

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

State-Level Complaint 2023:609
Cheyenne Mountain School District 12

DECISION

INTRODUCTION

On November 9, 2023, the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Cheyenne Mountain School District 12 (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified six allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from November 9, 2022 to the present for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to develop, review, and revise an IEP that was tailored to meet Student’s individualized needs from November 9, 2022 to November 9, 2023, in violation of 34 C.F.R. §§ 300.320 and 300.324(a)-(b), specifically by:

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 C.F.R. § 300.1, *et seq.* The Exceptional Children’s Education Act (“ECEA”) governs IDEA implementation in Colorado.

- a. Failing to consider or address information provided by Parent regarding Student’s mental health and behavioral needs, including a March 7, 2023 letter from a mental health provider;
 - b. Failing to consider or address information provided by Parent regarding Student’s visual impairments, including a September 28, 2023 letter from a medical provider;
 - c. Failing to include an adequately specific and definite statement of the supports/accommodations that would be provided to Student to enable him to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities, specifically by requiring certain accommodations “when possible”; and
 - d. Failing to address the effect of bullying on Student’s needs.
2. Refused to convene IEP Team meetings upon receiving reasonable requests for meetings to address Student's anticipated needs on or about December 7, 2022 and October 4, 2023, in violation of 34 C.F.R. § 300.324(b)(1);
3. Refused to conduct a reevaluation following a request by Parent made on or about October 2, 2023, in violation of 34 C.F.R. § 300.303;
4. Failed to provide prior written notice of the District’s refusal to conduct a reevaluation as requested by Parent on or about October 2, 2023, in violation of 34 C.F.R. § 300.503;
5. Failed to ensure that Student could participate with nondisabled children in nonacademic and extracurricular services and activities to the maximum extent appropriate to Student’s needs from January 1, 2023 through November 9, 2023, specifically by disallowing Student from socializing with students from other grades, sitting with his peers during lunch, and participating in recess, in violation of 34 C.F.R. § 300.117; and
6. Failed to properly implement Student’s IEP from November 9, 2022 to November 9, 2023, in violation of 34 C.F.R. § 300.323, specifically by:
 - a. Failing to make Student’s IEP accessible to teachers and service providers responsible for its implementation; and
 - b. Failing to implement the IEP accommodations listed on pages 22 through 27 of the Complaint, on the dates specified therein.

FINDINGS OF FACT

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

A. Background

1. Student is a nine-year-old child in fourth grade at a District elementary school (“School”). *Exhibit A*, p. 61. He qualifies for special education and related services under Other Health Impairment. *Id.*
2. Student is very bright, has strong verbal skills and handwriting, and is exceptionally creative in both academic and artistic pursuits. *Interviews with Parent, Student’s third grade general education teacher (“General Education Teacher 1”), Student’s fourth grade general education teacher (“General Education Teacher 2”), Student’s special education teacher (“Special Education Teacher”), School’s principal (“Principal”), and Student’s private nurse practitioner (“Nurse Practitioner”).* He enjoys activities that involve building and robotics, and he enjoys studying cause and effect. *Interviews with Parent and General Education Teachers 1 and 2; Exhibit A*, p. 63. Student has expressed interest in becoming a scientist when he grows up and may want to work as an engineer at NASA. *Exhibit A*, p. 63.
3. Student is privately diagnosed with attention deficit hyperactivity disorder (“ADHD”) and generalized anxiety disorder. *Interview with Nurse Practitioner; Exhibit 5.* Student has also been privately diagnosed by an optometrist with convergence insufficiency and oculomotor dysfunction in saccades and pursuits, diagnoses which affect his ability to visually track information. *Exhibit 9; Consultation with CDE Specialist 2.*
4. This investigation involves the implementation of an IEP dated September 23, 2022 (“Prior IEP”), which was in effect from September 23, 2022 through the end of the 2022-2023 academic year; and the development and implementation of an IEP dated May 17, 2023 (“IEP”), which has been in effect from the start of the 2023-2024 academic year through the date of this decision. *Exhibit A*, pp. 28-111. Both IEPs are based upon an initial evaluation of Student on March 19, 2021. *Id.* at p. 61.

B. Student’s IEPs

The September 23, 2022 IEP

5. Prior IEP documents Student’s academic strengths in science and art, as well as his ability to recognize instances in which he is dysregulated and use self-regulation strategies. *Id.* at p. 30.

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

6. Prior IEP's present levels of performance section describes Student's performance on state testing data, which indicated that he was performing above the 80th percentile in all skills measured. *Id.* at p. 36. This section also notes that Student is twice exceptional in the category of "general intelligence" and makes use of an advanced learning plan. *Id.* at p. 36. Additionally, this section includes input from Parent, teachers, service providers and others regarding his abilities and performance. *Id.* at pp. 31-37, 39-40.
7. Prior IEP describes Student's disability as impacting his attention, peer interactions, and social emotional regulation. *Id.* at p. 38.
8. Prior IEP answers "no" to all questions within the consideration of special factors section. *Id.* at pp. 40-41.
9. Prior IEP contains four goals, one each in the areas of "Peer Interactions," "Self-regulation/Behavior," "Self-Awareness," and "Coping Skills." *Id.* at pp. 42-45.
10. Prior IEP contains 26 accommodations. *Id.* at p. 45. Relevant to this investigation, Prior IEP's accommodations section does not include one pertaining to warning of fire drills. See *Id.*
11. Prior IEP identifies special education and related services in the areas of academic access skills and speech language therapy, with a total of 70 minutes of direct services and 35 minutes of indirect services to be delivered per week. *Id.* at p. 48.
12. Prior IEP determined that it was appropriate for Student to be in the general education classroom more than 80% of the time. *Id.*

The May 17, 2023 IEP

13. The IEP documents Student's academic strengths in science and math, as well as his interests and abilities in music. *Id.* at p. 63. It also indicates that he is an enthusiastic learner, loves to share his interests, and is growing in his social interactions. *Id.* Parent was asked to describe Student's strengths but declined to provide input. *Id.*
14. The IEP's present levels of performance section describes Student's performance on assessments, in his classes, and on his previous IEP goals. *Id.* at pp. 66-71. Student continues to be identified as twice exceptional and uses an advanced learning plan which focuses on studying scientific topics. *Id.* at p. 66.
15. The IEP's present levels of performance section is extensive, spanning 30 pages. *Id.* at pp. 63-92. This is primarily due to the section including a detailed summary of all discussions which took place over three IEP meetings spanning more than six hours. *Id.*; *Response*, p. 44. This information was transcribed by Special Education Teacher from a recording of the meeting to capture the input of Parent and Parent's Special Education Advocate ("Advocate").

Interview with Special Education Teacher. In addition, Parent provided 12 pages of additional written input in a file which included images incompatible with the IEP management software. *Exhibit A*, p. 92. This file was attached to the IEP. *Id.* Two additional emails from Parent including input were attached to the IEP file. *Id.* The Parent/Student input section also notes that the team was provided reports by Student's optometry clinic regarding his visual abilities and by Nurse Practitioner regarding Student's mental health diagnoses. *Id.*

16. The IEP answers "no" to all questions within the "Consideration of Special Factors" section except for "Does the student have unique communication needs?" *Id.* at pp. 92-93. Explaining the "yes" response, the IEP states that Student's unique communication needs will be addressed through his speech-language services and goals. *Id.* at p. 93.

17. The IEP contains four goals. *Id.* at pp. 94-99. The goals read as follows:

- Peer Interactions: "With direct instruction and/or adult support, [Student] will utilize learned strategies such as conflict resolution skills, perspective taking, problem solving skills, etc. to communicate about personal boundaries directly, respectfully, and assertively in 4 out of 5 opportunities with 80% accuracy."
- Self Regulation: "With direct instruction and/or adult support, [Student] will demonstrate effective interpersonal communication skills necessary to express emotions, personal needs, and wants in a healthy way with 80% accuracy."
- Self Awareness: "With direct instruction and/or adult support, [Student] will independently use coping strategies (i.e., deep breathing, walking away from a situation, thinking of something positive) to manage his feelings when upset/distressed in 4 out of 5 opportunities at 80% accuracy."
- Executive Functioning: "With direct instruction, [Student] will develop and utilize executive functioning skills to plan and complete long-term assignments with 80% accuracy in 4 out of 5 trials."

Id.

18. The IEP contains 32 accommodations. *Id.* at pp. 100-101. Relevant to this investigation, these accommodations include but are not limited to the following:

- "Teachers/Staff need to provide frequent positive feedback on behavior and expectations throughout his educational environment."
- "Remind/redirect to take a break or reference checklist of regulation strategies."
- "Use of visual and/or written checklists."

- “Incorporate visual and tactile modes of instruction.”
- “Break assignments into manageable chunks.”
- “Allow for oral reflection to process actions and interactions with peers.”
- “Allow for use of colored pen ink (cannot use permanent ink) or highlighter on ungraded/graded and unpublished work.”
- “Removal of movement breaks, choice time, or recess will not be used as consequence for any behaviors related to his disability.”
- “Communication between teacher and parent regarding curriculum.”
- “Use of a verbal/visual cue to drink water throughout the day.”
- “Offer calming activity (fidgets, gum, hoodie) or movement breaks as needed.”
- “Stop the clock breaks on classroom, district and state assessments as needed.”
- “Paper-based tests for classroom, district and state assessments (when possible).”
- “Provide warning of fire drills, when possible.”
- “Access to double-lined, grade level paper when possible.”
- “Access to visual tracking tools such as: enlarged print upon request and if possible, provide a choice to use a line guide or opaque window, orienting materials from top to bottom when possible, providing good contrast in reading materials.”
- “Visual breaks.”
- “Decrease the amount of visual information by covering part of work.”
- “Allow alternate way to demonstrate knowledge (oral/verbal, rather than written).”
- “Grade responses to allow for different answers that are conceptually correct and logical.”

- “Allow for work corrections to demonstrate understanding on classwork and homework.”

Id. Relevant to this investigation, no accommodations listed in the IEP pertain to the provision of leadership responsibilities or increased responsibilities. See *Id.*

19. The IEP identifies special education and related services in the areas of academic access skills and speech language therapy, with a total of 70 minutes of direct services and 25 minutes of indirect services to be delivered per week. *Id.* at p. 103.
20. The IEP determined that it was appropriate for Student to be in the general education classroom more than 80% of the time. *Id.* at p. 104.

C. District’s Practices, Policies and Procedures

21. District’s Special Education Director (“Director”) described the District’s responsibilities under IDEA, stating that each member of District and School staff who work with a student must collaborate to ensure that the student receives FAPE. *Interview with Director.* To ensure that these staff members are knowledgeable regarding their individual roles in the special education process, District conducts frequent meetings with staff and provides professional development training to keep staff up to date on changes in the law and new educational techniques. *Id.*
22. In developing an IEP, Director described her expectation that the IEP Team gather and carefully consider a sufficient body of evidence to develop goals, accommodations and services that can meet the student’s needs and allow them to make progress. *Id.*
23. If a parent provides a letter or other documentation from a medical professional raising concerns related to a student, this information must be carefully considered by the IEP Team, described in the present levels of performance section of the IEP, and incorporated into the IEP’s goals, accommodations and services as appropriate. *Id.*
24. When an IEP Team learns of allegations of bullying, the IEP team should carefully consider those allegations and develop an IEP that allows the student to effectively access FAPE in light of the concerns. *Id.*
25. A set of policies created by District’s Board of Education defines bullying as “the repeated use of coercion or intimidation to obtain control over another person or to cause physical, mental or emotional harm to another person.” *Exhibit K*, p. 6. The policy goes on to state that bullying does not include “children not getting along well,” “a situation of mutual conflict,” or “single episodes of nastiness or random acts of aggression or intimidation.” *Id.* Director stated that this policy is provided and available to District and school staff. *Interview with Director.*

26. When a parent requests an IEP meeting, the IEP Team should consider the parent's request. *Id.* While typically it is appropriate to hold a meeting, the IEP Team may decline the meeting request if it lacks sufficient data to be able to address the concerns, such as in a situation where the parent requests changes to a goal prior to the IEP Team being able to collect data on that goal. *Id.* If an IEP Team declines a meeting request, it should issue a Prior Written Notice ("PWN") detailing the reasons for declining the meeting request. *Id.*
27. When a parent requests a re-evaluation, District should promptly request consent to evaluate a student in all areas of suspected disability. *Id.* If the parent refuses consent for the re-evaluation, District may, at its discretion, seek to re-evaluate without consent by filing a due process complaint. *Id.*
28. Director stated that all students on IEPs should be allowed to participate in nonacademic activities with their nondisabled peers to whatever extent possible. *Id.*
29. Director stated that the IEP Team's case manager is responsible for making sure that every staff member involved in the implementation of an IEP has the appropriate level of access to the IEP to be able to perform their duties while maintaining student privacy to the maximum extent possible. *Id.*
30. Director instructs District and school staff to implement IEPs with fidelity, and to ensure that all accommodations are provided to Students. *Id.*

D. Student's Performance in the School Setting

31. After the first quarter of the 2023-2024 academic year, Student received a report card detailing his grades in core subjects and rating his performance in specials areas and skills that support learning. *Exhibit 1*, p. 2. Student received all As and Bs in his core subjects, with the exception of a C in social studies. *Id.* Student was rated 3 out of 4 in art and music, which is a score corresponding to "good" according to the rubric. *Id.* His skills that support learning were rated within a range of 2 through 4 out of 4, where 2 corresponds to "occasionally," 3 corresponds to "frequently" and 4 corresponds to "consistently." *Id.*
32. On October 25, 2023, School issued a progress report on Student's IEP goals which indicated that Student was making progress in all goals except the goal pertaining to long term assignments, for which data could not be collected because Student had not been assigned a long-term project yet. *CDE Exhibit 15*. At an IEP meeting on December 8, 2023, the IEP Team presented further information regarding progress on Student's IEP goals, indicating progress on all goals since the previous progress report. *CDE Exhibit 16*, pp. 9-12.
33. At the beginning of the 2023-2024 school year, Student participated, alongside his peers, in the Northwest Evaluation Association MAP Growth assessment in the areas of reading,

language and math. *Id.* at p. 5. He scored at the 74th percentile in math, the 85th percentile in language usage, and the 91st percentile in reading. *Id.* at pp. 5-6.

E. Concerns Regarding Mental Health and Behavioral Needs

34. On March 8, 2023, Parent sent school, via email, a letter dated March 7, 2023 from Nurse Practitioner. *Exhibit L*, p. 37; *Exhibit 5*. The version of the file sent by Parent to School differs from the original letter written by Nurse Practitioner in that Parent redacted the diagnosis of generalized anxiety disorder from the letter. *Interviews with Parent, Nurse Practitioner, Principal and Special Education Teacher*.
35. The unredacted portion of the letter notes that student has been diagnosed with ADHD and recommends that the IEP team consider adding one additional accommodation. *Exhibit 5*. It reads: "I am requesting that [Student] be allowed greater autonomy in completing his assignments and in the style in which he completes them. [Student] will likely have his own unique way of solving problems and finding solutions. At this point in his education restricting him to one way of expressing his understanding can work counter to him engaging with the presented material." *Id.*
36. Nurse Practitioner stated that her intent in making this recommendation was to spur the IEP Team to develop an accommodation to allow Student to receive full credit for correct answers, even if his method of reaching those answers was unorthodox. *Interview with Nurse Practitioner*.
37. On March 17, 2023, Parent signed a Release of Information allowing Nurse Practitioner to speak with School and District staff. *Exhibit D*, p. 4. Nurse Practitioner stated that she received a fax from a psychologist at School ("Former School Psychologist") asking her to discuss her recommendations from the March 7, 2023 letter. *Id.*
38. On April 13, 2023, Nurse Practitioner and Former School Psychologist spoke by phone for about 18 minutes, and Nurse Practitioner shared her recommendation regarding the potential added accommodation. *Id.*; *Exhibit L*, p. 296. In an email dated April 17, 2023, Nurse Practitioner offered additional recommendations after having read Student's IEP. *Exhibit L*, p. 314. In that email, Nurse Practitioner stated, "per my perspective there are too many accommodations." *Id.* She added, "after talking with the school last week, he seems to be doing just fine for an 8 year old boy." *Id.* She concluded by recommending "paring down accommodations to the basics that most of the kids I see have. Things like being able to take a break when needed and fidget options." *Id.*
39. At the IEP meeting on April 20, 2023, the IEP team read aloud the April 13, 2023 meeting notes and Nurse Practitioner's April 17, 2023 email. *Exhibit A*, p. 75-76. Parent revoked the release of information allowing Nurse Practitioner to speak to school staff as well as all other release forms authorizing District and School staff to speak with Student's medical

practitioners. *Id.* at p. 76; *Interview with Parent*. As of the date of this decision, these authorizations have not been reinstated. *Interview with Parent*.

40. The IEP included two accommodations in response to Nurse Practitioner's recommendation. *Exhibit A*, p. 100. One read, "Allow alternate way to demonstrate knowledge (oral/verbal, rather than written)," and the other read, "Grade responses to allow for different answers that are conceptually correct and logical." *Id.*
41. When provided the opportunity to review these accommodations, Nurse Practitioner stated that they conformed to her intention in recommending the new accommodation. *Interview with Nurse Practitioner*.
42. The SCO finds, in consultation with a CDE Content Specialist 1, that these accommodations are in conformity with the recommendations of the March 7, 2023 letter from Nurse Practitioner. *Consultation with CDE Content Specialist 1*.

F. Concerns Regarding Visual Impairment

43. On October 2, 2023, Parent sent school, via email, a letter from Student's optometrist ("Optometrist") dated September 28, 2023. *Exhibit 15*. This letter stated that Student had been diagnosed with convergence insufficiency, and oculomotor dysfunction in saccades and pursuits. *Exhibit 9*, p. 1.
44. These diagnoses indicate that Student may have difficulty tracking visual information over time due to overactive eye muscles. *Consultation with CDE Content Specialist 2*. On its own, this condition likely would not inhibit Student from accurately perceiving visual information but can cause fatigue over time. *Id.*
45. Optometrist's letter recommended a number of accommodations regarding the formatting and font size of reading materials and assignments, visual breaks, providing an outline of notes when copying notes from the board, breaking assignments into chunks, allowing the opportunity to present information in alternate methods, and extra time on assessments. *Exhibit 9*, pp. 1-2.
46. On October 4, 2023, District issued a PWN in response to a meeting request made by Parent on October 2 in a separate email. *Exhibit E*, p. 15. In that PWN, District acknowledged receipt of Optometrist's letter and noted that all accommodations recommended by Optometrist were already included in the IEP's accommodations list, with the exception of the recommendation regarding providing an outline of notes, which the PWN states is standard practice for all fourth-grade students. *Id.*
47. On October 26, 2023, Director sent an email to Parent and District's newly-hired Teacher of the Visually Impaired ("TVI"), indicating that TVI would be able to attend a December 8, 2023

IEP meeting, stating that TVI would be reviewing Optometrist's September 28 letter and other vision-related information that Parent had submitted, and indicating that TVI would like to speak to Optometrist about his recommendations pursuant to a release of information previously signed by Parent. *Exhibit 16*.

48. On October 30, 2023, Parent sent an email stating that she revoked all releases of information for Student. *Exhibit L*, p. 310. Later that day, Director sent a new release form to Parent seeking to obtain permission for TVI to speak to Optometrist. *Exhibit L*, p. 312. The next day, Director sent a form to Parent asking for her consent for TVI to conduct a screening or observation of Student. *Exhibit L*, p. 309. Parent has not returned either form. *Interviews with Parent and Director; CDE Exhibit 16*, p. 12.
49. The IEP Team convened for a meeting on December 8, 2023, which was continued on December 18, 2023. *CDE Exhibits 16 and 19*. During the December 18, 2023 portion of the meeting, the IEP Team reviewed and discussed Optometrist's September 28 letter and its recommendations, as well as other reports regarding Student's vision provided by Parent. *CDE Exhibit 16*, pp. 12-16. The IEP Team also discussed Student's existing accommodations to determine the extent to which they already incorporated the recommendations from Optometrist's letter. *Id.*
50. TVI recommended that prior to implementing vision accommodations in a general education classroom, it is common for students to get used to using vision accommodations in a separate setting to gain comfort with them. *CDE Exhibit 19*. This recommendation conforms to a recommendation provided by CDE Content Specialist 2. *Consultation with CDE Content Specialist 2*.
51. The December 18, 2023 IEP meeting was recessed prior to completion due to a scheduling conflict, and will be reconvened in January 2024, at which point the IEP Team intends to continue discussions regarding vision accommodations. *CDE Exhibit 19*.

G. Concerns Regarding Bullying and Peer Conflict

52. On January 13, 2023, Parent sent an email to Principal alleging that during lunch the previous day, Student was called "maskface" by a member of the lunchroom staff. *Exhibit L*, pp. 20-21.
53. On January 17, 2023, the next school day, Principal responded, stating that she takes situations like the one alleged seriously, and would like to talk to Student, with Parent present, to look into the matter further, offering to discuss the matter the next day. *Id.* at p. 23.
54. The same day, Principal spoke to all cafeteria staff who were present on the day of the alleged incident, reviewed video footage from the lunch session, and identified and spoke to the staff member against whom the allegation was made. *Interview with Principal*. Based on this

information, Principal determined that the staff member, unable to understand Student's lunch order, asked him to lower his mask so that she could hear him clearly. *Id.* She found it more likely than not that Student had misheard the staff member, and that the phrase "maskface" had not been used. *Id.* After making this determination, Principal reminded all cafeteria staff that they are expected to use respectful and appropriate language with all students. *Id.*

55. Parent declined the proposed meeting between herself, Student, and Principal, stating that she would prefer to answer written questions on Student's behalf. *Id.* at p. 24.
56. Principal stated that she would need to speak to Student, and a written questionnaire would not allow her to effectively investigate the matter, and offered five additional proposed meeting times, and that if convenient, Parent could attend telephonically or virtually. *Id.* at p. 31. Parent did not respond to these proposed meeting times. *See Id.* at pp. 29-32.
57. The next week, on January 25, 2023, Parent emailed Principal, expressing concern that the lunchroom staff member in question was still present at School, and stating that she believed that one of Student's classmates was treating Student inappropriately. *Id.* at p. 32. Parent also alleged that this classmate's behavior was condoned by her mother, a member of School staff with whom Parent has had previous conflict. *Id.*
58. After learning of the concern regarding Student's classmate, Principal met with General Education Teacher 1 and recess staff and asked them to observe both students closely to determine the nature of the alleged conflict. *Interviews with Principal and General Education Teacher 1.* The staff members reported that interactions between the students were characterized by unkind acts from both students, noting an instance in which Student dropped torn-up shreds of paper onto his classmate's head. *Id.; Response*, p. 19.
59. Principal replied later that day, stating, "I need to hear from [Student] directly to gather details and to ask follow-up questions based on his accounts." *Id.* at p. 33. Principal stated that she planned to talk with Student about both the alleged lunchroom incident and the alleged mistreatment by Student's classmate. *Id.* She offered three additional times to meet. *Id.* Parent responded that none of the proposed times were available on her calendar. *Id.* at p. 34.
60. On February 1, 2023, Parent sent an email to Principal indicating that in the School's front office, a different member of the cafeteria staff said "Hey [Student]! Are you coming to eat lunch with me today?" *Id.* at p. 35. Student was, at this time, regularly eating lunch outside of the cafeteria at his or Parent's request. *Interviews with Parent and Principal.* Principal responded, again inviting Parent to schedule a time at which she could speak to Student about these matters. *Id.* at p. 36. Parent did not respond, and later stated that she was unable to meet in February due to an illness. *Exhibit 14*, p. 4.

61. With respect to the February 1, 2023 allegation, Principal stated that she was in the front office that day and had observed the interaction firsthand. *Interview with Principal*. Based upon her perceptions of the incident and conversations with other front office staff, Principal determined that the cafeteria staff member was expressing genuine care for Student. *Id.*
62. On March 17, 2023, Parent sent an email to Principal alleging that during that week, students in Student's class poked Student with sticks, touched him on the head, and pinched him during his lunch recess. *Exhibit L*, p. 39. That day, Principal emailed General Education Teacher 1 to inquire about this allegation. *Interview with Principal*.
63. General Education Teacher 1, in an email that evening, indicated that she had asked him each day that week after lunch recess how it had gone, and Student did not report any concerns. *Exhibit L*, p. 40. She also noted that her class had participated in two class meetings that week to discuss safety and kindness, but Student did not bring up any concerns during those conversations. *Id.* Finally, she stated that she had spoken to her class that morning to say that pinching was unacceptable behavior; it was St. Patrick's Day, and some students were pinching students who were not wearing green. *Id.*
64. Principal emailed Parent to report that she would plan to follow up with Student the following week to document and address the allegations. *Id.* at p. 41. Parent asked to be present for that conversation, and Parent, Principal and Student met in-person on March 22. *Id.* at pp. 42-44.
65. During that meeting, Student reported that he and a friend were poked in the back by second grade girls, that he had been touched on the back of the head by another student and reported that incident to a teacher, who separated the students, and that he had not been pinched, but "actually I was threatened to be pinched." *Response*, p. 20. Principal followed up with lunch recess staff, asking them to ensure that students do not pick up sticks from nearby wooded areas. *Id.*
66. On April 5, 2023, Advocate observed Student, at Parent's request, in math class and at recess, and prepared a detailed report. *Interview with Advocate; CDE Exhibit 18*. During that observation, Advocate did not observe peer conflict or bullying. *Id.*
67. On March 8, 2023, Student's IEP Team convened a meeting, which would be continued at meetings on April 20, 2023 and May 17, 2023 and eventually result in the creation of the IEP. *Exhibit A*, pp. 54-60.
68. During the portions of this meeting taking place on April 20, 2023 and May 17, 2023, the IEP Team discussed the concerns of potential bullying raised by Parent. *Exhibit A*, pp. 78-82. Special Education Teacher suggested that one way to address concerns of peer conflict was through an annual goal aimed to work on Student's social interaction skills such as conflict

resolution skills, perspective-taking, and communicating boundaries. *Id.* at pp. 81-82; *Interview with Special Education Teacher.*

69. Parent and Advocate, in written parent input, proposed a peer interaction goal reading “[Student] will utilize conflict resolution strategies (such as...) to communicate his perspective/concern when faced with a potential conflict with another student 4 out of 5 opportunities with 80% accuracy.” *Exhibit L*, p. 286.
70. The goal adopted in the final IEP reads “With direct instruction and/or adult support, [Student] will utilize learned strategies such as conflict resolution skills, perspective taking, problem solving skills, etc. to communicate about personal boundaries directly, respectfully, and assertively in 4 out of 5 opportunities with 80% accuracy.” *Exhibit A*, pp. 94-95.
71. At the beginning of the 2023-2024 school year, Principal assigned an additional monitor to Student’s recess periods. *Interviews with Principal and Special Education Teacher.* In addition, the classmate whom Parent had alleged Student had conflict with in the February 1, 2023 email was assigned to a different class and recess period. *Interview with Parent; Response*, p. 34.
72. On November 7, 2023, Parent sent an email to Principal, General Education Teacher 2, and Special Education Teacher stating that at recess, some of Student’s classmates were doing harm to a particular tree that Student has “hyperempathy” for. *Exhibit L*, p. 226. Parent stated a belief that these students were harming the tree at the direction of the student referenced in Parent’s February 1, 2023 email. *Interview with Parent.* This student had been assigned to a different recess period and was not present at the recess in question. *Response*, p. 28, 34.
73. Principal responded on November 9, 2023, stating that she had been present at the recess in question. *Exhibit L*, p. 228. She noticed Student and a same-grade peer waving sticks at a group of students and intervened. *Id.* Student stated to Principal that one of those students had tripped him, so Principal spoke to both Student and the peer about this conflict. *Id.* The peer denied tripping Student, and Student replied that he thought the peer had done so. *Id.*
74. Principal reviewed video footage of the recess period and reported that while some students were grabbing branches or hanging on trees, she did not observe overt mistreatment of any trees. *Id.* She also reported to Parent that the video footage indicated that Student tripped and fell with no other students around him. *Id.*
75. During the December 8, 2023 IEP meeting, the IEP Team discussed Student’s difficulties with peer interactions. *CDE Exhibit 16*, pp. 9-11. That IEP meeting has not yet been completed, and discussion of goals and accommodations remain on the agenda for the next meeting. *CDE Exhibits 16 and 17.*

76. The events described by Parent do not conform to CDE's definition of bullying. *Consultation with CDE Content Specialist 1*. They do, however, indicate that Student may need social skills development to help avoid and resolve conflict with peers. *Id.*
77. The peer interaction goal adopted in the May 2023 IEP promotes the sorts of social interaction skills that might help to address the peer conflict reported by Parent. *Id.* Based on Student's level and frequency of in-school behavior, a behavior intervention plan would not be appropriate. *Id.* If Student's own behavior were to become more significant, that might be an appropriate next step for an IEP Team to consider. *Id.*

H. Parent's Requests for IEP Meetings and Re-evaluations

December 7, 2022 IEP Meeting Request

78. On December 7, 2022, Parent sent an email to Principal in which she requested an IEP meeting and asked for a date and time on which the meeting would take place. *Exhibit 2*, pp. 1-2
79. Two days later, on December 9, 2022, Director sent an email to Parent and Advocate in which she stated that the IEP Team was willing to meet, and proposed to schedule a meeting on either December 12, 2022 or December 21, 2022. *CDE Exhibit 17*, p. 2.
80. Parent did not respond to Director's proposed meeting dates, instead replying to Director's December 9, 2022 email with a request for an independent educational evaluation ("IEE"). *Id.*; *Interview with Parent*. Parent's request for an IEE was granted and resulted in a report from Optometrist dated January 10, 2023. *Exhibit A*, p. 71; *Exhibit C*, pp. 3-9.

October 2, 2023 IEP Meeting Request

81. On October 2, 2023, Parent sent an email to Director, Principal, Special Education Teacher, and General Education Teacher 2 in which she requested another IEE and requested that an IEP meeting be convened to address concerns with the May 2023 IEP. *Exhibit 15*, pp. 3-5.
82. On October 3, 2023, Director sent an email to Parent describing the District's process for providing an IEE and providing a list of pre-approved evaluators as well as instructions for having an evaluator not on the list approved. *Exhibit L*, pp. 284-285. Director also stated that upon completion of the IEE, the IEP Team would convene an IEP meeting to consider the results of the IEE. *Id.* at p. 284.
83. On October 4, 2023, Director issued a PWN declining the request for an IEP meeting, proposing instead that the IEP Team convene an additional meeting in December 2023, or after the receipt of Parent's requested IEE. *Exhibit E*, p. 15. The PWN stated that the reason for this delay is that because the IEP was finalized after the end of the previous school year

and the IEP had only been implemented for 32 days, meaning that the not enough data had been collected to determine whether or not changes should be made to the IEP. *Id.*

84. On October 25, 2023, Director sent an email to Parent proposing to schedule an IEP Team meeting for December 8, 2023. *Id.* at pp. 279-280. Parent and Advocate agreed to the meeting. *Id.*
85. A properly constituted IEP meeting took place as scheduled on December 8, 2023. *CDE Exhibits 16 and 17.*

Parent's Request for Reevaluation

86. In response to Director's October 26, 2023 email proposing that TVI attend the December 8, 2023 IEP meeting, Parent sent an email on October 30, 2023, requesting a functional vision assessment. *Exhibit L*, p. 301; see FF # 47, *supra*.
87. Director responded later that day, stating that on four previous occasions on which Parent had requested a visual evaluation, District sent Parent a PWN and Consent for Evaluation, and Parent did not sign or return that form on any occasion. *Id.* Director asked if Parent wished to proceed with a reevaluation, and stated that if she did, the IEP Team would send a new PWN and Consent to Evaluate for her signature. *Id.*
88. On each of November 9, 2022, December 6, 2022, January 20, 2023, and February 17, 2023, District sent Parent a PWN and Consent for Evaluation. *Exhibit E*, pp. 5-11. On February 17, 2023, District mailed the PWN and Consent for Evaluation to an address which matches Parent's address listed in her Complaint, and received confirmation that it was delivered on February 21, 2023. *Id.* at pp. 3-4.
89. Parent agreed, when asked, that she did not sign or return the Consent to Evaluate on any of these occasions. *Interview with Parent*. She stated that based upon her conversations with Advocate, District was obligated to conduct the reevaluation despite her lack of consent. *Id.* Advocate, when asked, stated that she had not advised Parent of this, and did not believe that District was obligated to proceed with a reevaluation without parental consent. *Interview with Advocate*.
90. On November 14, 2023, Director issued a PWN and Consent to Evaluate proposing to re-evaluate Student in all areas of suspected need. *Exhibit E*, pp. 1-2. Parent did not sign or return this Consent to Evaluate. *Interviews with Parent and Director*.
91. Student's triennial reevaluation is due on or before March 19, 2024. *Exhibit A*, p. 61. Parent has indicated that she will consent to a reevaluation at that time. *Interview with Parent*.

I. Student's Participation in Nonacademic Activities

92. On the afternoon of March 23, 2023, the last day of school prior to School's spring break, Parent sent an email to Principal stating that Student, then a third grader, reported that he was not allowed to socialize with second graders at recess or sit with second graders at lunchtime. *Exhibit L*, p. 46; see *Exhibit J*.
93. On April 3, 2023, the first school day following spring break, Principal replied, stating that she would investigate the matter and report back. *Id.* Later that day, Principal followed up by email, stating that two second graders had been disciplined and asked not to socialize with third graders. *Id.* This was due to the second graders' use of inappropriate language at recess. *Interview with Principal*. Principal spoke to Student and other third graders to inform them of the reason the second graders were not allowed to play with them at recess. *Exhibit L*, p. 46. General Education Teacher 1 confirmed that this was a result of the second grade teacher's request that her students be separate from third graders. *Interview with General Education Teacher 1*.
94. On April 17, 2023, Parent emailed again asking for clarification on lunchroom policies regarding students from separate grades eating together. *Id.*, p. 47. The next day, Principal responded, explaining that the school's group management procedures during lunch are that when students eat inside the lunchroom, they sit at tables with their homeroom classes, and when outside, each grade level eats in a designated area for that grade. *Id.*
95. Principal explained that this rule was applied universally to all third graders and was part of a COVID-related policy that required the school to be able to engage in contact tracing in case of an infection. *Interview with Principal*. She also stated that this year, fourth and fifth graders (who share a lunch period) are allowed to intermingle when eating lunch outside. *Id.*
96. In the aftermath of the incident in which Parent alleged that Student was called "maskface" by a member of the cafeteria staff, Parent and Student requested that Student be allowed to eat his lunch in the front office. *Interview with Parent*. Parent alleges that due to this, Student was limited in his participation with peers in nonacademic settings. *Complaint*, pp. 16-17.
97. Parent is also concerned that Student is prevented from interacting with peers during recess due to disciplinary measures imposed by School staff. *Interview with Parent*.
98. Special Education Teacher, who monitors Student's recess this year, stated that on one occasion, after Student called another student an inappropriate name, she asked him to sit with her for five minutes to reflect on his actions. *Interview with Special Education Teacher*. Special Education Teacher stated that this is a consequence imposed on all students for misbehavior during recess. *Id.* School's 2023-2024 Playground Rules and Procedures describes that "Take-a-break (positive time out) should be used as a way for students to regain self-control during recess." *Exhibit 10*.

99. Since that time, when Student engages in misbehavior, Special Education Teacher asks Student to take a walk with her to orally reflect on his behavior, which is a strategy listed in his accommodations. *Id.*; *Exhibit A*, p. 100.

J. IEP Implementation: Accessibility and Responsibilities

100. General Education Teachers 1 and 2, as well as Special Education Teacher, had access to Student's IEP via the District's electronic document management system. *Interviews with General Education Teachers 1 and 2, and Special Education Teacher*.

101. General Education Teacher 2 also kept a physical copy of Student's IEP in his desk for easy reference. *Interview with General Education Teacher 2*. General Education Teacher 2 and Special Education Teacher met weekly, starting September 4, 2023, from 3:00 p.m. to 3:15 p.m., to discuss Student's IEP. *Exhibit L*, p. 295.

102. General Education Teacher 2 kept a checklist of Student's accommodations, which he would mark daily to indicate whether each accommodation was "Offered," "Used," or "Not Used." *CDE Exhibit 1*.

103. Staff involved in implementing accommodations generally described strong and consistent understanding of these accommodations. *Interviews with General Education Teachers 1 and 2 and Special Education Teacher*. One accommodation, however, which reads "Removal of movement breaks, choice time, or recess will not be used as consequence for any behaviors related to his disability," presented difficulty for staff. *Id.*; *Exhibit A*, p. 100.

104. School Staff described this accommodation as a "gray area," and described the difficulty of determining when and whether student could be disciplined in accordance with this accommodation. *Interviews with General Education Teachers 1 and 2 and Special Education Teacher*. All three teachers stated that because they felt they were unable to quickly and certainly determine whether Student's behavior was "related to his disability," they chose not to discipline him at recess to ensure compliance with the accommodation. *Id.*

105. Determination of whether a behavior is related to a student's disability is properly the job of a manifestation determination review meeting and should not be tasked to individual teachers in a fast-paced recess environment. *Consultation with CDE Content Specialist 1*. The presence of such an accommodation renders it impracticable for staff to effectively manage recess periods and may be a contributing factor to reported behavioral issues by Student. *Id.*

K. IEP Implementation: Accommodations

106. Parent's Complaint identifies 16 accommodations or groups of closely related accommodations she asserts were not properly implemented. *Complaint*, pp. 22-27. These include:

- Allowing use of alternative methods to demonstrate knowledge;
- Reminder to drink water;
- Communication between teacher and parent regarding curriculum;
- Visual presentation of material;
- Work corrections;
- Access to checklist of regulation strategies;
- Calming activities and movement breaks;
- Use of visual tracking tools;
- Warning of fire drills;
- Visual breaks;
- Frequent positive feedback;
- Allow for oral reflection;
- Use of colored ink and highlighter;
- Break assignments into manageable chunks;
- Consequences for behaviors related to disability; and
- Provide leadership responsibilities or increased responsibilities.

Id.

107. For each of the above, Parent provided supporting facts asserting that General Education Teacher 2 did not implement the accommodation during the 2023-2024 academic year³. *Id.* Therefore, the SCO will consider whether the above accommodations were implemented by General Education Teacher 2 during the 2023-2024 academic year.

³ The complaint provides supporting facts asserting that General Education Teacher 1 did not provide the accommodation “Warning of fire drills” during the 2022-2023 academic year, but this accommodation was not in place during the 2022-2023 academic year. See *Exhibit A*, p. 45. Therefore, the SCO’s investigation into this investigation is limited to the 2023-2024 academic year.

108. The Complaint also raises concerns regarding the inclusion of the phrase “when possible” in four of the IEP’s accommodations. *Complaint*, p. 10. Parent stated that her concern regarding this phrase does not stem from a desire that accommodations be provided when impossible, but rather that School staff have failed to implement those accommodations. *Interview with Parent*.

Allowing use of alternative methods to demonstrate knowledge

109. Two accommodations pertain to this concern: “Allow alternate way to demonstrate knowledge (oral/verbal, rather than written)” and “Grade responses to allow for different answers that are conceptually correct and logical.” *Exhibit A*, p. 100.

110. General Education Teacher 2 described his familiarity with these accommodations, stating that they require him to look past the exact presentation of responses and focus on the intent behind such presentation. *Interview with General Education Teacher 2*.

111. He stated that he allows Student to present answers via abbreviation, by highlighting, circling and in other ways marking up paper assignments to indicate answers. *Id.* On computer-based assignments, Student was instructed in how to use a PDF-editing program called Kami to deliver answers via speech to text, audio recording, video recording, response via text box, and drawing. *Id.*

112. General Education Teacher 2 provided the SCO a copy of one of Student’s math homework assignments, in which he was asked to answer a word problem and explain his reasoning. *CDE Exhibit 4*. Student gave the correct answer to the word problem and did not explain his reasoning, but still received full credit. *Id.*; *Interview with General Education Teacher 2*. Lower on the page, Student was asked to fill in the blanks for an answer, but instead drew lines from the choices to the blanks, and still received full credit. *Id.*

113. General Education Teacher 2 also provided an excerpt of a math test in which Student was asked to determine the amount of money two individuals had saved, and then asked whether the individuals had saved enough to purchase a certain vehicle. *CDE Exhibit 5*. Student answered “Yes,” and did not answer the first part of the question or show his work on the test paper. *Id.* Student was provided the opportunity to verbally explain his answer to Special Education Teacher, who transcribed his explanation onto the sheet for grading. *Id.*

114. Based on these facts, the SCO finds that this accommodation was made available to Student.

Reminder to drink water

115. This accommodation reads “Use of a visual/verbal cue to drink water throughout the day.” *Exhibit A*, p. 100.

116. General Education Teacher 2 indicated his familiarity with this accommodation, describing that it requires him to provide both visual and verbal reminders to drink water to Student. *Interview with General Education Teacher 2.*
117. General Education Teacher 2 stated that all students in his class have free access to their water bottles at all times, and that when students do not have a water bottle, they are free to drink from the classroom water fountain or access a disposable cup to keep at their desk. *Id.* He stated that he frequently verbally reminds students to drink water, and emphasizes the “mind-body connection,” by which students must take care of their bodies’ needs to ensure the best functioning of their minds. *Id.*
118. General Education Teacher 2 provided a picture of a poster which he placed in Student’s direct line of sight. *Id.*; *CDE Exhibit 6.* The poster is bright red, with a large picture of a blue glass of water on it, with large text below reading “DON’T FORGET TO DRINK WATER.” *CDE Exhibit 6.* He also provided a copy of a document entitled “Daily Morning Checklist,” which lists the items to be made available to Student at the start of the school day. *Exhibit F*, p. 13. One item on this checklist reads “Visual reminder to drink water.” *Id.*
119. Based on these facts, the SCO finds that this accommodation was made available to Student.

Communication between General Education Teacher 2 and Parent regarding curriculum

120. This accommodation reads “Communication between teacher and parent regarding curriculum.” *Exhibit A*, p. 100.
121. General Education Teacher 2 stated that he was familiar with this accommodation, and that he believes that the parents of all students should always have access to their child’s curriculum, grades, and other information pertinent to their partnership with the school. *Interview with General Education Teacher 2.*
122. He stated that he sends a weekly update to all parents each Monday which includes general classroom information and curriculum updates, and sends other announcements and notes as needed. *Interview with General Education Teacher 2.* He provided the SCO with sent message logs from School’s Infinite Campus portal, showing 37 sent messages between August 28, 2023 and October 30, 2023. *CDE Exhibit 7.*
123. General Education Teacher 2 also provided four examples of weekly family updates from the weeks between October 2, 2023 and October 23, 2023, each of which describes the subjects to be studied that week and any anticipated assignments. *CDE Exhibit 8.*
124. Based on these facts, the SCO finds that this accommodation was made available to Parent.

Visual presentation of material

125. This accommodation reads, “use of visual and/or written checklists.” *Exhibit A*, p. 100.
126. General Education Teacher 2 expressed familiarity with this accommodation and stated that he regularly encourages all students in his class to make use of checklists when working on complex tasks. *Interview with General Education Teacher 2*.
127. He provided examples from a writing assignment in which Student was asked to write a paragraph about their favorite famous person by creating an outline, writing the paragraph, color-coding the sentences (e.g., topic sentence, detail sentences, conclusion sentence), and citing sources. *CDE Exhibit 9*. In the visual instructions provided to Student, the individual steps of the project are presented in outline form, and an example of a finished project (with all steps completed) is provided at the bottom of the page. *Id.* at p. 3.
128. Parent raised concern about a science assignment in which Student was asked to research facts about a type of rock he had chosen stating that Student was not provided a visual checklist. *Complaint*, p. 23. General Education Teacher provided a copy of a graphic organizer provided to Student to aid in completion of this project, which provided seven distinct questions to be answered by Student to complete the project. *CDE Exhibit 10*.
129. Based on these facts, the SCO finds that this accommodation was provided to Student.

Work corrections

130. This accommodation reads “allow for work corrections to demonstrate understanding on classwork and homework.” *Exhibit A*, p. 101.
131. General Education Teacher 2 stated that he was familiar with this accommodation, and that it requires him to proactively approach Student if he notices that Student’s work needs correction or clarification. *Interview with General Education Teacher 2*. When this happens, General Education Teacher 2 speaks with Student about what needs to be corrected, re-teaches what is necessary, and Student works individually with Special Education Teacher to facilitate the corrections. *Id.* Once the corrected work has been re-submitted, General Education Teacher 2 re-grades the assignment or assessment and records the better of the two grades. *Id.*
132. To illustrate this process General Education Teacher 2 provided the SCO a copy of a math assessment in which Student provided an incorrect answer to a word problem. *CDE Exhibit 5*. Student worked with Special Education Teacher to verbally demonstrate his reasoning and understanding, which Special Education Teacher transcribed onto the test page for credit. *Id.*

133. Based on these facts, the SCO finds that this accommodation was made available to Student.

Access to checklist of regulation strategies

134. This accommodation reads “remind/redirect to take a break or reference checklist of regulation strategies.” *Exhibit A*, p. 100.

135. General Education Teacher 2 stated that this accommodation is primarily made available to Student by verbally reminding him that he can take a movement break or consult his checklist of accommodations or regulatory strategies. *Interview with General Education Teacher 2*. He provided a copy of each of these documents to the SCO, which list Student’s strategies and accommodations. *CDE Exhibits 11 and 12*. Moreover, the “Daily Morning Checklist” includes items for both “Regulation strategies” and “Accommodation List.” *Exhibit F*, p. 13. General Education Teacher 2 also noted that he sets an alarm on his calendar several times per school day to remind him to remind Student of his opportunity to take movement breaks. *Interview with General Education Teacher 2*.

136. Based on these facts, the SCO finds that this accommodation has been made available to Student.

Calming activities and movement breaks

137. This accommodation reads “Offer calming activity (fidgets, gum, hoodie) or movement break as needed.” *Exhibit A*, p. 100.

138. General Education Teacher 2 stated that he is familiar with this accommodation, and routinely makes these calming activities available to Student. *Interview with General Education Teacher 2*. Fidgets are available in Student’s desk, and General Education Teacher 2 noted that they are used with some frequency. *Id.* As noted above, General Education Teacher 2 reminds Student of his ability to take movement breaks at set times during the daily routine. *Id.*

139. However, General Education Teacher 2 recounted an instance in mid to late October 2023 in which a group of students, including Student, came inside with the hoods on their sweatshirts over their heads, and General Education Teacher 2 instructed the group to take their hoods down. *Id.* He apologized to Student and Parent for the error, and since that time have allowed Student to wear hoods as desired. *Id.*

140. Based upon these facts, the SCO finds that General Education Teacher failed to implement this accommodation on one occasion.

Use of visual tracking tools

141. This accommodation reads, “Access to visual tracking tools such as: enlarged print upon request and if possible, provide a choice to use a line guide or opaque window, orienting materials from top to bottom when possible, providing good contrast in reading materials.” *Exhibit A*, p. 100.
142. General Education Teacher 2 stated that visual tracking tools take several forms. *Interview with General Education Teacher 2*. Physical tools, such as double lined paper, line guides and opaque windows, are available to Student in his desk for use as needed. *Id.* The “Daily Morning Checklist” contains items for each of these tools. *Exhibit F*, p. 13.
143. Student was also trained, in both class wide and individual lessons, in the use of a PDF editor called Kami, which he can use to enlarge any materials on his Chromebook as needed. *Interview with General Education Teacher 2*.
144. General Education Teacher 2 also provided the SCO with an example of an assignment Student received with enlarged text for readability. *CDE Exhibit 13*.
145. Based on these facts, the SCO finds that this accommodation was made available to Student.

Warning of fire drills

146. This accommodation reads: “Provide warning of fire drills, when possible.”
147. General Education Teacher 2 indicated that he was familiar with this accommodation, which requires him to notify Student prior to any planned fire drill, typically on the morning of the fire drill. *Interview with General Education Teacher 2*. He stated that School typically notifies him of planned fire drills via email, and he informs Student accordingly. *Id.*
148. On one occasion, General Education Teacher 2 received an email indicating that a fire drill would be taking place, but did not take note of that email, and thus did not inform Student. *Id.* When the fire drill took place, Student calmly and successfully participated in the fire drill with his peers. *Id.* Since that instance, both General Education Teacher 2 and Special Education Teacher are assigned to inform Student of planned fire drills. *Interviews with General Education Teacher 2 and Special Education Teacher*.
149. Based on these facts, the SCO finds that General Education Teacher 2 failed to make this accommodation available to Student on one occasion.

Visual breaks

150. This accommodation reads, “Visual breaks.” *Exhibit A*, p. 100.
151. General Education Teacher stated that this accommodation requires him as a classroom teacher to allow for breaks that do not require Student to maintain sustained visual engagement either periodically or as needed. *Interview with General Education Teacher 2*. General Education Teacher 2 noted that typically, this is an accommodation that Student would engage in on his own by simply disengaging his eyes from the learning material whether by closing his eyes or focusing on something in the distance. *Id.*
152. He further noted that Student is able, based on his movement breaks accommodation, to leave the classroom entirely when needed in order to give himself a visual break. *Id.* General Education Teacher routinely reminds Student to take scheduled movement breaks and allows Student to take unscheduled movement breaks as needed. *Id.*
153. Based on these facts, the SCO finds that this accommodation has been made available to Student.

Frequent positive feedback

154. This accommodation reads, “Teachers/Staff needs to provide frequent positive feedback on behavior and expectations throughout his educational environment.” *Exhibit A*, p. 100.
155. General Education Teacher 2 stated that this accommodation required that he give positive feedback, verbally or written, to Student whenever possible regarding peer-to-peer interaction, classroom behavior, and other expectations in the classroom setting. *Interview with General Education Teacher 2*.
156. General Education Teacher 2 stated that he has provided Student with positive, timely, and specific feedback, especially when Student has engaged in kind, responsible, or respectful behavior. *Id.*
157. Parent alleges that on October 17, 2023, General Education Teacher 2 verbally reprimanded Student regarding a dispute over Student’s planner. *Complaint*, p. 18. District reports a roughly similar account of events. *Response*, p. 34. Two weeks after this incident, a meeting between Parent, Advocate and General Education Teacher 2 was scheduled. *Response*, p. 31.
158. During the meeting on November 1, 2023, Parent, Advocate and General Education Teacher 2 discussed the need for positive feedback from General Education Teacher 2. *Response*, p. 31; *Interviews with Parent and Advocate*. District states that because of this meeting, General Education Teacher 2 is more aware of how important positive feedback is

to Student and has provided Student with more frequent praise since. *Response*, p. 31; *Interview with General Education Teacher 2*. Advocate stated that she believed that General Education Teacher’s approach to working with Student has improved since that meeting. *Interview with Advocate*.

159. Based upon these facts, the SCO finds that General Education Teacher 2 failed to adequately make this accommodation available to Student between the start of the 2023-2024 academic year and November 1, 2023, and that this accommodation was made available from November 1, 2023 to present.

Allow for oral reflection

160. This accommodation reads, “Allow for oral reflection to process actions and interactions with peers.” *Exhibit A*, p. 100.

161. General Education Teacher 2 stated that this accommodation requires him, after Student has had a negative interaction with peers, to verbally discuss with Student how the interaction went, and what, if any, changes would need to be made the next time a similar situation arises. *Interview with General Education Teacher 2*.

162. General Education Teacher 2 stated that he engages in such conversations with Student whether the interaction is positive or negative, to reinforce positive choices and provide strategies to replace negative choices. *Id.* In addition, Special Education Teacher stated that when there are issues at recess during her time as recess monitor, she will invite Student to take a walk with her to talk about what happened. *Interview with Special Education Teacher*.

163. Based on these facts, the SCO finds that this accommodation was made available to Student.

Use of colored ink and highlighter

164. This accommodation reads, “Allow for use of colored pen ink (cannot use permanent ink) or highlighter on ungraded/graded and unpublished work.” *Exhibit A*, p. 100.

165. General Education Teacher 2 described this accommodation as requiring him to allow Student to use colored writing instruments on assignments. *Interview with General Education Teacher 2*.

166. He states that Student has persistent access to colored pens and highlighters in his desk. *Id.* The “Daily Morning Checklist” includes an item which reads “Colored pens.” *Exhibit F*, p. 13.

167. Parent raised a concern that Student was not permitted to use a highlighter on a writing assignment in which students were asked to write an argumentative essay about an animal. *Complaint*, p. 25. In response, General Education Teacher 2 provided the instruction sheet for this writing assignment, which specifically instructs all students to use a highlighter to complete the assignment. *Exhibit F*, p. 14.

168. Based on these facts, the SCO finds that this accommodation was made available to Student.

Break assignments into manageable chunks

169. This accommodation reads, “Break assignment into manageable chunks.” *Exhibit A*, p. 100.

170. General Education Teacher 2 described this accommodation as requiring him to present the instructions for multi-step or complex assignments in individual, sequential steps to prevent students from feeling overwhelmed or lost. *Interview with General Education Teacher 2*. He indicated that he typically did this either by limiting instructions to one step at a time, or by creating a checklist. *Id.*

171. The instructions for the favorite famous person writing assignment noted above are presented as individual steps, wherein a student must first create an outline, then write each individual sentence, then color code the sentences, and then cite sources. *CDE Exhibit 9*. The instructions for the animal writing assignment noted above also follow this structure. *Exhibit F*, p. 14.

172. Based on these facts, the SCO finds that this accommodation was made available to Student.

Consequences for behaviors related to disability

173. This accommodation reads, “Removal of movement breaks, choice time, or recess will not be used as consequence for any behaviors related to his disability.” *Exhibit A*, p. 100.

174. General Education Teacher 2 described this accommodation as requiring that before imposing any consequences that would result in the loss of movement breaks, choice time, or recess, he should first consider whether the misconduct is related to his disability. *Interview with General Education Teacher 2*. He stated that, out of caution, he has never imposed any such consequences for any behavior on Student’s part. *Id.* General Education Teacher 1 also stated that during third grade, she would not impose such consequences on Student due to concern for violating this accommodation. *Id.*

175. On one occasion, after Student called a classmate a bad name, Special Education Teacher asked Student to spend five minutes sitting against a wall to talk with her about his choices. *Interview with Special Education Teacher*. She stated that because this name-calling was targeted and mean, she determined that it was not the sort of impulsive behavior that might be related to his disability. *Id.* Since this incident, however, Special Education Teacher has instead asked Student to take a walk with her to orally reflect on his behavior. *Id.*
176. In place of recess consequences, General Education Teacher 2 requires Student to engage in oral reflection, as noted above, and to write reflection paragraphs. *Id.* He provided examples of reflection paragraphs that Student has written in connection to such consequences. *CDE Exhibit 14.*
177. Based on these facts, the SCO finds that this goal was implemented as written and made available to Student.

Provide leadership responsibilities or increased responsibilities

178. Parent stated that there was an accommodation pertaining to leadership responsibilities and increased responsibilities in Student's IEP. *Interview with Parent*. General Education Teacher 2 stated that he was familiar with this accommodation and provided it to Student in his classroom. *Interview with General Education Teacher 2.*
179. However, Student's IEP does not contain this accommodation. See *Exhibit A*, pp. 100-101.
180. Nevertheless, General Education Teacher 2 described that in his classroom, there are a variety of classroom jobs to which students may, if they choose, be assigned. *Interview with General Education Teacher 2.* He provided the SCO a document with descriptions of 15 different classroom jobs. *CDE Exhibit 2.*
181. General Education Teacher 2 stated that Student has been assigned 8 of these jobs, including class librarian. *Interview with General Education Teacher 2.* He provided the SCO a copy of a spreadsheet worked on by Student during his time as class librarian in which books were organized by title, author, and number of Accelerated Reader points assigned to them. *CDE Exhibit 3.*
182. Based on these facts, the SCO finds that although this accommodation did not appear in the IEP, it was nevertheless made available to Student.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District developed an IEP that was tailored to meet Student’s individualized needs, consistent with 34 C.F.R. §§ 300.320 and 300.324(a)-(b). No IDEA violation occurred.

Parent’s concerns are that the IEP Team failed to adequately consider and address information pertaining to Student’s mental health needs, his potential visual impairments, and allegations that Student was the target of bullying. (FF #s 34, 43, 52-77.)

Parent clarified that her concerns regarding the inclusion of the phrase “when possible” pertained not to the adequacy of those accommodations, but to the alleged failure to implement such accommodations when implementation was possible. (FF # 108.) Accordingly, this issue is addressed as part of Allegation 6.

The IDEA requires a school to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with the IDEA’s procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Id.* Taken together, these two prongs assess whether an IEP is procedurally and substantively sound.

A. The IEP Development Process

The September 23, 2022 IEP

Prior IEP was developed in September 2022, outside the window of this Complaint. (FF # 4.) Thus, the SCO cannot consider the propriety of the events that occurred in September 2022. 34 C.F.R. § 300.153(c); *CDE State-Level Complaint Procedures*, ¶ 3(f). However, the SCO still has authority to consider the propriety of the IEP itself. A deficient IEP continues to violate the IDEA each day that a school district implements the IEP, allowing the one-year time limitation to begin as late as the final day the IEP is in effect. *Weld County Sch. Dist. 6*, 81 IDELR 239 (CO SEA April 24, 2022). Thus, the SCO will presume that the development process of the 2022 IEP complied with the procedural requirements of the IDEA. However, the SCO will separately consider below whether the 2022 IEP was substantively appropriate, complying with the second *Rowley* prong. *Rowley*, 458 U.S. at 207.

The May 17, 2023 IEP

Here, as to the first prong of the *Rowley* standard, nothing in the Record indicates that the May 2023 IEP did not comply with the IDEA’s procedural requirements regarding IEP development.

The May 2023 IEP was developed at a properly constituted IEP meeting, and it indicated, as required, the special education and related services that were to be provided to Student consistent with 34 C.F.R. § 300.320(a)(4). (FF #s 13-20). For these reasons, the SCO finds and concludes that the development process for the May 2023 IEP complied with IDEA's procedures. *Rowley*, 458 U.S. at 206.

Next, the SCO turns to the substantive adequacy of the IEPs—that is, whether the IEP has been reasonably calculated to enable Student to receive an educational benefit.

B. Substantive Adequacy of the IEPs

Consideration of Mental Health Needs

Parent's concern is that the IEPs failed to adequately consider Student's mental health needs, specifically those outlined in a March 7, 2023 letter from Nurse Practitioner. (FF # 34.)

That letter identified Student as having been diagnosed with ADHD and recommended that the IEP team consider adding an accommodation to allow Student greater choice in the method by which he presents information. (FF # 35.) District responded to this information, contacting Nurse Practitioner and discussing Student's needs. (FF # 38.) Parent, however, terminated District's ability to continue this dialogue with Nurse Practitioner by revoking permission for Nurse Practitioner to speak to District regarding Student's needs. (FF # 39.)

Nevertheless, the IEP Team added two accommodations in response to Nurse Practitioner's recommendations, and Nurse Practitioner confirmed to the SCO that those accommodations met the needs she identified in her March 7, 2023 letter. (FF #s 40-41.)

For these reasons, the SCO finds and concludes that District adequately considered and addressed the information provided by Nurse Practitioner regarding Student's mental health and behavioral needs. Thus, the SCO finds and concludes that the IEPs were tailored to Student's individualized needs, as required by 34 C.F.R. §§ 300.320 and 300.324.

Consideration of Visual Impairments

Parent's concern is that the IEPs failed to adequately consider Student's visual impairments, specifically those outlined in a September 28, 2023 letter from Optometrist. (FF # 43.)

Optometrist's letter described that Student had been diagnosed with a visual tracking impairment and recommended a number of visual accommodations. (FF #s 43-45.) District responded first by detailing in a PWN that most accommodations recommended by Optometrist had already been incorporated into Student's IEP. (FF # 46.) After this, District sought to have its newly hired TVI speak to Optometrist regarding his recommendations. (FF # 47.) She was unable

to do so, because again Parent revoked consent for Optometrist to share information with District and refused to consent to TVI's screening of Student. (FF # 48.)

Despite this, the IEP Team discussed Optometrist's letter at the December 2023 IEP meetings, and proposed a plan to identify workable vision accommodations which can be incorporated into Student's IEP. (FF #s 49-50.) This IEP development process remains ongoing, and the IEP Team plans to continue discussions regarding vision accommodations. (FF # 51.)

For these reasons, the SCO finds and concludes that District adequately considered and addressed the information provided by Optometrist regarding Student's vision impairments. Thus, the SCO finds and concludes that the IEPs were tailored to Student's individualized needs, as required by 34 C.F.R. §§ 300.320 and 300.324.

Consideration of Concerns Regarding Bullying or Peer Conflict

Parent's concern is that District failed to adequately consider or address information regarding her allegations that Student was bullied at School.

Under Colorado law, bullying is defined as "Any written or verbal expression, or physical or electronic act or gesture, or a pattern thereof, that is intended to coerce, intimidate, or cause any physical, mental, or emotional harm to any student." C.R.S. 22-32-109.1(1)(b). According to the U.S. Department of Education, "any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied." *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013). The U.S. Department of Education characterizes bullying as "aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time." *Id.* Bullying can take a variety of forms, including physical, verbal, emotional, or social behaviors. *Id.*

Here, Parent raised a series of concerns in emails to Principal about alleged conduct she described as bullying. (FF #s 52, 57, 60, 62, 72.) After each instance, Principal thoroughly investigated the allegation by speaking to witnesses, reviewing video footage, consulting with teachers and other staff, and attempting to speak to Student about his experiences. (FF #s 53-56, 58-59, 61, 63-65, 73-74.) After several allegations, Principal was unable to speak to Student about his experiences due to Parent's refusal or failure to permit such an interview. (FF #s 53, 55, 56, 59.)

In response to these investigations, and even when the investigations determined the allegations to be unfounded, Principal took steps to address the concerns and prevent recurrences, including speaking to staff members about using respectful language, asking teachers and recess monitors to carefully observe Student's interactions to prevent conflict, alerting recess monitors to concerns regarding students' use of sticks, assigning students alleged to be in conflict to different classes and recess periods, and speaking directly to students about their behaviors. (FF #s 54, 58, 65, 71, 73.) Moreover, General Education Teacher 1 spoke to her class on multiple occasions

regarding safety and kindness, and corrected students engaged in pinching on St. Patrick's Day. (FF # 63.)

Moreover, these alleged instances of bullying did not impact Student's ability to be involved in and make progress in the general education curriculum. Student has shown progress on his annual goals. (FF # 32.) He also achieves strong grades and performs above the level of his same-grade peers on standardized assessments. (FF #s 31, 33.)

Indeed, the SCO finds that the incidents described in the Record do not conform to the definition of bullying but do indicate Student's potential need in social skills development. (FF # 76.) At both the Spring 2023 and December 2023 IEP meetings, the IEP team discussed concerns of alleged bullying. (FF #s 68, 75.) During the Spring 2023 IEP development process, the IEP Team developed a Peer Interaction goal substantially similar to the goal proposed by Parent and Advocate in order to help Student develop social skills. (FF #s 68-70.) The December 2023 IEP development process remains ongoing, but the IEP team plans to discuss goals and accommodations to address these concerns. (FF # 75.)

For these reasons, the SCO finds and concludes that District adequately addressed allegations of bullying. Thus, the SCO finds and concludes that the IEPs were tailored to Student's individualized needs, as required by 34 C.F.R. §§ 300.320 and 300.324.

Conclusion to Allegation No. 2: District responded appropriately to requests for an IEP Team meeting on December 7, 2022 and October 2, 2023, consistent with 34 C.F.R. § 300.324(b)(1). No IDEA violation occurred.

Parent's concern is that District did not convene an IEP Team meeting following her requests on December 7, 2022 and October 2, 2023. (FF #s 78, 81.)

The IDEA contemplates that a student's IEP may need to be reviewed and revised more frequently than once a year to address changing needs or an unexpected lack of progress. See 34 C.F.R. § 300.324(a)(4)-(6), (b); *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (U.S. 2017). IEP reviews and revisions are appropriate to address, among other issues: any lack of expected progress toward meeting the annual goals; the results of any reevaluation; information about the child provided to, or by, the parent; the child's anticipated needs; or other matters. 34 C.F.R. § 300.324(b)(1)(ii). "Although the public agency is responsible for determining when it is necessary to conduct an IEP Team meeting, the parents of a child with a disability have the right to request an IEP Team meeting at any time." *Questions and Answers on U. S. Supreme Court Case Decision Andrew F. v. Douglas County School District Re-1*, 71 IDELR 68 (OSEP 2017). Consequently, a school district must carefully consider and appropriately respond to a parent's request to convene the IEP team. *Westminster Public Schools*, 118 LRP 50551 (SEA CO 11/14/2018). State laws may require a district to convene an IEP meeting pursuant to parental request—Colorado, however, has not. *Adams County Sch. Dist. 50*, 109 LRP 23970 (SEA CO 06/01/08).

Where a parent, through their own actions and decisions, chooses not to meaningfully participate in the IEP development process, resulting procedural defects do not result in a denial of FAPE. *Sytsema by Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306, 1315 (10th Cir. 2008).

The December 7, 2022 Meeting Request

On December 7, 2022, Parent requested an IEP meeting. (FF # 78.) Two days later, Director indicated that the IEP Team was willing to reconvene at Parent's request and offered multiple dates. (FF # 79.) Parent continued to communicate with District, requesting an IEE, but did not respond to District's offer of an IEP meeting. (FF # 80.) Parent's request for an IEP meeting was granted, but she chose not to avail herself of participation in the IEP development process. For these reasons, the SCO finds and concludes that District properly responded to Parent's request for a meeting by offering to reconvene the IEP Team, consistent with 34 C.F.R. § 300.324(b)(1).

The October 2, 2023 Meeting Request

On October 2, 2023, Parent sent an email to District requesting an IEE and an IEP meeting. (FF # 81.) The next day, Director responded, offering an IEE and proposing an IEP meeting after the completion of that IEE. (FF # 82.) The following day, District issued a PWN declining the request for the IEP meeting due to a lack of new data for the IEP team to consider, and proposed a December 2023 IEP meeting, at which point new data and the IEE would be available. (FF # 83.) Parent agreed to a December 8, 2023 meeting, which was held as scheduled. (FF # 84-85.)

Here, District carefully considered the IEP meeting request, declined the request via an adequate PWN which stated the reasons for its decision, and scheduled and held the meeting in December 2023 on a date agreed to by Parent. For these reasons, the SCO finds and concludes that District properly responded to Parent's request for a meeting, consistent with 34 C.F.R. § 300.324(b)(1).

Conclusion to Allegations No. 3 and 4: District responded to Parent's request for a reevaluation by sending Parent an adequate PWN and Consent for Evaluation, consistent with 34 C.F.R. §§ 300.303 and 300.503. No IDEA violation occurred.

Parent's concern is that District did not conduct a reevaluation following her October 30, 2023 request. (FF # 86.)

Districts must ensure that a reevaluation of a child with a disability is conducted if "the child's parent or teacher requests a reevaluation." 34 C.F.R. § 300.303(a)(2). Reevaluations cannot occur more than once a year, unless the parent and district agree otherwise, and reevaluations must occur at least once every three years, unless the parent and district agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b). However, districts must honor a parental request to reevaluate a student where the most recent reevaluation is more than one year old. *G.W. v. Boulder Valley Sch. Dist.*, 2019 WL 4464130, at *12 (D. Colo. Sept. 18, 2019) (holding that the

district was obligated to reevaluate the student upon parental request because the most recent reevaluation was then one year old).

Districts must obtain parental consent prior to conducting any reevaluation of a child with a disability. 34 C.F.R. § 300.300(c)(1)(i). If the parent refuses to consent to the reevaluation, the district does not violate its obligations under 34 C.F.R. §§ 300.111 and 300.301-300.311 if it declines to pursue the evaluation or reevaluation. 34 C.F.R. § 300.300(c)(1)(iii).

PWN must be issued a reasonable time before a district proposes or refuses to change “the educational placement of the child or the provision of FAPE to the child.” 34 C.F.R. § 300.503(a). PWN must include: (1) a description of the action proposed or refused by the district; (2) an explanation of why the district proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report used by the district as a basis for the action; (4) a statement that the parents of a child with a disability have protections under the procedural safeguards, and the means by which a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the information; (6) a description of other options the IEP team considered and the reasons why those options were rejected; and (7) a description of any other factors relevant to the district’s proposal or refusal. 34 C.F.R. § 300.503(b)(1-7). The notice must be “written in language understandable to the general public.” *Id.* at § 300.503(c).

Where a parent, through their own actions and decisions, chooses not to meaningfully participate in the IEP development process, resulting procedural defects do not result in a denial of FAPE. *Sytsema by Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306, 1315 (10th Cir. 2008).

Here, on October 30, 2023, Parent requested a functional vision assessment. (FF # 86.) On four previous occasions during the range of this investigation, District has sent Parent a PWN and Consent for Evaluation in response to a request by Parent to reevaluate Student. (FF # 88.) On all four prior occasions, Parent refused to sign or return the Consent for Evaluation, and District was unable to conduct the reevaluation. (FF # 89.)

Nevertheless, District sent Parent a fifth PWN and Consent for Evaluation proposing to evaluate student in all areas of suspected need on November 14, 2023. (FF # 90.) Parent again refused to sign or return the Consent for Evaluation. (FF # 91.)

Here, District responded to Parent’s request for a reevaluation by issuing an appropriate PWN proposing to evaluate Student in all areas of suspected disability, as required by 34 C.F.R. § 300.304(a), (c) and 300.304(c)(4). This PWN conformed to the requirements set forth in 34 C.F.R. § 300.503. Parent chose, for the fifth time in one calendar year, not to consent to the evaluation that she requested.

For these reasons, the SCO finds and concludes that District appropriately responded appropriately to Parent's request for a reevaluation, consistent with 34 C.F.R. §§ 300.303 and 300.503.

Conclusion to Allegation No. 5: District ensured that Student was able to participate with nondisabled children in extracurricular services and activities to the maximum extent appropriate to Student's needs, consistent with 34 C.F.R. § 300.117. No IDEA violation occurred.

Parent's concerns are that Student was not permitted to socialize with students in other grades, did not participate in lunch at the school cafeteria, and was not permitted to engage in recess. (FF #s 92, 96-97.)

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 the extracurricular services and activities to the maximum extent appropriate to the needs of that child." 34 C.F.R. § 300.117. "Regular educational environment" in 34 § CFR 300.114 (a) encompasses regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate. *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46,585 (2006).

Here, Student was disallowed on one occasion from socializing with students outside his grade level during recess. (FF # 92.) When Parent raised this concern to Principal, Principal investigated the matter, and found that the second-grade teacher had requested that her students be separated from the third graders at recess that day due to a disciplinary issue with some of her students. (FF # 93.) Student was not alone in being unable to socialize with second graders at recess that day: all second and third grade students were disallowed from intermingling.

Almost a month after the first incident, Student was instructed not to sit at a table with second graders in the lunchroom. (FF # 94.) This was again a policy of general applicability: in the lunchroom, students are expected to sit at tables with their homeroom classes for health and safety reasons. (FF # 95.) For these reasons, the SCO finds and concludes that Student was not disallowed from participating in nonacademic activities with different-grade students to any extent greater than required by the rules which applied to all third-grade students.

Next, Student and Parent requested that Student be allowed to eat his lunch in School's front office. (FF # 96.) Student was permitted to eat in the lunchroom if he chose and he did in fact choose that option on multiple occasions. (FF #s 92, 94.) For these reasons, the SCO finds and concludes that Student was not prevented from participating in lunch with peers.

Finally, Student, after calling another student an inappropriate name during recess, was given a five-minute time out to reflect on his actions. (FF # 98.) School's playground rules, applicable to all students, outline such a disciplinary measure for students who act inappropriately during recess. *Id.* After this incident, Student was not subject to this form of discipline even while peers are, due to teachers' difficulty in interpreting one of Student's accommodations. (FF # 104.) For these reasons, the SCO finds and concludes that Student was permitted to participate in recess to the same or greater extent as any of his peers.

For all these reasons, the SCO finds and concludes that District ensured that Student could participate with nondisabled children in nonacademic and extracurricular services and activities to the maximum extent appropriate to Student's needs, consistent with 34 C.F.R. § 300.117.

Conclusion to Allegation No. 6: District failed to properly implement Student's IEP, in violation of 34 C.F.R. § 300.323. This violation did not result in a denial of FAPE.

Parent's concern relates to implementation of the IEP, specifically 16 accommodations or groups of closely related accommodations. (FF # 4.)

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 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 district must ensure that each teacher and related services provider has access to the IEP and 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. IEP Accessibility and Responsibilities

The SCO must determine whether District satisfied its obligation under 34 C.F.R. § 300.323(d). Student's teachers and service providers had access to the IEP during the 2023-2024 academic year in District's data management system, and General Education Teacher 2 retained a hard copy. (FF #s 100-101.) General Education Teacher 2 and Special Education Teacher regularly met and collaborated to ensure that the IEP was implemented with fidelity. (FF # 101.) Overall, teachers and service providers were aware of their responsibilities under the IEP, as well as the more than thirty accommodations in the IEP. (FF # 103.)

However, General Education Teachers 1 and 2 and Special Education Teacher all expressed uncertainty about one accommodation: prohibiting the removal of recess as a consequence of behaviors related to Student's disability. (FF # 103.) All three teachers, faced with the daunting task of determining whether Student's behavior was a manifestation of his disability, chose to refrain from disciplining Student at recess under any circumstances. (FF # 104.) While this resulted in compliance with the accommodation as written, the SCO finds that the accommodation renders it impracticable for teachers to effectively manage recess periods, and that teachers should not be expected to essentially conduct a manifestation determination review on the fly. (FF # 105.)

Indeed, an IEP must clearly specify the amount and type of services that will be provided to a student. *Adams 12 Five Star Schs.*, 75 IDELR 86 (SEA CO 2019). This is meant to ensure that parents, and other members of the IEP team, have sufficient detail to understand what specific services and supports the school district is offering to provide. *Tamalpais Union Sch. Dist. v. D.W.*, 70 IDELR 230 (N.D. Cal. 2017) (noting that "Parents can't make an informed decision on whether to accept a proposed IEP if the document includes only a vague description of the student's services"); *see also Douglas Cnty. Sch. Dist.*, 118 LRP 35788 (SEA CO 7/6/18).

For these reasons, the SCO finds and concludes that District failed to ensure Student's teachers and service providers were informed of some their responsibilities under the IEP, in violation of 34 C.F.R. § 300.323(d).

B. The IEP's Implementation

The SCO must determine whether District made special education and related services available to Student in accordance with the IEP for the 2021-2022 academic year. 34 C.F.R. § 300.323(c)(2).

Here, the IEP identifies 32 accommodations, 16 of which are relevant to this investigation. (FF #s 18, 106.) District failed to provide three of these accommodations. (FF #s 140, 149, 159.) For these reasons, the SCO finds and concludes that District failed to implement the IEP with respect to accommodations.

C. Materiality of the Failure to Implement the IEP

Where the definition of a FAPE specifically references delivery of special education and related services consistent with an IEP, the failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19. However, not every deviation from an IEP's requirements results in a denial of a FAPE. *See, e.g., L.C. and K.C. v. Utah State Bd. of Educ.*, 125 Fed. App'x 252, 260 (10th Cir. 2005) (holding that minor deviations from the IEP's requirements which did not impact the student's ability to benefit from the special education program did not amount to a "clear failure" of the IEP); *T.M. v. Dist. of Columbia*, 64 IDELR 197 (D.D.C. 2014) (finding "short gaps" in a child's services did not amount to a material failure to provide related services). Thus,

a “finding that a school district has failed to implement a requirement of a child’s IEP does not end the inquiry.” *In re: Student with a Disability*, 118 LRP 28092 (SEA CO 5/4/18). Instead, “the SCO must also determine whether the failure was material.” *Id.* Courts will consider a case’s individual circumstances to determine if it will “constitute a material failure of implementing the IEP.” *A.P. v. Woodstock Bd. of Educ.*, 370 Fed. App’x 202, 205 (2d Cir. 2010).

“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. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” *Id.*

Here, about half of the IEP’s 32 accommodations were challenged. (FF #s 18, 106.) District failed to provide access to two of these accommodations on a single instance (warning of fire drill and access to calming tools), and to one of these accommodations for a portion of the time range investigated (frequent positive feedback). (FF #s 140, 149, 159.) One accommodation was implemented as written despite concerns regarding the clarity of the accommodation. (FF # 177.) The remaining accommodations were delivered with fidelity. (FF #s 109-182.)

Importantly, these failures did not impact Student’s ability to be involved in and make progress in the general education curriculum. On the occasion in which Student was not warned of a fire drill, he nevertheless calmly and successfully participated in the fire drill with peers. (FF # 148.) Student has shown progress on his annual goals. (FF # 32.) He also achieves strong grades and performs above the level of his same-grade peers on standardized assessments. (FF #s 31, 33.)

For these reasons, the SCO finds and concludes that District’s failure to implement the IEP was not material and did not result in a denial of FAPE.

Systemic IDEA Violations: This investigation does not demonstrate violations that are systemic and will likely impact the future provision of services for all children with disabilities in District if not corrected.

Pursuant to its general supervisory authority, CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in 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).

Here, nothing in the Record indicates that District’s violation is systemic in nature. District provides staff with guidance regarding IEP implementation, and staff regularly confer to ensure

that all staff members involved in the implementation of the IEP are made aware of their responsibilities. (FF #s 29-30, 101-102). When General Education Teacher 2 failed to adequately implement accommodations, he expressed understanding of that failure and took measures to ensure it did not recur. (FF # 139, 148, 158). Finally, the unusually large quantity of accommodations and intensity of the Parent-District communication render this situation relatively unique. (FFs 38, 15.) For these reasons, the SCO finds and concludes that District's failure to implement the IEP is not systemic in nature.

REMEDIES

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

- a. Failing to properly implement Student's IEP during the 2023-2024 school year, in violation of 34 C.F.R. § 300.323.

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

1. Corrective Action Plan

- a. By **Thursday, February 8, 2024**, District shall submit to the CDE a corrective action plan ("CAP") that adequately addresses the violation 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 District is responsible. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm District's timely correction of the areas of noncompliance.

2. Final Decision Review

- a. Director and General Education Teacher 2 must review this decision. This review must occur no later than **Thursday, February 8, 2024**. A signed assurance that this decision has been reviewed must be completed and provided to the CDE no later than **Thursday, February 15, 2024**.

3. Review of IEP

- a. District must convene Student's IEP Team, at a mutually agreeable date and time, but no later than **March 19, 2024**. The IEP Team must review and, as necessary, revise Student's current IEP, in accordance with 34 C.F.R. § 300.320, to address Student's unique needs and the concerns identified in this Decision including the clarity and practicability of the accommodation relating to discipline at recess.

- b. By **April 19, 2024**, District must provide a copy of the finalized IEP and notes or other documentation from the IEP meeting to CDE Special Education Monitoring and Technical Assistance Consultant.

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

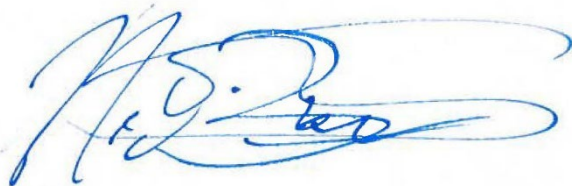
Colorado Department of Education
Exceptional Student Services Unit
Attn.: CDE Special Education Monitoring and Technical Assistance Consultant
1560 Broadway, Suite 1100
Denver, CO 80202-5149

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

CONCLUSION

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

Dated this 8th day of January, 2024.



Nick Butler
State Complaints Officer

APPENDIX

Complaint, pages 1-29

Response, pages 1-55

- Exhibit A: IEPs
- Exhibit B: n/a
- Exhibit C: Evaluations
- Exhibit D: Notices of Meeting
- Exhibit E: Prior Written Notices
- Exhibit F: Service Logs and other documentation of special education and related services
- Exhibit G: Documentation of behavior incidents
- Exhibit H: Attendance Records
- Exhibit I: Report cards and progress monitoring reports
- Exhibit J: School Calendars
- Exhibit K: District policies and procedures
- Exhibit L: Correspondence regarding the complaint allegations
- Exhibit M: Name, title and contact information for staff members with knowledge of the facts underlying the Complaint allegations.
- Exhibit N: Verification of Delivery of Response to Parent

Reply, pages 1-10

- Exhibit 1: 10/4/2023 PWN
- Exhibit 2: 12/7/2022 email with IEP meeting request
- Exhibit 3: May 2022 IEP
- Exhibit 4: May 2023 IEP
- Exhibit 5: Diagnosis letter from Nurse Practitioner
- Exhibit 6: Diagnosis and appointment letter from Nurse Practitioner
- Exhibit 7: Letter from counselor
- Exhibit 8: Letter from Nurse Practitioner
- Exhibit 9: Letter from Optometrist
- Exhibit 10: Playground Rules and Procedures
- Exhibit 11: 9/12/2023 email
- Exhibit 12: 8/28/2023 email
- Exhibit 13: 10/20/2023 email
- Exhibit 14: Email Bullying Complaint Documentation
- Exhibit 15: 10/2/2023 email
- Exhibit 16: Emails re: vision assessment
- Exhibit 17: 10/6/2023 Email re: threat
- Exhibit 18: 11/9/2023 Email

- Exhibit 19: Parent Rebuttal Statement

CDE Exhibits

- CDE Exhibit 1: Accommodation tracking sheets
- CDE Exhibit 2: Class Jobs -- descriptions
- CDE Exhibit 3: Classroom Library Catalog
- CDE Exhibit 4: Student math homework example
- CDE Exhibit 5: Student math test example
- CDE Exhibit 6: Reminder to drink water poster
- CDE Exhibit 7: Sent message logs
- CDE Exhibit 8: Weekly updates from October 2023
- CDE Exhibit 9: Favorite Famous Person assignment materials
- CDE Exhibit 10: Science Investigation Graphic Organizer
- CDE Exhibit 11: Regulatory Strategy List
- CDE Exhibit 12: Accommodations list in Student's Desk
- CDE Exhibit 13: Enlarged test example
- CDE Exhibit 14: Reflection Paragraph Examples
- CDE Exhibit 15: Student Progress Report 10/25/2023
- CDE Exhibit 16: IEP Draft 12/8/2023
- CDE Exhibit 17: Parent email re: 12/7/2022 meeting request
- CDE Exhibit 18: Advocate's Observation Report
- CDE Exhibit 19: Director's Notes from TVI portion of 12/18/23 meeting

Telephone Interviews

- Parent: December 11, 2023 and December 14, 2023
- Nurse Practitioner: December 14, 2023
- Advocate: December 18, 2023
- General Education Teacher 1: December 13, 2023
- Special Education Teacher: December 13, 2023
- General Education Teacher 2: December 13, 2023
- School Psychologist: December 13, 2023
- Principal: December 13, 2023
- Director: December 13, 2023