

Colorado Department of Education  
Decision of the State Complaints Officer (“SCO”)  
Under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup>

**State-Level Complaint 2016:522  
Thompson School District R2-J**

**DECISION**

**INTRODUCTION**

This pro-se, state-level complaint (“Complaint”) was properly filed on September 9, 2016 by the mother (“Mother”) of a child (“Student”) identified as a child with a disability under the IDEA. Mother brings this Complaint against Thompson School District R2-J (“School District”).

The SCO determined that the Complaint raised four issues subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.<sup>2</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**COMPLAINT ALLEGATIONS**

Mother’s Complaint raised the following issues, in summary:

Whether the School District has violated Mother’s rights and denied Student a free appropriate public education (FAPE):

1. by failing to consider Student’s individual needs in the development, review or revision of Student’s IEP since January 12, 2016;
2. by denying Mother meaningful opportunity to participate in the development of Student’s IEP since January 12, 2016;
3. by failing to provide Mother with a copy of Student’s IEP from January 12, 2016 until August 25, 2016; and
4. by failing to implement and comply with Student’s IEP since the beginning of the 2016-17 school year.

**Summary of Proposed Remedies.** To resolve the Complaint, Mother proposed, in summary:

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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 C.F.R. § 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).

- that Student’s IEP be updated immediately to address her need for ASL curriculum and, possibly, an ASL interpreter;
- that Student be provided a one-to-one paraprofessional during the school day for support in the general education classroom so Student is not unnecessarily segregated from general education students in the ILC classroom;
- that Student be provided with speech and occupational therapy as stated in her IEP and be compensated for any missed sessions;
- that School staff begin communicating with Mother regarding any issues and demonstrate how Student spends her days and what classrooms Student is in throughout the day; and
- that Student be encouraged to use the bathroom hourly and that Student’s pull-up be changed when needed.

### **FINDINGS OF FACT**

After a thorough and careful analysis of the entire record, the SCO makes the following FINDINGS:

1. At all times relevant to the Complaint, Student has lived with Mother within the boundaries of the School District and has attended School. Student has a congenital medical condition which has resulted in developmental delays in daily living skills, motor function, and communication and impacts her ability to interact with others, warranting skilled intervention. Student is nonverbal, communicating by signing, pointing, gesturing, and using vocalizations that are largely unintelligible. Student has been identified as a student with a disability, eligible for special education and related services under the IDEA and ECEA.<sup>3</sup>
2. Student’s last agreed upon IEP, dated December 18, 2014, noted that “[Student] is very observant of her peers and learns by imitating them. She accesses education in the general classroom through modifications and para support. Specific literacy and math skills require pacing, concentration, repetition and replacement curriculum that are best provided in a pull-out setting. Specialized instruction in motor and communication skills can also occur outside the classroom to best meet her individual needs. Pull-out services do cause missed time in the general classroom, but scheduling considerations are used to help limit lost instruction.” Accordingly, the December 2014 IEP placed Student in general education no less than 80% of the time, with limited pull-

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<sup>3</sup> Response; Exhibit A; Observation of Student; Interviews with Mother, Former Paraprofessional, General Education Teacher #1, ILC Teacher #1, ILC Teacher #2, and SLP.

out support to receive daily specialized instruction in literacy and math from a severe needs teacher, speech/language services for 60 minutes per week, and occupational therapy services for 60 minutes per week.<sup>4</sup>

3. In early December 2015, Student's annual review IEP meeting was scheduled for January 12, 2016.<sup>5</sup> On December 11, 2015, Mother emailed the IEP team a copy of a neurological report from Private Clinic ("Clinical Report") for their review prior to the meeting. Clinical Report noted Student's low average non-verbal cognitive skills and a receptive and expressive language disorder that suggests an auditory processing disorder.<sup>6</sup> Mother also requested that the team revisit the need for a sign language interpreter and how to support further development of Student's signing skills.<sup>7</sup> Throughout the years, Student's IEP team had consistently noted Student's heavy reliance and preference for communication through sign, had discussed whether Student would benefit from an interpreter, and had noted Mother's concern regarding Student's lack of progress with signing. Student's special education case manager at that time, ILC Teacher #1, assured Mother that the IEP team would discuss Mother's request at the January meeting.<sup>8</sup>

#### **January 12, 2016 IEP meeting**

4. Based on a thorough review of the documentation and numerous interviews with credible witnesses, SCO concludes that on January 12, 2016 the IEP team agreed that Student did need support in the development of communication, specifically with regard to the utilization of augmentative and alternative communication ("AAC") and sign, but that they did not develop Student's IEP at that time.

5. The IEP team met on January 12<sup>th</sup> and discussed Student's needs with regard to communication, agreeing that Student does not utilize her AAC device.<sup>9</sup> SCO notes that for several years the team had discussed and consistently noted the fact that Student did not utilize the AAC device at home or at school. SCO further notes that one of the

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<sup>4</sup> Exhibit A

<sup>5</sup> SCO notes that the meeting was scheduled more than a year after the December 2014 IEP, but that Mother agreed to the extension due to School staff schedules.

<sup>6</sup> Exhibits 1 and 4

<sup>7</sup> SCO notes that Mother was mistakenly asking for an "ASL" interpreter due to her misunderstanding of ASL and signing, but that Mother was essentially asking for communication using sign.

<sup>8</sup> SCO also notes that Student had previously attended a deaf and hard of hearing ("DHH") program in School District in order to develop her ability to communicate through sign language. Interviews with Mother, TOD, SLP, General Education Teacher #1, Former Paraprofessional, and ILC Teacher #1; Exhibits 1, 6, and A

<sup>9</sup> SCO notes that an AAC has always been provided by Mother.

accommodations listed on both the December 2014 and January 2016 IEP is “continued exploration of augmentative communication devices.”<sup>10</sup>

6. SCO also concludes that the team agreed that Student needed support to increase her ability to use sign to communicate (both expressively and receptively) and that they discussed Mother’s request for an interpreter. However, the team failed to address Student’s need for an interpreter in the IEP because:

- School team members did not know if School District would provide Student with an interpreter outside of one of the School District’s DHH programs due to School District policy;
- a School District representative with authority to make a decision about providing an interpreter was not invited to the meeting;
- School team members did not know what School District could provide in terms of supporting Student’s development of sign; and
- The team felt they needed additional information with regard to Student’s ability to access an interpreter.

As a result, the team discussed ways they may be able to find resources to help build Student’s signing skills, which included setting up a meeting to speak with Special Education Director. The team agreed to assess Student’s signing skills, specifically related to her ability to access sign through an interpreter. The team also agreed to reconvene to finish reviewing and developing Student’s IEP once ILC Teacher #1 and Mother met with Special Education Director.<sup>11</sup>

7. After the meeting, SLP began collecting data on Student’s ability to access sign through an interpreter with the assistance of an SLP intern who previously worked as an interpreter.<sup>12</sup> The data suggested that Student did not yet have enough sign vocabulary to utilize an interpreter, yet her attention to the interpreter did increase from 25% to 75% over the course of the assessment period.<sup>13</sup> School team members also stated that they immediately began working with Student on goals that were discussed (and were written into the January 2016 IEP) at the meeting. With regard to meeting with Special Education Director, ILC Teacher #1 unsuccessfully attempted to schedule a meeting for several months and, after more than two months, finally scheduled a meeting with ESS

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<sup>10</sup> Exhibit A; Interviews with SLP, Mother, Former Paraprofessional, and ILC Teacher #2

<sup>11</sup> Interviews with Mother, ILC Teacher #1, OT, SLP, Special Education Director, ESS Coordinator, and General Education Teacher #1; Exhibit A

<sup>12</sup> SCO understanding is that the interpreter was using ASL, which Student does not know.

<sup>13</sup> Exhibit A; Interviews with Mother, ILC Teacher #1, and SLP

Coordinator instead.<sup>14</sup>

### **March 30, 2016 meeting with ESS Coordinator**

8. On March 30, 2016, ILC Teacher #1, SLP, and Mother met with ESS Coordinator. They shared the IEP team's agreement that Student needs language development and development of her signing skills, as well as Mother's request for an interpreter. SLP shared the results of her data collection and her opinion that Student did not yet have signing skills sufficient to access an interpreter. ESS Coordinator informed them that interpreters are available at the School District's DHH programs, which do not also provide ILC services. ESS Coordinator also shared that no other ILC program has an interpreter and discussed the difficulty School District experiences filling interpreter positions. ESS Coordinator recommended that the team contact DHH programs to research instructional programs that may give the IEP team some direction on a signing instruction program to use with Student. ESS Coordinator stated that if they found a signing instruction program they wanted to use, he would have a conversation with Special Education Director about funding.<sup>15</sup>

9. Based on the credible record, SCO concludes that the IEP team never resolved the issues related to Student's communication needs, whether signing or AAC, or Mother's request for an interpreter after the March 30<sup>th</sup> meeting. Nonetheless, ILC Teacher #1 filled out the IEP forms to finalize the IEP with School District, as explained below.

10. ILC Teacher #1 did contact the DHH programs and other School District professionals to explore options for sign development and shared the information with Mother, but nothing new was found. A member of the School District's SWAAC team also observed Student. The IEP team never met again after the March 30<sup>th</sup> meeting as they had agreed.

11. Sometime between March 30<sup>th</sup> and the end of the 2015-16 school year, ILC Teacher #1 was asked by School District administrators to finalize the January 2016 IEP in the School District's system, which she did. Based on a review of the credible record, SCO concludes that although ILC Teacher #1 believes that she provided Mother with a copy of the January 12, 2016 IEP by sending it home in Student's backpack, she did not.

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<sup>14</sup> Interview with ESS Coordinator. ESS Coordinator serves as a special education liaison between the School District and School IEP teams.

<sup>15</sup> Exhibit A; Interviews with Mother, ESS Coordinator, ILC Teacher #1, and SLP

Mother first saw the January IEP on August 25, 2016 from ILC Teacher #2.<sup>16</sup> On August 18<sup>th</sup>, Mother requested an IEP meeting. After receiving the IEP on August 25<sup>th</sup>, Mother continued to voice her concerns. As of the date of this decision an IEP team has still not met.<sup>17</sup>

12. SCO also concludes that the finalized January IEP appears to have been carelessly completed. SCO notes that the IEP was documented on an outdated form and contains numerous errors, inconsistencies, and additions that were never discussed<sup>18</sup>, including:

- Section 3: Date of initial consent for evaluation is incorrect
- Section 3: Student's primary disability prior to the meeting is incorrect and was not changed from Student's December 2014 IEP
- Section 3: Primary Education Environment after the meeting shows no change in placement, however, Section 13 shows that Student's placement was changed from at least 80% in the general education class to 40% to 79% in the general education class<sup>19</sup>
- Section 3: Grade designation is inaccurate and was not changed from the December 2014 IEP
- Section 7: Missing the required question of whether Student has unique communication needs
- Section 9: The baseline data for the goal in the area of "Reading, Writing, and Communicating" indicates that the goal was already completed
- Section 9: The baseline data point is missing and/or the unit of measurement do not match in the goals related to several areas of need
- Section 9: The progress reporting data and content is repeated throughout from 2/26/16
- Sections 9 and 12: Indication that extended evidence outcomes and expanded benchmarks or alternative standards are being used without any evidence of a significant cognitive impairment
- Section 9: Goals and objectives related to use of the AAC device were never discussed or agreed upon

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<sup>16</sup> Interviews with ILC Teacher #1, Special Education Director, Mother, Principal, and ILC Teacher #2; Exhibit 1

<sup>17</sup> Interviews with ILC Teacher #1, ILC Teacher #2, Principal, SLP, and Mother; Exhibit 1

<sup>18</sup> SCO notes that the form used for Student's December 2014 and January 2016 IEP are both on the outdated form which had been revised twice already by December 2014 and is missing information that the IEP team was required to consider. SCO notes many of the problematic areas in the document itself, however, this list may not be a comprehensive list as SCO could not discern all of the items discussed and agreed upon at the January 12, 2016 meeting. Interviews with OT, SLP, Mother, ILC Teacher #1, and General Education Teacher #1

<sup>19</sup> SCO notes that Mother was also not provided with Prior Written Notice of the change of placement.

- Section 12: No accommodations are provided for Student’s responses in State/District Assessments
- Section 15: Prior Written Notice discussed an eligibility determination that was made in December 2014
- The IEP document does not indicate that a copy of the IEP has been provided to Mother<sup>20</sup>

## **2016-17 School Year**

### **Occupational Therapy and Speech/Language Services:**

13. The January 2016 IEP<sup>21</sup> provides that Student will receive 60 minutes per week of direct services in occupational therapy and speech/language. School District admits that these related services were not provided to Student between August 22<sup>nd</sup> and October 14<sup>th</sup> due to hiring difficulties. Student began receiving occupational therapy services in mid-October, however, she is still not receiving speech/language services. School District and Mother have agreed that School District will provide Student with compensatory services for all missed occupational therapy and speech/language services, but have not yet reached agreement on a plan.<sup>22</sup>

### **ILC Services:**

14. ILC Teacher #2 was hired to support students in the ILC class approximately one week before school started. When the school year began, ILC Teacher #2 had 11 kindergarten through fifth grade ILC students in her class with support by only three paraprofessionals. All of the ILC students required paraprofessional support throughout their day. A fourth paraprofessional was hired in mid-September and a fifth was hired in mid-October. Student was assigned to General Education Teacher #2’s classroom (“general education class”).<sup>23</sup>

15. Student’s January 2016 IEP placed her in the general education class 40% to 79% of the time, noting that “[Student] benefits greatly from being in the [general education]

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<sup>20</sup> Interviews with Mother and ILC Teacher #1; Exhibit A

<sup>21</sup> SCO notes that although the January 2016 IEP was never completed, it was filled out and finalized and the School team was working off of the January 2016 IEP. For purposes of this Decision, the discussion of implementation and compliance will be discussed with regard to Student’s January 2016 IEP.

<sup>22</sup> Response; Reply; Exhibit A; Interviews with Mother, OT, SLP, Special Education Director, and ILC Teacher #2

<sup>23</sup> Interviews with Principal, Mother, and ILC Teacher #2

classroom. She is very observant of her peers and learns by imitating them. She accesses education in the general classroom through modifications and para support.” The IEP also specifies that Student is to receive “Adult ILC staff support provided in [Student’s] general education class for her day with pull-out service to ILC room for 90 minutes literacy support and 45 minutes Math support per day in a small group or 1:1 direct instruction intervention.” Specialized instruction in literacy and math are to be provided by a severe needs teacher.<sup>24</sup>

16. General Education Teacher #1, who was Student’s teacher during the 2015-16 school year, stated that Student was largely unable to engage with the general education class without paraprofessional support and was, as a result, rarely engaged in her class last year. General Education Teacher #1 explained that this was because Student was paired with another ILC Student (“Student X”), who required significantly more support than Student, specifically in terms of the student’s safety and processes. General Education Teacher #1 also stated that often times Student was unable to attend the general education class at all because the paraprofessional assigned to the two students needed to support Student X outside of the general education classroom and there was no other paraprofessional available to support Student during those times. General Education Teacher #1 also stated that Student was not in her class every day due to scheduling of the ILC students.<sup>25</sup>

17. This school year, Student is again paired with Student X and another ILC Student (“Student Y”), both of whom are also assigned to general education class and require paraprofessional support. Although SCO was unable to observe Student in the general education class due to Student’s illness, SCO did observe Paraprofessional Y with Students X and Y. Paraprofessional Y brought Student’s X and Y into the classroom fifteen minutes after the class had started and directed them to sit next to one another in the back row of the class, separated from another student by an empty seat. The empty seat was furthest away from where Paraprofessional Y was seated and SCO assumes that the empty seat was where Student usually sits. SCO observed that for the first ten minutes Students X and Y were scribbling with crayons and appeared unengaged with the general education class, who were working on a language lesson. General Education Teacher #2 asked all of the students to come sit on the floor in the front of room, at which point Student X joined the group on her own while Paraprofessional Y prompted and assisted Student Y for several minutes to help her join

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<sup>24</sup> Exhibit A; Interviews with Mother, Former Paraprofessional, General Education Teacher #1, ILC Teacher #1, and ILC Teacher #2,

<sup>25</sup> Interview with General Education Teacher #1.



the group.<sup>26</sup>

18. Student receives specific instruction in literacy and math in the ILC class. All of Student's literacy and math instruction is provided one-to-one or in a small group of five or less ILC students. ILC Teacher #2 stated that all of Student's math instruction and 30 minutes of Student's literacy instruction is provided by a paraprofessional under her direct instruction and supervision. The remaining 60 minutes of literacy instruction is provided directly by ILC Teacher #2.<sup>27</sup>

19. SCO observed ILC Teacher #1 providing literacy instruction for Student in the ILC class with Students X and Y. SCO observed ILC Teacher #1 providing visual support for all of the students throughout the lesson, including using various signs. SCO observed that Student was very engaged in the lesson and pointed, gestured, signed, and vocalized to express herself, which ILC Teacher #1 responded to. SCO observed that Student had an iPad on the table next to her at all times, but that she did not touch it until ILC Teacher #1 prompted her to do so. It was evident to SCO that Student was not adept at using the iPad and had to be led through the process by ILC Teacher #1. SCO also observed that Student Y required a significant amount of support to remain at the table, seated, and engaged, and that Student Y remained under the table at the other students' feet for much of the literacy lesson.<sup>28</sup>

#### August 23<sup>rd</sup> through mid-September ("Schedule #1")

20. Based on the credible record, SCO concludes that the School District failed to provide Student with 15 minutes per day of specific instruction in math and that Student was with the general education class for only 155 out of the 285 minutes per day specified on her IEP from August 23<sup>rd</sup> through mid-September. On August 22<sup>nd</sup>, the first day of school, Student attended general education class with a paraprofessional because all of the ILC students were not at School that day and there was a paraprofessional available to support Student all day. From August 23<sup>rd</sup> through mid-September, Student followed Schedule #1. ILC Teacher #2 stated that during this time Student was with the general education class for recess, lunch, and specials. According to Schedule #1, Student was with the general education class every day for 155 minutes and with the ILC class for 265 minutes where Student was scheduled for 90 minutes of

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<sup>26</sup> Observation of general education class, General Education Teacher #2, Paraprofessional X, and ILC Students #1 and #2

<sup>27</sup> Interview with ILC Teacher #2

<sup>28</sup> Observation of ILC Teacher #2, Student, and ILC Students #1 and #2

literacy instruction and 30 minutes of math instruction.<sup>29</sup>

Mid-September through mid-October (“Schedule #2)

21. Based on the credible record, SCO concludes that the School District failed to provide Student with 15 minutes of specific instruction in math per day and that Student was with the general education class for only 150 minutes out of the 285 minutes per day specified on her IEP from mid-September through mid-October. From mid-September through mid-October, Student followed Schedule #2. According to this schedule, every day Student was with general education students for 150 minutes and with the ILC class for 290 minutes where Student was scheduled for approximately 60 minutes of literacy instruction and 30 minutes of math instruction. SCO notes that Student was not with the general education class during recess and lunch during this time period, but rather, was with general education students from another grade level due to staffing issues.<sup>30</sup>

Mid-October through November 4<sup>th</sup> (“Schedule #3)

22. Based on the credible record, SCO concludes that the School District failed to provide Student with 15 minutes of specific instruction in math per day and that Student was in the general education class for only 220 minutes out of the 285 minutes per day specified on her IEP from mid-October through November 4<sup>th</sup>. From mid-October through November 4<sup>th</sup>, Student followed Schedule #3. According to this schedule, Student was with the general education class every day for 220 minutes and with the ILC class for 215 minutes where Student was scheduled for approximately 90 minutes of literacy instruction and 30 minutes of math instruction.<sup>31</sup>

November 7<sup>th</sup> through November 14<sup>th</sup> (“Schedule #4)

23. Based on the credible record, SCO concludes that the School District failed to provide Student with 15 minutes of specific instruction in literacy per day and that Student was in the general education class for only 255 out of the 285 minutes per day specified on her IEP from November 4<sup>th</sup> through November 14<sup>th</sup>. From November 4<sup>th</sup> through November 14<sup>th</sup>, Student followed Schedule #4. During this time, Student was with the general education class every day for 240 minutes and with the ILC class for

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<sup>29</sup> Exhibit 7

<sup>30</sup> Exhibit J, page 2

<sup>31</sup> Exhibit J, page 1

only 165 minutes where Student was scheduled for approximately 75 minutes of literacy instruction and 45 minutes of math instruction.

November 14<sup>th</sup> to present (“Current Schedule”)

24. Mother and Principal met on November 14<sup>th</sup> to discuss Student’s schedule and agreed that Student’s schedule would be aligned with the academic schedule of the general education classroom. Accordingly, Mother reported to SCO that Student is now attending the general education class at all times, except for 90 minutes of literacy instruction and 45 minutes of math instruction with the ILC class.<sup>32</sup>

**CONCLUSIONS OF LAW**

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

**The School District has failed to comply with the procedural requirements set forth in the IDEA and ECEA.**

1. Mother alleges in her Complaint that since January 12, 2016, School District has denied her meaningful input and failed to consider Student’s individual needs in the development of Student’s IEP, specifically related to Student’s communication needs. Mother also alleges that School District failed to provide Mother with a copy of Student’s IEP from January 12, 2016 through August 25, 2016. For the following reasons, SCO agrees.

2. Under the IDEA, public school districts are required to provide children with disabilities with a “free appropriate public education” (or FAPE) by providing special education and related services individually tailored to meet the student’s unique needs, and provided in conformity with an individualized education program (or IEP) that is developed according to the IDEA’s procedures. 20 U.S.C. § 1401(9); 23 C.F.R. § 300.17; ECEA Rule 2.19. The IDEA contains extensive procedural requirements relating to the development of the IEP, including the requirements that the IEP be a written document, reviewed at least annually, and that it be developed by a team of individuals with knowledge about the child, including a representative of the public agency who is knowledgeable about the availability of resources of the public agency, and that it be based upon the input of the IEP meeting participants as well as evaluative data derived

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<sup>32</sup> Interview with Mother

from valid, scientifically based assessments conducted in accordance with the IDEA's requirements. *See, e.g.*, 34 C.F.R. §§ 300.301-300.304; 300.320-300.324. The IDEA also provides that in the development of an IEP, parents must be afforded the opportunity to attend and participate and that the parents' participation must be meaningful, including giving consideration to their concerns about their child and providing parents with a copy of the IEP. 34 C.F.R. §§ 300.321 (a)(1), 300.322(f), and 300.324(a)(ii). Finally, the IDEA's procedural safeguards also require that a school district give a parent prior written notice ("PWN") a reasonable time before it proposes or refuses to change the educational placement of a child. 34 C.F.R. § 300.503(a).

3. In the seminal case of *Board of Education v. Rowley*, the United States Supreme Court highlighted the importance of compliance with the IDEA's procedural requirements, particularly given the lack of specificity provided by the IDEA with respect to the substantive requirements for FAPE.

"[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, *see, e.g.* 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrate[s] the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."

*Board of Education v. Rowley*, 458 U.S. 176, 205-206 (1982).

4. Typically, contemplation of the two prong analysis set forth in *Rowley* is necessary to determine whether the procedural violation resulted in a denial of FAPE. *Rowley, supra* at 206-207. "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* It is well-established, however, that where the procedural inadequacies seriously infringe upon the parents' opportunity to meaningfully participate in the IEP process, the result is a "per se" denial of FAPE. *See, e.g., O.L. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11<sup>th</sup> Cir. 2014); *Deal v. Hamilton County Bd. Of Educ.*, 392 F.2d 840 (6<sup>th</sup> Cir. 2004); *see also*, 34 C.F.R. § 300.513(a)(2)(ii) ("In matters alleging a procedural

violation, a hearing officer may find that the child did not receive a FAPE only if the procedural inadequacies ... [s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child...").

5. Here, the IEP team met for an annual review of Student's IEP on January 12, 2016. Among the things that were discussed, it is clear that one of the team's primary concerns was Student's communication needs, specifically Student's preference for and ability to communicate using sign.<sup>33</sup> It is also clear that the team agreed that Student did not use her AAC device, needed support to develop her sign skills, both expressively and receptively, and that they brainstormed ideas to provide that support, but that they also never formed a plan for how to do so. It is clear that the team also discussed Mother's request for an interpreter<sup>34</sup>, but that they never determined whether an interpreter was appropriate and, even though the request was not a new one and Mother had given the team a month's notice, they did not know whether the School District could even provide an interpreter. As a result, the team did not develop Student's IEP and decided to reconvene after meeting with Special Education Director about the interpreter and sign language issues. Although Mother, ILC Teacher #1, and SLP did finally meet with ESS Coordinator, the IEP team never reconvened and Student's IEP form was completed and finalized without any IEP team discussion, without agreement, and without Mother's participation in the process. Finally, the IEP was never provided to Mother during the 2015-16 school year and it wasn't until the beginning of the 2016-17 school year that she first saw the document after requesting it from Student's new ILC Teacher.

6. Accordingly, SCO finds that School District violated 34 C.F.R. §§ 300.321(a)(1), 300.322(f), and 300.324(a)(ii) of the IDEA by failing to provide Mother with an opportunity for meaningful participation in the development of Student's IEP, including failing to provide Mother with a copy of the January 2016 IEP until August 25, 2016. SCO also finds that the School District violated 34 C.F.R. § 321(a)(4)(ii) of the IDEA by failing to ensure that the January 12, 2016 IEP team meeting included a School District representative who was knowledgeable about the availability of resources. SCO further finds that School District violated 34 C.F.R. §§ 300.324(a)(2)(iv) and (v) of the IDEA by failing to consider Student's communication and assistive technology needs in the

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<sup>33</sup> SCO notes that the Complaint allegations are specifically about Mother's request for an interpreter and/or development of sign language skills, however, Student's infrequent use of the AAC device was also relevant to Student's communication needs.

<sup>34</sup> SCO notes that Mother referred to an interpreter as an ASL interpreter, which may have added to the confusion. Nonetheless, the team clearly understood that Student's communication thus far has not been using ASL, but rather, signs.

development of the January 2016 IEP.

7. The IEP document itself is rife with errors, omissions, and inconsistencies. Notably, like the December 2014 IEP, the January 2016 IEP was completed on an outdated form, which did not even include a section for the team's requisite consideration of special factors, specifically whether Student has "unique communication needs." The IEP contains goals that had already been met according to the baseline data provided, while other goals were simply not aligned with the baseline data unit of measurement. The IEP also contained dates and information that were either irrelevant to Student or were possibly carried over from a previous IEP or a draft. SCO also notes that the IEP indicates that Student is taking alternate assessments and using extended evidence outcomes, however, there is no information to justify a determination that Student has a significant cognitive disability. Finally, Mother was never provided with PWN despite Student's change of placement from at least 80% in the general education classroom to 40% to 79%.

8. Accordingly, SCO finds that School District failed to develop measurable annual goals, in violation of 34 C.F.R. §§ 300.320(a)(2)(i)(A) and (B). SCO also finds that School District failed to appropriately state why Student cannot participate in regular State or districtwide assessment of student achievement, in violation of 34 C.F.R. § 300.503(a). SCO further finds that School District failed to provide Mother with PWN of a change in education placement, in violation of 34 C.F.R. § 300.114(a).

9. For all of these reasons, SCO finds that School District has failed to develop Student's IEP according to her individualized needs and failed to provide Mother with meaningful participation in the process, resulting in procedural violations and a per se violation of Student's right to a FAPE.

**School District failed to implement and comply with Student's IEP.**

10. SCO next considers the issues of implementation and compliance with Student's January 2016 IEP. Mother alleges that Student's IEP has not been appropriately implemented or complied with since the beginning of the 2016-17 school year. While School District admitted that occupational therapy and speech language services have not been provided in compliance with Student's IEP, it denied that Student's IEP has otherwise not been implemented or complied with. Based on a thorough review of the record, which includes numerous interviews with credible witnesses and SCO's own

observations, SCO concludes otherwise.

11. With regard to the specialized instruction that Student is to be provided by a severe needs teacher in literacy and math, SCO has noted through five different schedules the number of minutes for each subject that Student has not been provided for each period of time.<sup>35</sup>

12. Finally, SCO addresses Mother's concerns related to Student being unnecessarily segregated from her peers in the general education classroom. The IDEA demands that each public agency ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled. 34 C.F.R. § 300.114(a). In this case, it is abundantly clear to SCO that Student's IEP team has always determined that Student benefits greatly from education with typically developing peers. Student's IEPs have always noted and credible witnesses confirmed that she learns best by observing peers and imitating them, but requires modifications and paraprofessional support in the general education classroom, primarily due to her communication needs. Student's IEP notes that scheduling of Student's time out of the general education classroom should be utilized for specific intervention with a special needs teacher for 90 minutes of literacy and 45 minutes of math. Nonetheless, it is clear in the record that due to staffing issues Student has been spending far more time in the ILC classroom than her IEP specifies. Moreover, SCO believes it is probable that those staffing issues are also affecting how consistently Student is receiving the kind of paraprofessional support that is critical for her engagement in the general education classroom<sup>36</sup>.

13. For all of the aforementioned reasons, SCO concludes that Student has been denied a FAPE and is entitled to compensatory education. Compensatory education is an equitable remedy intended to place a student in the same position they would have been, but for the violation. *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.D. Cir.2005). Accordingly, Student is awarded compensatory education as specified in the remedies section of this decision.

## REMEDIES

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<sup>35</sup> SCO notes that Student is receiving all of her specialized instruction in math and 30 minutes of literacy from a paraprofessional instead of the severe needs teacher. While SCO is not making a finding of a violation with regard to the provision of specialized instruction, it is somewhat worrisome in light of the number of other implementation issues that are due to staffing difficulties.

<sup>36</sup> SCO wonders whether the level of support Student would need in the general education classroom would decrease if her communication needs were addressed.

The SCO has concluded that the School District committed the following violations of IDEA:

1. Failure to develop an IEP according to the procedural requirements and the unique needs of a child with a disability, including:
  - a. Providing parent with an opportunity for meaningful participation, including providing parent with a copy of the IEP (34 C.F.R. §§ 300.321(a)(1), 300.322(f) and 300.324(a)(ii));
  - b. Ensuring that the IEP team includes a representative of the public agency who is knowledgeable about the availability of resources of the public agency (34 C.F.R. § 321(a)(4)(ii));
  - c. Consideration of the communication needs of the child (34 C.F.R. § 300.324(a)(2)(iv));
  - d. Consideration of Assistive Technology devices or services (34 C.F.R. § 300.324(a)(2)(v));
  - e. Development of measurable annual goals (34 C.F.R. § 300.320(a)(2)(i)(A) and (B));
  - f. A statement of why the child cannot participate in regular State or districtwide assessment of student achievement (34 C.F.R. § 300.320(a)(6)(ii)(A) and (B)); and
  - g. Providing parent with prior written notice a reasonable time before it proposes or refuses to change the educational placement of a child (34 C.F.R. § 300.503(a)).
2. Failure to provide special education and related services (34 C.F.R. § 300.17).
3. Failure to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled (34 C.F.R. § 300.114(a)).

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

1. By December 16, 2016, the School District must submit to the Department a proposed corrective action plan (CAP) that addresses each and every 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 the School District is responsible. The CAP must, at a minimum, provide for the



following:

- a. Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violation, no later than January 30, 2017.
  - b. Effective training must be conducted for all School administrators, special education case managers, and School District coordinators concerning the policies and procedures, to be provided no later than March 17, 2017.
  - c. Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department no later than March 27, 2017.
2. Within 7 school days after receiving this Decision, School District must conduct an IEP team meeting in order to develop all areas of Student's IEP that complies with all procedural requirements of the IDEA, particularly all of the provisions that the SCO has found the School District to have violated.
- a. The IEP team meeting must include all professionals who currently provide services to Student and must also include General Education Teacher #2, SLP, and Principal. The IEP team must also include staff from the School District's SWAAC assessment team (or persons knowledgeable about SWAAC assessments) and a School District DHH staff members (or persons knowledgeable about communication through sign).
  - b. If it is determined that additional information is needed to inform the IEP process, the School District will provide Mother with a request for consent to re-evaluate Student.
  - c. Once the reevaluation is complete, the IEP team will reconvene within two weeks to review and revise Student's IEP, as necessary. The IEP team must also discuss a plan for compensatory services to address any deficiencies that is consistent with its consideration of Student's present levels and needs related to the absence of special education services from August 22, 2016 until the date of this Decision.

These compensatory services shall be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory education services will be provided, with special consideration to Student's needs, stamina, cooperation, and schedule.

Compensatory services will include a plan for addressing the following deficits found in the Decision:

Schedule #1: 15 minutes of specialized instruction in math per day; 155 minutes per day in the general education classroom

Schedule #2: 15 minutes of specialized instruction in math per day; 150 minutes per day in the general education classroom

Schedule #3: 15 minutes of specialized instruction in math per day; 220 minutes per day in the general education classroom

Schedule #4: 15 minutes of specialized instruction in literacy per day; 45 minutes per day in the general education classroom

- d. A complete copy of any new IEP developed for Student, including a plan for compensatory services, and prior written notice, as well as the School District's consent to reevaluate Student, shall be provided to the Department within five days after the IEP meeting occurs or consent form is provided.

The Department will approve or request revisions of the CAP. Subsequent to the approval of the CAP, the Department will arrange to conduct verification activities to verify the School District's timely compliance with this Decision. Please submit the documentation detailed above to the Department as follows:

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

Failure by the School District to meet the timelines set forth above will adversely affect the School District's annual determination under the IDEA and will subject the School District to enforcement action by the Department.

### **CONCLUSION**

The Decision of the SCO is final and 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.

This 18<sup>th</sup> day of November, 2016.

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Lisa A. Weiss, Esq.  
State Complaints Officer

## APPENDIX

### **Complaint, dated September 9, 2016, pages 1-5**

- Exhibit 1: Email correspondence (12/10/15 and 12/11/15 and 8/12/16 through 9/8/16)
- Exhibit 2: IEP (1/7/16) marked "DRAFT" with handwritten notes and highlighting; correspondence (1/5/16)
- Exhibit 3: IEP (1/12/16) marked "ILC COPY" with handwritten notes
- Exhibit 4: Neuropsychology Evaluation from Private Hospital (10/6/15)

### **Reply, dated October 27, 2016, pages 1-6**

Parent's Notes on District's Response, pages 1-6

- Exhibit 5: Email correspondence (10/24/16 and 10/24/16)
- Exhibit 6: Evaluation Reports with highlighting (2/8/12; 2/29/12 and 1/11/13, 1/10/14, and 11/24/14); Progress Reports (5/23/12, 11/2/12, 1/11/13, 5/20/13, 11/1/13, 1/10/14, 5/20/14, 1/14/14, 12/18/14; 2/25/15, 5/28/15, 11/13/15); IEP with highlighting (12/18/14); Notice of Meeting marked "Parent Copy" and Prior Written Notice and Consent for Evaluation (11/4/14); Determination of Eligibility, Prior Written Notice of Special Education Action, and Meeting Notes (12/18/14)
- Exhibit 7: Schedule #1

### **Additional documents provided by Mother**

- Exhibit 8: Email correspondence (8/15/16 through 10/31/16)
- Exhibit 9: "Back and Forth Notes"

### **Response, dated October 17, 2016, pages 1-7**

- Exhibit A: IEPs (12/18/14 and 1/12/16); Meeting notes (1/12/16 and 3/20/16); Prior Written Notice of Special Education Action and Determination of Eligibility (12/18/14)
- Exhibit B: Progress Reports (11/13/15, 5/28/15, 2/25/15, 2/26/16, 5/16/16); 2015-16 Report Card
- Exhibit C: Notices of Meeting (12/13/15, 11/30/15, and 11/4/14); Request to Postpone IEP Meeting (12/10/15); Prior Written Notices and Consents for Evaluation (10/22/15 and 11/4/14); Adapted Physical Education Referral forms (11/2/15); Evaluation Report (11/24/14); Eligibility meeting notes (12/18/14)
- Exhibit D: ILC Teacher #2's Emails 2016-17
- Exhibit E: School Staff with Knowledge
- Exhibit F: Equal Educational Opportunities document; Nondiscrimination/Equal Opportunity document
- Exhibit G: Confirmation of delivery to Mother

### **Additional documentation provided by School District**

- Exhibit H: Email correspondence between SLP and Mother; Progress Reports
- Exhibit I: Schedule #3; Schedule #2

**Interviews with:**

Mother  
Former Paraprofessional  
Executive Director  
SLP  
Special Education Coordinator  
Principal  
ILC Teacher #1  
ILC Teacher #2  
TOD  
OT  
General Education Teacher #1

**Observations of:**

Student  
ILC Teacher #2  
Paraprofessional X  
Paraprofessional Y  
Student X  
Student Y  
General Education Teacher #2