

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

**State-Level Complaint 2019:558
Mesa County Valley School District 51**

DECISION

INTRODUCTION

The parents (“Parents”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Mesa County Valley School District 51 (“District”) on September 6, 2019.

The State Complaints Officer (“SCO”) determined that the Complaint identified one allegation 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. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

The Colorado Department of Education (“CDE”) has the authority to investigate allegations of violations that occurred not more than one year from the date the original complaint was filed. 34 C.F.R. §300.153(c). Accordingly, this investigation will consider only events that occurred not earlier than September 6, 2018 in determining whether or not a violation of IDEA occurred. *Id.* Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

SUMMARY OF COMPLAINT ALLEGATION

Whether the District denied Student a free appropriate public education (“FAPE”) by:

1. Failing to develop an IEP in May 2019 that was tailored to meet Student’s individualized needs by:

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

- a. Not allowing Parents or others with special expertise regarding Student to meaningfully participate in the May 1, 2019 IEP meeting where Student's IEP was developed, consistent with 34 C.F.R. §§ 300.321(a)(1) and 322;
- b. Not considering the concerns of Parents for enhancing the education of Student at the May 1, 2019 IEP meeting and in the development of Student's May 14, 2019 IEP, consistent with 34 C.F.R. § 300.324(a)(1)(ii);
- c. Not considering recent evaluations of Student at the May 1, 2019 IEP meeting and in the development of Student's May 14, 2019 IEP, consistent with 34 C.F.R. § 300.324(a)(1)(iii); and
- d. Not considering the academic, developmental, and functional needs of Student at the May 1, 2019 IEP meeting and in the development of Student's May 14, 2019 IEP, consistent with 34 C.F.R. § 300.324(a)(1)(iv).

FINDINGS OF FACT

After thorough and careful analysis of the entire record,² the SCO makes the following FINDINGS OF FACT ("FF"):

A. Background

1. Student is currently eligible for special education and related services under the disability categories of Other Health Impairment ("OHI") and Visual Impairment. *Exhibit A*, p. 40. For the last two academic years, Student has been enrolled at a middle school in the District. *Id.* Student is currently in the seventh grade.
2. Student is described as a positive young woman with a wonderful personality. She enjoys making other people laugh and loves coming to school. *Interviews with Parents, Special Education Teacher, Teacher for the Visually Impaired ("TVI"), and Paraprofessional.* Student wants to own her own bakery when she grows up. *Interview with Parents.*
3. In the classroom, Student struggles with loud noises, fatigue, and new tasks. *Interviews with Special Education Teacher, TVI, and Paraprofessional.* Loud noises provoke Student to utter angry remarks at the noisemaker, whether it be another student or an inanimate object. *Interviews with Special Education Teacher and Paraprofessional.* Student often complains of being tired immediately upon arrival at school. *Interview with TVI.* During the school day, Student sometimes falls asleep at her desk or asks to rest her head for a few minutes. *Interviews with Special Education Teacher and Paraprofessional.* She has trouble following

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

multi-step directions and needs additional prompting to stay on task. *Interviews with Special Education Teacher, TVI, and Paraprofessional.*

4. Student has been receiving special education and related services since preschool. *Exhibit B*, p. 63. As a child with a Visual Impairment, Student was exposed to braille as early as 18 months of age. *Interview with Parents.* In elementary school, Student worked to develop braille readiness skills and, in fifth grade, began receiving instruction using a braille curriculum. *Id.*; *Interview with TVI.*

5. As of October 2019, TVI indicated that Student can read 14 of the 26 letters in braille when there are spaces between the letters. *Interview with TVI.* When there are no spaces between the letters—such as in words—Student struggles to identify where one braille cell begins and one ends. *Id.* Without spaces, Student can only tactually discriminate one letter consistently. *Id.* Student’s inability to tactually identify braille letters without spaces limits her ability to read braille words. *Id.* Additionally, Student reads braille very slowly. *Id.* For these reasons, Student cannot be expected to access her curriculum using braille, meaning braille is not currently a functional learning mode for Student. *Id.*

6. Parents and TVI concede that Student’s progress in braille has been slow, yet Parents hope Student will become a dual media learner. *Id.*; *Interview with Parents.* But for Parents’ desire, TVI would not recommend Student continue learning braille. *Interview with TVI.*

7. As part of Student’s reevaluation, District performed additional evaluations of Student in May 2018, including: (a) Wechsler Intelligence Scale for Children-V, (b) Woodcock-Johnson IV Tests of Achievement Form A, (c) Adaptive Behavior Assessment System, Third Edition, (d) Functional Vision Assessment (“FVA”), (e) Learning Media Assessment (“LMA”); and (f) Orientation and Mobility Evaluation (collectively, “May 2018 evaluations”). *Exhibit B*, pp. 63-89. The District also considered Student’s benchmark assessments from fifth grade, anecdotal behavior information, and evaluations of Student performed at an outpatient neuropsychology clinic in October and November 2016. *Id.*

8. Overall, the May 2018 evaluations found that Student’s cognitive abilities were below average as compared to other children her age. *Id.*, p. 71. However, while utilizing her visual and auditory senses in the classroom, Student was demonstrating growth in literacy—writing in particular—though she was still below grade level. *Id.*, p. 64.

9. Notably, the LMA found that Student uses her vision as her primary source of gathering information and her auditory sense as a secondary source. *Id.* at 85. The LMA recommended that Student continue to access the curriculum using print enlargement or visual mode with optical enhancement, with auditory mode as her secondary means of access. *Id.*; *Exhibit A*, pp. 96-97.

10. In August 2018, the IEP Team met to review Student’s eligibility for special education and related services. *District’s Response*, p. 4. The IEP Team confirmed Student’s eligibility

and—after considering the May 2018 evaluations—finalized Student’s IEP on August 31, 2018. *Id.*

11. Parents remained dissatisfied with the May 2018 evaluations and the resulting August 31, 2018 IEP. *Interview with Parents.* Parents’ dissatisfaction led them to request an Independent Educational Evaluation (“IEE”) of Student in December 2018. *Id.*

12. The current dispute relates to the adequacy of the IEP developed after the IEE and Parents’ participation in the development of that IEP.

B. The Independent Educational Evaluation

13. On December 10, 2018, Parents requested an IEE of Student. *Exhibit I*, p. 93.

14. On December 27, 2018, the District agreed to an IEE—at District expense—containing a FVA, LMA, and an Orientation and Mobility Evaluation. *Id.* At that time, the District provided Parents with a list of potential IEE evaluators. *Id.* Parents subsequently selected the Colorado School for the Deaf and Blind (“CSDB”) to perform the IEE. *Interviews with Parents and Interim Special Education Director.*

15. A team from CSDB (“CSDB evaluators”) evaluated Student on February 20-21, 2019. *Exhibit B*, p. 1. As part of the evaluation, the CSDB evaluators performed: (a) FVA, (b) LMA, (c) Orientation and Mobility Evaluation, (d) Slosson Intelligence Test, Fourth Edition, (e) Woodcock-Johnson Tests of Cognitive Abilities, Third Edition, and (f) Vineland Adaptive Behavior Scales, Third Edition. *Id.* at pp. 2, 10, 14, 15, 18. The evaluators also considered the May 2018 evaluations performed by the District. *Id.* at p. 12.

16. CSDB provided a copy of the IEE to the District in late March 2019. *Interview with Interim Special Education Director.* The District then distributed the IEE to Student’s IEP Team, including Parents. *Id.*; *Interview with Parents.*

17. The IEE reached, in part, the following conclusions:

- “[Student’s] weakness in the area of processing speed has a global impact in her educational environment. Difficulties in processing speed impacts [sic] how quickly [Student] can take in and process new information. When [Student] is given information or a task with multiple steps, it is difficult for her to process the needed information in a timely manner and relay the information or carry out the task. Processing speed is linked with difficulty in basic reading skills as well as performing tasks quickly and accurately. For some individuals, processing speed can look like a lack of focus.” *Exhibit B*, p. 20.
- “[Student] is learning braille with the TVI, but she does not currently access classroom materials in a tactile format. [Student] demonstrated braille readiness

skills and the ability to learn the braille code. She is a good candidate for becoming a dual-media learner. *It is recommended she continue to access the curriculum through visual and auditory means with accommodations and modifications, while continuing to learn the braille code.* *Id.* at p. 21 (emphasis added).

18. The IEE contained a number of considerations to be discussed by the IEP Team and implemented where appropriate. *Id.* at p. 21-25. The considerations were broken down into 11 categories: (1) Team Communication, (2) Para Support, (3) Academic Instruction, (4) Expanded Core Curriculum Instruction, (5) Print Materials, (6) Computer Use, (7) Braille Instruction/Tactile Materials, (8) Orientation and Mobility, (9) Independence, (10) Social Skills, and (11) Transitions. *Id.* Some of the relevant considerations included:

- Develop a system of communication between School and Parents that promotes consistent use of skills and strategies between home and School. *Id.*, p. 21.
- Encourage Student’s teacher and her peers to address Student directly rather than speaking to the paraprofessional to promote Student’s initiation of self-advocacy, social skills, and independence. *Id.*, p. 22.
- Provide training for the paraprofessional in determining when and how to provide audio description if visuals are not verbally described and/or accessible. *Id.*
- Continue to provide a video magnifier for near and distance viewing. Encourage use of a video magnifier as opposed to large print due to variability of Student’s font size needs. *Id.*, p. 23.
- Continue instruction in the braille code to practice accurately tracking lines and reading connected braille cells without scrubbing. *Id.*
- Consider incorporating braille into Student’s day to increase exposure and practice under the supervision of the paraprofessional with direction provided by TVI. *Id.*, p. 24.
- Encourage and reinforce appropriate cane width when using two-point touch and constant contact techniques. *Id.*

19. The District’s May 2018 evaluations and the IEE both concluded that Student should continue to access the curriculum using a combination of visual and auditory means while she continues to develop braille proficiency. *Id.*, pp. 21, 85. Neither evaluation supported Student receiving her general education curriculum using braille. *Id.* Both evaluations noted Student’s slow processing speed and below average cognitive functioning. *Id.*, pp. 20, 71. Accordingly, the SCO finds that the results of the IEE were—in large part—very similar to the District’s findings in the May 2018 evaluations.

C. The IEP Team Meetings

20. The District convened a properly constituted IEP team (the “IEP Team”) to review Student’s IEP in light of the IEE. *Exhibit A*, pp. 1-2, 36-37; *Exhibit G*, pp. 5-7. The IEP Team met for more than six hours over the course of three days—April 8, April 17, and May 1, 2019—to consider the IEE and develop Student’s IEP for the 2019-2020 school year (collectively, the “IEP Team Meetings”). *Interviews with Interim Special Education Director; Exhibit C*, at pp. 1-2; *Exhibit 6*, 2019-05-01-#12. Four advocates (“Advocates”) attended the IEP Team Meetings—either in person or by telephone—on behalf of Parents. *Interview with Parents; Exhibit A*, pp. 1-2, 36-37.

21. On March 25, 2019, the District issued a Notice of Meeting notifying Parents that an IEP review meeting had been scheduled for April 8, 2019 at 3:15 pm. *Exhibit G*, p. 5. Student’s IEP remained incomplete at the close of the time allocated on April 8, 2019. *Exhibit C*, pp. 1-2. At the close of the meeting, the IEP Team discussed all members’ availability for future dates to continue the meeting. *Id.* A date—April 17, 2019—was selected based on the input of Parents and Advocates. *Id.* The District did not issue a Notice of Meeting for the April 17, 2019 meeting.

22. Once more, the IEP Team ran out of time at the April 17, 2019 meeting. *Id.* The IEP Team again discussed all members’ availability for dates to continue the meeting. *Id.* May 1, 2019 was selected based on the availability of Parents and Advocates. The District issued a Notice of Meeting on April 27, 2019 confirming the date and time for the meeting. *Exhibit G*, p. 7.

23. Student’s IEP was completed on May 14, 2019 (the “May IEP”). Parents expressed their disagreement with the May IEP at the conclusion of the May 1, 2019 meeting. Parents disagreed with the IEP Team’s decision not to instruct Student in braille. *Interview with Parents*. Parents argue Student’s delays in her core subjects, such as math and reading, are due to the District educating Student as a sighted student and not emphasizing braille instruction enough. *Id.*

24. At each meeting, the IEP Team used a draft IEP to guide the discussion. *Interview with Interim Special Education Director*. The draft IEP was revised after each IEP Team meeting to incorporate discussion from that meeting. *Id.*, *Exhibit C*, pp. 1-2; *Exhibit A*, pp. 5-32. Revised drafts were provided to the IEP Team at the beginning of the subsequent meeting. *Exhibit C*, pp. 1-2; *Exhibit A*, pp. 5-32.

25. Parents and Advocates frequently asked questions or offered opinions during each of the IEP Team meetings. *Exhibit C*, at pp. 1-2. Each of these questions was answered. *Id.* For example, during the discussion of Student’s present levels of achievement, Parents or Advocates asked questions regarding a number of topics, including, but not limited to, the administration of evaluations, Student’s use of assistive technology, Student’s slow progress in

braille, and Student's need for prompts. *Id.* In one instance, an Advocate asked Special Education Teacher how the District administered benchmark assessments to Student. *Id.* Special Education Teacher responded that Student used ZoomText on a computer. *Id.* The Advocate then questioned whether Student was proficient enough at ZoomText to be able to do this. *Id.* TVI replied that Student was certainly proficient in ZoomText. *Id.* Parent inquired further, indicating that since they did not have ZoomText at home, he was not familiar with Student's skills. *Id.* TVI explained how Student functions in the software and how the proficiency has been developed over the last several years. *Id.*

26. During the May 1, 2019 meeting, the IEP Team discussed Student's proposed annual goals. *Id.* Either Parents or their advocates asked questions about each of the 11 goals. *Id.* To develop the proposed goals, Special Education Teacher looked at Student's present skills in literacy and writing and determined what the appropriate next step would be. *Interview with Special Education Teacher.* Because Student becomes frustrated or unwilling to work when she perceives a task as too difficult, it was important for the IEP Team to craft goals that were challenging but not daunting for Student. *Id.*

27. One of Student's goals during the 2018-2019 school year was to "add and subtract two-digit whole numbers with and without regrouping in 3 out of 5 problems." *Exhibit A*, p. 103. Student met this goal. *Id.*, p. 49. So, in 2019-2020, Special Education Teacher proposed (and the IEP Team approved) Student's goal be to "add and subtract three or four digit whole numbers with and without regrouping in 3 out of 5 problems." *Id.*, p. 59. The 2019-2020 goal built on the progress Student made during the prior school year. *Interview with Special Education Teacher.*

28. During the 2018-2019 school year, one of Student's reading goals required her to read a text at her instructional level and "verbally state the main idea of the text and provide 2-3 supporting details on 3 out of 4 passages read." *Exhibit A*, p. 104. Student made progress on this goal. Her benchmark assessments revealed that Student read and comprehended non-fiction texts better than fiction texts. *Id.*, pp. 43-45. So, the following year, Special Education Teacher wrote a goal targeting fiction texts to improve Student's comprehension of fiction: "When given a fiction text at her instructional level . . . , [Student] will be able to read and answer comprehension questions involving the main idea, supporting details, explicit and inferential questions with 70% accuracy." *Id.*, p. 58. The IEP Team adopted this goal.

29. Though Student progressed in math and literacy during the 2018-2019 school year, her growth was less pronounced with braille. In 2018-2019, Student had braille goals related to use of proper hand position on a braille writer, independently operating a braille writer, and tactually identifying all letters with and without spaces. *Id.*, pp. 108-09. Student did not meet any of these goals, though she did make some progress. *Id.*, p. 51. Though Student could technically perform some of these tasks, she could not do so consistently. *Id.* At the suggestion of the TVI, the IEP Team discontinued the hand position goal due to Student's success with a modified hand position. *Id.* Student's braille goals were modified and continued in 2019-2020.

The 2019-2020 goals require Student to independently operate the braille writer and tactually identify letters with and without spaces. *Id.*, p. 61. The goal also included tactually identifying and writing braille punctuation—a new skill for Student. *Id.*

30. During the IEP Team meetings, the District emphasized the need to adhere to the agenda and keep the discussion moving, but the District’s IEP Team Members never precluded discussion or prohibited anyone from asking questions. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12. Parents were also given an opportunity to provide uninterrupted input—both by speaking at the IEP Team Meetings and by submitting a written statement to be inserted into the final IEP. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12. Parents’ written statement appears in the final May IEP. *Exhibit A*, pp. 55-57.

31. Parents proposed including an additional goal measuring Student’s ability to use an abacus for math functions. *Id.* The IEP Team discussed the feasibility of this goal for nearly twenty minutes. *Id.* Among other considerations, the IEP Team considered whether Student needed the abacus to learn math given that she was already utilizing other tools with some success and what other instruction would be sacrificed in order for Student to be taught to use an abacus. *Id.*

32. The IEP Team was unable to reach a consensus, so—although Parents disagreed—the IEP Team determined that it would not add an IEP goal related to the abacus at that time. *Id.* However, the May IEP included use of “manipulatives in math” as an accommodation for Student. *Exhibit A*, p. 66.

33. The CSDB evaluators appeared via telephone at the April 8 and April 17 IEP Team Meetings, though it is unclear whether they appeared at the May 1, 2019 meeting. *Exhibit C*, pp. 1-2. The Interim Special Education Director recalls the CSDB evaluators participating in all three IEP Team Meetings, but the audio recordings do not reflect the evaluators’ attendance at the May 1 meeting. *Id.*; *Interview with Interim Special Education Director*.

34. The District, Parents, and Advocates asked the CSDB evaluators questions regarding the IEE, even though CSDB did not give a formal presentation on the IEE. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12. Among other topics, the IEP Team asked the CSDB evaluators questions about Student’s cognitive abilities, the evaluation process and results, LMA recommendations, and braille time. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12

35. The District provided Parents the opportunity to submit additional written questions regarding the IEE to the CSDB evaluators after the April 17, 2019 meeting. *Exhibit C*, pp. 1-2. The evaluators agreed to provide written responses to the questions so that the IEP Team could discuss the responses at the May 1, 2019 IEP Team Meeting. *Id.* The record does not indicate that Parents submitted any written questions to the CSDB evaluators between the April 17, 2019 and May 1, 2019 meetings.

36. The IEP Team—with the exception of Parents and Advocates—found the conclusions of the IEE to be rather similar to the results of the District’s May 2018 evaluations. *Exhibit C*, pp. 1-2; *Interviews with Interim Special Education Director and Special Education Teacher*. The understanding of Student’s means of accessing the curriculum and cognitive abilities remained unchanged. *Exhibit C*, pp. 1-2; *Interviews with Interim Special Education Director and Special Education Teacher*. The IEE, therefore, did not demand a radical departure from Student’s prior IEP. *Exhibit C*, pp. 1-2; *Interviews with Interim Special Education Director and Special Education Teacher*. Portions of the IEE were included in the final May IEP. *Exhibit A*, pp. 46-48.

37. Parents, with the support of Advocates, wholeheartedly disagreed with this determination. *Exhibit C*, pp. 1-2. Parents saw little similarity between the IEE and the May 2018 evaluations. *Exhibit C*, pp. 1-2; *Interviews with Parents*. When prompted for further explanation, Parents stated that the IEE weighted Student’s Visual Impairment more appropriately than the May 2018 evaluations (i.e. the IEE gave Student’s Visual Impairment more significance). *Interviews with Parents*.

38. Parents argue that the May IEP does not reflect the IEE’s findings. *Id.* Specifically, Parents noted that the May IEP does not incorporate all of the considerations identified in the IEE. *Id.* As an example, Parents mentioned the considerations regarding developing “a system of communication between school staff and parents that promotes consistent use of skills and strategies between home and school” and “use of a braille curriculum that parents can reinforce at home under direction of the TVI.” *Id.*; *Exhibit B*, pp. 21, 23.

39. The May IEP certainly does not contain all of the considerations noted in the IEE, though it does contain at least twenty of the considerations, including dividing new and complex skills or tasks into small and manageable steps and encouraging and reinforcing appropriate cane width when using two-point touch and constant contact techniques. Nonetheless, the IEE notes that “[i]t is not expected that all considerations will be implemented simultaneously, nor is it expected that all considerations will be deemed appropriate.” *Exhibit B*, p. 25.

40. Throughout the IEP Team Meetings, Parents and Advocates expressed frustration with the prior designation of Student’s primary and secondary disabilities. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12. Parents suggested Visual Impairment should be identified as Student’s primary disability, asserting that her limited vision has the greatest impact on her learning. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12. However, the other members of the IEP Team found that Student’s OHI, including her deficits in executive functioning, impacted Student’s learning in the general education classroom more than her Visual Impairment. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12. Student’s OHI affects how she processes information. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12. The IEP Team found this has a global impact and can be seen, for example, in Student’s difficulty learning braille (translating what she feels to her brain), reading comprehension, and following instructions. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12.

41. At the final IEP Team meeting on May 1, 2019, the IEP Team discussed Student’s service minutes. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12. Based on her progress during the 2018-2019 school year, Student’s math service minutes remained unchanged. The IEP Team recognized Student’s need for additional literacy services and increased her literacy minutes from 840 direct minutes per month to 1,080 direct minutes per month—a 28% increase. *Exhibit A*, pp. 71, 117.

42. The TVI proposed maintaining Student’s vision services at 400 direct minutes per month. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12. Advocates questioned the basis for maintaining the same service minutes even though Student’s progress in braille was slow. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12. The TVI explained that Student cannot focus on braille for more than 30 minutes and that, generally, she only stays focused for 15 to 20 minutes. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12; *Interview with TVI*. Thus, Student’s fatigue and attention span precluded the addition of more vision services. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12.

43. The IEP Team discussed Student’s fatigue and lack of focus throughout the IEP Team Meetings. During the April 17, 2019 meeting, the TVI explained Student’s vision service minutes were based on her inability to focus for long periods of time. *Exhibit C*, pp. 1-2. One of the advocates specifically asked whether Student needed more braille instruction. *Id.* The Interim Special Education Director responded that the District intended to continue braille instruction but did not want to stop or impede Student’s visual learning while Student worked on becoming proficient in braille. *Id.*

44. Parents contend the District precluded discussion of Student’s vision service minutes. The discussion of the vision service minutes on May 1, 2019 was indeed short. However, the SCO finds that the District’s rationale for maintaining the service minutes—Student’s fatigue and inability to focus—was discussed extensively throughout all three IEP Team Meetings. The District members of the IEP Team made clear in the first two meetings why additional vision service minutes would not benefit the development of Student’s braille skills.

45. During the IEP Team Meetings, Parents requested a braille writer for home use and resource materials regarding cane training. *Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12.

46. Parents contend the District never issued a PWN regarding the braille writer. However, the May IEP contains a Prior Written Notice (“PWN”) denying Parents’ request for a braille writer. *Exhibit A*, p. 72-73. The PWN notes that “[a]t this time having access to a Brailier at home is not considered necessary for [Student] to receive her special education and related services.” *Id.* at 73. Parents received the May IEP and, thus, received the PWN regarding the braille writer.

47. The PWN in the May IEP indicated that “[p]er parent request, resources regarding the proper use of white cane will be provided to the parents to assist [Student] in practice and appropriate use of cane. Please see stand alone Prior Written Notice written 5/3/2019.” *Id.* In

a separate PWN dated May 2, 2019, the District agreed to provide Parents with resources to reinforce the cane training Student receives at School. *Exhibit E*, p. 7. The District's agreement to provide these resources followed the discussion at the IEP Team Meetings about the resources being a related service. During this discussion, one Advocate suggested that the cane training resources needed to be included in the May IEP's Service Delivery Statement. *Exhibit C*, pp. 1-2. In response, Interim Special Education Director stated that "[i]t will go in the PWN; it does not go in the Service Delivery Statement." *Id.* The May IEP does not identify the cane training resources as a related service. *Exhibit A*, pp. 69-71.

48. The PWN indicated these resources would be sent home through email, regular mail, or with Student. *Id.* Parents state that they have not received these resources. *Interview with Parents*. During interviews, the Interim Special Education Director was unaware whether the resources had been provided. *Interview with Interim Special Education Director*. Based on these facts, the SCO finds that the District has not provided the cane training resources as proposed in the PWN.

49. During the IEP Team Meetings, the IEP Team also created a Learning Media Plan ("LMP" for Student consistent with Rule 4.03(6)(b) of the ECEA. *Exhibit A*, pp. 38-39. The LMP specified that Student should access the curriculum primarily through visual means, with secondary access via auditory means. *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: The May IEP was tailored to meet Student's individualized needs.

The sole allegation accepted for investigation suggests that the May IEP was not tailored to Student's individualized needs for four reasons:

- (1) the District did not allow Parents or others with special expertise to meaningfully participate in the IEP Team Meetings;
- (2) the District did not consider Parents' concerns;
- (3) the District did not consider the CSDB IEE; and
- (4) the District did not consider the academic, developmental, and functional needs of Student.

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

Each of the inadequacies alleged by Parents is addressed individually below in light of these legal standards.

A. District provided Parents and Advocates with a meaningful opportunity to participate in the development of Student's May IEP.

The IDEA's procedural requirements for developing a student's IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008). To that end, the creation of an appropriate IEP must involve a "fact-intensive exercise . . . informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." *Andrew F.*, 137 S. Ct. at 999.

The IDEA requires that parental participation be meaningful, to include carefully considering parents' concerns for enhancing the education of the child. 34 C.F.R. §§ 300.321(a)(1), 300.322, and 300.324(a)(1)(ii). Meaningful consideration occurs where the IEP team listens to parental concerns with an open mind, exemplified by answering questions, incorporating some requests into the IEP, and discussing privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of the student. *O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F.3d 692, 703 (10th Cir. 1998). Meaningful consideration does not require that a school district simply agree to whatever a parent has requested. *Jefferson Cnty. Sch. Dist. RE-1*, 118 LRP 28108 (SEA CO 3/22/18). But parental participation must be more than "mere form." *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014). "It is not enough that the parents are present and given an opportunity to speak at an IEP meeting." *Id.*

The findings here do not support Parents' contention that neither they nor their Advocates were afforded meaningful participation. The audio recordings evidence the participation by Parents and Advocates in the IEP Team Meetings. *See Exhibit C*, pp. 1-2; *Exhibit 6*, 2019-05-01-#12. As noted in FF #25-26, Parents and Advocates asked questions throughout the IEP Team Meetings on a wide variety of topics. Each of these questions was answered. During the discussion of Student's IEP goals, Parents or Advocates asked questions about every single one

of the 11 goals. (FF # 26.) The District emphasized the need to adhere to the agenda and keep the discussion moving, but the District never precluded discussion or prohibited anyone from asking questions. (FF #30.) Indeed, the IEP Team Meetings continued for more than six hours over the course of three days. (FF #20.)

The CSDB evaluators participated in at least two of the IEP Team Meetings. (FF #33.) The IEP Team questioned the CSDB evaluators regarding the IEE during those meetings. (FF #34.) Additionally, Parents had an opportunity to submit additional written questions regarding the IEE to the CSDB evaluators after the April 17, 2019 meeting. (FF #35.) Parents declined to submit any written questions. (*Id.*)

As recounted in FF #31-32, Parents encouraged the IEP Team to include a goal requiring Student to learn to use an abacus to assist with math. The IEP Team spent 20 minutes considering Parents' suggestion and discussing how such a goal would be implemented. Even though the IEP Team declined to include such a goal, the IEP Team approached the suggestion with an open mind and ultimately included a note regarding the use of manipulatives for math in the May IEP's accommodations section. Additionally, Parents were given the opportunity to speak freely during the parent input portion of the meeting and to provide written input to be included within the final IEP. (FF #30.)

The participation by Parents and Advocates was more than mere form; both parties truly participated in the IEP development process even if the District ultimately did not adopt many of their suggestions. Consequently, the SCO concludes that the District provided Parents and Advocates with meaningful participation in the IEP development process. The SCO reaches this conclusion despite the District's failure to provide a Notice of Meeting for the April 17, 2019 meeting.

Parents received proper notice of the April 8 and May 1, 2019 meetings. (FF #21, 22.) Even though the April 17, 2019 meeting was scheduled at a mutually agreed upon time and place, the District did not provide a Notice of Meeting for the April 17, 2019 meeting. (FF #21.) The District, therefore, failed to comply with the notice requirements of 34 C.F.R. §§ 300.322(a)-(b).

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

The District's failure to provide a notice of meeting for the April 17 meeting could have deprived Parents of an opportunity to meaningfully participate in that meeting. However, the April 17 meeting was scheduled based on Parents' availability and Parents were able to attend and participate in the meeting, as discussed above. Thus, this procedural violation did not result in a denial of FAPE under 34 C.F.R. § 300.513(a)(2). See *Carroll Cty. Pub. Sch.*, 23 IDELR 157 (SEA VA 1995) (finding that District's failure to provide notice was procedural violation that did not result in denial of FAPE because parents received verbal notice and participated in meeting without objection).

B. The IEP Team considered Parents' concerns at the IEP Team Meetings and in the development of Student's May IEP.

An IEP meeting "serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child." *Letter to Richards*, 55 IDELR 107 (OSEP 2010). "The IEP Team should work towards a general agreement, but . . . [i]f the team cannot reach agreement, the public agency must determine the appropriate services . . ." *Id.*

Parents contend the IEP Team did not consider Parents' concerns for Student's education during the IEP Team Meetings. The findings, however, indicate otherwise. Indeed, Parents' meaningful participation—as discussed in Part A above—alone indicates that the IEP Team considered Parents' concerns.

Parents raised a number of concerns during the IEP Team Meetings. Though their concerns may not have resulted in significant change to the May IEP, this fact does not demonstrate that the IEP Team disregarded Parents' concerns. Ultimately, the IEP Team was unable to reach a consensus regarding some of the concerns raised by Parents—such as designation of Student's primary disability, use of an abacus, and increased braille time. (FF # 31-32, 40, 41-42.) In that situation, the IEP Team had to make a decision regarding the appropriate services for Student.

And the discussions during the IEP Team meetings, the final May IEP, and the PWNs evidence that the IEP Team did, in fact, consider Parents' concerns. As noted in Part A above (and detailed in FF #31-32), Parents requested inclusion of a goal requiring Student to learn to use an abacus to assist with math. The IEP Team spent 20 minutes evaluating Parents' request and discussing how such a goal would be implemented. In the end, the IEP Team found a goal measuring Student's ability to use an abacus was not necessary, but the IEP Team agreed to note Student's ability to use manipulatives—including an abacus—for math. Parents' concern was heard.

The IEP Team also gave appropriate consideration to Parents' concerns over Student's braille skills. Parents want Student to become a dual media learner. (FF #6.) Student's progress in braille has been very slow. (FF #5-6.) To date, Student cannot consistently read braille words

but, instead, can read braille letters with spaces between them. (FF #5.) The IEP Team already made a determination pursuant to 34 C.F.R. § 300.324(a)(2)(iii) that instruction in braille is not appropriate for Student. *District's Response*, p. 7. Despite these facts, the IEP Team has continued to require that Student be taught braille because Parents strongly desire Student to become a dual media learner. (FF #6.) But for Parents' desire, TVI would not recommend continued braille instruction for Student. (*Id.*)

Finally—as recounted in FF #44-47—Parents requested the District provide Parents with a braille writer for use at home and with resources on cane training to reinforce Student's orientation and mobility skills at home. The IEP Team entertained discussion on both of these requests during the IEP Team Meetings. The May IEP contains a PWN denying Parents' request for a braille writer and explaining the District's basis for such denial. That IEP also indicated that the District would provide cane training resources pursuant to a separate PWN. On May 2, 2019, the District issued a separate PWN agreeing to provide Parents with the requested cane training resources as a related service. Under 34 C.F.R. §§ 300.34(a), (c)(8), parent counseling and training may be a related service. Parents' concerns regarding the braille writer and the cane training were considered by the IEP Team.

However, the District has not provided the cane training resources described and offered in the PWN. Indeed, based on interviews with Parents and Interim Special Education Director, the District has not provided Parents with any resources regarding cane training. The District's failure to comply with the PWN will be addressed below.

Going forward, the District must ensure related services are described within the IEP itself, not only in a PWN. *Colo. Dep't of Educ. IEP Procedural Guidance Manual*, pp. 18, 141. An IEP “embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP.” *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1197 (9th Cir. 2017). To that end, an IEP must contain “a statement of the special education and related services . . . to be provided to the child” 34 C.F.R. §§ 300.320(a)(4). Even though the District issued a PWN addressing the cane training resources, the District was still required to include the cane training resources as a related service within the May IEP (or an amendment thereto). And, indeed, the comments by Interim Special Education Director regarding this related service (FF #47) indicate the District incorrectly believed the PWN alone was sufficient.

As noted above, failure to comply with the IDEA's procedural safeguards may result in a denial of FAPE if the procedural violation (1) impedes the child's right to a FAPE, (2) significantly impedes the parent's opportunity to participate in the decision making process, or (3) causes a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001). Here, the SCO finds that the District's failure to comply with the PWN did not deny Student FAPE. The IEP Team intended the cane training resources to supplement the cane training Student already receives at School. The resources

would allow Parents to help Student practice using proper cane technique at home. Thus, the District's failure to provide those resources may have impeded Student's ability to effectively practice at home, but it has not deprived her of any educational benefit, as she is still receiving cane training at School.

C. The IEP Team considered the IEE at the IEP Team Meetings and in the development of Student's May IEP.

If a parent obtains an IEE at public expense, the district must consider the results of the IEE when making any decision regarding the provision of FAPE to the child. 34 C.F.R. § 300.502(c)(1). Though a district must consider the results of the IEE, the district is not obligated to accept the evaluator's recommendations or conclusions. *T.S. v. Bd. of Educ. of the Town of Ridgefield*, 10 F.3d 87 (2d Cir. 1993).

Here, Parents obtained the IEE at the District's expense, obligating the District to consider the IEE in the development of Student's IEP. (FF #14.) The findings above in FF #15 and 33-38 make clear that the District considered the IEE. The IEE was provided to all IEP Team members prior to the IEP Team Meetings. The CSDB evaluators attended at least the first two IEP Team Meetings via telephone and answered questions from IEP Team Members—including Parents and Advocates—regarding the IEE. Portions of the IEE's results and considerations were incorporated into the May IEP.

For the most part, and as relevant here, the results of the IEE and the District's May 2018 evaluations are in agreement. (FF #19.) Both concluded that Student should continue to access the curriculum using visual and auditory means while she developed braille proficiency. The IEE, like the May 2018 evaluations, recognized Student's slow processing speed and its impact on her overall learning. Therefore, consideration of the IEE by the IEP Team would not warrant a significant departure from Student's prior IEPs. If anything, the IEE reinforced what the District already believed to be true about Student's cognitive abilities and access to the curriculum. For these reasons, the SCO finds and concludes that the IEP Team considered the IEE.

D. The IEP Team considered the academic, developmental, and functional needs of Student at the IEP Team Meetings and in the development of Student's May IEP.

As noted above, an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174, 580 U.S. ____ (2017), 137 S. Ct. 988, 999. "The instruction offered must be 'specifically designed' to meet a child's 'unique needs' through an 'individualized education program.'" *Id.* (alteration in original) (quoting 20 U.S.C. §§ 1401(29), (14)). An IEP should take into account a "child's present levels of achievement, disability, and potential for growth." *Id.* For a student with a Visual Impairment, an IEP must

provide for instruction in Braille and the use of Braille unless the IEP determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child.

34 C.F.R. §§ 300.324(a)(2)(iii).

The findings indicate that the IEP Team considered Student's academic, developmental, and functional needs in developing the May IEP. Historically, Student's academic progress has been slow due to her disabilities. As detailed in FF #25-28, the goals in the May IEP reflect the IEP Team's consideration of her present levels of performance and prior rate of progress. Each of the goals builds upon Student's present levels to take her to the "next step." (FF #26.) In recognition of Student's ongoing literacy struggles, the IEP Team increased Student's literacy service minutes in the May IEP from 840 direct minutes per month to 1,080 direct minutes per month—a 28% increase. (FF #42.)

Student's IEP does not provide for instruction in braille because the IEP Team determined—consistent with 34 C.F.R. §§ 300.324(a)(2)(iii)—that instruction in braille is not appropriate for Student. At this time, braille is not a functional learning mode for Student. (FF #5.) Because she struggles to tactually discriminate one braille cell from another, Student cannot consistently read words in braille. (*Id.*) Until her proficiency improves, Student cannot be expected to access her curriculum through braille. (*Id.*) Since Student is not proficient in braille, instructing her in braille would sacrifice instruction in other key areas of the curriculum—such as reading and math.

Parents and Advocates argued Student needed more vision service minutes to develop her braille skills. But Student currently struggles to focus on braille for more than 15 to 20 minutes at time. (FF #40.) So—taking into account Student's unique needs and present levels of performance—the IEP Team declined to increase Student's vision service minutes.

For these reasons, the SCO finds that the IEP Team considered Student's academic, developmental, and functional needs in developing the May IEP.

REMEDIES

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

- a) Providing notices of meetings, consistent with 34 C.F.R. §§ 300.322(a)-(b);
- b) Providing parent counseling and training as a related service, specifically cane training resources, consistent with 34 C.F.R. §§ 300.34(a), (c)(8); and

- c) Including a statement of all related services being provided to Student in the IEP, consistent with 34 C.F.R. § 300.324(a)(4).

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

1. By **November 15, 2019**, the District must provide cane training resources to Parents, consistent with 34 C.F.R. §§ 300.34(a), (c)(8) and the District's May 2, 2019 Prior Written Notice. Documentation that the cane training resources have been provided to Parents shall be submitted to CDE by November 22, 2019.
2. By **November 22, 2019**, the District shall submit to CDE a corrective action plan ("CAP") that adequately addresses the violation noted in this Decision regarding prior written notices and related services. The CAP must effectively address how the noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:

- a. The District must review its written procedures regarding documentation of related services and issuance of prior written notices. The written procedures should ensure that all related services being provided to the child are documented in the IEP, in compliance with 34 C.F.R. § 300.320(a)(4), even where a separate prior written notice addresses the related service. If the District believes the existing procedures are adequate, the District must provide the written procedures and an explanation of their adequacy to CDE for approval by **December 13, 2019**.

If the District's procedures need to be revised to ensure related services are included within an IEP, in compliance with 34 C.F.R. §§ 300.320(a)(4), the District should revise the procedures and provide the revised procedures to CDE for approval by **December 13, 2019**.

To the extent the District does not currently have any applicable written procedures, the District must develop such written procedures and submit them to CDE for approval by **December 13, 2019**.

- b. By **December 13, 2019**, the District must ensure that Student's May 2019 IEP is amended pursuant to 34 C.F.R. § 300.324(a)(6) to include the provision of cane training resources as described in the prior written notice issued May 2, 2019.

If Parents and the District agree to amend the May 2019 IEP outside of an IEP meeting, the District shall submit evidence of this agreement and a copy of the amended May 2019 IEP to CDE by December 22, 2019.

If the District convenes an IEP meeting with Parents to amend the May 2019 IEP, it must do so at a mutually convenient time and setting. The District must provide proof that this IEP meeting occurred by submitting a copy of the Notice of Meeting, amended May 2019 IEP, and any relevant PWN to CDE no later than 10 days following the IEP meeting. If Parents do not respond to the District's efforts to amend the IEP by agreement or convene an IEP meeting by December 5, 2019, CDE will determine compliance with this remedy in accordance with 34 C.F.R. §300.322.

- c. CDE will approve or request revisions to the CAP.

Please submit the documentation detailed above to CDE as follows:

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

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

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 5th day of November, 2019.

Ashley E. Schubert, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1-13

- Exhibit 1: Email Correspondence with District
- Exhibit 2: CSDB IEE
- Exhibit 3: May 2019 IEP and LMA
- Exhibit 4: August 2018 IEP
- Exhibit 5: CORA Request
- Exhibit 6: USB Drive containing various files

Response, pages 1-10

- Exhibit A: 2018-2019 and 2019-2020 IEPs
- Exhibit B: Evaluation and Assessment Results
- Exhibit C: Audio Recordings of IEP Meetings
- Exhibit D: Progress Monitoring Reports
- Exhibit E: Prior Written Notices
- Exhibit F: Requests for Parental Consent
- Exhibit G: Notices of Meetings
- Exhibit H: Blank
- Exhibit I: Correspondence
- Exhibit J: Blank
- Exhibit K: Blank
- Exhibit L: Additional Information Produced by District
- Unlabeled: Correspondence regarding documents produced

Reply, pages 1-6

- Exhibit 7: Parents' Notes regarding District's Response
- Exhibit 8: Correspondence from Advocate
- Exhibit 9: USB Driving containing various files

Telephonic Interviews

- Special Education Teacher: October 11, 2019
- TVI: October 11, 2019
- Paraprofessional: October 11, 2019
- Interim Special Education Director: October 11, 2019; October 20, 2019
- Parents: October 16, 2019