

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

**State-Level Complaint 2020:515
Douglas County School District RE-1**

DECISION

INTRODUCTION

On March 20, 2020, 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 three allegations 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 300.153.² Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), 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 March 20, 2019 through March 20, 2020 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 the District violated the IDEA and denied Student a free appropriate public education (FAPE) by:

1. Failing to develop an IEP on December 6, 2019 that was tailored to meet Student’s individualized needs, specifically by reducing occupational therapy services and

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.* The Exceptional Children’s Educational Act

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).

- eliminating vision and physical therapy services, consistent with 34 C.F.R. §§ 300.304, 300.324;
2. Failing to provide an independent educational evaluation (IEE) at public expense, or file a due process complaint to show the District's evaluation was appropriate, following Parent's request for an IEE on December 6, 2019, consistent with 34 C.F.R. § 300.502(b)(1)-(2);
 3. Failing to provide Parent prior written notice following Parent's request for an IEE on December 6, 2019, consistent with 34 C.F.R. § 300.503.

FINDINGS OF FACT

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

A. Background

1. Student is a five-year-old who is eligible for special education and related services under the disability category of Developmental Delay ("DD"). *Ex. D*, p. 43. Student attends preschool at School, which is located within the District. *Id.*
2. Student is described as an energetic and kind child who is helpful to classmates and teachers. *Interview with Physical Therapist; Ex. E*, p. 33. Student enjoys playing with blocks, puzzles, and games, and has become a leader in his classroom. *Interview with Special Education Teacher; Ex. D*, p. 47.
3. Student first qualified for special education and related services in May 2018 while attending school out-of-state ("Other State"). His out-of-state IEP offered services both in-home and at preschool, which included vision therapy, physical therapy, speech language therapy, and occupational therapy. *Ex. E*, p. 1. Student's family moved from Other State to Colorado in August 2018, and Parents enrolled Student in District. After reviewing the out-of-state IEP, District conducted a comprehensive reevaluation ("2018 Reevaluation") to determine whether Student qualified for special education and related services under Colorado standards.
4. The 2018 Reevaluation completed by District on December 7, 2018 included a functional vision assessment, mobility assessments, and sensory processing assessments, among others. *Id.* at 1-17. Occupational Therapist conducted several assessments to measure Student's sensory functioning, and based on the results, noted that although Student had sensory processing challenges in the past, he was not demonstrating any challenges at that time at School. She therefore had Parents complete a sensory profile

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

questionnaire. Parents' observations noted sensory issues in several areas, including: seeking, emotional reactivity, low endurance and tone, inattention and distractibility, poor registration, sensory sensitivity, and fine motor/perceptual. *Id.* at 16.

5. The IEP team convened on December 14, 2018 to discuss the results of the 2018 Reevaluation. District found Student eligible for special education and related services under the disability category of DD. *Ex. D*, p. 1.
6. The IEP team determined Student's disability resulted in difficulty with social interactions and self-advocacy, as well as in delays with articulation. *Id.* at 6-7. The IEP team developed annual goals in the areas of self-determination, social/emotional wellness, pre-academics, and communication. *Id.* at 7-9. The IEP ("December 2018 IEP") included 240 minutes per month of early childhood special education, 180 minutes per month of speech language services, 105 minutes per semester of physical therapy, and 75 minutes per semester of occupational therapy. *Id.* at 12.
7. The IEP team considered adding vision therapy services to the December 2018 IEP but did not do so because the functional vision assessment indicated that Student's educational performance was not impacted by vision issues. *Id.* at 14. Instead, the IEP team added accommodations to address Student's visual fatigue. *Id.* at 9.
8. Parents disagreed with the IEP team's decision to eliminate vision therapy services and to reduce physical therapy and occupational therapy services. *Complaint*, pp. 10-11; *Interview with Special Education Coordinator*. Parents' first allegation is based on their continuing claim that Student requires these services in order to receive FAPE.
9. Since the SCO may only investigate alleged violations of IDEA that occurred starting on March 20, 2019—one year prior to the date Parents filed the Complaint on March 20, 2020—this investigation begins with concerns Parents raised about the December 2018 IEP as part of its annual review during the 2019-2020 school year. 34 C.F.R. §300.153(c).

B. The Mobility Opportunities Via Education ("MOVE") Evaluation

10. The December 2018 IEP was due for its annual review in December 2019. *Ex. D*, p. 1. On November 11, 2019, Physical Therapist requested parental consent to conduct an evaluation to measure Student's motor abilities and determine whether physical therapy services were still needed. *Ex. M*, p. 1; *Interview with Physical Therapist*.
11. Physical Therapist proposed assessing Student using MOVE, a functional mobility based assessment for accessing the school environment which "moves through motor ability categories from maintaining a sitting position in a chair and on the floor through to performing stairs and walking on uneven ground and slopes." *Ex. 8*, p. 1. Parent signed and returned the consent on November 19, 2019. *Ex. M*, p. 2.

12. Physical Therapist administered MOVE to Student in November 2019. Student scored “1” across all categories, the highest score. *Ex. 8*, p. 1. MOVE notes that Student has a strength imbalance, as illustrated by his ability to balance on his left leg for 45 seconds but only for 5 seconds on his right leg. However, his strength imbalance did not prevent him from demonstrating proficiency across all areas of the assessment. *Id.* at 2.
13. Physical Therapist noted “[Student] has consistently demonstrated good endurance, as at no time, during many sessions of completing several physical mobility challenges with this PT, over the course of this past year, did [Student] ask for or stop to take a rest.” *Id.* at 2. Physical Therapist previously administered MOVE as part of the 2018 Reevaluation, where Student scored similarly high across all categories. *Ex. E*, pp. 13-14.
14. Physical Therapist concluded that Student demonstrated “independence in higher level functional mobility and higher level balance skills beyond the level of the M.O.V.E Assessment as detailed in the evaluation report.” Student’s “physical mobility is not impacting his participation and access to school academics and activities.” *Ex. 8*, p. 3.
15. The November 2019 MOVE results are consistent with informal observations made by Physical Therapist and others working with Student at that time. Physical Therapist explained that although Student had a strength imbalance on the right side of his body, it did not affect his ability to safely navigate the school environment or prevent him from participating in the classroom or on the playground. *Interview with Physical Therapist*. Physical Therapist maintained consistent communication with Classroom Teacher and Special Education Teacher, neither of whom saw Student falling down more than his peers or unable to fully and safely participate in activities at School. *Id.*
16. These observations are consistent with Physical Therapist’s service logs from August and September 2019 which indicate that Student’s mobility and balance were not affecting his ability to access the general education curriculum. For instance, on August 14, 2019, Physical Therapist noted that Student made progress working on balance, going up and down stairs, and with single leg stance balancing on each side. Additionally, “[Student] demonstrated very good balance with shooting baskets for at least 10 minutes at recess as well as on all surfaces of playground and sidewalk.” *Ex. F*, p. 22.

C. The December 2019 IEP

17. On December 6, 2019, District convened a properly constituted IEP team to review and revise Student’s IEP (“December 2019 IEP”). The December 2019 IEP governed his special education programming from December 6, 2019 to March 12, 2020. *Ex. D*, p. 40.
18. The IEP team reviewed Student’s present levels of performance, noting that he had met all of his annual IEP goals for the previous year. *Id.* at 32. These goals pertained to self-determination, social emotional wellness, and communication. For instance, he met his first goal by effectively advocating for his needs by asking for help, stating what he

needs, or pursuing problem solving strategies without prompting in 80 percent of opportunities. Student's present levels of performance also included informal classroom observation data from Special Education Teacher, a communication update from Speech Language Pathologist, informal observations from Occupational Therapist, and the MOVE assessment conducted by Physical Therapist. *Id.* at 32-34.

19. The December 2019 IEP describes Student's needs and the impact of his disability as: "difficulty with initiating tasks and remaining focused during large group activities [which] will impact his ability to access and make progress in the general curriculum [and] his ability to learn and maintain new skill development. [Student's] decreased knowledge of vocabulary impacts his ability to understand and follow multi-step directions." *Id.* at 35.
20. The IEP team then reviewed and updated annual goals. The IEP team developed two annual goals in the area of self-determination, one annual goal for social emotional wellness, and one goal for communication. *Id.* at 35-37. As with the December 2018 IEP, no goals were developed for vision, physical, or occupational therapy.
21. The IEP team kept Student's early childhood special education direct service minutes at 240 minutes per month and speech language direct service minutes at 180 minutes per month. *Id.* at 40. Special Education Teacher was responsible for delivering the early childhood direct service minutes to work on goals pertaining to self-determination and social emotional wellness. Speech Language Pathologist delivered the speech language service minutes to aid Student's progress on the communication goal. *Id.*
22. Occupational Therapist explained that, prior to the annual review meeting, she considered recommending removal of occupational therapy services based on Student's progress. *Interview with Occupational Therapist.* Occupational Therapist stated that Student tested in the high average range in fine motor and visual motor skills, and was advancing without any sensory supports or accommodations in place. This view is consistent with results of the 2018 Reevaluation assessments, which indicated Student had age-appropriate fine motor and visual motor skills. *Ex. E*, pp. 14-16.
23. During the annual review meeting, Parents and the school team members of the IEP team expressed concern regarding Student's ability to complete sustained work. Based on this conversation, the IEP team decided to maintain occupational therapy services to prepare Student for the increasing demands of kindergarten. *Interview with Occupational Therapist.* However, occupational therapy services were changed from 75 direct minutes per semester to 120 indirect minutes per semester. *Ex. D*, p. 40.
24. Based on the results of the MOVE evaluation, the IEP team removed physical therapy services from Student's IEP. *Id.* at 41. In response to Parents' safety concerns regarding Student's muscle imbalance, the IEP team added safety monitoring details to the

December 2019 IEP's accommodations section to specify that Student may have "difficulty with uneven surfaces and maintaining his balance due in part to [Student's] weaker right arm and leg strength." *Id.* at 37.

25. The December 2019 IEP contains various accommodations to assist Student in accessing the general education curriculum. For instance, to address visual fatigue, there are accommodations requiring Student to sit close to the teacher and in the center of the room for group activities, frequent breaks during sustained near visual work, the performance of sustained near work early in the day, the use of a slant board for reading and writing tasks, and the use of a visual schedule. *Id.* To address sensory issues, there is an accommodation providing Student with noise cancelling headphones as needed and preferential seating in large groups. *Id.*
26. Student's recommended placement in the least restrictive environment was a regular early childhood program at least 10 hours per week, and receiving all special education and related services in the general education classroom. *Id.* at 40. This option was chosen because it gave Student more access to peer models and opportunities for skill practice within natural routines.

D. Parents' Request for an Independent Educational Evaluation (IEE)

27. At the conclusion of the annual review meeting, Parents presented the IEP team with a letter from Private Optometrist dated December 5, 2019. *Ex. 9.* In the letter, Private Optometrist expressed concern regarding Student's motor skill development, and recommended that he receive an "independent comprehensive occupational therapy evaluation." *Id.* at 1. This recommendation noted that "[s]ince [Student] would be entering kindergarten this next year, he is going to need improved attention span and motor control to succeed in school." *Id.*
28. Special Education Teacher spoke with Parents regarding their request, and confirmed they were asking for an outside independent evaluation. She explained that someone from the District would contact Parents with information on the request. *Interview with Special Education Teacher.* Special Education Teacher recalled that during this conversation Parents were holding the copy of the IDEA procedural safeguards that she provided them at the beginning of the meeting. *Id.* Special Education Teacher documented this conversation in the prior written notice embedded in the December 2019 IEP: "Based on the letter from [Private Optometrist], the parents are interested in pursuing an outside evaluation for occupational therapy (see attached letter). The parents will be provided with further guidance with regards to the evaluation process." *Ex. D, p. 41.*
29. Parents explained to the SCO that they requested an IEE for occupational therapy because of the discrepancy between their observations of Student at home and

Occupational Therapist's assessment from the 2018 Reevaluation, discussed at FF #4. Due to this discrepancy, they wanted to seek the opinion of an evaluator not employed by District. *Interview with Parents*. However, neither Parents nor Special Education Teacher could recall the details of their conversation on December 6, and it is unclear whether Parents' specifically stated their disagreement with the results of the 2018 occupational therapy evaluation when making the IEE request. *Interviews with Parents and Special Education Teacher*. District did not seek to clarify Parents' request. Rather, Special Education Coordinator recognized the request as one for an IEE in the area of sensory processing. Accordingly, the SCO finds that Parents requested an IEE on December 6 based on their disagreement with the occupational therapy assessments administered during the 2018 Reevaluation.

30. Understanding Parents' request as one for an IEE, Special Education Teacher emailed Special Education Coordinator to discuss the situation. *Interviews with Special Education Teacher and Special Education Coordinator*. Special Education Teacher told Special Education Coordinator that, during the course of the annual review meeting, Parents raised concerns regarding Student's attention span and sensory processing. *Interview with Special Education Teacher*. Special Education Coordinator explained that problems with attention can result from a wide range of developmental issues, and that only conducting an occupational therapy evaluation would likely give an incomplete picture of his current functioning. *Interview with Special Education Coordinator*. Therefore, she suggested requesting consent from Parents to conduct a comprehensive reevaluation.

31. On December 17, 2019, Special Education Coordinator emailed Parents, writing:

I understand that you are requesting an IEE related to [Student's] sensory processing. As we have not had the opportunity to evaluate your son in over a year, I am respectfully asking for consent for reevaluation for [Student] in the following areas: general intelligence – including executive functioning, communication, academics, social/emotional, health, fine motor, sensory processing, adaptive functioning, vision. The consent for reevaluation document is attached. If, at the conclusion of that evaluation, you continue to want an IEE, the district will consider your request.

Ex. J, p. 8.

32. Special Education Coordinator attached a prior written notice and consent for reevaluation to this email which stated: "During the recent meeting on 12/6/19, the team, including the parents, discussed [Student's] difficulty with initiating tasks and remaining focused during large group activities. The parents also provided a recent

evaluation from [Private Optometrist] during this meeting. Based on the conversation during this meeting, the team, including the parents, are interested in pursuing additional evaluations.” *Ex. K*, p. 2. Parent discussed the consent in-person with Special Education Teacher, and provided consent for the reevaluation on December 17, 2019.

E. The 2020 Reevaluation

33. In January and February 2020, District conducted a comprehensive reevaluation of Student (“2020 Reevaluation”). *Ex. E*, pp. 18-40. Relevant to this investigation, the SCO now reviews the results of the vision and occupational therapy assessments.
34. On January 31, 2020, a teacher of students with visual impairments (“TVI”) conducted a functional vision assessment. TVI noted issues with tracking and convergence, as well as a muscle imbalance which caused Student’s right eye to have a slight outward turn. All of these issues can cause visual fatigue while working on near visual activities. *Id.* at 35. However, it is also noted that Student “demonstrates strong visual motor skills and is able to independently complete puzzles, pegboard activities and string beads. He also enjoys playing games such as Shark Bite, which requires fine motor and visual-motor skills.” *Id.* at 35. It was further noted that “[o]verall, [Student] is able to use his vision to access his environment safely and to access his preschool curriculum.” *Id.* at 36.
35. Occupational Therapist also conducted several assessments, including the Developmental Test of Visual-Motor Integration (“VMI”), the VMI Visual Perception Test (“VP”) and the Motor Coordination Test (“MC”), to compare purely visual and motor performance. *Id.* at 36. Student scored in the 91st percentile in both the VMI and the VP, and the 58th percentile in the MC. Occupational Therapist also administered the Learning Accomplishment Profile – Ed 3 (LAP-D 3), which assesses four domains of development. Student completed the fine motor section, which includes manipulation of objects and writing, and scored in the 80th percentile on this assessment. *Id.* at 38.
36. Occupational Therapist also administered the Sensory Processing Measure, which consists of separate home and school questionnaires that enable assessment of sensory processing issues, praxis and social participation in elementary school aged children. *Id.* at 37. The assessments from Parents and School staff differed markedly. School staff reported that Student displays some difficulty with visual processing, as well as some distractibility. Parents reported notable difficulties with processing, hearing, balance and motion, and planning and ideas. For instance, Parents noted significant sensory issues relating to loud noises and background noises, and difficulty completing tasks with multiple steps. *Id.* at 38.
37. The IEP team met on February 24, 2020 to discuss the 2020 Reevaluation results. *Ex. G*, p. 4. At the end of the meeting, Parents requested an IEE. *Id.* On March 2, 2020, Early Childhood Special Education Director emailed Parents, approving the IEE and including

the District's IEE forms. *Id.* at 8. Parent indicated in an email on April 1, 2020 that they were in the process of scheduling the IEE, but that the process had been delayed due to the COVID-19 pandemic. *Ex. J*, p. 11.

F. The March 2020 IEP

38. On March 12, 2020, District convened a properly constituted IEP team to update Student's IEP ("March 2020 IEP") based on the results of the 2020 Reevaluation. At the meeting, District determined that Student continued to qualify for special education and related services under the category of DD. *Ex. D*, p. 55. The March 2020 IEP has governed Student's special education programming from March 12, 2020 to present.
39. The IEP team identified Student's present levels of performance as similar to the present levels of performance in the December 2019 IEP: "while [Student] demonstrates many skills within age-level expectations or above, his underlying ability to initiate and complete tasks and sustain his attention to tasks and directions impact his ability to learn and consistently demonstrate his skills in the classroom setting." *Id.* at 48.
40. Student's needs and the impact of his disability are described identical to those in the December 2019 IEP: "difficulty with initiating tasks and remaining focused during large group activities will impact his ability to access and make progress in the general curriculum in his ability to learn and maintain new skill development." *Id.*
41. The IEP team reviewed the most recent vision assessment, determined that Student is able to access the preschool classroom environment without the need for specially designed instruction, and therefore did not include vision therapy services in the March 2020 IEP. *Ex. G*, p. 7. Parents expressed concern that Student's "difficulty with attending to tasks may be related to the amount of energy he is using while completing tasks requiring close vision work." *Id.* The School IEP team members stated that Student's performance improves when the accommodations in his IEP are implemented.
42. While discussing accommodations, Parent asked about Student's convergence and tracking issues leading to fatigue with respect to far work. TVI described several accommodations included in the March 2020 IEP to address fatigue, including "writing in black markers, preferential seating, and offering high contrast materials." *Id.* Special Education Teacher also suggested either shortening assignments or extending the time Student has to complete assignments in order to help with fatigue issues. Parent expressed concern about shortening assignments, and suggested that breaks and extended time to complete tasks would be more appropriate. The IEP team adopted Parent's suggestion, and the accommodation now reads "extended time to complete tasks" and "provide visual breaks such as after sustained near work." *Id.*
43. The IEP team then discussed Occupational Therapist's evaluation. Occupational Therapist explained that Student began the 2018-19 school year at age-level for fine

motor and visual motor skills, and that he was now performing above age level in both categories. *Ex. E*, p. 40. Occupational Therapist explained to the SCO that Student had excelled despite not receiving any direct occupational therapy interventions. *Interview with Occupational Therapist*. Based on these updated assessments and the IEP team’s discussion, occupational therapy services were not included in the March 2020 IEP.

44. The IEP team again updated Student’s annual goals, developing three goals to address pre-academic development. *Id.* at 49. These goals include using a checklist or visual schedule to independently complete tasks, gathering appropriate items to complete a given task or activity, and demonstrating the ability to remain on task and work independently. *Id.* at 49-50.
45. In terms of specialized instruction, only 240 direct minutes per month in early childhood special education were included in the March 2020 IEP.
46. Student’s placement in the least restrictive environment remained identical to the December 2019 IEP as it specified that Student would receive all special education and related services in the early childhood general education classroom. *Ex. D*, p. 53.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: The December 2019 IEP and the March 2020 IEP were each specifically tailored to Student’s individual needs, consistent with IDEA requirements.

IDEA requires a school district to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 69 IDELR 174, 580 U.S. ____ (2017), 137 S. Ct. 988, 999. An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with IDEA’s procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Westminster Pub. Sch.*, 118 LRP 50551 (SEA CO 11/14/2018).

In developing a child’s IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child. 34 C.F.R. § 300.324(a)(1). The IEP team must also consider a child’s need for related services, defined as “transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education” 34 C.F.R. § 300.34(a). A child’s need for related services is determined on an individual basis as

part of the IEP process, and is based on that child's unique needs. 34 C.F.R. § 300.320; *see also Letter to Ackerhalt*, 112 LRP 51286 (OSEP 9/6/12) (decisions regarding related services "must be made by the IEP team and must be based on the student's unique needs").

Here, Parents contend that Student requires vision therapy, physical therapy, and occupational therapy services in order to receive a FAPE.

The SCO finds and concludes that District complied with IDEA requirements when the IEP team updated and developed Student's IEP in December 2019 and March 2020. The SCO also finds and concludes that both IEPs were tailored to Student's unique needs and that both IEPs were reasonably calculated to enable Student to receive an educational benefit. The SCO first examines the December 2019 IEP.

A. The December 2019 IEP

Here, the findings show that the December 2019 IEP—which governed Student's educational programming from December 6, 2019 to March 12, 2020—was tailored to Student's individual needs. (FF #17). The IEP team began by reviewing Student's present levels of performance, noting that he had met all of his annual IEP goals in the areas of self-determination, social emotional wellness, and communication. The IEP team also discussed informal observations and the MOVE assessment conducted by Physical Therapist. Based on this discussion, the IEP team determined the impact of Student's disability as difficulty "initiating tasks and remaining focused during large group activities" as well as issues following multi-step directions due to a limited vocabulary. (FF #19). Annual goals were developed to address self-determination, social emotional wellness, and communication. Student's early childhood special education and speech language direct service minutes remained unchanged from the December 2018 IEP.

The IEP team also discussed Student's occupational therapy and physical therapy needs. Occupational Therapist questioned whether occupational therapy services should be removed from the IEP, owing to Student's age appropriate fine motor and visual motor skills. However, based on the IEP team's discussion concerning Student's ability to complete sustained work and the upcoming rigors of kindergarten, the IEP team increased occupational therapy services to 120 minutes per semester and changed them to indirect or consultative services. (FF #22-23).

The IEP team then discussed the MOVE assessment administered by Physical Therapist, which concluded that physical mobility was not impacting Student's participation or access to academics or activities. The IEP team thus removed physical therapy services from the IEP. (FF #14, 24). Nevertheless, the IEP team responded to Parents' concerns by keeping and adding accommodations to address Student's visual fatigue and potential safety issues due to his muscle imbalance. (FF #26).

For these reasons, the SCO finds and concludes that the District offered an IEP tailored to Student's unique needs from December 6, 2019 to March 12, 2020. The SCO now considers the March 2020 IEP.

B. The March 2020 IEP

The findings show that the March 2020 IEP—which has governed Student's educational programming from March 12, 2020 to the present—is tailored to Student's individual needs. (FF #38). The IEP team convened on March 12 to review and revise the December 2019 IEP based on the 2020 Reevaluation. The IEP team determined that Student's present levels of performance and impact of his disability were largely unchanged from the December 2019 IEP. (FF #39-40). Only the statement regarding Student's limited vocabulary was removed.

The IEP team reviewed Student's annual goals, and developed three goals pertaining to pre-academic development. Because Special Education Teacher is responsible for Student's pre-academic goals, only the 240 direct minutes per month of early childhood special education remained in the March 2020 IEP.

The IEP team discussed the functional vision assessment completed by TVI for the 2020 Reevaluation which concluded that, although Student's vision issues resulted in fatigue while working on near visual activities, he is able to access the preschool environment without the need for specially designed instruction. (FF #41). The IEP team thus did not include vision therapy services, but rather several accommodations to address visual fatigue. (FF #42).

The IEP team also discussed the assessments Occupational Therapist conducted as part of the 2020 Reevaluation. Those assessments indicated that Student possesses age appropriate fine motor and visual motor skills. (FF #43). Additionally, Student had progressed to this level without sensory accommodations or interventions. Based on these assessments and the IEP team's discussion, occupational therapy services were removed from Student's IEP.

For these reasons, the SCO finds and concludes that the District offered an IEP tailored to Student's unique needs from March 12, 2020 to the present.

Conclusion to Allegation No. 2: The District improperly delayed Parents' request for an IEE, resulting in a denial of FAPE.

Parents have a right to seek an IEE at public expense if they disagree with an evaluation conducted by the school district. 34 C.F.R. § 300.502(b)(1). An IEE is an "evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i). After a parent requests an IEE at public expense, the district "must without unnecessary delay, either – (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an

independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.” 34 C.F.R. § 300.502(b)(2).

The SCO finds and concludes that Parents requested an IEE based on their disagreement with the results of the occupational therapy assessment completed as part of the 2018 Reevaluation. (FF #29). Although it is unclear whether Parents specifically stated a disagreement with the results of Occupational Therapist’s assessments from the 2018 Reevaluation when requesting the IEE, District recognized the request as one for an IEE related to Student’s sensory processing needs as demonstrated by Special Education Coordinator’s December 17 e-mail.

The SCO also finds and concludes that Parents requested an IEE in a timely manner. Student’s sensory processing needs had not been evaluated since the 2018 Reevaluation—only one year prior to the IEE request—and the next reevaluation would not have been required until December 2021. 34 C.F.R. § 300.303(b)(2). Also, despite no additional assessments in the area of sensory processing, the IEP team altered Student’s occupational therapy services during the December IEP meeting. Having determined that Parents asked for an IEE in a timely manner due to a disagreement with the 2018 Reevaluation, the SCO must now determine whether District appropriately responded to the IEE request.

The SCO finds and concludes that District did not appropriately respond to Parents’ IEE request. Rather than approve the request or file a due process complaint to defend its prior evaluation, District requested consent to perform a comprehensive reevaluation of Student. (FF #31-32). Specifically, Special Education Coordinator stated in her December 17 email that if Parents permitted District to reevaluate Student and still disagreed with the reevaluation, then District would consider the IEE request. District’s failure to fund an IEE at public expense or file for due process results in a procedural IDEA violation. 34 C.F.R. § 300.502(b)(2); *see also Fullerton Sch. Dist.*, 112 LRP 8549 (SEA CA 1/30/12) (concluding that a district’s offer to reevaluate a child was not appropriate and that the only two options were to fund the IEE or file for due process).

The SCO must now determine if the procedural violation resulted in a denial of FAPE. A procedural violation results in a denial of FAPE if it “(1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (3) caused a deprivation of educational benefit.” 34 C.F.R. § 300.513(a)(2).

A parent’s ability to request an IEE is a powerful procedural safeguard provided by IDEA. 34 C.F.R. § 300.502. When a parent disagrees with an evaluation conducted by a school district, the ability to request an IEE helps ensure parents “are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the

firepower to match the opposition.” *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 61 (2005)(citing *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)).

In this case, Parents disagreed with the provision of Student’s occupational therapy services and attempted to have Student evaluated by a specialist outside of the District in December 2019. By requiring Parents to provide consent to reevaluate before agreeing to grant the IEE or file for due process, District caused an unnecessary delay in the IEE process. Accordingly, the SCO finds and concludes that this procedural violation results in a denial of FAPE because it significantly impeded Parents’ opportunity to participate in the decision making-process.

Conclusion to Allegation No. 3: District failed to provide adequate prior written notice of its refusal to grant Parents’ request for an IEE, resulting in a procedural violation of IDEA.

Essential to a parent’s ability to participate in the development of a child’s educational program is the procedural requirement that the school district provide sufficient notice before it makes or refuses to make substantial changes to the child’s educational program. 34 C.F.R. § 300.503(a). This obligation to provide prior written notice is triggered when the proposed change involves identification, evaluation, educational placement, or the provision of FAPE. *Id.*

Adequately identifying the specific action being proposed or refused is essential because the primary purpose of prior written notice is to help parents understand the basis for disagreement and whether to seek resolution of the dispute through the available procedural safeguards. *See Letter to Boswell*, 49 IDELR 196 (OSEP 2007); *Douglas Cnty. Sch. Dist.*, 118 LRP 35788 (SEA CO 7/6/18).

Prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report used by the district as a basis for the action; a description of other options the IEP team considered and the reasons why those options were rejected; and a description of any other factors relevant to the district’s proposal or refusal. 34 C.F.R. § 300.503(b)(1-3) and (6-7). It must also include a statement that the parents of a child with a disability have protections under the procedural safeguards and the means by which to obtain a copy if the notice is not for an initial evaluation, and sources for parents to contact to obtain assistance in understanding the procedural safeguards. 34 C.F.R. § 300.503(b)(4-5).

In this case, because an IEE is an evaluation, the SCO finds and concludes that District’s refusal to grant an IEE following Parents’ request on December 6 triggered its responsibility to provide Parents with prior written notice. District provided Parents with prior written notice on December 6 within the December 2019 IEP and on December 17 along with the consent to evaluate. (FF #28, 32). The SCO now considers whether the contents of each prior written notice were consistent with IDEA requirements.

With regard to the December 6 prior written notice, Special Education Teacher recognized that Parents were asking for an IEE at the annual review meeting. (FF #28, 30). However, the prior written notice embedded in the December 2019 IEP does not reference Parents' request for an IEE, and instead states they are "interested in pursuing an outside evaluation for occupational therapy" and refers to the letter from Private Optometrist. (FF #28).

With regard to the December 17 prior written notice, it was issued by Special Education Coordinator as an attachment to the consent to reevaluate. It stated that, based on the conversation at the December 6 IEP meeting, "the team, including parents, are interested in pursuing additional evaluations." (FF #32). Again, this prior written notice does not mention Parents' IEE request, despite Special Education Coordinator specifically acknowledging in the email that she understood Parents were requesting an IEE in sensory processing. (FF #31).

The SCO finds and concludes that the prior written notices issued by District on December 6 and December 17 failed to include "a description of the action proposed or refused by the agency." 34 C.F.R. § 300.503(b)(1). Specifically, the prior written notices do not reference the District's refusal to provide an IEE at public expense, and therefore do not meet the requirements of 34 C.F.R. § 300.503, resulting in a procedural violation. *See Fulton Cnty. Sch. Dist.*, 118 LRP 4607 (SEA GA 12/27/17) (finding a procedural violation where district's prior written notice regarding denial of parents' IEE request did not include all required content).

The SCO must now determine if this procedural violation resulted in a denial of FAPE. A procedural violation results in a denial of FAPE if it "seriously impair[s] the parents' opportunity to participate in the IEP formulation process, result[s] in the loss of educational opportunity for the child, or cause[s] a deprivation of the child's educational benefits." *See* 34 C.F.R. § 300.513(a)(2).

Here, the SCO finds and concludes that the procedural violation did not result in a denial of FAPE because it did not prevent Parents from participating in the IEP process. Parents were provided a copy of the procedural safeguards at the December 6, 2019 IEP annual review meeting and were aware of their right to request an IEE. Parents understood that District was refusing to provide their requested IEE until after Student was reevaluated. Accordingly, because Parents knew their rights and acted upon them, this procedural violation did not impede their ability to participate, and thus did not result in substantive harm.

REMEDIES

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

- a) Unnecessarily delaying approval of an IEE, consistent with 34 C.F.R. § 300.502;

- b) Failing to include required content in a prior written notice, consistent with 34 C.F.R. § 300.503.

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

- 1) By June 16, 2020, the District shall submit to CDE a corrective action plan (“CAP”) that adequately addresses the two (2) violations noted in this Decision. The CAP must effectively address how the noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
 - a) Training with Special Education Director, Coordinator, Special Education Teacher, and any other District staff responsible for responding to IEE requests on the requirements of 34 C.F.R. § 300.502, and the content of this Decision, no later than July 7, 2020.
 - b) Training with Special Education Director, Coordinator, Special Education Teacher, and any other District staff responsible for completing prior written notices on the requirements of 34 C.F.R. § 300.503, and the content of this Decision, no later than July 7, 2020.
 - c) Training materials for the above-described training must be submitted to CDE for review and approval **at least 14 days prior to the delivery of training**.
 - d) Evidence that this training has occurred must be documented (i.e. training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets, with roles noted) and provided to CDE no later than July 14, 2020. These trainings may be conducted in-person, or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast. If the individuals identified in paragraph 1(a) or 1(b) are no longer employed by the District when the training occurs, District may train staff occupying identical roles in order to demonstrate compliance with this remedy.
- 2) Within 30 days of receipt of this Decision, the District must provide CDE an update on the status of Parents’ previously approved IEE request. If the Parties are unable to agree on an evaluator or the scope of the proposed IEE, they must notify CDE, through Michael Ramirez, no later than June 16, 2020. Whether or not a proposed evaluation is consistent with the scope of this Decision will be determined solely by CDE, should the parties dispute the scope of the IEE. If the parties are unable to agree on an evaluator, CDE will choose an evaluator. In the event that CDE must choose the evaluator and/or determine the scope of the evaluation, and parent does not agree with the evaluator and scope of the proposed evaluation, as determined by CDE, District shall be excused from providing the IEE at public expense.

- 3) The District must provide written documentation to CDE that it has provided the IEE at public expense by August 1, 2020, or why it should be excused from providing the IEE, in accordance with the conditions set forth in paragraph 2 above.

CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, CDE 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.: Michael Ramirez
1560 Broadway, Suite 1100
Denver, CO 80202-5149

Failure by District to meet any of the timelines set forth above may adversely affect District's annual determination under the IDEA and subject District to enforcement action by CDE. **Given the current circumstances surrounding the COVID-19 pandemic, the Department will work with District to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

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 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46607 (August 14, 2006).

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

Dated this 18th day of May, 2020.

/s/ Thomas Treinen
Thomas Treinen
State Complaints Officer

Appendix

Complaint, pages 1-21

- Exhibit 1: Out of state IEP dated 5/8/18
- Exhibit 2: Developmental Optometrist report dated 3/8/18
- Exhibit 3: Occupational Therapy evaluation dated 3/28/18
- Exhibit 4: Interim IEP dated 9/17/18
- Exhibit 5: Vision evaluation dated 11/19/18
- Exhibit 6: IEP dated 12/14/18
- Exhibit 7: Fall 2018 draft evaluation
- Exhibit 8: Evaluation report November 2019
- Exhibit 9: Optometrist report dated 12/5/2019
- Exhibit 10: IEP dated 12/6/19

Response, pages 1-13

- Exhibit A: District relies on CDE IEP procedural guidance manual
- Exhibit B: District relies on IDEA regulation and OSEP guidance on IEEs
- Exhibit C: District relies on CDE IEP procedural guidance, IDEA regulations, and OSEP
- Exhibit D: IEP dated 12/14/18; IEP dated 12/6/19; IEP dated 3/12/20; 9/17/18 interim IEP
- Exhibit E: Evaluation dated 12/7/18; evaluation dated 2/24/20
- Exhibit F: Service log history
- Exhibit G: PWNs dated 12/7/18, 2/24/20, 3/12/20
- Exhibit H: Notices of meeting dated 11/14/18, 10/18/18, 3/12/19, 11/4/19, 1/9/20, 3/3/20
- Exhibit I: Progress reports
- Exhibit J: Email correspondence
- Exhibit K: PWN and consent for reevaluation dated 12/17/19
- Exhibit L: ESY data documentation
- Exhibit M: PWN and consent for reevaluation dated 11/11/19

Reply, pages 1-9

Interviews with:

Parents
Occupational Therapist
Physical Therapist
Special Education Teacher
Special Education Coordinator
Special Education Director