

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

**State-Level Complaint 2018:501
Centennial BOCES**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on January 17, 2018, by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹ On January 23, 2018, the Parties agreed to try and resolve the Complaint through mediation and further agreed to extend the 60-day investigation timeline for that purpose. The State Complaints Officer (SCO) resumed this investigation immediately following notification from the Parties that they were unable to resolve their dispute in mediation.

Based on the written Complaint, the 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 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

SUMMARY OF COMPLAINT ALLEGATIONS

Whether the BOCES violated the IDEA and denied Student a free appropriate public education (FAPE) by:

1. Failing to properly implement Student's IEP, specifically as follows:
 - a. Failing to provide modifications and accommodations between January 17 and February 22 of 2017, including the provision of fidgets and books, adaptive seating, sensory strategies, and access to choice board/visual supports;

¹ 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.*

² 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).

- b. Failing to provide accommodations related to communication, i.e., access to ASL, from November 27, 2017, to present; and
 - c. Failing to provide occupational therapy (OT) services in accordance with Student's IEP from December 18, 2017, to present.
2. Disclosing personally identifiable information concerning Student's special education programming and services to a third party without parental consent on or around December 19, 2017.

FINDINGS OF FACT

After thorough and careful analysis of the entire record,³ the SCO makes the following FINDINGS:

1. At all times relevant to the Complaint, Student was five years old and enrolled in Early Learning Center, a preschool program where special education and related services are provided by the BOCES.
2. Student is eligible for special education and related services as a child with a developmental delay based on a diagnosis of Down syndrome.⁴

Provision of accommodations related to sensory/communication needs in Teacher One's Classroom:

3. First, Parents allege that Student was not provided with fidgets and books, adaptive seating, sensory strategies, and access to choice board/visual supports while she was in Teacher One's classroom, between January 17 and February 22 of 2017.⁵ Based on the facts described below, the SCO finds that Student was provided with accommodations consistent with her IEP while in Teacher One's classroom.
4. Relevant to the specific allegations raised in this Complaint, Student's IEP listed the following accommodations: provide fidgets and books to assist with sitting through non-preferred activities; provide adaptive seating through the school day to meet sensory/physical needs; offer headphones to meet sensory needs; provide sensory/deep pressure strategies to

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

⁴ Exhibit 1A, p.1.

⁵ The dates of this allegation directly correspond to Student's transfer from Teacher One to Teacher Two's classroom. Student was transferred from Teacher One to Teacher Two's classroom on or around February 22, 2017, at the request of Parents. Interviews with Teacher One and Special Education Director. Although Parents concerns with Teacher One began in the fall of 2016, this investigation must be limited to alleged violations that occurred not more than one year prior to the date that the complaint was received, pursuant to state and federal regulation. 34 CFR § 300.153(c); State-Level Complaint Procedures, ¶ 3 (f).

meet sensory/physical needs; and provide visual supports to aid transitions, familiarity with schedule, and understanding of new concepts.⁶

5. To begin, Teacher One demonstrated that she was knowledgeable about the specific accommodations identified above, reporting that she was familiar with Student's needs and the accommodations on the IEP because she participated in Student's May 2016 IEP meeting and was provided with a copy of the IEP at that time.⁷ In addition, Teacher One reported that she was provided with an IEP "snapshot" that identified Student's IEP goals, accommodations, modifications, and the statement of special education and related services to be provided, including the November 2016 amendment.⁸ Special Education Teacher also documented that Student's IEP team was notified of the changes made to Student's IEP by the November 2016 amendment.⁹

6. In addition to demonstrating knowledge of Student's accommodations, Teacher One illustrated how these accommodations were provided in her classroom. To facilitate Student's participation and engagement in classroom activities, specifically circle time and non-preferred activities, Student was provided with fidgets, books, adaptive seating, and sensory strategies. While in Teacher One's classroom, Student had a specific tub that included a variety of fidgets and books, most of which were provided by Parents. In addition, Teacher One created "busy boxes" that Student enjoyed solving or working on during non-preferred activities.¹⁰ Although Student had access to the tub containing the fidgets and books, Teacher One reported that Student typically required adult guidance to select the items. Adult guidance for providing these accommodations was generally provided by Paraprofessional One.¹¹

7. To further facilitate participation and attention during circle time, Student was also provided with adaptive seating. By providing special and designated seating, Student was more likely to remain in circle and engaged with her peers. In Teacher One's classroom, Student was consistently provided with adaptive seating that included a cube chair, a textured foam square, and a chair with an attachment designed by Physical Therapist.¹² These adaptive seating options were available and provided to Student in Teacher One's classroom.¹³

⁶ The IEP in effect between January and February of 2017 is the May 2016 IEP as amended in November of 2016. Exhibit 1B, pp. 10-11.

⁷ Exhibit 1A at page 16 (IEP signature sheet documenting attendance); Interviews with Teacher One, Teacher Two, and Special Education Teacher. Teacher Two and Special Education Teacher also reported that Early Education Teachers typically attend the IEP meeting for students in their class and are also provided with a copy of the IEP.

⁸ Interviews with Special Education Director, Special Education Teacher, Teacher One, and Teacher Two. The "IEP snapshot" is a feature of the Enrich IEP software used by the BOCES.

⁹ Exhibit 1B at page 2; Interviews with Teacher One and Special Education Teacher.

¹⁰ A "busy box" provides an activity, such as pulling scarves through openings, to capture the student's attention. Teacher One reported that she made eight such boxes for Student while in her classroom. Interviews with Teacher One and Special Education Teacher.

¹¹ Interviews with Teacher One, Special Education Teacher, Teacher Two, and OT.

¹² *Id.*

¹³ Interviews with Teacher One, Teacher Two, Special Education Teacher, and OT.

8. Student was also provided with a variety of sensory strategies, including rice bags and headphones. With the exception of head phones, specific sensory strategies are not identified on the IEP. Instead, the IEP requires that Student be provided with sensory/deep pressure strategies to meet sensory/physical needs.¹⁴ In Teacher One’s classroom, Student was offered sensory strategies, including headphones and rice bags. For example, Paraprofessional One stated that she often offered Student headphones when she observed that Student was “getting overwhelmed with auditory stimuli.”¹⁵ Teacher One also reported that Parents regularly sent Student to school in a compression shirt. And although there is some confusion as to whether Student was provided with a weighted vest, this specific strategy was not identified on Student’s IEP.¹⁶ Consequently, the SCO finds that Student was provided with sensory strategies consistent with her IEP while she was in Teacher One’s classroom.

9. Finally, Parents allege that Student was not provided with a “choice board.” Similar to sensory strategies, Student’s IEP does not identify a “choice board” or visual schedule. Instead, the IEP states that Student is to be provided with “visual supports to aid transitions, familiarity with schedule, and understanding of new concepts.”¹⁷ Special Education Teacher designed several visual supports, including a board with pictures that depicted Student’s daily schedule and activities, and a booklet of pictures depicting people and activities.¹⁸ In addition, Teacher One and Paraprofessional One regularly used sign language as a visual cue when making verbal requests. For example, when it was time for Student to transition to work at a specific station/task, Teacher One or Paraprofessional One would verbally instruct Student that it was time to work at the red table, show Student a picture of the red table, and sign “red” and “table.”¹⁹ Although Paraprofessional One did not recall using the specific visual schedule described by Teacher One, she stated that she consistently paired verbal requests and expectations with sign language and pictures.²⁰ Based on these facts, the SCO finds that Student was provided with visual supports consistent with the accommodation described on her IEP.

¹⁴ Exhibit 1B at page 4 (November 2016 IEP amendment).

¹⁵ Exhibit K (Statement from Paraprofessional One).

¹⁶ Exhibit K (Statement from Paraprofessional One); Interviews with Teacher One, Paraprofessional One, Special Education Teacher, and Teacher Two. It is possible that the term “weighted vest” was used by some staff to describe the compression shirt.

¹⁷ Exhibit 1B at page 3.

¹⁸ Teacher One brought the visual schedule to her interview. The schedule depicted various activities that could be attached via Velcro.

¹⁹ Response; Interviews with Teacher One, Special Education Teacher, and OT.

²⁰ Interview with Paraprofessional One. Parents report that Teacher One refused to place the choice board at the front of the classroom. Because Teacher One and Paraprofessional One provided verbal and visual cues, including sign language and pictures, the placement of the choice board does not determine whether Student was provided with the accommodations identified in the IEP.

Provision of accommodations related to communication following change in paraprofessional staff:

10. As an accommodation, Student’s IEP required the “use of sign language while listing expectations” and support of Student’s “dual [sic] modes of communication (verbal and sign).”²¹ Parents allege that Student has not been provided with these specific accommodations from November 27, 2017, to present. This allegation corresponds directly to the change in Student’s dedicated paraprofessional, from Paraprofessional One to Paraprofessional Two, in late November of 2017.²² Parents assert that Student has not been provided with access to sign language in accordance with her IEP because Paraprofessional Two was not proficient in American Sign Language (ASL) at the time she was hired to serve as Student’s paraprofessional.²³ Based on the facts described below, the SCO finds that Paraprofessional Two was not required to be proficient in ASL or any other sign language system to provide the accommodations identified on Student’s IEP. Moreover, Parents decision not to send Student to Preschool following the transition to Paraprofessional Two does not support an assertion that the BOCES denied Student access to the accommodations related to sign language.

11. To evaluate Parents’ claim that Paraprofessional Two was not sufficiently proficient in sign language to provide the required accommodations, it is necessary to describe Student’s identified need for access to sign language. To begin, Student is not deaf or hard of hearing, nor does she have a communication plan. Notably, Student primarily expresses herself verbally and was estimated by her most recent evaluation to be intelligible 70% of the time. Typical, same-aged peers are expected to be intelligible 80% of the time.²⁴

12. Because Student communicates verbally, her two annual goals in the area of communication are designed to improve verbal communication skills and rely on verbal--not visual--cues to do so. Indeed, none of Student’s annual goals require or implicate the use of sign language for expressive or receptive communication.²⁵ The most recent formal evaluation data related to Student’s communication needs, dated May of 2016, did not include an assessment of Student’s use of sign language.²⁶ The BOCES has requested consent to evaluate Student in

²¹ Exhibit 1D at page 13 (May 2017 IEP).

²² Student’s Paraprofessional One was employed by the BOCES from January 2, 2017 through December 8, 2018. Paraprofessional Two was assigned as Student’s Paraprofessional on November 27, 2017. Correspondence with Legal Counsel for the BOCES.

²³ Complaint, pp. 7-8.

²⁴ Exhibit 1A, pp. 17-18.

²⁵ Exhibit 1C, pp. 6-10. Although Student communicates orally, Parents, Paraprofessional One, and Private Speech Language Pathologist report that sign language enhances Student’s receptive communication skills and improves compliance in noisy environments. Exhibits J and K (statements from Paraprofessional One and Private SLP); Interviews with Parents and Paraprofessional One. In contrast, Teacher One, Teacher Two, Special Education Teacher, and Teacher of the Deaf have not observed Student use sign expressively and have not observed an increase in compliance or understanding when using sign language. Interviews with Special Education Teacher, Teacher One, Teacher Two, and Teacher of the Deaf.

²⁶ Exhibit 1A, pp. 17-18.

the areas of communication, academic performance, social emotional status and motor abilities prior to her transition to Kindergarten next fall.²⁷ Parents have not yet provided consent for the evaluation. Based on these facts, the SCO finds that Student's IEP did not require that paraprofessional staff be proficient or certified in ASL or any other sign language system.

13. Although the IEP did not require paraprofessional support that included proficiency in sign language, it did identify accommodations that signs be used when listing expectations and that Student's use of sign language be supported. Paraprofessional One, who consistently used sign language to list expectations with Student, reported that she used at least 20 different signs on a daily basis. Admittedly, Paraprofessional Two did not have knowledge of sign language commensurate with Paraprofessional One when she was hired. In fact, Paraprofessional Two knew only the alphabet, numbers 1-10, and approximately twelve of the signs regularly used by Paraprofessional One on the day she started working with Student.²⁸

14. Acknowledging the difference in expertise between the two paraprofessionals, the BOCES meaningfully responded to the concerns expressed by Parents at the November 2017 IEP meeting regarding proficiency in sign language. First, Special Education Director agreed to supplement the proposed training schedule for Paraprofessional Two by adding Teacher of the Deaf to the training schedule to teach additional signs and arranging a time for Parents to meet Paraprofessional Two to discuss Student's use of sign. In addition, Special Education Director confirmed that Paraprofessional One would be available to help train Paraprofessional Two for a minimum of four days, with the possibility of extending the training to eight days, depending on Paraprofessional One's availability.²⁹ Finally, Special Education Teacher informed Parents that she would be meeting with Student's classroom teacher and Paraprofessional Two to discuss ongoing training needs after Paraprofessional Two had started. Special Education Teacher informed Parent that she would be invited to attend and participate in these meetings.³⁰

15. Because Parents did not believe that Paraprofessional Two's skills and training were sufficient to address their concerns regarding sign language, they have chosen not to take Student to Preschool since December 20, 2017.³¹ Between November 27, 2017, and December 19, 2017, Student attended Preschool for ten out of fourteen school days. Out of the ten days Student attended Preschool, Paraprofessional One was present for six. Consequently, Paraprofessional Two has served as Student's dedicated aid for a total of four days. Based on these facts, the SCO finds that there is no credible evidence to support a claim that the BOCES failed to provide the accommodations related to sign language.

²⁷ Exhibit 2A.

²⁸ Interviews with Paraprofessional One and Paraprofessional Two; Exhibit 12.

²⁹ Exhibit 1E at page 6 (November 2017 IEP meeting notes).

³⁰ *Id.*

³¹ Exhibit 5; Interviews with Parents, Special Education Director, and Teacher Two.

Occupational therapy (OT) services:

16. On December 18, 2017, Parent observed Student's Preschool class and noticed that the OT provided approximately 12 minutes of direct service to Student rather than the 30 minutes Parent expected Student was receiving through her IEP. Based on this observation, Parents allege that Student had not been provided with the OT services described on her IEP. Based on the findings below, the SCO agrees.

17. Student's IEP provided that she would receive 30 minutes of direct OT services each week.³² In its Response, the BOCES asserted that the service minutes identified on the IEP were a clerical error and did not represent the IEP team's decision regarding OT services. Occupational Therapist stated that the May 2017 IEP team determined that Student would receive 60 minutes of direct OT services on a monthly basis, or 15 minutes each week, but failed to accurately document the agreed level of service in the IEP.³³ Contrary to this assertion, Parents stated that the May 2017 IEP team agreed to reduce Student's OT services from 45 to 30 minutes each week, as reflected in the IEP. Notably, Student's IEP was amended twice before the start of the 2017-18 school year, and yet the service delivery statement reflecting direct OT services did not change.³⁴ Because it is the public agency's obligation to accurately document the services to be provided on an IEP, and Parents have reasonably relied on the services described on the IEP, the SCO finds that the BOCES was required to provide the 30 minutes of direct occupational therapy each week and failed to do so.

18. In its Response, the BOCES offered to compensate Student for the difference between the OT services identified on the IEP and those actually provided. The SCO accepts the BOCES' proposed remedy.³⁵ Because Student should have received an additional 15 minutes of OT services each week, Student has missed approximately three hours and 45 minutes of OT services from the beginning of the 2017-18 school year to December 19, 2018, the date Student stopped attending Preschool.³⁶ Because Parents chose not to send Student to Preschool for 14

³² Exhibit 1C at page 13 (May 2017 IEP); Exhibit 1D at page 16 (IEP Amendment dated August 2017); Exhibit 1E at page 9 (IEP Amendment dated November 2017).

³³ Student's May 2016 IEP provided 60 minutes of direct OT each month. Exhibit 1A at page 11. In November of 2016, Parent and the BOCES agreed to amend Student's IEP to increase OT services from 60 minutes a month to 45 minutes each week. The increase in OT services was intended to improve self-help and play skills. Exhibit 1B, pp. 1-2. In January of 2017, Student was assigned a dedicated paraprofessional. With the addition of a paraprofessional, the IEP team determined that Student no longer needed 45 minutes of OT each week. Interview with OT and Parents.

³⁴ Exhibit 1D at page 16 (IEP Amendment dated August 2017); Exhibit 1E at page 9 (IEP Amendment dated November 2017). Both amendments resulted in changes to the service delivery statement for behavioral support.

³⁵ Exhibit 4 (OT service logs) demonstrated that BOCES was providing or attempting to provide 60 minutes of direct service per month.

³⁶ This calculation is based on fifteen minutes of OT services missed each week for approximately fifteen weeks of school, between August and December 19, 2017. As noted above, Student stopped attending Preschool on December 20, 2017.

days during this time, the BOCES had a more limited opportunity to provide services. Accordingly, the SCO has reduced the amount of OT services owed to two hours and thirty minutes.³⁷

Confidentiality:

19. On December 19, 2017, the BOCES convened an IEP meeting to further discuss Parents' concerns with the services Student was receiving, including the change in paraprofessional support.³⁸ By all accounts, this meeting was contentious.³⁹ Following this meeting, [School Official] disclosed to [Third Party] how difficult the meeting had been, and in so doing, also disclosed personally identifiable information that included Student's name, Father's name, Student's receipt of paraprofessional services, and Parents' concerns about the changes to the paraprofessional staff working with Student.⁴⁰ The information disclosed, including Parents' concerns with paraprofessional staff, derives from Student's December 2017 IEP.⁴¹ [Third Party] then contacted Father's Brother, with whom he was acquainted, to ask about Father's conduct toward [School Official] at the meeting. The text message exchange between [Third Party] and Father's Brother evidences the personally identifiable information disclosed, as identified above.⁴²

20. Recognizing that the disclosure may have violated FERPA, [School Official] contacted an attorney with demonstrated expertise concerning FERPA and IDEA's confidentiality provisions to provide a one-on-one training on school laws related to the protection of confidential information.⁴³ In addition, [School Official] read and reviewed guidance issued by the Colorado Attorney General regarding FERPA with the BOCES' Legal Counsel.

CONCLUSIONS OF LAW

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

Conclusion to Allegation One: With the exception of occupational therapy services, the BOCES has appropriately implemented Student's IEP.

Under IDEA, local education agencies are required to provide eligible students with disabilities a free appropriate public education (FAPE) by providing special education and

³⁷ Exhibit 5, p. 2.

³⁸ Exhibit 1F (December 2017 IEP).

³⁹ Interviews with Special Education Director, Child Find Coordinator, Parents, Special Education Teacher, Teacher Two, and OT.

⁴⁰ Interview with Special Education Director; Exhibit G (screen shots of text message exchange). The entire text message exchange establishes the information disclosed.

⁴¹ Exhibit 1F (December 2017 IEP).

⁴² Exhibit G (screen shots of text message exchange).

⁴³ Interview with Special Education Director and Legal Counsel. This training was provided in a one-on-one setting and lasted for an hour.

related services individually tailored to meet the student's unique needs and provided in 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 BOCES, must implement a student's IEP in its entirety. 34 CFR § 300.323(c). To satisfy this obligation, the BOCES 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). In this case, Student's teachers and service providers had access to Student's IEP and were informed about the accommodations and services to be provided. For example, Teacher One participated in Student's IEP meeting, was provided with a copy of the IEP at the meeting itself, and was also provided with an IEP snapshot that identified Student's goals, accommodations and modifications, and services. Moreover, Special Education Teacher insured that Teacher One was informed of changes and amendments to Student's IEP made in November of 2016.

In addition to informing teachers of their responsibilities regarding a student's IEP, however, the BOCES must ensure that the IEP is being implemented. This obligation includes ensuring that all identified accommodations and 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.

Regarding the implementation of Student's IEP, Parents first allege that Student was not provided with specific accommodations related to sensory and communication needs while she was in Teacher One's classroom. As explained more fully in Findings of Fact (FF) # 6-8, Teacher One and Paraprofessional One consistently provided Student with fidgets and books, headphones, adaptive seating, and sensory strategies in accordance with the IEP. Although Parents dispute that Student was provided with a weighted vest, the IEP does not identify this as a specific sensory strategy. In addition, Student was provided with "visual supports to aid transitions, familiarity with schedule, and understanding of new concepts," in accordance with the IEP. As explained in FF # 9, Teacher One and Paraprofessional One both paired verbal requests with sign language and/or pictures when listing expectations and explaining concepts. This is all the IEP required.

Next, Parents allege that the BOCES did not implement Student's IEP when it hired a paraprofessional who was not proficient in ASL. The SCO finds and concludes that the BOCES did not fail to provide the accommodations listed on Student's IEP, as alleged. As explained more fully in FF #10-16, Student's IEP does not require that paraprofessional staff be proficient in ASL or any other sign language system. Instead, Student's IEP provides that signs be used when listing expectations and that Student's use of signs be supported. Although Paraprofessional Two did not have the same expertise in sign language as Paraprofessional One when she was hired, the BOCES responded to Parents' concerns by agreeing to provide additional training in sign language. Further, the BOCES agreed to assess Paraprofessional Two

and provide ongoing training, as needed. Notably, the BOCES agreed to invite Parent to attend meetings with Special Education Teacher and Paraprofessional Two designed to assure that Student was receiving the support she needed.

The SCO cannot ignore the fact that Student has not attended Preschool since December 20, 2017, and was only served by Paraprofessional Two for four days. Because Parents have refused to send Student to Preschool, the BOCES has not had an opportunity to follow through with the ongoing training and support it agreed to provide Paraprofessional Two in response to Parents' concerns. Based on these facts, the SCO concludes that the BOCES appropriately implemented the accommodations relating to sign language that were identified in Student's IEP.

Finally, Parents have alleged that the BOCES did not provide OT services in accordance with Student's IEP. For the reasons explained below, the SCO concludes that the BOCES was obligated to provide the OT services as documented on Student's IEP, and as relied upon by Parents in accepting and enforcing the BOCES' offer of FAPE. The IEP is a comprehensive written statement that identifies the unique educational needs of an eligible student and sets forth the specific special education programming and related services that will be provided to meet the identified needs. 34 CFR § 300.320. Because the IEP is the public agency's written offer of what it has determined constitutes a free appropriate public education (FAPE) for a particular student, it has the obligation to ensure that the IEP accurately reflects the Team's determination. 34 CFR § 300.17. In its Response, the BOCES asserted that the service minutes identified on the IEP constituted a clerical error and did not reflect the IEP Team's decision. Parents disagreed, asserting that the IEP accurately reflected the Team's decision. Persuasive to the conclusion that the BOCES was obligated to provide the OT services identified on the IEP is the fact that the BOCES twice reviewed Student's IEP, amending other services, and did not notice the inaccuracy.

In reaching the conclusion that the BOCES was obligated to provide the services identified on the IEP, the SCO was equally persuaded by the fact that Parents reasonably relied on the accuracy of the IEP to enforce the BOCES' obligation to provide FAPE. "[I]n enacting the IDEA, Congress was as concerned with parental participation in the *enforcement* of the IEP as it was in its *formation*." *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1198 (Ninth Cir. 2017)(Relying on *Rowley* for this proposition), *cert. denied*, 138 S. Ct. 556 (2017). "Parents must be able to use the IEP to monitor and enforce the services that their child is to receive." *Id.* In this case, Parent reasonably relied on the OT services described on the IEP when observing Student in class. Parent then used the IEP to enforce the provision of FAPE in the filing of this Complaint.

Not every deviation from an IEP's requirements, however, results in a denial of FAPE. *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); *Van Duyn v. Baker Sch. Dist.*

5J, 481 F.3d 770 (9th Cir. 2007)(failure to implement IEP must be material to incur liability under IDEA, and minor discrepancies between the services provided and the services called for do not give rise to an IDEA violation); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003)(failure to implement “essential” element of IEP denies FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000)(*de minimis* failure to implement IEP does not deny FAPE). This means that a finding that a school district has failed to implement a requirement of a child’s IEP does not end the inquiry. Rather, the SCO must also determine whether the failure was material.

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*, 67 IDELR 39 (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, Student was not provided with half of the weekly OT service minutes identified on her IEP. Given the difference between what was required and what was provided, the SCO concludes that Student is entitled to compensatory services, as described in FF # 19 and identified below under Remedies.

Conclusion to Allegation Two: The BOCES disclosed personally identifiable information concerning Student’s special education services to a third party without parental consent on or around December 19, 2017.

IDEA requires public agencies to protect the confidentiality of personally identifiable data, information, and records that it collects or maintains. 34 C.F.R. §§ 300.610-627. To that end, a school official may not disclose personally identifiable information to a third party without parental consent, unless the disclosure falls within an exception. 34 C.F.R. § 300.622(a). This protection applies not only to the educational record itself but extends to personally identifiable information originating *from* the educational record. *Letter to Anonymous*, 117 LRP 46536 (FCPO 2017)(Finding that a teacher who disclosed information about a student’s behavior to a third party during a telephone call violated FERPA’s confidentiality provisions because the disclosure was made without parental consent and did not meet an exception); *See also Letter to Reisman*, 60 IDELR 293 (OSEP 2012)(Advising public agencies that IDEA’s confidentiality provisions apply to due process hearings because such hearings necessarily involve testimony, evidence, and discussions that will include personally identifiable information about the child who is the subject of the hearing.) Consequently, IDEA’s confidentiality provisions reasonably apply to a conversation between a school official and a third party during which personally identifiable information about the services a student was receiving on her IEP was disclosed.

In this case, [School Official] disclosed personally identifiable information to a third party, without parental consent. The information disclosed included Student’s name, Father’s name, Student’s receipt of paraprofessional services, and Parents’ concerns with those services.

Because this information was described in Student's December 2017 IEP, a document that qualifies as an education record, the disclosure violated IDEA's provisions regarding confidentiality.

Following the disclosure, [School Official] took action to remedy the situation by securing one-on-one training for herself regarding school laws related to confidentiality. This action, initiated prior to any order or direction from the CDE, evidences [School Official's] commitment to understanding and upholding the regulations protecting student confidentiality. Based on the meaningful and earnest action taken by [School Official], the SCO concludes that the violation concerning the disclosure of personally identifiable information has been remedied.

REMEDIES

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

- a) Provision of special education and related services in accordance with the IEP, 34 C.F.R. § 300.17; and
- b) Confidentiality of information, 34 C.F.R. § 300.622(a).

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

1) Compensatory Education Services

- a) The BOCES shall provide Student with two hours and thirty minutes of OT services. These services shall be provided at the Early Learning Center, or at another mutually agreeable location. If the Parties are not able to agree on an alternate location, services shall be provide at the Early Learning Center. To document the provision of these services, the BOCES must submit service logs to CDE by the second Monday of each month until October of 2018, or until the last scheduled services have been provided.
- b) Parents may accept or refuse the compensatory services ordered here. If Parents consent to services, they must notify the BOCES' Special Education Director by May 15, 2018. If Parents do not notify the Special Education Director by this date, the BOCES may assume that Parents do not consent to services and are excused from providing the compensatory services ordered in this decision.
- c) By May 25, 2018, the BOCES must meet with Parents to schedule compensatory services. If Parents refuse to meet with the BOCES within this time period, the BOCES will be excused from providing compensatory services, provided that the BOCES diligently attempts to meet with Parents and documents its efforts. The determination that the BOCES has diligently attempted to meet with Parents and should therefore be

excused from providing these services rests solely with the CDE. If Parents are unable to meet within this timeframe, a reasonable extension may be provided upon request.

- d) These compensatory services shall begin as soon as possible. The Parties shall cooperate in determining how the compensatory education services will be provided. The BOCES must submit the schedule to the Department no later than June 1, 2018.
- e) If for any reason, including illness, Student is not available for any scheduled compensatory services, the BOCES will be excused from providing the service scheduled for that session. If for any reason, including illness of the provider, the BOCES fails to provide a scheduled compensatory session, the BOCES will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parents, as well as notify the Department of the change in the monthly service log.

The Department will approve or request revisions that support compliance with 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 4th day of May, 2018.

Candace Hawkins, Esq.
State Complaints Officer

Appendix

Complaint, pages 1-9.

- Exhibit A: 2017 IEP.
- Exhibit B: 2017 BIP.
- Exhibit C: Meeting notes and progress monitoring data.
- Exhibit D: Correspondence
- Exhibit E: Parent observation notes.
- Exhibit F: 2016 IEP amendment.
- Exhibit G: Screen shots of text messages.

Response, pages 1-8.

- Exhibit 1A: IEP dated May 2016.
- Exhibit 1B: IEP amendment dated November 2016.
- Exhibit 1C: IEP dated May 2017.
- Exhibit 1D: IEP amendment dated August 2017.
- Exhibit 1E: IEP dated November 2017.
- Exhibit 1F: IEP amendment dated December 2017.
- Exhibit 2A: PWN and consent for evaluation dated February 2018.
- Exhibit 2B: PWN regarding refusal to change personnel serving as paraprofessional support.
- Exhibit 2C: Referral form.
- Exhibit 3: Notices of meeting.
- Exhibit 4: OT service log and therapy notes.
- Exhibit 5: Attendance records.
- Exhibit 6A: IEP progress reports for 2017-18 school year.
- Exhibit 6B: IEP progress reports for 2016-17 school year.
- Exhibits 6C through 6E: Performance data and teaching strategies.
- Exhibit 7: Behavioral data.
- Exhibit 8: BOCES policy related to confidentiality.
- Exhibit 9: Correspondence.
- Exhibit 10: Licensure/Credentials of various professional staff.
- Exhibit 11: Contact information.
- Exhibit 12: Documentation related to use of signs by Paraprofessional Two.

Parent's Reply, pages 1-8.

- Exhibit H: Statement from Private Behavioral Therapist.
- Exhibit I: Statement from Private Occupational Therapist.
- Exhibit J: Statement from Private Speech Language Pathologist.

Exhibit K: Statement from Paraprofessional One.

Exhibit L: Information on stabilizing pressure input orthosis (SPIO).

Exhibit M: Drawing sample.

Exhibit N: Vacancy posting for BOCES paraprofessional.

Exhibit O: Pictures of select accommodations.

Interviews with:

- Parents
- Private Educational Consultant for Parents
- BOCES Special Education Director
- BOCES Child Find Coordinator
- Special Education Teacher
- Teacher of the Deaf
- Occupational Therapist
- Preschool Teacher One
- Preschool Teacher Two
- Paraprofessional One*
- Paraprofessional Two

*Paraprofessional One is not currently employed by the BOCES. Paraprofessional One was included in the interview with Parents.