

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

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**State-Level Complaint 2013: 506**  
**Valley Logan School District, Re-1, Sterling**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on February 28, 2013, by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup>

Based on the written Complaint and a telephone interview with Parents on February 28, 2013, the State Complaints Officer (SCO) determined that the Complaint identified four 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.<sup>2</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

On March 25, 2013, the Parties voluntarily agreed to extend the 60-day investigation timeline to engage in mediation. The SCO notified the Parties in writing that the date for issuing a decision in this matter would therefore be extended from April 29, 2013, to May 29, 2013.

On April 5, 2013, the Parties notified the SCO that they were unable to resolve the complaint allegations through mediation. Consequently, the SCO immediately resumed the investigation and issues this decision in accordance with the extended timeline.

**PARENTS' COMPLAINT ALLEGATIONS**

Parents' Complaint raised four allegations, summarized as follows:

1. From the beginning of the 2012-2013 school year to present, the District has denied Student a free appropriate public education by:

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

<sup>2</sup> Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

- a. Failing to have an accurate and current IEP in place, as evidenced by the fact that Parents have been provided with three different versions of Student's November 2011 IEP; and by
  - b. Failing to review and revise Student's IEP at least annually, in accordance with 34 CFR §§ 300.320-324.
2. The IEP meeting on November 12, 2012, violated the IDEA because:
  - a. The only general education teacher present left the meeting before it concluded;
  - b. The IEP team did not present or discuss present levels of academic performance; and
  - c. The IEP team did not discuss or develop new annual goals.
3. The IEP meeting on December 10, 2012, violated the IDEA because a general education teacher was not present.
4. From the beginning of the 2012-2013 school year to present, Student's IEP has not been properly implemented, as evidenced by the following:
  - a. Student has not been educated in the general education environment 40-79% of the school day, including the school's month long delay in providing paraprofessional support so that Student could attend the general education science class;
  - b. The curriculum and classroom assignments in science class have not been appropriately modified;
  - c. Student has routinely arrived late and left early for [Student's] science class, resulting in a loss of 20 minutes of instruction for each class period;
  - d. Student has not received appropriate instruction in math, including access to computer and educational software;
  - e. The School did not follow Student's health plan on December 13, 2012 and January 14, 2013;
  - f. Student was given an alternative to the NWEA Fall and Winter 2012 test; and
  - g. The School has not provided Parents with progress monitoring reports or otherwise communicated with Parents concerning Student's progress.

**Summary of Proposed Remedies:** To resolve the Complaint, Parents proposed that the District complete Student's IEP and set appropriate goals as soon as possible; provide a private tutor during the summer to compensate for lack of progress; and transfer Student to a specific school within the District for the remainder of Student's education.

## **SUMMARY OF THE DISTRICT'S RESPONSE**

The District denied all allegations except allegation 4(f), which it admitted. Concerning allegation 4(d), the District acknowledged that there were some technological issues that needed to be resolved at the beginning of the school year so that Student could access ST Math, but asserted that Student has received appropriate instruction in math even without this program. In support of its assertions, the District submitted written, signed statements from relevant District staff, IEP meeting notes, samples of Student's work and assignments, lesson plans and lecture notes for science class, and assessments, including the written reports of recent evaluations.

## **SUMMARY OF PARENTS' REPLY**

Parents reiterated the allegations that were raised in the Complaint. In addition, Parents denied that they requested that Student's November 2011 IEP "stay put," asserting that the District is the party responsible for delaying the development of Student's IEP. Parents admitted that they received a progress report on November 13, 2012, but asserted that they had never seen the progress reports for the 2011-2012 school year that were submitted with the District's Response.

## **FINDINGS OF FACT (FF)**

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

### **Background:**

1. Student is [age] and lives with [Student's] Parents in the District. Student is in the [grade level] grade and attends School. Student is eligible for special education and related services as a child with multiple disabilities.<sup>4</sup>
2. Physically, Student has limited mobility and uses an electric wheelchair at school to get to and from class. Student also has limited fine motor skills and needs some assistance with certain classroom and daily living activities, such as writing, personal hygiene, and getting [Student's] lunch. When completing written assignments, Student needs physical assistance to trace and write letters, numbers and shapes.<sup>5</sup> Student also uses assistive technology, such as Go Talk 20,<sup>6</sup> an adaptive keyboard, and a large touch screen computer.<sup>7</sup> Although Student has

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<sup>3</sup> The appendix, attached and incorporated by reference, details the entire record.

<sup>4</sup> Exhibit 1, p. 42.

<sup>5</sup> Exhibit 1(b), p. 17; Exhibit 8, pp. 6-10; Interviews with Parents, Special Education Teacher, Special Education Director, and Paraeducator.

<sup>6</sup> The Go Talk 20 is an augmentative communication device.

<sup>7</sup> Exhibit 8; Exhibit 18; Interviews with Parents, Former Special Education Teacher, Special Education Teacher, and Special Education Director.

access to a touch screen computer, [Student] prefers to use a computer with a mouse.<sup>8</sup> To address medical/health needs, Student has an individualized health care plan.<sup>9</sup>

3. Educationally, Student performs below grade-level in all subjects. The most recent cognitive assessment, dated January 3, 2013, indicated that Student's basic reading, math, and cognitive skills are in the very low range when compared with other students [Student's] age. To participate in the general education classroom, Student requires one-to-one assistance from a paraeducator, and grade-level curriculum must be significantly modified. Representing an educational strength, Student has a good memory and knows [Student's] own class schedule as well as the schedules of the other students in [Student's] class.<sup>10</sup>

4. Socially, Student is friendly, engaging, polite, and well-liked by [Student's] peers and teachers. Student enjoys social interaction and is able to effectively communicate [Student's] wants and needs.

5. During the 2011-2012 school year, Student attended Former School, a middle school, where [Student] had the same special education teacher, Former Special Education Teacher, for the previous three years. Parents were satisfied, overall, with the special education programming and services Student was receiving at Former School.<sup>11</sup> At the beginning of the 2012-2013 school year, however, Parents became concerned that Student was not receiving appropriate instruction. Parents' concerns grew significantly after the November 2012 IEP meeting and eventually resulted in the filing of this Complaint.

6. In their Complaint, Parents raise three main concerns about Student's November 2011 IEP: 1) the IEP is not accurate, 2) the IEP was not timely reviewed and revised, and 3) the IEP was not properly implemented during the 2012-2013 school year. The SCO has organized the findings of fact consistent with these three areas of concern.

#### **Accuracy of the November 2011 IEP:**

7. Parents allege that Student has been denied a free appropriate public education (FAPE) since the beginning of the 2012-2013 school year because [Student's] November 2011 IEP is not accurate. Parents base this allegation on the fact that the District has provided them with three different versions of the same IEP. While the District admitted that Student's November 2011 IEP contained clerical errors, it asserted that the errors were minor and did not have a substantive impact on Student's education or parental participation in Student's education.

8. Between November 2011 and December 2012, Parents received three different versions of Student's November 2011 IEP from the District. Shortly after Student's IEP meeting on

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<sup>8</sup> Exhibit 8, p. 9.

<sup>9</sup> Exhibit 8, p. 10.

<sup>10</sup> Interviews with Former Special Education Teacher, Special Education Teacher, General Education Teacher, and Paraeducator.

<sup>11</sup> Interviews with Parents, Former Special Education Teacher, and Special Education Director.

November 29, 2011, Former Special Education Teacher sent a copy of the original IEP home with Student in [Student's] backpack.<sup>12</sup> On December 10, 2012, Parents requested, and received, another copy of Student's November 2011 IEP by email.<sup>13</sup> The second version of the IEP is the one available in Student's electronic file.<sup>14</sup> On December 12, 2012, Parents requested a copy of Student's special education file.<sup>15</sup> The third version of Student's November 2011 IEP is the one that was kept in the paper file.<sup>16</sup> The three versions of Student's November 2011 IEP will be referenced as follows: original, electronic, and paper.<sup>17</sup>

9. These three different versions were the result of corrections made to Student's IEP following the IEP meeting on November 29, 2011. Because the District's IEP software does not automatically check the IEP for discrepancies between various sections, Administrative Assistant proof-reads a student's IEP when it is received at the District's central office, enters the IEP into a master database, and files the IEP in student's special education file.<sup>18</sup>

10. On January 13, 2012, Administrative Assistant proof-read Student's November 2011 IEP and noticed the following clerical errors or discrepancies between the IEP cover page and various sections of the IEP:<sup>19</sup>

- The cover-page listed Student's primary disability as physical disability while the determination of eligibility page identified Student's primary disability as multiple disabilities.<sup>20</sup>
- The cover page identified Student's primary education environment as being in the general education classroom for 40-79% while Section 14 of the IEP, recommended placement in the least restrictive environment, identified Student's education environment as in the general education classroom for less than 40% of the time.<sup>21</sup>
- The dates for Student's next eligibility meeting and IEP review meetings had not been updated for the next year, inaccurately identifying the date of next eligibility meeting and IEP review as 11/29/2011, rather than 11/29/2014 and 11/29/2012.

11. Administrative Assistant contacted Former Special Education Teacher about the discrepancies on or around January 13, 2012. Former Special Education Teacher confirmed that

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<sup>12</sup> Exhibit 1(a), p. 3; Exhibit C, pp. 17-36; Interview with Parents and Former Special Education Teacher.

<sup>13</sup> Exhibit C, pp. 1-16; Interview with Parents and Former Special Education Teacher.

<sup>14</sup> Response; Interview with Special Education Director.

<sup>15</sup> Response; Exhibit 1(a), p. 5.

<sup>16</sup> Exhibit C, pp. 37-56; Interview with Special Education Director.

<sup>17</sup> Student's original IEP is identified as Exhibit C, pp. 17-36. Student's electronic IEP is identified as Exhibit C, pp. 2-16 and Exhibit 8, pp. 24-38. Student's paper-file IEP is identified as Exhibit C, pp. 37-53 and Exhibit 8, pp. 4-20.

<sup>18</sup> Exhibit 1(a), p. 1; Interview with Special Education Director.

<sup>19</sup> Exhibit 1(a), p. 1-2; Exhibit C; Interview with Administrative Assistant.

<sup>20</sup> Exhibit C, pp. 17 and 33.

<sup>21</sup> Exhibit C, pp. 17 and 29.

the information on the IEP cover-page regarding Student's primary disability and educational setting was incorrect and corrected Student's IEP in Infinite Campus, the District's electronic file system, so that the cover-page identified [Student's] primary disability as multiple disabilities and identified [Student's] primary education environment as in the general education classroom for less than 40% of the time. Although Former Special Education Teacher claimed that she sent the corrected cover-page home to Parents in Student's back-pack on the day that she made the changes, Parents claim that they never received the corrected cover-page. The SCO finds it more likely than not that this single-page was sent home in Student's back-pack, but was not remembered or retained because Parents did not have concerns about the special education services Student was receiving at this time.<sup>22</sup>

12. After Former Special Education Teacher made corrections to Student's electronic IEP, Administrative Assistant printed the IEP, corrected the dates for Student's next eligibility and IEP review meeting by hand, and filed the IEP in Student's paper-file. The corrections to the dates of meetings were never made to the electronic IEP. Consequently, Parents received three different versions of Student's IEP, the original, electronic, and paper. The School has subsequently implemented an internal procedure for ensuring that any corrections to an IEP are made to both the electronic and paper-file versions of a student's IEP and sent to parents.<sup>23</sup>

13. While Parents agree that the discrepancies on the IEP cover-page regarding the disability category and dates of meetings are clerical errors, they assert that Student's educational setting, i.e., 40-79% in the general education classroom, is not an error. Rather, Parents argue that the setting identified on the cover-page of the original IEP is what the IEP team intended.<sup>24</sup> The SCO does not agree.

14. Based on the credible evidence in the record, the SCO finds it more likely than not that Student's November 2011 IEP team determined that the least restrictive environment for Student was in the general education classroom for less than 40% of the time. First, Former Special Education Teacher, who was present at Student's IEP meeting and drafted the IEP, credibly stated that the intent of the IEP team was that Student be in the general education classroom for less than 40% of the time due to the level of support Student needed to access the curriculum. This is consistent with statements from Special Education Teacher, General Education Teacher, Paraeducator, and Special Education Director regarding the level of support Student requires to participate in a general education class. Second, the section of the IEP identifying the least restrictive environment required that the box for specifying the appropriate setting be checked on two separate sections. The box indicating "less than 40%" is consistently checked on both sections. This educational setting is also consistent with Student's 2010 IEP and the IEP drafted on April 22, 2013.<sup>25</sup> Accordingly, the SCO finds that the setting identified on the original version of Student's November 2011 IEP, i.e., in the general education

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<sup>22</sup> Interviews with Former Special Education Teacher and Parents.

<sup>23</sup> Interviews with Administrative Assistant, Former Special Education Teacher, and Special Education Director.

<sup>24</sup> Complaint; Reply; Interview with Parents.

<sup>25</sup> Exhibit H; Exhibit 18.

classroom for 40-79% of the time was a clerical error, rather than the setting intended by Student's IEP team.

15. Although clerical errors could arguably render an IEP so confusing and inaccurate as to deny FAPE, the SCO finds that the clerical errors described above did not substantively impact the delivery of Student's educational program, based on the following:

- There are no discrepancies between the three versions of Student's November 2011 IEP with regard to present levels of academic achievement and functional performance, annual goals, accommodations and modifications, service delivery statement, health care plan, and state/district assessments.<sup>26</sup>
- The substantive sections of the IEP identifying Student's eligibility category and describing [Student's] educational setting correctly identified Student as a student with multiple disabilities who would be participating in the general education environment for less than 40% of the time.
- Although the cover-page contained errors regarding Student's eligibility category and educational setting from November 29, 2011 to January 13, 2012, the individuals responsible for implementing the IEP were at the IEP meeting. Further, Former Special Education Teacher consults the substantive sections of the IEP for guidance when necessary, not the cover page.<sup>27</sup>
- The dates for the eligibility review were corrected in the paper-file used by Administrative Assistant to track IEP meeting dates, and the District scheduled Student's annual review IEP meeting, as required, before November 29, 2012. Further, Parents stated that they were not concerned about the inaccuracy of these dates because Student has been on an IEP since [Student] was in preschool and they know the District must schedule an annual IEP meeting each year.

#### **Development, Review, and Revision of Student's IEP:**

16. Parents allege that Student has been denied a free appropriate public education (FAPE) because the District has not reviewed and revised Student's IEP on an annual basis. Student's previous annual IEP review meeting was held on November 29, 2011.<sup>28</sup> Consequently, the District was required to review and revise Student's IEP no later than November 29, 2012, to be in compliance with 34 CFR § 300.324(b). Student's IEP was not reviewed and developed in a manner consistent with the IDEA's procedural requirements until April 22, 2013, a total of 142 calendar days, or nearly five months, after it was due.<sup>29</sup> For the reasons described below, the

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<sup>26</sup> Exhibit C, comparing pp. 12, 13, 27, 28, 48, and 49.

<sup>27</sup> Interview with Former Special Education Teacher and Special Education Director.

<sup>28</sup> Exhibit 8. This meeting was also an eligibility meeting.

<sup>29</sup> Exhibit 18.

SCO finds that the District violated 34 CFR 300.324(b) by failing to timely review and develop Student's IEP and that the failure resulted in a loss of educational opportunity for Student.

17. On November 12, 2012, the District timely convened an IEP meeting to conduct Student's annual review. Members of Student's IEP team included Parents, Special Education Director, Special Education Teacher, General Education Teacher, School Principal, and Occupational Therapist.<sup>30</sup> Special Education Teacher served as the meeting facilitator.

18. Parents allege that the November 12, 2012, IEP team did not discuss Student's present levels of academic achievement and functional performance, that General Education Teacher left before the meeting concluded, and that the IEP team failed to review and develop annual goals.

19. Contrary to Parents' allegation, Student's IEP team did discuss present levels of academic achievement and functional performance at the November 2012 IEP meeting. Special Education Teacher and General Education Teacher each discussed how Student was performing in class. The District's occupational therapist, who provides services to Student, also addressed Student's motor and assistive technology needs.<sup>31</sup> In addition, Special Education Teacher discussed the results of informal assessments she had conducted on August 24, 2012, in the areas of number recognition, counting, money recognition, letter recognition, and alphabet.<sup>32</sup>

20. When Special Education Teacher discussed the results of her assessments, and how Student was doing in math and reading, Father expressed disagreement. In response to Special Education Teacher's assessment that Student was performing at the kindergarten-level on the ST Math program, Father informed the IEP Team that Student was performing at the fourth grade-level the previous year.<sup>33</sup> Because Student was reportedly performing at a much higher grade-level the previous year, Father questioned the results of Special Education Teacher's assessments and requested further information on how the assessments were conducted, including the written results of the assessment and the data used to support the results.<sup>34</sup>

21. Special Education Teacher admitted that she mistakenly did not discuss Student's annual goals and objectives during the IEP meeting because she felt "overwhelmed" and "frazzled" by the line of questioning from Parents and "lost track" of the meeting agenda.<sup>35</sup> Special Education Director, who was present at the meeting, did not intervene to direct the team to discuss annual goals or offer to continue the IEP meeting for the purpose of completing Student's IEP. Rather, the IEP meeting concluded as if Student's IEP had been properly

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<sup>30</sup> Exhibit 2(b), p.1.

<sup>31</sup> Exhibit 2(a)-(e)(notes taken at Student's 11/12/12 IEP meeting); Interviews with Special Education Teacher, Special Education Director, General Education Teacher, and Parents.

<sup>32</sup> Exhibit 15, pp. 3-5; Interview with Special Education Teacher.

<sup>33</sup> Exhibit 3, p. 10; Interviews with Special Education Teacher and Parents.

<sup>34</sup> Interviews with Special Education Teacher and Parents.

<sup>35</sup> Exhibit 4, p. 13 (written statement of Special Education Teacher); Interviews with Special Education Teacher, Special Education Director, and Parents.

developed, without the IEP team discussing progress on Student's previous IEP goals or setting new annual goals. Based on the above, the SCO finds that IEP team did not review, discuss, or develop Student's annual goals at the November 2012 IEP meeting.

22. Both Parties agree that General Education Teacher, the only general education teacher present at the meeting, left before the IEP meeting concluded.<sup>36</sup> While Parents did not object to General Education Teacher leaving the meeting, the District did not request or obtain written parental consent for General Education Teacher's excusal, resulting in a technical violation of 34 CFR §§ 300.321(a)(2). General Education Teacher did share his assessment of how Student was performing in his classroom with the IEP team and was present for the discussion concerning Student's performance in his class.<sup>37</sup> There is no evidence that the departure of General Education Teacher impeded parental participation in the IEP process.

23. The evening of the IEP meeting, Mother called Special Education Director to complain that the IEP meeting ended without developing new goals for Student.<sup>38</sup> In response, Special Education Director told Parent that Special Education Teacher would "look at [Student's] current goals," review [Student's] progress, and "then determine if [Student] had met that goal or not."<sup>39</sup> Mother informed Special Education Director that she had not received any progress report and questioned whether Special Education Teacher knew what goals Student should be working on. Special Education Director told Mother that she would check the District's electronic system for a progress report and that they could schedule another IEP meeting to address annual goals.<sup>40</sup> Although it appears that a progress report on Student's November 2011 IEP goals was generated on November 12, 2012, the day of [Student's] IEP meeting, the SCO finds it more likely than not that progress on these goals was not discussed or shared at the IEP meeting. Rather, the District sent a copy of the IEP progress report after Mother informed Special Education Director that she had not yet received it.<sup>41</sup> The SCO finds that the failure to provide the progress report prior the IEP meeting impeded Parents participation at the November 12, 2012 IEP meeting because Parents lacked any information about Student's progress on [Student's] annual IEP goals prior to or at the IEP meeting.

24. As a result of Mother's phone call, the District scheduled an IEP meeting for December 10, 2012.<sup>42</sup> The notice stated that the purpose of the IEP meeting was an annual review and that a general education teacher would be in attendance.<sup>43</sup> Parents allege that the IEP meeting

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<sup>36</sup> Exhibit 2(e), pp. 5-7; Interviews with General Education Teacher, Special Education Teacher, Special Education Director, and Parents.

<sup>37</sup> Interviews with General Education Teacher, Special Education Teacher, Special Education Director, and Parents.

<sup>38</sup> Exhibit 4, p. 14 (Special Education Director's handwritten, contemporaneous notes of phone call with Mother on November 12, 2012 at 5:51 p.m.)

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Exhibit 13, pp. 5-6, Exhibit 4, p. 14; Exhibit 2(a)-(c); Interviews with Parents, Special Education Teacher, and Special Education Director.

<sup>42</sup> Exhibit 9, p. 5.

<sup>43</sup> Exhibit 5, p. 2 (Notice of Meeting).

on December 10, 2012, violated the IDEA because a general education teacher was not present when the meeting began.

25. At the beginning of the IEP meeting on December 10, 2012, Special Education Teacher announced that General Education Teacher was unexpectedly unable to attend the meeting.<sup>44</sup> Parents refused to have the IEP meeting without a general education teacher present.<sup>45</sup> Special Education Teacher asked Parents if they still would like to use this time to discuss their concerns. Parents agreed. Both the District and Parents further agreed that this meeting was no longer an IEP meeting, and the IEP meeting was rescheduled that day for December 17, 2012.<sup>46</sup> Based on these facts, the SCO finds that the meeting on December 10, 2012, was not an IEP meeting subject to IDEA's procedural requirements concerning IEP meetings. That said, the failure of the District to ensure that a general education teacher was available for Student's IEP meeting meant that Student's annual review meeting would be further delayed.

26. During the meeting on December 10, 2012, Parents requested an independent educational evaluation (IEE) to help Student's IEP team determine future goals and to explore the appropriateness of new technology tools, such as the iPad.<sup>47</sup> In response to Parents' request for an IEE, the District offered to have an outside provider, such as Children's Hospital or Assistive Technology Partners (ATP), conduct a state-wide assistive technology augmentative and alternative communication (SWAAAC) evaluation, while it conducted a vision assessment" to determine level of support for assistive technology."<sup>48</sup>

27. On December 11, 2012, Mother called Special Education Director to cancel the IEP meeting scheduled for December 17, 2012, because she wanted additional testing, specifically an IEE in the areas of cognitive and academic functioning.<sup>49</sup> Rather than conducting the evaluation itself, the District agreed to pay for additional evaluations to be conducted by an out-of-district professional and gave Parents a list of evaluators.

28. During this call, Mother and Special Education Director further agreed that Student's November 2011 IEP would remain in effect until the additional testing was completed—at which time the IEP team would reconvene to discuss the evaluation results and develop Student's IEP.<sup>50</sup>

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<sup>44</sup> Exhibit 5, p. 2; Complaint; Response; Interview with Parents, General Education Teacher, and Special Education Director.

<sup>45</sup> Interview with Parents, Special Education Teacher, and Special Education Director.

<sup>46</sup> Complaint, p. 6; Exhibit 5, p. 4.

<sup>47</sup> Exhibit 18, p. 2 ("An [IEE] was requested by the parents. The district offered a SWAAAC evaluation and vision technology assessment."); Response; Interviews with Parents, and Special Education Director.

<sup>48</sup> Exhibit 1(b), p. 4.

<sup>49</sup> Exhibit 1(b), p. 6; Interview with Special Education Director and Parent.

<sup>50</sup> Interviews with Mother and Special Education Director.

29. On January 9, 2013, the independent psychological evaluation was completed, and a copy was provided to Special Education Director.<sup>51</sup> The evaluator recommended the use of computer-based strategies to make progress in academic and functional skills, and instruction in skills necessary for independent living, including recognition of sight words necessary for independent living skills, basic math skills, and practice in following simple written directions. Finally, the evaluator recommended an additional evaluation to determine appropriate assistive technology “for the purpose of increasing academic skills and written communication.”<sup>52</sup>

30. On January 13, 2013, a vision technology assessment (VTA) was completed by the District’s Teacher of Visually Impaired (TVI), and a copy was provided to Special Education Director. In her report, TVI observed that Student may have a visual impairment “related to the eye muscles or to the macula,” and a visual processing disorder “related to the brain not being able to correctly interpret what the eyes are seeing.” Consequently, the TVI recommended that Student be examined by an ophthalmologist to determine if there was an underlying visual impairment or processing disorder. She also recommended a SWAAAC evaluation. Her recommendations for addressing Student’s visual needs in the classroom included positioning Student’s computer monitor, utilizing specific font size, and color-coding Student’s schedule and assignments.<sup>53</sup>

31. On January 16, 2013, Parent requested that the District “move forward” with developing Student’s IEP using the results of the psychological and vision assessments, rather than wait for the results of the SWAAAC evaluation.<sup>54</sup>

32. On January 22, 2013, the District refused Parents’ request by issuing prior written notice in which it stated that “is important, essential, and best practice to have all educational evaluations . . . available to us in order to create and implement the best possible educational plan for [Student].”<sup>55</sup>

33. On March 5, 2013, the District’s occupational therapist contacted ATP at Special Education Director’s request to inquire about the status of the SWAAAC report. ATP confirmed that Student’s SWAAAC evaluation was completed on February 27, 2013, and to expect the report within a couple of weeks.<sup>56</sup> Although Special Education Director provided Parents with the information to schedule an appointment with ATP in mid-December, Parents were not able to obtain an appointment until February 27, 2013.<sup>57</sup> Parents first tried to schedule an appointment with Children’s Hospital. On December 19, 2012, Children’s Hospital informed

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<sup>51</sup> Exhibit 1(b), pp. 7-15.

<sup>52</sup> Exhibit 1(b), p. 15.

<sup>53</sup> Exhibit 1(b), pp. 16-20.

<sup>54</sup> Exhibit 10, p. 5.

<sup>55</sup> Exhibit 10, p. 5.

<sup>56</sup> Exhibit 1(b), pp. 22.

<sup>57</sup> Interviews with Special Education Director and Parents.

Mother that they could evaluate Student for assistive equipment, but not technology. When Parents called ATP in late-December, ATP was booked solid, and the first available appointment that would work with Parents' work schedule was February 27, 2013. Accordingly, the SCO finds that this delay was the result of limited availability for appointments at ATP and not Parents' delay in scheduling the appointment. Further, Special Education Director was aware, as early as December 13, 2012, that Student was not likely to be evaluated by ATP until early to mid-February, based on the email she had received from the District's Occupational Therapist regarding availability of appointments at ATP.<sup>58</sup>

34. On or around, March 13, 2013, the District received the written report of the SWAAAC evaluation conducted by ATP.<sup>59</sup> The SWAAAC evaluation included recommendations for ergonomics and visual access to Student's computer, including positioning, recommended adjustments to settings, and software to assist with basic screen reading. For academic support, the report recommended electronic books from Bookshare and Learning Ally due to Student's vision impairment, and software using word-based templates to promote Student's writing ability. Like the VTA, the SWAAAC evaluation recommended Student be examined by an ophthalmologist to assess [Student's] visual impairment.<sup>60</sup>

35. After receiving the SWAAAC evaluation in mid-March, the District contacted Parents to schedule Student's IEP meeting. Although the IEP meeting was initially scheduled for April 5, 2013, the parties subsequently agreed to use this date to engage in mediation. Consequently, Student's IEP meeting was rescheduled for April 22, 2013. The SCO finds that Student's annual IEP, due November 29, 2012, was not reviewed and developed until April 22, 2013, a total of 142 calendar days, or nearly five months, after it was due. Notably, this entire delay occurred during the school year.

36. Both the VTA and SWAAAC reports indicated that Student may have an underlying visual impairment or visual processing disorder that should be evaluated by an ophthalmologist.<sup>61</sup> In preparing for the April 2013 IEP meeting, Special Education Director learned that Student was evaluated by a private ophthalmologist in 2012. The District's TVI and Special Education Director have requested a copy of this report, but Parents have not yet provided it.<sup>62</sup> At Student's April 2013 IEP meeting, Parents agreed to have a conference call with Student's private ophthalmologist, the District's TVI, and Parents to share information about Student's vision.<sup>63</sup> A conference call has been scheduled for May 13, 2013.<sup>64</sup> Because the IEP team noted that there is an ongoing concern about "what [Student] can actually see and process," this

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<sup>58</sup> Exhibit E, p. 8.

<sup>59</sup> Interview with Special Education Director.

<sup>60</sup> Exhibit 19, p. 6.

<sup>61</sup> Exhibit 1(b), p. 19; Exhibit 19, p. 7.

<sup>62</sup> Email correspondence with Special Education Director on April 26, 2012.

<sup>63</sup> Exhibit 18, p. 4; Interviews with Special Education Director and Parents.

<sup>64</sup> Interview with Special Education Director.

missing information is important in determining appropriate instructional supports and services.<sup>65</sup>

37. Based on the above, the SCO finds that the District failed to timely develop an IEP for Student consistent with 34 CFR § 300.324(b) when it failed to review progress on Student's November 2011 IEP goals and discuss annual goals at the November 12, 2012 IEP meeting. The failure to have a general education teacher present at the December 10, 2012 IEP meeting further delayed the review and revision of Student's IEP. Although the District agreed with Parents that Student should be evaluated in the areas of vision, assistive technology, and academic/functional skills, the District's decision to use independent evaluators, rather than conduct its own evaluation, further delayed the development of Student's IEP because it is Parents who arrange for the private evaluations and control the schedule.

38. Regardless of the reasons, the District argues that the delay in reviewing and revising Student's IEP did not result in a denial of FAPE because Student was receiving adequate educational programming through the implementation of [Student's] November 2011 IEP. Consequently, the SCO now considers whether Student's IEP was properly implemented and reasonably calculated to confer some educational benefit.

#### **Implementation of November 2011 IEP**

39. Parents assert that Student's IEP has not been properly implemented since the beginning of the 2012-2013 school year. Specifically, Parents assert that the Student has not been educated in the general education classroom for 40-79% of the school day, has not received appropriate instruction and modifications in science and math, and did not take the NWEA as required by [Student's] IEP. In addition, Parents assert that School has failed to follow Student's health plan, and provide Parents with progress reports.

#### **Health Care Plan**

40. The SCO begins with Parents' allegation concerning the failure to implement Student's health care plan. Parents base this allegation on several occasions where Student came home from school with food on [Student's] face and one occasion where Student came home smelling of urine. Student has a health care plan that is included in [Student's] November 2011 IEP. Student's health care plan primarily addresses medical needs that are related to seizure activity, as well as physical and safety needs that are related the use of a wheelchair and lack of fine motor skills. Identified interventions include providing Student with assistance when transferring from wheelchair to walker or toilet, and providing assistance with setting-up lunch.<sup>66</sup> There are no interventions listed for personal hygiene. While the SCO understands Parents' concerns, the occasional failure to check Student for personal hygiene does not represent a failure to implement the November 2011 health care plan. The SCO notes that the

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<sup>65</sup> Exhibit 18, p. 4.

<sup>66</sup> Exhibit 8, p. 29.

health care plan included in Student's April 2013 IEP does identify interventions related to personal hygiene, such as assisting Student with wiping [Student's] face and blowing [Student's] nose.<sup>67</sup>

### Educational Setting

41. Concerning Student's intended educational setting, the SCO does not agree that Student's November 2011 IEP team intended that Student's educational setting be in the general education classroom for 40-79% of the school day. See FF 13 and 14 above. Rather, the SCO finds that this setting code was a clerical error. Student's educational setting, as determined by the November 2011 IEP team, was in the general education classroom for less than 40% of the school day. Currently, Student participates in the general education classroom with support from a paraeducator for two out of eight class periods, science and physical education.<sup>68</sup> Although the District considered Student's music class a general education classroom, there are no general education students participating in this particular class. Consequently, the SCO does not consider it a general education classroom. Because Student is participating in the general education environment in a manner consistent with the November 2011 IEP, the SCO finds that the District is properly implementing Student's IEP with regard to educational setting.

### Science Class

42. Concerning Student's science class, Parents have alleged that the general education curriculum has not been appropriately modified. The SCO does not agree. General Education Teacher has modified the curriculum based on Student's unique educational needs by: developing modified lecture notes individually tailored to Student's needs that are also provided to paraeducator and parents; using manipulatives to explain basic concepts; and significantly modifying homework assignments and tests.<sup>69</sup> While the curriculum that Student is provided in science class matches the general education curriculum in terms of big ideas and essential concepts, it is significantly modified in terms of complexity and depth. For example, while the class was learning about the atom, students were tested on the ability to balance chemical equations. Student's assignments and tests were modified, however, to evaluate [Student's] ability to count the number of atoms of each element on either side of the equation.<sup>70</sup> Based on the credible evidence in the record, the SCO finds that General Education Teacher has modified the general education curriculum based on Student's needs.

43. Parents have also alleged that Student is not receiving appropriate instruction in science class because [Student] arrives late and leaves early. At Student's IEP meeting on November

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<sup>67</sup> Exhibit 20, p. 18.

<sup>68</sup> Exhibit 6, p. 7; Interviews with Special Education Teacher, Special Education Director, and General Education Teacher.

<sup>69</sup> Exhibit 6, pp. 53-81; Interviews with General Education Teacher, Paraeducator, and Special Education Teacher.

<sup>70</sup> Exhibit 6, p. 66; Interview with General Education Teacher and Paraeducator.

12, 2012, Mother asked General Education Teacher if Student was arriving on time for class. General Education Teacher reported that Student typically arrived five to ten minutes late and left early to avoid congestion in the hallways, as Student uses [Student's] wheelchair to travel to and from class.<sup>71</sup> General Education Teacher indicated that he was more concerned with Student leaving early because this is the time that students are still receiving instruction in content and homework assignments. Based on this discussion, the Special Education Teacher assured Parents that Student would transition to and from science class with other students and not miss any class time. General Education Teacher reported that Student has not arrived late or left early since this discussion on November 12, 2012, meaning this allegation has been remedied. While regular loss of instruction time may result in educational harm, there is no evidence that Student suffered a loss of educational opportunity by missing the very beginning and ending of class when homework assignments and content were reviewed individually and one-to-one with the paraeducator.

#### IEP Math Goal and ST Math Program

44. Parents have alleged that the District has failed to implement Student's IEP because [Student] did not have access to math-based computer programs, specifically ST Math, at the beginning of the school year. Student's math goal states:

[Student] will continue to increase [Student's] number sense, basic math calculation skills (with a calculator). [Student] will continue to improve on basic time & money skills. [Student's] goal in math is to be able to use [Student's] counting and basic math skill to help [Student] get through [Student's] daily routines. [Student's] NWEA goal is to maintain [Student's] score of (177 in +6 NWEA to 180) and (182 in +2 NWEA to 185) in the spring. [Student] is exposed 3-4 times a week to ST math or IXL math programs.<sup>72</sup>

The baseline data point was identified as Student's NWEA score for winter of 2011.

45. As part of [Student's] annual goal in math, Student is to be "exposed to the ST Math or IXL math program three to four times a week."<sup>73</sup> Student has not had access to IXL math during this school year and did not have access to ST Math until mid-October of 2012.<sup>74</sup> Accordingly, the District failed to implement this portion of Student's IEP goal in math for the first two months of the 2012-2013 school year by not providing access to any of the computer programs identified in Student's IEP as part of [Student's] goal in math.

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<sup>71</sup> Exhibit 2(b), p. 1 (Special Education Director's notes from IEP meeting); Interviews with General Education Teacher, Special Education Director, and Parents.

<sup>72</sup> Exhibit 8, p. 81.

<sup>73</sup> Exhibit 8, p. 31.

<sup>74</sup> Interview with Special Education Teacher.

### Measurability of Student's IEP Goal in Math

46. Because the failure to properly implement a student's IEP does not entitle a student to relief unless it is material, the SCO must also investigate the substantive impact this failure may have had on Student. In doing so, the SCO considers what role the computer program played in Student's IEP goal for math. The statement in Student's IEP, that [Student] is exposed to ST Math three times a week, describes an activity, not an academic goal, which makes it difficult to determine what purpose the program was intended to serve and consequently, what educational impact missing this activity would have had on Student. Because Student received instruction in math from Special Education Teacher during this time and the statement in Student's IEP regarding exposure to ST Math is not aligned with any academic goal, the SCO cannot find that the District's failure to provide access to this program for two months represented a material failure to implement Student's IEP.

47. Although the failure to provide Student with access to ST Math does not represent a material failure to implement the IEP, it does raise questions about the IEP itself, specifically, the measurability of Student's annual goal in math. ST Math is referenced as one way to measure progress on Student's annual goal in math to "be able to use [Student's] counting and basic math skill to help [Student] get through [Student's] daily routines."<sup>75</sup> The other identified units of measurement included the IXL Math program and the NWEA, the district-wide assessment. Student has not been provided with access to the IXL Math program and has not taken the NWEA during the 2012-2013 school year, leaving ST Math the only unit of measurement identified on [Student's] math goal that has been used to monitor progress.<sup>76</sup>

48. Embedded in Student's one annual goal in math, there appear to be five different goals or objectives. Unfortunately, none of them are defined with enough specificity to determine what the actual goal is, where Student started, or where [Student] is going. For example, what are "basic" time and money skills, and what skills are required to help Student get through daily routines? Indeed, what specific daily routines are these undefined skills intended to support? The annual goal, as stated in Student's IEP, simply does not contain the information necessary to answer any of these questions. Further, stating that Student will simply "improve" on these undefined math skills is so vague that there is no way progress can be objectively measured. Finally, there is no baseline to tell us where Student started. As a result, Student's annual goal in math is not measurable. The SCO does not need to determine whether Student's progress could be adequately measured without access to ST Math for the first two months of the school year because Student's annual goal for math is not measurable, with or without ST Math.

### Failure to Give Student the Regular NWEA and Measurability of Annual Goals in Language Arts

49. Related to the measurability of Student's math goal is the allegation that Student was not provided with the District's assessment, the NWEA, at the beginning of the 2012-2013

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<sup>75</sup> Exhibit 8, p. 31.

<sup>76</sup> Response; Interview with Special Education Teacher.

school year. According to Student's November 2011 IEP, [Student] is supposed to take the regular district-level assessment, which in this case would be the NWEA. The District admitted that Student was not given the NWEA. Special Education Teacher did not give Student the NWEA because she had been informed by Former Special Education Teacher that Student took CSAPA, the alternative state-wide assessment, and she presumed that [Student] would therefore take the alternate district-wide assessment, as well.<sup>77</sup> She was not aware that there was a primary version of the NWEA, so she gave Student the informal screenings, described above in FF 19, as an alternative to the NWEA.

50. Although Student's November 2011 IEP indicated that [Student] was to take the alternate assessment, Former Special Education Teacher stated that this must be a clerical error, considering that Student has always taken the primary version. For example, Student's 2010 IEP also stated that [Student] was to take the regular NWEA assessment, but Former Special Education Teacher reported that [Student] took the primary version that year as well because the grade-level version would be far too challenging.<sup>78</sup> In addition, both the 2010 and 2011 IEPs indicate that Student is to take the alternate state-wide assessments, here the CSAPA, which supports the assertion that designating Student to take the regular district-wide assessment was a clerical error.

51. While the SCO agrees that designating Student to take the regular NWEA is more likely than not an error, rather than what the IEP team intended, Student was not given the alternate, or primary version for the 2012-2013 school year. Because the NWEA is used as a baseline and unit of measurement for Student's math and reading goal, the failure to provide the alternate NWEA implicates the measurability of Student's goals. The SCO does not need to determine how the failure to provide Student with the NWEA impacted the measurability of Student's annual goals, however, because Student's annual goals are not measurable.

52. Like the annual goal for math, Student's annual goals for reading and writing lack the specificity to be measurable. Student's reading goal states:

[Student] will increase [Student's] level of comprehension by practicing on short stories and will achieve a 70% or higher on each activity. [Student] will continue to work on sight word recognition of functional daily useful words. [Student] will increase [Student's] NWEA scores from (+2 program score of 161 to 167 in Spring 2012).<sup>79</sup>

There is no baseline data point. Although the goal defines achievement as 70% or higher on each activity, there is no definition for what that activity is, what constitutes comprehension, what "functional daily useful words" are, or what it means to "practice" on a short story. In

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<sup>77</sup> Exhibit 6, p. 221 (written statement of Special Education Teacher); Interview with Special Education Teacher.

<sup>78</sup> Exhibit H, p. 11; Interview with Former Special Education Teacher.

<sup>79</sup> Exhibit 8, p. 32.

addition, a goal stating that Student will “continue to work on” sight words is a goal that identifies an activity, not an academic goal that could be used to measure progress in the general education curriculum. For these reasons, the SCO finds that Student’s reading goal is not measurable.

53. Student’s writing goal states that [Student] will be “encouraged to work on [Student’s] writing skills” and is “challenged daily to recognize functional sight words, signs, and different resources (phone books, cookbooks, the internet) that [Student] will need to be able to use in order [sic] to function on a daily basis.”<sup>80</sup> Like the reading goal described above, Student’s goal to be “encouraged” and “challenged” to work on writing skills describes an activity, not a measurable goal. In other words, this goal defines what staff will do, rather than what skills Student will be expected to achieve in the area for writing over the next year.

54. Furthermore, Student’s November 2011 IEP does not contain short-term objectives or benchmarks, as required by IDEA for students taking alternate state assessments. 34 CFR § 300.320(a)(2)(ii). Because short term objectives represent progressive, developmental steps for measuring progress in achieving the annual goal, the different goals that are embedded in a few of Student’s annual goals, e.g., math, cannot be considered short-term objectives. Accordingly, the SCO finds that in addition to failing to implement Student’s IEP with regard to the NWEA, the District has also violated the IDEA by failing to include short-term objectives.

#### IEP Progress and Reports

55. Because Student’s annual goals are not measurable, it is not possible to determine whether Student has made progress. That said, the SCO notes that Special Education Teacher has reported progress using data from ST Math, MobyMath, Click-n-Read, class assignments, and informal assessments. Although Special Education Teacher uses a variety of data to support her progress reports, progress reports demonstrate that Student continues to work on skills after meeting them with 100% accuracy. For example, Student was able to identify all coins and their values by November 12, 2012, yet continued to be tested in this area for the next two quarters when [Student] had continued to demonstrate this skill with 100% accuracy.<sup>81</sup> In addition, progress was identified as “being on ST Math at least 2X per week for the entire class period.” Simply documenting the time Student has spent on a computer-based math program does not tell us what, if any, progress Student has made in the general education math curriculum.

56. Also related to Student’s progress on IEP goals is the allegation that the District has not provided progress reports for the 2012-2013 school year. Student’s IEP states that Parents will receive quarterly progress reports.<sup>82</sup> According to the District’s academic calendar, Parents

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<sup>80</sup> Exhibit 8, p. 33.

<sup>81</sup> Exhibit 8, p. 31.

<sup>82</sup> Exhibit 8, p. 31.

should have received Student's first quarter progress report around October 18, 2012.<sup>83</sup> Parents did not receive Student's first quarter progress report until after Student's IEP meeting on November 12, 2012.<sup>84</sup> Accordingly, the SCO finds that the District failed to provide Student's first quarter progress report to Parents in accordance with [Student's] November 2011 IEP. Although Parents have been provided with quarterly progress reports for the remainder of the 2012-2013 school year, they did not receive the first progress report until nearly a month after it was due. This delay is significant because Parents had not received this report prior to Student's IEP November 12, 2012, IEP meeting; nor was progress on Student's annual goals discussed at this meeting. As a result, Parents were denied the meaningful opportunity to participate in the meeting.

57. Finally, the SCO notes that the results of Student's recent cognitive and educational assessments are just as likely the result of low expectations, inadequate instruction, and a lack of appropriate assistive technology as they are valid measures of [Student's] cognitive and academic abilities. First, the lack of measurable goals and short-term objectives, combined with having Student continue to work on skills that have been clearly achieved, indicate a concerning, low expectation of achievement and progress for Student. In addition, there is credible evidence that District staff underestimate Student's reasoning skills, such as [Student's] ability to understand the implications of statements made about [Student].<sup>85</sup> Recent evaluations further indicate that Student may have a visual impairment or processing disorder that has prevented [Student] from benefitting from previous instructional strategies or from being able to convey what [Student] knows. The finding that Student's educational and functional skills are underestimated is further supported by evidence of Student's strong oral communication and social skills, including [Student's] ability to independently and appropriately engage people in conversation, and by examples of [Student's] proficiency on the computer, such as teaching [him/herself] to log on to [Student's] ST Math program without help from anyone else.<sup>86</sup>

58. Based on the above, the SCO finds that the November 2011 IEP, regardless of how it was implemented, denied Student a FAPE because it lacked measurable goals in the areas of math and language arts. Thus, the failure to review and revise Student's November 2011 IEP resulted in the continuation of a violation that has denied Student a FAPE since the implementation of [Student's] November 2011 IEP, on or around November 29, 2011.

### **CONCLUSIONS OF LAW**

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

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<sup>83</sup> Exhibit 16, p. 3.

<sup>84</sup> Exhibit 4, p. 14; Interviews with Parents, Special Education Teacher, and Special Education Director.

<sup>85</sup> Exhibit M, p. 5; Interview with Parents.

<sup>86</sup> Interviews with Parents, Special Education Teacher, and Former Special Education Teacher; Exhibit 8, p. 26.

1. Any analysis of the appropriateness of an IEP must begin with the standard established by the United States Supreme Court in *Rowley v. Board of Education*, 458 U.S. 176 (1982), in which the Court set out a two-pronged analysis for determining whether an IEP has offered a FAPE. The first part of the analysis looks to whether the IEP development process complied with the IDEA's procedures; the second looks to whether the resulting IEP was reasonably calculated to confer some educational benefit upon the child. *Id.* at 207; *see also Thompson R2-J School Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008). If those two questions are satisfied in the affirmative, then the IEP is appropriate under the law.

2. Under the first "prong" of *Rowley*, the analysis looks to whether the IEP was developed according to the IDEA's procedures. When a student's IEP is developed in compliance with the IDEA's procedural requirements, *Rowley* holds that a certain degree of deference is to be given to the resulting IEP. "We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206. In this case, the analysis begins with whether the District violated the procedural requirements of the IDEA concerning the accuracy, and review and revision of Student's November 2011 IEP, including the allegations concerning the procedural adequacy of IEP meetings in November and December of 2012.

#### **Accuracy of the November 2011 IEP**

3. First, the SCO addresses the accuracy of the November 2011 IEP. Parents have alleged that Student's November 2011 IEP did not accurately reflect the IEP team's determination regarding the least restrictive environment. The IEP is a comprehensive written statement that identifies the unique educational needs of an eligible student and sets forth the specific special education programming and related services that will be provided to meet those identified needs. 34 CFR § 300.320. The IEP is the District's written offer of what it has determined constitutes a free appropriate public education (FAPE) for a particular student who is eligible to receive special education. 34 CFR § 300.17. At the beginning of the school year, the District must have an IEP in effect for each student with a disability that is accessible to every general and special education teacher, related services provider, and any other service provider who is responsible for its implementation. 34 CFR § 300.323(a) and (d). Consequently, an IEP that does not accurately reflect the decisions made by the IEP team or that contains inaccuracies that generate confusion concerning what programming and services are to be provided may constitute a denial of FAPE.

4. In this case, Parents had received three different versions of Student's November 2011 IEP with noted discrepancies between the dates for eligibility and annual review, disability code, and educational setting. Most concerning to Parents was the discrepancy between the cover-page of the original IEP, which identified Student's educational environment as in general

education classroom for 40-79% of the time, and the cover-page on other two versions, which identified the setting as in the general education classroom for less than 40% of the time. While the District argued that this was a clerical error, Parents asserted that the educational setting identified on cover-page of Student's original IEP was what Student's IEP team intended. The SCO found that the discrepancies were clerical errors that did not substantively impact the delivery of special education and related services. (FF 7-16).

### **Review and Revision of Student's IEP**

5. Second, the SCO addresses the procedural requirements involving the annual review and revision of Student's IEP which include whether the review was timely, the IEP team included the required participants, the IEP team reviewed and developed annual goals, and parents were afforded the opportunity to meaningfully participate in the development of their child's IEP. See 34 CFR §§ 300.320-324. Under the IDEA, each school district has an affirmative duty to ensure that a child's IEP team meets no less than annually to review and revise the IEP. 34 CFR § 300.324(b). In this case, Student's annual IEP review was due on or before, November 29, 2012. For various reasons, Student's IEP was not appropriately reviewed and revised until April 22, 2013, five months after it was due, in violation of 34 CFR § 300.324(b).

6. The District essentially argues that it should not incur liability for this technical violation because it held an annual IEP meeting for Student on November 12, 2012, and it was Parents' who requested that Student's November 2011 IEP remain in place while the evaluations they requested were completed. Parents argue that the IEP meetings on November 12, 2012, and December 10, 2012, violated the IDEA. (FF 16 and 38).

### **November 2012 IEP Meeting**

7. In conducting an annual IEP review, the IEP team must consider whether the annual goals are being achieved, and revise the IEP, as appropriate, to address any lack of expected progress toward annual goals and in the general education curriculum, the results of any reevaluation, information about the child provided to or by the parents, the child's anticipated needs, or other matters. 34 CFR § 300.324(b). Here, the IEP team failed to discuss progress on Student's November 2011 IEP goals or address new goals at the IEP meeting on November 12, 2012. The evening of the IEP meeting, Mother informed the Special Education Director that the team did not discuss new annual goals for Student. Special Education Director's first response was not to immediately convene another IEP meeting but to suggest instead that Special Education Teacher review the goals to determine if [Student] had made progress on [Student's] goals. It was when Mother stated she had never received a progress report and questioned Special Education Teacher's knowledge of Student's IEP goals that Special Education Director offered to convene another IEP meeting. (FF 17-24). Accordingly, the SCO concludes that the IEP meeting on November 12, 2012, violated the IDEA's procedural requirements concerning the development, review, and revision of IEP at 34 CFR § 300.324(b) when the IEP team failed to discuss progress on Student's IEP goals or revise the goals to address any lack of progress.

8. The SCO further concludes that the failure to provide Parents with Student's IEP progress report in accordance with [Student's] IEP, and before the IEP meeting on November 12, 2012, impeded parental participation, in violation of 34 CFR § 300.322. A school district must periodically report a student's progress toward meeting annual goals to Parents, in accordance with the schedule described in the IEP. 34 CFR § 300.320(a)(3). Here, Student's IEP stated that Parents were to receive progress reports on a quarterly basis. Parents did not receive the first progress report of the 2012-2013 school year until after the quarter had ended and after Student's November 2012 IEP meeting. Because Parents were not provided with information regarding Student's progress before or during [Student's] IEP meeting, their participation in the development of [Student's] educational program was impeded. (FF 21, 23, and 55-56).

9. Finally, the District violated the IDEA's procedural requirements regarding IEP team members by failing to properly excuse General Education Teacher. The IEP team must include at least one general education teacher if the child is or may be participating in the regular education environment. 34 CFR § 300.321(a)(2). A required member of an IEP team may be excused from attending the meeting, in whole or in part, when the meeting involves a discussion of the member's area if the parent and the district consent to the excusal in writing and the member submits written input into the development of the IEP prior to the meeting. 34 CFR § 300.321(e)(2). Here, General Education Teacher, the only general education teacher present, left the IEP meeting before it concluded. Because Student participates in the general education class, a general education teacher was a required member of Student's IEP team. Although General Education Teacher was present for a discussion concerning Student's participation in his class, Parents did not consent to his excusal in writing and he did not submit written input prior to the meeting, resulting in a violation of 34 CFR § 300.321(e)(2). (FF 22).

#### December 2012 IEP Meeting

10. Parents also alleged that the December 10, 2012 IEP meeting violated the IDEA because a general education teacher was not present. The meeting scheduled on December 10, 2012, was initially scheduled as an IEP meeting. At the start of the meeting, the District discovered that the general education teacher invited to participate was unexpectedly absent. Parents refused to participate in an IEP meeting without a general education teacher present and the meeting was rescheduled. Although the parties agreed that the meeting was no longer an IEP meeting, they continued to meet to discuss general concerns. Accordingly, the SCO found that the meeting on December 10, 2012, was not an IEP meeting subject to the procedural requirements of the IDEA. (FF 25-26). The failure to secure the attendance of a general education teacher at the IEP meeting scheduled for December 2012 did, however, delay the review and revision of Student's IEP.

### Delay Resulting from Evaluation Process

11. Unfortunately, the District further compounded the delay in reviewing and revising Student's November 2011 IEP by essentially turning the IDEA evaluation process on its head. Parents of a child with a disability have the right to obtain an independent educational evaluation if they disagree with an evaluation obtained by the school district. 34 CFR § 300.502(b). At the December 10, 2012 meeting, Mother requested an IEE, though the District had not done an evaluation with which she disagreed. Thus, Parents were not entitled to an IEE; rather, the District should have treated Mother's request as one for a reevaluation and conducted the evaluation itself. (FF 26-27). While nothing in the law prevents a school district from agreeing to pay for private evaluations at parent request, in this case, by doing so, the District gave up its ability to ensure the quality of the evaluation or to have any control over the timing of the evaluation. Although Parents certainly did not engage in an intentional effort to delay evaluations, logistical difficulties and availability of appointments at ATP resulted in a lengthy delay in completing the evaluations. Specifically, the District gave Parents approval for the SWAAC evaluation on December 12, 2012, but the report was not available until mid-March 2013. (FF 33-35).

12. Compounding the delay further, the District refused Parents' request to move forward with developing Student's IEP on January 16, 2013, claiming that it could not review or revise Student's IEP without first obtaining the private evaluations that Parents were in the process of obtaining. (FF 31-32). The problem with this stance is that if the District believed that it required a reevaluation of Student in order to, *inter alia*, determine appropriate instructional strategies and support, then it should have either requested consent to conduct its own evaluations, by experts of its own choosing, arguably before or at the November 2012 IEP meeting, or at a minimum, treated the Parents' request for an IEE as a request for a reevaluation, and proceeded accordingly. See 34 C.F.R. § 300.303(a)(1)-(2) ("A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311—(1) if the public agency determines that the educational or related services needs ... of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation.") Essentially, the SCO concludes that by granting Parents' December 2012 request for an IEE, when the Parents were not entitled to one, and then refusing to review or revise an already "overdue" IEP until those private evaluations were completed, the District unreasonably delayed the review and revision of Student's IEP and impeded parental participation in the development of Student's educational program.

### Substantive Harm Resulting from Procedural Violations

13. Concluding that the District committed the above procedural violations concerning the review and revision of Student's November 2011 IEP, the SCO addresses whether the procedural violations resulted in a denial of educational benefit or deprived parents the ability to participate meaningfully in the IEP process. Procedural violations in the development of an IEP do not necessarily entitle a student to relief. *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d

1306, 1313 (10th Cir. 2008). Rather, the SCO must also determine “whether the procedural errors resulted in substantive harm to the child or his parents; deprived an eligible student of an [IEP]; or resulted in the loss of an educational opportunity.” *Id.* (internal quotations omitted).

14. The procedural violations described above resulted in the failure to timely review and revise Student’s November 2011 IEP. In other words, the procedural violations associated with Student’s November 2012 IEP meeting, combined with the improper handling of Parents’ request for an IEE, resulted in Student not having a properly reviewed and revised IEP until April 22, 2013, five months after it was due.

15. In determining whether the procedural violations deprived Student of an educational opportunity, the SCO considers whether the November 2011 IEP was substantively appropriate, i.e., reasonably calculated to confer some educational benefit. *Rowley, infra*. The District has argued that the five-month delay in developing Student’s IEP did not result in a denial of FAPE because Student was receiving adequate educational services through the November 2011 IEP. In reviewing whether the November 2011 IEP was substantively appropriate, the SCO concludes that it was not, because the goals set out in the November 2011 IEP were not measurable. (FF 44-54).

16. A student’s IEP must contain measureable annual goals that are designed to meet the child’s disability related needs and enable the child to access and make progress in the general education curriculum, including a description of how progress towards the annual goals will be measured and how often progress will be reported to parents. 34 CFR § 300.320 (a)(2) and (3). For students who take alternate assessments, the IEP must also include a description of short-term objectives or benchmarks. 34 CFR § 300.320 (a)(2)(ii). IEP goals are immeasurable when they contain vague, subjective, and undefined targets. *Ind. Sch. Dist. No. 701 v. J.T. by C.L.*, 45 IDELR 92 (D. Mn. 2006). In the *J.T.* case, the court determined that a student’s IEP goals in math and reading were immeasurable when they defined the range of conduct too broadly, did not clearly define what math and reading skills were required for independent living, and did not provide objective criteria against which progress could be measured. *Id.* For example, the court determined that an annual goal to “improve functional academic skills. . . to a level of being able to read, write, and do basic math skills independently” was too vague because it was unclear what reading, writing, and math skills were required for independent living.

17. Here, as in the *J.T.* case, Student’s goals for math and reading are immeasurable because they do not specifically define what basic math and reading skills are required to help Student get through [Student’s] daily routines or how improvement in these skills would be objectively measured. Further, Student has goals which describe an activity, such as exposure to the ST Math program, that are not aligned with an objectively measured academic or functional skill. Consequently, the SCO finds that Student’s November 2011 IEP lacks measurable IEP goals. (FF 44-54).

18. An IEP that does not contain measurable goals is one that is not reasonably calculated to confer educational benefit. *Escambia County Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248, 1275 (S.D. Ala. 2005). “Vague and [immeasurable] objectives are the handmaiden of stagnation, as a program cannot possibly confer an educational benefit to [the student] if his teachers and parents do not know where they are trying to take [him] and how they will know when he has arrived.” *Id.* By failing to include measurable IEP goals in Student’s November 2011 IEP, the District has denied Student a FAPE from the time [Student’s] IEP was implemented, on or around November 29, 2011, through April 22, 2013, the date [Student’s] IEP was revised.

19. While the SCO acknowledges that Parents agreed that Student would continue to receive special education programming and services in accordance with the November 2011 IEP while the evaluations were completed, the November 2011 IEP was not reasonably calculated to confer educational benefit because it lacked measurable annual goals. Consequently, the failure to timely conduct Student’s annual review, regardless of the reasons, represented a continuing, substantive violation that resulted in a deprivation of educational benefit from November 29, 2011, through April 22, 2013.<sup>87</sup> 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

20. Because [Student] has been denied a FAPE, Student is entitled to compensatory education. Compensatory education is an equitable remedy intended to place a student in the same position they would have been, if not for the violation. *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Due to the length of time this violation represents, the SCO concludes that Student is entitled to 112.5 hours of direct, individualized instruction in the areas of math and literacy. In designing this instruction, the District will ensure that the special education teacher confers with a general education teacher(s) in both math and literacy for grade-level content. In addition, the District shall consult with an out-of-district professional who has extensive experience in the instruction of students with significant support needs (SSN) and with ATP.

#### **Implementation of November 2011 IEP during the 2012-2013 School Year**

21. Finally, the SCO addresses Parents’ allegations concerning the implementation of Student’s November 2011 IEP. Under IDEA, local education agencies such as the District are required to provide eligible students with disabilities with a free appropriate public education (FAPE) by providing special education and related services individually tailored to meet the student’s unique needs and provided in conformity with an individualized education program developed according to the Act’s requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA

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<sup>87</sup> The SCO’s jurisdiction is limited to IDEA violations occurring one year prior to the date a state complaint is filed. 34 CFR § 300.153(c). In this case, the appropriateness of the November 2011 IEP is subject to the SCO’s jurisdiction to the extent it was implemented in the one year period preceding the filing of Parent’s Complaint (on February 28, 2013). Accordingly, the relief the SCO awards in this Decision flows from the denial of FAPE starting on February 29, 2012.

Rule 2.19. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to implement an IEP can result in a denial of FAPE. *Id.*

22. Here, Parents alleged that the District failed to properly implement Student's IEP in various ways, including: implementing the IEP in the wrong educational setting; failing to properly implement Student's health care plan; failing to provide appropriate instruction time and modify the curriculum in science class; failing to provide appropriate instruction in math; failing to follow Student's IEP regarding district assessments; and failing to provide progress reports in accordance with the IEP. The SCO found that Student's IEP was implemented consistent with the education setting intended by [Student's] IEP team, i.e., in the general education setting for less than 40% of the time, that [Student's] health care plan had been properly implemented, and that instruction and modification of curriculum in Student's science class was consistent with [Student's] IEP. (FF 13-14, and 40-43). Accordingly, the SCO concludes that Student's IEP was properly implemented with regard to these allegations. (These allegations are also identified in the summary of Parents' allegations as 4(a)-(c) and (e).)

23. Parents also alleged that Student did not have access to a computer-based math program for the first part of the 2011-2012 school year and that [Student] was not given the NWEA, as required by [Student's] IEP. The District admitted that it had not been able to provide Student with access to the ST Math program until mid-October of 2012 and that it did not offer Student the NWEA, as indicated on [Student's] IEP. Accordingly the SCO found that the District failed to implement Student's IEP with regard to these specific requirements. (FF 45).

24. Not every deviation from an IEP's requirements, however, results in a denial of FAPE. *E.g., L.C. and K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10<sup>th</sup> Cir. 2005)(minor deviations from IEP's requirements which did not impact student's ability to benefit from special education program did not amount to a "clear failure" of the IEP); *Van Duyn v. Baker Sch. Dist.* 5J, 481 F.3d 770 (9<sup>th</sup> Cir. 2007)(failure to implement IEP must be material to incur liability under IDEA, and minor discrepancies between the services provided and the services called for do not give rise to an IDEA violation); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8<sup>th</sup> Cir. 2003)(failure to implement "essential" element of IEP denies FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir.2000)(*de minimis* failure to implement IEP does not deny FAPE). This means that a finding that a school district has failed to implement a requirement of a child's IEP does not end the inquiry. Rather, the SCO must also determine whether the failure was material.

25. The SCO could not, however, determine the substantive impact of these technical failures due to the vagueness and immeasurability of Student's IEP goals as they related to the ST Math program and the NWEA. Concerning the ST Math program, Student's IEP stated that [Student] was to be "exposed" to this or another computer-based program three to four times a week. This activity, however, was not linked to a measurable goal in math. Consequently, it

was not possible to determine what impact, if any, missing this program for two months at the beginning of the school year had on Student. (FF 46-48). Concerning the NWEA, Student's IEP listed this assessment as a unit of measurement for Student's math and reading goals. Because the NWEA was embedded into Student's IEP goals for reading and math as a unit of measurement, the SCO was required to consider what impact the loss of this assessment would have on determining Student's progress towards [Student's] IEP goals, i.e., whether the failure to provide this assessment was material. Like the allegation concerning ST Math, the SCO found that it was not possible to determine if the failure to provide the assessment was material because Student's goals were immeasurable, with or without the results of the NWEA. (FF 49-54).

26. The fact that the SCO is not able to determine whether these technical violations regarding implementation of Student's IEP were material does not excuse the District from liability because the SCO concludes that the lack of measurable annual goals on Student's November 2011 IEP denied Student a FAPE from the date it was implemented, on or around November 29, 2011, until April 22, 2013, the date Student's IEP was revised. Further, the failure to provide Parents with IEP progress reports before the November 2012 IEP meeting, and the subsequent failure to review Student's progress on [Student's] IEP goals at the meeting itself, denied Parents a meaningful opportunity to participate in the development of Student's educational program. In conclusion, the failure to timely review and revise an inadequate IEP, including the procedural violations associated with the November 12, 2012 IEP meeting, resulted in substantive harm to Student and Parents which entitles Student to relief.

### **REMEDIES**

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

- a) Definition of IEP at 34 CFR § 300.320(a)(2);
- b) IEP team at 34 CFR § 300.321(e);
- c) Parent participation at 34 CFR § 300.322; and
- d) Development, review, and revision of IEP at 34 CFR § 300.324(b);

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

- 1) **By June 21, 2013**, the District must submit to the Department a proposed corrective action plan (CAP) that addresses each and every violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
  - a) Submission of compliant, written policies and procedures and, as applicable, compliant forms that address each of the cited violations, no later than **August 6, 2013**.

- b) Effective training must be conducted for all Special Education Directors and intended designees concerning the policies and procedures, to be provided no later than September 27, 2013.
- c) Training in the development of measurable annual goals for students with significant needs in the areas of math and literacy for all special education directors, intended designees, and special education teachers. The training must include development of measurable annual goals that are rigorous, contain measures appropriately aligned with targets, and designed to meet the child's needs resulting from the child's disability and enable the child to be involved in the general education curriculum.
- d) Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to CDE no later October 11, 2013.

The Department will approve or request revisions to the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance. At the request of the District, CDE is willing and able to provide the training specified above.

## **2) Compensatory Education Services for Failure to Provide Student with a FAPE.**

- a) The District shall provide Student with 112.5 hours of direct, individualized instruction in the areas of math and literacy. To document the provision of these services, the District must submit records of service logs to CDE by the second Monday of each month until May 28, 2014.
- b) In developing this instruction, the District shall ensure that the special education teacher providing the services confers with a general education teacher for math and literacy for grade-level content on a monthly basis to monitor Student's progress and adjust instruction accordingly. The District must submit documentation that these conferences have occurred by the second Monday of each month until May 28, 2014.
- c) In addition, the District shall consult with an out-of-district special education professional who has extensive experience teaching students with significant support needs to review instructional strategies and Student's progress. This consultation must occur within the first week of compensatory services, and once every three months until May 28, 2014. Upon request, CDE is able to provide the District with a list of qualified consultants. The District must submit documentation to CDE that these consultations have occurred.
- d) Finally, the District shall consult with ATP within the first week of compensatory services, and once again approximately six months after the initial consult, to ensure

that Student's assistive technology needs are being met with regard to instructional strategies. The District must submit documentation to CDE that these consultations have occurred.

Parents are expected to provide access to Student's ophthalmological records, if they have not already done so, prior to this initial consultation. If Parents refuse to cooperate in providing these records or refuse to provide consent for the District to consult with Student's private ophthalmologist, the District shall be excused from consulting with ATP.

These compensatory services shall be in addition to any services Student currently receives, or will receive, that are designed to advance Student towards IEP goals and objectives, including ESY. The Parties shall cooperate in determining how the compensatory education services will be provided, with special consideration to Student's needs, stamina, and family schedule. The consultation required with out-of-district providers shall be at the District's expense.

The District shall provide the Department with documentation that it has complied with this requirement no later than May 28, 2014. Documentation must include the service logs for providing compensatory services, documentation that special education teacher(s) has conferred with general education teacher(s) and outside consultants, and the contracts for consulting with an out-of-district SSN specialist and ATP.

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

Colorado Department of Education  
Exceptional Student Services Unit  
Attn.: Joyce Thiessen-Barrett  
1560 Broadway, Suite 1175  
Denver, CO 80202-5149

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

### **CONCLUSION**

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. See, 34 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

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

Dated this 28<sup>th</sup> day of May, 2013.

*Candace Hawkins*

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Candace Hawkins, Esq.  
State Complaints Officer

## Appendix

### Complaint, pages 1-7.

- Exhibit A: Notice of Meeting for November and December 2012 IEP meeting.
- Exhibit B: Prior written notice dated December 2012.
- Exhibit C: Three different versions of Student's November 2011 IEP.
- Exhibit D: Parents' meeting notes.
- Exhibit E: Email correspondence between Parents and School.
- Exhibit F: Student's grades and assessment results.
- Exhibit G: Student planner and sample of completed class assignments.
- Exhibit H: November 2010 IEP.

### Reply, pages 1-4.

- Exhibit I: Copies of Student's planner.
- Exhibit J: Email correspondence between Parents and School.
- Exhibit K: Statement from Parent regarding incident on 2/16/2013.
- Exhibit L: Statement from Parent regarding conversation with Principal.
- Exhibit M: Email correspondence and note from Parent. Hand-delivered to SCO on day of interviews.

### Response, pages 1-14.

- Exhibit 1 (a): Signed statements from District staff, notes, and correspondence between Parents and District staff.
- Exhibit 1(b): IEP meetings notes, consent to evaluate, and evaluation reports.
- Exhibit 2 (a): November 2012 IEP meeting notes and signed statements from District staff.
- Exhibit 2 (b): November 2012 IEP meeting notes and signed statements from District staff.
- Exhibit 2 (c): Student work samples, meeting notes, and signed statements from District staff.
- Exhibit 2 (d): November 2012 IEP meeting notes from School principal.
- Exhibit 2 (e): Documentation from General Education Teacher regarding meetings with Parents.
- Exhibit 3: Signed statement from Special Education Teacher regarding November 2012 IEP meeting.
- Exhibit 4: Student work samples, Special Education Director notes, and notice of meeting.
- Exhibit 5: Email correspondence, notice of meeting, and December 2012 meeting notes.
- Exhibit 6: Signed District staff statements, email correspondence, service logs, meeting notes, progress reports, lesson plans, assignments, tests, and class outlines.
- Exhibit 7: Student's November 2012 IEP, meeting notes, and email correspondence.
- Exhibit 8: Hand corrected copy of Student's November 2012 IEP and electronic copy of Student's November 2012 IEP.
- Exhibit 9: Notices of meeting from August 2012 to present.
- Exhibit 10: Prior written notices from August 2012 to present.
- Exhibit 11: District policies and procedures concerning development of IEPs.

- Exhibit 12: Student's grades and progress reports for the 2011-2012 school year.
- Exhibit 13: Student's grades and progress reports for the 2012-2013 school year.
- Exhibit 14: District assessments for the 2011-2012 school year.
- Exhibit 15: District assessments for the 2012-2013 school year.
- Exhibit 16: District calendar for the 2012-2013 school year.
- Exhibit 17: Contact information for relevant District staff.
- Exhibit 18: Draft IEP dated 4/22/2013.
- Exhibit 19: SWAAAC evaluation dated 2/27/13.
- Exhibit 20: Final IEP dated 4/22/13, including rubric for math and reading objectives, and meeting agenda and norms

**Interviews with:**

- Special Education Director
- Former School Special Education Teacher
- Special Education Teacher
- Paraprofessional
- General Education Teacher
- Parents