

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

---

**State-Level Complaint 2018:519**  
**Pueblo 60 School District**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on April 27, 2018, by the mother (Mother) of a student (Student) who attends school in the Pueblo 60 School District (School District). Student is currently identified as an eligible child with a disability under the Individuals with Disabilities Education Act.<sup>1</sup>

Based on the written Complaint, 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.<sup>2</sup>

**COMPLAINT ALLEGATIONS**

Whether the School District violated IDEA and denied Student a free appropriate public education (FAPE) by:

1. Failing to implement and comply with Student's IEP since the beginning of the 2017-2018 school year. Specifically, as follows:
  - a. Failure to appropriately monitor Student to ensure focus and understanding;
  - b. Failure to track completion of assignments for reinforcement by general education teacher;
  - c. Failure to implement Student's Behavioral Intervention Plan (BIP) as it pertains to teaching Student how to deal with other Students that do not treat him with respect;
  - d. Failure to provide Student with the occupational therapy services identified on the IEP;

---

<sup>1</sup> 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.*

<sup>2</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).

- e. Failure to provide specialized transportation that ensured Student arrives on time to school;
  - f. Failure to provide timely sensory breaks throughout the day.
2. Failing to ensure all individuals providing direct special education and related services are appropriately trained in a rudimentary understanding of applied behavioral analysis.

### **FINDINGS OF FACT**

After a thorough and careful analysis of the entire record,<sup>3</sup> the SCO makes the following FINDINGS:

1. Student is [age] years old and at all times relevant to this Complaint, has resided within the boundaries of the School District and attended Middle School. Student is identified and served as a student with autism spectrum disorder.
2. Student is considered a student with “high-functioning” autism. Student participates in the general education setting and generally gets passing grades. Student is described as a “hard worker,” a “caring person,” and “always eager to please.”<sup>4</sup>
3. During the 2017-2018 school year, Student was educated pursuant to an IEP dated March 14, 2017 (2017 IEP) and an IEP dated March 14, 2018 (2018 IEP). He is assigned a 1:1 paraprofessional as a result of his disability.<sup>5</sup>

Issue 1.a. – Failure to appropriately monitor Student to ensure focus and understanding

4. Both the 2017 and 2018 IEP state that Student’s disability affects his ability to focus. Specifically, the language in both IEPs provides that “[Student] needs constant monitoring in order to ensure focus and understanding of instructions and assignments...”<sup>6</sup> To address this need, Student’s IEPs provide an accommodation requiring “frequent prompts to focus and on-task behavior, both verbal and non-verbal.”<sup>7</sup>
5. According to Special Education Teacher, Paraprofessional 1 was primarily assigned to assist with this provision. Paraprofessional 1 reports that when Student gets distracted, he verbally directs him to refocus and get back to the task at hand. He states however,

---

<sup>3</sup> The appendix, attached and incorporated by reference, details the entire record.

<sup>4</sup> Exhibit B, Interviews with Special Education Teacher, Art Teacher, Math Teacher, Paraprofessional 1 and Mother.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

that Student typically does well in most classes and doesn't usually have issues with focusing on the tasks at hand. In fact, in his opinion, Student is more focused than many of the other students in the classroom. Additionally, Paraprofessional 1 uses fidgets and sensory breaks to support Student in this accommodation.<sup>8</sup> Based on the interviews and the record, the SCO finds that Paraprofessional was monitoring Student for focus and using verbal prompts, fidgets and sensory breaks to help Student attend to the task at hand. Furthermore, Student's focus did not present as an area of concern.

6. In addition to prompting Student to focus, this accommodation required that Student be monitored for understanding. The SCO finds that School failed to implement this part of the provision. Neither Paraprofessional 1 nor Math Teacher were aware of this accommodation nor their responsibility to implement it. Paraprofessional 1 reported never reading Student's IEP. Math Teacher reported only knowing that Student had autism and that he received extra time for assignments.
7. According to Math Teacher and ELA Teacher, Student frequently had difficulty understanding what was being asked of him. While ELA teacher reports building in checks for understanding, Math Teacher did not. Math Teacher reported that he would only catch Student doing an assignment incorrectly when he walked around the classroom. He stated Student did not ask questions when he didn't understand the assignment and Paraprofessional 1 didn't often know that Student didn't understand. Math Teacher acknowledged that while Student has passing grades, his School and District assessment scores are concerning and may actually demonstrate that Student might not be ready for math next year.<sup>9</sup>

Issue 1.b. – Failure to track assignments for reinforcement by Student's general education teacher

8. According to the 2017 and 2018 IEPs, "Student requires support and extra time in order to complete and turn-in assignments." The accommodation for this need requires designated staff to "track assignment completion for reinforcement by general education teacher."<sup>10</sup> School District states that Paraprofessional 1 was to track completed assignments and general education teachers were to log assignments into Infinite Campus. Special Education Teacher stated that the expectation would be that teachers circle back to Student if he is missing assignments.<sup>11</sup>

---

<sup>8</sup> Interviews with Special Education Teacher, Paraprofessional 1, Art Teacher, Math Teacher and ELA Teacher.

<sup>9</sup> Interviews with Math Teacher, ELA Teacher and Paraprofessional Teacher.

<sup>10</sup> Exhibit B.

<sup>11</sup> Response; Interviews with ESS Specialist and Special Education Teacher.

9. The evidence does not support a finding that School staff were implementing this accommodation. Both Math Teacher and Paraprofessional were unaware of their responsibilities as it pertained to this accommodation. Math Teacher states that it was not until after the March 2018 IEP meeting that he provided a list of Student's missing assignments to Mother and even then, did not follow up to see if they were turned in. As for Paraprofessional 1, he stated that he was not aware this accommodation was part of his responsibilities. He stated that, while he would inquire regarding assignments and may note assignment completion in the Tracking Log, he was not tracking missing assignments. As for ELA Teacher, she states that it was her practice to send progress reports and missing assignment reports home to Parents to keep them informed. Mother states however that she never received these reports and was unaware of Student's missing assignments until March of 2018.<sup>12</sup>
10. School District relies on the Tracking Logs to demonstrate that School was "tracking completion of assignments." The SCO does not find this documentation sufficient to demonstrate that the accommodation was being consistently implemented. The Tracking Logs contain minimal information and lack specificity, especially as it pertains to assignments. The descriptions generally used in the Tracking Logs were phrases such as "finished project," "started new project," or "had a good day." There is rarely anything noting the name of the assignment and nothing noting when assignments were due, if any extensions were given and whether there were missing assignments.<sup>13</sup>
11. Lastly, School District relies on the general education teacher to log assignments in Infinite Campus to demonstrate its implementation of this accommodation. Again, the SCO disagrees. First and foremost, School acknowledged that Mother did not have access to infinite campus until March of 2018. Secondly, the use of Infinite Campus is a tool available for all students and their families. It does not substitute as reinforcement as contemplated by the accommodation. School did not have in place a system for tracking and reinforcing Student's assignment completion.

Issue 1.c. – Failure to implement Student's Behavioral Intervention Plan (BIP) as it pertains to teaching Student how to deal with other students that do not treat him with respect.

12. Student's IEPs describe peer interactions as an area of concern. To address this need, Student has a BIP that describes Student as follows:

Student is a very literal thinker. He follows the rules by the books. When someone tells him something that he does not agree with or is hurtful to him, he tends to respond with verbal or physical aggression (i.e. name calling or

---

<sup>12</sup> Interviews with Mother, Math Teacher, ELA Teacher, Special Education Teacher and Paraprofessional 1.

<sup>13</sup> Exhibit M.

pushing). This causes [Student] distress and he will perseverate on that situation. [Student] struggles the most during unstructured times such as P.E., changing classes, lunch and recess.<sup>14</sup>

13. The BIP provides that “[Student] should be taught how to deal with other students that don’t treat him with respect. Social skill lessons should be used to provide alternatives for name calling and physical aggression.” This is memorialized in both IEPs, which provides that Special Education Teacher will provide Student with social skills lessons 30 minutes a week and ESS staff will monitor and provide support to Student. The criterion for success is “a reduction in the number of calls home to let mom know of an incident for the day.”<sup>15</sup>
14. According to Special Education Teacher, she provided weekly classes to Student with the exception of August to December due to Mother not wanting Student around the other students in her class.<sup>16</sup> As evidence, she provided a list of topics covered in the lessons. In terms of Paraprofessional 1, Special Education Teacher acknowledges that Mother has voiced concern regarding Paraprofessional 1’s lacking the necessary skills to work with Student. She states School has tried to remedy the situation both by providing Paraprofessional 1 more individual guidance and by offering to change paraprofessionals. Special Education Teacher reports that she has regularly worked with Paraprofessional 1 to improve his skills and address ongoing issues. Paraprofessional 1 reports that he receives regular guidance and coaching from Special Education Teacher.<sup>17</sup>
15. Based on a review of the record, interviews and a review of the academic school year, the SCO finds that Special Education Teacher provided 10 classes out of approximately 32 academic school weeks.<sup>18</sup> As previously noted, Special Education Teacher acknowledged that she did not provide the 30-minute lessons in her classroom during the months of August through December which adds up to approximately 16 classes. She states that she did not conduct these lessons during that period as contemplated by the IEP because Mother did not want Student around the other students in her class.<sup>19</sup> During the Winter and Spring quarter (January to May 10<sup>th</sup>), approximately 16 weeks (excluding spring break, Student absences, professional training days, etc.), Special Education Teacher provided a total of 10 lessons, leaving six weeks unaccounted for where Student did not receive lessons. Accordingly, the SCO finds that School failed to

---

<sup>14</sup> Exhibit B.

<sup>15</sup> *Id.*

<sup>16</sup> Interview Special Education Teacher.

<sup>17</sup> Exhibit K; Interviews with Mother, Paraprofessional 1 and Special Education Teacher.

<sup>18</sup> This was based off a review of School’s calendar and taking into account school holidays and professional training days.

<sup>19</sup> The SCO notes that a Prior Written Notice or an Amendment to the IEP would have been an appropriate way to address this change in services.

provide social skills lessons as contemplated by Student's BIP and both the 2017 and 2018 IEPs.

16. As for Paraprofessional 1 and the reinforcement he provided, the SCO found that Student did not receive a significant percentage of social skills classes prescribed in the IEP. Accordingly, the SCO finds that Paraprofessional 1 could not reinforce lessons Student was not receiving. However, there is no dispute that Paraprofessional 1 tried deescalating situations and would encourage Student to ignore negative peer comments or walk away.
17. The SCO finds that the documentation provided on Student's social skills goal is insufficient to indicate he made progress. The social skills goal contained in Student's 2017 IEP provides "By March 14, 2018, [Student] will have proactive social behaviors such as cooperation, consideration, and self-control in five out of ten social situations." Student's progress was to be monitored and charted and reported to Mother on a quarterly basis. School District reports that not only have they implemented this provision but that Student has also made progress toward this goal. The October 16, 2017 and January 13, 2018 progress reports for the social skills goal note Student made adequate progress with commentary. However, the commentary does not provide any measures or documented observations. In fact, Special Education Teacher states she used the Tracking Logs as the method for determining Student's progress in this area. As previously stated, Student uses a four point scale to gauge his mood and this is documented on the Tracking Log. The four colors are Blue, Green, Yellow and Red. Yellow and Red signify Student needs a break or some type of intervention. Green means Student is in control, calm, happy and ready to learn. Blue means he is sad, sick, tired or bored. According to Special Education Teacher, the fewer yellow or reds the more progress Student has made in this area. Special Education Teacher states the Tracking Logs demonstrated this improvement.<sup>20</sup> The SCO does not find that this documentation supports a finding that Student made progress on this goal.
18. Upon a thorough review of the Tracking Logs, the SCO finds the Tracking Logs lack meaningful data. Except for a handful of times, Student is always shown to be at a level Green, regardless if there has been a documented incident involving another student requiring a trip to the office, a phone call to Mother or a discussion with the Special Education Teacher.<sup>21</sup> While Special Education Teacher recalls Student's emotions were more frequently labeled Red or Yellow in the beginning of the school year, the Tracking Logs do not support that assertion. The SCO finds the Tracking Logs are not an accurate

---

<sup>20</sup> Exhibits B, F and M. Interviews with Mother, Special Education Teacher, Advocate 1, Advocate 2, Disability Law Attorney, and Paraprofessional 1.

<sup>21</sup> Exhibit B and M. The SCO notes that in the 2018 Reevaluation, Student still requires the 1:1 paraprofessional which contradicts how Student is portrayed in the Tracking Logs.

reflection of Student as it pertains to his emotions and could not be used for progress monitoring.

19. In terms of the BIP, School District provided no other evidence or documentation to demonstrate the plan was successfully addressing Student's behaviors. While the BIP specifies the criterion for success is a reduction of phone calls home, School did not develop a log to track this data. School provided phone logs but they do not correspond to the documented incidences and they often pertain to other non-peer related issues.
20. The SCO finds that School failed to implement this provision by not providing Student a significant number of the social skills classes outlined in his IEP. The SCO finds that Special Education Teacher's reliance on the Tracking Logs for determining progress was not in accordance with Student's IEP.

Issue 1(d) – Failure to provide Student with occupational therapy (OT) services identified on the IEP

21. The 2017 IEP service delivery statement provides “[Student] will receive a minimum of 1 hour a month of direct occupational therapy services by the certified occupational therapy assistant/licensed.”<sup>22</sup> While the delivery statement doesn't specifically state what the OT will be addressing, based on interviews with the Certified Occupational Therapy Assistant (COTA) and OT Supervisor, Student was working on his typing goal with the COTA. The COTA indicated that these services took place outside of the classroom, generally in the library.<sup>23</sup>
22. The evidence does not support a finding that Student received the occupational therapy services outlined in his IEP. The evidence provided by School District includes an official log documenting occupational therapy services provided to Student and a copy of COTA's handwritten log with corresponding dates. SCO reviewed the Tracking Logs in order to cross reference services. While the SCO does not doubt that some OT services were likely provided, the SCO is not persuaded by the evidence that Student received the 60 minutes of occupational therapy services as described by the COTA. First, the handwritten log provided by COTA references the 2018 IEP's goal and service time which is significantly different than what is contained in the 2017 IEP.<sup>24</sup> Specifically, the 2017 IEP provides for 1 hour a month of direct occupation therapy services whereas the 2018 IEP only provides 15 minutes of indirect occupational therapy. The SCO questions the reliability of the logs given that Mother had been requesting logs documenting occupational services since early in the schoolyear without success. As corroborated by one of mother's advocates, Mother did not receive information regarding the OT

---

<sup>22</sup> Exhibit B.

<sup>23</sup> Exhibit B; Interview with COTA and COTA Supervisor.

<sup>24</sup> Exhibit C.

services until the March 2018 IEP meeting when the COTA handwrote a list of dates and provided it to Mother.<sup>25</sup>

23. Furthermore, the Tracking Logs don't align with the therapy logs. COTA was providing 60 minutes of occupational therapy outside of the classroom. The Tracking Logs do not note Student being out of the classroom or with COTA. Furthermore, Paraprofessional stated that he and the occupational therapist did not talk. Lastly, no progress monitoring data was provided for the January progress report.<sup>26</sup> Given the lack of reliable evidence demonstrating Student received OT services, the SCO finds that School failed to implement this service or at a minimum, as contemplated by the IEP. Accordingly, the SCO finds Student did not receive 6.5 hours counting the months from September through March 14, 2018.
24. The SCO notes, that even if all of the occupational therapies were provided, there is no meaningful progress monitoring to support that Student made progress and ultimately met his typewriting goal. The goal states "[b]y March 14, 2018, [Student] will be able to type 3 sentences in five minutes with 80% accuracy in 4/5 trials." There is only one progress report dated October 16, 2017. At that point, Student was typing three sentences with more than 50% accuracy. The next goal provided that Student was to work towards 65% accuracy for the January reporting period.<sup>27</sup> As previously stated, the occupational therapist failed to provide any progress monitoring for the January reporting period. As result, there is no evidence documenting Student's progress or work towards his OT goal.<sup>28</sup>
25. Based on the facts described above, the SCO finds that School failed to implement Student's IEP as it pertains to occupational therapy.

Issue 1.e. – Failure to provide specialized transportation that ensured Student arrives on time to school.

26. The academic day begins at 8:25 for all students. However, breakfast is served at 8:15 when first bell rings. Mother states that it is important for Student to arrive prior to the first bell ringing otherwise Student becomes dysregulated and agitated. She states that transportation is regularly late to the point that Student is not only missing out on breakfast but also academics and this is causing him anxiety.
27. School District acknowledges that early in the school year, there were issues with transportation dropping off Student after the first bell. Upon becoming aware of the

---

<sup>25</sup> Interviews Mother, Advocate 1 and Advocate 2.

<sup>26</sup> Exhibit B; Interviews with Paraprofessional 1 and COTA.

<sup>27</sup> Exhibit B.

<sup>28</sup> Exhibit B, p. 27; The SCO notes that neither the OT Supervisor nor the COTA could say whether the goal set for Student was appropriate given his age and the upcoming demands of high school.

issue, transportation changed the pick-up time to ensure Student would arrive for breakfast. The Transportation Dispatcher interviewed for this State Complaint also acknowledged that there are other times Student may arrive late such as if there is a problem with the bus or a substitute bus driver is covering the route. Other than those situations, Transportation Dispatcher states that Student arrives as planned.<sup>29</sup>

28. In addition to interviewing the Transportation Dispatcher, the SCO reviewed a sampling of bus logs (March 14, 2018 – June 6, 2018) as a representation of Student’s arrival times at School. Based on a thorough review of the documentation provided, the SCO does not find evidence to support Mother’s contention that Student regularly arrived late. Out of the dates reviewed, Student arrived after first bell a total of 6 times. Of those six times, there was only one documented time when the bus arrived after the academic hour started. Lastly, Math Teacher, who is Student’s first hour teacher, reports that he has not observed Student being upset or anxious when he arrives after the first bell. In fact, he states that Student usually comes in and greets him with a smile.<sup>30</sup>
29. The SCO does not find evidence to support Mother’s assertion that Student was not delivered to School in a timely fashion, except for a few isolated incidences. Additionally, Mother acknowledges that she herself would take Student in late due to Student not feeling well or being reluctant to go to school. The SCO finds that these isolated incidences did not have an impact on Student’s access to the first period’s academic material.

Issue 1.f. – Failure to provide timely sensory breaks throughout the day

30. Student’s 2017 IEP requires that he receives three sensory breaks a day.<sup>31</sup> Specifically, the IEP states that “[Student] will have three regularly scheduled sensory breaks a day in order to prevent over-stimulation and reduce anxiety.” As for Student’s 2018 IEP, the accommodations provide that Student will receive at least two sensory breaks a day. Paraprofessional 1 was responsible for implementing this accommodation and he documented Student’s sensory breaks in the Tracking Log.<sup>32</sup>
31. Based on the evidence, the SCO finds that September through March 14, 2018, School failed to provide Student with the number of sensory breaks required by the IEP. A review of the Tracking Logs<sup>33</sup> show Student most often received only two sensory breaks a day and at times, he received only one or no sensory breaks.

---

<sup>29</sup> Interview Transportation Dispatcher.

<sup>30</sup> Exhibit D; Interviews Transportation Dispatcher, Math Teacher and Mother.

<sup>31</sup> The need for Student to receive three sensory breaks a day was again discussed during a meeting convened in November of 2017.

<sup>32</sup> Exhibit B; Interviews with Mother, Special Education Teacher and Paraprofessional 1.

<sup>33</sup> The Tracking Logs began consistently documenting sensory breaks mid-November of 2017.

32. As for the implementation of sensory breaks provided in the 2018 IEP, again, this IEP was modified to provide “at least two sensory breaks a day” to reduce Student’s anxiety. While the 2018 IEP reduced the number of Student’s sensory breaks a day, Student’s sensory needs continued to be one of the more documented areas of need. In fact a goal was added to Student’s 2018 IEP to address this need. A review of the Tracking Logs shows Student received only about two thirds of the sensory breaks he should have received from the March 2018 IEP through mid-May of 2018. Accordingly, the SCO finds that School failed to provide Student with the sensory breaks as outlined in the 2018 IEP.

Issue 2 - Whether the District failed to ensure all individuals providing direct special education and related services are appropriately trained in a rudimentary understanding of applied behavioral analysis

33. Student’s BIP provides that [a]ll individuals providing direct instruction with [Student] should have at least a rudimentary understanding of applied behavior analysis.” While there are many ways to define applied behavior analysis, in general, it is understanding the “why” behind a behavior and figuring out ways to increase positive behaviors and decrease and replace negative behaviors. Mother’s primary concern is focused on Paraprofessional 1 and whether he had the requisite skill to support Student.<sup>34</sup>
34. Based on a review of the record and interviews with School staff, the SCO finds that both Paraprofessional 1 and Paraprofessional 2 had a rudimentary understanding of applied behavior analysis. Special Education Teacher is primarily responsible for this provision. Her own background consists of previously working in an autism program and taking courses covering ABA. She provides daily coaching and mentoring to the paraprofessionals, as well working with them at weekly meetings. Paraprofessional 1 states that Special Education Teacher frequently worked with him, explained about Student’s reaction to peers and how best to support Student and coached him on the 4-point feeling chart. Lastly, Special Education Teacher made a specific protocol for how to handle situations involving Student that she reviewed with Paraprofessional 1.<sup>35</sup> Based on interviews with School staff and a review of the record, the SCO finds that Paraprofessional 1 and 2 had a rudimentary understanding of applied behavior analysis.

### **CONCLUSIONS OF LAW**

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

---

<sup>34</sup> Exhibit B. Interview with Mother, Special Education Teacher and Paraprofessional 1.

<sup>35</sup> *Id.* and Exhibit F.

**Issue 1: Whether the School District failed to implement and comply with Student’s IEP since the beginning of the 2017-2018 school year.**

Under the IDEA, local education agencies such as the School District are required to provide eligible students with disabilities with a free appropriate public education (“FAPE”) by providing special education and related services individually tailored to meet the student’s unique needs and provided in conformity with an individualized education program developed according to the Act’s requirements. 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17; ECEA Rule 2.19. To satisfy this obligation, the District must ensure that each teacher and service provider responsible for implementing a student’s IEP is informed of “his or her specific responsibilities related to implementing the child’s IEP” and “the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.” 34 CFR § 300.323(d)(2).

In addition to informing teachers of their responsibilities regarding a student’s IEP, however, the District must ensure that the IEP is being implemented. This obligation includes ensuring that all identified services are being consistently provided. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to implement an IEP can result in a denial of FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19.

With respect to 1(a) (relating to failure to appropriately monitor to ensure focus and understanding), the SCO finds School implemented this accommodation as it pertains to monitoring Student for focus. See FF (5). However, as it pertained to the understanding portion of this provision, the SCO finds that School failed to ensure the implementation of this provision. First, neither Paraprofessional nor Math Teacher were aware of this accommodation and as a result, Math Teacher would only catch Student making errors when he walked around the classroom. There was not a systematic check for understanding that occurred on a regular basis. See FF (6).

With respect to 1(b) (relating to failure to track completion of assignments), the SCO finds School failed to implement this accommodation. Paraprofessional 1 and Math Teacher were unaware of this provision and their responsibility to implement it. While School required all teachers to log assignments into Infinite Campus, neither Paraprofessional 1 nor Math Teacher followed-up with Student regarding missing assignments. In fact, it was not until March 2018 that Math Teacher provided Mother with a copy of Student’s missing assignments. Furthermore, Mother did not have access to Infinite Campus until March of 2018. A review of Infinite Campus shows Student was missing numerous assignments yet the main check for assignment completion was Infinite Campus and the Tracking Logs. As discussed in FF 9 and FF 10, the Tracking Logs did not contain meaningful data.

With respect to 1(c), (relating to failure to implement Student’s Behavioral Intervention Plan (BIP) as it pertains to teaching Student how to deal with other Students that do not treat

him with respect). As described in FF 12, Student was to receive social skills classes every week for 30 minutes. Student received 10 out of approximately 32 possible classes. While Paraprofessional tried to assist in this regard by removing Student from the situation or instructing him to ignore negative comments, Student was not provided the skills lessons specified in the IEP. While School states that they observed Student's social skills much improved from the previous year, neither the progress monitoring data nor the Tracking Log provides meaningful data to objectively determine progress.

With respect to 1(d), (relating to failure to provide Student with the occupational therapy services identified on the IEP), the SCO finds School failed to implement this service. While the School provided a formal log and OT's handwritten log, the SCO finds that the Tracking Log does not support the times Student was documented as receiving services. Additionally, OT's handwritten logs appear to have been written after the fact as the goals and time periods pertained to the March 2018 data and not the 2017 IEP data. The SCO concludes that the evidence is not sufficient to demonstrate that occupational therapy services were provided given the inconsistencies in the documentation provided.

With respect to 1(e), (relating to failure to implement specialized transportation that ensured Student arrives on time to school), the SCO does not find a failure to implement. All parties agree that initially Student was arriving late to School. Upon becoming aware of the situation, transportation arranged to pick-up Student earlier to remedy the situation. Upon review of the last three months of transportation logs, Student only arrived late one time where he missed less than 10 minutes of academic time. School has been responsive to Student's transportation needs during 2017-2018 academic year.

With respect to 1(f) (failure to provide timely sensory breaks throughout the day), the SCO finds that School failed to implement this provision as outlined in both Student's 2017 and 2018 IEP. Per Student's 2017 IEP, Student was to receive three regularly spaced sensory breaks a day to help reduce anxiety and over-stimulation. As logged in the Tracking Log and reported by Paraprofessional, Student received at most two sensory breaks a day and on occasion only one. The SCO concludes, Student received less than 2/3 the number of sensory breaks required by the 2017 IEP. As for the 2018 IEP, that IEP required "at least" two sensory breaks a day. Again, as logged in the Tracking Log, while Student frequently received two sensory breaks a day, there were days where he only received 1 or no sensory breaks at all. Upon a review of Student's Tracking Logs, School failed to provide approximately a 1/3 of the sensory breaks from March 14 through May 14, 2018.

Not every deviation from an IEP's requirements, however, results in a denial of FAPE. *E.g., L.C. and K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005)(minor deviations from IEP's requirements which did not impact student's ability to benefit from special education program did not amount to a "clear failure" of the IEP); *Van Duyn v. Baker Sch. Dist.* 5J, 481 F.3d 770 (9th Cir. 2007)(failure to implement IEP must be material to incur liability under IDEA, and minor discrepancies between the services provided and the services called for

do not give rise to an IDEA violation); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003)(failure to implement “essential” element of IEP denies FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000)(*de minimis* failure to implement IEP does not deny FAPE). This means that a finding that a school district has failed to implement a requirement of a child’s IEP does not end the inquiry. Rather, the SCO must also determine whether the failure was material. However, a showing of educational harm is not always required to demonstrate that the failure to implement the IEP was material. Rather, it is sufficient to compare the services required by the IEP to the services actually provided. *Holman v. District of Columbia*, 67 IDELR 39 (D.D.C. 2016)(stating that “[t]he ‘crucial measure’ under the materiality standard is the ‘proportion of services mandated to those provided’ and not the type of harm suffered by the student”).

In this case, the SCO has found a failure to implement a number of provisions in Student’s IEP, of which two were failures to provide a significant proportion of what was outlined in the IEP. Specifically, as discussed regarding allegation 1(c), Student did not receive over two thirds of the social skills lessons he should have been provided over the course of the school year. As for allegation 1(d) pertaining to occupational therapy, School failed to provide occupational therapy as required by the 2017 IEP. As for allegation 1(f) pertaining to sensory breaks, School failed to provide over one third of the sensory breaks. Accordingly, the SCO finds School’s failure to implement was material and denied Student FAPE.

### **REMEDIES**

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

- a) Failure to implement IEP, 34 C.F.R. § 300.323;
- b) Provision of FAPE, 34 C.F.R. Sec. 300.17.

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

- 1) By August 17, 2018, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violations noted in this Decision.
- 2) To remedy the failure to provide a Student with a FAPE, the District is ordered to take the following actions:
  - a. Within one week of the beginning of the 2018-19 school year,
    - i. Special Education staff (e.g., Special Education Director or ESS Case manager) shall meet with each of the Student’s teachers, paraprofessionals and direct service providers to review Student’s IEP for the 2018-2019 school year. This discussion should include the following:
      1. A review of Student’s goals and accommodations;

2. An explanation of responsibilities and obligations for implementing the IEP; and
  3. An explanation of how progress will be monitored.
  4. No later than September 7, 2018, School District shall provide documentation verifying the date the meeting(s) took place, the name of the individuals involved and the materials presented.
- b. Provide Compensatory Services:
- i. (11) hours of social skills lessons. These lessons be provided by a licensed special education teacher and consistent with the IEP. In addition, the provider of these lessons shall consult with Student's designated paraprofessional and special education teacher on a monthly basis to discuss how to incorporate the material to support Student's interactions with peers. These consultations shall occur until the requirements for compensatory services have been satisfied.
  - ii. (6.5) hours of direct occupational therapy to address both sensory and fine motor skills. These services must be provided by a licensed occupational therapist.
  - iii. To document the provision of these compensatory services, the School District must submit records of service logs to CDE by the second Monday of each month until compensatory services have been completed and no later than one year following the date of this decision.
  - iv. Within 10 days of receipt of this Decision, the School District must meet with Parent to schedule compensatory services. If Parent refuses to meet with the School District within this time period, the School District will be excused from providing compensatory services, provided that the School District diligently attempts to meet with Parent and documents its efforts. The determination that the School District has diligently attempted to meet with Parent and should therefore be excused from providing these services rests solely with the CDE.
  - v. These compensatory services shall begin immediately and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student towards IEP goals and objectives. The Parties shall cooperate in determining how the compensatory education services will be provided, with special consideration to Student's needs and stamina. The District must submit the schedule to the Department no later than September 7, 2018.

If for any reason, including illness, Student is not available for any scheduled compensatory services, the School District will be excused from providing the service scheduled for that session. If for any reason, the School District fails to provide a tutor for a scheduled compensatory education session, the School District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent, as well as notify the Department of the change in the monthly service log.

### **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).

Dated this 19th day of July, 2018.

---

Jacqueline Esquibel, Esq.  
State Complaints Officer

### **APPENDIX**

#### Complaint

1. 2017 IEP
2. List of concerns and Solutions
3. Notes
4. Communications between Mother and School staff
5. Incident Reports
6. Pictures of student
7. Text messages
8. Investigation Report

#### Response

- A. All prior written notices
- B. Special Education Documentation

- C. All Service Logs
- D. Documentation from transportation pertaining to scheduled and actual times of pick-up and drop-off from August 2017-present
- E. All disciplinary records involving Student
- F. Documentation regarding any training direct service providers receive
- G. Student's class schedule for the 2017-2018 school year
- H. All District policies and procedures relevant to the Complaint allegations
- I. All correspondence between District staff, School staff and Parent from the 2016-2017 school year to present
- J. All School District and School staff members who are involved with Student and have knowledge of the facts underlying the Complaint allegations
- K. Attendance Logs
- L. Special Education Teacher's Notes from weekly social skills lessons
- M. Daily Tracking Logs

**Interviews with:**

- Mother
- Advocate 1
- Advocate 2
- Disability Attorney
- English Teacher
- Art Teacher
- Math Teacher
- COTa
- Transportation Dispatcher
- Principal
- Paraprofessional 1
- Paraprofessional 2
- Special Education Teacher
- ESS Specialist