins and check-outs, working on organization techniques, tracking and completing outstanding assignments, and focusing on task initiation. *Id.*; *Exhibit B*, pp. 26-47. Special Education Teacher 1 documented Student's self-determination services in the Enrich service log. *Id.*

57. At times, Student refused to work with Paraprofessional and Special Education Teacher 1, and those refusals are documented in the Enrich service log. *Interviews with Paraprofessional and Special Education Teacher 1*. Paraprofessional and Special Education Teacher 1 discussed techniques for supporting Student during refusal, including giving Student space or breaks and returning to offer support. *Id.* If Student continued to refuse support, then Paraprofessional and Special Education Teacher 1 completed observation. *Id.*
58. During remote instruction, Special Education Teacher 1 scheduled time to provide Student's self-determination instruction via Zoom from 12:00pm to 12:30pm daily, and Special Education Teacher 1 was also available during office hours. *Interview with Special Education Teacher 1*. Special Education Teacher 1's support during online learning included reviewing the virtual learning platforms and discussing tools to be successful. *Exhibit B*, p. 39.
59. Student did not attend the majority of the remote instruction sessions during the first semester. *Interviews with Special Education Teacher 1 and Paraprofessional*. Attendance records reflect that Student missed three or more class periods every day from November 30, 2020 to December 17, 2020. *Exhibit H*, pp. 3-5.
60. When Student missed class, Special Education Teacher 1 emailed or called to check in with Student and provide her with information about how to access the lesson and materials. *Interview with Special Education Teacher 1*; see, e.g., *Exhibit S*, pp. 1-2, 38, 42-47, 50; *Exhibit B*, pp. 26-47.
61. Enrich service logs reflect that during weeks when Student attended class, she received 90 minutes or more per week of direct, specialized instruction in math, as well as 60 minutes of direct, specialized instruction in self-determination. *Exhibit B*, pp. 26-47; *Exhibit H*, pp. 3-5.

The December 18, 2020 Progress Report

62. District policies require progress reporting on a quarterly basis, and the policies also require that data collection and progress reporting continue during periods of remote instruction. *Exhibit R*, pp. 5, 26.
63. The December 18, 2020 progress report shows that Student made some progress on her math goals as of the reporting date December 18, 2020. *Exhibit H*, pp. 6-8. For example, Student's calculation skills improved from a 10 percent average in two out of five tries

to a 15 percent average, with no more than one prompt from the teacher. *Id.* Special Education Teacher 2 also reports that she has observed progress in Student’s ability to work quickly and comfortably with math tools to complete calculations. *Interview with Special Education Teacher 2.*

64. The progress report indicates that Student “did not work on” her self-determination goal, but Special Education Teacher 1 says that this section of the progress report is inaccurate. *Interview with Special Education Teacher 1; Exhibit H*, p. 8. Special Education Teacher 1 did not provide a report, but she did monitor Student’s task initiation during in-person instruction and her completion of assignments during remote instruction. *Interview with Special Education Teacher 1; Exhibit B*, pp. 3-25. Special Education Teacher 1 stated that her failure to provide a progress report was an oversight, and she is drafting an amended progress report to include a summary of her progress monitoring during the first semester. *Interview with Special Education Teacher 1.*

c. Implementation of Student’s IEP During the Second Semester

65. In the second semester of the 2020-2021 academic year, Student continued to receive instruction online from January 6, 2021 until January 15, 2021. *Interviews with Special Education Teacher 2, Math Teacher, and Assistant Principal.* On January 19, 2021, School returned to in-person instruction Monday through Thursday, with remote instruction provided via Zoom on Fridays. *Id.*

Student’s Math Services

66. Special Education Teacher 2 provided Student’s specialized math instruction in a class co-taught with Math Teacher. *Interviews with Special Education Teacher 1, Special Education Teacher 2, and Math Teacher.*
67. In the remote setting, Special Education Teacher 2 attended Zoom sessions Monday through Thursday, and also offered support during office hours from 12:00pm to 1:00pm. *Interview with Special Education Teacher 2.* On Fridays, Special Education Teacher 2 scheduled office hours or Zoom check-ins. *Id.* Student did not attend math class from January 6, 2021 to January 15, 2021. *Exhibit B*, pp. 28-32.
68. When in-person learning resumed, Special Education Teacher 2 was present in Student’s math class Monday through Thursday for 55 minutes each day, and she attended the Zoom session on Fridays. *Interview with Special Education Teacher 2.* Special Education Teacher 2 serves Student by supporting her work on assignments in class, including by talking through examples, explaining concepts, and supporting Student’s use of tools, such as number families to assist with calculation. *Special Education Teacher 2 and Math Teacher.*

Student's Self-Determination Services

69. Special Education Teacher 1 scheduled time to provide Student's self-determination instruction remotely from 12:00pm to 12:30pm, and during other scheduled check-ins and office hours. *Interview with Special Education Teacher 1; Exhibit B*, pp. 29-31. From January 6, 2021 to January 15, 2021, Student attended one Zoom session with Special Education Teacher 1, during which they discussed tools for success in the second semester. *Exhibit B*, pp. 29-31. Special Education Teacher 1 continued to contact Student when she missed classes, and she offered to review the lessons and materials with Student. *Exhibit S*, pp. 2, 120-27.
70. As in the first semester, Student's direct service minutes in self-determination are provided in-person by Special Education Teacher 1 four days per week for 15 minutes during Student's Enrichment class, with additional one-on-one time scheduled on Fridays. *Interview with Special Education Teacher 1*.
71. Beginning in the second semester, Student was also enrolled in a resource class taught by Special Education Teacher 2 and Special Education Teacher 1. *Interviews with Special Education Teacher 1 and Special Education Teacher 2*. Student attends resource in-person for 55 minutes daily Monday through Thursday. *Id.* Special Education Teacher 2 teaches the class two days per week with a focus on math skills, and Special Education Teacher 1 teaches the class two days per week with a focus on language arts. *Id.*
72. Special Education Teacher 1 and Special Education Teacher 2 collaborate on a regular basis regarding the implementation of Student's IEP, and they track their services and any refusal behavior in the Enrich service log. *Id.*; *Exhibit B*, pp. 26-47. The service log shows that during weeks when Student attended class, she received 90 minutes per week of direct, specialized instruction in math, as well as 60 minutes of direct, specialized instruction in self-determination. *Id.*
73. Student is earning passing grades in math, resource, and enrichment, but she is failing her remaining classes. *Interviews with Special Education Teacher 1 and Special Education Teacher 2*. Special Education Teacher 1 and Special Education Teacher 2 attribute Student's failing grades to her absences (42 school days thus far during the 2020-2021 academic year) and missing assignments, but they report working with Student to complete and submit outstanding assignments. *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: The District failed to provide an IEE at public expense without unnecessary delay, or file a due process complaint to show the District's evaluation was

appropriate, in violation of 34 C.F.R. § 300.502(b)(1)-(2), and failed to provide Guardian with PWN, in violation of 34 C.F.R. 300.503(a). These violations resulted in a denial of FAPE.

i. District's Failure to Provide an IEE

Parents have a right to seek an IEE at public expense if they disagree with an evaluation conducted by the school district. 34 C.F.R. § 300.502(b)(1). An IEE is an “evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” 34 C.F.R. § 300.502(a)(3)(i). After a parent requests an IEE at public expense, the district “must without unnecessary delay, either –(i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.” 34 C.F.R. § 300.502(b)(2).

“When an evaluation is conducted in accordance with 34 C.F.R. §§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.” *Letter to Baus*, 115 LRP 8855 (OSEP 2015); *Letter to Carroll*, 116 LRP 46076 (OSEP 2016) (concluding this right applies “even if the reason for the parent’s disagreement is that the [district’s] evaluation did not assess the child in all areas related to the suspected disability”).

When a parent requests an IEE to make up for a missing assessment, the district may not avoid its obligation to file for due process or fund the IEE by conducting the missing assessment: “[I]t would be inconsistent with the provisions of 34 C.F.R. § 300.502 to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation” before granting the parents’ request. *Letter to Carroll*, 116 LRP 46076 (OSEP 2016).

In this case, the evidence shows that District failed to either provide an IEE without unnecessary delay or file for due process. District completed Evaluation 1 on January 17, 2020 and Student was found ineligible for special education and related services. (FF #4-8). Guardian timely requested an IEE for OHI (i.e., a missing assessment) on June 16, 2020 to address Student’s ADHD diagnosis. (FF #11-13). Director of Special Education acknowledged the request by offering to honor it on June 19, 2020. (FF #12).

Although District initially agreed to provide the IEE, District unnecessarily delayed Guardian’s request for an IEE until after District completed Evaluation 2 in September 2020. (FF #11-27, 39-42). Guardian shared that she wanted Student assessed in all areas, and Director of Special Education informed Guardian that she could not receive an IEE in an area in which District had not previously assessed Student. (FF #11-13, 17-22). Director of Special Education observed that

the MDT did not look at the disability category OHI as part of Evaluation 1, and she proposed to complete Evaluation 2 to focus on Student's ADHD diagnosis. Guardian provided consent for Evaluation 2 because she wanted Student to receive services as soon as possible. (FF #18, 22, 25-26).

Guardian had a right to an IEE not only based on disagreement with assessments that the District conducted in Evaluation 1, but also if Guardian believed Evaluation 1 did not assess Student in all areas related to the suspected disability. District was not justified in conducting missing assessments in place of either filing for due process or funding the IEE.

Accordingly, the SCO finds and concludes that District's failure to fund an IEE at public expense or file for due process resulted in a procedural IDEA violation. 34 C.F.R. § 300.502(b)(2); *see also Fullerton Sch. Dist.*, 112 LRP 8549 (SEA CA 1/30/12) (concluding that a district's offer to reevaluate a child was not appropriate and that the only two options were to fund the IEE or file for due process).

A procedural violation results in a denial of FAPE if it "(1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefit." 34 C.F.R. § 300.513(a)(2).

A parent's ability to request an IEE is a powerful procedural safeguard provided by the IDEA. 34 C.F.R. § 300.502. When a parent disagrees with an evaluation conducted by a school district, the ability to request an IEE helps ensure that parents "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 61 (2005)(citing *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)).

Here, Guardian disagreed with Evaluation 1 because it was not comprehensive and did not assess Student in all areas of disability. (FF #11-13, 19). Guardian wanted an assessment in OHI to address the impact of Student's ADHD and neurocognitive disorder, and she requested an IEE on June 16, 2020. District initially agreed to honor this request. (FF #12). However, at the end of July, District refused to provide an IEE in OHI until after District completed Evaluation 2. (FF #17-22).

Evaluation 2 was not completed until September 25, 2020, and Guardian's request for an IEE addressing Student's ADHD diagnosis was not granted until October 20, 2020—over four months after Guardian first requested an IEE. (FF #11-13, 29-31, 39-42). Accordingly, the SCO finds and concludes that this procedural violation resulted in a denial of FAPE because it significantly impeded Guardian's opportunity to participate in the decision-making process.

The SCO also finds and concludes that this procedural violation did not impede Student's right to a FAPE or cause a deprivation of educational benefit. Guardian requested an IEE on June 16, 2020 and secured an evaluator in September 2020. (FF #11, 23). District completed Evaluation 2 in September 2020, and Student was ultimately found eligible for special education on September 25, 2020. (FF #29-31). District began providing special education and related services to Student in October 2020. (FF #46). Thus, the SCO finds that District's delay in providing an IEE did not cause a delay in the provision of special education to Student.

iii. District's Failure to Provide PWN

The IDEA requires that PWN be provided to the parents of a child with a disability within a reasonable time before the public agency:

- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

34 C.F.R. § 300.503(a).

Failure to provide PWN within a reasonable time before refusing to initiate or change a student's identification constitutes a procedural violation that may result in a denial of FAPE. See *El Paso County Sch. Dist. 2*, 113 LRP 44602 (SEA CO 08/15/13). The notice must be provided so that parents have enough time to fully consider and respond to the action before it is implemented. *Letter to Chandler*, 59 IDELR 110 (OSEP 2012).

In this case, Guardian requested an IEE on June 16, 2020. (FF #11). Then, in late July, District refused to provide Guardian with an IEE addressing Student's ADHD diagnosis until after District completed Evaluation 2. (FF #17-21). Director of Special Education failed to provide Guardian with PWN documenting the District's refusal. Thus, the SCO finds and concludes that District failed to provide Guardian with PWN regarding its refusal to provide an IEE, in violation of 34 C.F.R. §§ 300.503.

The failure to comply with a procedural requirement amounts to a denial 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); *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10th Cir. 1996).

Here, because the District failed to provide PWN, Guardian lacked notice that District was denying Guardian's request for an IEE. (FF #11-27). Guardian's request was delayed for over four months, significantly impeding Guardian's opportunity to participate in the decision-

making process. (FF #11-27, 29-31). Accordingly, the SCO finds and concludes that the procedural violation, in combination with District's delay of the IEE, resulted in a denial of FAPE.

Conclusion to Allegation No. 2: District properly implemented Student's IEP from October 12, 2020 to present, consistent with 34 C.F.R. § 300.323. However, District failed to monitor and report Student's progress on her annual IEP goal for self-determination, from October 12, 2020 to December 18, 2020, in violation of at 34 C.F.R. § 300.320(a)(3).

i. Implementation of Student's IEP

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); *Board of Education v. Rowley*, 458 U.S. 176, 181 (1982)). To that end, the U.S. Supreme Court concluded 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.

A school district must ensure that "as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). To satisfy this obligation, a school district must ensure that each teacher and related services provider is informed of "his or her specific responsibilities related to implementing the child's IEP," as well as the specific "accommodations, modifications, and supports that must be provided for the child in accordance with the IEP." 34 C.F.R. § 300.323(d). Where the definition of a FAPE specifically references delivery of special education and related services consistent with an IEP, the failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19.

In this case, Guardian alleges that District failed to provide Student with 90 weekly minutes of specialized instruction in math, as required by her IEP. However, the SCO finds and concludes that the evidence does not support this claim.

First, the findings demonstrate that Special Education Teacher 1, Special Education Teacher 2, and Paraprofessional were informed of their responsibilities related to implementing Student's IEP. (FF #43-45). Special Education Teacher 1 and Special Education Teacher 2 accessed Student's IEP through Enrich, and Special Education Teacher 1 provided Student's teachers and Paraprofessional with snapshots of Student's IEP. Special Education Teacher 1 discussed the IEP with Student's teachers and Paraprofessional, and Student's teachers signed a Notice of Responsibility to Implement Student IEP.

Second, the findings show that Student was provided with 90 weekly minutes of direct instruction in math and 60 weekly minutes of direct instruction in self-determination as required by her IEP from October 12, 2020 to the present. (FF #46-73). Paraprofessional and Special Education Teacher 2 provided Student's math instruction on a daily basis inside her general education classroom and remotely through Zoom, and Special Education Teacher 1 provided self-determination instruction on a daily basis during Enrichment class and scheduled Zoom sessions. Throughout the first semester, Special Education Teacher 1 ensured that Student was receiving services through daily check-ins with Paraprofessional, unannounced observation, and conversations with Student's teachers. During the second semester, Special Education Teacher 1 and Special Education Teacher 2 collaborated on the implementation of Student's IEP.

Third, Student's math and self-determination services were documented in Enrich, and service logs show the time, date, and location of services, as well as the goals worked on. (FF #51-52, 56-57, 61, 72). Service logs show that during the weeks Student attended class, she received 90 minutes or more per week of direct, specialized instruction in math, as well as 60 minutes of direct, specialized instruction in self-determination. Student is earning passing grades in math, enrichment, and resource, and her other failing grades are attributed to absences and incomplete work. (FF #73). Finally, progress reports indicate that Student made some progress on her annual goals for math. (FF #63).

For the above reasons, the SCO finds and concludes that District properly implemented Student's IEP consistent with 34 C.F.R. § 300.323.

ii. District's Failure to Monitor Progress

Under the IDEA, school districts must provide periodic reports on the progress a student is making toward the student's annual goals. 34 C.F.R. § 300.320(a)(3). During the COVID-19 global pandemic, guidance from CDE indicated that "[s]chools should make reasonable, good faith efforts to continue to collect and report progress on IEP goals to parents consistent with the schedule identified on the student's IEP" *Special Education & COVID-19 FAQs at www.cde.state.co.us/cdesped/special_education_faqs*. CDE suggested parents and other IEP Team members "collaborate and partner to identify flexible data collection strategies that can be used to track progress." *Id.*

Here, District provided Guardian with a progress report for the first semester of the 2020-2021 academic year. (FF #63). The findings show that District completed progress monitoring and reporting for Student's annual math goals. (FF #62-64). However, District failed to provide Guardian with a progress report on Student's annual goal in self-determination. Special Education Teacher 1 monitored Student's task initiation and completion of assignments but failed to provide that information in the December 18, 2020 progress report, depriving Guardian of information regarding Student's progress. Thus, the SCO finds and concludes that

District failed to report Student's progress on her annual IEP goal for self-determination, from October 12, 2020 to December 18, 2020.

A procedural violation results in a denial of FAPE if it "(1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefit." 34 C.F.R. § 300.513(a)(2).

The findings demonstrate that District's procedural violation did not amount to a violation of FAPE. At the end of the first semester, District monitored and reported progress on Student's math goals. (FF #62-64). Despite failing to report progress on Student's self-determination goal, Special Education Teacher 1 monitored Student's task initiation and completion of assignments. Special Education Teacher 1 reported that she is drafting an amended progress report to include a summary of her progress monitoring during the first semester. Therefore, the SCO finds and concludes that District's procedural violation did not amount to a violation of FAPE.

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

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

In this case, the SCO finds and concludes that the procedural violations were not systemic in nature. District policies and procedures provide that when District receives a request for an IEE, District must either file a request for a due process hearing to show that its evaluation was appropriate or ensure that an IEE is provided at public expense. (FF #9-10). Director of Special Education's actions were not consistent with these policies. (FF #11-27). Further, Director of Special Education has only responded to two other requests for an IEE during her time as director, and she granted both requests. (FF #28).

Additionally, District policies provide that progress reports must be issued to parents on a quarterly basis, including during remote instruction, and the evidence indicates that the failure to report progress in this case was due to an oversight. (FF #62-64). Nothing in the record indicates that District regularly delays the provision of IEEs or regularly fails to monitor progress. These facts support finding that these violations are not systemic.

REMEDIES

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

- a) Failing to provide an IEE at public expense without unnecessary delay, or file a due process complaint to show the District's evaluation was appropriate, in violation of 34 C.F.R. § 300.502(b)(1)-(2);
- b) Failing to provide PWN following District's refusal to provide an IEE, in violation of 34 C.F.R. §§ 300.503;
- c) Failing to monitor progress, in violation of 34 C.F.R. § 300.320(a)(3).

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

1. By **Friday, April 16, 2021**, District must submit to CDE a proposed corrective action plan (CAP) that effectively addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to reoccur 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. Director of Special Education, Special Education Teacher 1, and any other District staff responsible for responding to IEE requests must review this Decision in its entirety and the requirements of 34 C.F.R. §§ 300.320(a)(3), 300.502(b), and 300.503, with District's legal counsel, no later than **Friday, April 23, 2021**. In the event that these individuals are no longer employed, the District may substitute individuals in the same roles. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Friday, April 30, 2021**.
 - b. Attendance and completion of a training provided by CDE on responding to IEE requests. This training will address, at a minimum, the concerns noted in this Decision and the requirements of 34 C.F.R. § 300.502(b)(1)-(2). Special Education Director and CDE Consultant will determine the date, time, and format for this training (i.e., video conference, web conference, webinar, or webcast). The training must be completed by **Friday, April 30, 2021**.
 - i. This training is mandatory for Director of Special Education and any other District staff responsible for responding to IEE requests.
 - ii. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation,

with names, titles, and signed assurances that they attended the training) and provided to CDE no later than **Friday, May 7, 2021**.

The Department will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance.

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

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

NOTE: Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the Department. **Given the current circumstances surrounding the COVID-19 pandemic, the Department will work with the 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, 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 19th day of March, 2021.



Lindsey Watson
State Complaints Officer

Appendix

Complaint, pages 1-5

- Exhibit 1: Private evaluation
- Exhibit 2: Student's 504 Plan
- Exhibit 3: Student's IEP
- Exhibit 3-2: Evaluation 1
- Exhibit 4: Email communications
- Exhibit 5: Email communications
- Exhibit 6: Email communications
- Exhibit 7: Email communications
- Exhibit 8: Email communications

Response, pages 1-5

- Exhibit A: Student's IEP, notices of meeting, PWNs, Evaluation 1
- Exhibit B: Service logs
- Exhibit H: Grade reports and progress reports
- Exhibit J: Copy of Complaint and exhibits
- Exhibit K: Email communications and IEE Criteria
- Exhibit M: Email communications and IEE Contract
- Exhibit N: District staff contact information
- Exhibit O: Response delivery receipt
- Exhibit P: Student's 504 Plan
- Exhibit Q: Evaluation 2
- Exhibit R: District policies and procedures
- Exhibit S: Email communications and logs

Reply, pages 1-2

Telephonic Interviews with:

- School Psychologist: February 24, 2021
- Math Teacher: February 24, 2021
- Special Education Teacher 2: February 24, 2021 and February 25, 2021
- Guardian: February 25, 2021 and March 2, 2021
- Assistant Principal: February 26, 2021 and March 1, 2021
- Special Education Teacher 1: February 26, 2021 and March 5, 2021
- Director of Special Education: March 1, 2021 and March 5, 2021
- Paraprofessional: March 5, 2021