

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

**State-Level Complaint 2024:599
Arapahoe County School District 6**

DECISION

INTRODUCTION

On October 1, 2024, 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 Arapahoe County School District 6 (Littleton Public Schools) (“District”). The Colorado Department of Education (“CDE”) determined that the Complaint identified three allegations subject to its jurisdiction for the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.

The CDE’s goal in state complaint investigations is to improve outcomes for students with disabilities and promote positive parent-school partnerships. A written final decision serves to identify areas for professional growth, provide guidance for implementing IDEA requirements, and draw on all available resources to enhance the quality and effectiveness of special education services.

RELEVANT TIME PERIOD

The CDE has the authority to investigate alleged noncompliance that occurred no earlier than one year before the date the Complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, findings of noncompliance shall be limited to events occurring after October 1, 2023. Information prior to October 1, 2023 may be considered to fully investigate all allegations.

SUMMARY OF COMPLAINT ALLEGATIONS

The Complaint raises the following allegations subject to the CDE’s jurisdiction under 34 C.F.R. § 300.153(b)² of the IDEA:

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

² The CDE’s state complaint investigation will determine if District complied with the IDEA, and if not, whether the noncompliance resulted in a denial of a free appropriate public education (“FAPE”). 34 C.F.R. §§ 300.17, 300.101, 300.151-300.153.

1. District did not afford Parent an opportunity to inspect and review Student’s education records after Parent’s request on October 2, 2023, as required by 34 C.F.R. §§ 300.501 and 300.613.
2. District did not provide an Independent Educational Evaluation (“IEE”) at public expense without unnecessary delay or file a due process complaint to show District’s evaluation was appropriate, following Parent’s request for an IEE on October 9, 2023, as required by 34 C.F.R. § 300.502(b)(1)-(2).
3. District did not fully implement Student’s Individualized Education Program (“IEP”) because it:
 - a. Did not make the IEP and attached Health Care Action Plan accessible to teachers or service providers responsible for its implementation, as required by 34 C.F.R. § 300.323(d);
 - b. Did not follow Student’s Health Care Action Plan listed in her IEP during a medical incident on November 28, 2023, as required by 34 C.F.R. § 300.323(c); and
 - c. Did not provide Parent with periodic reports on progress consistent with the IEP, during the 2023-2024 school year, as required by 34 C.F.R. §§ 300.320(a)(3)(ii) and 300.323(c).

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,³ the CDE makes the following findings of fact (“FF”):

A. Background

1. Student is a twenty-one-year-old young woman enrolled in District’s secondary transition program. *Interviews with Parent and Director of Student Support Services (“Director”).*
2. Student is eligible for special education and related services under the disability category of autism spectrum disorder (“ASD”). *Exhibit A, p. 15.*
3. Student is funny, kind, and empathetic. *Interviews with Parent and Director.* She enjoys dance class and fiercely advocates for herself and her needs. *Id.* Student has delayed processing difficulties and anxiety that can sometimes produce non-epileptic seizures (“NES”) and increase the likelihood of elopements. *Id.* Her frequent seizures and elopement impact her ability to participate in transition programming. *Interviews with Assistant Superintendent of Learning Services (“Assistant Superintendent”) and Director.*

³ The appendix, attached and incorporated by reference, details the entire Record.

4. Over the last year, Parent has filed four state-level complaints against District. *See Arapahoe Cty. Sch. Dist. 6, 124 LRP 34385 (SEA CO 12/08/23) (amended 04/23/24) [hereinafter First Decision]; Arapahoe Cty. Sch. Dist. 6, 124 LRP 15412 (SEA CO 04/23/24) (hereinafter Second Decision); Arapahoe Cty. Sch. Dist. 6, 124 LRP 22118 (SEA CO 06/03/24) (hereinafter Third Decision); Arapahoe Cty. Sch. Dist. 6, 124 LRP 39074 (SEA CO 10/15/24) (hereinafter Fourth Decision).* The outcome of Parent’s prior complaints may be found in these four decisions. *Id.*
5. With this Complaint, Parent’s concern is that District did not fulfill its obligations with respect to requests for records and an IEE in October 2023. *Complaint*, pp. 1-13. Parent’s other concern is District did not fully implement Student’s IEP, specifically a Health Care Action Plan (“HCAP”) during a medical incident in November 2023 and required reports on Student’s progress during the 2023-2024 school year. *Id.*

B. Parent’s Request for Records

6. When a parent makes a request for a student’s educational record, a District administrator is typically notified and they work collaboratively with various staff, including the information technology department, to fulfill the request. *Interviews with Assistant Superintendent and Director.* District aims to respond to a request for educational records within forty-five days pursuant to the Family Educational Rights and Privacy Act of 1974 (“FERPA”) and the IDEA. *Interviews with Assistant Superintendent and Director.*
7. Information that is, or would have been, contained in a physical diagnostic file with the purpose and intent of being shared amongst professionals is considered a record by District. *Id.* A record is distinguished from information that is recorded by a District staff member and not intended to be shared, such as a provider’s treatment notes. *Id.* District uses both physical and electronic record keeping. *Id.*
8. On October 2, 2023, Parent emailed Assistant Superintendent with a request. *Complaint*, p. 1; *Exhibit E*, pp. 3-5; *Interview with Parent.* Specifically, Parent requested “a list of the types and location of education records collected, maintained, or used by the agency since the last information was sent to us last semester.” *Exhibit E*, p. 3. Parent further wrote “we would ask to inspect and review any education records relating to [Student] that were collected, maintained, or used by the administrative unit.” *Id.* Assistant Superintendent acknowledged receipt of the request on October 16 and said she would respond soon. *Exhibit 1*, p. 162.
9. Parent emailed District on October 17, 2023 and December 10, 2023 to follow up. *Id.* On December 11, 2023, District responded to Parent’s request by writing District “believes that we honored your request for records through our response to the state complaint.” *Exhibit E*, p. 2; *Interviews with Assistant Superintendent and Director.* Assistant Superintendent asked which additional records Parent was requesting beyond what had already been provided. *Exhibit E*, p. 2.
10. On December 12, 2023, Parent clarified her request, writing:

This list might include, but is not limited to, such things attendance records, schedules, behavioral records, any and all staff notes, emails between staff, grades, etc. Many of those items should be available to me to review through Infinite Campus, but they are not. The list would and should include all records the district is keeping regarding [Student], but I don't know what all that entails, and that is why I asked for a list. I may be able to make a more narrow determination of what I am looking for once I have this complete list."

Id. Parent clarified that the request was for March 8, 2023 through the present. *Id.*

11. On December 18, 2023, Assistant Superintendent emailed Parent a list of records. *Id.* at p. 1. District's position is that between October 2 and December 11 it was unclear that Parent was requesting a "list of types of records in addition to the records themselves and assumed that since they were providing the actual records, the types of records included would be self-evident and unnecessary." *Response*, p. 3. When it became clear that Parent was requesting a "list of types of records" that list was provided on December 18, 2023. *Id.*; *Exhibit E*, p. 1.
12. District had previously submitted educational records to Parent on November 1, 2023—including IEPs, BIPs, notes and recordings from IEP Team meetings, prior written notices, progress monitoring data and reports, Student's schedule and attendance reports, documentation regarding behavior incidents, copies of District's annual restraint review, and correspondence from the 2022-2023 school year—as part of its response to the complaint for the investigation into First Decision. *Response*, p. 3; *See Generally First Decision*.
13. Parent submitted a new records request on September 20, 2024, which District fulfilled on November 4, 2024. *Response*, p. 3; *Exhibit N*. District indicated that there are no other education records, as defined by FERPA, in its possession that have not been provided to Parent. *Response*, p. 3

C. Parent's Request for an IEE

14. District's written policies and procedures regarding the IEE request process are consistent with IDEA regulations and updated regularly. *See Exhibit J*, pp. 1, 5-14.
15. When a parent makes a request for an IEE based off disagreement with a previous evaluation, that request typically goes to Director who then reviews areas of concern prior to discussing timelines and identifying potential evaluators. *Id.*; *Interview with Director*. Within a reasonable time after receiving the request, Director makes the final determination as to whether an IEE at public expense will be authorized or whether District will file a due process complaint to show its evaluation was appropriate and issue prior written notice. *Id.*

16. District aims to decide on IEE requests as soon as possible, however there are instances where the timeline is extended due to a lack of clarity in a parent’s request for an IEE. *Id.*
17. On October 9, 2023, Parent emailed Assistant Superintendent, Director, and Special Education Coordinator, requesting a “full and complete IEE” with a particular evaluator identified by Parent. *Exhibit F*, p. 1. The basis of Parent’s request was her position that there had not been an evaluation completed by District since 2019. *Id.* Assistant Superintendent acknowledged receipt of the request on October 16 and said she would respond soon. *Exhibit 1*, p. 162.
18. On December 10, 2023, Parent emailed Assistant Superintendent, Director, and Special Education Coordinator, again to follow up on her October 9 email. *Exhibit F*, p. 2. Parent stated that the basis for this request was her disagreement with a District evaluation that was completed on February 17, 2023. *Id.*
19. On December 11, 2023, District agreed to provide an IEE. *Id.* at p. 2; *Response*, p. 3. On December 15, 2023, District asked Parent to fill out a Consent for Mutual Exchange of Information Form. *Exhibit F*, p. 3. District further indicated that it would reach out to the evaluator identified by Parent to initiate the IEE process and that if that specific evaluator was unable to accommodate the Parent’s request in a timely manner, it would share a list of other potential evaluators. *Id.* That same day, Parent requested that the IEE be put on hold until after Student’s annual review. *Exhibit 1*, p. 115; *Exhibit K*, p. 2. Student’s annual IEP review took place on January 19 and January 25, 2024. *See Exhibit A*, p. 72; *Exhibit H*, pp. 1-8.
20. On January 30, 2024, Parent informed District that Student was ready to move forward with the IEE process and that she intended to send signed consent documents. *Exhibit 1*, p. 53. Parent signed the consent forms on February 10, 2024. *Id.* at 57. On March 6, 2024, Director informed Parent that the IEE was confirmed, and that she was aware that an assessment start date had been scheduled between Parent and the outside evaluator. *Id.* at 74. The delay between February 10 and March 6 was due to scheduling with the evaluator Parent selected. *Exhibit 1*, p. 54. Student’s IEE assessments took place on April 23, 2024 and May 1, 2024. *Exhibit B*, p. 1.
21. District attributed the delay in responding to Parent’s October 9 request to a lack of clarity in “the reason the Parent gave for the IEE in her initial request on October 9.” *Response*, p. 3; *Interviews with Assistant Superintendent, Director, and Special Education Coordinator*. Parent had indicated the request was made because there had been no evaluation since 2019 even though District had completed an evaluation on February 17, 2023. *Response*, p. 3; *Exhibit F*, p. 1. This “confusion” led to District taking “more time than it typically would to reach a decision as to how to respond.” *Response*, p. 3.

D. Student’s IEP

22. At the beginning of the 2023-2024 school year, Student's IEP originally dated October 7, 2022 and amended on April 11, 2023 ("2022 IEP") was in effect. *Exhibit A*, pp. 15-71; *First Decision*, p. 10, ¶ 44; *Fourth Decision*, p. 3, ¶ 8. More details on the 2022 IEP may be found in these decisions. *Id.* Relevant to this investigation are Student's HCAP and the provision of periodic reports on Student's progress to Parent. *See Complaint*, pp. 1-13.

Health Care Action Plan: IEP Requirements

23. A copy of Student's HCAP was attached to and required by Student's 2022 IEP. *Exhibit A*, pp. 40-44. The HCAP indicates that NES "are not caused by epileptic brain activity and do not need medical attention because they are not dangerous in the same way as an epileptic seizure." *Id.* at p. 40. It indicates further that NES "are completely subconscious and unintentional" and "typically caused by difficulties coping with stress or anxiety." *Id.*

24. For Student, NES triggers include "Tiredness; Loud noise; Large crowds; Being overheated; Overexertion; Increased stress; [and] Anxiety." *Id.* NES warning signs include that Student "May feel the need to sit down; May express feeling off; [and] Most often there is no warning." *Id.* Student's NES history can "look like Convulsive, Focal, and Absence Seizures" and they occur daily. *Id.* Student's NES "can happen several times per day, especially when [she] is active." *Id.*

25. The HCAP outlines various procedures for District staff to follow if Student experiences NES. *Id.* at pp. 40-44. Those procedures vary slightly depending on the type of NES (Convulsion Generalized Tonic Looking, Focal Looking, or Absence Looking). *Id.* at p. 41.

26. The HCAP outlines specific instances where staff must call 911 and then Parent. *Id.* First, if Student is "injured to the degree of needing emergency medical attention, call 911, then immediately notify parent(s)." *Id.* Second, if Student "turns blue from lack of oxygen, call 911, then immediately notify parent(s)." *Id.* Third, during an "active convulsive-looking NES" that lasts longer than five minutes, if Student's "oxygen drops to 87 or below for two straight minutes when pulseox is reading correctly . . . call 911, then immediately notify parents(s)." *Id.* Fourth, during an "active convulsive-looking NES" that last longer than five minutes, if Student's "heart rate is less than 50 or higher than 170 for two straight minutes when pulseox is reading correctly . . . call 911, then immediately notify parent(s)." *Id.*

27. Although a child's healthcare plan, like the HCAP here, may delineate specific instances in which 911 must be called, these instances are not exclusive. *Consultation with CDE Content Specialist*. School staff should not be discouraged from contacting 911 in emergency situations as the priority is to ensure student safety. *Id.*

28. Finally, the HCAP indicates that it "is not appropriate to give emergency medications, to send away from class/school, call the paramedics, or encourage avoidance of certain activities in response to NES." *Exhibit A*, p. 41. Notwithstanding, advance care such as emergency

medicine should not be delayed in situations where time is of the essence and there is a high probability of crisis. *Consultation with CDE Content Specialist.*

Periodic Reports on Progress: IEP Requirements

29. The IEP contains one annual goal. *Exhibit A*, pp. 63-64. Progress is to be “reported semesterly along with the school reporting period.” *Id.* at p. 63. The reporting periods for the fall and spring semester ended on December 22, 2023 and May 24, 2024. *Exhibit 1*, p. 21.

E. 2022 IEP Implementation

Accessibility and Responsibilities

30. A group of school staff members, including School Nurse Consultant, were involved in supporting Student and implementing her IEP and attached HCAP. *Interviews with Assistant Superintendent and Director.* School Nurse Consultant’s role included training staff and providers on what to do in the event Student experiences a NES. *Id.* Due to Student’s frequency of episodes, District staff and providers were regularly responding and implementing Student’s IEP and HCAP. *Id.*

31. School Nurse Consultant provided staff with specialized training on recognizing signs of respiratory distress, properly using the pulse ox instrument, and identifying critical physical indicators. *Interview with Director.* These indicators include choking sounds, bluish or gray skin, and signs of physical rigidity. *Id.*

32. Copies of the HCAP are electronically uploaded, along with Student’s IEP, in District’s Frontline software and included in physical form in a medical fanny pack that follows Student throughout her day (this also includes Student’s pulse ox instrument). *Interviews with Assistant Superintendent and Director.* NES events are tracked on a paper log that is kept in the medical fanny pack and then those logs are entered into a Google Doc at the end of each day. *Interview with Special Education Coordinator.*

Health Care Action Plan: Implementation on November 28, 2023

33. Parent’s concern is that District did not follow Student’s HCAP on November 28, 2023, specifically by not calling her immediately after 911 and by administering emergency medication to Student. *Interviews with Parent, Director, and Special Education Consultant.*

34. On November 28, 2023, Special Education Coordinator and Director received a radio call around 12:20 p.m. that Student, while having lunch with her occupational therapist and a paraprofessional in the resource room at school, began experiencing what appeared to be a NES. *Interviews with Assistant Superintendent, Director, and Special Education Coordinator.*

35. Special Education Coordinator and Director responded to the resource room simultaneously and observed Student falling over in her chair with food in her mouth. *Interview with Special Education Coordinator*. Special Education Coordinator observed Student's skin to be pale. *Id.* As a result, Special Education Coordinator stepped out of the room to call 911 and Parent. *Id.*
36. Director noticed that Student's skin appeared blue, she was rigid, and she was slightly foaming from her mouth. *Interview with Director*. Director was concerned that food may be lodged in Student's throat. *Id.* Director reported that District staff were taking readings from the pulse ox instrument and determined that Student was having a NES that required an emergency medical response. *Id.* Director called School Nurse Consultant, trained on the delegation responsibilities of the HCAP, to direct further action. *Id.*
37. Special Education Coordinator was told to stay on the phone with emergency medical services ("EMS") so that she could alert school security personnel to open an entryway and help direct the ambulance upon arrival due to complexity of the school layout. *Interview with Special Education Coordinator*.
38. The EMS incident report noted that dispatch was alerted at 12:22 p.m. by District staff that Student was having a seizure. *Exhibit 1*, p. 25. EMS arrived sometime between 12:23 p.m. and 12:29 p.m. *Id.* Director and School Nurse Consultant greeted EMS upon arrival and guided them to the room that Student was in so that they could assume care. *Interviews with Special Education Coordinator and Director*. EMS observed Student to be actively seizing upon arrival. *Exhibit 1*, p. 25. Director carried a paper copy of Student's HCAP with her that she handed to EMS while directing them not to administer emergency medication. *Interview with Director*.
39. While Director and School Nurse Consultant talked with one member of the EMS team, other members pushed past her and administered emergency medication before she could intervene. *Id.* There were six EMS responders and while Director was able to give a physical copy of the HCAP to one responder, Special Education Coordinator said the other five responders saw Student on the floor and decided to administer emergency medication because the message not to do so, "couldn't get there quickly enough." *Interview with Special Education Coordinator*.
40. Special Education Coordinator had placed the first call to Parent at 12:30 p.m. *Exhibit 1*, p. 4. She placed a second call to Parent, with an EMS responder present, at 12:32 p.m. after the ambulance had arrived, informing Parent that Student had a "heart rate of 30 for two minutes straight." *Id.* at pp. 4, 32. Parent arrived on the scene after emergency medicine had been administered to Student. *Interviews with Parent, Director, Special Education Coordinator*.
41. The EMS incident report confirmed that District staff members told EMS that Student experiences NES, and that Student "had been seizing for approximately 20 minutes." *Id.* The report further noted that District staff recorded a pulse ox reading of 80 percent oxygen level, but it did not state for how long. *Id.*

Period Reports on Progress: Implementation during the 2023-2024 school year

42. Parent’s concern is that District did not provide progress reports consistent with the IEP for either first or second semester of the 2023-2024 school year, specifically, for the reporting periods ending on December 22, 2023 (first semester) and on May 24, 2024 (second semester). *Complaint*, p. 8.
43. District’s guidance documents pertaining to the provision of progress monitoring reports state that “progress monitoring (including tool, dates of monitoring, and outcome) can live in the progress report as long as it’s presented in its entirety OR it must be uploaded into Frontline.” *Exhibit J*, p. 2. Case managers will distribute progress reports to parents at the same time the school sends report cards. *Id.* at p. 3. District uses an IEP management system to help District staff and providers track a student’s progress towards their IEP goals. *Interviews with Assistant Superintendent and Director*. Special Education Coordinator, as Student’s case manager, ensures that Student’s IEP is updated in the internal management system. *Interview with Special Education Coordinator*.
44. From August 2023 through October 2023 of the first semester, Parent’s actions prevented District from implementing Student’s IEP. *See Fourth Decision*.
45. On January 17, 2024, Special Education Coordinator emailed Parent a first semester progress report. *Exhibit 1*, p. 19. Parent confirms she received this progress report. *Reply*, p. 20. The progress report that Parent received indicates that Student made progress on her single annual goal. *Exhibit C*, pp. 25-27. For the spring semester, there is a progress report dated May 24, 2024, and Special Education Coordinator confirmed that she emailed this progress report, as is her practice for each semester, to Parent. *Id.* at pp. 28-20; *Interview with Special Education Coordinator*.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District afforded Parent an opportunity to inspect and review Student’s education records after Parent’s request on October 2, 2023, as required by 34 C.F.R. § 300.613. District complied with IDEA.

A. The Right to Inspect and Review Records

One of the procedural safeguards afforded to parents under the IDEA is the right to inspect and review their child’s education records. 34 C.F.R. §§ 300.501 and 300.613(a). Thus, a school district “must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency.” *Id.* A district must comply with a request from a parent to review his or her child’s education records “without unnecessary delay and before any meeting regarding an IEP,” and in no case more than 45 days after the request. *Id.*

The IDEA borrows the definition of “education records” from FERPA. 34 C.F.R. § 300.611(b). Under FERPA, “education records” are “those records, files, documents, and other materials which: (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution” *Id.* § 99.3. A record means “any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.” *Id.* The U.S. Supreme Court has held that “[t]he word ‘maintain’ suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database.” *Owasso Indep. Sch. Dist. No. 1-001 v. Falvo*, 534 U.S. 426, 432-33 (2002).

Here, on October 2, 2023, Parent requested “a list of the types and location of education records collected, maintained, or used by the agency since the last information was sent to us last semester.” (FF # 8). This included a request “to inspect and review any education records relating to [Student] that were collected, maintained, or used by the administrative unit.” *Id.* Assistant Superintendent acknowledged receipt of the request on October 16 and said that she would respond soon. *Id.* Parent followed up with District twice. (FF # 9). On December 11, District, indicating it had already provided Student’s records as part of a state complaint, sought an explanation of the other records Parent was requesting. *Id.* Parent clarified that she was seeking a “list” of educational records rather than the educational records themselves. (FF # 10).

With respect to the “list” requested by Parent, the SCO finds that this is not a record District maintained. (FF # 11). School districts are required to provide records they maintain and are not required to create records to respond to parental requests. 34 C.F.R. §§ 99.3 and 300.611(b); *see Denver Pub. Schs.*, 124 LRP 34401, (SEA CO 02/09/24). District was not obligated to create a “list” of educational records for Parent, and thus the SCO finds and concludes that the provisions of 34 C.F.R. §§ 300.501 and 300.613 do not apply here. Nonetheless, based on Parent’s clarification, District still created and emailed Parent a list of educational records on December 18. (FF # 11).

With respect to the request “to inspect and review any education records relating to Student” the SCO finds that District provided these educational records to Parent as part of a prior state complaint investigation on November 1, 2023, within 45 days of October 2. (FF # 12). District also responded to Parent’s new records request of September 20, 2024, on November 4, 2024. (FF # 13). Thus, the SCO finds and concludes that District complied with 34 C.F.R. §§ 300.501 and 300.613.

Conclusion to Allegation No. 2: District did not provide Parent an IEE without unnecessary delay or file a due process complaint to show District’s evaluation was appropriate, as required by 34 C.F.R. § 300.502(b)(1)-(2). This noncompliance did not result in a denial of FAPE.

A. The Right to an IEE at Public Expense

Under the IDEA, parents have the right to seek an IEE at public expense if they disagree with an evaluation completed by the school district. 34 C.F.R. § 300.502(b)(1). An IEE is “an evaluation

conducted by a qualified examiner who is not employed” by the child’s school district. *Id.* § 300.502(a)(3)(i). If a parent requests an IEE at public expense, the school district must “without unnecessary delay” either: (1) file a due process complaint to request a hearing to show that the district’s evaluation was appropriate; or (2) provide the IEE at public expense. *Id.* § 300.502(b)(2).

B. Timeliness of IEE

Neither the IDEA nor guidance from the U.S. Department of Education defines what constitutes “unnecessary delay.” *See id.* § 300.502(b)(2). Whether a delay is unnecessary turns on the circumstances of the individual case. *C.W. v. Capistrano Unified Sch. Dist.*, 784 F.3d 1237, 1247 (9th Cir. 2015).

Prior CDE state-level complaint decisions provide guidance. The CDE previously found delays of 63 days, 120 days, and 135 days to be unnecessary. *See Boulder RE-1J, St. Vrain*, 123 LRP 5309 (CO SEA 09/14/22) (finding a delay of 63 days without any communication to be unnecessary); *Weld Cty. Sch. Dist. RE-5J*, 121 LRP 19090 (CO SEA 03/19/21) (finding a four-month delay in providing the IEE to be unnecessary); *San Luis Valley BOCES*, 121 LRP 34228, (CO SEA 06/28/21) (finding a delay of 135 days—in which the BOCES repeatedly asked parent to explain the basis for her disagreement—to be unnecessary). Alternatively, the CDE previously found delays of two weeks and 38 days to not be unnecessary. *See Arapahoe Cty. Sch. Dist. 6*, 121 LRP 13659 (CO SEA 03/03/21) (finding a two-week delay before moving forward with an IEE to be acceptable); *Denver Public Schools*, 124 LRP 34289, (CO SEA 08/13/24) (finding a delay of 38 days between the time of IEE request and prior written notice authorizing an IEE to be acceptable).

C. Parent’s Request for an IEE

Here, Parent emailed Director on October 9, 2023 seeking an IEE for Student on the basis that no evaluations had been completed since 2019. (FF # 17). Assistant Superintendent acknowledged receipt of the request on October 16 and said she would respond soon. *Exhibit 1*, p. 162. *Id.* Parent followed up with District on December 10, 2023, indicating the basis for the request was District’s February 17, 2023 evaluation. (FF # 18). On December 11, District agreed to provide an IEE at public expense. (FF # 19). District provided a Consent for Mutual Exchange of Information Form to Parent on December 15. *Id.* That same day Parent indicated the IEE would need to be put on hold until after Student’s annual review, which occurred on January 19 and 25, 2024. *Id.* Parent advised District on January 30 that it may proceed with the IEE and signed consent on February 10, 2024. (FF # 20). There was an additional delay after February 10 due to scheduling with the evaluator Parent selected. *Id.* The IEE was completed by May 1, 2024. *Id.*

A total of 67 days elapsed between Parent’s request on October 9 and District’s provision of a Consent for Mutual Exchange of Information Form to Parent on December 15 for the IEE. (FF #s 17-19). Although District lacked clarity on the basis for Parent’s initial request and was determining how it was going to proceed, it did not, apart from acknowledging the request, respond to Parent’s email on October 9 or otherwise seek clarification. (FF # 17, 20). Parent

followed up on December 10, at which point she cited her disagreement with the February 17, 2023 evaluation. (FF # 18). The SCO finds and concludes that a delay of 67 days without any communication and a response to the initial IEE request is unnecessary, resulting in noncompliance with 34 C.F.R. § 300.502(b)(1)-(2).

D. Procedural Noncompliance

Procedural noncompliance with the IDEA results in a denial of FAPE if it (1) impeded the child’s right to a FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765-66 (6th Cir. 2001).

Here, after Parent’s email of December 10, District agreed to the IEE on December 11 and provided consent on December 15. (FF # 19). Parent then asked that the IEE be put on hold and did not agree to move forward until February 10. *Id.* This put the IEE on hold for a total of 61 days. *Id.* There was further delay after February 10 due to scheduling with the evaluator Parent selected. *Id.* The IEE at public expense was ultimately completed by May 1, 2024. (FF # 20). Had Parent not paused the IEE process, District would have had the opportunity to complete it much closer in time to her original requests. For these reasons, the SCO finds and concludes that District’s procedural noncompliance did not result in a denial of FAPE.

Conclusion to Allegation No. 3: District properly implemented the 2022 IEP—specifically the HCAP on November 28, 2023—as required by 34 C.F.R. §300.323(c). District did not properly implement the 2022 IEP—specifically the provision of progress reports during the fall semester of the 2023-2024 school year—as required by 34 C.F.R. §§ 300.320(a)(3)(ii) and 300.323(c). This noncompliance was not material and did not result in a denial of FAPE.

A. Legal Requirements

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.* 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).

B. Accessibility and Responsibilities

The SCO must determine whether District satisfied its obligation under 34 C.F.R. § 300.323(d).

Here, the District provided Student’s IEP, and attached HCAP, to appropriate staff and providers. (FF #s 22-23, 30-32, 43). Specifically, District ensured that each staff member who supported Student was trained in implementing her HCAP since it had been recently updated and due to the frequency of her NES events at that time. (FF # 30-31). The HCAP was accessible in both physical and electronic formats for District staff. (FF # 32, 43) Furthermore, Special Education Coordinator ensured the 2022 IEP was uploaded in District’s internal IEP management system. *Id.* As a result, the SCO finds and concludes that the District ensured that each appropriate staff member was informed on how to implement Student’s IEP and attached HCAP, as required by 34 C.F.R. § 300.323(d).

C. HCAP Implementation on November 28, 2023

The SCO must determine whether District satisfied its obligation under 34 C.F.R. § 300.323(c)(2).

i. Calls to 911 and Parent

Parent’s concern is that Student’s HCAP was not implemented on November 28, 2023, because District did not call her immediately after 911 was called. (FF # 33). The 2022 IEP includes an HCAP which describes procedures for District staff if Student experiences a NES. (FF #s 24-28). This includes specific instances when staff must call 911 and then immediately notify Parent. (FF #s 26-27). One such instance is if Student is “injured to the degree of needing emergency medical attention.” (FF # 26). Another instance is if Student “turns blue from lack of oxygen.” *Id.* Another instance is if Student’s “oxygen drops to 87 or below for two straight minutes when pulseox is reading correctly.” *Id.*

On November 28, 2023, Special Education Coordinator and Director received a radio call around 12:20 p.m. that Student began experiencing a NES event at School. (FF # 34). They responded to the room in which Student was in and observed her falling over in her chair with food in her mouth. (FF #s 34-36). Her skin was pale, and as a result, Special Education Coordinator called 911 at 12:22 p.m. (FF #s 35, 38). She was told to stay on hold with EMS so she could help responders reach the correct location within School. (FF # 37). Director observed Student’s skin to be blue, and that she was rigid and foaming from the mouth. (FF # 36). An EMS incident report indicated that Student’s oxygen level was at 80 percent. (FF # 38). Special Education Coordinator called Parent at 12:30 p.m., and then again at 12:32 p.m. after an ambulance arrived. (FF # 40).

Consistent with the HCAP and above all to ensure Student’s safety, District staff contacted 911 because she had turned blue and experienced a drop in her oxygen level. (FF #s 26, 35-36). District staff also contacted Parent immediately—eight minutes to be exact—after calling 911. (FF # 40).

Thus, the SCO finds and concludes that District implemented the 2022 IEP—specifically the HCAP in this respect on November 28, 2023—as required by 34 C.F.R. § 300.323(c)(2).

ii. Emergency Medication

Parent’s concern is that Student’s HCAP was not implemented on November 28, 2023, because Student was administered emergency medication. (FF # 33). The HCAP indicates, in part, that it “is not appropriate to give emergency medications.” (FF # 27).

When EMS arrived on the scene on November 28, 2023, responders observed Student to be actively seizing. (FF # 38). Director handed a paper copy of the HCAP to one of the EMS responders while directing them to not administer emergency medication. (FF # 39). As she and School Nurse Consultant talked with that responder, other responders pushed past her and administered emergency medication before she could intervene. *Id.* Advance care should not be delayed in situations like this where time is of the essence, and professional responders determined, with their expertise, that administering emergency medication was appropriate given the potential crisis as Student was actively seizing. (FF #s 28, 39). Moreover, the responsibility to implement an IEP under IDEA applies to school districts and not emergency medical responders. *See* 34 C.F.R. §§ 300.101, 300.153(b)(1), 300.323. Thus, the SCO finds and concludes that District implemented the 2022 IEP—specifically the HCAP in this respect on November 28, 2023—as required by 34 C.F.R. § 300.323(c)(2).

D. Provision of Progress Reports during the 2023-2024 School Year

The SCO must determine whether District satisfied its obligation under 34 C.F.R. § 300.323(c)(2).

A parent’s right to participate in the development of their child’s educational program requires that they be regularly informed of progress toward IEP goals. *See M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1198 (9th Cir. 2017) (“[I]n enacting the IDEA, Congress was as concerned with parental participation in the *enforcement* of the IEP as it was in its *formation*.”). For that reason, school districts must monitor students’ progress and periodically give parents a report of their student’s progress toward meeting annual goals, in accordance with the schedule described in the IEP. 34 C.F.R. §§ 300.320(a)(3) and 300.323(c).

Here, the 2022 IEP provides that progress is to be “reported semesterly along with the school reporting period.” (FF # 29). The reporting periods for the Fall and Spring semester ended on December 22, 2023 and May 24, 2024. (*d.*

Parent received a fall semester progress report on January 17. (FF # 45). This is 26 days after the reporting period date of December 22. (FF # 29, 45). Parent received a spring semester progress report on May 24, the reporting period date. (FF # 45). Because the fall progress report was not provided consistent with the 2022 IEP, the SCO finds and concludes that District did not comply with 34 C.F.R. §§ 300.320(a)(3) and 300.323(c)(2).

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).

The omission of a "material," "essential," or "significant" provision of a student's IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with "sister courts . . . that a material failure to implement an IEP violates the IDEA"); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an "essential element of the IEP" denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the "significant provisions of the IEP" denies a FAPE).

"A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard "does not require that the child suffer demonstrable educational harm in order to prevail. 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, delay in the provision of the fall progress report was only 26 days. (FF # 45). Student did not attend school for a significant portion of the fall semester, and the 26 days also represent time District schools were not in session due to winter holiday. (FF # 44). Moreover, Student had two annual review meetings on January 19 and January 25 where her progress on her goals were discussed with Parent. (FF # 19). Thus, the SCO finds and concludes that District's noncompliance with IEP implementation was not material and did not result in a denial of FAPE.

Systemic IDEA Noncompliance: This investigation does not demonstrate noncompliance that is systemic and will likely impact the future provision of services for all children with disabilities in District if not corrected. 34 C.F.R. § 300.151(b)(2).

Pursuant to its general supervisory authority, the CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the District. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the State

Complaint Procedures are “critical” to the State Educational Agency’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, there is nothing in the Record to demonstrate that District’s noncompliance with 34 C.F.R. §§ 300.320(a)(3)(iii), 300.323(c), and 300.502(b)(1)-(2) is systemic in nature or otherwise pervasive throughout District. Rather, the noncompliance is isolated and limited to Student’s specific situation. Thus, the SCO finds and concludes that the noncompliance is not systemic.

REMEDIES

The CDE concludes that District did not comply with the following IDEA requirements:

- a. Providing an IEE at public expense without unnecessary delay or filing a due process complaint to show an evaluation was appropriate, as required by 34 C.F.R. § 300.502(b)(1)-(2).
- b. Implementing the IEP, as required by 34 C.F.R. §§ 300.320(a)(3)(iii) and 300.323(c)(2).

To demonstrate compliance, District is ORDERED to take the following actions:

1. Corrective Action Plan

- a. By **Thursday, December 26, 2024**, District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the noncompliance 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, Assistant Superintendent, Special Education Coordinator, and School Nurse Consultant must review this Decision. This review must occur no later than **Friday, January 10, 2025**. A signed assurance that this Decision has been reviewed must be completed and provided to the CDE no later than **Friday, January 17, 2025**. If the individuals identified in this paragraph are no longer employed by District when the review occurs, staff occupying identical roles must review the Decision. If District no longer has any of these roles, District may substitute the individual occupying the role with similar responsibilities.

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
201 E. Colfax Avenue
Denver, CO 80203

NOTE: If District does not meet the timelines set forth above, it may adversely affect the District's annual determination under the IDEA and subject District to enforcement action by the CDE.

CONCLUSION

The Decision of the CDE 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 26th day of November, 2024.



Tiera Brown
State Complaints Officer

APPENDIX

Complaint, pages 1-13

Response, pages 1-5

- Exhibit A: IEPS
- Exhibit B: Evaluations
- Exhibit C: Progress monitoring
- Exhibit D: Attendance reports
- Exhibit E: Record request documentation
- Exhibit F: IEE request documentation
- Exhibit G: Medical incident documentation
- Exhibit H: Notices of meeting
- Exhibit I: Prior written notices
- Exhibit J: District policies and procedures
- Exhibit K: Email correspondence
- Exhibit L: District witnesses
- Exhibit M: Verification of delivery
- Exhibit N: Email re: records request

Reply, pages 1-22

- Exhibit 1: Supporting Documentation

Telephone Interviews

- Special Education Coordinator: October 30, 2024
- Assistant Superintendent of Learning Services: October 30, 2024
- Director of Student Support Services: October 30, 2024
- Parent: November 4, 2024