

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

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**State-Level Complaint 2017:516  
Pueblo City Schools, District 60**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on August 29, 2017, by the parent of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup>

Based on the written Complaint, the State Complaints Officer (SCO) determined that the Complaint identified four allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.<sup>2</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**SUMMARY OF COMPLAINT ALLEGATIONS**

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

1. Failing to include the necessary IEP meeting participants or obtain proper excusals for the IEP meeting dated November 18, 2016;
2. Failing to provide Student with one-on-one occupational therapy services following an FBA review meeting in November 2016, based upon staffing levels and contract requirements, rather than Student's individual needs;
3. Failing to implement Student's IEP, both while at Charter School and at School, from August 29, 2016 through the end of the 2016-2017 school year;
4. Failing to educate in the least restrictive environment after Student transferred from Charter School to School in November 2016.<sup>3</sup>

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

<sup>2</sup> Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

<sup>3</sup> Letters to the Parties accepting this Complaint for investigation misidentified the date of Student's transfer from Charter School to School as January of 2017 rather than November of 2016.

## **FINDINGS OF FACT**

After a thorough and careful analysis of the entire record,<sup>4</sup> the SCO makes the following FINDINGS:

### **Background:**

1. At all times relevant to the Complaint, Student was six years old and has resided with Parent within the District's boundaries. Student is eligible for special education and related services as a child with developmental delay.<sup>5</sup> Specifically, Student has demonstrated delays in the areas of social/emotional and sensory regulation skills.
2. For the 2015-16 school year, Student attended a 12 hour/week preschool program where he participated in the general education classroom for at least 80% of the time with 120 minutes of consultative special education support each month. Because Student's disability impacted his ability to interact appropriately with peers and teachers, his preschool educational program primarily focused on improving social/emotional regulation and reciprocal play with peers. In the classroom, Student exhibited disruptive behaviors that could last 45 minutes to an hour per incident. Appropriately, Student's January 2016 IEP included a behavior intervention plan (BIP) to address the disruptive behavior.<sup>6</sup>
3. For the 2016-17 school year, Parent enrolled Student in Charter School. Upon reviewing Student's January 2016 IEP, Charter School staff expressed concern that Student may not be successful in a general kindergarten class based on the behaviors described in his BIP. Specifically, Charter School staff were concerned that the larger class size, longer school day, and the transition from social to academic programming might increase the likelihood that Student would exhibit disruptive behavior. To address these concerns, District and Charter School convened an IEP meeting on August 11, 2016.<sup>7</sup>
4. As a result of the August 2016 IEP meeting, the team agreed that Student would attend a general kindergarten classroom at Charter School with the additional support of 80 minutes of direct specialized instruction each month to "reinforce appropriate behavioral expectations."<sup>8</sup> To further support behavioral needs, the team agreed to incorporate Student's January 2016 BIP and make changes as needed. Finally, the team amended Student's IEP goals to align with kindergarten behavioral expectations.<sup>9</sup>

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<sup>4</sup> The appendix, attached and incorporated by reference, details the entire record.

<sup>5</sup> Exhibit A-1, p. 3.

<sup>6</sup> Exhibit A-3, pp. 1-15.

<sup>7</sup> Response, p. 2.

<sup>8</sup> Exhibit A-2, p. 5.

<sup>9</sup> Exhibit A-2, pp. 3-6; Exhibit A-3.

5. Parent's Complaint concerns the implementation of Student's IEP at Charter School in the fall of 2016, the November 2016 IEP meeting involving Student's transfer from Charter School to School, and the implementation of Student's IEP at School for the remainder of the 2016-17 school year.

**Implementation of IEP at Charter School (August 29 to November 28, 2016)**

6. Student attended Charter School from August 29, 2016, until November 28, 2016. During this time, Charter School was following the January 2016 IEP, as amended during the August 2016 IEP meeting.<sup>10</sup>

7. Parent has alleged that the District failed to implement Student's IEP while he attended Charter School. Specifically, Parent was concerned that Student was not being provided with OT services, including access to a compression vest, and was spending too much time in Charter School Special Education Teacher's office rather than in the classroom. As explained in Finding of Fact # 20 below, OT services were not finalized and included in Student's IEP until the meeting on November 18, 2016. Consequently, Charter School was not obligated to provide these services from August 29 through November 18, 2016.

8. The SCO now turns to Parent's allegation that Charter School was not providing behavioral supports consistent with Student's IEP, resulting in Student spending too much time out of the classroom. Student's IEP included a BIP that was first developed in preschool to address disruptive behavior. According to the functional behavioral assessment (FBA) summary statement, Student exhibited disruptive behavior when "situations did not go according to his wants." This behavior included hitting, pushing, and kicking others; throwing items, pushing furniture, and clearing tables; and exhibiting loud shouts or cries. Once Student became upset, it was difficult for him to calm down or be redirected to other tasks which resulted in the disruptive behavior sometimes lasting for 45 minutes to an hour.<sup>11</sup>

9. To address disruptive behavior, the BIP described specific setting event strategies, antecedent strategies, behavior teaching strategies, and reinforcement strategies. To reduce the impact of setting events, Student was to be provided with verbal and visual reminders, a morning social story, and song to prepare for transition. In addition to transition reminders, educators were to provide information about transition in brief statements and check for understanding to decrease the likelihood that the targeted behavior would occur. Behavior teaching strategies included social stories, peer modeling, reviewing behavioral expectations with the class, and positive affirmation.<sup>12</sup>

10. Based on the facts below, the SCO finds that Student's BIP was appropriately implemented at Charter School. Charter School General Education Teacher and Charter School

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<sup>10</sup> Response, pp. 7-8; Exhibit A-2, pp. 3-6; Exhibit A-3.

<sup>11</sup> Exhibit A-2, p. 6 (Statement incorporating January 2016 BIP into August 2016 IEP); Exhibit A-3, pp. 5-6 (BIP).

<sup>12</sup> Exhibit A-3, pp. 5-6 (BIP).

Special Education Teacher had access to and were able to credibly demonstrate familiarity with Student's BIP. For example, Charter School General Education Teacher was able to describe how she prepared Student for the day ahead to reduce unpredictability, including assigned seating, reviewed Student's schedule and any changes in routine with him every morning, and provided verbal and visual reminders throughout the day. General Education Teacher was also able to describe efforts to improve Student's understanding of behavioral expectations, including the importance of providing clear and simple instructions, pre-teaching, and reviewing expectations and class rules in the morning. Moreover, Charter School General Education Teacher received consistent and ongoing support from Charter School Special Education Teacher and Charter School Psychologist in addressing behavioral challenges.<sup>13</sup>

11. In early September of 2016, Student began exhibiting disruptive behavior that was similar to that exhibited in preschool. This behavior escalated in October and November, as evidenced by the incidents described below.<sup>14</sup>

- Screaming, crying, and punching the ground while lying on the floor when requested to return to class (10/3/2017).
- Punching a student in the stomach (10/17/2017).
- Punching a student (10/18/17).
- Screaming, yelling, and kicking/punching an adult. This incident lasted for over two hours, resulting in the classroom being cleared and Student being restrained (11/3/2017).
- Slapping another student, punching Special Education Teacher in the stomach, yelling, and throwing paper. Student had to be removed from class during this incident (11/8/2017).

12. As Student's behavior escalated, Assistant Special Education Director provided increasing support to Charter School Special Education Teacher. This support included reviewing Student's BIP with Charter School Special Education Teacher, providing Charter School staff with additional strategies, and responding to several behavioral incidents at Charter School in an effort to help Student deescalate.<sup>15</sup> In addition, Assistant Special Education Director conducted observations of Student in class to provide Charter School Special Education Teacher and General Education Teacher with new behavioral and instructional strategies intended to reduce and effectively respond to problematic behavior. This support

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<sup>13</sup> Interviews with Charter School General Education Teacher, Charter School Special Education Teacher, and Assistant Special Education Director.

<sup>14</sup> Exhibit B, p.1. Interviews with Assistant Special Education Director, Charter School Special Education Teacher, and Charter School General Education Teacher.

<sup>15</sup> Interviews with Assistant Special Education Director, Charter School Special Education Teacher, and Charter School General Education Teacher.

included having Student work in small groups when possible, modifying a “stop light” chart<sup>16</sup> used to teach classroom behavioral expectations, providing Student with access to sensory regulation devices, and allowing Student to spend time with Charter School Special Education Teacher when he needed a break or became upset.<sup>17</sup>

13. Despite the support provided, Student was spending an increasing amount of time out of the classroom due to disruptive behavior. During her interview, Parent indicated that the amount of time Student was spending in Charter School Special Education Teacher’s office was evidence that his IEP was not being properly implemented. Although the SCO agrees that time out of class could support such a finding, the SCO finds that in this case Student was removed from class because he could not deescalate in the presence of his classmates -- not because his BIP was not being properly implemented. As described above, Student had difficulty calming down once he had exhibited disruptive behavior. Student had to be removed from the classroom to deescalate because the behavior was reinforced by the presence of an audience, i.e., his classmates.<sup>18</sup>

14. Notably, Student’s behavioral outbursts also compromised the safety of others and negatively impacted the classroom environment, interfering with the ability of his peers to benefit from instruction. For example, several teachers reported that Student would scream or cry loudly in an attempt to be louder than whoever was talking, would throw himself on the floor, and would throw items or destroy the work of other students when he was upset.<sup>19</sup> Art Teacher reported that on difficult days, Student’s disruptive behavior made it “almost impossible to teach.”<sup>20</sup> Student’s behavior also impacted his peer relationships. Although Student’s teachers reported that he was empathetic and caring towards others, especially those who were hurt, he did not understand reciprocal play, i.e., how to take turns or share. In addition, Student would regularly interrupt or talk over others, throw items, and hit others when he was upset.<sup>21</sup> Several teachers reported that other students complained about Student’s behavior and avoided playing with him or sitting next to him.<sup>22</sup>

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<sup>16</sup> The stop light chart is a class-wide behavioral management device. Each day, students start with a green light and may be moved to yellow or red for inappropriate behavior.

<sup>17</sup> Interviews with Assistant Special Education Director, Charter School Special Education Teacher, and Charter School General Education Teacher.

<sup>18</sup> Interview with Assistant Special Education Director, Charter School Special Education Teacher, and School Special Education Teacher.

<sup>19</sup> Exhibit A-1, p. 36; Interviews with Charter School Special Education Teacher, Charter School General Education Teacher, and Assistant Special Education Director.

<sup>20</sup> Exhibit A-1, p. 36.

<sup>21</sup> Exhibit A-1, p. 36; Interviews with Assistant Special Education Director, Charter School General Education Teacher and Charter School Special Education Teacher.

<sup>22</sup> Exhibit A-1, p. 36; Interviews with Charter School General Education Teacher and Charter School Special Education Teacher.

15. In response to Student's escalating behavior, the District conducted an FBA in early November of 2016.<sup>23</sup> As discussed more fully below, the District held multiple IEP meetings in November to review the FBA as well as other assessments, to better understand Student's needs and determine appropriate program and services. Through these November IEP meetings, Student's placement was changed from Charter School to School, beginning November 28, 2016. The SCO now turns to Parent's allegation that the District violated the IDEA by failing to include the required participants at the November 18, 2016 IEP meeting and by making a placement decision that violated the LRE requirement.

### **November 2016 IEP Meetings**

16. On November 1, 2016, the District convened a properly constituted IEP Team to review a recent motor/physical evaluation, anecdotal behavioral data, and update Student's present levels of academic achievement and functional performance. During this meeting, the IEP team discussed, in detail, the specific behavioral strategies that were being used at Charter School to address Student's behavior, as well as Student's response to these interventions.<sup>24</sup> As a result of this meeting, the team concluded that additional information about Student's behavior was necessary to better understand Student's needs and develop an appropriate BIP. Accordingly, the District requested consent to conduct an FBA. Parent provided consent, and the FBA was completed in early November.<sup>25</sup>

17. On November 7, 2016, the District convened a properly constituted IEP team to review the results of the FBA and revise the IEP.<sup>26</sup> Based on the recent evaluations, the team determined that Student experienced "hyper-sensitive responses to auditory, touch and movement," over-responded to situations he did not find favorable, and was unable delay gratification at an age-appropriate level. Student's needs were specifically described as follows:

[Student] needs direct instruction in social/emotional/behavioral skills in order to better navigate his classroom demands and develop positive peer relationships . . . [Student] needs adult supervision in all school based settings to address concerns related to his running out of his classes, leaving without permission, and running away from staff when moving from one setting to another, as well as hitting adults and peers when upset.<sup>27</sup>

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<sup>23</sup> Exhibit A-1, p. 18.

<sup>24</sup> Interviews with Assistant Special Education Director, Special Education Coordinator, and Charter School Special Education Teacher.

<sup>25</sup> Exhibit A-1, p. 14.

<sup>26</sup> Exhibit A-1, p. 30.

<sup>27</sup> Exhibit A-1, p. 15.

During this meeting, Assistant Special Education Director first raised the concern that Student's needs may require a level of support that could not be provided in the general education classroom. The IEP team then agreed to meet again to more thoroughly discuss Student's needs and the services and programming that would best meet those needs.<sup>28</sup>

18. On November 10, 2016, the District convened a properly constituted IEP team to continue the discussion regarding Student's needs. Although General Education Teacher was present for this meeting, she had to leave early. Parent was provided with the option of continuing the meeting without the General Education Teacher or ending the meeting and rescheduling. Parent agreed to continue the meeting without the General Education Teacher and signed the written excusal form.<sup>29</sup> Through this meeting, and the two prior meetings described above, General Education Teacher had provided her "input, recommendations, and suggestions" regarding the development of Student's IEP. Further, there is no evidence to suggest that the early departure of General Education Teacher would have resulted in a different placement decision.<sup>30</sup>

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19. While the first two IEP meetings in November involved robust discussions of Student's needs, the meeting on November 10<sup>th</sup> primarily focused on developing a program that would meet these needs. During this meeting, the IEP team, including Parent, agreed that Student's needs could not be appropriately met at Charter School because Student currently required a level of behavioral supports and services available only in a center-based program.<sup>31</sup> Notably, the decision to change Student's placement is consistent with the findings above that Student could not be appropriately educated in the general education classroom due to disruptive behavior.

20. Having determined placement, the District and Parent then agreed to schedule another IEP meeting to finalize services at the selected location and allow Parent an opportunity to meet the School team. On November 18, 2016, the District convened another IEP meeting at School, the specific location where Student would be receiving services for the primary purpose of providing Parent with an opportunity to tour the School.<sup>32</sup> At this meeting, the IEP team also determined that Student would receive the OT services specified in the IEP, and that these services would begin once Student transferred to School on or around November 28, 2017.<sup>33</sup>

21. Parent alleged that a general education teacher was not present for the November 18 meeting, in violation of IDEA's IEP team membership requirements. The SCO agrees. The

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<sup>28</sup> Interviews with Assistant Special Education Director, Special Education Coordinator, Charter School Special Education Teacher, and General Education Teacher.

<sup>29</sup> Exhibit A-1, p. 18; Interviews with Assistant Special Education Teacher and Special Education Coordinator.

<sup>30</sup> Interviews with Parent, General Education Teacher, Charter School Special Education Teacher, Assistant Special Education Director, and Special Education Coordinator.

<sup>31</sup> Interviews with Parent, General Education Teacher, Charter School Special Education Teacher, and Special Education Coordinator.

<sup>32</sup> Exhibit A-1, p. 28.

<sup>33</sup> Exhibit A-1; Interviews with Parent, Assistant Special Education Director, and Occupational Therapist.

Notice of Meeting specifically informed Parent that a general education teacher would be in attendance at the meeting on November 18, 2016. In addition, the Notice indicated that the purpose of the meeting was both to “finalizing school/services” and serve as an annual review.<sup>34</sup> Based on the Notice of Meeting, Parent could reasonably expect that this meeting would include a discussion about opportunities for Student to participate in the general education classroom at School, a discussion that would necessitate the attendance of a general education teacher. Indeed, Student would have consistent opportunities to participate in the general education classroom at School, even though he would be starting in the center-based program.<sup>35</sup>

22. As a result of the four IEP meetings in November 2016, Student’s educational environment was changed from being in the general education class at least 80% of the time, to being in the general education class less than 40% of the time. As described in the least restrictive environment and prior written notice sections of the November 2016 IEP, the IEP team considered less restrictive options but determined that Student’s behavioral needs required a level of services and support available in a center-based affective needs program.<sup>36</sup> Parent was provided with detailed information about the program at the IEP meetings on November 10 and 18, 2016. In addition, Parent met Student’s new teachers and toured the program as part of the meeting on November 18, during which time she was able to ask questions about the program.

### **Implementation of IEP at School (November 28, 2016 to June 6, 2017)**

23. Parent alleged that the District had not provided the OT services required by Student’s November 2016 IEP. Based on the motor/physical assessment conducted by an occupational therapist (OT) in early November 2016, Student’s IEP provided that Student would receive 45 minutes/month of direct services by a certified occupational therapy assistant (COTA) and 15 minutes/month of consultative services by an OT at School to help identify effective strategies to address his sensory needs.<sup>37</sup> In its Response, the District admitted that Student missed approximately one hour and fifteen minutes of COTA services out of the four and a half hours that Student was entitled to receive between December and June of 2016.<sup>38</sup> This means that Student missed over a quarter, or 28%, of the direct COTA services he should have received. Reasons for missing the required service minutes included Student being ill and scheduling conflicts around standardized testing, among other challenges.<sup>39</sup> To remedy the missing services, the District has offered to provide an hour and fifteen minutes of COTA services, direct

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<sup>34</sup> Exhibit A-1, p. 28.

<sup>35</sup> Exhibit G (Student’s class schedule); Interviews with School Special Education Teacher and Assistant Special Education Director.

<sup>36</sup> Exhibit A-1, pp. 18-20.

<sup>37</sup> Exhibit A-1, p. 25.

<sup>38</sup> Response, pp. 6-7. The District’s admission is consistent with the COTA service logs in Exhibit A-4.

<sup>39</sup> Interview with COTA.



or consultative, at Student's new school, if permitted, or at some other mutually agreed-upon time and location.<sup>40</sup>

24. During her interview, Parent also alleged that the District failed to provide Student with access to a compression vest, in accordance with his IEP. Student's November IEP provides that Student "will use sensory diet activities outlined by the OT, such as the use of a compression vest." In addition, Occupational Therapist, was required to "train school staff to use the recommended sensory diet with [Student] to decrease sensory needs that may lead to negative behaviors."<sup>41</sup> Special Education Teacher reported that the Occupational Therapist and COTA consulted with her about Student's needs in the area of sensory regulation, including the use of the compression vest.<sup>42</sup> This consultation included helping Special Education Teacher recognize when Student should be offered a sensory device or activity, of which the compression vest was one option among several. Although Special Education Teacher offered Student the compression vest when he was agitated, he rarely requested it or agreed to keep it on for longer than a couple of minutes.<sup>43</sup> Based on these facts, the SCO finds that Student was provided with access to sensory regulation activities in accordance with his IEP.

25. Finally, Parent alleged that the District failed to implement Student's IEP at School because he was not provided with opportunities to participate in the general education classroom and interact with typical peers. Student's November 2016 IEP described his educational setting as in the regular education classroom less than 40% of the time. The IEP further provided that Student would "benefit from services in a self-contained setting until he is able to regulate his emotions and behaviors" and that opportunities to participate in the general education classroom would be maximized as sensory regulation and social skills improved.<sup>44</sup> At School, Student consistently participated in the general education classroom for two reading classes that met twice a day for 40 minutes each.<sup>45</sup> In addition, Student attended all school assemblies and field day activities with typical peers and participated in a general education music class to prepare for kindergarten graduation. The amount of time Student spent in the general education classroom was consistent with the LRE specified on his IEP.

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<sup>40</sup> Response, pp. 6-7.

<sup>41</sup> Exhibit A-1, pp. 18-19.

<sup>42</sup> Interviews with School Special Education Teacher, COTA, and Occupational Therapist.

<sup>43</sup> Although the initial compression vest provided to Student in November of 2016 was a bit large, Student did have access to other sensory devices. Further, Parent altered the compression vest, rendering it unusable. Another vest was ordered in the beginning of 2017. Interviews with Assistant Special Education Director, COTA, and Occupational Therapist.

<sup>44</sup> Exhibit A-1, p. 26.

<sup>45</sup> Exhibit G and Interview with School Special Education Teacher.

## CONCLUSIONS OF LAW

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

**Allegation One:** Whether the District failed to include the necessary IEP meeting participants or obtain proper excusals for the IEP meeting dated November 18, 2016.

For the reasons explained more fully below, the SCO concludes that the District failed to include the required participants for the November 18, 2016 IEP meeting when it did not include a general education teacher, in violation of 34 CFR § 300.321(a)(2). Any analysis of the appropriateness of an IEP must begin with the standard established by the United States Supreme Court in *Rowley v. Board of Education*, 458 U.S. 176 (1982), in which the Court set out a two-pronged analysis for determining whether an IEP has offered a FAPE. The first part of the analysis looks to whether the IEP development process complied with the IDEA's procedures; the second looks to whether the resulting IEP was reasonably calculated to confer some educational benefit upon the child. *Id.* at 207. If those two questions are satisfied in the affirmative, then the IEP is appropriate under the law.

Under the first "prong" of *Rowley*, the analysis looks to whether the IEP was developed according to the IDEA's procedures. The IDEA requires that an IEP team include at least one general education teacher if the child is or may be participating in the regular education environment. 34 CFR § 300.321(a)(2). In response to this allegation, the District argued that the failure to include a general education teacher at the November 18, 2016, IEP meeting did not violate IDEA's meeting participant requirement because General Education Teacher had attended the three previous IEP meetings in November and had provided her input during these meetings.

In this case, however, the SCO concludes that a general education teacher was required to either attend the meeting on November 18, 2016, or be properly excused. First, the Notice of Meeting informed Parent that a general education teacher would be in attendance. In addition, the Notice informed Parent that one purpose of the meeting was to review Student's IEP. Finally, and perhaps most importantly, Student would still have the opportunity to participate in the general education classroom even though he would be attending a center-based program. The fact that General Education Teacher had attended the previous meetings did not alter IDEA's IEP team membership requirements for this meeting.

Concluding that the failure to have a general education teacher present at the November 18, 2016, IEP meeting violated IDEA's procedural requirement for IEP team membership, the SCO now considers whether the procedural violation denied Student FAPE. To deny a student FAPE, the procedural violation must result in educational harm or loss of educational opportunity. *L.C. and K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005). When addressing the failure to include a general education teacher at an IEP meeting, one factor courts have considered is whether a properly constituted IEP team would likely have

given greater consideration to inclusion and provided the student with an IEP that allowed for more opportunities to participate in the general education setting. *M.L v. Federal Way Sch. Dist.*, 394 F.3d 1025 (9th Cir. 2005). In addition to discussions about inclusion, general education teachers offer critical expertise and input regarding present levels of academic performance, access to the general education curriculum, the development of appropriately ambitious IEP goals, and implementation of the IEP. Consequently, the failure to include a general education teacher may significantly impact the quality of the IEP team discussion and the development of a student's IEP, resulting in a denial of FAPE.

In this case, however, there is no evidence that General Education Teacher's attendance at the November 18, 2016 IEP meeting would have resulted in a different placement or otherwise altered Student's IEP. First, General Education Teacher had participated in three previous IEP meetings, including the November 10 meeting where placement was determined, and had provided her input and expertise in the development of Student's IEP during these meetings. Second, the IEP team did not review Student's IEP at the November 18 meeting because the primary purpose of that meeting was to provide Parent with an opportunity to meet the School team. Finally, the IEP team, including Parent, agreed at the November 10 IEP meeting that Student would be most appropriately served in center-based program. Consequently, the SCO concludes that the District's failure to include a general education teacher at the November 18, 2016 IEP meeting did not deny Student FAPE.

In its Response, the District proposed that any procedural violation regarding IEP team membership be remedied by "issuing a notice approved by CDE to its special education coordinators and case managers regarding the meeting participant requirements of 34 C.F.R. § 300.321, including the requirements related to the inclusion of regular education teachers as set forth in the CDE's decision in this matter."<sup>46</sup> Pursuant to 34 CFR § 300.152(a)(3)(i), the District may include a proposal to resolve the Complaint when responding to the allegations. Indeed, respondents in state complaint investigations are encouraged to offer proposed remedies, if appropriate. In this case, the SCO concludes that the District's proposal is sufficient to remedy the procedural violation, with the assurances outlined in the Remedies section below.

**Allegations Two and Three:** Whether the District failed to implement Student's IEP, both while at Charter School and School, from August 29, 2016 through the end of the 2016-2017 school year, including the provision of one-on-one occupational therapy services.

For the reasons explained below, the SCO concludes that the District failed to implement Student's IEP only with respect to allegation two, i.e., the provision of COTA services at School. Under IDEA, local education agencies are required to provide eligible students with disabilities a free appropriate public education (FAPE) by providing special education and related services individually tailored to meet the student's unique needs and provided in

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<sup>46</sup> Response, p. 5.

conformity with an individualized education program developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. A public agency, here the District, must implement a student's IEP in its entirety. 34 CFR § 300.323(c). To satisfy this obligation, the District must ensure that each teacher and service provider responsible for implementing a student's IEP is informed of "his or her specific responsibilities related to implementing the child's IEP" and "the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP." 34 CFR § 300.323(d)(2).

Based on the facts briefly described here, and more fully in Findings of Fact # 7-12 above, the SCO concludes that Student's IEP was properly implemented at Charter School. There is no credible evidence that Student's IEP, including the BIP, was not being implemented at Charter School. Special Education Teacher and General Education Teacher had access to Student's IEP and were able to adequately describe their responsibilities for implementing it. Moreover, Assistant Special Education Director reviewed the IEP with Charter School Special Education Teacher, was available to answer questions, and provided direct support to Special Education Teacher while Student was at Charter School.

With the exception of direct COTA services, the SCO concludes that Student's IEP was also appropriately implemented at School. As described more fully in Findings of Fact #25 and #26, Student was educated in a setting consistent with the LRE identified on the November 2016 IEP. In addition, COTA and OT regularly consulted with Special Education Teacher regarding Student's sensory needs, including the use of a compression vest.

In addition to informing teachers of their responsibilities regarding a student's IEP, however, the District must ensure that the IEP is being implemented. This obligation includes ensuring that all identified services are being consistently provided. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to implement an IEP can result in a denial of FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19. In this case, the District admitted that it failed to provide Student with one hour and fifteen minutes of direct COTA services from the four and a half hours to which Student was entitled. Consequently, the SCO concludes that the District failed to properly implement Student's IEP at School with respect to providing direct COTA services.

Because not every deviation from an IEP's requirements results in a denial of FAPE, the SCO must also determine whether the failure to implement the IEP was material. *E.g., L.C. and K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005)(minor deviations from IEP's requirements which did not impact student's ability to benefit from special education program did not amount to a "clear failure" of the IEP). A showing of educational harm is not required to demonstrate that the failure to implement the IEP was material. Rather, it is sufficient to compare the services required by the IEP to the services actually provided. *Holman v. District of Columbia*, LRP 3907 (D.D.C. 2016)(stating that "[t]he 'crucial measure' under the materiality standard is the 'proportion of services mandated to those provided' and not the type of harm suffered by the student.").

In this case, the SCO concludes that the failure to provide over one quarter of the COTA services specified in Student's IEP was material. Related services are supportive services "required to assist a child with a disability to benefit from special education." 34 C.F.R. § 300.34; ECEA Rule 2.37. Student was provided with OT, direct and consultative, as a related service to decrease disruptive behavior and allow Student to benefit from specialized instruction. For example, Student's November 2016 FBA indicated that he experienced "hyper-sensitive responses to auditory, touch, and movement." To address this hypersensitivity, Student's IEP required that an OT "train school staff to use recommended sensory diet . . . to decrease sensory needs that may lead to negative behaviors." Based on Student's sensory related needs, the IEP team determined that Student required 45 minutes of direct COTA services each month in order for him to benefit from specialized instruction. In its Response, the District argued that the missing services did not deny Student FAPE because his needs were more behavioral than sensory related, as evidenced by his progress in the center-based program. In most cases, the SCO considers the IEP to be the best evidence of a student's needs. If Student's progress at School demonstrated that he did not need COTA services, the District should have convened the IEP team to evaluate progress and revise the IEP, as appropriate. Relying on the IEP, the SCO concludes that the failure to provide a significant proportion of this related service is sufficient to support the conclusion that Student was denied FAPE.

In its Response, the District also offered to provide one hour and fifteen minutes of COTA services, consultative or direct, at Student's new school, if permitted, or at some other mutually agreed-upon time and location. The SCO accepts the District's offer as an appropriate remedy for failing to provide the COTA services specified on Student's November 2016 IEP.

**Allegation Four:** Whether the District failed to educate Student in the least restrictive environment after Student transferred from Charter School to School in November 2016.

For the reasons explained more fully below, the SCO concludes that the District has determined Student's placement in accordance with the IDEA's LRE requirement. The IDEA requires that students with disabilities receive their education in the general education environment with typical peers to the maximum extent appropriate, and that they attend the school they would attend if not disabled. 34 CFR §§ 300.114 and 300.116. Moreover, students should only be placed in separate classes, separate schools, or otherwise removed from the general education setting "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR § 300.114 (a)(2)(ii).

In determining whether the LRE requirement has been met, the Tenth Circuit applies a two-part test to determine: 1) whether education in a regular classroom with the use of supplementary aids and services can be achieved satisfactorily, and if not, 2) whether the school district has mainstreamed the student to the maximum extent appropriate. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 980 (10th Cir. 2004).

Consistent with *Nebo*, the SCO considers the following factors to determine whether the first prong has been met: 1) the steps taken to accommodate the student in the regular classroom, including consideration of a continuum of placement and support services; 2) the academic benefits the student will receive in the regular classroom compared with those he will receive in the special education classroom; 3) the student's overall educational experience in the regular classroom, including non-academic benefits; and 4) the effect the student's presence has in the regular classroom. *Id.* These factors, as applied to the findings in this case, weigh in favor of a conclusion that the District appropriately determined that Student could not be educated satisfactorily in the general education classroom with supplementary aids and services.

First, Charter School did take appropriate steps to accommodate Student in the general education classroom. At the beginning of the school year, the IEP team added 80 minutes of specialized instruction each month and incorporated Student's BIP. When Student began to exhibit disruptive behavior, General Education Teacher modified her classroom management system and received additional support from Special Education Teacher, School Psychologist, and Assistant Special Education Director to try new strategies, including access to sensory devices. Notably, Student received additional support from Special Education Teacher and was allowed to visit his office when he felt agitated. Despite increasing support, Student's behavior continued to escalate and he was spending more time out of the classroom.

Second, Student's behavior interfered with his ability to benefit from instruction in the general education classroom. Despite the additional support, Student's behavior continued to escalate, resulting in Student being removed from the classroom. Student had to be removed from the classroom to calm down because he was unable to deescalate in the presence of his classmates. Because it would often take 45 minutes to an hour for Student to calm down, he was regularly missing instruction. In the center-based program, Student would have access to an area that could be used for de-escalation without being removed from the classroom. In addition, Student would have more access to small group and one-on-one instruction and behavioral support.

Third, Student's overall experience in the general education classroom, including nonacademic aspects, was negatively impacted by his disruptive behavior. Because Student had difficulty understanding social boundaries and had difficulty sharing or taking turns, his peers routinely avoided or refused to play with him. In October and November, Student demonstrated physical aggression against peers on three different occasions. Consequently, the nonacademic benefits Student was receiving in the general education classroom did not outweigh the benefits of placement in a special classroom. Finally, as described more fully in Finding of Fact # 14, Student's behavior also interfered with the ability of other students to benefit from instruction. For example, Student disrupted the class environment by screaming or crying loudly, throwing himself on the floor, and throwing items when he was upset.

Concluding that Student could not be educated satisfactorily in the regular education setting with supplementary aids and services, the SCO now addresses the second part of the test to determine whether Student has been educated with children who are nondisabled to the maximum extent appropriate. The IDEA requires that each public agency have a continuum of placement options available to meet the needs of students with disabilities, including instruction in regular classes, special classes, special schools, in home, and in hospitals and institutions. 34 CFR § 300.115. The less a placement resembles a regular classroom, the more restrictive it is considered to be. In this case, the District offered a continuum of placement options, including the center-based affective needs program, a special class where Student would have the opportunity to regularly participate in the general education classroom. The SCO concludes that Student was educated with typical peers to the maximum extent appropriate when he routinely participated in two general education reading groups that met daily for forty minutes each, in addition to being included on field trips and all school events.

### **REMEDIES**

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

- a) IEP team membership requirements at 34 CFR § 300.321(a)(2); and
- b) Provision of special education and related services in accordance with the IEP, 34 C.F.R. § 300.17.

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

- 1) **By December 1, 2017**, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
  - a) Submission of guidance/statement approved by CDE regarding the meeting participant requirements of 34 C.F.R. § 300.321, including the requirements related to the inclusion of general education teachers. This guidance must be consistent with this Decision and submitted to CDE for approval no later than **November 30, 2017**. CDE will revise the guidance, if appropriate.
  - b) The CDE approved guidance must be shared with all District special education coordinators, case managers, and general education teachers no later than **December 22, 2017**.
  - c) Evidence that this has occurred must be documented (i.e., signed assurances from all currently employed District special education coordinators and case managers that they

have received and understand the approved guidance) and provided to CDE no later than **January 8, 2018**.

**2) Compensatory Education Services for Failure to Provide Student with a FAPE.**

- a) The District shall provide Student with one hour and fifteen minutes of consultative COTA services. These consultative services may be provided at the private school Student currently attends, provided that the Private School agrees, or at a mutually agreeable location outside of school. To document the provision of these services, the District must submit service logs to CDE by the second Monday of each month until **February 13, 2018**.
- b) Within 10 days of receipt of this Decision, the District must meet with Parent to schedule compensatory services. If Parent refuses to meet with the District within this time period, the District will be excused from providing compensatory services, provided that the District diligently attempts to meet with Parent and documents its efforts. The determination that the District has diligently attempted to meet with Parent and should therefore be excused from providing these services rests solely with the CDE. If Parent refuses these services, Parent must notify the Department of the refusal no later than **November 15, 2017**.
- c) These compensatory services shall begin as soon as possible. The Parties shall cooperate in determining how the compensatory education services will be provided. The District must submit the schedule to the Department no later than **December 1, 2017**.
- d) If for any reason, including illness, Parent or Private School staff are not available for any scheduled compensatory services, the District will be excused from providing the service scheduled for that session. If for any reason, the District fails to provide a scheduled compensatory session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent, as well as notify the Department of the change in the monthly service log.

The Department will approve or request revisions to the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance.

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

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



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

### **CONCLUSION**

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

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

Dated this 26<sup>th</sup> day of October, 2017.

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Candace Hawkins, Esq.  
State Complaints Officer

## **Appendix**

### **Complaint, pages 1-3.**

Exhibit A: Behavior Documentation.

Exhibit B: Discipline log.

Exhibit C: IEPs, including drafts.

### **District's Response, pages 1-11.**

Exhibit A:

- A-1: November 2016 IEP and related documents.
- A-2: August 2016 IEP and related documents.
- A-3: January 2016 IEP.
- A-4: Service logs for 2016-17 school year.

Exhibit B: Correspondence.

Exhibit C: Contact information for District witnesses.

Exhibit D: Documentation of Discipline/Behavioral.

Exhibit E: 2016-17 Progress Reports.

Exhibit F: Link to CDE's IEP Procedural Guidance Manual.

Exhibit G: Delivery Receipt

### **Parent did not submit a Reply.**

### **Interviews with:**

- Parent
- Assistant Special Education Director
- Special Education Coordinator
- School Special Education Teacher
- Charter School Special Education Teacher
- Charter School General Education Teacher
- Occupational Therapist
- Certified Occupational Therapist Assistant (COTA)