

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

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**State-Level Complaint 2011:507**

**Cherry Creek School District # 5**

**DECISION**

**INTRODUCTION**

This is a state-level complaint (Complaint) dated April 26, 2011 which was properly filed with the Department on May 2, 2011.

The Complaint was filed by the grandparent of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup>

In order to comply with the federal privacy laws (i.e., Family Educational Rights and Privacy Act (FERPA) and the IDEA<sup>2</sup> and to protect the anonymity of the parent and parent's child, hereafter, the persons and locations identified in conjunction with the Complaint investigation and Decision will be abbreviated as follows and redacted prior to publication:

- [Grandparent], Grandparent of [Student] (“Grandparent” or “Complainant”);
- [Parent], Parent of [Student] (“Parent” or “Mother”);
- [Student], Child of Parent and grandchild of Complainant, (“Student”);
- Student’s age of [Age][Age];
- Cherry Creek School District #5 (“District”);
- [Special Education Director], Executive Director of Student Achievement Services (“Special Education Director”);
- [District’s Legal Counsel], District’s Legal Counsel (“District’s Legal Counsel”);
- [School] (“School”);
- [Principal], Principal (“Principal”);
- [Assistant Principal], Assistant Principal (“Assistant Principal”);
- [Special Education Teacher], ILC Sp. Ed. Teacher (“Special Education Teacher”);
- [SLP], Speech Therapist (“SLP”);
- [School Psychologist], School Psychologist (“School Psychologist”);
- [LD Language Arts Teacher], LD Language Arts Teacher (“LD Language Arts Teacher”);

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

<sup>2</sup> FERPA, codified at 20 U.S.C. § 1232g, was enacted in 1974 to protect a parent’s access to education records and to protect the privacy rights of students and their parents.

- [LD Math Teacher], LD Math Teacher (“LD Math Teacher”);
- [Choir Teacher], Music/Choral Teacher (“Choir Teacher”);
- [Former Special Education Director], [Former School District] Special Education Director (Former Special Education Director);
- [Former School District] (Former School District);
- [Former Middle School] (Former Middle School);
- [Former Elementary School] (Former Elementary School); and
- [Former Charter School] (Former Charter School).

The Complaint consisted of 17 pages and Exhibits “A” through “D.”

The State Complaints Officer (SCO) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaints process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.<sup>3</sup> The SCO has jurisdiction to resolve the Complaint pursuant to those regulations.

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

Whether, between August 23, 2010 and May 2, 2011, the District failed to supply Student with a free appropriate public education (FAPE) in violation of the IDEA and its implementing regulations.

On May 9, 2011, Special Education Director was notified of Complainant’s allegations in a cover letter which included a complete copy of the Complaint and Exhibits “A” through “D.” The District was specifically directed to supply the SCO with:

- A. A written response specifically admitting or denying each of the Complaint allegations; and
- B. All documentation supporting the District’s Response to the allegation, including, but not limited to:
  1. A complete copy of the Student’s current IEP, including a legible sign in sheet listing each and every person who attended any IEP Team meeting held in conjunction with development of the current IEP;
  2. A complete copy of any meeting notes written or recorded in conjunction with the current IEP;
  3. A complete copy of any prior written notice supplied to the parent in conjunction with any IEP in effect during the 2010-2011 school year;
  4. A complete copy of any other IEP that Student previously had during the 2010-2011 school year;
  5. Complete copies of all meeting notes written or recorded in conjunction with any other IEP previously in effect during the 2010-2011 school year;

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<sup>3</sup> Hereafter, only the IDEA regulation and any corresponding Exceptional Children’s Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

6. A complete copy of all service logs for all related services provided to Student in the 2010-2011 school year, including the name of each provider, the date of each service and the number of minutes of services provided;
7. A complete copy of all of Student's progress reports compiled in conjunction with the 2010-2011 school year;
8. A complete copy of Student's grade reports for the 2010-2011 school year;
9. Student's attendance records for the 2010-2011 school year;
10. Complete copies of the District's policies and procedures in effect at the beginning of the 2010-2011 concerning Least Restrictive Environment (LRE) including those circumstances when placement in the general education classroom is not the LRE;
11. The complete name, title and contact information for each District staff member who has knowledge of the facts underlying the Complaint allegations; and
12. A legible copy of the District's 2010-2011 school calendar.

On May 19, 2011, the District's Response (consisting of a cover letter and Position Statement), and Exhibits "1" through "18" were timely received.

On May 25, 2011, at the SCO's request, Complainant supplied Parent's notarized consent authorizing the Department to release Student's personally identifiable information concerning the investigation (e.g., District's Response, exhibits and the Decision) to Complainant.

On May 26, 2011, the SCO sent Complainant a cover letter which included a complete copy of the Response and exhibits by overnight mail.

On May 27, 2011, the SCO denied Complainant's request for an extension of time in which to file a Reply.

On June 6, 2011, Complainant's Reply, consisting of pgs. 1-7 and Exhibits "E" through "G" were timely received.

On June 6, 2011, the SCO sent Special Education Director a complete copy of Complainant's Reply and exhibits by overnight mail.

On June 7<sup>th</sup> and 8<sup>th</sup>, 2011, the SCO interviewed the Former Special Education Director by telephone.

On June 8, 2011, the SCO conducted a face-to-face interview of Complainant.

On June 9, 2011, the SCO conducted face-to-face interviews of the following District staff: Special Education Teacher; School Psychologist; LD Math Teacher; and LD Language Arts Teacher. The SCO was accompanied by CDE Senior Consultant Dena Bethel.

On June 9, 2011, the SCO received additional District documentation which was marked as Exhibits 19 and 20.

On June 14, 2011 the SCO interviewed Special Education Director by telephone and received additional documentation which was marked as Exhibit 21.

On June 20, 2011, the SCO conducted a face-to-face interview with Parent.<sup>4</sup>

On June 21, 2011, having received a final requested piece of information from the District, the SCO closed the Record.

### **GRANDPARENT'S COMPLAINT ALLEGATIONS**

Grandparent's Complaint contains two allegations which are summarized below:

Between August 23, 2010 and May 2, 2011:

- 1) The District failed to educate Student in the least restrictive environment (LRE) to the maximum extent appropriate, in violation of 34 C.F.R. §§ 300.114 through 300.116. Specifically:
  - a) Student was not been educated to the maximum extent appropriate with nondisabled peers;
  - b) Student did not have [Student's] educational needs met in the current placement; and
  - c) Because the current placement was inappropriate, Student regressed both socially and academically.
- 2) The District failed to supply Student with the special education and related services (including speech/language therapy and psychological counseling) listed in the September 28, 2010 IEP.

**Summary of Proposed Remedies:** The Grandparent's Complaint proposed that, in order to remedy the allegations, Student be removed from the "Life Skills" classroom and be placed in a program offering services related to [Student's] strengths, learning abilities, special problems and learning needs.

### **DISTRICT'S RESPONSE**

The District's denial of each of the Complaint allegations is summarized as follows:

- 1) Student's placement (i.e., less than 40% in the general education setting in the Integrated Learning Center (ILC)) was appropriate to [Student's] individual needs. Specifically:

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<sup>4</sup> At the conclusion of the interview, Parent requested and was supplied with a copy of the Complaint, Response and Reply. Parent was also supplied with a copy of the Procedural Safeguards. Parent requested that she also be supplied with a copy of the SCO's Decision.

- a) Student was mainstreamed into the general education setting to the maximum extent appropriate through elective courses (i.e., computer skills class and choir) as well as through lunch, recess, school assemblies and field trips;
  - b) The ILC program provided Student with academic instruction in small group and one-to-one instruction; and
  - c) Progress monitoring and therapy logs document that Student made growth on all three of the September 28, 2010 IEP goals.
- 2) Student was supplied speech/language therapy as well as individual psychological counseling and group therapy.

### **GRANDPARENT'S REPLY**

Complainant's Reply reiterated the Complaint allegations.<sup>5</sup> For the first time, Complainant characterized the District's alleged violations as having been done with a discriminatory purpose.<sup>6</sup>

### **FINDINGS OF FACT**

After thorough and careful analysis of the Record,<sup>7</sup> the SCO makes the following FINDINGS:

#### **Factual Background:**

1. At the time of the Complaint, Student was [Age] years of age.
2. Student has been identified as a child with a disability (i.e., [disability]) since [Student] attended the first grade.<sup>8</sup>
3. Complainant believes that Student is merely "behind in [Student's] academics" and "is capable of surviving in the regular classroom with help." As evidence of Student's abilities, Complainant pointed to Student's receipt of a 4.0 GPA Principal's Honor Roll certificate during the third quarter of 2011.<sup>9</sup> Complainant feels strongly that it is inappropriate for Student to be placed in either a "life skills" classroom or a learning disabilities classroom, describing other

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<sup>5</sup> Complainant also made vigorous arguments concerning the District's statement in the Response "[T]he Complainant has alleged that *Student* has violated 34 C.F.R. Section 300.114 through 300.116 . . ." However, the SCO concludes that the italicized language was merely a typographical error.

<sup>6</sup> Complainant's discrimination claim is beyond the SCO's jurisdiction and she was so advised in the cover letter which accompanied the Decision.

<sup>7</sup> Appendix A, attached and incorporated by reference, details the entire Record.

<sup>8</sup> Interview of Parent. In August, 2006, Student obtained a Full Scale I.Q. score of 54 on the Universal Nonverbal Intelligence Test (UNIT). In May, 2008, Student obtained a general conceptual ability score of 45 on the Differential Ability Scales, Second edition (DAS II). On May 6, 2008, Student obtained a Full Scale I.Q. score of 42 on the Stanford Binet Intelligence Scales, Fifth Edition (SB V). Exhibit 4, pg. 6.

<sup>9</sup> Interview of Complainant and Exhibit E. See also Reply, pg. 5 where Complainant argued "IQ tests are an unsatisfactory way of measuring intelligence because they are culture bound . . ." Student's performance on the I.Q. testing could be attributable to other reasons including "lack of confidence" "inhibition" . . . "being too nervous" etc.

students in these classes as “deformed kids in wheelchairs” and therefore “a distraction.”<sup>10</sup> Conversely, although Parent has a difficult time accepting the “label of cognitive disability” she recognizes that Student “struggles in every area – academic, social, just all areas. [Student] loves music and art although [Student] may always struggle academically. I try to be realistic at the same time.”<sup>11</sup>

4. Parent is a single mother raising four children, two of which are special needs children. Until recently being laid off, Parent worked the nightshift at a grocery store for 14 years. Because of her work demands and the cost of child care, Parent has historically relied on Complainant to supply child care assistance. Over the years, Complainant has taken particular interest in Student’s development and has come to view herself as [Student’s] surrogate parent.<sup>12</sup>

5. Although Parent has not always agreed with Complainant’s perspectives, because of Parent’s challenges as a single parent, she has frequently acquiesced to Complainant’s point of view concerning Student’s education. Parent acknowledges that Student has a disability. However, she struggles with understanding the extent of Student’s disability or [Student’s] needs. Parent gave the example of spending two weeks teaching Student [Student’s] new address and telephone number when Parent moved from Former District into the present District. Although Student had successfully learned to recite [Student’s] current address and telephone number to her by the start of the 2010-2011 school year, [Student] could not supply this information to teachers at School and “now [Student] does not know the street numbers – it baffles me.”<sup>13</sup>

6. Complainant reported that Student did not attend preschool or kindergarten.<sup>14</sup> However, the credible information in the Record reveals that over a period of approximately two years Parent attempted to have Student educated in a variety of settings including: Former Elementary School; an unidentified parochial school, Charter School, and home schooling with Complainant. None of the formal school settings lasted for more than two to three months.<sup>15</sup> Parent described several instances where Student would experience “panic attacks” at school. Because Student had no more than “choppy speech,” Parent was never able to determine what prompted Student to become so upset at school. Parent recalled that while Student was attending Charter School, something would happen, Student would have a panic attack and the Charter School would call to have Parent come and take Student home. Ultimately, Charter School staff advised Parent that the school could not serve Student’s needs. Parent attributed these incidents to Student’s “lack of socialization,” explaining that before [Student] began attending school Student had only been around Parent, [Student’s] sibling and [Student’s] grandparents. Parent denied that any District has ever offered her training or counseling concerning Student’s disability.<sup>16</sup>

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<sup>10</sup> Interview of Complainant.

<sup>11</sup> Interview of Parent.

<sup>12</sup> Id.

<sup>13</sup> Id. Upon questioning by the SCO, Parent denied that any school district had ever supplied her with any training concerning Student’s disabilities or needs.

<sup>14</sup> Interview of Complainant.

<sup>15</sup> Interview of Parent.

<sup>16</sup> Id.

7. Throughout the 2008-2009 and 2009-2010 school years, Student resided in Former School District.

### **The 2008-2009 School Year**

8. During the 2008-2009 school year, Student was enrolled in the 5<sup>th</sup> grade at Former Elementary School in Former School district. During the entire 2008-2009 school year, Student was educated in the Life Skills program.

9. An IEP meeting was held on May 11, 2009 to discuss Student's progress and the program Student should attend during the 2009-2010 school year when [Student] began middle school. During the meeting, both Parent and Complainant acknowledged that Student had made academic progress during the 2008-2009 in the Life Skills program but both expressed dissatisfaction with [Student's] growth as compared with [Student's] peers. The IEP team concluded that, given Student's needs, the least restrictive environment (LRE) would continue to be in the regular general education class less than 40% of the time when Student began attending the 6<sup>th</sup> grade during the 2009-2010 school year. The team also concluded that it was appropriate for Student's special education services to be delivered in the Former Middle School Life Skills class.<sup>17</sup>

10. **The Life Skills Program.** The Former Middle School Life Skills class is a self-contained, center based program designed to serve the needs of children with severe and profound disabilities. Generally speaking, the program serves students with an I.Q. at or below 50 (roughly based on how a student is performing on their social, communicative and adaptive skills). The program offered much lower teacher to student ratios of 3:1 or 2:1, depending on the size of the class and the individual needs of the students. The Life Skills consisted of an alternative curriculum which focused on personal safety and community skills (i.e., mobility training and going out into community settings to integrate activities with academics - such as making purchases at a grocery store in conjunction with a cooking class). The goal of Life Skills program is to foster independent living with an emphasis on money management, shopping in stores, use of public transportation, etc.<sup>18</sup>

### **The 2009-2010 School Year**

11. On August 7, 2009, Parent provided written notice to Former Special Education Director and the Former Middle School Principal that she was revoking consent for the provision of special education and related services to Student.<sup>19</sup> Parent took this action because she did not want Student to receive services in the Life Skills Program.<sup>20</sup>

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<sup>17</sup> Interview of Former Special Education Director.

<sup>18</sup> Id.

<sup>19</sup> Exhibit 12, pg. 1.

<sup>20</sup> Interview of Parent.

12. Recognizing that Student’s significant needs required the provision of special education and related services, on August 12, 2009, Former School District staff met with Parent and convinced her to rescind the revocation of consent. A reconvening of the IEP team was arranged.<sup>21</sup>

13. **September 4, 2009 IEP (“2009 IEP”).** The IEP team reconvened and concluded that, given Student’s needs, Student’s LRE continued to be in the regular general education class less than 40% of the time. The Former District’s IEP team also considered the general education setting but concluded that the “general education setting does not provide enough assistance for [Student] to be successful . . . and does not address social adaptive needs such as safety and community use.”<sup>22</sup> The 2009 IEP notes that:

- Student is “functioning at a kindergarten overall academic ability level”;
- Cognitively and socially, Student “functions in a significantly lower range than most of [Student’s] peers”;
- Student has “difficulty in [Student’s] gross motor skills with [Student’s] midline balance”;
- Student has “limited fine motor skills”; and
- Student “uses minimal verbiage when [Student] communicates and [Student] will not willingly communicate with others.”<sup>23</sup>

However, the IEP notes indicate that “Parent does not want a life skills program at this point, they would rather only academics were stressed.”<sup>24</sup> The team also discussed the feasibility of providing Student’s services in the Functional Academic program.

14. **The Functional Academic Program.** The Former School District’s Functional Academic program is also a self-contained program serving students with severe needs (i.e., social, communication and adaptive skills and, roughly, students with I.Q.s between 50 and 70). The program has a special education teacher and a floater paraprofessional<sup>25</sup> with a typical class size of 15 students. When the student class size exceeds 15, another paraprofessional might be added, depending on the needs of the individual students. The curriculum has a complete education focus. Literacy and math are supplied in the self-contained classroom while science and social studies classes are modified (i.e., “big ideas” rather than the regular, general education curriculum with floater paraprofessional support). Students in the Functional Academic program take electives (i.e., music, visual arts, wood shop, band, P.E., computer lab, etc.) appropriate to their abilities and, depending on their needs, this may be with the support of a floater paraprofessional.<sup>26</sup>

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<sup>21</sup> Interview of Former Special Education Director.

<sup>22</sup> Exhibit 4, pg. 10. In its Response, pg. 2, the District mistakenly assumed that the quoted language was referencing the Functional Academic program. However, the SCO concludes that the quoted language actually referenced the general education setting which the Former District’s IEP team considered and rejected.

<sup>23</sup> Id., pg. 7.

<sup>24</sup> Id., pg. 12.

<sup>25</sup> A ‘floater’ paraprofessional helps throughout the class as needed rather than being specifically assigned to any one student.

<sup>26</sup> Interview of Former Special Education Director.



15. The 2009 IEP team concluded that, given Student's needs, [Student] could appropriately receive services in either the Life Skills program or in the Functional Academic program with supports. However, given Parent's concerns, the IEP team concluded that Student would receive 20 direct hours per week of special education services in the Functional Academics program which, as noted above, is a program supported by a floater paraprofessional. Student was also to receive 30 direct minutes per week of both group mental health and speech-language services.<sup>27</sup> Student also had inclusion opportunities including specials, field trips, lunchrooms, and recess.<sup>28</sup> Student attended physical education in the general education classroom.<sup>29</sup>

16. Student attended the Functional Academic program from September 5, 2009 and throughout the remainder of the 2009-2010 school year and "did well in the program."<sup>30</sup>

### **The 2010-2011 School Year**

17. On May 3, 2010, Parent moved into the District and enrolled Student. As a result, the District obtained Student's records, including [Student's] 2009 IEP, from Former School District.

18. The District's school year began August 23, 2010 and ended on June 7, 2011. Student's school of attendance was identified as [School]. The school day is from 8:10 a.m. to 3:20 p.m. with a total of 430 minutes in the entire school day.

19. **Interim Services between August 23, 2010 and September 28, 2010.** Parent was supplied with an Interim Services Notice which advised her that, until an IEP meeting could be convened, Student's interim placement would be "inside the regular class less than 40% of the time" which is consistent with Student's 2009 IEP.<sup>31</sup> Per the notice, Student was to receive:

- Special Education Services, 1150 direct minutes per week (i.e., 1150 divided by 5 days or 230 minutes p/day);
- Speech-Language Services, 50 direct minutes per week; and
- Mental Health Services, 50 direct minutes per week.<sup>32</sup>

Parent was notified that Student's interim special education and related services, including P.E., would be delivered in the Integrated Learning Center (ILC) program.<sup>33</sup> Student also was to

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<sup>27</sup> Id.

<sup>28</sup> Exhibit 4, pg. 17.

<sup>29</sup> Interviews of Complainant and Parent.

<sup>30</sup> Interview of Former Special Education Director and Parent.

<sup>31</sup> Comparing Exhibit 1, pg. 4 and Exhibit 4, pg. 1. The SCO notes that the interim services notice incorrectly lists percentage of time student would be with non-disabled peers as "83%" and concludes that this is a typographical error. Exhibit 1, pg. 4.

<sup>32</sup> Exhibit 1, pg. 4.

<sup>33</sup> Response, pg. 3.

receive 100 minutes of daily general education instruction in two classes, Computer Skills and Choir, and would attend lunch in the cafeteria.<sup>34</sup>

20. **ILC Program.** The ILC program serves students needing a placement inside the regular classroom less than 40% of the time.<sup>35</sup> Students in the ILC program, ages 11 to 15, have various disabilities which typically include traumatic brain injury, low cognitive ability, autism, Down’s syndrome, etc. The program is not arranged by grade level. “A student’s I.Q. is a factor in placement consideration in the [School] ILC program. Generally, a student who has one of the [previously described disabilities] who has a 70 I.Q. or below and who has low adaptive scores (as gathered from surveys of parents, teachers, mental health personnel or other data) is placed in the ILC program at [School].”<sup>36</sup> There are two ILC classrooms which are grouped due to differentiated instruction based upon student needs. The District characterizes the programming in both ILC classrooms as “functional academics” in math, language arts and reading which is grouped in the “higher level” ILC class and the “lower level” ILC class, “based on the skills a student currently has, and not on an I.Q. score.”<sup>37</sup>

21. **September 28, 2010 IEP (“2010 IEP”).** Parent was notified that an annual review IEP meeting had been scheduled in order to “review and update [Student’s] present level of functioning needs, goals and objectives and to develop a plan to provide special education and related services for the next year.”<sup>38</sup> The meeting participants were Special Education Teacher, SLP, Parent and Complainant.<sup>39</sup>

22. At the outset of the meeting, Complainant presented the IEP team with a letter in which she described Student’s strengths (e.g., music intelligence, enjoys reading and being read to, likes to operate computers and calculators, gets along well with others, etc.).<sup>40</sup> In her letter, Complainant described Student as being “instructionally and academically delayed in [Student’s] academic studies in school . . . [however] [Student] has been placed in the wrong academic surroundings. . . [Student] needs to be placed in a classroom *with normal children such as [him/herself] who are experiencing problems due to being behind in their studies.*”<sup>41</sup> Complainant noted that the ILC program “appears to be for trainable retarded education or blind education or no education at all and physically handicapped education which = inferior education . . .”<sup>42</sup>

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<sup>34</sup> Id. Although the Response also indicates that Student enjoyed “inclusion in lunch, field trips and recess,” inclusion in these activities is not reflected in the interim services notice.

<sup>35</sup> District’s Response, pg. 3.

<sup>36</sup> Exhibit 21, pg. 2.

<sup>37</sup> Id. District’s Legal Counsel confirmed that Student was in the “lower level” ILC class taught by Special Education Teacher.

<sup>38</sup> Exhibit 1, pg. 3. The SCO notes that the District’s Notice of Meeting form did not comply with the IDEA and this also caused additional procedural errors being committed in conjunction with the appropriate meeting participants.

<sup>39</sup> Exhibit 1, pg. 7. The Choir Teacher, Assistant School Principal (identified as the Special Education Director Designee in the sign-in sheet), and School Psychologist were not in attendance during the meeting due to scheduling conflicts. Response, pg. 3.

<sup>40</sup> Exhibit 2, pgs. 1-4.

<sup>41</sup> Id., pg. 2 (emphasis added).

<sup>42</sup> Id. Complainant reiterated these and similar statements during an interview with the SCO.

23. The 2010 IEP contains no notes indicating that the team discussed a continuum of alternative placements. Special Education Teacher confirmed that “the only placement discussed in the meeting was ILC.”<sup>43</sup>

24. The team identified Student’s basic educational needs as:

- Math skills for everyday use – time to the ½ hour; money skills; basic addition and subtraction; calculator usage; effectively using a calendar;
- Understanding environmental/community signs – expressively for meaning;
- Demonstrating appropriate use of voice and vocal quality;
- Sight words/DOLCH nouns and preprimer words; comprehension skills;
- Completing tasks in a timely manner; and
- Following multi-step directions.<sup>44</sup>

25. As a result of the meeting, the IEP Team concluded that Student’s appropriate and LRE placement was “inside the regular class less than 40% of the time.”<sup>45</sup> The placement rational was articulated as follows: “Given the students [sic] severe educational/emotional needs, the self-contained environment (with opportunities to add other special ed or general ed classes as ready) has been designated by the staffing team as the least restrictive, most appropriate school setting at this time.”<sup>46</sup> According to the IEP, Student was to receive a total of 2150 direct minutes per week in the ILC classroom:

- Special Education Services, 2050 direct minutes (i.e., 2050 divided by 5 school days = 410 minutes p/day) in the ILC classroom;
- Speech-Language Services, 50 direct minutes per week; and
- Mental Health Services, 50 direct minutes per week.<sup>47</sup>

Numerous accommodations were listed in the IEP, including “sensory breaks, mak[ing] direct eye contact and providing opportunity to problem solve with adult support.”<sup>48</sup> Student continued to participate daily in two elective general education classes, Choir and Computer Skills. A paraprofessional accompanied Student and two other students to both of these classes “to facilitate inclusion (i.e., the paraprofessional was present in a floating capacity to explain class instructions and directions and keep the three students on task) in the two general education classes.”<sup>49</sup> Student was to continue to receive P.E. in the ILC program rather than in the general education setting. The 2010 IEP contained no explanation concerning why Student required receipt of P.E. in the ILC program rather than in the general education classroom as was the case under the 2009 IEP. The Adaptive P.E. class provides ILC students with adaptive exercises and

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<sup>43</sup> Interview of Special Education Teacher. The SCO notes that the September 28, 2010 Prior Written Notice (i.e., Exhibit 3) supplied to Parent was silent as to the other options considered. Given the concerns raised by the Complainant, this omission also constituted a procedural error which violated the IDEA.

<sup>44</sup> Exhibit 1, pg. 8.

<sup>45</sup> Id.

<sup>46</sup> Id. The SCO notes that the IEP incorrectly lists percentage of time student would be with non-disabled peers as “98%” and concludes that this is also a typographical error.

<sup>47</sup> Id., pg. 9.

<sup>48</sup> Id., pg. 10.

<sup>49</sup> Interview of Special Education Teacher and Special Education Director.

team sports, based upon what “Students in ILC are able to do. It is also a period when we follow through on physical therapy goals.”<sup>50</sup> The SCO notes that Student had no physical therapy goals. The SCO concludes that Adaptive P.E. setting did not allow Student to be educated to the maximum extent appropriate to [Student’s] needs.

26. The 2010 IEP contains three measurable goals in the following areas:

- Functional Math Skills in the areas of telling time; calendar skills; addition and subtraction/calculator usage – baseline 44 and targeted level of success 75;
- Reading and giving meaning for functional reading vocabulary to include safety signs; Dolch nouns and Dolch PP list – baseline 12 and targeted level of success 30; and
- Interpersonal [communication] Access Skills - Initiating contact with others in an age appropriate manner; conversational skills: asking and answering questions of [Student’s] peers – baseline 10 and targeted level of success 30.<sup>51</sup>

27. Student’s ILC classes were taught by Special Education Teacher and, depending on the class, a paraprofessional might be assisting in the class. Between August 23, 2010 and November 3, 2010, Student’s class schedule was as follows:

- 1<sup>st</sup> Period – 8:10-9:02 a.m. [Functional/Life Skills] Individual Reading, 1:3 (i.e., Special Education Teacher and three students) learning sight words, reading basic sentences, worksheets, comprehension and WH questions. (52 direct minutes);
- 2<sup>nd</sup> Period – 9:06-9:58 a.m. [Functional] Math, 3:7 (i.e., Special Education Teacher and two students; one paraprofessional and two students; one paraprofessional and three students) Learning time, money, calculator, consumer math concepts such as “more or less.” (52 direct minutes);
- 3<sup>rd</sup> Period – 10:02-10:54 a.m. Computer Elective, a paraprofessional accompanied Student and two other students to the computer class and provided support (i.e., explained instructions; explained directions; and kept the students on task). (45 minutes inclusion in general classroom);
- 4<sup>th</sup> Period – 10:58-11:32 a.m. Choir Elective, a paraprofessional accompanied Student and two other students to the computer class and provided support (i.e., explained instructions; explained directions; and kept the students on task). (45 minutes inclusion in general classroom);
- Lunch -11:36-12:06 p.m. in the general education setting. (30 minutes inclusion);
- 5<sup>th</sup> Period – 12:06-12:36 p.m. Movie in the ILC classroom. (30 minutes);
- 6<sup>th</sup> Period – 12:40-1:32 p.m. Adaptive Physical Education, 4:12 or 6:12 (i.e., Special Education Teacher and additional paraprofessionals). Exercise and stretching, followed by relays, team sports, individual skills (i.e., basketball – throwing and dribbling or soccer – dribbling and kicking). (52 direct minutes).
- 7<sup>th</sup> Period: - 1:36- 2:16 p.m. Functional Reading 3:7 (i.e., Special Education Teacher and two students; one paraprofessional and two students; one paraprofessional and three

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<sup>50</sup> Interview of Special Education Teacher.

<sup>51</sup> Exhibit 1, pg. 14.

students) learning community words and safety signs; ability to read and express meaning for each; use of computers; writing; worksheets; matching. (52 direct minutes).

- 8<sup>th</sup> Period: 2:18-3:10 p.m. [Functional/Life Skills] Language/Social Skills/Work completion 3:7 (i.e., Special Education Teacher and two students; one paraprofessional and two students; one paraprofessional and three students) Conversation skills; social skills; being read to; answering comprehension questions; completing assignments not finished earlier in the day and group games to facilitate interaction. (52 direct minutes).<sup>52</sup>

As noted in FF # 18, above, the maximum amount of minutes in the school day was 430 minutes. Therefore, even under the most generous of calculations, the maximum amount of minutes that Student could receive special education and related services in the ILC classroom each day was 310 minutes each day (i.e., 430 minutes minus 30 minutes for lunch and minus 90 minutes when Student was in the general education elective classes = 310 minutes). The SCO concludes that the total direct minutes special education services that Student was promised in the 2010 IEP (i.e., 2050 minutes per week or 410 minutes per day) was, given the length of the school day, an impossibility and therefore, a typographical error.<sup>53</sup> This error contributed to Complainant's belief that Student was not supplied with all the special education services to which [Student] was entitled.

28. The District claimed that Student also obtained inclusion with general education peers during lunch, recess and field trips.<sup>54</sup> However, Student attended no field trips during the school year.<sup>55</sup> Additionally, throughout the school year, after lunch Student was required to watch a movie for 30 minutes each day in the ILC classroom rather than enjoying inclusion with general education peers at recess.<sup>56</sup>

29. As previously noted (i.e., FF #25, above), Student was to also receive 50 minutes per week of direct Speech-Language services and Mental Health services each week. Between August 23, 2010 and May 9, 2011, Student did receive the 50 minutes per week of direct Speech-Language services to which [Student] was entitled.<sup>57</sup> However, the 2010 IEP contains no notes indicating why Mental Health services were necessary or what specific emotional Student needs these services would address. Nor are there any IEP goals to measure progress Student was to make in conjunction with the Mental Health services. The SCO notes that, between March 14, 2011 and May 9, 2011, School Psychologist and the SLP jointly supplied direct services to Student and two other students consisting of six 60 minute sessions.<sup>58</sup> However, because these direct service minutes were jointly supplied and claimed by the SLP,<sup>59</sup> School Psychologist cannot also claim that these same direct service minutes provided partial satisfaction of the direct Mental Health service obligation. Given the credible evidence in the Record, the SCO concludes that:

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<sup>52</sup> Interviews of Special Education Teacher and Special Education Director's Secretary and Exhibit 2, pg. 6.

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<sup>54</sup> Response, pg. 3.

<sup>55</sup> Interview of Special Education Teacher.

<sup>56</sup> Id.

<sup>57</sup> Comparing Exhibit 1, pgs. 4 and 9 to Exhibit 5, pgs. 2-6.

<sup>58</sup> Interview with School Psychologist and Exhibit 5, pg. 7. School Psychologist first learned of the weekly direct Mental Health Services obligation on October 15, 2010.

<sup>59</sup> Interview of School Psychologist and Exhibit 5, pg. 3.

- The IEP Team failed to identify precisely what direct Mental Health services Student needed or School Psychologist was to deliver;
- Between August 23, 2010 and May 2, 2011 Student received none of the promised Mental Health services; and
- It is more likely than not that Mental Health services were not needed by Student.

30. **October 22, 2010 “Special Request” Meeting.** Parent contacted Special Education Teacher and expressed dissatisfaction with Student’s placement in the ILC program. Consequently, a special request meeting was scheduled.<sup>60</sup> The meeting participants were: Parent; Complainant; Assistant Principal (acting as Special Education Director Designee); Special Education Teacher; School Psychologist; and a School Psychologist Intern.<sup>61</sup>

31. During the meeting, both Parent and Complainant stated that they did not like the “life skills label” and expressed the desire for Student to attend more general education classes. According to the 2010 IEP notes, the team:

- Assured Parent that Student’s programming placement remained the same as the 2009 IEP from Former Middle School (i.e., placement in the regular education classroom 40% or less);
- Advised Parent that ILC provided functional academics;
- Advised Parent that, the ILC program was the only setting where Student could receive individualized or small group direct instruction;
- Discussed the textbooks used in 7<sup>th</sup> grade science and social studies classes; and
- Discussed Student’s previous cognitive testing results.<sup>62</sup>

32. The IEP is silent concerning discussion of a continuum of alternative placements. When questioned by the SCO concerning whether the team discussed a continuum of alternative placements, Special Education Teacher stated that the team had only discussed the ILC program and the LD (i.e., learning disabilities) program and noted “There is really no middle ground in this school – you’re either ILC or the next level which is LD. Both are self-contained [classrooms] but there is nothing in between these two programs.”<sup>63</sup> The SCO specifically finds that a discussion of a continuum of alternative placements was not had. Furthermore, the IEP Team failed to discuss whether the two LD curriculums could be modified to supply “big ideas” or whether, with paraprofessional support, Student could succeed in the LD classroom. The meeting adjourned with no changes to Student’s placement, schedule or programming. Given Parent’s reason for requesting the meeting, the District committed a procedural error when it failed to supply her with a Prior Written Notice at the conclusion of the meeting.

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<sup>60</sup> Exhibit 1, pg. 20. The District’s Notice of Meeting form does not conform with the IDEA and this resulted in additional procedural errors.

<sup>61</sup> Response, pg. 4 and Exhibit 1, pg. 22. Although Choir Teacher was listed on the meeting participant sheet, she did not attend the meeting.

<sup>62</sup> Exhibit 1, pg. 23.

<sup>63</sup> Interview of Special Education Teacher.

33. **The Learning Disabilities (“LD”) Program.** The LD program is offered to students having one or more specific learning disabilities alone or in combination with other physical disabilities. All of the students have reading and writing skills above the functional level and they receive grade-level classes which are remedial in nature. As a rule, the classes do not involve one-to-one instruction on any consistent basis or for extended periods of time. Nor are the LD classes individualized.<sup>64</sup> Although the District classifies both the ILC program and the LD program as the same placement (i.e., in the regular education classroom 40% or less) the ILC program serves students with more severe educational needs through much smaller classes and with greater supports than is required for students in the LD program.

34. On November 1, 2010, Parent telephoned Special Education Teacher to advise that she wanted Student to begin attending at least two LD classes daily effective November 4, 2010.<sup>65</sup> Subsequent to the telephone conversation, the District failed to supply Parent with Prior Written Notice concerning the change in Student’s special education and related services. On or after December 12, 2010, Special Education Teacher completed an IEP Addendum indicating that “[Student’s] family is insistent [Student] be moved at least 2 periods a day for academics outside of the ILC. They want [Student] with students who do not ‘look different, or make noises.’ They have been advised of [Student’s] numerous cognitive tests, and have been shown results of informal testing that show [Student] far behind [Student’s] same age, typical peers. *They are aware [Student] will not have a paraprofessional with [Student], nor will [Student] receive small group or one to one direct instruction outside of the ILC.*”<sup>66</sup> It is unclear whether Parent was supplied with a copy of the IEP Addendum and, even if she was, the addendum did not supply Parent with Prior Written Notice.

35. Between November 4, 2010 and December 17, 2010, Student attended the LD Math and LD Language Arts classes (i.e., 100 minutes per day for 26 days) in the place of two ILC periods, Functional Math and Functional Reading.<sup>67</sup> Student received no paraprofessional supports during these classes. The Record contains no explanation as to why a paraprofessional was not offered or supplied. The SCO finds this particularly troubling inasmuch as the 2010 IEP makes no mention of the need for paraprofessional supports yet the District supplied Student with paraprofessional support during the Choir and Computer classes.

36. On November 4, 2010, LD Language Arts Teacher wrote to Parent summarizing Student’s poor performance in her class. The letter concluded, “I will send unfinished work home with [Student] for the first week in class, but after that the expectation is that [Student] will complete [Student’s] classwork during class time. . .”<sup>68</sup> LD Language Arts Teacher did not believe that it was appropriate for Student to be in her class and came to this conclusion after [Student’s] first day in her class.<sup>69</sup> When Student was in her class [Student] “could not understand directions and instructions. Even with one-on-one assistance [Student] did not

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<sup>64</sup> Interview of Special Education Director and Exhibit 21, pg. 2.

<sup>65</sup> Response, pg. 5.

<sup>66</sup> Exhibit 1, pg. 24 (emphasis added).

<sup>67</sup> Interview of Special Education Director and Exhibit 11.

<sup>68</sup> Exhibit 6, pg. 48.

<sup>69</sup> Interview of LD Language Arts Teacher.

understand and, as a result, [Student] could not do the work.”<sup>70</sup> Student’s grade report reflects a grade of “F” for this second quarter class.<sup>71</sup>

37. LD Math Teacher did not believe that it was appropriate for Student to be in her class. “This math class ‘Math Navigator’ is for kids with LD – [Student] doesn’t have [a] LD. [Student] could not understand the course materials. We worked a lot with math manipulatives and the course work was beyond [Student’s] abilities. . . [Student] did not have the basics down (i.e., adding 6 plus 7; borrowing; carrying; etc.). This [class] was way too high for [Student].”<sup>72</sup> Student’s grade report reflects a grade of “US” (i.e., fail on a pass fail) for this second quarter class.<sup>73</sup>

38. Given the credible information in the Record,<sup>74</sup> including Student’s severe disability and numerous educational needs,<sup>75</sup> the SCO specifically finds:

- Contrary to Complainant’s claims, Student is not merely “behind in [Student’s] studies” or capable of “surviving in the regular classroom with help;”<sup>76</sup>
- Complainant, and, to a lesser extent Parent, have been unable to come to terms with the full extent of Student’s disability and educational needs;<sup>77</sup>
- Parent would benefit from professional counseling and comprehensive training concerning Student’s disability and educational needs;
- During the 2010-2011 school year, Student’s placement inside the regular education classroom 40% or less was [Student’s] LRE and it was appropriate for Student to receive [Student’s] special education and related services in the ILC classroom;
- It was inappropriate for the District to remove Student from the ILC Functional Reading and Functional Math classes where [Student] was receiving educational benefit;
- It was inappropriate for the IEP Team and District to “acquiesce” to Parent’s demands that Student be placed in the LD classes, particularly without paraprofessional support;
- Instead of acquiescing to Parent’s demands, the District should have supplied Parent with appropriate counseling and training to assist her in understanding the special needs of Student;
- Even with paraprofessional support and extensive modification of the LD curriculums, Student could not have obtained any measurable educational benefit from the two LD classes; and
- Between November 5, 2010 and December 17, 2010 when Student was permitted to attend the two LD classes, the District failed to provide Student with appropriate educational programming tailored to meet [Student’s] individual needs.

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<sup>70</sup> Id.

<sup>71</sup> Exhibit 7, pg. 2.

<sup>72</sup> Interview of LD Math Teacher.

<sup>73</sup> Exhibit 7, pg. 2.

<sup>74</sup> Complaint, Response, Interviews of Special Education Teacher; LD Math Teacher; LD Language Arts Teacher; School Psychologist; Complainant; Parent; and Exhibit 1, pgs. 23-24 .

<sup>75</sup> Exhibit 1, pg. 8.

<sup>76</sup> Interview of Complainant.

<sup>77</sup> Interviews of Complainant and Parent.



39. At Parent's request, effective January 18, 2011, Student was removed from the two LD classes and, instead, returned to Functional Math and Functional Reading in the ILC classroom, consistent with [Student's] prior class schedule.<sup>78</sup> Consequently, between January 18, 2011 and May 2, 2011, consistent with number of the minutes in the school day, the maximum amount of direct special education minutes Student could receive each day and, in fact, did receive, were 310 minutes per day. The additional direct special education minutes promised in the 2010 IEP were erroneous and the result of a typographical error. (See FF #27, above). Nor did the District supply Parent with Prior Written Notice when the amount of Student's services and supports changed as a result of Parent's request.

40. **Student's School Attendance.** Student missed a total of 11 days of school between October 11<sup>th</sup> and November 3<sup>rd</sup>. All but two of these absences were tabulated as "excused" inasmuch as Parent had notified School that she would not bring Student to School until another IEP meeting could be held.<sup>79</sup> Student did not attend School for a period of ten days between January 3<sup>rd</sup> and January 14, 2011. Four of those absences were tabulated as "unexcused" with the remainder being marked as "excused."<sup>80</sup> Between August 23, 2010 and May 2, 2011, Student missed over 28 days of school. At least 15 days of absences occurred during periods when Parent kept Student out of school pending an IEP meeting or change in scheduling. Parent's actions were encouraged by Complainant.

41. **Student's Progress on 2010 IEP Goals.** One of Grandparent's Complaint allegations was that during the school year Student had "regressed socially and academically." However, the SCO is troubled by the number of times that Student was kept home from School, sometimes at Grandparent's urgings. (See FF # 38, above). Certainly poor school attendance has a significant impact on any child's ability to make progress or receive educational benefit.

42. As noted in FF #27, above, Student had three measurable goals in the areas of Functional Math, Reading and Interpersonal Communications Access Skills. There are no progress notes detailed in the 2010 IEP concerning the first or second quarters of school. The progress notes for each goal indicate "Due to extended absences, unable to properly assess progress."<sup>81</sup> However, between September, 2010 and March, 2011, according to the progress monitoring notes, Student demonstrated progress in four of the Functional Math skills objectives and regressed on the fifth objective concerning time to the hour and half hour.<sup>82</sup> In Reading, between September, 2010 and April, 2011, Student demonstrated progress on all three of the objectives.<sup>83</sup> The SLP's IEP progress report notes indicate that by January 18, 2011, Student demonstrated progress on one objective (addressing a peer/using their name and asking a question 3 times a day).<sup>84</sup> By April 5, 2011, the SLP progress notes indicate that Student had made progress in a "friends group" relevant to the second objective.<sup>85</sup> Furthermore, during the first through third quarters, Student

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<sup>78</sup> Interview of Parent and Response, pg. 6.

<sup>79</sup> Interview of Special Education Director and Exhibit 11.

<sup>80</sup> Interview of Special Education Director and Exhibit 11.

<sup>81</sup> Exhibit 1, pgs. 16, 18 and 19.

<sup>82</sup> Exhibit 6, pg. 30.

<sup>83</sup> Exhibit 6, pg.1.

<sup>84</sup> Exhibit 1, pg. 17.

<sup>85</sup> Exhibit 1, pg. 19.

received a passing grade of “S” in all of the ILC classes; an “A” in Choir; a passing grade of “S” in Computing; and an “A+” in Exploring the Web. As previously noted in FF #s 34 and 35, above, Student received an “F” in LD Language Arts and a “US” or fail in LD Math. The SCO concludes that, despite Student’s numerous absences and gaps in the delivery of special education and related services when Student attended the two LD classes, Student did not regress, as Grandparent claims but, in fact, showed progress on all of [Student’s] educational goals.

43. Although Student made progress in [Student’s] placement, in conjunction with the Complaint investigation, the SCO received several reports of Student exhibiting behaviors commonly associated with an autism spectrum disorder. For example, in discussing Student’s placement in the ILC class, Special Education Teacher noted that “Student has behaviors of [Student’s] own – [Student] talks to [him/herself]; laughs inappropriately for no apparent reason; flaps [Student’s] arms – *autism like behaviors*; [Student] is a loner; [and] [Student]’s not good socially.”<sup>86</sup> The SCO notes that, Student “did well” in the Functional Academics class with paraprofessional support when [Student] was attending Former Middle School even though that class was geared towards student’s having an I.Q. measurably higher than the I.Q. attributed to Student and even though the curriculum was more demanding than the Life Skills program (see FF #s 14-16, above). Additionally, Parent shared that, historically: Student was very slow to develop speech; was prone to panic attacks, has poor eye contact; has difficulty expressing [Student’s] needs; has difficulty following directions; and has difficulty remembering the steps to an activity from day to day and setting to setting.<sup>87</sup> The SCO concludes that a multidisciplinary reevaluation of Student, including complete testing specific to autism spectrum disorders, would provide invaluable information concerning the full extent of Student’s disabilities and educational needs.

### **CONCLUSIONS OF LAW**

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

1. Under the IDEA and the corresponding Colorado law, the Exceptional Children’s Educational Act (ECEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. 1400 *et seq.*; ECEA 1 CCR 301-8, 2220-R-1.00 *et seq.*)<sup>88</sup>
2. The IDEA defines a FAPE to mean *special education and related services that*:
  - (a) Are provided at public expense, under public supervision and direction, and without charge;
  - (b) Meet the standards of the [Colorado Department of Education];
  - (c) *Include an appropriate* preschool, elementary school, or *secondary school education*; and
  - (d) *Are provided in conformity with an IEP* that meets the requirements of

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<sup>86</sup> Interview of Special Education Teacher (emphasis added).

<sup>87</sup> Interview of Parent.

<sup>88</sup> Hereafter, only the IDEA regulation and corresponding ECEA rule will be cited.

§§ 300.320 through 300.324.

Section 300.17 (emphasis added).

3. The standard for determining whether a student has received a FAPE is whether the student received “some educational benefit.” *Board of Education v. Rowley*, 458 U.S. 176 (1982). The educational benefit required by the IDEA must be “more than *de minimis*.” *Urban ex re. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10<sup>th</sup> Cir. 1996).

4. In assessing whether a district has provided a student with a FAPE, courts follow a two-step process as set forth by the U.S. Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176, 206-207 (1982). First, the court considers whether the district complied with the procedures set forth in the IDEA, including the specific requirements of the IEP. *Garcia v. Board of Educ.*, 520 F.3d 1116, 1125 (10<sup>th</sup> Cir. 2008). Next, the court looks at whether the special education services provided to the student in the IEP are reasonably calculated to enable the child to receive educational benefits. *Id.*

#### **Allegation #1 – LRE Claims.**

5. Under the IDEA, Districts must ensure that, *to the maximum extent appropriate*, children with disabilities are educated with children who are not disabled. To that end, placement in special education classes outside of the regular education environment is to occur only when, *because of the nature or severity of a student’s disability*, education cannot be achieved satisfactorily within the regular classroom, even with the use of supplementary aids and services. § 300.114(a)(2) (emphasis added).

6. The terms “placement” and “educational placement” are used throughout the IDEA. Although the term “educational placement” is not specifically defined in the IDEA regulations, the term is discussed in the Preamble. “Educational placement” means the setting along a continuum of alternative placements (i.e., instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) where the provision of special education services are to be delivered rather than the specific place, such as a specific classroom or specific school. See Preamble, Vol. 71, No. 156, August 14, 2006, pg. 46687. In other words, the IEP Team is responsible for determining a student’s placement setting while the District is responsible for determining the specific location or classroom where the services are to be delivered.

7. Student’s placement in both the 2009-2010 school year when [Student] attended Former Middle School and the 2010-2011 school year when [Student] attended School was in the regular classroom 40% or less. (FF #s 9, 13, 19, 25, 32-33). Given the persuasive evidence in the Record concerning Student’s severe cognitive disability and [Student’s] extensive educational needs, it was appropriate for District to continue Student’s placement in the regular classroom 40% or less. (FF #s 2, 13, 15, 24, 31 and 38). Consistent with § 300.114(a)(2), this placement was the LRE where Student could be educated to the maximum extent appropriate. (FF # 38).

8. The term “special education” is defined in the IDEA as follows:

- (a) General. (1) *Special education* means *specially designed* instruction, at no cost to the parents, *to meet the unique needs of a child with a disability, including-*
  - i) *Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and*
  - ii) *Instruction in physical education.*
- (2) *Special education* includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section –
  - (i) Speech-language pathology services, or any other related service . . . ;
  - . . .
  - (b) Individual special education terms defined. The terms in this definition are defined as follows:
    - . . .
- (3) *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction –
  - (i) To address the unique needs of the child that result from the child’s disability; and
  - (ii) To ensure access of the child to the general curriculum . . .
  - . . . .
- (4) *Travel training* means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to-
  - (i) Develop an awareness of the environment in which they live; and
  - (ii) Learn the skills necessary to move effectively and safely from place to place within the environment (e.g., in school, in the home, at work, and in the community).
  - . . .

Section 300.39(a) and (b) (emphasis added).

9. The School has two programs which deliver services in the regular classroom less than 40% of the time (i.e., the ILC program and the LD program). (FF #s 20 & 33). The two programs serve students having different disabilities and exhibiting far different educational needs. (FF # 33). Given Student’s severe cognitive disability and [Student’s] unique educational needs, (FF #s 33 & 38), delivery of special education services in the ILC classroom comported with § 300.39(a)(1).

10. Consistent with §§ 300.114(a)(2) and 300.39(a)(1), throughout the school year, Student also took two electives in the general education setting (i.e., Choir and Computer Skills). (FF #s 25 & 27). However, [Student] was required to take Adaptive P.E. in the ILC classroom though the credible evidence in the Record demonstrates that [Student] could have taken P.E. in the general education classroom without supports. (FF #25). Furthermore, contrary to the District’s Response, Student was not allowed to attend recess with [Student’s] general education peers. (FF # 28). Consequently, for approximately 90 minutes each day, Student was not educated in the LRE to the maximum extent appropriate with [Student’s] nondisabled peers. These District actions violated §§ 300.39(a) and 300.114(a)(2) and resulted in a denial of FAPE.

11. Between November 4, 2010 and December 17, 2010, the educational services that Student received in the LD classroom failed to meet [Student's] educational needs and failed to provide [Student] with any educational benefit. (FF #s 38 and 42). This was a violation of §§ 300.39(a) and 300.114(a) and resulted in a denial of FAPE.

12. The District's meeting notices and the 2010 IEP contain numerous procedural and typographical errors. (FF #s 21, 23, 25, 27, 30 & 32). For example, there was an obvious disparity between the number of special education service minutes promised in the 2010 IEP vs. the number of minutes actually delivered. (FF # 27). Except for the time Student spent in the LD classroom, the District delivered as much of the special education services which, given the length of the school day, were possible. (FF #s 27 & 39). These and numerous other procedural errors could have been avoided with careful drafting in compliance with the IDEA. The District's actions violated §§ 300.17(d), 300.320 through 300.322 and 300.324.

13. Additionally, the IDEA requires that before a District proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child, the District must give the Parent written notice. § 300.503. The District also failed to supply Parent with proper Prior Written Notice on at least two occasions (FF #s 34 & 39) and this was a violation of § 300.503.

14. Student demonstrated progress on each of [Student's] three IEP goals and, as a consequence, received educational benefits from [Student's] special education and related services. (FF #s 41 through 43). This is true despite Student's poor attendance during the school year. (FF # 40).

15. Applying the Tenth Circuit's two prong analysis to the FAPE standard enunciated in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the District committed multiple procedural violations over the course of several meetings which violated several IDEA regulations. However, the special education services delivered to Student over the course of the school year did allow [Student] to make progress on [Student's] measurable goals and, therefore, provided [Student] with educational benefits. *Garcia v. Board of Educ.*, 520 F.3d 1116 at 1125 (10<sup>th</sup> Cir. 2008). Furthermore, given the credible evidence in the Record, the SCO concludes that Student's educational benefits were more than de minimis. *Urban ex re. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, at 727 (10<sup>th</sup> Cir. 1996). Consequently, the District's multiple procedural violations did not result in a denial of FAPE.

## **Allegation #2: - Special Education and Related Services Claims.**

16. A district's failure to supply special education and related services in conformity with an IEP that meets the requirements of § 300.324 constitutes a denial of FAPE. § 300.17(d).

17. Between August 23, 2010 and May 2, 2011, the District failed to supply Student with all of the direct minutes per week of special education and related services promised in the Interim Services Notice or the 2010 IEP. However, the variance between the number of direct special education service minutes promised versus the number of minutes actually delivered is

attributable to multiple typographical errors that occurred during drafting. (FF #27). Furthermore, despite the Mental Health service minutes promised, there is nothing in the Record to indicate that these services were needed. (FF #29). Student did receive all of the direct Speech-Language services to which [Student] was entitled. (FF #29 & 42).

18. The District's typographical errors and sloppy IEP drafting resulted in Complainant concluding that Student had not been supplied with all of the special education and related services to which [Student] was entitled. The District's imprecise drafting practices violated the procedural regulations concerning preparation of the Interim Services Notice and the 2010 IEP. §§ 300.320 through 300.324. However, the credible information in the Record is that, during the school year, Student made progress on all of [Student's] IEP goals. Because Student made progress on each of [Student's] IEP goals, [Student] received educational benefit and therefore, the District's procedural errors did not result in a denial of FAPE. *Garcia v. Board of Educ.*, 520 F.3d 1116 at 1125 (10<sup>th</sup> Cir. 2008).

19. Finally, Complainant's perspectives concerning Student's educational needs and abilities are contradicted by multiple assessments from a variety of sources. (FF #s 3 and 38). Ignoring Student's disability and concomitant needs will not make them otherwise. Parent has some level of acceptance of Student's disabilities. (FF #s 5 & 6). However, she has only a limited understanding of Student's extensive special needs and therefore lacks the ability to provide support concerning implementation of Student's IEP. (FF # 38). Under the IDEA, *a parent of a child with a disability* is entitled to receive counseling and training in order to understand the special needs of their child. § 300.34(c)(8) (emphasis added). It is imperative that the District offer and that Parent accept counseling and training sufficient to enable her to be a partner in her [child]'s educational future.

### **REMEDIES**

The SCO has concluded that the District violated the following IDEA requirements concerning provision to Student of a FAPE:

- a) IEP regulations §§ 300.320 through 300.322 and 300.324;
- b) FAPE regulation § 300.17;
- c) Services consistent with the terms "Special Education" and "Specially Designed Instruction" at § 300.39(a) and (b);
- d) The LRE requirements of § 300.114(a)(2); and
- e) Prior Written Notice regulation §300.503

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

#### **1) Multidisciplinary Reevaluation of Student:**

- a. Within **five business days** after the receipt of this Decision, the District shall supply Parent with prior written notice and request for consent consistent with the IDEA and this Decision which authorizes the District to conduct a multidisciplinary reevaluation consistent with the IDEA and this Decision;

- b. Within **three business days** after receiving Parent's fully executed consent form, the District shall supply the Department with a copy of the executed consent form;
- c. Within **45 calendar days** after receipt of Parent's written consent, the District shall complete a multidisciplinary reevaluation which, at a minimum, shall include *formal assessments* to identify Student's eligibility and service needs specific to:
  - i) autism spectrum disorder;
  - ii) occupational therapy;
  - iii) physical therapy;
  - iv) adaptive behaviors;
  - v) cognition;
  - vi) mental health;
  - vii) speech-language pathology;
  - viii) vision; and
  - ix) health.

The reevaluation shall be consistent with §§ 300.304 through 300.311 and this Decision. The District is specifically directed to ensure that each of the foregoing assessments is administered by persons trained and knowledgeable in the areas being assessed;

- d. **Simultaneously supply** to the Department complete copies of any written communications mailed, emailed or hand-delivered to Parent concerning the reevaluation as well as summaries of conversations with Parent (e.g., contact logs);
- e. Within **three business days** after completion of the reevaluation and reevaluation report, the District shall simultaneously supply to the Parent and the Department all reevaluation results and reports, including but not limited to: all assessments administered, all testing results obtained and all reports and recommendations made by the person(s) conducting each portion of the reevaluation (including their name, address, telephone number and knowledge and experience in conducting said assessments);
- f. Within **five business days** after completion of the reevaluation, the District shall, at a minimum, provide the Parent with explanations and interpretations of all of the reevaluation results consistent with the IDEA and this Decision;
- g. Within **ten calendar days** after completion of the reevaluation, the IEP team shall convene and develop an IEP which provides Student with special education and related services appropriate to meet Student's unique needs in the LRE, consistent with the IDEA and this Decision;
- h. Within **two business days** after completion of the IEP meeting(s), the District shall supply Parent and the Department with a complete copy of Student's IEP, including copies of all meeting notices, prior written notices and meeting notes associated with the IEP. The documentation must be fully compliant with this Decision and the IDEA; and
- i. Within **seven calendar days** after completion of the IEP, the District shall, at a minimum, supply Parent with counseling and training consistent with the IDEA

and this Decision concerning i) Student's special needs, ii) information about child development, and iii) help Parent acquire the skills necessary to support the IEP implementation.

**2) Corrective Action Plan:**

- a. No later than **5:00 p.m. on August 1, 2011**, please submit to the Department a Corrective Action Plan (CAP) that addresses each and every violation noted in this Decision. The CAP must, at a minimum, provide for the following:
- b. **By August 9, 2011**, submission of all revised District written policies, procedures, forms, notices and website information, consistent with the IDEA and this Decision.
- c. **By August 21, 2011**, submission of the name and title of all proposed trainers and a complete copy of all proposed written training materials consistent with the IDEA and this Decision.
- d. **By October 3, 2011**, conduct a training which shall include, *at a minimum*, training and discussion consistent with the IDEA and this Decision concerning:
  - IEP meeting notices;
  - The composition of an IEP team;
  - Excusal from an IEP meeting;
  - Placement in the LRE;
  - Specially designed instruction appropriate to meet the unique needs of children with a disability and to ensure access of the child to general curriculum;
  - Prior written notice;
  - Parent counseling and training sufficient to assist them in understanding the special needs of their child and help them acquire the skills that will allow them to support implementation of their child's IEP; and
  - The provision of special education and related services in conformity with the child's IEP.

The District's training *shall include* all of the following staff:

- i) All building level administrators (i.e., the Principals and Assistant Principals) at the School;
  - ii) All District level special education administrators (i.e., Directors, Assistant Directors, Coordinators, Facilitators, etc.); and
  - iii) Any individual who is or may be responsible for serving as a Special Education Director Designee; and
  - iv) Any individual who is or may be responsible for developing an IEP or for implementing an IEP at the School.
- e. **By October 10, 2011**, submission of evidence that such training has occurred (i.e., complete copies of training schedule(s), agenda(s), curriculum/training materials, the name and title of each trainer, and legible attendee sign-in sheets which lists each attendee's printed name and job title).



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

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

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

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

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### **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 29th day of June, 2011.

*Jeanine M. Pow*

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Jeanine M. Pow, Esq.  
State Complaints Officer

**Appendix A**  
**2011:507 Record**

**Grandparent's Complaint, pgs. 1 through 17;**

Exhibit A Facsimiles dated 12/6/2010; 12/08 /2010 and 01/8/2010 from Grandparent to [Principal], pgs. 1-12;

Exhibit B Parent's 08/07/2009 revocation of consent for continued provision of special education services, pgs. 1-2;

Exhibit C Student's class schedule, 1<sup>st</sup>-3<sup>rd</sup> Qtr. Grade reports, classroom work examples and written communications with Parent, pgs. 1-16;

Exhibit D 09/28/2010 IEP pgs. 1-7;

**DISTRICT's Response, pgs. 1-2;**

Position Statement, pgs. 1-10;

Exhibit 1 09/28/2010 (current) IEP and sign in sheet, pgs. 1-24;

Exhibit 2 Grandparent's 09/28/2010 letter to IEP team and [Special Education Teacher]'s 10/20/2010 memo to [Assistant Principal], pgs. 1-7;

Exhibit 3 09/28/2010 Prior Written Notice;

Exhibit 4 09/04/2009 (previous) IEP, pgs. 1-25;

Exhibit 5 Service logs: SLP and School Psychologist, pgs. 1-10;

Exhibit 6 Progress monitoring notes 2010-2011, pgs. 1-70;

Exhibit 7 2010-2011 grade reports, 1<sup>st</sup>-3<sup>rd</sup> quarters, pgs. 1-6;

Exhibit 8 Student's attendance records and miscellaneous correspondence, pgs. 1-26;

Exhibit 9 Relevant District policies in effect during 2010-2011 school year, pgs. 1-13;

- Exhibit 10 “Contact Log” (i.e., District staff having knowledge of facts underlying the Complaint allegations), pg. 1;
- Exhibit 11 District’s 2010-2011 school calendar;
- Exhibit 12 Parent’s 08/07/2009 Revocation of Consent for special education services, pgs. 1-2;
- Exhibit 13 Student’s “Cumulative File”, pgs. 1-16;
- Exhibit 14 Miscellaneous e-mails, pgs. 1-5;
- Exhibit 15 01/18/2011 e-mail from Grandparent to [Principal], pgs. 1-7;
- Exhibit 16 “Bell Schedule View,” pgs. 1-2;
- Exhibit 17 “All enrollments”, pg. 1; and
- Exhibit 18 pgs. 1-4.

**Complainant’s Reply, pgs. 1-7;**

- Exhibit E April 15, 2011 “Principal’s Honor Roll” certificate;
- Exhibit F Duplication of Exhibits B and 12 and August 2009 progress notes – not relevant and not considered.
- Exhibit G June 3, 2011 miscellaneous comments by Complainant – not relevant and not considered.

**Additional District Information:**

- Exhibit 19 Notes from Special Education Teacher to Assistant Principal in advance of October 22, 2010 Special Request IEP Meeting;
- Exhibit 20 School Psychologist progress notes, January 19<sup>th</sup> – May 16, 2011; Puppet Club curriculum; and miscellaneous notes re communications w/Complainant and attempts to contact parent, ,pgs. 1-13; and
- Exhibit 21 June 14, 2011 e-mail from Special Education Director re Student’s attendance; the ILC, LD and other special education programs at School; and Special Education Teacher’s direct services minutes.

**Interviews of:**

Complainant; Special Education Teacher; School Psychologist; LD Math Teacher; LD Language Arts Teacher; Former Special Education Director; Special Education Director and Parent.