

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

State-Level Complaint 2023:521

Boulder Valley School District RE-2

DECISION

INTRODUCTION

On March 7, 2023, the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Boulder Valley School District RE-2 (“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), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from March 7, 2022 to the present for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to monitor Student’s progress on annual IEP goals and failed to provide Parent with periodic reports on Student’s progress from the beginning of the 2022-2023 school year to present, in violation of 34 C.F.R. § 300.320(a)(2)-(3).

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 the beginning of the 2022-2023 school year to present, specifically by failing to provide the 60 minutes per week of direct writing services required by Student’s IEP, 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 OF FACT (“FF”):

A. Background

1. Student is fourteen years old and currently attends seventh grade at a District middle school (“District School”) for half the day and at a private school (“Private School”) that specializes in educating students with dyslexia for the other half of the day. *Complaint*, p. 4.
2. Student is eligible for special education and related services under the disability categories of Specific Learning Disability and Hearing Impairment. *Exhibit A*, p. 1.
3. Student is a kind individual who is well spoken, has a sense of humor, and enjoys telling stories and baking. *Id.* at p. 3. She is a “great kid,” “easy to talk to,” and is doing well socially at District School with signs that she has the potential to be a leader. *Interviews with Special Education Teacher and Principal*.
4. Due to her hearing impairment and dyslexia, she sometimes has difficulty following large group verbal instructions, and her reading and writing skills lag behind her grade level. *Exhibit A*, pp. 13, 18; *Interview with Special Education Teacher*.
5. For the 2021-2022 school year, Student was also in the seventh grade—she is currently repeating seventh grade—and was homeschooled for half the day. *Exhibit A*, p. 3; *Interview with Parent*. She spent the other half of the day at Private School. *Interview with Parent*.
6. In the second semester of the 2021-2022 school year, Student was reevaluated to update her levels of academic achievement and functional performance in anticipation of her attendance at District School half-time during the 2022-2023 school year. *Exhibit A*, p. 3.
7. Student’s IEP Team developed a draft IEP at a meeting on April 4, 2022. *Id.* at p. 1. The draft IEP was finalized (the “IEP”) after a second IEP Team meeting on May 12, 2022. *Id.* at p. 30.

B. April 4 and May 12, 2022 IEP Meetings

8. The April 4, 2022 IEP meeting was attended by, among others, Parent, Special Education Director, Principal, an instructional specialist from the District (“Instructional Specialist”),

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

Private School Teacher, and a District special education teacher who changed positions prior to the school year (“Anticipated Special Education Teacher”) so that a different person (“Special Education Teacher”) was Student’s caseworker during the 2022-2023 school year. *Id.* at p. 2. The May 12, 2022 meeting was attended by these same individuals except for Principal. *Id.* at p. 30. Both meetings were recorded, and the recordings were provided to the SCO. *Exhibits L and M.*

Services

9. When the IEP Team discussed which services would be provided to Student, District staff repeatedly acknowledged that Student would not be attending District School full time, and District staff repeatedly stated that the IEP and offer of services were being written *as if* Student would attend full time. *Exhibit L* at 01:00:00-01:03:00.

10. For example, Instructional Specialist and Private School Teacher had the following exchange:

Private School Teacher: Will she be doing [a certain academic program] at [District School] next year?

Instructional Specialist: It depends on schedule. So hopefully, but it is all going to depend on schedule. We are writing the IEP like she is going to be receiving it . . . when she is at [District School].

Private School Teacher: Okay.

Instructional Specialist: We will create the IEP based on what she needs if she were there full day.

Private School Teacher: Right.

Instructional Specialist: And then if she is at [Private School] during the times when that [special education class] would happen, then we would not be able to provide that intervention.

Private School Teacher: Right.

Instructional Specialist: But if her purpose is to be at [District School] for the electives and social pieces, then she would just be receiving her literacy instruction from you at [Private School].

Id. (Instructional Specialist stating, “we are thinking of her [IEP] if she were to come all day,” “we are writing the IEP to reflect what she would need while she was here,” and “we will put a note . . . that you have chosen to have [Student] go to private setting for half day”;

Anticipated Special Education Teacher stating, “you are going to write it for what you would need if she was there full time”); *see also Exhibit M* at 00:27:00-00:28:00 (Instructional Specialist saying the service minutes would reflect “what we would offer as our IEP in [District] if she were here full-time”).

11. Despite acknowledging Student’s part-time attendance status, the IEP Team did not discuss which services would be provided at District School. *See Exhibits L, M.*

Collaboration with Private School

12. The IEP Team also understood that there would be some kind of collaboration between District School and Private School to evaluate Student’s baseline competencies and monitor her progress on IEP goals, although the nature and degree of that collaboration were not clearly delineated. *Exhibit L* at 01:00:00-01:03:00.

13. For example, Instructional Specialist, Private School Teacher, and Parent agreed that progress on Student’s IEP goals would be determined through new baseline testing and data sharing:

Instructional Specialist: . . . [S]he would just be receiving her literacy instruction from you at [Private School]. So then really you would be working on the [IEP] goal so we would be communicating with you around that progress monitoring.

Private School Teacher: Yeah. . . . [W]e typically have them do social studies, science, and then an elective [at a public school] and then they do math and literacy at [Private School] and I report on progress in order to inform [the IEP] goals. . . .

Instructional Specialist: I would say to you [Private School Teacher] if you have a baseline on this goal . . . we can add that baseline in [to the IEP] and not put [Student] through assessment at the beginning of the year if it is not needed.

Parent: I guess we craft the IEP now based on where we are. And then maybe when [Student] comes back at the beginning of the year, retest and then sort of go back and see if we need to change the goal.

Instructional Specialist: Yeah. We can do that through an amendment. We could just call the meeting and amend the baselines.

Id.

Progress Monitoring

14. The IEP Team also discussed Student's eligibility for extended school year ("ESY") services, and the relationship between collecting baseline data for Student's IEP goals and using that data to determine Student's eligibility for ESY. *Id.* at 01:34:00-01:35:00.
15. Specifically, Instructional Specialist said that Student could not be found eligible for ESY because District did not have sufficient data regarding progress or regress on her IEP goals over breaks, due to her part-time status in the 2021-2022 school year, but promised that the District would collect baseline data at the beginning of the school year:

Instructional Specialist: So ESY, has [Student] ever qualified for ESY?

Parent: She did last year for math.

Instructional Specialist: For math. Okay. We just do not have any pre- and post-break data right now to really make that determination. Unless, [Private School Teacher] were you seeing any regression?

Private School Teacher: She actually did really, really well over Christmas and spring break.

Instructional Specialist: So I just hit "no" because we do not have the, [*sic*] because she is in a private setting, to really make that determination so at this point in time now next year we will look at it again. We will do some baseline [testing] at the beginning of the school year.

Id.

16. At the May 12, 2022 meeting, Instructional Specialist again said that District would collect baseline data for the IEP's writing goal at the beginning of the school year:

Parent: The goals are good. We just, at the beginning of the year, we have to get the baseline [for writing].

Instructional Specialist: We'll have to get a baseline from that, which we will do.

Exhibit M, 00:04:00-00:05:00.

Progress Reporting

17. The IEP Team did not clearly establish when Student's progress on her IEP goals would be reported. *Exhibit L* at 00:50:00-00:51:00; *Exhibit M* at 00:07:00-00:08:00.
18. Specifically, at the April 4, 2022 meeting, in response to Parent's request for more frequent progress reporting, including getting a second-semester progress report before the end of the school year, Instructional Specialist stated that progress reports would be issued in "December and May." *Exhibit L* at 00:50:00-00:51:00.
19. Yet at the May 12, 2022 meeting, Instructional Specialist stated that the District provided reports "five times throughout the year," including "report cards and then . . . two parent teacher conferences and then at the [annual] IEP [meeting]." *Exhibit M* at 00:07:00-00:08:00.
20. The IEP Team also did not state clearly whether Private School or District School would do the reporting. *See Exhibits L, M.*

C. Student's IEP

21. The IEP describes Student's levels of performance. *Exhibit A*, p. 3. At the time of the reevaluation, Student's speech-language skills, as measured by the CELF-5 test, were at the average to above-average range. *Id.* at p. 5. She demonstrated age-appropriate social communication skills. *Id.* Her reading, writing, and math skills, as measured by the KTEA-3 test, were all in the average to below-average range. *Id.* at p. 7. Her overall reading composite score was at the 13th percentile, her overall written language composite score was at the 14th percentile, and her overall math composite score was at the 12th percentile. *Id.*
22. Her overall academic skills battery composite score was in the 9th percentile. *Id.* Her overall academic fluency composite score—encompassing decoding fluency, writing, and math—was in the 2nd percentile. *Id.* at p. 9. She sometimes had challenges following large group verbal instructions and advocating for herself when she needed help. *Id.* at p. 13.
23. The IEP Team wrote that Student's progress on her prior IEP goals could not be reported because she was not attending District School during the 2021-2022 school year. *Id.* at p. 14. The IEP provides her progress only as it stood prior to the 2021-2022 school year, when she had attended a District school. *Id.*
24. The Student Needs and Impact of Disability section indicates she had a hearing impairment and a specific learning disability in reading, written expression, and math that impacted her ability to access the general education environment and grade level curriculum, and to perform at grade level expectations without support of specialized instruction. *Id.* at p. 18.

25. The Parent/Student Input section records Parent’s goal that, for the 2022-2023 school year, she wanted Student to “successfully navigate the demands of traditional middle school while attending half day at [Private School].” *Id.*
26. The IEP offers six goals. *Id.* at pp. 19-23. Five of the goals targeted improvements in reading, writing, and math. *Id.* at pp. 19-22. The sixth targeted Student’s hearing disability and, specifically, her ability to advocate for herself whenever she needed help. *Id.* at pp. 22-23.
27. Of the six goals, the IEP stated that Goals 3 and Goal 4 for writing lacked baseline data for later comparison and that the data would need to be gathered. *Id.* at pp. 20-21. Specifically, for Goal 3, under “Objectives,” the IEP states “new objective, so will need to gain this.” *Id.* at p. 21. For Goal 4, under “baseline data point,” it states, “new goal, need new baseline.” *Id.* For Goal 5, regarding math, under “measurable goal,” it states, “New goal, so this measured is based on the formal assessment given.” *Id.* at p. 22.
28. The IEP offers a long list of accommodations to allow Student access the general education curriculum, including both academic supports and assistive technology to aid her hearing. *Id.* at p. 24.
29. The IEP also offers special education and related services to be provided in an “integrated service delivery model” and limited to Student’s attendance. *Id.* at pp. 27-28. Specifically, it stipulates that “[c]lassroom teacher will provide cooperative co-teaching with special educator” with “consultation” and “co-teaching.” *Id.* at p. 27.
30. The IEP offers the following services:
- 60 minutes per month of deaf and hard-of-hearing services outside of the general education classroom and 45 minutes per month inside the general education classroom. *Id.* at pp. 27-28.
 - 240 minutes per week of reading intervention and 240 minutes per week of math and writing intervention outside of the general education classroom, for a total of 480 minutes per week of specialized instruction in special education classes. *Id.*
 - 60 minutes per week of direct specialized writing instruction inside the general education classroom and 30 minutes per month of indirect writing instruction outside of the classroom. *Id.*
31. The IEP anticipates that the math and writing services would be provided as a collaboration between a special education teacher and regular classroom teacher, stating that “[m]ath would include . . . supporting the general education teacher in scaffolds and accommodations” and “[w]riting intervention would be provided . . . through collaboration with the general education teacher.” *Id.*

32. The IEP Team determined that Student’s least restrictive environment (“LRE”) should be reduced from at least 80 percent to a range of 40 to 79 percent. *Id.* at p. 29.
33. The IEP Team used the Prior Written Notice (“PWN”) section for both PWNs and arbitrary meeting notes without clear differentiation between proposed actions, rejected actions, existing processes, and simple meeting notes. *Id.* at pp. 30-31 (recording points of discussion that resulted in no proposed action or inaction, names of meeting attendees, prior and planned future meetings between Parent and educators or between educators without connecting these to any proposed action or refusal, and clerical adjustments to the IEP made at the end of June 2022).
34. According to the District’s Executive Director of Special Education, this PWN—an undifferentiated mixture of notes, stray observations, actions, and refusals—complies with District training. *Interview with District Executive Director of Special Education.*
35. Based on the Complaint, Response, Reply, emails, and the investigation interviews, the SCO finds that the parties’ dispute is largely rooted in miscommunications that would have been at least partly avoided had the IEP Team used the PWN section to record proposed actions, refused actions, and the specific reasons for each proposal or refusal, with the specific reasons expressly tied to each specific proposal and refusal. *Exhibit A*, pp. 30-31; *Complaint; Response; Reply; Interviews with Special Education Teacher, Principal, Special Education Director, Parent, CDE Content Specialist 1, and CDE Content Specialist 2.*
36. For example, as relevant to the Complaint allegations:
- Services: The PWN records that the District refused Parent’s request for 675 minutes of specialized instruction in a small-group setting and then states, “[District] declined and discussed how specific intervention and services would be provided at [District School].” *Exhibit A*, p. 30. But the PWN, IEP, and meeting records do not describe how specific interventions and services would be provided at District School given Student’s half-time enrollment. *See id.*
 - Progress Monitoring: The PWN states that “[Student] will be halftime at [Private School] and halftime at [District School], the [Private School] team is willing to collaborate with progress monitoring and share progress monitoring data with the [District School] team.” *Id.* at p. 30. But it does not specify who would do what, when, or how. *See id.*
 - Progress Reporting: The PWN states that “Progress is reported out 5 times a year, progress reporting time, parent teacher conferences and at the annual IEP.” *Id.* at p. 29. It is unclear if this is a statement of fact, a proposed action, or a refused action. *See id.* This statement conflicts with the statement under the IEP’s Annual Goals

section that “Progress reports will be sent home during report card periods. Progress toward goals will also be provided at IEP annual review meetings.” *Id.* at p. 19. This is the same contradiction—three times per year versus five times—as arose, without resolution, at the April and May IEP meetings. *See above* FF #s 17-20. Nor does the PWN explain whether Private School or District School would be responsible for reporting Student’s progress. *See Exhibit A*, p. 29.

37. Despite the lack of clarity in the PWN, the SCO finds that the District committed itself to collecting baseline data regarding Student’s IEP goals because the PWN acknowledges that Student would be at District School half-time while making a commitment for District to collect the data, as follows:

- The PWN first states, “[District’s] offer is a full day at [District School] and the [Private School] 1/2 day as a placement is parent choice.”
- It then states, “[Student] is not currently attending school within [District], therefore some of the goals will not have a baseline. The [District School] team will need to collect progress monitoring data and baseline scores at the start of the 22-23 school year and update the goals through an IEP amendment. Goal 4 will be collected by using the progress checks from [grading software].”

Id. at pp. 29-30.

38. The SCO also finds that the District made clear that its full offer of services was contingent on Student’s full-time enrollment because the PWN states, “[Parent] requested that [Private School] minutes [of specialized instruction] be added into the service grid as IEP minutes This was rejected because [District’s] offer is a full day at [District School] and the [Private School] 1/2 day as a placement is parent choice.” *Id.* at p. 29.

D. The 2022-2023 School Year

39. Before August 2022, both Instructional Specialist (who had facilitated Student’s IEP meetings) and Anticipated Special Education Teacher (who had participated in the IEP meetings) switched jobs within the District, and Special Education Teacher—who had not attended either IEP meeting—was newly appointed as Student’s special education teacher and caseworker for the 2022-2023 school year. *Interviews with Special Education Teacher, Principal.*

40. Student attended District School in the morning for three classes: art, science, and social studies. *Exhibit F*, p. 1; *Interviews with Parent and Special Education Teacher*. She attended Private School in the afternoon where she received specialized instruction in reading, writing, and math. *Interview with Parent.*

Implementation: Services

41. Student received the IEP's deaf and hard-of-hearing services and the 30 minutes per month of indirect writing support but did not receive the 480 minutes of specialized reading, math, and writing instruction outside of the general education classroom or 60 minutes per week of push-in writing support. *Interviews with Parent, Special Education Teacher, Principal, and Special Education Director.* Both Parent and the District understood that Student would not receive the 480 minutes of specialized reading, math, and writing instruction at District School, because she would learn those skills at Private School. *Id.*
42. Special Education Teacher and Special Education Director determined, in August or September 2022, to provide only those services that could be implemented during Student's half-day at District School. *Interview with Special Education Teacher.* They specifically determined the 60 minutes per week of push-in writing support would not be provided. *Id.*
43. Special Education Teacher indicated that Parent understood this to be the case based on a phone call they had in August discussing Student's schedule. *Id.*
44. Parent, however, understood that District would provide the 60 minutes of push-in writing support during Student's science or social studies classes. *Exhibit I, p. 40; Interview with Parent.*
45. Parent emailed Special Education Teacher on September 10, 2022, to express her concern that Student was unable to write a basic paragraph and needed the push-in support discussed at the IEP meetings. *Id.*
46. District did not provide the 60 minutes of push-in writing support during Student's science or social studies classes because Special Education Teacher had only one class period available for providing push-in services; her other class periods were spent providing pull-out support in her special education classroom. *Interview with Special Education Teacher.* Special Education Teacher's open class period overlapped with Student's art class rather than Student's science or social studies classes. *Id.* She used that open class period to provide push-in support to other students with academic classes during that period. *Id.* Accordingly, Special Education Teacher determined, with Special Education Director, that it was not feasible to provide push-in support during Student's science or social studies classes. *Id.*
47. Special Education Teacher did not explain this to Parent or tell her this service was not being provided, and she did not respond to Parent's September 10 email. *See Exhibit I; Interviews with Special Education Teacher and Parent.* Special Education Teacher thought that Special Education Director was communicating with Parent at that time. *Interview with Special Education Teacher.* Special Education Director, however, had no communications with Parent from the end of August through at least mid-December. *Interview with Special Education Director.*

Implementation: Progress Monitoring and Reporting

48. In August 2022, Parent had a phone call with Special Education Teacher to discuss progress monitoring and reporting. *Exhibit I*, p. 19; *Interviews with Special Education Teacher and Parent*.
49. Parent sent an email soon after the meeting to record her understanding of the call:

My take aways from our conversation were:

Establish baselines for IEP goals: Goal 3 objective, Goal 4, & Goal 5

Pro[gr]ess monitoring BOY, before & after winter break and spring break, EOY – and as needed throughout the year

We discussed using Aimsweb for progress monitoring but are open to using other tools

Collaboration with [Private School] so that progress monitoring is streamlined and neither teacher is duplicating efforts

Ongoing communication with family regarding progress, goals, etc.

I think those were the highlights. Please let me know if I missed anything or misinterpreted our plan.

Exhibit I, p. 19.

50. Special Education Teacher replied, simply, “Almost identical to what I wrote down!” *Id.*
51. Parent then sent an email to both Special Education Teacher and Student’s 2022-2023 teacher at Private School (“New Private School Teacher”) to “connect the two of you” because “I have spoken with [Special Education Teacher] about progress monitoring and the need for collaboration so that we aren’t duplicating efforts.” *Id.* at p. 21.
52. Special Education Teacher wrote to New Private School Teacher inquiring about “what baseline data your team collects.” *Id.* at p. 22. Special Education Teacher did not receive a response. *See Exhibit I.*
53. District did not establish baselines for any of Student’s IEP goals in the fall semester of the school year. *Interview with Special Education Teacher; see Exhibit F.*

54. District did conduct any progress monitoring in the fall semester, except for grading Student's general education assignments. *See Exhibit F.*
55. District School and Private School did not communicate easily, as shown by an exchange of emails in November and December 2022. *See Exhibit I*, pp. 48-52. On November 17, 2022, Special Education Teacher emailed New Private School Teacher, for the first time since August, to request data regarding Student's progress to use in an application, on Student's behalf, for accommodations on a statewide standardized test. *Id.* New Private School Teacher asked Parent for permission to share the data with Special Education Teacher; Parent asked Special Education Teacher why the data was needed; and, after learning why, Parent told Special Education Teacher that Parent would follow up with New Private School Teacher; finally, New Private School Teacher sent the data on December 1, 2022. *Id.*
56. There was a lack of understanding within District School, between District School and Private School, and between Parent and District School regarding whether and how District School would collaborate with Private School to monitor Student's fall progress and report it at the end of the fall semester. *See Exhibit I*, pp. 54-64; *Exhibit 3.*
57. Specifically, on December 16, 2022, Special Education Teacher emailed New Private School Teacher asking for Student's progress toward her IEP goals in writing, reading, and math. *Exhibit 3.* New Private School Teacher did not provide this data, and she did not email Parent asking for permission to share the data until January 5, 2023. *Id.* This prompted Parent to investigate and discover that, contrary to the District's repeated promises—at both IEP meetings, in the goals section of the IEP, in the PWN section of the IEP, and in Special Education Teacher's August email—to gather baseline data in the fall semester, the District had not done so. *Interview with Parent; see above*, FF #s 13, 15-16, 27, 37.
58. Parent viewed the District's reliance on Private School, which Parent is paying for, as an improper delegation of duties that the District was required to perform according to the conditions of its receipt of funding for special education programs. *Interview with Parent.* In response, she instructed Private School Teacher not to share any data, and she explained to the District staff that the District needed to measure progress without relying on Parent or Private School. *Id.*; *Exhibit 3; Exhibit I*, pp. 54-64.
59. After some internal discussion within District about how to handle Parent's request, Special Education Teacher pulled Student from class on January 11 and 12, 2023, to perform assessments and create a baseline of data to begin tracking progress on IEP reading, writing, and math goals. *Exhibit I*, p. 56; *Exhibit F*, p. 18. District reported the results to Parent. *Exhibit F*, pp. 18-22.
60. Since then, the District has continued to administer assessments to monitor Student's IEP's reading, writing, and math goals—even though Student is learning these topics at Private

School—including assessments conducted before and after school breaks in the spring semester. *Interviews with Special Education Teacher and Special Education Director.*

61. Both Special Education Teacher and Special Education Director reported that the lack of fall semester baseline data will not hinder a determination of Student’s eligibility for ESY services for this coming summer, because there will be sufficient data regarding Student’s progress on her IEP goals from January through May, including over spring break. *Interviews with Special Education Teacher and Special Education Director.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District failed to monitor and report Student’s progress on annual goals, in violation of 34 C.F.R. § 300.320(a)(3). District also failed to provide Parent adequate PWN, in violation of 34 C.F.R. § 300.503. These violations did not result in a denial of FAPE.

Parent’s first concern is that the District failed to monitor and report progress on Student’s annual IEP goals. *Complaint*, p. 3.

A. School Districts’ Duties to Part-Time Students

A school district must offer a FAPE to children with disabilities. 34 C.F.R. § 300.101 (requiring districts to make a FAPE “available” to children with disabilities). This means that the district must offer individually designed special education and related services, described in an IEP that is “reasonably calculated to enable a child to make progress in light of the child’s circumstances.” *Andrew F. v. Douglas County School Dist.*, 580 U.S. 386, 399 (2017); 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.*, 580 U.S. at 391.

The IDEA regulations provide that a parent may consent to services only in part, and the district must still provide other services:

A public agency may not use a parent’s refusal to consent to one service or activity under paragraphs (a), (b), (c), or (d)(2) of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part.

34 C.F.R. § 300.300(d)(3). The Department of Education’s 1999 comments to this regulation make clear that this allows parents to selectively reject services:

For example, if a State requires parental consent to the provision of all services identified in the IEP, and the parent refuses to consent to physical therapy services included in the IEP, the agency is not relieved of its obligation to implement those portions of the IEP to which the parent consents.

Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12406, 12610 (March 12, 1999); see also CDE's *Procedural Safeguards Notice*, p. 8 (2011) (indicating "[t]he administrative unit may not use your refusal to consent to one service or activity to deny you or your child any other service, benefit, or activity").

Nonetheless, if a parent's refusal to one part of an IEP means that the remaining portions of the IEP no longer provide a FAPE, then the district is not liable for failure to provide a FAPE. *I.L. through Taylor v. Knox County Bd. of Educ.*, 257 F. Supp. 3d 946, 981-84 (E.D. Tenn. 2017), *aff'd on other grounds sub nom. I.L. by & through Taylor v. Tennessee Dep't of Educ.*, 739 Fed. Appx. 319 (6th Cir. 2018). "[P]arents retain the right to refuse consent to an offer of FAPE. Accordingly, it would prove impossibly onerous to require school districts to somehow implement a rejected IEP and provide a FAPE in the face of such refusal." *I.R. ex rel. E.N. v. Los Angeles Unified Sch. Dist.*, 805 F.3d 1164, 1170 (9th Cir. 2015).

Further, a parent whose actions prevent a school district's ability to fully implement an IEP cannot complain that the IEP has not been implemented as written. *Montgomery County Public Sch.*, 111 LRP 54915, (Md. SEA 2011). A school district can be held to implement only so much of the IEP as it reasonably can within the constraints imposed by the parent's actions. *Id.*; *accord D.O. v. Escondido Union Sch. Dist.*, 59 F.4th 394, 412-13 (9th Cir. 2023); *Dougall v. Copley-Fairlawn City Sch. Dist. Bd. of Educ.*, 2020 WL 435385, at *28 (N.D. Ohio Jan. 28, 2020).

In sum, when a parent accepts an offer in part, the district must implement those portions of the IEP that have been accepted and can reasonably be implemented under the circumstances.

B. Progress Monitoring and Reporting

i. Legal Requirements for Progress Monitoring and Reporting

IEPs must include a description of how a child's progress towards their annual goals will be measured, and school districts must provide periodic reports on the progress a student is making toward the student's annual goals. 34 C.F.R. § 300.320(a)(3).

ii. The District Failed to Monitor and Report on Student's Progress

In this case, in terms of monitoring, at the April and May 2022 IEP meetings, Instructional Specialist twice stated that the District would gather baseline data to allow it to track Student's

progress on her IEP goals. (FF #s 13, 15-16). The IEP itself provides that baseline data will need to be collected. (FF #s 27, 37). Specifically, for Goal 3 regarding writing, under “Objectives,” the IEP states “new objective, so will need to gain this.” (FF # 27). For Goal 4 also regarding writing, under “baseline data point,” it states, “new goal, need new baseline.” (*Id.*). For Goal 5, regarding math, under “measurable goal,” it states, “New goal, so this measure is based on the formal assessment given.” (*Id.*).

In terms of reporting, Instructional Specialist stated at the IEP meetings that the District would report progress on IEP goals twice a year, “December and May.” (FF # 18). But she also said that this progress would be reported five times per year, specifically “report cards and then . . . two parent teacher conferences and then at the [annual] IEP [meeting].” (FF # 19). The IEP itself is ambiguous because it states in different places that progress on IEP goals would be reported both five times per year, including at a parent-teacher conference each semester, and three times per year “during report card periods” and at the annual IEP review meeting. (FF # 36).

Parent’s position is that the District is responsible for monitoring and reporting Student’s progress on her IEP goals, particularly the data regarding Student’s baseline. *Complaint*, p. 3. The District’s position is that it was not required to monitor Student’s progress on annual goals in reading, writing, and math—including the collection of baseline data to track progress over time—because Student was learning those skills in Private School. *Response*, p. 5. The District construes Parent’s placement of Student in Private School for reading, writing, and math as a rejection of its offer to monitor progress under the IEP. *Id.* The District also asserts that Parent’s revocation of consent for Private School to share information with District School interfered with its ability to monitor progress. *Id.* at p. 3.

Although Parent rejected much of the IEP by enrolling Student in Private School part-time, the SCO finds and concludes that this did not relieve the District of its duty to implement those portions of the IEP that had not been rejected and could reasonably be implemented (and indeed those it agreed to implement), as required by 34 C.F.R. § 300.300(d)(3). Thus, the SCO finds and concludes that the District committed to collecting baseline data and reporting Student’s progress on her IEP goals to Parent at least three times a year, including once in the fall semester, whether that was in December or earlier at a parent-teacher conference.

For instance, Parent did not reject—either in words or actions—the District’s offer to collect baseline and regression data for Student’s IEP goals. (FF #s 16, 37, 49). Parent and District staff discussed the need for the District to have this data in the context of tracking Student’s progress on her IEP goals. (FF # 16). They also discussed the need for such data to evaluate Student’s eligibility for summer 2023 ESY services, because the District had been unable to evaluate Student’s eligibility for summer 2022 ESY services due to a lack of data. (FF # 15).

In addition, District staff confirmed five times—at both IEP meetings, in the IEP, in the IEP’s PWN section, and in Special Education Teacher’s August 2022 email—that it would collect baseline data at the beginning of the 2022-2023 school year to track progress on her IEP goals and prepare

for a summer 2023 ESY determination. (FF #s 13, 15-16, 27, 37, 49). In each of these instances, District understood that Student would learn reading, writing, and math at Private School. (FF #s 13, 38). It is true that the District qualified, at the IEP meetings, that the IEP anticipated Student would attend District School full time to receive its offer of FAPE. (FF # 10). However, the SCO finds and concludes that this qualification did not apply to the collection of baseline and regression data given, in part, the District’s verbal commitments, the IEP, and the IEP’s PWN section. (FF #s 13, 15-16, 27, 37).

The District’s failure to gather this baseline data meant it was unable to measure Student’s progress toward meeting her IEP goals in reading, writing, and math in the fall semester. *See* 34 C.F.R. § 300.320(a)(3)(i) (requiring districts to measure a child’s progress toward annual goals). By failing to gather baseline data in September, the District was unable to measure Student’s progress or regress over Thanksgiving and Christmas breaks, and it was only the District’s belated collection of baseline data in January that allowed it to measure her progress or regress over Spring break—which it then did. (FF # 61). Because the District was unable to monitor Student’s progress in the fall semester, it also, of course, was unable to and failed to report Student’s progress in the fall semester as Instructional Specialist had promised. (FF #s 17-19).

Although Parent revoked her consent for Private School to share data with District School in December 2022 or January 2023, this did not prevent the District from collecting baseline data. (FF # 59). In January 2023, the District collected the baseline data by administering several tests over the course of two days during Student’s half-days at District School. (*Id.*). It reported the results of that data to Parent. (*Id.*). Nothing prevented it from doing the same at the beginning of the school year. (FF # 59). Further, the District has subsequently monitored Student’s progress on her IEP goals. (FF # 60).

Accordingly, the SCO finds and concludes that the District failed to monitor and report Student’s progress, resulting in a procedural violation of 300.320(a)(3).

C. Prior Written Notice

i. Legal Requirements for PWN

The IDEA requires districts to provide a PWN 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 taking or refusing an action constitutes a procedural violation that may result in a denial of FAPE. *See Weld County School District 6*, 81 IDELR 239 (Colo. SEA 2022). PWN 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).

PWN must include (1) a description of the action proposed or refused by the public agency; (2) an explanation of why the agency proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (4) a statement that the parents of a child with a disability have protection under the procedural safeguards, and if the notice is not an initial referral for an evaluation, the means by which a copy of the procedural safeguards can be obtained; (5) sources for the parent to contact to obtain assistance in understanding the relevant provisions of IDEA; (6) a description of other options that the IEP Team considered and the reasons why those options were rejected; and (7) a description of other factors that are relevant to the agency's proposal or refusal. 34 C.F.R. § 300.503(b). As with an IEP, a PWN—embedded or not—must pass the “stranger test,” meaning that a stranger to the IEP should be able to understand and implement it. *Mason City Comm. Sch. Dist.*, 46 IDELR 148 (Iowa SEA 2006).

ii. *The District Failed to Provide Parent a Proper PWN*

In this case, the SCO finds and concludes that the District failed to provide Parent with a proper PWN when it finalized the IEP on May 12, 2022.

Both parties understood at the time that the IEP was developed that some portions of the IEP and not others would be implemented due to Student's half-time enrollment. (FF # 38). The embedded PWN should have, but did not, inform Parent *which* portions would be provided. (FF #s 33-36); 34 C.F.R. § 300.503. For instance, the PWN should have described: (1) whether, when, and how the District would monitor Student's progress on her reading, writing, and math goals, in light of Student's part-time enrollment; (2) whether, when, and how the District would report Student's progress on those goals, in light of her part-time enrollment; and (3) whether, when, and how the District would provide each of the IEP's offered services in light of Student's part-time enrollment. 34 C.F.R. § 300.503. And, for each of these proposed actions or refused actions, the PWN should have explained the District's reasons for its action or refusal. *Id.* For example, if the District understood that monitoring and reporting Student's progress on her annual goals would be infeasible due to her part-time enrollment, it should have included a PWN notifying Parent that District was refusing to implement those portions of the IEP because Student's part-time enrollment made implementation infeasible. (FF # 35).

The PWN did not provide any such notice or explanation. (FF # 36). Instead, it contains arbitrary meeting notes without clear differentiation between proposed actions, rejected actions, existing processes, and simple meeting notes. (FF # 33). A stranger reading the IEP and PWN could not know what the District actually planned to do in the 2022-2023 school year. (FF # 35).

Nevertheless, the District Director of Special Education indicated that the PWN complied with District's training. (FF # 34).

For these reasons, the SCO finds and concludes that District failed to provide Parent with a proper PWN, resulting in a procedural violation of 34 C.F.R. § 300.503.

D. Procedural Violations

Failure to comply with a procedural requirement amounts to an actionable 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).

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

First, although District failed to monitor Student's progress at the beginning of the school year, it began to do so in January 2023. (FF # 59). Both Special Education Teacher and Special Education Director assured the SCO that the District's failure to collect data in the fall semester will not impede the ability to determine Student's upcoming eligibility for ESY. (FF # 61). Second, Parent chose to enroll Student half-time at Private School, which had direct knowledge of Student's progress and was in the best position to monitor and report it. (FF # 40). Third, District did not have a duty to collaborate with Private School based on Parent's decisions when it offered its FAPE for full-time attendance at District School. *Cf.* 34 C.F.R. § 300.137(a) (providing that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education services that the child would receive if enrolled in a public school").

Fourth, although the District failed to write a legally compliant PWN, Parent worked to clarify the District's responsibilities as soon as she realized, in January 2023, that she and the District had different understandings of which portions of the IEP would be implemented. (FF # 57). Indeed, she exercised her right to participate in the decision-making process, and ultimately the District began to collect the data it needs to determine Student's eligibility for summer 2023 ESY services. (FF #s 57-59). Finally, Private School contributed to the lack of clarity as Private School Teacher agreed at the IEP meetings to collaborate with District School. (FF # 13). Private School Teacher said that Private School would report on Student's progress in math and literacy. (*Id.*) Parent then sent an introductory email connecting Special Education Teacher and New Private School Teacher at the beginning of the school year. (FF # 51). New Private School Teacher never responded, which was part of a pattern of Private School's untimely responses. (FF #s 51, 55, 57).

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

Conclusion to Allegation No. 2: District properly implemented the IEP, in the context of Student’s part-time enrollment, consistent with 34 C.F.R. § 300.323.

Parent’s concern is that the District failed to implement the IEP’s required 60 minutes of direct specialized instruction in writing at District School from the beginning of the 2022-2023 school year to present. *Complaint*, p. 3.

A. Requirement to Implement a Student’s IEP

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is “the centerpiece of the statute’s education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Endrew F.*, 580 U.S. at 391. A student’s IEP must be implemented in its entirety as soon as possible following its development—although here, as discussed in the analysis for Allegation No. 1, this requirement must be analyzed in light of Student’s part-time enrollment. 34 C.F.R. § 300.323(c)(2). Indeed, a school district with a part-time student must implement those portions of the student’s IEP that have been accepted by the student’s parent and that can reasonably be implemented under the circumstances and constraints imposed by the parent. 34 C.F.R. § 300.300(d)(3); *I.L.*, 739 Fed. Appx. At 319; *I.R.*, 805 F.3d at 1170; *Montgomery County*, 111 LRP 54915.

B. District Did Not Fail to Implement the 60 Minutes of Writing Instruction

In this case, the IEP offers 60 minutes per week of direct specialized writing instruction inside the general education classroom. (FF #s 28-30). At the IEP Team meetings in April and May 2022, however, District Instructional Specialist repeatedly stated that the IEP services were offered as if Student would attend District School full-time. (FF #s 9-10). The IEP states that this instruction would be provided as a collaboration between the special education teacher and classroom teacher. (FF #s 28-30). The IEP limits its offer of services to Student’s times of attendance at School, within School’s calendar, and in a “co-teaching” model. (FF # 28). The IEP’s PWN also states, “[Parent] requested that [Private School] minutes [of specialized instruction] be added into the service grid as IEP minutes This was rejected because [District’s] offer is a full day at [District School] and the [Private School] 1/2 day as a placement is parent choice.” (FF # 37).

By removing Student to Private School for half the day, Parent limited District’s ability to provide this service consistent with the IEP. (FF # 46). The instruction was to be provided by Student’s caseworker, Special Education Teacher. (*Id.*). Special Education Teacher had only one period available to provide push-in services. (*Id.*). It did not overlap with Student’s two academic classes at District School. (*Id.*). It was not feasible for District to provide the instruction during one of Student’s two academic classes at District School without rearranging Special Education

Teacher’s schedule, which would have meant disrupting other students’ receipt of special education services. (*Id.*).

The District made its full offer of FAPE contingent on Student attending District School full-time. (FF # 38). Student’s half-time attendance made it difficult for the District to implement the IEP in its entirety. (FF # 46). For instance, neither Parent nor the District expected the District to provide the 480 minutes of specialized education outside of the general curriculum in Student’s half-day at District School. (FF # 41). Indeed, placing Student in special education for an average of 96 minutes per day at District School followed by half a day of special education classes at Private School would likely have violated Student’s LRE requirement of 40-79% of time in general education. (FF # 32). Because Parent’s partial rejection of the IEP prevented District from providing its full offer of FAPE—i.e., all the services in that IEP—Parent cannot then allege that the District violated its duty to offer a FAPE. *I.R.*, 805 F.3d at 1170; *Montgomery County Public Sch.*, 111 LRP 54915; *see D.O.*, 59 F.4th at 412-13; *Dougall*, 2020 WL 435385 at *28. The District fulfilled its residual duty under the IDEA to provide those services that Parent did not reject and that could reasonably be implemented within the constraints imposed by Parent. *See id.*

Accordingly, the SCO finds and concludes that the District did not fail to implement the IEP in this respect, and that no violation of 34 C.F.R. § 300.323(c) occurred.

REMEDIES

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

- a. Failing to monitor and report on Student’s progress, in violation of 34 C.F.R. § 300.320(a)(3); and
- b. Failing to provide Parent proper PWN, in violation of 34 C.F.R. § 300.503.

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

1. **Corrective Action Plan**

- a. By **Tuesday, June 6, 2023**, the District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm the District’s timely correction of the areas of noncompliance.

2. **Training**

- a. By **Tuesday, June 6, 2023**, the District shall submit to CDE Special Education Monitoring and Technical Assistance Consultant finalized written revisions to the District's training regarding PWNs. The training must be consistent with the requirements of this Decision and 34 C.F.R. § 300.503, addressing PWNs embedded in IEPs as well as separately issued PWNs. Upon approval from CDE, by **Tuesday, June 20, 2023** the District must also provide CDE with an explanation of how these revisions will be communicated to all District staff responsible for writing PWNs.

3. **Final Decision Review**

- a. By **Tuesday, June 6, 2023**, the Executive Director of Special Education, Special Education Director, Special Education Teacher, Instructional Specialist, Anticipated Special Education Teacher, and Principal must review this decision, as well as the requirements of 34 C.F.R. § 300.503. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Tuesday, June 20, 2023**.

4. **IEP Team Meeting**

- a. By **July 6, 2023**, District must convene Student's IEP Team at a mutually agreeable date and time. Student's IEP Team must revise Student's IEP to clearly explain any difference between the District's offer of services, monitoring, and reporting and the District's anticipated provision of services, monitoring, and reporting. Any such difference must be explained through a PWN compliant with this Decision and 34 C.F.R. § 300.503. A copy of the revised IEP must be provided to CDE no later than **Monday, August 7, 2023**. CDE may determine, at its sole discretion, whether the IEP complies with these requirements. If CDE determines that the IEP does not so comply, then the IEP Team must convene again upon a timeline to be determined by CDE. If this action occurred at the May 2023 IEP meeting for Student, then no second meeting needs to be convened solely to accomplish this action.

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

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

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

CONCLUSION

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

Dated this 6th day of May, 2023.

A handwritten signature in black ink, appearing to read "Nicholaus Podsiadlik", written over a horizontal line.

Nicholaus Podsiadlik
State Complaints Officer

APPENDIX

Complaint, pages 1-3

Response, pages 1-6

- Exhibit A: IEP
- Exhibit B: PWNs
- Exhibit E: Attendance records
- Exhibit G: District calendar
- Exhibit H: Policies and procedures
- Exhibit I: Emails
- Exhibit J: Information regarding staff with knowledge of the Complaint
- Exhibit K: Verification of delivery of Response
- Exhibit L: Video recording of April, 2022 IEP meeting
- Exhibit M: Video recording of May, 2022 IEP meeting

Reply, pages 1-7

- Exhibit 1: Emails
- Exhibit 2: Emails
- Exhibit 3: Emails
- Exhibit 4: Article

Telephone Interviews

- Parent: April 10, 2023
- CDE Content Specialist 1: April 12, 2023
- CDE Content Specialist 2: April 11, 2023
- Special Education Teacher: April 12, 2023
- Principal: April 12, 2023
- Executive Director of Special Education: April 12, 2023
- Special Education Director: April 14, 2023
- CDE Content Specialist 3: April 17, 2023