

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

State-Level Complaint 2023:564
Douglas County School District RE-1

DECISION

INTRODUCTION

On August 3, 2023, the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Douglas County School District RE-1 (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from August 3, 2022 to the present for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to identify and evaluate Student between August 2022 and January 2023, when District was on notice that Student may have a disability and be in need of special education and related services, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).

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

2. Failed to develop an IEP for Student within 30 days of a determination, on or about December 13, 2022, that Student needs special education and related services, and thereafter make services available to Student in accordance with an IEP, in violation of 34 C.F.R § 300.323(c).

FINDINGS OF FACT

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

A. Background

1. Student is six years old and attends a District elementary school (“School”) in first grade. *Exhibit A*, p. 1. Student attended another District elementary School (“Prior School”) during the 2022-2023 academic year until April 3, 2023, when he transferred to School. *Id.*, *Interview with Parent*.
2. Student qualifies for special education under the disability category of Autism Spectrum Disorder. *Exhibit A*, p. 1. He is sweet, intelligent, and imaginative. *Interviews with Parent, Kindergarten Teacher (“Teacher”), and Prior School’s Psychologist (“Psychologist”)*. He loves art, logic puzzles, playing with Lego toys, and coming up with inventions. *Id.*
3. This investigation involves the child find process leading up to a determination of Student’s eligibility for special education on December 13, 2022, and the timing related to the development of an IEP that took effect on April 20, 2023 (the “IEP”). *Exhibit A*, p. 1.

B. Child Find and IEP Development: District’s Practices and Procedures

4. District’s Special Education Director (“Director”) described practices and procedures regarding its responsibility to identify and evaluate students with disabilities, stating that if a parent raises concerns, the practice is to hold a meeting with the parent to try to address those concerns. *Interview with Director*. At that meeting, the staff should decide on whether to evaluate the student and then issue a prior written notice (“PWN”) of its decision. *Id.*
5. Director also described practices and procedures regarding its responsibility to develop an IEP after a student has been found eligible, stating that once eligibility is established and consent for services is obtained, an IEP team must develop an IEP tailored to the student’s needs. *Id.* When asked about the timeline for IEP development, Director stated that the IEP should be developed within 90 days of the consent to evaluate. *Id.*
6. In terms of how these practices and procedures are communicated to school staff, Director said special education coordinators are expected to meet regularly with school teams to

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

provide guidance. *Id.* District does not have written guidance related to these practices and procedures. *Id.* Instead, Director stated, “we expect staff to understand the deadlines.” *Id.* When interviewed by the SCO, school staff expressed an accurate understanding of District’s responsibilities regarding its practices and procedures, which are consistent with the IDEA. *Interviews with Teacher, Psychologist, and District Behavior Specialist (“Behavior Specialist”).*

7. District’s website features a page entitled “Timeline for Special Education Process,” which outlines the steps in identifying a child with a disability and developing an IEP, as well as the timeline by which those steps must be taken. *CDE Exhibit 1.* This guidance provides, “if the student is found eligible for special education and related services, school personnel have an additional 30 days to convene an Individual Education Program (IEP) meeting.” *Id.*

C. The 2022-2023 School Year: August to December

8. On August 4, 2022, prior to the start of Student’s kindergarten school year, Parent wrote an email to Prior School Principal (“Principal”) with the subject line “504 or IEP.” *Exhibit 5.* The email stated that Student “was just diagnosed with ADHD” and that Parent was “confident that he will need some extra assistance, particularly with regard to behavior.” *Id.* Parent wrote: “[w]ith whom do I need to meet to discuss the need for a 504 or an IEP?” *Id.* Parent added “[c]an you please help me get this process started?” *Id.*
9. On August 8, 2022, Prior School’s 504 Coordinator called Parent to discuss the email. *Complaint*, p. 13. Parent, noting that Student had not yet participated in his first day of school, asked to postpone the conversation for two weeks. *Id.* A meeting was scheduled for August 26, 2023. *Id.*
10. On August 23, 2022, Parent provided Principal, Teacher, and Psychologist with a copy of a private evaluation dated July 6, 2022. *Complaint*, p. 13; *Exhibit 2*, p. 11. This evaluation diagnosed Student with ADHD, and provisionally diagnosed him with Oppositional-Defiance Disorder, Unspecified Anxiety Disorder, and Unspecified Depressive Disorder. *Exhibit 2*, p. 11.
11. On August 26, 2022, Parent met with school staff and signed a “Section 504 Consent for Additional Testing.” *Interviews with Parent and Psychologist; Exhibit 6*, p. 3. Parent consented to two assessments: (1) “emotion/behavior rating scales,” to be collected by Psychologist, and (2) “classroom data collection re: behavior and academic skills,” to be collected by Teacher and Psychologist. *Exhibit 6*, p. 3. During this meeting, Parent did not object to the pursuit of a 504 plan and did not request that an IEP be developed. *Interview with Psychologist.*
12. Following this meeting, Psychologist created a “Section 504-Referral Form” dated August 29, 2023, which documented the diagnoses outlined in Student’s private evaluation. *Exhibit 6* at p. 1. This referral form states: “At school, [Student] presents with impulsive, defiant and aggressive behaviors.” *Id.* “He struggles to follow classroom and school expectations.” *Id.* In

describing the major life activities impacted by Student’s diagnoses, the document lists “concentrating” and “communicating when emotionally dysregulated.” *Id.*

13. Due to the need to collect additional information through these evaluations, Prior School and Parent scheduled a meeting for October 14, 2022, to review collected data and develop a 504 plan. *Complaint*, p. 13.
14. The SCO finds that in consideration of the foregoing facts—specifically Student’s age and grade combined with the time of school year—Prior School’s decision to pursue a 504 plan rather than an initial evaluation for an IEP was appropriate. *Consultation with CDE Content Specialist*.
15. Between the August 26, 2022 meeting and the October 14, 2022 meeting, Student struggled with behavioral regulation in the classroom setting. *Interviews with Parent, Teacher, and Psychologist*. At various points during that period, Student “used a sharpened pencil to scratch a classmate,” threw “chairs and school supplies,” and “put hands on other kids.” *Interview with Teacher*.
16. On August 29, 2022, Student was involved in a behavioral incident in which he “took his notebook and hit [a fellow student] multiple times in the face.” *Exhibit D*, pp. 16-17. The next day Psychologist sent an email to Parent stating that Student “would benefit from some individual time to work on emotional regulation skills,” and asking for parental consent to provide Student with 20 minutes per week of “emotional identification and regulation skills” services outside the general education classroom. *Exhibit 7*. These were not IEP services but instead were general education interventions. *Interview with Psychologist*.
17. On September 1, 2022, Student was involved in another incident in which he “[s]tarted kicking the teacher with his foot, wrapped himself around her, and was banging his head on her knee.” *Exhibit D*, p. 15. In another incident on October 6, 2022 he “punched another student” and received a half-day in-school suspension. *Id.* at pp. 14-15.
18. On October 7, 2022, Psychologist emailed Parent regarding the meeting scheduled for October 14, writing: “given [Student’s] needs even with the accommodations implemented, we feel moving into a special education referral meeting would be appropriate at this time.” *Exhibit 8*. The email continued “[a]fter the 504 meeting is complete, we would like to invite one of our special education providers to join us to capture [his] strengths and the concerns we are seeing in order to move forward with a referral for special education services.” *Id.*
19. Psychologist did not attach a consent to evaluate form to this email, instead planning to review it at the October 14 meeting because Parent “seemed unfamiliar with the process so we wanted to support them and discuss the consent form.” *Interview with Psychologist*.

20. At the meeting on October 14, 2022, school staff did not provide Parent with a consent to evaluate form. *Interviews with Parent and Psychologist*. Psychologist described conflict between school staff and Parent’s advocate (“Advocate”) as “the meeting was paused because it had become so aggressive.” *Interview with Psychologist*. Due to the abrupt end to the meeting, Psychologist did not present the consent to evaluate form to Parent. *Id.*
21. On October 27, 2022, Psychologist emailed a consent to evaluate form to Parent. *Exhibit 11*, p. 1; *Exhibit L*, p. 282. Parent signed the form November 4, 2022. *Exhibit 11*, p. 3. The evaluation was completed on December 13, 2022. *Exhibit F*.
22. The SCO finds that—based on ECEA Rule 4.03(1)(d)(i)—the IEP must have been developed no later than February 2, 2023, 90 days after Parent returned the signed consent to evaluate.

D. Eligibility Determination and Development of the IEP

23. On December 13, 2022, a multidisciplinary team, including Director (a CDE facilitator also attended given concerns arising from the October 14 meeting), met to consider Student’s eligibility for special education and related services. *Exhibit I*, p. 1; *Interviews with Psychologist and Director*. The multidisciplinary team found Student eligible under the category Autism Spectrum Disorder. *Exhibit I*, p. 1. On December 20, 2022, Director sent Parent a PWN detailing the eligibility decision. *Id.* at pp. 1-2.
24. After the eligibility meeting, Psychologist emailed all attendees except Advocate, acknowledging the eligibility determination and encouraging everyone to schedule an IEP meeting as soon as possible. *Exhibit 15*, p. 1. Psychologist proposed two dates: January 10 and 11, 2023. *Id.* Parent responded thirty minutes later to indicate that both dates worked for her. *Id.* at p. 2.
25. On December 14, 2022, Psychologist sent another email, noting a scheduling conflict on the District’s end and proposing a meeting January 18, 2023. *Id.* Director was unavailable to attend the meetings on January 10 or 11. *Interviews with Psychologist and Director*.
26. Advocate sent an email to Director, copying all meeting attendees, on December 15, 2023, expressing concern that the newly proposed date of January 18 violated the IDEA’s timeline requirements. *Exhibit 15*, p. 4. Advocate stated that she was not available for a meeting on January 18, 2023. *Id.*
27. On December 16, 2022, Director emailed all meeting attendees, stating: “We do understand the meeting may be late, the team does not feel comfortable proceeding without my presence and I can’t move things on my calendar for the week of the 9th.” *Exhibit 14*. “The district will take the hit for the timeline mis-step and I own that completely.” *Id.*

28. On December 19, 2022, Psychologist proposed by email a meeting on January 20, 2023. *Exhibit 15*, p. 4. Psychologist sent a follow-up email January 2, 2023, in which she noted that she had not received a response from Parent and re-proposed the same time. *Id.* at p. 6.
29. Parent responded on January 9, 2023, stating that the time did not work for Advocate. *Exhibit L*, p. 138. When asked about the lack of communication between December 19, 2022 and January 9, 2023, Parent explained that her family was on vacation abroad from December 22, 2022 until January 8, 2023, and that she “did not feel it was healthy to continue this negotiation while on vacation.” *Interview with Parent*.
30. Scheduling continued unsuccessfully until January 23, 2023, when Psychologist proposed a meeting for February 7, 2023, which was confirmed by all parties. *Exhibit L*, pp. 72-73.
31. On February 7, 2023, a properly composed IEP Team met to develop Student’s IEP, but was not able to complete it during that meeting. *Interviews with Parent, Director, Psychologist, Teacher, and Behavior Specialist*. District staff was ready to have an IEP put into place, but did not proceed due to disagreement from Parent and Advocate. *Interview with Psychologist*. Another IEP meeting on February 16 did not result in a completed IEP. *Id.* Parent and school staff disagreed regarding Student’s placement in an affective needs program. *Interviews with Parent and Director*.
32. Between February 16 and March 22, 2023, Director and Advocate engaged in continued conversation regarding Student’s placement. *Exhibit L*, pp 370-372. Director stated that at the time she was hopeful that consensus could be reached regarding Student’s IEP, but that it became clear that an impasse had been reached. *Interview with Director*.
33. On March 22, 2023, Director issued a PWN stating that District’s “offer of FAPE for [Student] includes enrollment and participation in an Affective Needs (AN) program that is not at [Prior School],” adding that “[Student] will be enrolled into the Affective Needs Center Based Program at [School] no later than April 3, 2023.” *Exhibit I*, p. 4-5.
34. Student began attending School on April 3, 2023. *Interviews with Parent and Director*. An IEP meeting was scheduled for April 20, 2023, at which Student’s IEP was completed. *Exhibit A*, p. 1. Student began receiving services under the IEP on April 21, 2023. *Id.* at p. 13.

E. The IEP

35. The IEP documents Student’s strengths, preferences, and interests, including that he “loves to color, create, and build things with his hands;” “has a good work ethic;” and is “helpful, thoughtful, and genuine.” *Id.* at p. 3.
36. The IEP reviews Student’s present levels of performance, including data both from Student’s outside therapist as well as evaluations undertaken by District. *Id.* at pp. 3-5.

37. The Student Needs and Impact of Disability section documents that “difficulties with transitioning/adaptation to change and struggles with non-preferred tasks/interactions/demands impact his social/emotional functioning, social communication, and behavioral regulation.” *Id.* at p. 6. It adds “social language impairment limits his ability to understand nuances in social situations and respond appropriately with peers and adults.” *Id.*

38. The IEP contains six annual goals in the areas of social/emotional wellness, self-determination, and communication. *Id.* at pp. 7-9. It also contains 22 accommodations to help Student to access the general education curriculum. *Id.* at p. 10.

39. The Service Delivery Statement of the IEP provides for:

- 120 minutes per month of direct social emotional skills development outside the general education setting;
- 120 minutes per month of direct social emotional skills development inside the general education setting;
- 120 minutes per month of direct speech/language support outside the general education setting;
- 120 minutes per month of direct speech/language support inside the general education setting;
- 50 minutes per week of specialized instruction outside the general education setting; and
- 100 minutes per week of specialized instruction inside the general education setting.

Id. at pp. 12-13.

40. The IEP team determined it is appropriate for Student to be in the general education classroom at least 80% of the time. *Id.* at p. 14.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District identified and evaluated Student as a child suspected of having a disability and needing special education and related services between August 2022 and January 2023. No IDEA violation occurred.

Parent's concern is that District failed to identify and evaluate Student after District was on notice that Student might have a disability and need special education services. (FF #s 8-21.)

A. The Child Identification Process under the IDEA

The IDEA mandates that states develop and implement adequate procedures to identify, locate, and evaluate children with disabilities who may need special education and related services. 34 C.F.R. § 300.111(a). In Colorado, the child identification process "shall include child find, special education referral, initial evaluation, and determination of disability and eligibility for special education." ECEA Rule 4.02(1)(a)(ii).

Under the "special education referral" component of the identification process, school districts have an affirmative obligation to evaluate a child where the district has reason to suspect a qualifying IDEA disability and a need for special education and related services. 34 C.F.R. § 300.111(c); ECEA Rule 4.02(1)(a). This obligation exists even where the child advances from grade to grade. 34 C.F.R. § 300.111(a). A student who is gifted may still be eligible for special education and related services under the IDEA as long as the student has a qualifying disability. *Letter to Anonymous*, 110 LRP 52277 (OSEP 01/13/10) ("[S]tudents who have high cognition, have disabilities, and require special education and related services are protected under the IDEA and its implementing regulations").

The threshold for suspecting a disability is relatively low. *Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001). The appropriate inquiry by a school district is "whether the child should be referred for an evaluation, not whether the child actually qualifies for the services." *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). Suspicion "may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation." *Cheyenne Mtn. Sch. Dist. 12*, 117 LRP 25901 (D. Colo. 2017) (quoting *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)).

The actions of a school district in terms of whether it had knowledge of, or reason to suspect, a disability must be evaluated in light of the information the district knew, or had reason to know, at the relevant time. *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). It should not be based on hindsight. *Id.*; see also *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). School districts must systematically seek out IDEA-eligible students and may not take a passive approach and wait for others to refer students for special education. *Compton Unified Sch. Dist. v. Addison*, 54 IDELR 71 (9th Cir. 2010). Remaining vigilant for red flags and referring students who may have a disability and need special education is part of this ongoing obligation. *Arapahoe County Sch. Dist. 5*, 117 LRP 2988 (SEA CO 12/21/16) (citing *Cincinnati City Sch.*, 115 LRP 26069 (SEA OH 5/07/15)).

A school district may attempt pre-referral interventions before initiating an IDEA evaluation. See, e.g., *M.G. v. Williamson County Schs.*, 71 IDELR 102 (6th Cir. 2018, unpublished). However, a response to intervention ("RTI") process cannot be used to delay or deny an evaluation. *Letter to Ferrara*, 60 IDELR 46 (OSEP 2012). RTI is a "schoolwide approach that addresses the needs of

all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors." *Memo to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011). RTI cannot be used to delay or deny a timely initial evaluation. *Id.*

To decide whether District fulfilled its child find obligations here, the SCO considers the individual circumstances of this case to determine whether District had a reason to suspect that Student needed to be evaluated for special education. *Cherry Creek Sch. Dist.*, 119 LRP 30204 (SEA CO 5/17/19); *Weld RE-4 School District*, 119 LRP 5662 (SEA CO 1/2/19) (citing *Clark County Sch. Dist.*, 114 LRP 45477 (SEA NV 8/28/14)).

B. Concerns Regarding Student's Behavior

Here, the SCO finds and concludes that the evidence in the Record demonstrates that District did not have a reasonable suspicion that Student may have a disability and a need for special education and related services until October 2022. In August 2022, Student entered Prior School as a kindergartner. (FF # 8.) Prior to the start of the school year, Parent informed School of the potential that Student might need additional assistance with behavior. (*Id.*) Parent asked for a meeting "to discuss the need for a 504 or an IEP." (*Id.*) After conversation with Parent, Prior School initiated the 504 process shortly after the beginning of the school year. (FF #s 8-9, 11.) Notably, Parent participated in the 504 process and did not specify or otherwise indicate a wish to pursue an IEP rather than a 504 plan during the Section 504 process. (FF # 11.)

Over the next two months, as District worked on, developed, and implemented the 504 plan, Student exhibited a series of behavioral incidents in the school setting, leading to an in-school suspension on October 6, 2022. (FF #s 15-17.) The next day, Psychologist reached out to Parent to schedule a special education referral meeting based on these incidents occurring despite the accommodations and general education interventions. (FF # 18.) Although Psychologist did not provide Parent with consent to evaluate on October 14, 2022 as planned because the meeting was contentious, she did so on October 27, 2023. (FF #s 20-21.) Parent signed and returned the consent on November 4, 2022. (FF # 21.) After receiving the consent to evaluate, Prior School completed an initial evaluation and found Student eligible on December 13, 2022. (FF #s 23-24.)

Overall, only three months elapsed between Parent first raising the possibility that Student might require additional assistance and District initiating the special education evaluation process. On August 4, 2022, she requested that the school initiate either a 504 plan or an IEP process, and after discussion, agreed to proceed with a 504 plan. Because Student was a kindergartner and had only been in an elementary school setting for two weeks, it was reasonable for Prior School to first pursue a 504 plan and attempt pre-referral interventions. (FF # 14.) When Student's behaviors indicated that these were not meeting Student's behavioral needs, District promptly recognized by October 7 that it needed to initiate a special education referral for Student. (FF #

18.) District obtained Parent's consent, completed an initial evaluation, and determined that Student qualified for special education services on December 13, 2022. (FF # 21.)

For these reasons, the SCO finds and concludes that District appropriately identified and evaluated Student as a child suspected of having a disability and needing special education and related services, consistent with 34 C.F.R. § 300.111 or ECEA Rule 4.02(1)-(3).

Conclusion to Allegation No. 2: District failed to develop an IEP for Student within 90 calendar days of the date Parent provided consent for the initial evaluation, in violation of ECEA Rule 4.03(1)(d)(i). This violation resulted in a denial of FAPE.

Parent's concern is that after determining Student was eligible as a child with a disability in December 2022, District did not develop an IEP until April 2023. (FF #s 23, 34.)

A. IEP Development Timing

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is "the centerpiece of the statute's education delivery system for disabled children . . . [and] the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student's initial IEP must "be developed within 90 calendar days of the date that parental consent was obtained to conduct the initial evaluation." ECEA Rule 4.03(1)(d)(i).

As soon as possible following development of the IEP, special education and related services must be made available to the child in accordance with the child's IEP. 34 C.F.R. § 300.323(c)(2). Indeed, a final IEP must be issued in a timely manner after an eligibility determination. *Delaware Cnty. Intermediate Unit No. 25 v. Martin K.*, 831 F. Supp. 1206, 1215 (E.D. Pa. 1993) (holding that a district's failure to issue a final IEP for nearly four months after determining the student eligible violated the IDEA).

Here, Parent provided consent for the initial evaluation on November 4, 2023. (FF #21). Thus, District was required to develop the IEP no later than February 2, 2023. However, District did not develop the IEP until April 20, 2023. (FF # 22). Therefore, the SCO finds and concludes that District failed to develop Student's IEP within 90 calendar days of the date Parent consented to the initial evaluation, in violation of ECEA Rule 4.03(1)(d)(i).

B. Procedural Violation

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 205-06 (1982). However, procedural violations of IDEA are only actionable to the extent that they impede the child's right

to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

Here, although a meeting to develop the initial IEP was held on February 7, 2023, the IEP was not developed until April 20, 2023, more than two months after it should have been developed. (FF #s 22, 31, 34.) During this time, Student did not receive approximately 1,000 monthly minutes of specialized instruction or work on any of the six annual goals detailed in the resulting IEP. (FF #s 38-39.) The SCO recognizes a tension that can exist for school districts—especially in contentious situations—among affording meaningful parent participation and ensuring IDEA and ECEA Rules timelines are met. See *Doug C. v. Hawaii Department of Education*, 720 F.3d 1038, 1046 (9th Cir. 2013) (holding that when confronted with complying with one IDEA procedural requirement or another, school districts must make a reasonable determination of which course of action promotes the central purpose of the IDEA which is “to provide disabled students a free appropriate public education and to protect the educational rights of those students”).

Indeed, the delay in IEP development here was driven by District's desire to achieve consensus among the entire IEP team and afford meaningful participation to Parent and Advocate in a contentious situation. (FF # 32.) Although District prioritized parental participation over strict deadline compliance, it should have ultimately developed an IEP and documented its offer of FAPE (including any disagreements) in a PWN much sooner once it recognized the ECEA Rule's 90-day window passed. (*Id.*) In this specific situation, the SCO finds that allowing an additional two and a half months to elapse was not reasonable as it caused a deprivation of educational benefit. See *Martin K.*, 831 F. Supp. at 1215. For these reasons, the SCO finds and concludes that this procedural violation resulted in a denial of FAPE.

C. Compensatory Education

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

Here, at the latest, the IEP should have been developed by February 2, 2023. (FF # 25.) It was not developed and implemented until April 20, 2023. (FF # 34). The SCO in consultation with CDE Content Specialist, and in consideration of Student's young age and the current IEP, finds an award of the following compensatory services to be appropriate to place Student in the same position he would have been if not for District's violation: (a) 180 minutes of direct social emotional skills development outside the general education setting; (b) 180 minutes of direct

speech/language support outside the general education setting; and (c) 400 minutes of direct specialized instruction outside the general education setting.

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

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

Here, nothing in the Record indicates that District’s violation is systemic in nature. District’s practices and procedures are consistent with the IDEA and ECEA Rules. (FF #s 4-5). Indeed, District staff demonstrated knowledge and understanding of those responsibilities. (FF # 6). The circumstances of this case are unique to scheduling challenges and demands for Student’s IEP process under contentious circumstances. (FF #s 24-29.) Moreover, Director acknowledged and took responsibility for a delay in scheduling the initial IEP meeting, noting the exceptional circumstances. (FF # 27.) For these reasons, the SCO finds and concludes that District’s violation is not systemic in nature.

REMEDIES

The SCO concludes that District has violated the following ECEA requirement:

- a. Failing to develop an IEP with 90 calendar days of the date that parental consent was obtained to conduct the initial evaluation, in violation of ECEA Rule 4.03(1)(d)(i).

To remedy this violation, District is ORDERED to take the following actions:

1. Corrective Action Plan

- a. By **Monday, October 30, 2023**, District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom District is responsible. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm District’s timely correction of the areas of noncompliance.

2. Final Decision Review

- a. Director must review this Decision. This review must occur no later than **Monday, October 30, 2023**. A signed assurance that this Decision has been reviewed must be completed and provided to the CDE no later than **Monday, November 6, 2023**.

3. Compensatory Education Services

- a. Student shall receive **180 minutes of direct social emotional skills development services** provided by a school psychologist or social worker outside the general education setting. These services must target Student's current annual IEP goals. All 180 minutes must be completed by **Thursday, May 24, 2023**.
- b. Student shall receive **180 minutes of direct speech/language support services** provided by a speech/language pathologist outside the general education setting. These services must target Student's current annual IEP goals. All 180 minutes must be completed by **Thursday, May 24, 2023**.
- c. Student shall receive **400 minutes of direct social emotional skills development services** provided by an affective need center-based teacher outside the general education setting. These services must target Student's current annual IEP goals. All 400 minutes must be completed by **Thursday, May 24, 2023**.
- d. **By Friday, November 10, 2023**, District shall schedule compensatory services in collaboration with Parents. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. District shall submit the schedule of compensatory services, to include the dates, times, and durations of planned sessions, to the CDE no later than **Wednesday, November 15, 2023**. If District and Parent cannot agree to a schedule by November 10, 2023, the CDE will determine the schedule for compensatory services by **November 21, 2023**.
 - i. The parties shall cooperate in determining how the compensatory services will be provided. If Parents refuse to meet with District within this time, District will be excused from delivering compensatory services, provided that District diligently attempts to meet with Parents and documents such efforts. A determination that District diligently attempted to meet with Parents, and should thus be excused from providing compensatory services, rests solely with the CDE.

- ii. Parents may opt out of some or all of the compensatory services if they wish.
- e. Monthly consultation between the provider(s) delivering compensatory services and Director shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. District must submit documentation that these consultations have occurred **by the second Monday of each month**, once services begin, until compensatory services have been completed. Consultation logs must contain the name and title of the provider and the date, the duration, and a brief description of the consultation.
- f. To verify that Student has received the services required by this Decision, District must submit records of service logs to the CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service must be included in the service log.
- g. These compensatory services will be in addition to any services Student currently receives, or will receive, that are designed to advance her toward IEP goals and objectives. These compensatory services must be provided to Student outside of the regular school day (such as before and/or after school, on weekends, or during school breaks) to ensure Student is not deprived of the instruction Student is entitled to (including time in general education). If for any reason, including illness, Student is not available for any scheduled compensatory services, District will be excused from providing the service scheduled for that session. If for any reason District fails to provide a scheduled compensatory session, District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parents and notify the CDE of the change in the appropriate service log.

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

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

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

CONCLUSION

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

Dated this 28th day of September, 2023.



Nick Butler
State Complaints Officer

APPENDIX

Complaint, pages 1-20

- Exhibit 1: Disciplinary referral form
- Exhibit 2: Evaluation of Student by outside provider
- Exhibit 3: Student's IEP
- Exhibit 4: Before- and after-school program policies
- Exhibit 5: August 4, 2022 email
- Exhibit 6: Section 504 Referral Form
- Exhibit 7: August 30, 2022 email
- Exhibit 8: October 7, 2022 email
- Exhibit 9: February 7, 2023 email
- Exhibit 10: October 25, 2022 email
- Exhibit 11: Prior Written Notice and Consent of Initial Evaluation
- Exhibit 12: February 10, 2023 email

Response, pages 1-10

- Exhibit A: IEPs and Amended IEPs
- Exhibit B: n/a
- Exhibit C: n/a
- Exhibit D: Functional Behavior Assessment and Behavior Detail Report
- Exhibit E: Section 504 Eligibility Determination Report and IEP Determination of Eligibility
- Exhibit F: Evaluation report
- Exhibit G: Student attendance and report cards
- Exhibit H: Notices of meeting
- Exhibit I: Prior Written Notices
- Exhibit J: District Calendar
- Exhibit K: District Policies
- Exhibit L: Correspondence

Reply, pages 1-24

- Exhibit 13: December 13, 2022 email
- Exhibit 14: December 16, 2022 email
- Exhibit 15: Emails from December 13, 2022 to January 24, 2023
- Exhibit 16: CDE decision in State-Level Complaint 2018:533
- Exhibit 17: April 11, 2023 emails
- Exhibit 18: District Higher Level of Programming Placement Procedure and Guidance Checklist
- Exhibit 19: U.S. Department of Education guidance letter

CDE Exhibit:

- CDE Exhibit 1: District website – Timeline for Special Education Process

Telephone Interviews

- Parent: September 6, 2023
- Behavior Specialist: September 7, 2023
- Kindergarten Teacher: September 7, 2023
- School Psychologist: September 8, 2023
- Special Education Director: September 8, 2023