

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

---

**State-Level Complaint 2020:526  
Larimer County School District R-3**

**DECISION**

**INTRODUCTION**

The custodial grandparent (“Grandparent”) of a child (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> filed a state-level complaint (“Complaint”) against Larimer County School District R-3 (“District”) on August 3, 2020.

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

**RELEVANT TIME PERIOD**

The Colorado Department of Education (“CDE”) has authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, this investigation will consider only events that occurred not earlier than August 3, 2019 to determine whether a violation of the IDEA occurred. *Id.* Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. Findings of non-compliance, if any, shall be limited to one year prior to the date the Complaint was filed.

**SUMMARY OF COMPLAINT ALLEGATIONS**

Whether District denied Student a Free Appropriate Public Education because the District:

1. Failed to provide Grandparent with periodic reports on Student’s progress between August 23, 2019 and October 14, 2019, consistent with 34 C.F.R. § 300.320(a)(3)(ii);

---

<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.* The Exceptional Children’s Education Act (“ECEA”) governs IDEA implementation in Colorado.

2. Failed to properly implement Student’s IEP from August 3, 2019 to August 9, 2019, specifically by:
  - a. Failing to provide Student the extended school year (“ESY”) services required by his IEP, consistent with 34 C.F.R. §§ 300.106, 300.323; and
3. Failed to properly implement Student’s IEP from October 14, 2019 to January 13, 2020, specifically by:
  - a. Failing to provide Student the speech therapy, occupational therapy, and direct instruction from the school psychologist required by Student’s IEP, consistent with 34 C.F.R. §§ 300.34, 300.320(a)(4), 300.323.

### **FINDINGS OF FACT**

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

#### **A. Background**

1. Student attends sixth grade at a facility school (“Facility School”) for students with intense behaviors resulting from autism spectrum disorder (“ASD”) or serious emotional disturbance. *Interviews with Grandparent and Special Education Teacher.*
2. During the 2019-2020 school year, Student attended fifth grade at an elementary school in the District (“School”). *Id.* Student began at Facility School on or around January 15, 2020. *Id.*
3. Student is eligible for special education and related services under the categories of ASD and Serious Emotional Disability (“SED”). *Exhibit 6, p. 1.*
4. Student is described as a very bright young man with a wonderful imagination. *Interviews with Grandparent, Special Education Teacher, Speech Language Pathologist (“SLP”), Occupational Therapist, and School Psychologist.* Student is particularly interested in bugs, Legos, and dinosaurs and knows a great deal about each topic. *Id.* At School, Student struggles most with staying on task and completing his work. *Id.*

---

<sup>2</sup> The appendix, attached and incorporated by reference, details the entire record.

## **B. Student's 2018-2019 IEP**

5. At the beginning of Student's fifth-grade year, his November 28, 2018 IEP ("2018 IEP") was in effect. See *Exhibit 4*, pp. 1-20. Under the 2018 IEP, Student qualified for special education and related services under only SED. *Id.* at p. 1.

6. The 2018 IEP reviewed Student's present levels of performance, noting that Student often refused to complete work when asked. *Exhibit 4*, pp. 3-4. When Student did comply, he produced quality work (though significantly below grade level). *Id.* at p. 3. However, when Student did not comply, he became disruptive, engaging in unsafe and unpredictable behaviors. *Id.* at p. 4.

7. As noted in the 2018 IEP, Student's SED "heavily impacted" his academic performance. *Id.* at p. 6. "When [Student] [was] in a positive emotional state, he typically complie[d] with directions from staff and complete[d] his work without issue. When [Student] [was] in a negative emotional state, he refuse[d] to comply with directions from staff" and became disruptive. *Id.*

8. The 2018 IEP contained eight goals targeting Student's self-determination, social/emotional wellness, mathematics, reading, and writing. *Id.* at pp. 8-11.

9. Under the 2018 IEP, Student received the following special education and related services:

- Special Education: 1,830 minutes per week (30.5 hours) of direct instruction outside of general education;
- Special Education: 100 minutes per week of direct instruction inside general education;
- Speech Therapy: 15 minutes per quarter of indirect services; and
- Psychological Services: 120 minutes per month of direct services.

*Id.* at p. 16.

10. Per the 2018 IEP, Student spent less than 40% of his time in the general education classroom. *Id.* at p. 17.

## **C. Extended School Year ("ESY")**

11. In Spring of 2019, Student's IEP Team determined that Student qualified for ESY services. *Interview with Director of Student Services ("Director"); Exhibit 4*, p. 15.

12. August 3 and 4 were weekend days, so Student would not have received any ESY services those days. *Interview with Director*. During the week of August 5-9, Student was to

receive three hours of one-on-one academic instruction on four days, for a total of 12 hours. *Id.* Though Student received other ESY services that summer, those services are not the subject of this investigation.

13. The District does not dispute that Student did not receive any ESY services the week of August 5-9. *Response*, p. 4; *Interview with Director*. The District was unable to locate a teacher for Student and, therefore, did not provide the ESY services. *Response*, p. 4; *Interview with Director*.

#### **D. Beginning of 2019-2020 School Year**

14. Student began fifth grade on August 21, 2019. *Interview with Director*. In Spring 2019, Student was temporarily placed on homebound instruction, so, in August, Student was transitioning back into the traditional school environment. *Id.*; *Interview with Special Education Teacher*. As a result, Student had a modified schedule, attending School for three hours each day, five days a week. *Interviews with Director and Special Education Teacher*. Though the hours occasionally varied, Student typically attended School from 9:00 a.m. to 12:00 p.m. *Interviews with Special Education Teacher and Grandparent*.

15. Ordinarily, Grandparent dropped Student off in front of the School, where he was met by Special Education Teacher. *Id.* Special Education Teacher escorted Student to the classroom. *Interview with Special Education Teacher*.

16. Once in the special education classroom, Special Education Teacher provided Student one-on-one academic instruction for the duration of Student's school day except for short restroom or snack breaks. *Id.*

17. At the beginning of the 2019-2020 school year, Special Education Teacher focused on Student's ability to remain on task for academic work. *Id.* Each day, Special Education Teacher contemporaneously logged Student's activities—down to the minute—in a daily points sheet. *Id.*; *see Reply*, pp. 18-19, 22-32. Special Education Teacher used the data in the daily points sheets to prepare weekly graphs detailing Student's time on task that particular week. *Response*, p. 1; *Interview with Special Education Teacher*; *see, e.g., Exhibit G*, p. 22-23; *Exhibit J*, pp. 1-5.

18. Other than brief restroom breaks, Special Education Teacher was with Student the entire time Student was at School. *Interview with Special Education Teacher*.

19. From the beginning of the school year until October 1, Student did not receive recess; instead, his time at School was focused on academics and increasing time on task. *Id.* Beginning October 1, Student had recess but without any of his peers (with only Special Education Teacher). *Id.* Before he left for the day, Student usually ate lunch in the classroom—either something Student brought from home or a hot lunch he would pick up in the cafeteria and bring back to the classroom. *Id.* Though Student was given the choice to eat lunch in the

cafeteria, he never chose that option, preferring, instead, to eat in the classroom with Special Education Teacher. *Id.*; *Reply*, p. 6.

### **E. Implementation of 2018 IEP**

20. Per District policy, a student’s case manager is responsible for providing a student’s teachers and service providers with a snapshot of the student’s IEP, which summarizes the services and accommodations required by the IEP. *Exhibit B*, p. 154. Special Education Teacher provided a snapshot of Student’s 2018 IEP to Student’s service providers at the beginning of the 2019-2020 academic year. *Interview with Special Education Teacher*.

21. District policy provides that “[t]he IEP is a legally binding document. All services described therein must be provided.” *Exhibit B*, p. 155. Service providers must “maintain records/logs of services provided to all students on IEPs. Service records/logs will be submitted to supervisor on a monthly basis or as requested.” *Id.* At a minimum, the logs must include: the date of the service, the length of the service, and the location of the service. *Id.*

#### **Special Education**

22. Between August 21 and October 14, Student received approximately three hours of special education instruction each day (or 15 hours per week). *Interview with Special Education Teacher*. The entirety of Student’s special education instruction occurred during Student’s one-on-one time with Special Education Teacher outside the general education classroom. *Id.*

23. During this time period, Student did not receive any special education instruction inside the general education classroom. *Id.*

24. Student’s modified school day made it impossible for Student to receive 30.5 hours per week of special education instruction outside the general education classroom, as required by the 2018 IEP. *Id.* Student’s IEP Team did not amend the 2018 IEP to adjust Student’s special education and related services based on his modified school day. *Interview with Director*.

25. Based on these facts, the SCO finds that in the first 7 weeks of the school year—when Student’s 2018 IEP was implemented—the District failed to provide Student with (a) 105 hours of special education instruction outside the general education classroom and (b) 11 hours and 40 minutes of special education instruction inside the general education classroom.

#### **Speech Therapy**

26. Between August 21 and October 14, SLP provided Student’s indirect speech services through informal, unscheduled conversations with Special Education Teacher when they passed in the hallway. *Interview with SLP*. During these conversations, SLP would ask questions such as “What is [Student’s] mood?” or “How is he interacting?”. *Id.* At the time, Student “was having a lot of outburst type behaviors and we would discuss that and how [Special Education

Teacher] handled those things.” *Id.* By SLP’s own admission, she and Special Education Teacher “talked about a lot of things that weren’t always communication based but we spoke a lot.” *Id.*

27. Special Education Teacher recalled having only a single conversation with SLP about Student’s speech needs. *Interview with Special Education Teacher.* On that occasion, SLP popped by the classroom unannounced and “said a few words and encouraged [Student] to keep working on his r’s.” *Id.*

28. SLP tracked the indirect services provided to Student in her planner. *Interview with SLP.* When she had a conversation with Special Education Teacher, SLP would put a checkmark next to Special Education Teacher’s name on the pages for that week in her planner. *See, e.g., Exhibit O, pp. 11-18.*

29. Based on these facts, the SCO finds that Student received five minutes of indirect speech therapy during the single conversation that Special Education Teacher recalled having about Student’s speech needs. As a result, the SCO finds that—between August 21 and October 14—the District failed to provide Student with 10 minutes of indirect speech therapy.

#### Psychological Services

30. On the first two days of the 2019-2020 school year, School Psychologist met with Student to help his transition back to School from homebound learning. *Interviews with School Psychologist and Special Education Teacher.* This also allowed Special Education Teacher to serve other students as needed. *Id.* After the first couple of days, Student began his regular one-on-one schedule with Special Education Teacher. *Id.*

31. From August 23 to October 14, School Psychologist indicated she met with Student on Wednesdays “toward the end of [Student’s] day.” *Interview with SLP.* School Psychologist said Special Education Teacher used time with School Psychologist to motivate Student to stay on task and complete his work. *Id.*

32. During their meetings, School Psychologist and Student worked on regulating emotions and social skills. *Id.* They also practiced meditation and mindfulness. *Id.*

33. Special Education Teacher indicated that School Psychologist never had any scheduled time with Student but, instead, occasionally spoke with Student in the hallway for a minute or two at a time. *Interview with Special Education Teacher.*

34. School Psychologist tracked the services she provided to Student on paper notes. *Interview with School Psychologist.* The notes were maintained in separate folders for each student on her caseload. *Id.*

35. During this investigation, the District did not produce any logs or notes identifying the services School Psychologist provided to Student between August 21 and October 14. *See, e.g., Exhibit O*, pp. 1-18.

36. Because School Psychologist and Special Education Teacher agree that Student received some psychological services on the first two days of the school year, the SCO finds that the District provided Student with 6 hours of psychological services. As demonstrated by the facts above, nothing in the record substantiates the provision of any further services. Therefore, the SCO finds that the District failed to provide Student with 204 minutes of psychological services between August 21 and October 14.

#### **F. Student's 2019-2020 IEP**

37. On October 9, 2019, Clinical Psychologist completed an independent educational evaluation ("IEE") of Student. *Exhibit 8*, pp. 1-18. The IEE concluded that Student experienced ASD, Attention Deficit Hyperactivity Disorder ("ADHD"), Specific Learning Disorder, Developmental Coordination Disorder, and Other Specified Disruptive, Impulse-Control and Conduct Disorder. *Id.* at p. 14.

38. The District issued a proper Notice of Meeting on October 3, indicating that Student's IEP Team would meet on October 14. *Exhibit D*, p. 2.

39. Student's IEP Team met on October 14 to consider the IEE and data from the first quarter of the 2019-2020 school year (regarding Student's ability to stay on task). *Interviews with Special Education Teacher and Director; see Exhibit 6*, pp. 1-6. After consideration of the IEE, the IEP Team determined that Student qualified for special education and related services under the categories of SED and ASD. *Exhibit 6*, p. 1.

40. Student's new IEP ("2019 IEP")—dated October 14, 2019—recounted Student's present levels of performance, noting that Student had "made progress in the areas of attending to assigned tasks, responding to redirection and persevering when encountering a challenging task." *Exhibit 6*, p. 3. However, Student "often balk[ed] at engaging in even the most simple academic task, regardless of prior success, reminders or assistance." *Id.* Student was reading at a third-grade level, with his math skills below his peers. *Id.* at p. 4.

41. Student's SED and ASD "heavily impacted" his academic performance. *Id.* at p. 7. His disabilities also affected his peer relationships and his ability to handle transitions at School. *Id.*

42. The 2019 IEP contained 12 goals targeting the areas of self-determination, social/emotional wellness, mathematics, reading, writing, and independent living skills. *Id.* at pp. 9-13. Eight of the goals in the 2019 IEP were identical to those in the 2018 IEP. *Id.* at pp. 9-13; *Exhibit 4*, pp. 8-11.

43. Under the 2019 IEP, Student was to receive the following special education and related services:

- Special Education: 1,980 minutes (33 hours) per week of direct instruction outside of general education;
- Speech Therapy: 15 minutes per week of indirect speech services;
- Psychological Services: 120 minutes per month of direct services; and
- Occupational Therapy: 30 minutes per month of indirect services.

*Exhibit 6, p. 17.*

44. Based on the IEE, the IEP Team concluded that Student required more therapeutic supports than the District could provide. *Interview with Director.* As a result, the IEP Team changed Student's placement to a separate school. *Id.; Exhibit 6, p. 1.*

### **G. Implementation of 2019 IEP**

45. In accordance with District policy, Special Education Teacher provided a snapshot of Student's 2019 IEP to his service providers once the IEP was developed. *Interview with Special Education Teacher.*

#### **Special Education**

46. Between October 15 and January 14, Student continued to receive approximately three hours of special education instruction each day (or 15 hours per week). *Interview with Special Education Teacher.* The entirety of Student's special education instruction occurred during Student's one-on-one time with Special Education Teacher outside the general education classroom. *Id.*

47. The 2019 IEP did not take into account Student's modified schedule at School but, instead, tried to set forth the services the IEP Team thought Student would need at a separate school. *Interview with Director.* During the time between finalization of the 2019 IEP and Student's placement at a separate school, however, Student's modified schedule made it impossible for Student to receive 33 hours of special education instruction per week, as required by the 2019 IEP. *Interview with Special Education Teacher.*

48. Based on these facts, the SCO finds that the District failed to provide Student with 176 hours of special education between October 15 and January 14.



### Speech Therapy

49. Between October 15 and January 14, SLP continued to provide Student's indirect speech services through informal, unscheduled conversations with Special Education Teacher.

*Interview with SLP.* As with the services under the 2018 IEP, these conversations occurred in passing in the hallway. *Id.* SLP acknowledged that much of her communications with Special Education Teacher were not related to Student's speech needs. *Id.*

50. During this time period, Special Education Teacher recalled his conversations with SLP being "nothing more than 'How's he doing?' catch ups in the hallway." *Interview with Special Education Teacher.* Special Education Teacher indicated they had no conversations about Student's speech needs. *Id.*

51. SLP tracked the indirect services provided to Student in her planner. *Interview with SLP.* When she had a conversation with Special Education Teacher, SLP would put a checkmark next to Special Education Teacher's name on the pages for that week in her planner. *See, e.g., Exhibit O, pp. 11-18.*

52. Based on these facts, the SCO finds that the District failed to provide Student with 180 minutes (or 3 hours) of indirect speech services between October 15 and January 14.

### Psychological Services

53. Between October 15 and January 14, School Psychologist indicated she met with Student either first thing in the morning or near the end of his school day. *Interview with School Psychologist.* During their meetings, Student and School Psychologist worked on regulating emotions and social skills. *Id.* They also practiced meditation and mindfulness. *Id.*

54. In its Response, the District stated that School Psychologist provided Student services on the following dates:

- 10/17 – "morning check in – rough start and needed to go for a walk – 30 min[s]"
- 10/24 – "went to book fair – 30 min[s]"
- 10/31 – "morning check in – meditation 30 [mins]"
- 11/05 – "morning check in – played Angry Dragon card game – 20 [mins]"
- 11/14 – "morning check in – read story and identified emotions of characters – 20 [mins]"
- 11/20 – "morning check in – lego emotion activity – 15 [mins]"
- 12/04 – "supported student at lunch in cafeteria – 20 [mins]"
- 12/11 – "supported student at lunch in cafeteria – 20 [mins]"
- 12/18 – "went on walk with student – 15 [mins]"
- 1/14 – "went on walk with student (last day of school in our district for time being) – 15 [mins]"

*Response*, p. 2. School Psychologist provided this information to Director for inclusion in the District's Response. *Interviews with Director and School Psychologist*. Director did not personally review School Psychologist's notes before submitting the District's Response. *Id.*

55. School Psychologist tracked the services provided to Student on paper kept in School Psychologist's file for Student. *Interview with School Psychologist*. On September 18, 2020—more than 46 days into this investigation—the District produced a copy of School Psychologist's notes to the SCO. *See Exhibit O*, pp. 2-10.

56. School Psychologist's notes contradict, in part, the District's Response. Her notes indicate she provided Student with 35 minutes of services on October 17 and October 24, instead of the 30 minutes listed in the Response. *Exhibit O*, pp. 2-3; *Response*, p. 2. Additionally, per her notes, Student received 25 minutes of services on November 5 compared to 20 minutes listed in the Response. *Exhibit O*, p. 5; *Response*, p. 2. Her notes contain no entry for November 20. *See Exhibit O*, pp. 2-10. In total, School Psychologist's notes suggest she provided Student with—at most—100 minutes of services in October, 45 minutes of services in November, and 15 minutes of services in January. *Id.*

57. Additionally, School Psychologist's notes contradict Special Education Teacher's memory and daily logs. Special Education Teacher indicated that School Psychologist never had any scheduled time with Student but, instead, occasionally spoke with Student in the hallway for a minute or two at a time. *Interview with Special Education Teacher*. Special Education Teacher specifically recalled School Psychologist having an 8 to 10-minute conversation with Student on October 31. *Id.*; *Reply*, p. 17. During that conversation, Special Education Teacher remembered School Psychologist "lecturing" Student on "how to conduct himself when trick-or-treating." *Reply*, p. 17. Special Education Teacher noted this conversation in his daily log using School Psychologist's initial and "t/t" for trick-or-treating. *Reply*, p. 27.

58. Special Education Teacher's daily logs also conflict with the other dates of service provided by School Psychologist in her notes and in the District's Response. For example, on October 24, School Psychologist indicated she took Student to the book fair from 9:00-9:35 a.m. *Exhibit O*, p. 3. Per Special Education Teacher's log, Student arrived at School at 8:30 a.m. that day. *Reply*, p. 25. Between 9:00-9:35 a.m., Special Education Teacher's log says Student was working on subtraction, taking a restroom break, and having a snack. *Id.*

59. There are also inconsistencies between School Psychologist's account and Student's daily activities at School. For example, School Psychologist reported that she provided Student with morning check-ins when Student arrived at School. *Response*, p. 2. Yet, Special Education Teacher stated that he met Student at the School doors each and escorted him immediately to the classroom to begin academic work. *Interview with Special Education Teacher*.

60. School Psychologist also indicated she served Student while he ate lunch in the cafeteria with his peers. *Response*, p. 2; *Exhibit O*, pp. 7-8. But Special Education Teacher contended that Student never ate lunch in the cafeteria with his peers. *Interview with Special Education Teacher*.

61. Based on these facts, the SCO finds Special Education Teacher's account of Student's psychological services to be more credible than that of School Psychologist. The SCO has given the District credit for 10 minutes of psychological services provided on October 31. The SCO finds that—between October 15 and January 14—the District failed to provide Student with 350 minutes of psychological services.

### Occupational Therapy

62. Between October 15 and January 14, Occupational Therapist indicated she provided indirect occupational therapy to Student by popping into Special Education Teacher's classroom and, if he was alone, asking him how things were going with Student and if he needed anything. *Interview with Occupational Therapist*. Most of the time Special Education Teacher said things were going fine and that he did not need help. *Id.* The District's Response indicated that she provided services through "weekly emails and meetings," but Occupational Therapist said she did not provide services via email during the relevant period. *Id.*; *Response*, p. 3.

63. Special Education Teacher denied having any conversations with Occupational Therapist about Student's occupational therapy needs. *Reply*, p. 40.

64. During this time, Occupational Therapist tracked the services provided to Student in a paper notebook. *Interview with Occupational Therapist*. For example, when Occupational Therapist spoke with Special Education Teacher, she would write something akin to "Touched base with [Special Education Teacher], all is well." *Id.* The entries in her notebook were undated. *Id.*

65. The District did not produce any records from Occupational Therapist's notebook. See *Exhibit O*, pp. 1-18. Instead, on September 18, 2020, the District untimely produced a document Occupational Therapist created during the investigation that was a "reconstruction from [her] notes and memory" of the services she provided to Student. *Id.* at p. 1.

66. Occupational Therapist's reconstruction includes 120 minutes of services provided during Student's October 14 IEP Team meeting. *Id.*; *Interview with Occupational Therapist*. The other entries—which total 50 minutes—include discussions about Student during "Child Find" meetings and impromptu hallway conversations with Special Education Teacher. *Exhibit O*, p. 1.

67. The SCO finds Occupational Therapist's reconstruction to be unreliable. As result, the SCO finds that the District failed to provide Student with 90 minutes of occupational therapy between October 15 and January 14.

## H. Progress Monitoring

68. Per District policy, “[p]rogress reports related to student progress toward IEP goals are to be completed, at a minimum, at the same frequency as progress reports for general education students.” *Exhibit A*, p. 137. At the elementary level, progress reports are sent home quarterly with a student’s report card. *Interview with Director; Exhibit A*, p. 138.
69. Case managers and service providers are required to complete progress reports in the District’s data management system at the end of each quarter. *Exhibit A*, p. 138.
70. The first quarter of the 2019-2020 school year ended on October 14, 2019 (the same day as Student’s IEP Team meeting). *Exhibit B*, p. 1. The second quarter ended on December 20, 2019. *Id.*
71. Two progress reports are at issue in this investigation. The first progress report addressed Student’s progress under the 2018 IEP (“2018 IEP Progress Report”), while the second progress report addressed Student’s progress under the 2019 IEP (“2019 IEP Progress Report”). See *Exhibit 1*, pp. 1-4 and *Exhibit 3*, pp. 1-6.
72. The 2018 Progress Report contains data entries on October 1, 2019 and December 1, 2019. *Exhibit 1*, pp. 1-4. These entries do not align with the end of quarter dates. *Exhibit B*, p. 1; *Interview with Special Education Teacher*. Because Student’s 2019 IEP was developed on October 14, there would have been no need to continue monitoring Student’s progress on the 2018 IEP on December 1, 2019 (after implementation of the 2019 IEP). *Interview with Special Education Teacher*.
73. Several of the December 1 entries refer to Special Education Teacher as “homebound teacher.” *Exhibit 1*, pp. 1-4. Special Education Teacher was Student’s homebound teacher in the Spring of 2019 but was not Student’s homebound teacher in December 2019. *Interview with Special Education Teacher*. Indeed, Special Education Teacher taught Student at School. *Id.*
74. Like the 2018 IEP Progress Report, the 2019 IEP Progress Report contains data entries for December 1, 2019. *Exhibit 3*, pp. 1-6. Additionally, all eight of the goals from the 2018 IEP were included in the 2019 IEP. *Exhibit 1*, pp. 1-4; *Exhibit 3*, pp. 1-6. As a result, both progress reports measure—in large part—the same goals for the same period. Yet, the December 1 entries are remarkably different on the two reports.
75. For example, one reading goal challenged Student to “read irregular words from a 4<sup>th</sup> grade list with 80% accuracy in 3 consecutive trials, as measured by teacher/provider charted records.” *Exhibit 1*, p. 3; *Exhibit 3*, pp. 3-4. The December 1 entries in the progress reports state:

- 2018 IEP Progress Report: “Per [S]pecial Education Teacher], homebound teacher: Currently [Student] is reading irregular words from a 4<sup>th</sup> grade list with 20-30% accuracy.” *Exhibit 1*, p. 3.
- 2019 IEP Progress Report: “[Student] is reading from a 2<sup>nd</sup> grade irregular word list and achieving 50% accuracy over 3 consecutive trials.” *Exhibit 3*, pp. 3-4.

76. One of Student’s mathematics goals provided: “With the option to use a multiplication chart, [Student] will give the product of 10 multiplication problems (numbers 0-12) with 80% accuracy in 3 consecutive trials, as measured by teacher observation.” *Exhibit 1*, p. 2; *Exhibit 3*, p. 3. The December 1 entries in the progress reports state:

- 2018 IEP Progress Report: “Per [Special Education Teacher], homebound teacher: [Student] is currently meeting this goal with 100% accuracy . . . .” *Exhibit 1*, p. 2.
- 2019 IEP Progress Report: “[Student] is successfully completing multiplication problems using a multiplication chart with 70% accuracy over 10 problems for 3 consecutive days.” *Exhibit 3*, p.3.

77. These are only two examples of the contradictions between the two progress reports. See *Exhibit 1*, pp. 1-4; *Exhibit 3*, pp. 1-6.

78. During both first and second quarters, Special Education Teacher was Student’s case manager and Student’s special education teacher. *Interviews with Director and Special Education Teacher*. As a result, Special Education Teacher was responsible for monitoring Student’s goals under both the 2018 and 2019 IEPs. *Id.* Special Education Teacher indicated that he did not author the December 1 entries in the 2018 IEP Progress Report. *Interview with Special Education Teacher*. He also found the dates for the remaining entries—the October 1 entries in the 2018 IEP Progress Report and the December 1 entries in the 2019 IEP Progress Report to be suspect based on the quarter end dates but agreed that the language appeared to be his. *Id.*

### **I. Facility School**

79. On January 15, 2020, Student began at Facility School. *Interviews with Grandparent and Special Education Teacher*. Though Facility School accepted Student shortly after development of the 2019 IEP, Facility School needed to hire and train additional staff before Student could start attending. *Id.* Shortly after Student began at Facility School, Special Education Teacher’s position was eliminated. *Interview with Special Education Teacher*.

80. Facility School suspended in-person instruction as a result of the COVID-19 pandemic in March 2020. *Interview with Grandparent*. On September 8, 2020, Student returned to in-person instruction at Facility School. *Id.* Due to his transportation needs, Student leaves for Facility School around 6:45 a.m. and returns home around 4:00 p.m. *Id.*

81. Student's current IEP at Facility School—dated March 2, 2020—requires Student to receive the following special education and related services:

- Special Education: 1,717 minutes (28.6 hours) per week of direct instruction outside of general education;
- Mental Health: 240 minutes per month of direct services;
- Occupational Therapy: 120 minutes per month of direct services; and
- Speech Therapy: 60 minutes per month of indirect services.

*Exhibit 10, p. 39.*

82. In the past, Student received therapy from a Private Psychologist with success. *Interview with Grandparent.* Due to the COVID-19 pandemic, Student has not seen Private Psychologist recently, but Grandparent hopes Student can resume in-person therapy with Private Psychologist soon. *Id.*

### **CONCLUSIONS OF LAW**

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

**Conclusion to Allegation No. 1: The District failed to provide Grandparent with periodic reports of Student's progress on his annual IEP goals between August 23, 2019 and January 14, 2020, in violation of 34 C.F.R. § 300.320(a)(3).**

Grandparent's Complaint alleged that the District failed to provide her with periodic reports on Student's progress between August 23, 2019 and January 14, 2020. A note of clarification is necessary before analyzing Grandparent's allegation. Because the District's progress reports are undated, Grandparent cited the IEP meeting date (October 14, 2019) as the date of the deficient progress report. However, though the progress report contains that date, it monitors Student's progress through January 14, 2020. Accordingly, the SCO has investigated whether the District failed to provide Grandparent with periodic reports of progress between August 23, 2019 and January 14, 2020.

Under the IDEA, school districts must provide periodic reports on the progress a student is making toward the student's annual goals. 34 C.F.R. § 300.320(a)(3). Here, the SCO finds and concludes the District's progress reports to be inadequate and unreliable. As detailed below, the progress reports contain widespread inaccuracies and contradictions.

As an initial matter, the dates contained within the progress reports contradict the District's policy of reporting progress at the end of a quarter. The reports measured progress on October 1 and December 1 when the respective quarters did not end until October 14 and December

20. (FF #s 70, 72.) Additionally, Student's IEP Team met on October 14 to develop the 2019 IEP. (FF #s 39, 40.) As a result, there would have been no need to continue to measure Student's progress on the 2018 IEP on December 1, after the 2019 IEP had already been implemented. (FF # 72.)

Moreover, the December 1 entries in the 2018 IEP Progress Report refer to Special Education Teacher as "Homebound Teacher." (FF # 73.) Though Special Education Teacher was Student's homebound instructor in Spring of 2019, he was not in Fall of 2019. (*Id.*) And, if Special Education Teacher authored the 2018 IEP Progress Report as the District indicated, it seems incredulous that Special Education Teacher would have incorrectly referred to himself as Student's homebound teacher. This is especially true given that the October 1 entries do not refer to Special Education Teacher in that manner.

Eight of Student's annual IEP goals appeared in both the 2018 IEP and the 2019 IEP. (FF # 42.) Accordingly, the 2018 IEP Progress Report and the 2019 IEP Progress Report contained data entries measuring Student's progress on those goals as of December 1. (FF # 74.) One would expect to see significant overlap in the progress reported on December 1; however, this could not be further from the truth. Instead, the reported progress for December 1 is inconsistent on the exact same goals. (See FF #s 75-77.) Where the 2018 IEP Progress Report might indicate that Student mastered the goal, the 2019 IEP Progress Report might state that Student has not yet mastered the goal. (*Id.*)

These discrepancies occur throughout the progress reports and undermine the credibility of the reports. Without accurate information, a progress report cannot adequately inform a parent or guardian of a student's progress on his or her annual goals. Here, the inconsistent information between the 2018 IEP Progress Report and the 2019 IEP Progress Report (which, per District policy, would have been provided to Grandparent on the same day) would not have informed Grandparent of Student's progress on his IEP goals. As a result, the SCO finds and concludes that the District failed to provide Grandparent with periodic reports monitoring Student's progress on his annual goals in violation of 34 C.F.R. § 300.320(a)(3).

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent's opportunity to participate in the IEP process).

Based on the record, the District's failure to provide Grandparent with progress reports did not impede Student's right to a FAPE or deprive Student of an educational benefit. This failure could have impeded Grandparent's opportunity to participate in the decision-making process

regarding Student's change of placement. However, no evidence in the record suggests Grandparent relied, in any way, on the 2018 IEP Progress Report or 2019 IEP Progress Report, as both reports were provided after the decision to change Student's placement. Therefore, this procedural violation did not result in a denial of FAPE under 34 C.F.R. § 300.513(a)(2).

**Conclusion to Allegation No. 2: The District failed to fully implement Student's 2018 IEP when it did not provide Student ESY services on August 5-8, 2019, in violation of 34 C.F.R. § 300.323(c)(2).**

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is "the centerpiece of the statute's education delivery system for disabled children . . . [and] the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student's IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

**A. Failure to Implement ESY Services under 2018 IEP**

The District agrees that Student was entitled to 12 hours of one-on-one academic instruction during the week of August 5, 2019 as part of Student's ESY services. (FF # 12.) There is no dispute that Student did not receive the required services. (FF # 13.) As a result, the SCO finds and concludes that the District failed to fully implement Student's 2018 IEP, in violation of 34 C.F.R. § 300.323(c)(2).

**B. Materiality of Failure to Implement**

The failure to implement a "material", "essential", or "significant" provision of a student's IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with "sister courts . . . that a material failure to implement an IEP violates the IDEA"); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an "essential element of the IEP" denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the "significant provisions of the IEP" denies a FAPE). "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard "does not require that the child suffer demonstrable educational harm in order to prevail." *Id.* But a child's educational progress, or lack thereof, may indicate whether there has been more than a "minor shortfall in the services provided." *Id.*



Here, the District failed to provide Student ESY services over one week in the summer. (FF #s 12-13.) The missed services included 12 hours of academic instruction spread over four calendar days. (*Id.*) Without diminishing the value of the ESY services Student missed, the SCO finds the District's failure to be immaterial. Given the significant services required by Student's 2018 IEP (FF # 9), the District's failure to provide 12 hours of services amounts to a minor shortfall in services and did not result in a denial of FAPE.

**Conclusion to Allegation No. 3: The District failed to fully implement Student's 2018 IEP by neglecting to provide Student all the required special education and related services, in violation of 34 C.F.R. § 300.323(c)(2). Additionally, the District similarly failed to fully implement Student's 2019 IEP when it did not provide Student all the required special education and related services, in violation of 34 C.F.R. § 300.323(c)(2).**

As noted above, a student's IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2). A school district must ensure that "as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child's IEP." *Id.* § 300.323(c)(2). To satisfy this obligation, a school district must ensure that each teacher and related services provider is informed of "his or her specific responsibilities related to implementing the child's IEP," as well as the specific "accommodations, modifications, and supports that must be provided for the child in accordance with the IEP." *Id.* § 300.323(d).

**A. Implementation of 2018 IEP between August 21 and October 14**

The SCO initially accepted an allegation regarding implementation of the 2019 IEP. During the course of this investigation, Grandparent notified the SCO of an error in the allegations accepted for investigation. Specifically, Grandparent indicated she alleged that the District failed to fully implement Student's 2018 IEP, in addition to Student's 2019 IEP. Further review by the SCO confirmed Grandparent's claim. The SCO notified the District that the investigation would also address implementation of Student's 2018 IEP from August 21 to October 14. The District was given opportunity to produce additional documentation and to address implementation of the 2018 IEP during interviews.

Under the 2018 IEP, Student should have received the following services:

- Special Education: 1,830 minutes per week (30.5 hours) of direct instruction outside of general education;
- Special Education: 100 minutes per week of direct instruction inside general education;
- Speech Therapy: 15 minutes per quarter of indirect services; and
- Psychological Services: 120 minutes per month of direct services.

(FF # 9.)

The SCO finds and concludes that each of Student's teachers and service providers was informed of his or her responsibilities under Student's 2018 IEP. As Student's case manager, Special Education Teacher provided Student's service providers with a snapshot of Student's IEP in accordance with District policy. (FF # 20.) Additionally, the entire 2018 IEP remained available to staff in the District's data management system. Therefore, the District complied with 34 C.F.R. § 300.323(d). Nonetheless, for the reasons detailed below, the SCO concludes that the District violated the IDEA when it neglected to provide Student the required special education and related services.

### Special Education

The 2018 IEP required significant special education despite Student's modified schedule. (FF #s 22, 24). Between August 23 and October 14, Student only attended School three hours per day. (*Id.*) And Student spent almost the entirety of his day receiving special education instruction. (FF # 16.) But Student's modified schedule made it impossible for Student to receive the 30.5 hours of direct special education instruction per week. (*Id.*) The SCO, therefore, finds and concludes that—during the approximately seven weeks at issue—Student missed 108 hours of direct special education instruction outside the general education classroom.

Additionally, at that time, Student was not participating in general education whatsoever (not even recess). (FF # 19.) As a result, Student did not receive any of the required direct special education instruction inside the general education environment. (FF # 23.) The SCO finds and concludes that the District failed to provide Student with 700 minutes of direct special education instruction inside the general education classroom. (FF # 25.)

### Speech Therapy

Between August 23 and October 14, SLP provided Student indirect speech services through informal, unscheduled conversations with Special Education Teacher. (FF # 26.) SLP, by her own admission, conceded that many of their conversations were not related to Student's speech needs. (*Id.*) In fact, Special Education Teacher recalled only one conversation with SLP about Student's speech needs. (FF # 27.)

SLP tracked the services provided to Student by making a checkmark in her planner next to Special Education Teacher's name. (FF # 28.) The SCO has given the District five minutes of credit for the conversation Special Education Teacher recalled. (FF # 29). As a result, the SCO

finds and concludes that the District failed to provide Student with 10 minutes of indirect speech therapy. (*Id.*)

### Psychological Services

Between August 23 and October 14, School Psychologist indicated she met with Student on Wednesdays to provide him psychological services. (FF # 31.) Meanwhile, Special Education Teacher asserted that School Psychologist never had any scheduled time with Student; instead, School Psychologist sometimes spoke to Student in the hallway in passing but not for the purpose of providing psychological services. (FF # 33.)

Though School Psychologist indicated she maintained paper records of the services provided to Student, the District has not produced any of those records to date. (FF #s 34-35.) The SCO, therefore, has nothing to substantiate the District's assertion that Student received his psychological services. However, both School Psychologist and Special Education Teacher agree that School Psychologist provided Student with at least some psychological services on the first two days of the school year. (FF # 30.) Therefore, the SCO has given the District credit for 6 hours of psychological services. (FF # 36.) The SCO finds and concludes that the District failed to provide Student with 204 minutes of psychological services. (*Id.*)

In total, as a result of the District's failure to fully implement Student's 2018 IEP, Student did not receive: (a) 108 hours of direct special education instruction outside the general education environment; (b) 700 minutes of direct special education instruction inside the general education environment; (c) 10 minutes of indirect speech therapy; and (d) 204 minutes of direct psychological services.

### Least Restrictive Environment ("LRE")

An IEP must include "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section." 34 C.F.R. § 300.320(a)(5). This statement describes a student's recommended placement in the LRE. "Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements." *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004).

Thus, the IDEA requires that students with disabilities receive their education in the general education environment with typical peers to the maximum extent appropriate, and that they attend the school they would attend if not disabled. 34 C.F.R. §§ 300.114 and 300.116. This requirement extends outside of the classroom, as school districts must ensure that each child with a disability participates with nondisabled children in meals and recess periods to the maximum extent appropriate to the needs of that child. *Id.* § 300.117.

Here, Student's 2018 IEP required him to spend at least 100 minutes per week in the general education environment. (FF #s 9, 10.) However, the District failed to provide Student with any access to the general education environment. (FF #s 19, 23.) Student was not given access to recess or required to attend lunch with his non-disabled peers. (FF #s 19.) As a result, Student was completely denied access to his non-disabled peers, and the District failed to implement Student's 2018 IEP consistent with the identified LRE.

#### **B. Implementation of 2019 IEP between October 15 and January 14**

Grandparent's Complaint also alleges the District did not provide Student with all the special education and related services required by the 2019 IEP. Under the 2019 IEP, which was in effect from October 15, 2019 through January 14, 2020, Student should have received the following services:

- Special Education: 1,980 minutes (33 hours) per week of direct instruction outside of general education;
- Speech Therapy: 15 minutes per week of indirect speech services;
- Psychological Services: 120 minutes per month of direct services; and
- Occupational Therapy: 30 minutes per month of indirect services.

(FF # 43.)

The SCO finds and concludes that each of Student's teachers and service providers was informed of his or her responsibilities under Student's 2019 IEP. As Student's case manager, Special Education Teacher provided Student's service providers with a snapshot of Student's IEP in accordance with District policy. (FF # 45.) Additionally, the entire 2019 IEP remained available to staff in the District's data management system. Therefore, the District complied with 34 C.F.R. § 300.323(d). However, as detailed below, the SCO concludes that the District violated the IDEA when it neglected to provide Student the required special education and related services.

#### **Special Education**

Student's 2019 IEP required 33 hours per week of direct special education instruction despite Student's modified schedule. (FF #s 46, 47.) Between October 15 and January 14, Student only attended School three hours per day. (FF # 46.) Indeed, Student spent nearly the entirety of his day receiving direct special education instruction. (*Id.*) Still, Student's modified schedule made it impossible for Student to receive all the special education minutes required by the 2019 IEP. (FF # 47.) Student's IEP Team failed to consider Student's modified school day (and the possibility that a separate school placement might take some time) in developing Student's 2019 IEP. (*Id.*) As a result—over the course of the 49 days the 2019 IEP was implemented, the

SCO finds and concludes that the District failed to provide Student with approximately 176 hours of special education instruction. (FF # 48.)

### Speech Therapy

During this same period, SLP indicated she provided Student indirect speech services through informal conversations with Special Education Teacher when they passed in the hallway. (FF # 49.) By SLP's own admission, these communications were rarely related to Student's speech needs. (*Id.*) In fact, during her interview, SLP provided examples of the types of conversations she had with Special Education Teacher. (FF # 26.) None of the examples constituted an indirect service because the conversations related to Student's school performance overall, without any focus on Student's speech needs. (*Id.*) Additionally, the District produced no records substantiating its claim that Student received all of his indirect services. SLP's records amounted to nothing more than a checkmark next to Special Education Teacher's name in her planner. (FF # 51.) SLP's own statements, combined with those of Special Education Teacher, support finding that Student did not receive his indirect speech services between October 15 and January 14. As a result—over the 12 weeks the 2019 IEP was implemented—the SCO finds and concludes that the District failed to provide Student with 180 minutes (or 3 hours) of indirect speech services. (FF # 52.)

### Psychological Services

The provision of Student's psychological services between October 15 and January 14 presents a tough question. In its Response, the District acknowledged it failed to provide Student with at least 150 minutes of psychological services and offered to provide Student compensatory services. But the SCO cannot simply take the District's admission at face value.

Though the SCO requested all service provider logs in her initial correspondence with the District, the District failed to produce any service provider logs with its Response. During questioning, School Psychologist indicated she had logged Student's services on paper. (FF # 55.) When the SCO directed the District to produce those logs by a set deadline, the District failed to do so. Finally, on September 18, 2020—46 days into the 60-day investigation—the District produced School Psychologist's notes. (*Id.*) Those notes plainly contradict the daily reports previously produced by Special Education Teacher. (FF # 58.) This is not a situation where a scrivener's error could have resulted in a minor contradiction between the two staff members' accounts. The contradictions are so significant that both accounts cannot be true.

Even though the District produced School Psychologist's notes untimely, the SCO has still considered them to give the District the benefit of the full record. Nonetheless, the SCO finds that the greater weight of the evidence supports finding that the District failed to provide Student with any psychological services other than those he received on October 31, in alignment with Special Education Teacher's daily logs. (See FF #s 57, 61.) Special Education

Teacher maintained daily logs that detailed, to the minute, Student's activities for the day. (FF # 17.) These logs were necessary because Special Education Teacher's primary focus was measuring and improving Student's ability to stay on task. (*Id.*) Each week, Special Education Teacher used the data from these logs to prepare pie charts showing Student's time allocation for the week. (*Id.*)

During her interview, School Psychologist indicated she had a scheduled day of the week to meet with Student (though she could not recall which day). (FF # 53.) Yet, according to her notes, School Psychologist saw Student on two Tuesdays, four Wednesdays, and four Thursdays during the relevant time period. (See FF # 54.) The District's failure to timely produce School Psychologist's notes does not add credibility to her notes (nor does the missing entry for November 20). (FF # 55.)

The SCO also cannot ignore the inconsistencies in the descriptions of Student's activities at School. School Psychologist, for example, indicated she provided morning check-ins with Student on several occasions. (FF # 54.) Special Education Teacher, however, said that he met Student at the School doors each day and escorted him immediately to the classroom to begin academic work. (FF # 15.) Though Student sometimes said "hi" to School Psychologist in the hallway, Special Education Teacher denied that Student ever received any direct services from School Psychologist as a morning check-in. (FF # 59.)

Additionally, School Psychologist also indicated she provided services to Student while he ate lunch in the cafeteria with his peers. (FF # 54.) Yet, Special Education Teacher contends that Student never ate lunch in the cafeteria with peers; even on the days Student got a hot lunch, he returned to the classroom (on his own volition) to eat lunch with Special Education Teacher. (FF # 19.)

All things considered, the SCO finds and concludes that Special Education Teacher's account of Student's psychological services is more credible than School Psychologist's account. (FF # 61.) However, the SCO has given the District credit for 10 minutes of psychological services provided on October 31. (*Id.*) In total, the SCO finds and concludes that the District failed to provide Student with 350 minutes of psychological services between October 15 and January 14. (*Id.*)

### Occupational Therapy

Between October 15 and January 14, Occupational Therapist provided indirect occupational therapy services to Student through informal, unscheduled conversations with Special Education Teacher. (FF # 62.) Though the District's Response indicated that she provided

services through “weekly emails and meetings,” Occupational Therapist concedes that she did not provide services via email during the relevant period. (*Id.*)

No log of Occupational Therapist’s services was produced; instead, the District untimely produced Occupational Therapist’s “reconstruction” of the services she provided Student. (FF # 65.) Though her reconstruction contains approximate dates and length of services, no such specificity appeared in the District’s Response, and Occupational Therapist was not able to provide such specificity during her interview. (*Id.*) For these reasons, the SCO finds Occupational Therapist’s reconstruction unreliable. (FF # 67.) As a result, the SCO finds and concludes that the District failed to provide Student with 90 minutes of occupational therapy between October 15 and January 14. (*Id.*)

In total, as a result of the District’s failure to fully implement Student’s 2019 IEP, Student did not receive: (a) 176 hours of direct special education instruction outside the general education environment; (b) 3 hours of indirect speech therapy; (c) 350 minutes of direct psychological services; and (d) 90 minutes of indirect occupational therapy.

### **C. Materiality of Failure to Implement**

The failure to implement a “material”, “essential”, or “significant” provision of a student’s IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with “sister courts . . . that a material failure to implement an IEP violates the IDEA”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an “essential element of the IEP” denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the “significant provisions of the IEP” denies a FAPE). “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard “does not require that the child suffer demonstrable educational harm in order to prevail.” *Id.* But a child’s educational progress, or lack thereof, may indicate whether there has been more than a “minor shortfall in the services provided.” *Id.*

This case involves more than a minor discrepancy between the services required and the services provided. Here, the District neglected to provide Student with the majority of his special education and related services under both the 2018 IEP and the 2019 IEP. In total, Student lost over 308 hours of services between August 2019 and January 2020. The District’s failure to implement the IEPs resulted in Student experiencing no time with general education peers (whether through academics, recess, or lunch). Even if the SCO wanted to consider Student’s educational progress, or lack thereof, the District’s progress monitoring was deficient. As a result, the SCO finds and concludes that the District’s failure to implement both Student’s 2018 IEP and 2019 IEP to be material failures that amount to a denial of FAPE. This denial of

FAPE entitles Student to an award of compensatory services. *See Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

#### **D. Compensatory Services**

Compensatory services are an equitable remedy intended to place a student in the same position he would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory services need not be an “hour-for-hour calculation.” *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child, and ensuring children receive the services to which they are entitled. *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010).

Here, the District failed to provide Student with a significant amount of services. An hour-by-hour award, however, runs the risk of compromising Student’s ability to benefit from current educational services.. Due to his transportation needs, Student’s current school day is long, with Student leaving home at 6:45 a.m. and returning home around 4:00 p.m. (FF # 80.) The SCO, in consultation with CDE consultants, has devised a compensatory education award that seeks to benefit Student without overburdening Student.

Facility School currently provides Student with approximately 5.7 hours per day of direct special education instruction. (FF # 81.) Therefore, the SCO finds an increase in special education instruction at Facility School to be unnecessary. Instead, the SCO awards Student 56 hours of one-on-one tutoring services to be provided by the District directly or through a contract between the District and a suitable provider.

Additionally, Student receives direct occupational therapy and speech therapy at Facility School. (*Id.*) The SCO finds a slight incremental increase in these services at Facility School to be the most beneficial option for Student. As a result, the SCO awards Student 49 minutes of direct occupational therapy and 84 minutes of direct speech therapy.

Finally, Student’s IEP at Facility School requires 4 hours per month of direct mental health services. (*Id.*) Given the significance of the mental health services Student already receives at Facility School, an increase in those services seems imprudent. In the past, Student has participated in private counseling with Private Psychologist with success. (FF # 82.) The SCO, therefore, awards Student eight hours of mental health services to be provided by Private Psychologist at District expense or through a contract between the District and another suitable provider.



### **E. Systemic Nature of Violations**

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

In this case, it does not appear that District’s failure to implement Student’s IEPs was systemic in nature. Instead, these violations likely resulted from a few District staff members who did not diligently provide services to Student (or document the provision of those services). Nothing in the record indicates that the District regularly fails to implement students’ IEPs. Indeed, the District’s policy requires service providers to provide all services identified in a student’s IEP. (FF # 21.) These facts support finding that these violations are not systemic.

### **REMEDIES**

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

- a. Failing to provide periodic reports of Student’s progress on his annual IEP goals, in violation of 34 C.F.R. § 300.320(a)(3);
- b. Failing to fully implement Student’s 2018 IEP by failing to provide Student ESY services on August 5-8, 2019, in violation of 34 C.F.R. § 300.323(c)(2); and
- c. Failing to fully implement Student’s 2018 and 2019 IEPs by failing to provide Student all the required special education and related services, in violation of 34 C.F.R. § 300.323(c)(2).

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

1. By **Friday, October 30, 2020**, District shall submit to CDE a corrective action plan (“CAP”) that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
  - a. Director, School Psychologist, Occupational Therapist, and SLP must review this decision, as well as the requirements of 34 C.F.R. §§ 300.323(c)(2) and 300.320(a)(3). This review must occur no later than **Friday, November 13, 2020**.

A signed assurance that the above materials have been reviewed must be completed and provided to CDE no later than **Friday, November 20, 2020**.

- b. Training for Director, School Psychologist, Occupational Therapist, and SLP on the requirements of 34 C.F.R. § 300.323(c)(2), regarding fully implementing a student's special education and related services. This training should also address how to appropriately document the provision of those services. Such training shall be provided no later than **Friday, December 18, 2020**.
  - i. Evidence that this training has occurred must be documented (i.e. training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets, with roles noted) and provided to CDE no later than **Monday, January 4, 2021**. This training may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.
  - ii. Training materials for the above-described training must be submitted to CDE for review and approval **at least 14 days prior to the delivery of training**.
- c. CDE will approve or request revisions to the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to confirm District's timely correction of the areas of noncompliance.

## 2. Compensatory Education Services for Denial of a FAPE

- a. Student shall receive the following compensatory education services from Facility School at District's expense: **49 minutes of direct occupational therapy and 84 minutes of direct speech therapy**. These services must be provided by a licensed occupational therapist and a licensed speech therapist. All services must be completed by **Friday, May 18, 2021**. Given the COVID-19 pandemic, these services may be provided remotely where necessary.
- b. Student shall receive **56 hours of one-on-one tutoring services** from the District directly or through a contract between the District and a suitable provider at the District's expense. All 56 hours must be completed by **Friday, May 18, 2021**, though Grandparent and the District are free to allocate the services however they see fit (i.e., weekly sessions, monthly, etc.). If the Parties do not agree to a Provider, the CDE will select the Provider.
  - i. The District (and, if applicable, the District's contracted provider) shall work with Facility School to develop a plan for Student's one-on-one tutoring services. This plan must identify the academic skills to be targeted

by the tutoring services, any applicable IEP annual goals, and behavioral strategies to be implemented to improve Student's success during tutoring. The plan shall be consistent with the services Student is currently receiving at Facility School. **This plan must be provided to CDE at least 14 days prior to delivery of the first tutoring services.**

- c. Student shall receive **eight hours of private psychological services** from Private Psychologist or through a contract between the District and a suitable provider at the District's expense. All eight hours must be completed by **Friday, May 18, 2021**, though Grandparent and the private provider are free to allocate the services however they see fit (i.e., weekly sessions, monthly, etc.). If the Parties do not agree to a Provider, the CDE will select the Provider.
- d. To verify that Student has received the services required by this Decision, the District must submit records of service logs to CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log. The District shall communicate with each of the service providers (such as Facility School, Tutoring Center, and any private psychologist) to obtain this information.
- e. By **Friday, October 30, 2020**, District shall schedule compensatory services in collaboration with Grandparent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. These compensatory services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory services will be provided. If Grandparent refuses to meet with District within this time period, District will be excused from delivering compensatory services, provided that District diligently attempts to meet with Grandparent and documents its efforts. A determination that District diligently attempted to meet with Grandparent, and should thus be excused from providing compensatory services, rests solely with CDE.
- f. District shall submit the schedule of compensatory services to CDE no later than **Friday, November 6, 2020**. If for any reason, including illness, Student is not available for any scheduled compensatory services, District will be excused from providing the service scheduled for that session. If for any reason District fails to provide a scheduled compensatory session, District will not be excused from providing the scheduled service and must immediately schedule a make-up session

in consult with Grandparent and notify CDE of the change in the appropriate service log.

Please submit the documentation detailed above to CDE as follows:

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


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

#### **CONCLUSION**

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, the aggrieved party may file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. See 34 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 2nd day of October, 2020.



Ashley E. Schubert  
State Complaints Officer

## Appendix

### **Complaint, pages 1-2**

- Exhibit 1: 2018 IEP Progress Report
- Exhibit 2: Email correspondence regarding ESY
- Exhibit 3: 2019 IEP Progress Report
- Exhibit 4: 2018 IEP
- Exhibit 5: Screenshot regarding Psychological Services
- Exhibit 6: 2019 IEP

### **Response, pages 1-7**

- Exhibit A: Handbook of Special Education Procedures
- Exhibit B: 2019-2020 Academic Calendar
- Exhibit C: 2019 IEP
- Exhibit D: Notices of Meeting
- Exhibit E: Prior Written Notice
- Exhibit F: Prior Written Notice
- Exhibit G: Email Correspondence between Grandparent and Special Education Teacher
- Exhibit H: 2019 IEP Progress Report
- Exhibit I: Determination of Eligibility
- Exhibit J: Special Education Teacher's Pie Charts
- Exhibit K: Evaluation Report
- Exhibit L: Email Correspondence
- Exhibit M: Email Correspondence
- Exhibit N: Email Correspondence
- Exhibit O: Service Provider Logs

### **Reply (including incorporated attachments), pages 1-44**

- Exhibit 7: Settlement Agreement
- Exhibit 8: Evaluation Report
- Exhibit 9: School Hours Spreadsheet
- Exhibit 10: Facility School IEP

### **Telephonic Interviews:**

- Director of Student Services: September 15, 2020
- Speech Language Pathologist: September 14, 2020
- School Psychologist: September 14, 2020
- Special Education Teacher: September 11, 2020
- Occupational Therapist: September 14, 2020
- Grandparent: September 11, 2020