

**State-Level Complaint 2009:512**

Colorado Springs District 11

**Amended Decision**

**INTRODUCTION**

This Complaint was brought pursuant to the Individuals with Disabilities Education Act (IDEA) and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.<sup>1</sup> The undersigned State Complaints Officer (SCO) has determined that the SCO has the jurisdiction to resolve the Complaint pursuant to those same regulations.

The Complaint was properly filed in the office of the SCO on 11/11/2009 by the parent (Complainant) of the child (Student).

The SCO sent to the District a Complaint Notification letter with a copy of the Complaint and an attachment via Federal Express/Overnight delivery on 11/12/2009. Delivery confirmation established that the District received this packet on 11/13/2009.

The District's Response was received via fax on 11/30/2009 followed by a hard copy which was received by the SCO on 12/1/2009. Attachments to the Response were sent under separate cover and were received on 11/30/2009.

The Complainant's Reply to the District's Response was timely received by the SCO 12/9/2009.

The SCO submitted additional questions and a request for a 2008-2009 school year calendar to the District via email on 12/10/2009. The SCO requested that the District provide the additional documentation and respond to the follow-up questions by 12/18/2009. The District responded to the questions submitted by the SCO on 12/18/2009. However, the District sent a 2009-2010 school year calendar. The SCO requested and received a 2008-2009 school year calendar on 12/22/2009.

The SCO conducted a telephone interview with the Complainant on 12/18/2009. The SCO requested additional information from the Complainant regarding previous data collected on regression and recouplement for ESY to be submitted by 12/23/2009. No additional documentation on regression and recouplement was submitted to the SCO by the Complainant.

The SCO closed the record on 12/23/2009.

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<sup>1</sup> Hereinafter IDEA regulations will be referred to by regulation number, e.g., § 300.000.

## **ISSUES**

The issues raised in the Complaint from the time period of 11/11/2008 to 11/10/2009 that are subject to the jurisdiction of the SCO are as follows:

1. Whether the District denied the Student a free appropriate public education (FAPE) when it improperly determined that the Student was not eligible for Extended School Year (ESY) services during the summer of 2009 pursuant to § 300.106.
2. Whether the District denied the Student a FAPE when it failed to provide the Complainant with progress reports on the Student's Individualized Education Program (IEP) goals and objectives during the 2008-2009 school year pursuant to § 300.320(a)(3).

## **COMPLAINANT'S ALLEGATIONS**

The Complainant's allegations were for the Student's IEPs that were in effect from 11/11/2008 through 11/10/2009. The Complainant's allegations are summarized below:

1. The District denied the Student a FAPE when it denied the Student ESY services. Specifically, the District –
  - Failed to provide documentation of the Student's progress or regression with regard to the ESY determination;
  - Made the determination using differing measurements of Student's progress that could not be compared; and
  - Failed to assess the Student's progression or regression over the summer break.

In support of Allegation #1, the Complainant submitted a memo dated 10/26/2009 from the District outlining how the District determines eligibility for ESY services. No other documentation was submitted by the Complainant.

2. The District failed to report Student's progress on IEP goals and objectives. Specifically, the District –
  - Failed to provide updates on the Student's progress during the 2008-2009 school year; and
  - Reported the Student's performance on IEP goals based on subjective teacher opinion rather than objective measurements.

## **THE DISTRICT'S RESPONSE**

The District's Response is summarized as follows:

1. The District appropriately determined that the Student was not eligible for ESY services. Specifically, the District made that determination based on –

- The IEP team's observation of Student's regression/recoupment over all breaks during the 2008-2009 school year;
  - Teacher reports of the Student's regression/recoupment over breaks during the 2008-2009 school year;
  - Factors such as the nature of the Student's disability; and
  - The fact that Student made progress towards the IEP goals and objectives.
2. The District was not required to collect data on Student's regression and recoupment over breaks. The general trends of Student's performance did not reflect regression in the absence of reteaching. Further, the Student showed a general trend of progress towards IEP goals and objectives. Therefore, no collection of data on Student's regression and recoupment was necessary.
  3. The District collected data regarding the Student's progress towards IEP goals and objectives and provided the Complainant with periodic progress reports.

### **THE COMPLAINANT'S REPLY**

The Complainant's Reply is summarized as follows:

1. The Student has qualified for ESY services every year since the Student was in the first grade. However, the Complainant declined ESY services the summer of 2008. The District has historically kept documentation on Student's progress towards goals and regression after breaks. However, the District failed to collect documentation of the Student's regression and recoupment for the 2008-2009 school year.
2. The District improperly relied on teacher observation as the only measurement of Student's regression in its ESY determination.
3. The District failed to monitor Student's progress towards IEP goals. The District's progress reports do not address Student's specific goals. Specifically –
  - a. Student had an IEP goal to write a one page essay with accurate spelling, punctuation, and sentence structure. However, Student's teachers told the Complainant that students in their classes were not expected to write essays of that length. Therefore, none of the teachers worked with Student on the writing goal. The only documentation of Student's progress on the writing goal was a paragraph written by the Student. Further, the IEP progress notes were not specific and merely indicated that the Student was making progress in History and English.
  - b. Student's IEP math goal was to communicate using appropriate mathematical representation using graphs and or functions. The math teacher never stated how the Student was progressing on this goal and there is no evidence that the teacher worked on this goal with the Student.
4. In the Reply, the Complainant raised a new allegation that the District failed to provide prior notification of the IEP meetings held in May and October 2009. This

allegation will not be investigated as part of this Complaint because it is a new allegation for which the District has not had an opportunity to respond. However, the Complainant may file another state-level complaint on this new allegation.

### **FINDINGS OF FACT**

After thorough and careful analyses of the entire record,<sup>2</sup> the SCO makes the following FINDINGS of Fact:

#### **Background**

1. At the time of the Complaint, Student was [age]. Student was enrolled in (High School) in the District.
2. Student was eligible for special education as a child with a [disability].
3. Student's most recent triennial reevaluation was on 10/14/2007. The reevaluation indicated:
  - a. Student's strengths included strong social skills, participation in extracurricular activities, and concern for academic performance. Student also had strong and consistent parental support for Student's education.
  - b. Student was assessed with the Weschler Individual Achievement Test Second Edition (WIAT II). Student had scores in reading comprehension and math within the average range. However, the assessment indicated a deficiency in the area of written language. It was because of this deficiency that Student was determined eligible for special education.
  - c. Student had behaviors that affected attending, learning, study skill-sets and adaptability. However, the Student's behaviors did not rise to the level of requiring a behavior intervention plan.
  - d. Student had weaknesses in the area of written language including spelling, sentence structure and written organization. These weaknesses impacted Student's ability to be successful in the general education curriculum.
4. In an interview with the SCO, the Complainant stated that the Student needed ESY services because the Student had significant memory problems. Specifically, the Complainant said that Student had difficulty remembering grammar rules and the steps necessary to solve math problems. The Complainant maintained that the Student would forget such skills and regress if the Student did not continually work on those skills. However, nothing in the record supports the Complainant's contention. The Complainant submitted no documentation of the Student's memory problems. Further, the Complainant could not articulate specific examples of how the memory problems affected the Student's performance in school. Additionally, memory problems were not identified as an area of concern or weakness for the Student in any of the IEPs submitted by the District.

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<sup>2</sup> Decision Appendix A, pp. 16-17, which is incorporated by reference, details the record (Record) from which the Findings were determined in this case.

5. As of the end of the 2008-2009 school year, Student had 28 of the 46 course credits necessary for graduation. Student took 10 general education courses during the 2008-2009 school year: US History, English, Integrated Algebra/Geometry, Physical Education (PE), Biology, and Drama. Student was also enrolled in Math and Reading Tutorial classes the first semester of the 2008-2009 school year.
6. The SCO reviewed Student's High School transcripts which indicated that generally the Student's grades had improved from the 2007-2008 school year to the 2008-2009 school year.
7. Special education services in the Student's 10/29/2008 IEP totaled five hours per week. Student received the following services:
  - a. 15 minutes per week, Special Education Teacher consultation with General Education Teachers;
  - b. 15 minutes per week, Special Education Teacher/Paraeducator individual meetings with Student to assist with assignments and assessments.
  - c. Four hours per week, Special Education Teacher/Paraeducator small group instruction for academic support and study skill development.
  - d. 30 minutes per week, Special Education Teacher/Social Worker educational counseling and academic support.
8. Accommodations in Student's 10/9/2008 IEP included: study guides; opportunity to retake assessments; extended time on assessments and assignments; preferential seating; use of calculator; oral instructions to accompany written assignments; and frequent checks for understanding. Student received instruction in the general education curriculum without modification.
9. The SCO finds that the special education and related services as well as the accommodations determined by the IEP team for the Student were not especially extensive.
10. Having carefully reviewed the Student's grades, the SCO finds that the Student made progress in the general education curriculum throughout the 2008-2009 school year.<sup>3</sup> The SCO specifically finds that the Student received educational benefit from the 10/9/2008 IEP as written.
11. The SCO finds nothing in the record that indicated that the Student required ESY due to Student's degree of impairment, rate of progress, or behavioral issues. Additionally, there was no indication that Student needed ESY services to maintain the ability to interact with non-disabled children or for vocational needs. The SCO also finds no indication that that ESY services were necessary because of the Complainant's inability to provide Student with educational structure at home.
12. The Student initially received ESY services in the summer of 1999. Student last received ESY services in the summer of 2007. According to the Student's 10/9/2008 IEP in effect for the 2008-2009 school year, the IEP team determined that Student was not eligible for ESY services because the Student has not shown significant

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<sup>3</sup> See Decision Appendix B, Student Academic Performance, p.18-19.

regression on IEP goals and objectives. Based on a review of the Student's IEPs, the SCO specifically finds that the IEP team determined that the Student was not eligible for ESY services the summers of 2008 and 2009.

13. According to the Complainant, the Student received outside therapy and educational support during the summer of 2008 and two hours per week of tutoring during the summer of 2009.
14. The District ESY policies specified that ESY eligibility was to be discussed at all IEP meetings and that the determination of ESY eligibility was made annually by the IEP team. The policies provided that the ESY determination is based on whether the educational benefits accrued during the regular school year will be significantly jeopardized in the absence of ESY services. The policies and procedures indicated that the staffing team should consider retrospective data (e.g., evidence of significant past regression and recoupment) and predictive data relating to future regression and recoupment (e.g., severity of child's needs, or physical or behavior issues).
15. The District ESY protocol was to gather information about the Student's regression and recoupment during school breaks throughout the school year. The District's ESY Guide indicated that Teachers should collect data relating to specific skills and objectives just as they collect data on all IEP objectives to determine progress throughout the chronological year. The decision of whether a student is eligible for ESY services was based on the student's ability to maintain learned skills identified on the IEP during the typical school year. The data collected during the current year was used to determine eligibility for ESY services.
16. In a memo from the District to the Complainant dated 10/26/2009, the District explained why the District collected data over school breaks during the school year rather than over the summer break. Given the length of summer breaks and the District formula for recoupment, the length of time necessary to determine recoupment would not timely reflect recoupment difficulties. Further, because instructors and curricula change from year to year, using the summer break to determine ESY recoupment would not accurately reflect whether a student recouped skills more quickly or slowly under prior instructional conditions. The SCO finds that the District's rationale for using breaks throughout the school year to analyze the Student's regression and recoupment was appropriate and consistent with Colorado Department of Education (CDE) ESY Guidelines.<sup>4</sup>
17. The District policies ensured ESY determinations were individualized and made within the IEP process. The District ESY policies also ensured that the analysis used in determinations included both retrospective data and predictive factors. The SCO specifically finds that the District policies were consistent with the ESY requirements under the IDEA and Colorado Department of Education ESY Guidelines.

### **10/9/2008 IEP Writing Goal**

18. The Student's 10/9/2008 IEP had the following four annual goals in the areas of writing, math, post-school career, and test taking.

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<sup>4</sup> "Determining ESY Services" (1998). Available at <http://www.cde.state.co.us/cdesped/download/pdf/law-ESYGuidelines.pdf>.

19. The District used the following ratings for IEP progress reports: (1) Student has not yet worked on this goal; (2) Student has made inconsistent progress on this goal; (3) Student has made steady progress on this goal; (4) Student has met this goal. The Student's IEP progress reports extended over three reporting periods during the 2008-2009 school year.
20. The 10/9/2008 IEP writing goal was "When writing a one page essay, [Student] will use correct punctuation, grammar, sentence structure and spelling with 95% accuracy." The SCO finds that the focus of this goal was on discrete elements of writing that could be measured through writings of any length including paragraphs.
21. Progress on the writing goal was to be measured through Student performance and demonstration on *assignments* and from portfolio-samples. The Student's progress on IEP goals was as follows:
  - a. 12/19/2008: Rating 3. Supporting Data: "[Student] shows consistent progress in English and US History."
  - b. 3/12/2009: Rating 3. Supporting Data: "[Student] generally does well on completed English assignments."
  - c. 5/28/2009: Rating 3. Supporting Data: "When measured as error density by word count, [Student] perform[ed] between 90-100% on English assignments."
22. The 12/19/2008 and 3/12/2009 supporting data statements reflected the Student's general progress in classes. Because progress on the goal was to be measured based on Student's performance on assignments, the supporting data statements provided adequate information on Student's progress. The 5/28/2009 supporting data statement was more specific to the elements of the IEP goal.
23. In May 2009, Student's classroom teachers completed a "Teacher Input Form for Consideration of Extended School Year (ESY) Services." The Student's History and Biology Teachers reported the following information regarding the Student's progress on the writing goal:
  - a. "In History, students are required to write well developed paragraphs at least once a week. These paragraphs include topic and concluding sentences and supporting reasons, details, or facts. [Student] successfully writes well developed paragraphs and includes appropriate evidence. [Student] also successfully completed a [five] paragraph essay earlier this semester with at least 95% accuracy concerning the [IEP goal]."
  - b. In Biology, students are required to write in complete sentences. [Student] is able to perform this task and meet [the IEP] goal of 95% accuracy. Students are seldom required to complete essays, but lab conclusion paragraphs are often a requirement and [Student] is able to accomplish this task appropriately.
  - c. Both the History and Biology Teachers reported that [Student] had not shown regression in skills after extended periods away from school.

- d. Both the History and Biology Teacher stated that [Student] did not need additional assistance to learn the material or to regain writing skills after spring break or extended excused absences.
24. During the 2008-2009 school year, some of Student's writing assignments for English were evaluated based on writing components within a rubric.<sup>5</sup> These components included content, organization, voice, *sentence structure*, description, and conventions. The "conventions" component of the rubric assessed *grammar*, *spelling* and *punctuation*. The rubric had four point levels: advanced – 4 points; proficient – 3 points; partially proficient – 2 points; and unacceptable – 1 point. The percentages calculated for assignments were based on the total points possible for all components within the rubric.
25. The Student's writing assignments were also evaluated using an Error Density Word Count (EDWC) analysis. The EDWC was calculated based on the total number of words and sentences in the Student's writing sample. Spelling, grammar and punctuation errors were reported as a percentage of total words. Sentence structure errors were reported as a percentage of total sentences.
26. The SCO specifically finds that both the rubric and the EDWC appropriately measured Student's progress on the IEP writing goal because both methods measured the discrete skills of punctuation, grammar, sentence structure and spelling identified in the IEP goal. Although assignments analyzed using the rubric resulted in lower percentages, the SCO finds that the discrepancy was due to the fact that the rubric evaluated additional components of writing such as organization, content, style, and fluency.
27. In its Response, the District submitted to the SCO several writing samples completed by the Student. There were eight writing samples that fell near or within the dates of 11/11/2008 to 11/10/2009. The writing samples consisted of paragraphs ranging in length from two to seven sentences and consisted of 25 to 133 words. The accuracy for spelling, grammar, punctuation and sentence structure were calculated by the District using the EDWC analysis.
- a. Of the writing samples, Student's accuracy ranged between 84 to 100% in spelling; 94 to 100% in grammar; 88 to 98% in punctuation; and 66 to 100% in sentence structure. The average accuracy for all writing elements ranged between 89.8 to 96.1%.<sup>6</sup>
- b. Student's accuracy fluctuated across writing elements from assignment to assignment. For example, on one writing assignment Student had 100% accuracy on spelling and 85.7% accuracy on sentence structure. However, on a subsequent writing assignment, Student had 84% accuracy on spelling and 100% accuracy on sentence structure.
- c. The SCO specifically finds that the Student's overall accuracy on the writing assignment samples fluctuated by less than 10% from assignment to assignment. The SCO further finds that the Student's accuracy on

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<sup>5</sup> The rubrics attached to writing assignments from 2008 were based on a six component rubric. The rubrics on writing assignments from 2009 were based on a 3 categories: Content/Organization, Style/Fluency, Conventions. Both rubrics included evaluation of sentence structure, grammar, spelling, and punctuation.

<sup>6</sup> See Decision Appendix B, Student Performance, p.18.



assignments did not reflect problems with regression or recoupment after breaks during the 2008-2009 school year.

28. Based on the above documentation, the SCO specifically finds that the District appropriately monitored and measured the Student's progress on the 10/9/2008 IEP writing goal. Further, the SCO finds the Student made progress on the writing goal.

### **10/9/2008 IEP Math Goal**

29. The 10/9/2008 IEP math goal was: "When presented with an appropriate real life situation, [Student] will be able to communicate the event through an appropriate mathematical representation using graphs and/or functions 85% of the time."
30. Progress was to be measured through Student's performance and demonstration on *assignments*. Data was to be gathered based on portfolio-samples.
- a. 12/19/2008: Rating 2. Supporting Data: "[Student] struggles with mathematical concepts, but is putting forth good effort and is showing progress."
  - b. 3/12/2009: Rating 3. Supporting Data: "[Student] is doing well on math class assignments but is struggling with assessments."
  - c. 5/28/2009: Rating 3. Supporting Data: "[Student] has performed between 29-100% on quizzes and 56-68% on tests in the past 9 weeks."
31. During this period, Student was quizzed on functions and had graphing assignments in the Integrated Algebra/Geometry class. In an interview with the SCO, the Complainant acknowledged that she had ongoing communications with the Math Teacher and understood that the content of the class covered graphing and functions.
32. The SCO finds that the supporting data statements in the IEP progress reports reflected the Student's general progress in math, but were not stated in a manner that was specific to the IEP math goal. However, progress on the goal was to be measured based on Student's performance on assignments and the math curriculum encompassed the areas stated in the Student's IEP goal. Therefore, the Student's progress on the math goal was adequately measured, monitored and reported based on class assignments.
33. Student had 39 assignments in the Integrated Algebra/Geometry class from 11/7/2008 to 5/7/2009. The average grade percentage Student received on homework assignments was 86.3% for first semester and 87.2% for second semester. The SCO finds that the Student's grade percentages on math homework assignments had wide fluctuations which ranged from 40-100%. Further, the grade percentages the Student received on homework assignments after school breaks did decrease. However, the Student's grades on assignments quickly rebounded after a period of a few days.<sup>7</sup> The SCO specifically finds that, although there was some regression in the Student's grades on homework assignments after breaks, the Student's performance did not reflect problems with recoupment of skills.

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<sup>7</sup> See Decision Appendix B, Student Academic Performance, p.19.

34. The Student's quiz/test grades in the Integrated Algebra/Geometry class also fluctuated. However, the SCO finds no correlation between the fluctuations in quiz and test scores and school breaks.

35. Overall, the SCO finds the Student made progress on the 10/9/2008 math goal.

#### **10/9/2008 Other Goals**

36. The Student's career goal was "[Student] will gather information on a career in the military quarterly and enroll in a ROTC course by the beginning of the junior year." Progress was to be measured by Student performance, demonstration or self-report.

37. The progress reported on this goal was as follows:

- a. 12/19/2008: Rating 2. Supporting Data: "[Student] gained information on the military from the counseling department."
- b. 3/12/2009: Rating 1. Supporting Data: "[Student] is no longer interested in the military. [Student] is challenged to identify a career of interest."
- c. 5/28/2009: Rating 1. Supporting Data: "[Student remains uninterested in pursuing a career and has not identified another career interest."

38. Although the Student chose to discontinue this goal, the SCO finds that the progress on the career goal was measured, monitored and adequately reported.

39. The 10/9/2008 IEP had a test taking goal, "[Student] will gain five test taking strategies for standardized testing."

- a. 12/19/2008: Rating 1. Supporting Data: "[Student] has not worked on this goal."
- b. 3/12/2009: Rating 3. Supporting Data: "[Student] can state five test taking strategies."
- c. 5/28/2009: Rating 3. Supporting Data: "[Student] can state five test taking strategies and demonstrated at least three strategies on the math final."

40. The supporting data statement specifically reported the Student's progress on this goal. The Complainant contended that the District only put forth a superficial effort to work with the Student on the test taking goal. However, the SCO finds that the progress on the test taking goal was measured and monitored and that Student progressed on this IEP goal.

#### **5/11/2009 IEP Meeting**

41. In April 2009, the Complainant requested an IEP meeting to discuss the Student's eligibility for ESY services. An IEP meeting was held on 5/7/2009. The Complainant disagreed with the IEP team's determination that Student did not qualify for ESY services. The meeting was continued to 5/11/2009 at the Complainant's request because the District did not have written documentation regarding the Student's regression and recoument over breaks prepared for the Complainant.

42. The following individuals were in attendance at the 5/11/2009 IEP meeting: District Special Education Facilitator (Facilitator), High School Assistant Principal ( Asst. Principal), Special Education Case Manager (Case Manager), Student's US History Teacher (Teacher), and the Complainant.
43. At the 5/11/2009 IEP meeting the IEP team discussed whether there was a need to collect data on the Student's regression and recoupment. The IEP team determined that the Student was not eligible for ESY services. These discussions were appropriately documented in a prior written notice memo to the Complainant dated 5/11/2009.
44. The SCO finds that a properly convened IEP team made the determination of ESY eligibility for the Student for the summer of 2009. The SCO further finds that the ESY determination was made on an individualized basis. Additionally, the SCO finds that the ESY determination was made in accordance with District ESY policies and State ESY guidelines.
45. The SCO finds no error in the IEP team's determination of the Student's ESY eligibility for the summer of 2009. The Student's IEP history reflected no concern regarding the Student's reported memory problems (see Finding of Fact<sup>8</sup> 4). The Student's performance did not reflect significant regression or recoupment problems (FF 27c, FF 33, FF 34). Further, the Student was progressing in the general education curriculum and on IEP goals and objectives.
46. Although the District maintained that the IEP progress reports were sent to the Complainant's address by US mail at the end of each quarter, the District acknowledged that the Complainant had complained of not receiving progress reports in the 5/11/2009 IEP meeting. The District subsequently provided the progress reports attached to the 5/11/2009 memo to the Complainant.
47. The Complainant had other children who received special education in the District. In an interview with the SCO, the Complainant stated that IEP progress reports were properly received for the other children. The Complainant stated that the progress report issue was specific to this particular Case Manager at the High School.
48. The SCO finds the Complainant's allegations credible because the Complainant is familiar with how IEP progress reports are provided and the Complainant raised the issue with the District well before the filing of this Complaint. Other than its assertion that IEP progress reports were mailed to the Complainant, the District provided no other supporting documentation. However, the SCO finds that this failure to provide progress reports did not result in a denial of FAPE to the Student because the Student continued to progress even though the Complainant had not been supplied with IEP progress reports. Further, the District provided the Complainant with the Student's IEP progress reports on 5/11/2009. Therefore, this issue has been resolved.

#### **8/26/2009 IEP**

49. The Complainant requested both an assessment of the Student's writing and an IEP team meeting at the beginning of the 2009-2010 school year. The IEP team

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<sup>8</sup> Hereinafter, *FF*

reconvened on 8/26/2009. A new IEP was developed. Relevant to this Complaint, the following changes were made to the IEP:

- a. Student's writing goal was revised to "[Student] will use the writing process of planning, writing, and reviewing to respond to a prompt receiving three or better on the District writing rubric in all categories 90% of the time."
- b. Student's math goal was revised to "[Student] will increase math application skills by increasing the score to 18 correct responses on a standard bi-weekly 8 minute 5<sup>th</sup> grade math skills probe."
- c. Student's career goal was revised to "[Student] will research possible career options and their requirements for three separate careers."
- d. Student's test taking goal was revised to "[Student] will learn and practice three standardized test-taking strategies."
- e. Student's special education services were reduced from five hours per week to two hours and forty minutes per week.

50. At the 8/26/2009 IEP meeting, the IEP team discussed the Student's performance on a writing sample dated 8/24/2009.

- a. Based on the District's rubric, the Student received a rating of two out of four possible points – partially proficient - in all categories including content and organization, style and fluency, and conventions. The Student received 50% on the assignment.
- b. Using the EDWC on the same writing sample, the Student had 97.6% accuracy on spelling, grammar, and punctuation, and 66.7% accuracy on sentence structure. Average accuracy using the EDWC analysis was 90%.
- c. Although the Student had a higher accuracy on the writing sample as calculated by the EDWC, as previously explained in FF 23, the rubric extends to other categories of writing which resulted in a lower percentage using the rubric.

51. An IEP meeting was reconvened on 11/3/2009. The purpose of the meeting was to discuss whether the Student had regression or recoupment problems over the summer of 2009. The IEP continued to indicate that the Student was not eligible for ESY services because the Student's performance data did not indicate significant regression. The Complainant indicated disagreement with the Student's ESY eligibility determination because of the measurements used as the basis for the decision on the IEP.

52. For the same reasons explained in FF 44-45, the SCO finds no error in the ESY determination indicated in the Student's IEP.

### **ANALYSIS AND CONCLUSIONS OF LAW**

Having carefully considered all information in the record, the SCO makes the following CONCLUSIONS OF LAW which are specifically limited to the facts of this case:

1. Under the IDEA, each child with a disability is entitled to a free appropriate public education (FAPE). A FAPE is tailored to the unique needs of the child by means of an IEP. *Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176 (1982).
2. The appropriate education required by the IDEA is not one which is guaranteed to maximize the child's potential. The substance of an IEP provides a FAPE if it provides the child with a basic floor of opportunity that consists of access to specialized instruction and related services which are individually designed to provide educational benefit. *Rowley*. This educational benefit must be more than de minimis. *Urban by Urban v. Jefferson Co. Sch. Dist. 1*, 89 F.3d 720 (10<sup>th</sup> Cir. 1996).
3. In reviewing an IEP, it must be first determined whether or not the IEP development process complied with IDEA procedures. Secondly, it must be determined whether the substance of the IEP provided a FAPE. *Rowley*. However, a procedural error in the IEP does not necessarily entitle a child to relief. Procedural errors amount to substantive failures only where the procedural inadequacy results in an effective denial of FAPE. *Sytsema v. Academy Sch. Dist 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008).
4. The IDEA requires each public agency to ensure that extended school year (ESY) services are available *as necessary to provide FAPE*. ESY services must be provided *only if* a child's IEP team determines, on an individual basis, in accordance with §§ 300.320 – 300.324, that the services are necessary to provide FAPE to the child. 34 C.F.R. § 300.106(a)(2).
5. A public agency may not limit ESY services to particular categories of disability or unilaterally limit the type, amount, or duration of those services. 34 C.F.R. § 300.106(a)(3).
6. States have considerable flexibility in determining eligibility for ESY services and in establishing State standards for making ESY determinations. However, the State standards must be consistent with the individually-oriented requirements of the Act. *See Analysis of Comments and Changes 2004 IDEA Part B regulations*, 71 Fed. Reg. p. 46582, discussion of ESY services.
7. The provision of ESY services is the exception and not the rule under the IDEA regulatory scheme. It is incumbent upon the individual proposing to include ESY services in the child's IEP to demonstrate, in a particularized manner related to the individual child, that ESY services are necessary to avoid something more than adequately recoupable regression. *Cordrey v. Euckert*, 917 F.2d 1460 (6<sup>th</sup> Cir. 1990).
8. Determination of whether a child requires ESY services is based on retrospective data - the amount of regression suffered by a child during school breaks considered together with the amount of time required to recoup those lost skills. Specifically, it must be determined whether the benefits accrued to the child during the regular school year will be significantly jeopardized if the child is not provided an educational program outside of the normal school year. *Johnson v. Ind. Sch. Dist. No. 4 of Bixby*, 921 F.2d 1022 (10<sup>th</sup> Cir. 1990).
9. However, in addition to the retrospective data considered in the regression and recoupment analysis, the ESY analysis should include predictive data. *Bixby*. Predictive data includes factors such as:

- The degree of the child's impairment;
- The ability of the child's parent to provide educational structure at home;
- The child's rate of progress;
- The child's behavioral or physical problems;
- The availability of alternative resources;
- The ability of the child to interact with non-disabled children;
- The areas of the child's curriculum which need continuous attention;
- The child's vocational needs; and
- Whether the service is extraordinary to the child's condition, as opposed to an integral part of a program for those with the child's condition.

*Bixby.* See also Colorado ESY Guidelines: "Determining ESY Services" (1998) at pp. 10-11.

10. The CDE ESY Guidelines provide that teachers should collect data relating to specific skills and behaviors that have been identified on the child's current IEP, *just as they would to determine if appropriate progress is being made during the school year.* The CDE ESY Guidelines *suggest* that service providers collect data before and after major breaks and record the data in the child's file. The decision as to whether a child is eligible for ESY services is determined by a child's ability to maintain learned skills identified on the IEP *during the typical school year.* Colorado ESY Guidelines, p.2.

11. The IDEA has several requirements for IEP content. Relevant to this Complaint, an IEP must contain:

- A statement of *measurable* annual goals, including academic and functional goals designed to:
  - (1) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum.
  - (2) Meet each of the child's other educational needs that result from the child's disability.

34 CFR § 300.320(a)(2)

- A description of —
  - (1) How the child's progress toward meeting the annual goals will be measured; and
  - (2) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.

**Issue 1: Whether the District improperly determined that the Student was not eligible for ESY services.**

12. The SCO concludes that there was no error in the District's determination that the Student was not eligible for ESY services. The CDE ESY Guidelines do not require assessment of a child specifically after summer breaks or collection of data for the sole purpose of documenting regression and recoupment. The District's ESY policies and procedures were consistent with the IDEA and the CDE ESY Guidelines (FF 16-17). The District followed its ESY policies and procedures in making the ESY determination for the Student (FF 44, FF 52). Additionally, the Complainant did not demonstrate that the Student required ESY services in order to receive a FAPE (FF 4). The record demonstrated that the Student made progress in the general education curriculum and on IEP goals (FF 10, FF 28, FF 35, FF 40, FF 45). Further, there was no clear evidence of regression or recoupment problems (FF 27c, FF 33, FF 34) or predictive factors indicating a need for ESY services for the Student (FF 3a, FF 3c, FF 11). Therefore, the SCO finds no IDEA violation.

**Issue 2: Whether the District failed to provide the Complainant with progress reports on the Student's Individualized Education Program (IEP) goals and objectives.**

13. The SCO concludes that the District failed to provide the Complainant with regular reports of Student's progress on IEP goals (FF 48). However, the failure to provide the Complainant with regular progress reports did not result in a denial of FAPE (FF 48). Additionally, the District has provided the Complainant with the relevant progress reports (FF 46, FF 48). Therefore, the SCO concludes the violation has been remedied.

**REMEDY**

As no violation was found as to Issue I, and because the procedural violation found regarding Issue II was previously remedied by the District, no remedy is hereby ordered.

**CONCLUSION**

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Dated this 8<sup>th</sup> day of January, 2010.

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Stephanie D. Lynch, Esq.

## Appendix A Record

<b>Complaint</b>	
Attachment 1 (Att. 1)	Memo from District to Complainant Dated 10/26/2009
<b>Complainant Reply</b>	
<b>Complainant Phone Interview</b>	12/18/2009.
<b>District Response</b>	
Document A (Doc. A)	District Exhibit A: ESY Policies & Procedures, ESY Teaching Application Form, ESY Referral-Eligibility Form, District ESY Guide, ESY Examples.
Doc. B1	District Exhibit B1: District Internal email 5/2009 re: Complainant dispute regarding ESY.
Doc. B2	District Exhibit B2: Prior Written Notice memo to Complainant 5/11/2009.
Doc. B3	District Exhibit B3: Teacher Input Form for Consideration of ESY Services (History, Biology, Math Tutorial/Integrated Algebra/Geometry).
Doc. B4	District Exhibit B4: Writing and Math Performance Data, Writing Performance Graph by month 9/2008 – 10/2009, Spelling Errors-Biology Biweekly Graph 1/2009 – 5/2009, Math Performance Monthly Graph 8/2008 – 5/2009, Statements of Progress on career and test-taking IEP goals.
Doc. B5	District Exhibit B5: Writing Performance Graph by Month 9/2008 – 10/2009, English Assignment Writing Data, Student's written assignments (one paragraph each) dated 8/24/2009, 8/25/2009, 9/21/2009, 10/1/2009, and 10/29/2009.
Doc. B6	District Exhibit B6: Two Student writing samples (one paragraph each) dated 6/2/2009 with High School rubric evaluation.
Doc. B7	District Exhibit B7: Student writing assignments (one paragraph each) with High School rubrics evaluations from 8/24/2009, 10/29/2009, and 11/24/2009.
Doc. B8	District Exhibit B8: Student Transcript printed 11/23/2009, Student Marks Information, Student Transcript Information, Case Management Notes, IEP progress reports from 3/12/2009, Quarter 3 Grades, Student Assignment Information-Quarter 3, 9/12/2007 Student Report Card, Student Assignment Information First Semester 2007, Student District & State Assessment scores 4/2008 – 4/2009, Student District Assessment Information 3/2005 – 4/2007, Student Reading Progress Monitoring Information 2006 – 2009, State Assessment Longitudinal Reports 2005 – 2007, <i>duplicate</i> Writing Performance Graph by Month, Writing Performance Error Density Graph by Month 9/2008 – 10/2009, Student writing assignment (one paragraph) 9/22/2008 with High School rubric evaluation, Student writing assignment (2.5 pages, seven paragraphs) with High School rubric evaluation 10/3/2008, Student writing assignment with High School rubric evaluation 11/17/2008, Career Fair '08 Worksheet 2/25/2009, Student writing assignment 3/30/2009, <i>duplicate</i> Spelling Errors on Biology Assignments Biweekly Graph, Biology Assignment 1/12/2009 (one page), Biology Assignment 1/21/2009 (three questions/one paragraph), Student



Assignment – Fast Food Summary (one paragraph) 1/26/2009, Biology Assignment (one page) 2/6/2009, Biology assignment (three paragraphs) 2/27/2009, Biology notes (one page) 3/9/2009, Biology lab notes (one sentence) 3/16/2009, Student Biology lab notes (4 sentences) 3/31/09, Student Biology assignment (one sentence summary) 3/31/2009, Student Biology worksheet 3/9/2009, Student Biology notes 3/9/09, Student Biology worksheet 4/7/2009, Student Progress Report – Integrated Algebra/Geometry 8/19/2008 – 12/19/2008, Student Progress Report – Integrated Algebra/Geometry 1/9/2009 – 5/4/2009, Teacher Input for Consideration of ESY Services 5/6/2009 from History, Biology, and Integrated Algebra/Geometry teachers, *duplicate* Prior Written Notice ESY memo 5/11/2009, Receipt of Parent's Rights signed by Complainant 10/9/2008, *duplicate* IEP Progress Report from 3/12/2009, *duplicate* Writing and Math Performance Data, *duplicate* Writing Performance Graph by Month, *duplicate* Spelling Errors on Biology Assignments Biweekly Graph, *duplicate* Math Performance Monthly Graph, Progress Notes on career and test-taking IEP goals, IEP progress Report on career and test taking IEP goals, *duplicate* Student Progress Report – Integrated Algebra/Geometry.

Doc. B9 District Exhibit B9: *duplicate* Prior Written Notice ESY memo dated 5/11/2009.

Doc. C1 District Exhibit C1: IEP Progress Report all Goals for periods ending 12/19/2008, 3/12/2009, and 5/28/2009.

Doc. C2 District Exhibit C2: IEP Progress Report all goals for period ending 11/5/2009.

Doc. C3 District Exhibit C3: Student 10/9/2008 IEP.

Doc. C4 District Exhibit C4: Student 8/26/2009 IEP, Prior Written Notice 11/3/2009.

Doc. D District Exhibit D: Student 10/25/2007 IEP, 10/10/2007 Triennial Evaluation Report, 10/25/2007 Eligibility Determination, 10/22/2007 Notice of Meeting, 9/19/2007. Notice of Meeting, 9/17/2007 Permission to Reevaluate.

Doc. E District Exhibit E: Student Cumulative File.

**District Supplement to the Record received 12/18/2009**

Doc. F Email response to questions submitted by the SCO.  
 Doc. G 2008-2009 School Year calendar.

**SCO supplement to the Record**

CDE ESY Guidelines: Determining ESY, 1998.  
 High School Course Catalog

## Appendix B Student Academic Performance

Student Grades 2008-2009

Semester One		Semester Two	
Course	Grade	Course	Grade
US History	B	US History	B
English 3	B	English 4	C
Integrated Algebra/Geometry	D	Integrated Algebra/Geometry	C
PE	D	PE	C
Math Tutorial	C	Drama	A
Reading Tutorial	A	Biology	B

Student's Writing Performance: Accuracy based on Error Word Density Count

Date	Sentences	Words	Spelling	Grammar	Punctuation	Sentence Structure	Average Accuracy <sup>9</sup>
11/7/08	4	43	93.0	100	90.7	100	95.9
2/25/09	6	59	91.5	94.9	89.8	83.3	89.8
<b>Five Day Spring Break</b>							
3/30/09	7	71	94.4	94.4	88.7	100	94.4
<b>Summer Break</b>							
8/24/09	3	42	97.6	97.6	97.6	66.7	89.9
8/25/09	7	133	100	100	98.5	85.7	96.1
9/21/09	2	25	84	100	96	100	95
10/1/09	5	57	96.5	98.2	96.5	80	92.8
10/29/09	5	49	94	97.5	94.5	80	91.5

Student's Math Assignment Performance

Date	Assignment	Percent
11/21/2008	Week 14 Assignments	96.7%
11/25/2008	Week 15 Assignments	70%
<b>Three day Thanksgiving Break</b>		
12/5/2008	Week 16 Assignments	90%
12/11/2008	Week 17 Assignments	100%
12/17/2008	Week 18 Assignments	100%
<b>Twelve day Winter Break</b>		
01/09/2009 <sup>10</sup>	Area, Circumference Circles	60%
01/12/2009	Volume & Surface Area	60%
1/13/2009	Section 11.1, p.634	40%
1/14/2009	Section 11.2, p.643	100%
1/15/2009	Just Plane Geometry	100%

Date	Assignment	Percent
3/16/2009	5-1 p.256, #10-15	100%
3/18/2009	5-1 p.256, #16-28 even	60%
3/20/2009	5-1 p.256, #17-27 odd	100%
<b>Five Day Spring Break</b>		
4/2/2009	Review: Graph & Substitution	40%
4/3/2009	Worksheet 3	100%
4/7/2009	p.263, #14-16	100%

<sup>9</sup> As calculated by the SCO, average accuracy of all writing elements for each of the eight assignments.

<sup>10</sup> After the semester break, Student had a new teacher for this class. The new teacher listed daily grades for assignments rather than the previous grading based on assignments for the week.

**Appendix B**  
**Student Academic Performance**

Student's Math Quiz/Test Scores

<b>Date</b>	<b>Grade</b>
8/22/2008	60%
9/12/2008	65%
10/10/2008	67.1
10/16/2008	80%
10/24/2008	100%
10/28/2008	33.3%
11/4/2008	60%
11/14/2008	35.8%
11/25/2008	50%
<b>Three Day Thanksgiving Break</b>	
12/3/2008	80%
12/5/2008	66.7
12/12/2008	40.2%
12/17/2008	50%
<b>Twelve Day Winter Break</b>	
1/20/2009	66.7%
1/23/2009	100%
1/30/2009	37.5%
2/5/2009	66%
2/11/2009	60%
2/17/2009	80%
3/4/2009	56.2%
<b>Five Day Spring Break</b>	
4/10/2009	75%
4/21/2009	56%
5/4/2009	28.6%