

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

**State-Level Complaint 2022:527
El Paso 20 (Academy) School District**

DECISION

INTRODUCTION

On May 24, 2022, the parents (“Parents”) 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 the El Paso 20 (Academy) School District (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified three (3) allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), the Colorado Department of Education (“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 May 24, 2021 through May 24, 2022 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to properly implement Student’s IEP from May 2021 through August 2021, specifically by failing to provide the required extended school year (“ESY”) services, in violation of 34 C.F.R. § 300.323.
2. Failed to provide Parents with periodic reports on Student’s progress during the summer of 2021, in violation of 34 C.F.R. § 300.320(a)(3)(ii).

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

3. Failed to provide Parents with access to Student's education records, specifically Student's 2021 ESY service logs, within 45 days of their request, which was made on or about February 22, 2022, in violation of 34 C.F.R. § 300.613.

FINDINGS OF FACT

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

A. Background

1. Student is a social and outgoing 13-year-old, with a love of music and a flare for comedy. *Interviews with Case Manager and Parents*. Student qualifies for special education and related services under the multiple disabilities category, to include meeting the criteria for other health impairment, intellectual disability, orthopedic impairment, and vision impairment. *Exhibit A*, p. 14.
2. During the 2020-2021 academic year, Student attended 6th grade at a District middle school ("School"). *Id.* at p. 2. On April 12 and 13, 2021, a properly constituted IEP Team met to review and revise Student's IEP ("2021 IEP"). *See Exhibit A*, pp. 4, 29; *Interview with Parents*.

B. The 2021 IEP

3. The 2021 IEP was developed in conjunction with Student's triannual reevaluation. *Exhibit A*, p. 2. The 2021 IEP documented Student's strengths, preferences, and interests, including that he enjoys learning through music and rhythm; that he is typically easily refocused; and that once he has a trusted relationship, he demonstrates outward social skills. *Id.* at p. 5.
4. The 2021 IEP reviewed Student's present levels of performance, documenting the results of the reevaluation, observations from teachers and service providers, and a review of records. *Id.* at pp. 5-13.
5. The Student Needs and Impact of Disability section documented that, due to his cognitive disabilities, Student requires academic support in math, reading, and writing, and that he has delays in fine and visual motor skills, which impact his ability to participate in functional activities necessary to access educational programming at school. *Id.* at p. 14. Student's visual and speech impairments likewise impact his ability to access education without supports. *Id.*
6. The Parent/Student Input section contained input from Parents, including that Student requires support for safety during feeding, toileting, and personal care. *Id.* at p. 15. This section also included Parents' responses to a questionnaire about Student's needs. *Id.*

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

7. The 2021 IEP contained annual goals in math, reading, fine motor function, speech, physical access, and physical education. *Id.* at pp. 19-27. Relevant to this investigation are:
 - a. Goal 1 – Math: “Through vocalizations, pointing, gestures, and with guidance and support to generalize skills, [Student] will add and subtract numbers less than ten using multiple strategies, including but not limited to melodic tone, rhythm, fill in the blank, movement, visual support, and manipulatives for each operation with 80% accuracy in 4 out of 5 opportunities.” *Id.* at pp. 19-20.
 - b. Goal 2 – Reading: “Through vocalizations, pointing, gestures, and with guidance and support to generalize skills, [Student] will identify 25 functional sight words in print (e.g., Elevator, Danger, Open) through multiple strategies including but not limited to melodic tone, rhythm, fill in the blank, movement, visual supports, and manipulatives with 80% accuracy in 4 out of 5 opportunities.” *Id.* at pp. 20-21.
 - c. Goal 6 – Physical Education: “Through collaboration with the SSN teacher, general education pe teacher, physical therapist and occupational therapist, and or special education service provider [Student] will increase his active participation and receptive engagement in warm-ups, class lessons and activities as evidenced by [Student] correctly identifying each activity and physically participating with his peers at least 80% of the time.” *Id.* at pp. 26-27.
8. The 2021 IEP indicated written progress reports detailing Student’s progress toward annual goals would be provided to Parents on a quarterly basis, apart from the quarter in which the annual IEP review was held. *Id.* at p. 20.
9. The 2021 IEP contained accommodations to help Student access the general education curriculum, including constant and “intentional” adult supervision, extended response time, and access to sensory supports. *Id.* at p. 28. The 2021 IEP contained modifications to the general curriculum in academics and physical education, documenting that Student qualifies to receive instruction under alternative academic standards. *Id.* at p. 29.
10. The IEP Team found Student qualified for ESY services based on predictive factors and determined he would receive ESY for three weeks in June 2021 (four days per week, three hours each day). *Id.* at p. 29; *Interview with Special Education Teacher*. The 2021 IEP indicated that Student would work on all six annual goals during ESY. *Exhibit A*, pp. 19-27.
11. The Service Delivery section provided for:
 - a. 240 minutes of monthly direct speech/language services;
 - b. 15 minutes of monthly indirect speech/language services;
 - c. 30 minutes of monthly indirect vision services;
 - d. 120 minutes of monthly direct occupational therapy services;

- e. 120 minutes of monthly physical therapy services;
- f. 15 minutes of monthly indirect physical therapy services;
- g. 60 minutes of weekly direct special education from a special education service provider;
- h. 15 minutes of weekly indirect special education from a special education service provider;
- i. 1,920 minutes of weekly direct special education from a special education teacher;
- j. 15 minutes of weekly indirect special education from a special education teacher.

Id. at pp. 33-34.

- 12. The IEP Team determined it was appropriate for Student to be placed in the general education class 40 to 79 percent of the time. *Id.* at p. 34.
- 13. Finalized on April 15, 2021, the 2021 IEP was in effect during the summer of 2021. *See id.* at p. 2; *Interviews with Parents, Special Education Teacher, and Director of Special Education.*

C. Implementation of the 2021 IEP (ESY - June 2021)

- 14. Parents' concern is that District failed to implement the 2021 IEP during ESY because District did not provide Student with the required services in the areas of math, reading, and physical education. *Complaint*, pp. 1-9; *Reply*, pp. 1-7; *Interview with Parents.*

IEP Accessibility to Student's Teachers

- 15. Special Education Teacher, who is no longer with District, oversaw Student's ESY class during the summer of 2021 along with another special education teacher and several paraprofessionals. *Interview with Special Education Teacher.* The class had approximately 14 students and was divided in half between the two instructors. *Id.*
- 16. Prior to the start of ESY, Special Education Teacher met with the other ESY teacher, service providers, and paraprofessionals to review the 2021 IEP and discuss the plan for ESY. *Interview with Special Education Teacher.* All staff members working with Student, including paraprofessionals, were provided access to the 2021 IEP. *Id.*
- 17. On June 4, 2021, the Friday prior to the start of ESY, Special Education Teacher and other ESY service providers met with Parents and Student to introduce the ESY team and discuss ESY logistics, such as transportation and equipment for physical therapy services. *Interviews with Parents and Special Education Teacher; Exhibit B*, p. 11. Parents informed staff that he would be absent on occasion due to private therapies and appointments. *Exhibit B*, p. 11.

The ESY Program

18. From June 7 to June 24, 2021, Student was set to attend District's ESY program four days per week, for a minimum of three hours each day. *Interviews with Parents and Special Education Teacher; Exhibit B*, pp. 2-14. Due to private therapies/appointments, Student missed the first three days of ESY but otherwise attended each day. *See Exhibit B*, p. 12.
19. The ESY classroom contained "quite a few" students with significant needs, and the classroom was divided according to the needs of specific students. *Interview with Special Education Teacher*. Due to the variety of services Student received over summer (physical therapy, occupational therapy, music therapy, etc.), his schedule was somewhat different day-to-day to accommodate time with various service providers. *Id.*
20. A typical day at ESY for Student began with warmup activities, such as coloring to "get into the routine for the school-day" followed by math instruction. *Id.* After math, the class would go outside for a snack, then return for reading instruction. *Id.* Student also participated in a physical activity once a day most days, although the physical activity sometimes occurred in the cafeteria due to noise from nearby construction. *Id.* During math and reading instruction, Student received a combination of whole group and one-on-one instruction, either from Special Education Teacher or a paraprofessional. *Id.*
21. Parents were kept apprised of Student's services through a daily log, which was sent home daily. *See Exhibit B*, pp. 2-10. The daily log, which was filled out by the ESY nurse in collaboration with Special Education Teacher, detailed toileting, eating/drinking, the therapy services Student received, and any supplies needed for Student from home (e.g., diapers, wipes, lotion, etc.). *Id.*; *Interviews with Parents and Special Education Teacher*. Parents were also provided with a progress report at the conclusion of ESY detailing progress toward annual goals during ESY on June 24, 2022. *See Exhibit D*, pp. 117-119.

Math Services

22. Parents' concern is that District failed to provide Student with services in math as required by the 2021 IEP during ESY because the annual math goal targets addition and subtraction, and according to the June 24, 2022 progress report, Student worked toward his math goal by counting by 1s, 5s, and 10s and learning the names and values of coins. *Exhibit B*, p. 16.
23. Special Education Teacher concedes that Student did not work on addition or subtraction during ESY. *Interview with Special Education Teacher*. While the 2021 IEP indicates that Student was able to identify numbers 1-10, 20, 30, 40, and 50 at the time of its development, ESY staff were unsure about the extent of his math abilities. *Id.*
24. Although staff and Student were introduced during the meeting prior to ESY, none of the staff had worked with Student previously. *Id.* As a result, it took time for Student to "open up" and

it was difficult to gauge his skill level in math. *Id.* Student's abilities were further difficult to gauge because of inconsistent interest and engagement during ESY. *Id.*

25. The 2021 IEP indicated Student could identify numbers 1-10, but it was silent about his ability to count by 5s and 10s, and ESY staff did not "see a lot of this ability" in the beginning of ESY. *Id.* As a result, Special Education Teacher thought it more appropriate to work on "core skills" before moving to more advanced skills such as subtraction and addition. *Id.*
26. Although Student's goal targeted addition and subtraction, it was appropriate for Special Education Teacher to focus on basic math skills like counting and identifying currency during daily math instruction. *Consultations with CDE Content Specialists 1 and 2.* The purpose of ESY is to avoid regression, or the need to spend time on recoupment of lost skills during the regular school year. *Id.* Counting was a newly learned skill for Student, and it was appropriate for Special Education Teacher to tailor the math instruction to Student's ability level rather than simply giving him addition or subtraction problems if ESY staff did not see signs he was ready to work on those skills. *Id.* The SCO accordingly finds District properly implemented the 2021 IEP during ESY with respect to Student's math services. *Id.*

Reading Services

27. Parents' concern is that District failed to provide Student with the required reading services during ESY because the annual reading goal targeted the identification of functional sight words, and according to the June 24, 2022 progress report, Student worked on learning sight words from an "ocean unit" which are not functional sight words. *Exhibit B*, p. 16.
28. Functional sight words are unique and functional for an individual student (meaning useful for the student in everyday life) and must be words that can be generalized across environments. *Consultation with CDE Content Specialist 1.* Words like "danger" or "bathroom" could be potential functional sight words for Student, as could the names of colors, but words like "dolphin" and "ocean" would not be considered functional for a student living in Colorado, far from the ocean. *Consultation with CDE Content Specialists 1 and 2.* While Student received daily reading instruction during ESY, he did not work on identifying functional sight words as was required by the 2021 IEP. *Exhibit A*, pp. 20-21.
29. Special Education Teacher explains that during the "ocean unit" the ESY class worked on reading materials from the "Unique" learning curriculum. *Interview with Special Education Teacher.* The "Unique" learning curriculum contained reading materials at several different skill levels (e.g., paragraph writing, picture supported levels, word identification) and thus could be tailored to the individual needs and ability level of a specific student. *Id.*
30. Special Education Teacher concedes that words from the "ocean unit" were not necessarily words that Student would realistically use in the immediate future, but that they were sight words chosen from the texts as words that would either be "functional to the text," useful

for Student, or tailored to his interests (he expressed interest in the names of fish). *Id.* Student also learned the names of colors during coloring time. *Id.*

31. The “Unique” curriculum came with “word cards” which could be used to match words, and Student worked on identifying sight words from the text using the cards. *Id.* Like the annual math goal, Student began showing more reading ability toward the end of ESY once he became more familiar with ESY staff, although the data was too inconsistent to mark any progress toward his annual reading goal. *Id.*
32. Because Student did not work on identifying functional sight words, the SCO finds that District failed to implement the 2021 IEP during ESY with respect to Student’s reading services.

Physical Education Services

33. Parents’ concern is that Student did not receive the required physical education services during ESY because the June 24, 2022 progress report did not contain any information about his progress toward his annual goal in physical education. *See Exhibit B, pp. 15-17.*
34. During daily physical activities, Special Education Teacher and Physical Therapist worked collaboratively with Student to encourage him to participate with other students and engage in physical activities with the rest of the class. *Interview with Special Education Teacher.* Although the class sometimes participated in structured activities such as playing with balloons (to help students with coordination), the physical activities were often unstructured in comparison to a structured physical education class. *Id.*
35. Special Education Teacher explains that the objectives for the annual goal specifically mentioned participation in a general education physical education class, and the goal had to be adjusted to fit the unstructured daily physical activities during ESY. *Id.* During those physical activities, Special Education Teacher and Physical Therapist encouraged Student’s participation and tried to ensure that he was engaging with the other students, but they did not spend time with him identifying the physical activity the class worked on each day. *Id.*
36. Indeed, the primary purpose of Student’s annual physical education goal was attendance and engagement during physical activities. *Consultations with CDE Content Specialists 1 and 2.* For these reasons, the SCO finds that District properly implemented the 2021 IEP with respect to Student’s physical education services.

D. Progress Reporting - ESY

37. Parents’ concern is that District failed to provide periodic progress reports as required by the 2021 IEP, because the June 24, 2022 progress report did not contain any information about the physical education goal. *Complaint, pp. 1-9; Reply, pp. 1-7; Interview with Parents.* District’s position is that although a progress report was not required by the 2021 IEP for ESY,

it nevertheless kept Parents apprised of Student's progress during ESY through the daily log and the June 24, 2022 progress report. *Response*, pp. 1-14.

38. The 2021 IEP required District to provide quarterly progress reports during the regular academic year, but there is nothing in the 2021 IEP that required District to provide a progress report for ESY. *See Exhibit A*, pp. 2-34. A progress report was nevertheless generated for ESY on June 24, 2022, though it did not include any information about Student's physical education goal. *Exhibit B*, pp. 15-17.
39. Special Education Teacher concedes that a progress report was not generated for Student's physical education goal during ESY due to an oversight. *Id.* Since Physical Therapist was involved in helping Student during physical activities, Special Education Teacher assumed Physical Therapist was writing the progress report for the physical education goal (Physical Therapist wrote a report for Student's annual physical therapy goal but did not write a report for the physical education goal). *Id.* Neither Special Education Teacher nor Physical Therapist compiled and sent out the June 24, 2022 progress report, so Special Education Teacher did not notice the omission before the report went out to Parents. *Id.*
40. From July 26 through August 5, 2021, Student participated in District's optional "SPED Jumpstart" program four days per week for two hours per day before beginning 7th Grade at School in August of 2021. *Interview with Parents; see Exhibit G*, pp. 4-8; *Response*, p. 6; *Exhibit J*, p. 445.

E. Progress Reporting – October 2021

41. During the investigation, Parents raised concerns that District failed to provide periodic reports on Student's progress toward annual goals as required by the 2021 IEP during the 2021-2022 academic year, because the progress report generated in October of 2021 lacked information about three of six annual goals. *Interview with Parents; Reply*, pp. 3-4. District's position is that Parents were provided with periodic reports on Student's progress during the 2021-2022 academic year as required by the 2021 IEP. *Response*, p. 10.
42. On October 15, 2021, Parents were provided with a quarterly progress report detailing Student's progress toward annual goals. *See Exhibit D*, pp. 103-106.
43. The October 15, 2021 progress report indicated Student did not yet meet his goal in physical access and partially met his goals in fine motor function and receptive/expressive language, and contained highly detailed observations of Student's progress toward those annual goals. *Id.* The October Report did not, however, contain any information about Student's progress toward annual goals in reading, math, or physical education. *See id.*
44. The October 15, 2021 progress report was compiled by Student's former case manager. *Interview with Case Manager*. In November of 2021, prior to the thanksgiving holiday break,

Student's former case manager left District unexpectedly and was subsequently replaced by Case Manager. *Interviews with Case Manager, Parents, and Director of Special Education.*

45. Case Manager concedes that when she was not provided with "very much" progress monitoring data, and she is not sure why the October Report was missing information about progress in reading, math, and physical education. *Interview with Case Manager.* Upon taking over, Case Manager created data collection documents for progress monitoring, to be used by both Case Manager and the paraprofessionals working with Student. *Id.*
46. Parents report that they saw a significant improvement in Student's progress when Case Manager took over, and that Case Manager was much more communicative than Student's former case manager with regards to progress. *Interview with Parents; Exhibit J, p. 572.*
47. On December 17, 2021, Parents were provided with another quarterly progress report detailing Student's progress toward his annual goals. *Exhibit D, pp. 107-111.* The December Report contained progress reports for all six annual goals. *See id.*

F. Parents' Records Requests

48. Parents' concern is that they requested Student's ESY service logs from District on February 22, 2022, and that District failed to respond or otherwise provide the requested records. *Complaint, pp. 1-9; Reply, pp. 1-7; Interview with Parents.* District maintains it was unaware of any record requests made on or about February 22, 2022. *Response, p. 10.* District adds that Parents and IEP Team members verbally discussed (and that Parents viewed) special education progress reports and data at an IEP review meeting on March 16, 2022. *Id.*
49. District has policies and procedures to address parent/guardian-initiated records requests. *Exhibit E, pp. 8-11; Exhibit L, p. 1.* Under District policy and procedure, a parent/guardian must submit a written request to the principal of the school attended by the student to review the student's records. *Exhibit L, p. 1.*
50. The Record here demonstrates that on February 22, 2022, in preparation for Student's annual IEP review, Parents emailed Case Manager and Instructional Program Facilitator to request copies of 2021 ESY service logs. *Exhibit 1, p. 72.* Case Manager responded to the email on the same date, and clarified that Parents were requesting ESY service logs. *Exhibit 1, pp. 71-72.* Parents confirmed their request was for ESY service logs. *Id. at p. 71.*
51. Case Manager indicates this was the first time a parent had "asked for something like this" and she referred the request to Instructional Program Facilitator. *Interview with Case Manager.* Case Manager also later provided Parents with some data at the IEP meeting on March 16, 2022, but assumed Parents were asking about "quarterly data." *Id.; Response, p. 10.* Teachers' service logs are not centrally maintained in District's student information

system with IEPs and other educational records, and Case Manager gave Parents “everything [she] had.” *Interviews with Case Manager and Director of Special Education.*

52. On May 17, 2022, Parents emailed Case Manager and Instructional Program Facilitator to renew their request for ESY service logs. *Exhibit 1*, p. 71. In the message, Parents indicated they were aware that Case Manager did not maintain the records, but that she was their point of contact. *Id.* Instructional Program Facilitator responded the same date and said she would forward the request to a special education administrator. *Id.*
53. On May 25, 2022, the IEP Team finalized the 2022 IEP. *See Exhibit J*, p. 656; *see Response p. 10.* District did not provide ESY service logs to Parents until after the Complaint was filed, as part of this investigation. *Exhibit J*, pp. 1-1912; *Interviews with Parents and Case Manager.* Parents were never made aware of District’s procedures for records requests or instructed to submit their request in writing to the principal of School. *Interviews with Parents and Case Manager; see Exhibit G*, pp. 1-8; *see Exhibit J*, pp. 1-1912.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District failed to properly implement Student’s IEP in June of 2021, in violation of 34 C.F.R. § 300.323. This violation did not result in a denial of FAPE.

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is “the centerpiece of the statute’s education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student’s IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

A school district must ensure that “as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child’s IEP.” *Id.* § 300.323(c)(2). To satisfy this obligation, a school district must ensure that each teacher and related services provider is informed of “his or her specific responsibilities related to implementing the child’s IEP,” as well as the specific “accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.” *Id.* § 300.323(d). Where the definition of a FAPE specifically references delivery of special education and related services consistent with an IEP, the failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19.

However, not every deviation from an IEP’s requirements results in a denial of a FAPE. *See, e.g., L.C. and K.C. v. Utah State Bd. of Educ.*, 125 Fed. Appx. 252, 260 (10th Cir. 2005) (holding that

minor deviations from the IEP's requirements which did not impact the student's ability to benefit from the special education program did not amount to a "clear failure" of the IEP); *T.M. v. District of Columbia*, 64 IDELR 197 (D.D.C. 2014) (finding "short gaps" in a child's services did not amount to a material failure to provide related services). Thus, a "finding that a school district has failed to implement a requirement of a child's IEP does not end the inquiry." *In re: Student with a Disability*, 118 LRP 28092 (SEA CO 5/4/18). Instead, "the SCO must also determine whether the failure was material." *Id.* Courts will consider a case's individual circumstances to determine if it will "constitute a material failure of implementing the IEP." *A.P. v. Woodstock Bd. of Educ.*, 370 Fed. Appx. 202, 205 (2d Cir. 2010).

A. Implementation of the 2021 IEP (ESY - June 2021)

Parents' Concerns

The 2021 IEP was in effect for ESY in June 2021. (FF # 13). Parents allege Student did not receive ESY math, reading, and physical education services consistent with the 2021 IEP. (FF # 14).

Accessibility to Student's Teachers

The SCO must first determine whether District satisfied its obligation under 34 C.F.R. § 300.323(d). Here, Special Education Teacher oversaw Student's ESY class, along with another special education teacher and support paraprofessionals. (FF # 15). She was responsible for ensuring staff were aware of their responsibilities under the 2021 IEP, and thus, held a meeting with staff before the start of ESY to discuss the plan for ESY, the 2021 IEP, and Student's needs. (FF # 16). All staff working with Student were provided access to the 2021 IEP, and there was collaboration between Special Education Teacher and other service providers during ESY. (FF # 16-17, 21, 34). For these reasons, the SCO finds and concludes that District ensured teachers and service providers working with Student over the summer were informed of their responsibilities under the 2021 IEP, consistent with 34 C.F.R. § 300.323(d).

The 2021 IEP's ESY Services

The 2021 IEP provided for 12 hours per week of ESY, for three weeks between June 7 and 24, 2021. (FF #s 10, 18). The 2021 IEP indicated all six of Student's annual goals would be worked on during ESY. (FF # 10). Except for the three days when Student was absent, Student attended ESY from June 7 through June 24, 2021, for three hours each day, four days a week. (FF # 18). A typical day at ESY for Student included instruction in both math and reading, and most days Student's ESY class engaged in a physical activity. (FF # 20).

Math Services

Student's annual math goal targeted number sense through basic addition and subtraction. (FF # 7). Special Education Teacher concedes that Student did not work on addition and subtraction

during ESY because staff were trying to match the instruction to Student's ability level. (FF #s 23-25). Counting and identifying numbers were relatively new skills for Student, and ESY staff did not see evidence that Student had sufficient proficiency with those skills to move to more advanced skills like addition and subtraction. (FF #s 23, 25).

Indeed, the purpose of ESY is not to obtain new skills, but rather to maintain skills to avoid regression or the need to spend unreasonably long time during the regular school year on recoupment of lost skills. (FF # 26); *Johnson v. Independent School District No. 4 of Bixby*, 921 F.2d 1022 (10th Cir. 1990); *CDE Extended School Year Services Manual*, available at http://www.cde.state.co.us/cdesped/esy_guidelines_rev2017. Special Education Teacher did not see evidence that Student was ready to work on addition or subtraction, so daily math instruction instead focused on core skills to ensure Student continued to build foundational math skills necessary to move into addition and subtraction during the regular academic year. (FF #s 23-25). The SCO accordingly finds and concludes, in consultation with CDE Content Specialists 1 and 2, that District properly implemented the 2021 IEP during ESY with respect to math services.

Reading Services

Student's annual goal in reading targeted identification of functional sight words. (FF # 7). Special Education Teacher indicates that during daily reading instruction, she chose Student's "sight words" from the "Unique" reading materials, selecting words that would either be "functional to the text," useful for Student, or tailored to his interests. (FF # 30).

Being "functional to the text" is not the same as being a functional sight word for Student, and the "sight words" Special Education worked on with Student were not functional sight words. (FF # 28). Although Student received daily reading instruction during ESY, the reading instruction was not targeted at functional sight words as was required by the 2021 IEP. (FF # 7). The SCO accordingly finds and concludes, in consultation with CDE Content Specialists 1 and 2, that District failed to implement the 2021 IEP over ESY with respect to reading services.

Physical Education Services

Student's physical education goal targeted attendance and participation during physical activities. (FF # 7). Special Education Teacher concedes that a progress report for the physical education goal was not provided to Parents over ESY, but nonetheless indicates Student received physical education services as required by the 2021 IEP. (FF #s 34-35, 39).

During ESY, Student's class engaged in daily physical activities, although the activities were unstructured in comparison to a structured general education physical education class. (FF # 34). While the class participated in physical activities, Special Education Teacher and Physical Therapist worked collaboratively to encourage Student to participate in activities and engage with other students. *Id.* The SCO accordingly finds and concludes, in consultation with CDE

Content Specialists 1 and 2, that District implemented the 2021 IEP over ESY with respect to physical education services.

B. Materiality of Failure to Implement

Where the definition of a FAPE specifically references delivery of special education and related services consistent with an IEP, the failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19. However, not every deviation from an IEP's requirements results in a denial of a FAPE. *See, e.g., L.C. and K.C. v. Utah State Bd. of Educ.*, 125 Fed. Appx. 252, 260 (10th Cir. 2005) (holding that minor deviations from the IEP's requirements which did not impact the student's ability to benefit from the special education program did not amount to a "clear failure" of the IEP); *T.M. v. District of Columbia*, 64 IDELR 197 (D.D.C. 2014) (finding "short gaps" in a child's services did not amount to a material failure to provide related services). Thus, a "finding that a school district has failed to implement a requirement of a child's IEP does not end the inquiry." *In re: Student with a Disability*, 118 LRP 28092 (SEA CO 5/4/18). Instead, "the SCO must also determine whether the failure was material." *Id.* Courts will consider a case's individual circumstances to determine if it will "constitute a material failure of implementing the IEP." *A.P. v. Woodstock Bd. of Educ.*, 370 Fed. Appx. 202, 205 (2d Cir. 2010).

Here, ESY occurred for three weeks in June of 2021, for three hours a day, four days a week. (FF # 18). Student was absent for the first three days of ESY, so that means he did not work on his annual reading goal during the remaining 27 hours of ESY. *See Id.* During this time, Student worked on his other annual goals, and while he did not work on identifying functional sight words during reading instruction, he nevertheless received reading instruction daily, which was tailored to his individual ability level. (FF #s 20, 29). Student also received additional instruction during his time at District's optional "SPED Jumpstart" program, which he attended from July through August. (FF # 40). Taken as a whole, the failure to implement was a relatively minor shortfall or short gap in services, and District properly implemented the vast majority of the 2021 IEP during ESY. For these reasons, and in consultation with CDE Content Specialists 1 and 2, the SCO finds and concludes that the failure to implement the 2021 IEP was not material.

Conclusion to Allegation No. 2: District failed to provide Parents with periodic reports on Student's progress, in violation of 34 C.F.R. § 300.320(a)(3)(ii). This violation did not result in a denial of FAPE.

A parent's right to participate in the development of their child's educational program requires that they be regularly informed of progress toward IEP goals. *See M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1198 (Ninth Cir. 2017), *cert. denied*, 138 S. Ct. 556 (2017) ("[I]n enacting the IDEA, Congress was as concerned with parental participation in the *enforcement* of the IEP as it was in its *formation*.") For that reason, school districts must periodically report a student's progress toward meeting annual goals to his parents, in accordance with the schedule described in the IEP. 34 C.F.R. § 300.320(a)(3). In light of *Andrew F.*, OSEP provided additional guidance concerning the importance of sharing progress monitoring data with Parents:

Public agencies may find it useful to examine current practices for engaging and communicating with parents throughout the school year as IEP goals are evaluated and the IEP Team determines whether the child is making progress toward IEP goals. IEP Teams should use the periodic progress reporting required at 34 CFR §300.320(a)(3)(ii) to inform parents of their child’s progress. Parents and other IEP Team members should collaborate and partner to track progress appropriate to the child’s circumstances.

Questions and Answers (Q&A) on *U. S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1*, 71 IDELR 68 (OSEP 2017).

Parents allege that District failed to provide periodic progress reports as required by the 2021 IEP, because District did not provide a report for Student’s progress toward his physical education goal during ESY. (FF # 37). Parents further allege that the October 15, 2021 progress report was missing information on Student’s progress toward annual goals in math, reading, and physical education. (FF # 41). District argues that the 2021 IEP only requires quarterly progress reports during the school year, and that Parents were nevertheless kept apprised of Student’s progress during ESY through the daily log, the June 24, 2021 progress report, and throughout the 2021-2022 academic year by quarterly progress reports. (FF #s 21, 37).

A. The June 24, 2021 Progress Report

Here, the 2021 IEP required Parents to be provided with progress reports regarding Student’s progress toward annual goals each quarter, except for the quarter in which the IEP was developed. (FF # 8). District operates on a quarter system, with the first quarter ending in October, the second in December, the third in March, and the fourth at the end of the academic year. *See* (FF #s 8, 42, 47). The 2021 IEP only required quarterly progress reports (and not during ESY). *See* (FF # 8).

On June 24, 2021, District nevertheless provided Parents with a progress report of ESY. (FF # 21). Moreover, District also provided Parents with additional information on Student’s progress during ESY through the daily log. *Id.* For these reasons, the SCO finds and concludes that District did not violate 34 C.F.R. § 300.320(a)(3)(ii).

B. The October 15, 2021 Progress Report

During the course of the investigation, Parents raised concerns that they were not provided with a periodic progress report in October of 2021 as required by the 2021 IEP, because the October 15, 2021 progress report only contained information about three of six annual goals. (FF # 41). In its Response, District countered that Parents were provided with progress reports during the 2021-2022 academic year as was required by the 2021 IEP. *Id.*

Again, the 2021 IEP required District to provide Parents with quarterly progress reports detailing Student's progress toward annual goals. (FF # 8). Parents were provided with a progress report on October 15, 2021, but it only contained progress reporting information for three of six annual goals. (FF #s 42-43). The SCO accordingly finds and concludes that District failed to provide periodic reports of Student's progress to Parents as required by the 2021 IEP, in violation of 34 C.F.R. § 300.320(a)(3)(ii).

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation: (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent's opportunity to participate in the IEP process).

Here, despite the missing information in the October 15, 2021 progress report, Parents received progress reports consistent with the 2021 IEP thereafter, and Student's progress toward his annual goals improved. (FF # 46-47). As progress reporting improved and became more consistent, Parents had the information necessary to participate in Student's annual IEP review and be involved in the decision-making process for Student. *See id.*

The SCO accordingly finds and concludes that the failure to include progress monitoring information in the October 15, 2021 progress report did not significantly impede Parents' ability to participate in the decision-making process. The SCO thus finds and concludes that District's procedural violation did not result in a denial of FAPE.

Conclusion to Allegation No. 3: District failed to provide Parents with access to Student's education records after their February 22, 2022 request, in violation of 34 C.F.R. § 300.613. This violation did not result in a denial of FAPE.

One of the procedural safeguards afforded to parents under the IDEA is the right to inspect and review their child's education records. 34 C.F.R. § 300.613(a). Accordingly, a school district "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency." *Id.* A district must comply with a request from a parent to review his or her child's education records "without unnecessary delay and before any meeting regarding an IEP," and in no case more than 45 days after the request. *Id.*

A parent has a right to inspect "education records." 34 C.F.R. § 300.613(b). This includes a "right to a response from the participating agency to reasonable requests for explanations and interpretations of the records." *Id.* IDEA borrows the definition of "education records" from the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 300.611(b). FERPA defines education records as those records that are "directly related to a student" and "maintained by

an educational agency or institution or by a party acting for the agency or institution.” 34 C.F.R. § 99.3. A record means “any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.” *Id.*

Here, Parents requested ESY service logs from District on February 22, 2022 and May 17, 2022. (FF # 48, 52). The SCO finds that ESY service logs qualify as educational records. Although school districts are not required to maintain service logs under IDEA, District had in its possession ESY service logs (indeed, they were provided to CDE and Parents after the filing of the Complaint). *See* (FF # 53). District did not provide Parents these education records in advance of the March 16, 2022 IEP meeting or otherwise respond to Parents’ requests. *Id.* The SCO accordingly finds and concludes that District failed to provide Parents with access to Student’s educational records consistent with the IDEA, resulting in a procedural violation of 34 C.F.R. § 300.613(a).

The failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10th Cir. 1996).

In this case, District failed to provide Parents with access to ESY service logs until after the filing of the Complaint. *See* (FF # 53). While Parents requested this information in advance of Student’s annual IEP review and still did not receive it, they did not require the ESY service logs to participate in the decision-making process for Student. Parents were kept apprised of Student’s progress during ESY through daily logs and the June 24, 2022 progress report. (FF # 21). The SCO accordingly finds and concludes that District’s procedural violation did not significantly impede Parents’ ability to participate in the decision-making process, and thus, did not result in a substantive denial of FAPE.

Systemic IDEA Violations: This investigation does not demonstrate violations that are systemic and will likely impact the future provision of services for all children with disabilities in District if not corrected. 34 C.F.R. § 300.151(b)(2).

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

In this case, the SCO finds and concludes, in consultation with CDE Content Specialists 1 and 2, that District’s procedural violations regarding IEP implementation, progress reporting, and access to records were not systemic in nature. Both Special Education Teacher and Student’s former

case manager have since left District, and there is no evidence to suggest that other students were impacted. (FF #s 15, 44). Violation No. 1 was directly caused by Special Education Teacher's misunderstanding of functional sight words, and despite this misunderstanding, Student still received services during this time. (FF#s 29, 30). The SCO thus finds and concludes that Violation No. 1 was not systemic.

District failed to provide Parents with a complete progress report in October of 2021 resulting in Violation No. 2, but nevertheless went above and beyond what was required by IDEA by providing Parents progress reporting during ESY. (FF # 38). Although Student's former case manager failed to provide a report for annual goals in math, reading, and physical education, the information about other annual goals in the October 15, 2021 progress report was highly detailed. (FF # 43). Moreover, Parents indicate that once Case Manager replaced the former case manager, Student's progress significantly improved, and progress monitoring was improved in the subsequent December 17, 2021 report for all of Student's annual goals. (FF # 47). The SCO accordingly finds and concludes that Violation No. 2 was not systemic.

District failed to respond to Parent's February and May requests for Student's ESY service logs, resulting in Violation No. 3, but District has policies and procedures in place to address parent/guardian-initiated records requests. (FF # 49). Here, District's failure to respond to Parents' request for ESY service logs was directly caused by District staff's failure to follow District procedures, and there is no evidence that other students were impacted. (FF #s 49, 51-52). The SCO accordingly finds and concludes that Violation No. 3 was not systemic.

REMEDIES

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

1. Failing to properly implement the 2021 IEP during June of 2021, in violation of 34 C.F.R. § 300.323.
2. Failing to provide Parents with periodic reports on Student's progress, in violation of 34 C.F.R. § 300.320(a)(3)(ii).
3. Failing to provide Parents with access to Student's educational records, in violation of 34 C.F.R. § 300.613.

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

1. **Corrective Action Plan**

- a. By **Friday, August 26, 2022**, District shall submit to CDE a corrective action plan ("CAP") that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not

to recur as to Student and all other students with disabilities for whom District is responsible. The CAP must, at a minimum, provide for the following:

- i. Special Education Director, Case Manager, and Instructional Program Facilitator must review this Decision, as well as the requirements of 34 C.F.R. §§ 300.320, 300.323, and 300.613. This review must occur no later than **Monday, August 22, 2022**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Friday, August 26, 2022**.
- b. 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 confirm District's timely correction of the areas of noncompliance.

Please submit the documentation detailed above to CDE as follows:

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

NOTE: Failure by 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 the Department. **Given the current circumstances surrounding the COVID-19 pandemic, the Department will work with District to address any 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. *CDE State-Level Complaint Procedures*, ¶13. If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶13; *See also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 23rd day of July 2022.



Ross Meyers
State Complaints Officer

APPENDIX

Complaint, pages 1-9

- Exhibit 1: IEP(s), Emails, Progress Reports

Response, pages 1-14

- Exhibit A: IEPs
- Exhibit B: Service Logs
- Exhibit C: Evaluation Reports
- Exhibit D: Progress Monitoring
- Exhibit E: Policies and Procedures
- Exhibit F: Parent Records Requests
- Exhibit G: Correspondence
- Exhibit H: List of Staff
- Exhibit I: Verification of Delivery to Parents
- Exhibit J: Additional Correspondence
- Exhibit K: Teacher Notes
- Exhibit L: Additional Policies and Procedures

Reply, pages 1-86

Telephone Interviews

- Case Manager: June 21, 2022
- Director of Special Education: June 22, 2022
- Special Education Teacher: June 22, 2022
- Parents: June 29, 2022