

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 2020:504  
Arapahoe County School District 6**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on January 24, 2020 by the parents (Parents) of a child (Student) identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup>

Based on the written Complaint, the SCO determined that the Complaint identified allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.<sup>2</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from January 24, 2019 through January 24, 2020 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

**SUMMARY OF COMPLAINT ALLEGATIONS**

Whether Student has been denied a Free Appropriate Public Education (FAPE) because Arapahoe County School District 6 (District):

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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 C.F.R. § 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).

1. Failed to properly implement Student’s IEP from August 1, 2019 to present, specifically as follows:
  - i. Failing to provide Student with certain accommodations, specifically cell phone access to use calming applications and audio books, consistent with 34 C.F.R. § 300.323.
  - ii. Failing to follow Student’s Behavioral Intervention Plan (BIP) with respect to tracking Student’s non-epileptic events, consistent with 34 C.F.R. § 300.323.
2. Failed to educate Student in the Least Restrictive Environment (LRE) by removing Student from general education courses during non-epileptic events, from August 1, 2019 to present, consistent with 34 C.F.R. §§ 300.114(a), 300.320(a)(5).

### **FINDINGS OF FACT**

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

#### **A. Background**

1. Student is a 14-year-old eligible for special education and related services under the disability categories of Other Health Impairment and Specific Learning Disability. *Exhibit A*, p. 3. Student attends eighth grade at a middle school (School) located in District. *Id.*
2. Student has been diagnosed with Functional Neurological Disorder (FND), which causes Student to experience Non-Epileptic Events (NEEs). *Interview with Mother; Exhibit A*, pp. 8-9; *Exhibit J*, p. 129. NEEs limit her ability to use coping skills and access the general education curriculum. *Id.*
3. Student’s IEP and BIP include accommodations and supports to assist Student with coping strategies and to mitigate the impact of her NEEs. *Interviews with Case Manager 1, Mother, and School Psychologist 1; Exhibit A*, pp. 13-14; *Exhibit B*, pp. 1-4.
4. This dispute arose as Student transitioned into the eighth grade. *Interviews with Mother and Special Education Coordinator*. Mother expressed concerns regarding the implementation of Student’s IEP and BIP with respect to accommodations and the response of School staff to NEEs. *Interviews with Mother, Case Manager 2, and Special Education Coordinator*. Ultimately, Parents filed the current complaint. *Interviews with Mother and Special Education Coordinator*.

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

## **B. Nature of the NEEs**

5. Student was first diagnosed with FND and NEEs after evaluation at Hospital in March of 2018. *Interview with Mother; Exhibit A*, p. 8. Parents provided District with copies of Student's medical records, including a Response Plan for NEEs created by Hospital. *Interviews with Mother, Case Manager 1, and School Psychologist 1; Exhibit J*, pp. 125-26.
6. NEEs may present similar to seizures, but they are not caused by abnormal electrical brain activity like an epileptic seizure. *Exhibit J*, p. 129. NEEs are psychological in nature and do not require medical attention. *Id.* They are typically caused by difficulties coping with chronic stress or anxiety, and the body responds physically to negative emotions. *Id.*
7. Student's NEEs vary in duration from less than one minute to as long as 58 minutes, and their physical manifestation can vary from eye fluttering to a full body event during which Student's eyes may roll back, her limbs may flail or shake, and she may drool. *Interviews with Mother, School Psychologist 1, and School Psychologist 2; Exhibit E*, pp. 1-4; *Exhibit J*, p. 129. During an NEE, Student may be sitting or lying down, she may cry, and she may or may not be able to respond by talking or squeezing hands. *Id.*
8. Following an NEE, Student generally needs a recovery period. *Interviews with School Psychologist 1, School Psychologist 2, Special Education Coordinator, and Mother; Exhibit J*, pp. 130-31. Student may feel tired or appear exhausted, and she may complain of headaches or soreness. *Id.* Additionally, Student may cry, and she may not be able to remember what happened. *Id.*
9. Student is not able to engage in the general education curriculum during an NEE and the subsequent recovery. *Interviews with Special Education Coordinator, School Psychologist 1, and Case Manager 2.* School staff discussed that if Student had an extended NEE or repeated NEEs in the classroom, clearing the classroom would be necessary. *Interview with Case Manager 2.*

## **C. The February 5, 2019 BIP**

10. To target Student's NEEs, as well as other verbal and physical signs of distress, the District completed a functional behavioral assessment (FBA) of Student on February 5, 2019, during her seventh grade year. *Exhibit B*, p. 1. The FBA included a review of previous intervention data, parent and staff interviews, direct observation of Student, data collection, and the Motivation Assessment Scale. *Id.* at p. 1. The District also reviewed medical records and the Response Plan for NEEs provided by Hospital. *Interview with Case Manager 1; Exhibit J*, pp. 125-26.

11. The BIP outlines setting event strategies, such as regular check-ins with trusted adults and communication between home and school regarding factors that may impact Student's behavior. *Exhibit B*, p. 2.
12. Listed antecedent strategies to decrease the likelihood of target behaviors include gentle pushing to work through a situation and scheduled and requested self-care breaks during which Student will use a menu of self-care options. *Id.* at pp. 2-3. Scheduled self-care breaks are part of Student's daily schedule and generally occur at the same time each day, whereas requested self-care breaks occur during periods of increased anxiety or difficulty with emotional regulation. *Interviews with School Psychologist 1 and Case Manager 2*.
13. The BIP includes behavior teaching strategies, such as following scripts for NEEs and self-care (further detailed in the NEE Protocol) and permitting Student to go to an alternative room to calm when she is unable to control her feelings and anxiety. *Id.* at p. 2. The BIP provides reinforcement strategies to include positive praise and extra time with trusted adults. *Id.*
14. Additionally, the BIP outlines progress monitoring methods, such as tracking the following: the frequency of NEEs, the recovery time between an anxious event and subsequent return to learning with use of a coping skill, the percentage of time spent in class, and the time spent working in an alternate setting or going home. *Id.* at pp. 3-4. Progress monitoring methods also include the use of a communication log and processing sheets for Student to rate anxiety. *Id.* Criterion for success are increased time spent in class, decreased time between anxiety producing event and recovery, and ability to use coping skills independently. *Id.* at p. 4.
15. In addition to the BIP, School Psychologist 1 worked with Student's medical providers to adapt the Response Plan for NEEs to the school environment. *Interview with School Psychologist 1; Exhibit J*, pp. 100-101. The adapted Response Plan is outlined in a document titled Accommodations to Support Management of Anxiety (NEE Protocol). *Interview with School Psychologist 1; Exhibit B*, pp. 14-16. The NEE Protocol is incorporated into the BIP. *Exhibit B*, pp. 2-3. For example, the BIP requires that staff use the scripts for self-care breaks and NEEs that are contained in the NEE Protocol, and the NEE Protocol outlines guidance for self-care breaks and tracking Student's NEEs, as required by the BIP. *Id.* at pp. 2-3, 14-16.
16. The NEE Protocol outlines the adult response during an emotional escalation prior to and during an NEE, and the protocol for self-care breaks. *Id.* It also contains scripts for adults to follow during Student's NEEs and self-care breaks, which use language provided in the Response Plan for NEEs. *Id.*

17. The adult response during an emotional escalation prior to an NEE, as outlined in the NEE Protocol, requires the following:
- Prompt Student to choose a coping strategy from her self-care cards while in the classroom.
  - If she continues to escalate, remove Student from the classroom and take her to one of the two identified private areas.
  - Follow self-care break steps. *Exhibit B*, pp. 14-16.
18. The self-care break protocol requires that staff allow opportunities for Student to request a self-care break and encourage self-care breaks—in class and out of the classroom—in designated areas with adult supervision. *Id.* Further, the protocol requires staff to follow the self-care script and time the break for 10 minutes, during which Student will choose a self-care activity. *Id.* Following the break, Student should rate her anxiety and return to class. *Id.*
19. Per the NEE Protocol, the adult response during NEEs requires that Student not be moved when experiencing an NEE. *Id.* Staff should follow the NEE script, encourage others to return to their activities, and monitor Student for safety. *Id.* Additionally, staff are instructed to document the time, length, and precipitating factors for the NEE, as well as any observations. *Id.* Following the NEE, staff should encourage Student to resume activity or return to class, follow the NEE script, allow processing time as needed, and provide a processing sheet for Student. *Id.*

#### **D. The March 18, 2019 IEP**

20. The District convened a properly constituted IEP meeting on March 18, 2019 to review and update Student’s IEP. *Interviews with School Psychologist 1 and Case Manager 1; Exhibit A*, p. 1. The March 18, 2019 IEP governed Student’s special education programming from August 1, 2019 to present. *Interviews with Case Manager 1, Case Manager 2, and School Psychologist 1.*
21. The IEP documents Student’s present levels of academic achievement and functional performance, including progress with emotional regulation and use of coping strategies, as well as a decrease in the number of NEEs. *Exhibit A*, p. 8. The IEP also reflects Student’s needs and the impact of her disability, including how FND causes NEEs that limit Student’s ability to use coping skills and access the general education curriculum. *Exhibit A*, p. 9.
22. Additionally, the IEP outlines accommodations to support Student’s use of coping strategies. *Interviews with Mother, Case Manager 2, and Special Education Coordinator; Id.* at p. 14. For example, the accommodations require that staff allow Student to “utilize her cell phone to access audio books, stress-reducing apps and to communicate

with parents (with adult supervision).” *Id.* The accommodations also include “Adult support within the classroom to monitor anxiety levels, provide prompts to utilize coping skills, and to determine when [Student] needs to temporarily be in an alternate environment,” which is consistent with the BIP and NEE Protocol. *Id.*; *Exhibit B*, pp. 2-4, 14-16.

23. The service delivery statement provides for 240 minutes per month of direct services from the school psychologist outside of general education to work on emotional regulation skills and 9.66 hours per week of adult support in general education to monitor anxiety levels, provide prompts to use coping skills, and determine when Student needs to temporarily be in an alternate environment. *Id.* at p. 16.
24. The IEP Team determined that it was appropriate for Student to spend 86.8% of her time in the general education environment and 13.2% of her time outside of general education in order for Student to gain greater access to the general education curriculum and her peers while receiving support for her general education classes in a content support class. *Id.* at p. 18.

#### **E. Knowledge of Student’s IEP and BIP**

25. School Psychologist 1 and Case Manager 1 assisted in the development of Student’s IEP and BIP. *Interviews with School Psychologist 1 and Case Manager 1.* Both were present for the March 18, 2019 IEP meeting and attended a transition meeting at the end of Student’s seventh grade year to discuss Student’s needs and the transition into eighth grade with Mother, Student, and Student’s eighth grade case manager (Case Manager 2). *Interviews with Case Manager 1 and Case Manager 2; Exhibit A*, pp. 23-24.
26. Case Manager 2 worked closely with School Psychologist 1 and Case Manager 1 during Student’s transition and met with them to discuss the IEP and BIP, including accommodations. *Interviews with Case Manager 1 and Case Manager 2.* Copies of the IEP and BIP were available to, and accessed by, Case Manager 2 through the Frontline online program. *Interviews with Case Manager 1, Case Manager 2, and School Psychologist 1.*
27. All case managers in District have access to their students’ IEPs and BIPs through Frontline, and case managers ensure that teachers and other service providers are informed of their responsibilities in the IEP by giving every teacher and provider a snapshot of their students’ IEPs, which includes goals and accommodations. *Interviews with Case Manager 1, Case Manager 2, and Special Education Coordinator.* Case managers are also present for weekly team meetings with teachers to answer questions. *Id.* Case Manager 2 provided Student’s teachers and providers with snapshots of her IEP. *Interview with Case Manager 2.*

28. With respect to the BIP, School Psychologist 1 informed teachers and other service providers of their responsibilities and provided staff with copies of the BIP at the initial eighth grade team meeting at the beginning of the 2019-2020 academic year. *Interviews with Case Manager 2 and School Psychologist 1.*
29. Additionally, on August 23, 2019, School Psychologist 1 trained School staff on Student's BIP and NEE Protocol, and she provided staff with copies of the protocol. *Interviews with School Psychologist 1 and Case Manager 2; Exhibit B*, p. 9. A sign-in sheet shows that nine staff attended, including Case Manager 2, Language Arts Teacher, and Assistant Principal. *Id.* Additional staff have been trained on an ongoing basis, and staff were provided with another copy of the protocol as a refresher in January of 2020. *Interviews with School Psychologist 1, School Psychologist 2, and Attendance Support; Exhibit C*, pp. 6-41.
30. Throughout the 2019-2020 academic year, Student's teachers and service providers have communicated with Parents on a daily basis using a communication log, which is a Google document shared with Parents. *Interviews with Mother, School Psychologist 1, and Case Manager 2; Exhibit C*, pp. 6-41. Training provided to School staff on the NEE Protocol is documented in the communication log. *Exhibit C*, pp. 6-41.

**F. Implementation of IEP Accommodations: Cell Phone Access**

31. Parents' concerns regarding the implementation of the accommodations in the IEP began on August 16, 2019. *Interview with Mother.* On that day, Case Manager 2 informed Student that she should keep her cell phone in her locker and get an adult when she needs to use it. *Interviews with Case Manager 2 and Mother; Exhibit C*, p. 41. This discussion is recorded in the communication log. *Exhibit C*, p. 41. At the end of the day, Case Manager 2 contacted Mother to discuss this arrangement. *Interviews with Mother and Case Manager 2.*
32. School policy mandates that devices that may disrupt instruction, including cell phones, are not allowed during the school day and must be kept in lockers. *Interviews with Case Manager 1 and Case Manager 2; Exhibit N*, p. 13. Students are generally not allowed to access cell phones, but Student's accommodation is an exception to that policy. *Id.*
33. On August 19, 2019, Mother emailed Case Manager 2 and expressed concerns regarding Student's access to her cell phone. *Exhibit L*, p. 324. Case Manager 2 replied to Mother's email the same day and explained that if Mother felt that Student needs to keep her cell phone on her person, "we can make this happen." *Exhibit L*, p. 326.
34. By August 22, 2019, School staff had discussed with Student that she could carry her cell phone with her—in a cinch sack—to avoid potential distractions for other students. *Exhibit C*, p. 40.

35. Mother has also expressed concerns that on January 7, 2020, Case Manager 2 told Student that she did not need an accommodation, specifically use of audio books. *Interviews with Mother, Case Manager 2, and School Psychologist 2; Exhibit C*, p. 15. On January 8, 2020, School Psychologist 2 facilitated a conversation between Student and Case Manager 2. *Id.* They discussed that Student had requested to read a book that was not available through her audiobook application. *Id.* Case Manager 2 offered that Student could still read the book because it was at her level, but Student requested and was permitted to read another book that was available through the application. *Id.*
36. The SCO finds, due to both School staff and Mother's reports, that there was never an occasion since August 16, 2019 when Student was denied access to her cell phone. *Interviews with Mother, Case Manager 2, School Psychologist 1, and School Psychologist 2.*

### **G. Implementation of Student's BIP**

37. During the beginning of the 2019-2020 academic year, the frequency of Student's NEEs was limited, with only one occurring in August, one in September, and two in October, the longest of which was eight minutes in duration. *Interviews with Mother, Special Education Coordinator, Case Manager 2, and School Psychologist 1; Exhibit E*, p. 1. Recovery time for these NEEs varied from 15 minutes up to 60 minutes. *Exhibit E*, p. 1.
38. Throughout the 2019-2020 academic year, School staff tracked NEEs in the daily communication log. *Interviews with Case Manager 2 and School Psychologist 1.* Staff document the location of the NEE; a description of the NEE, including duration; any events preceding the NEE; staff who supported Student through the NEE; use of coping strategies; and details regarding the duration and nature of Student's recovery. *Exhibit C*, pp. 6-41.
39. Case Manager 2, School Psychologist 1, and School Psychologist 2 also tracked the NEEs in a document titled NEE Tracker, which they access as a shared Google document. *Interviews with School Psychologist 1 and School Psychologist 2; Exhibit E*, pp. 1-22. The NEE Tracker is used to document the date of the NEE, time, antecedent event, length of the NEE, length of recovery, and location of the NEE. *Id.*
40. Parents' concerns regarding the implementation of Student's BIP with respect to NEEs developed following an NEE Student experienced on November 4, 2019. *Interviews with Mother and Special Education Coordinator; Exhibit L*, p. 619.
41. On that date, Student came to Case Manager 2's classroom for a scheduled break. *Interview with Case Manager 2; Exhibit C*, p. 27. She arrived at 10:34 a.m. and sat on a couch. *Id.* Case Manager 2 reports that she checked in with Student and that Student was okay and sitting quietly. *Id.*

42. Case Manager 2 walked over to Language Arts Teacher's classroom, where Case Manager 2 co-teaches a class with Language Arts Teacher. *Interview with Case Manager 2*. Language Arts Teacher's classroom is across the hall from Case Manager 2's classroom, and Case Manager 2 can see into her classroom from the door of Language Arts Teacher's classroom. *Id.* Case Manager 2 admitted that when she is instructing other students in Language Arts Teacher's classroom, she cannot see into her room. *Id.*
43. Case Manager 2 walked back to her classroom at 10:40 a.m. to check on Student, and she was fine. *Interview with Case Manager 2; Exhibit C*, p. 27. Following this check, Language Arts Teacher left her classroom for a restroom break, and Case Manager 2 asked her to check on Student. *Id.* Language Arts Teacher checked in with Student at 10:43 a.m., and Student was experiencing an NEE. *Id.* Language Arts Teacher talked Student through the NEE and noted that Student could hear her and was drooling. *Id.*
44. The NEE ended at 10:47 a.m., and Language Arts Teacher asked Student to practice deep breathing. *Id.* Case Manager 2 returned to her classroom and assisted Student in processing and recovery. *Id.* Student returned to class by 11:21 a.m. *Id.* Case Manager 2 documented the NEE and related details in the communication log, and the NEE is also documented in the NEE Tracker. *Exhibit C*, p. 27; *Exhibit E*, p. 1.
45. Mother disputes the circumstances surrounding the November 4, 2019 NEE and expressed suspicion that Student was left unsupervised for a longer period than was documented in the communication log, but the SCO finds no evidence to support this position. *Interview with Mother*.
46. According to School Psychologist 1, up to this point in the school year, supervision during self-care breaks generally consisted of teachers checking in on Student every few minutes, as was done in this case, because Student's NEEs were infrequent and staff had been able to foresee their occurrence. *Interview with School Psychologist 1*. However, pursuant to the NEE Protocol, a staff person is required to monitor Student for safety during an NEE, which School Psychologist explained means being in the same room as Student and in line of sight. *Exhibit B*, p. 14; *Interview with School Psychologist 1*.
47. Following the November 4, 2019 NEE, it was determined in consultation with Mother that Student's self-care breaks should be supervised by staff in line of sight to prevent Student from having an NEE without staff present to monitor her for safety. *Exhibit C*, p. 23-24, 26-27.
48. School staff selected the Student Services Office as a new location for self-care breaks because of its proximity to the eighth grade classrooms and because multiple staff are present in the office at one time. *Interviews with Special Education Coordinator, School Psychologist 1, and Case Manager 2*. For instance, Clinic Manager, Attendance Support, and Registrar are all located within Student Services, and one or more of them is always

in the office. *Interview with Special Education Coordinator, School Psychologist 1, and Attendance Support.* Student Services also has private space for Student during an NEE, such as the clinic and a private room behind Attendance Support. *Id.*

49. Clinic Manager, Attendance Support, and Registrar were trained in the NEE Protocol on November 7, 2019. *Interviews with Attendance Support and School Psychologist 1; Exhibit C*, p. 25. Student began taking breaks in the office following the training. *Id.* Student Services staff were instructed to contact one of Student's support staff during an NEE, such as School Psychologist 1, School Psychologist 2, and Case Manager 2. *Interviews with Attendance Support, School Psychologist 1, and Special Education Coordinator.*
50. When Student began taking her breaks in Student Services, she would sit in a chair next to Attendance Support or at a table approximately five feet from Attendance Support's desk, both within line of sight. *Interview with Attendance Support.* If Student escalated, she was provided with space in the clinic during NEEs, and staff cleared the clinic for Student's privacy. *Id.* Attendance Support recalled one occasion where Student had an NEE at the table in the front of the office, but the office was cleared to give Student privacy. *Id.* Support staff were contacted to assist Student during NEEs and recovery. *Interviews with Attendance Support and School Psychologist 1.*
51. During the winter of 2019, Student's NEEs began to increase in duration and frequency. *Interview with Mother; Exhibit E*, pp. 1-22. The NEE Tracker reveals that Student experienced three NEEs in November and five NEEs in December, although four of the five NEEs occurred on one day, December 2, 2019. *Id.*
52. In January of 2020, Student's NEEs increased to a total of 15 over seven days, the longest of which was 58 minutes. *Id.*
53. In light of the increasing number of NEEs and upcoming transition to high school, the IEP Team agreed to complete a reevaluation of Student, and Parents provided consent for the evaluation on January 14, 2020. *Interviews with Mother, Case Manager 2, and School Psychologist 1.* The IEP Team met on February 12, 2020 to discuss the results of the reevaluation. *Interview with School Psychologist 1 and Case Manager 2.*
54. On January 15, 2020, Mother spoke with Special Education Coordinator and requested that Student be provided with one consistent person to support her throughout each day. *Interview with Mother and Special Education Coordinator; Exhibit L*, p. 707.
55. On January 16, 2020, the District began using para educators to ensure that Student has additional adult support throughout the school day. *Interview with Special Education Coordinator; Exhibit C*, pp. 11-12; *Exhibit E*, p. 3; *Exhibit L*, pp. 707, 711. School Psychologist 1 and School Psychologist 2 trained para educators assigned to Student on the NEE Protocol. *Interviews with School Psychologist 1; Exhibit C*, p. 8-9. Using the daily

communication log, they documented the name of the para educator who would be with Student each day and when they were trained in the NEE Protocol. *Exhibit C*, pp. 8-12.

56. Para educators provide one-on-one support to Student throughout her day, except for during the lunch hour, at which time Assistant Principal monitors Student. *Interviews with Assistant Principal, Case Manager 2, and Special Education Coordinator*.
57. Student's NEEs have decreased since January, and Student has not had an NEE since February 12, 2020. *Interviews with Mother and School Psychologist 1*. Mother attributes the decline to the provision of additional adult support. *Interview with Mother*.

#### **H. Missed Class Due to NEEs**

58. Student has missed class time during NEEs and recovery, and due to going home from school early after NEEs. *Exhibit E*, pp. 1-22. The NEE Tracker documents a total of 28 NEEs from August 20, 2019 through February 6, 2020, and Student's NEEs and recovery totaled 582 minutes during the school day, though a number of NEEs occurred, at least in part, during Student's lunch period. *Id.*
59. During that same time period, the NEE Tracker shows that Student has left school early five times following NEEs, missing a total of 847 minutes during the school day. *Id.* at p. 8. The NEE Tracker indicates that through supports provided during recovery, Student has received 1,347 minutes of additional, direct psychological service time, or an average of 224.5 additional minutes per month. *Id.*
60. The IEP, BIP, and NEE Protocol each provide for Student to go to an alternate room during episodes of emotional escalation or heightened anxiety. *Exhibit A*, p. 14; *Exhibit B*, p. 2. Mother and Student requested that Student be permitted to leave class if possible prior to the onset of an NEE to give Student privacy and preserve her dignity, as well as out of consideration for the impact on other students and possible safety concerns. *Interviews with Mother, School Psychologist 1, and Special Education Coordinator*. Additionally, the Response Plan for NEEs provided by Hospital instructs that Student may be required to leave class for designated breaks. *Exhibit J*, p. 129.
61. Mother expressed concerns that para educators were not helping Student return to the classroom after an NEE, prolonging time out of class. *Id.* However, the SCO finds that documentation of Student's NEEs in the communication log is inconsistent with this assessment. *Exhibit C*, pp. 6-41. In the event of an NEE, support staff were contacted to assist Student in recovery. *Id.* Though the goal has been to limit recovery time to 10-15 minutes, support staff learned through experience that urging Student to return to class before she has recovered fully can result in additional NEEs. *Interview with School Psychologist 2*.

62. The accommodations in Student's IEP and the NEE Protocol require that Student have the opportunity to contact Parents following an NEE. *Exhibit A*, p. 14; *Exhibit B*, p. 14. However, the NEE script advises that if Student does not request the phone, staff should not mention it. *Exhibit B*, p. 16. When Student calls Parents, she may request to go home for the day, and School staff do not prohibit her from doing so. *Interviews with Mother, School Psychologist 1, and School Psychologist 2.*
63. Mother asserts that School staff have implied but not mandated that Student go home by informing Parents that Student is "having a hard time" or is "done for the day." *Interview with Mother.* School staff report that it has always been the decision of Parents and Student, whether Student needs to leave early. *Interviews with School Psychologist 1, School Psychologist 2, and Case Manager 2.*
64. Although the SCO does not find that School staff sent Student home early on the occasions outlined above, School staff did request that Student remain at home for three days in December 2019, and the SCO now turns to this period of absence.
65. During the week of December 2, 2019, Student was evaluated by Hospital to determine if she was experiencing epileptic seizures in addition to NEEs, and Parents kept Student home from December 3 through December 5. *Interviews with Mother, Special Education Coordinator, and School Psychologist 2.*
66. When Student was cleared by her medical provider on December 5, 2019, Parents requested that Student return to School the next day. *Interview with Mother, School Psychologist 2, and Special Education Coordinator.* School staff determined that a reentry meeting should be held before Student's return so that staff could discuss medical reports with Parents and be prepared to respond to Student's medical needs. *Interviews with School Psychologist 2, Assistant Principal, and Special Education Coordinator.* The SCO finds that Student was not kept home due to any disciplinary concerns. *Interviews with Mother, School Psychologist 1, and School Psychologist 2.*
67. School staff received the medical report and updated Response Plan for NEEs on December 5, 2019, but a reentry meeting was not held until December 10, 2019 due to scheduling difficulties. *Id.* As a result, Student missed three days of classes, on December 6, 2019; December 9, 2019; and December 10, 2019. *Id.* The time missed included 60 total minutes of direct, psychological services. *Interview with School Psychologist 1.* Student also missed four core classes (60 minutes each) and two elective classes (45 minutes each) for each of the three days. *Interview with Case Manager 2.*
68. At the December 10, 2019 reentry meeting, Mother and School staff discussed the medical report, supervision requirements for Student, and the difference between protocol for epileptic seizures and NEEs, none of which resulted in significant changes to

the protocol. *Exhibit A*, pp. 27-29. Student’s medical providers ruled out epileptic seizures. *Interview with Mother*.

69. Student was provided with makeup assignments per her request, and other work was excused. *Interview with Special Education Coordinator; Exhibit L*, p. 670.

70. Overall, the SCO finds that Student’s time spent outside of class due to NEEs did not impact her academic performance. *Interviews with Mother, School Psychologist 1, School Psychologist 2, and Case Manager 2*. When Student misses class during NEEs, she is provided with makeup work, and some assignments are excused. *Interviews with Special Education Coordinator and Case Manager 2*. Further, Student has 45 minutes of daily content support and 30 minutes of Extended Learning Opportunity four times per week, which she uses to catch up on work. *Interview with Case Manager 2*. Student is on the honor roll and earns As and Bs. *Interviews with Mother, Case Manager 2, and School Psychologist 1; Exhibit I*, p. 5. Additionally, Student’s progress monitoring report for the first semester indicates that she made progress toward all IEP goals. *Exhibit I*, pp. 1-4.

### **CONCLUSIONS OF LAW**

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

**Conclusion to Allegation No. 1: The District properly implemented Student’s IEP and BIP from August 1, 2019 to present, consistent with 34 C.F.R. § 300.323.**

i. IEP Implementation under the IDEA

Under the IDEA, a district is required to provide eligible students with disabilities a FAPE by providing special education and related services individually tailored to meet the student’s unique needs, in conformity with an IEP that meets the IDEA’s requirements. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is “the centerpiece of the statute’s education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Board of Education v. Rowley*, 458 U.S. 176, 181 (1982)). To that end, the U.S. Supreme Court concluded an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at p. 999.

A district must ensure that “as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child’s IEP.” 34 C.F.R. § 300.323(c)(2). To satisfy this obligation, a school district must ensure that each teacher and related services provider is informed of “his or her specific responsibilities related to implementing the child’s IEP,” as well as the specific “accommodations, modifications, and

supports that must be provided for the child in accordance with the IEP.” 34 C.F.R. § 300.323(d).

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

“A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard “does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” *Id.*

The failure to implement a “material,” “essential,” or “significant” provision of a student’s IEP amounts to denial of a FAPE. *Id.* (concluding consistent with “sister courts . . . that a material failure to implement an IEP violates the IDEA”). *See also Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an “essential element of the IEP” denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the “significant provisions of the IEP” denies a FAPE).

## ii. Implementation of IEP Accommodations: Cell Phone Access

In this case, Parents allege that Case Manager 2 failed to allow Student to use her cell phone to access audio books and stress-reducing apps, and to communicate with Parents with adult supervision, as required by the accommodations in her IEP. However, the SCO finds and concludes that the evidence does not support their claim.

First, FF #25-27 show that Case Manager 2 was informed of her specific responsibilities related to implementing the IEP, including its accommodations. Case Manager 2 had multiple meetings with Case Manager 1 as part of Student’s transition to eighth grade, including a meeting in May of Student’s seventh grade year. Student’s IEP was available through Frontline, and Case

Manager 2 accessed the IEP through that program. Additionally, the communication log from the first day of school indicates that Case Manager 2 was aware of Student's cell phone accommodation, as she informed Student that she should get an adult when she needed to use the phone (FF #31).

Second, FF #31-36 demonstrate that Student was never denied access to her phone. When Mother emailed Case Manager 2 to express her preference for Student to carry the phone on her person, Case Manager 2 agreed. Three days later, it was decided that Student would carry the phone in her cinch sack. Further, despite Parents' concerns regarding access to audio books, the evidence shows that when Student requested to read a book using an audiobook application, Student's request was granted. Mother is not aware of a time when Student was denied access to her phone when she needed it.

Thus, the SCO finds and concludes that District provided Student with access to her cell phone consistent with IEP accommodations, from August 1, 2019 to present, in accordance with 34 C.F.R. § 300.323.

### iii. BIP Implementation: Tracking Student's NEEs

Here, Parents allege that District failed to track Student's NEEs consistent with the BIP. Specifically, Parents allege that School staff were not properly trained and failed to provide Student with required support during her NEEs, resulting in additional missed class time. The SCO finds and concludes that the evidence does not support their claim.

First, FF #28-30, 38, and 55 demonstrate that staff were informed of their responsibilities in the BIP and NEE protocol, and that they were trained to implement them. School Psychologist 1 provided copies of Student's BIP to staff at the beginning of the academic year, and she offered guidance on its implementation. In addition, School Psychologist 1 trained staff on the NEE Protocol starting on August 23, 2019, and she continued to train additional staff that provided Student with supervision and support. The initial training attendance is documented in a sign-in sheet, and subsequent trainings were documented in the daily communication log, including the training of Student Services staff and para educators. The regular use of the communication log and NEE Tracker is further evidence that staff were educated in the requirements of Student's BIP and NEE Protocol, as staff used the documents to record data regarding NEEs consistent with the requirements of the BIP and NEE Protocol.

The SCO next considers the implementation of the BIP, starting with Student's November 4, 2019 NEE. Per FF #12-14 and 17-19, the BIP and NEE Protocol require staff to track NEEs, provide Student with self-care breaks in an area with adult supervision, and monitor Student for safety during NEEs. On November 4, 2019, Case Manager 2 supervised Student during her scheduled break starting at 10:34 a.m. (FF # 41-43). She checked on her six minutes later, at 10:40 a.m., and Student was fine. At some point between 10:40 a.m. and 10:43 a.m., when

Language Arts Teacher checked on Student as requested, Student began having an NEE. Precisely when the NEE began is not known, but based on the communication log, no more than three minutes passed during which Student was unmonitored.

As discussed in FF #29, Language Arts Teacher was trained in the NEE Protocol. She monitored Student throughout her NEE and assisted Student in using a coping strategy (FF #43-44). Case Manager 2 returned to assist with Student's recovery. The communication log documents the duration of the NEE, location, and recovery time. Following the NEE, Student returned to class. The SCO finds and concludes that the actions taken on November 4, 2019 represent a deviation from the BIP and NEE Protocol. However, because Student was unmonitored for three minutes at most during the NEE, the SCO finds and concludes that this was a minor deviation and not a material failure to implement the BIP.

Parents also allege District failed to implement the BIP by requiring Student to take breaks in Student Services, which Parents allege is not an appropriate and private location with trained staff, resulting in missed class time.

Nevertheless, the evidence shows that both Student Services staff and para educators have been trained in the NEE Protocol. As outlined in FF# 47-50, Student Services was selected as the location for Student's breaks after Parents requested line of sight supervision during all breaks, because of its proximity to eighth grade classrooms and because trained staff are present in the office at all times. Although Student took breaks in the front office, rooms were cleared as needed to provide privacy during NEEs. Support staff were contacted to assist Student during NEEs and recovery, and the daily communication log documents the names of staff who were present, antecedent events, the duration and location of NEEs, and coping strategies used. (FF #38, 50).

In sum, apart from one minor deviation on November 4, 2019, the SCO finds and concludes that District implemented the BIP from August 1, 2019 to present, consistent with 34 C.F.R. § 300.323.

**Conclusion to Allegation No. 2: District educated Student in the LRE from August 1, 2019 to present, consistent with 34 C.F.R. §§ 300.114(a), 300.320(a)(5).**

i. Missed Class Time Due to NEEs

“Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements.” *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004). Districts must ensure that children with disabilities are educated in the general education setting with children who are nondisabled to the maximum extent appropriate and that they attend the school they would if not disabled. 34 C.F.R. §§ 300.114 and 300.116.

An IEP must include “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.” 34 C.F.R. § 300.320(a)(5). This statement describes a student’s recommended placement in the LRE. *Id.* Students with disabilities must be educated consistent with the LRE described in the IEP. *Id.*

Here, FF #24 shows that the IEP’s LRE section placed Student in the general education classroom 86.8% of the time and outside of general education 13.2% of the time. Additionally, the IEP and BIP contemplate Student’s removal from class, prior to onset of an NEE, during an emotional escalation and during self-care breaks. (FF #12-14, 17-19, 23, 60).

Children with disabilities should only be placed in separate schooling, or otherwise removed from the regular educational environment, “if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii). For instance, placement in the regular education classroom may not be appropriate when the student engages in dangerous or disruptive behavior that threatens the safety of others or interferes with the education of peers. *See Clyde K. v. Puyallup Sch. Dist.*, 21 IDELR 664 (9th Cir. 1994); *see also C.L. v. Lucia Mar Unified Sch. Dist.*, 114 LRP 1813 (C.D. CA 1/9/14) (concluding violent and disruptive behavior that results in safety concerns for a student, classmates, or school staff may be a reason to reduce a student’s time in the general education environment). However, any significant change in placement must be made by the IEP team—including the parents of the child—and in consideration of a reevaluation. *See* ECEA Rule 4.03(8)(b)(ii)(B); 34 C.F.R. §§ 300.305, 300.327.

In this case, FF #6-9 show that NEEs presented a potential safety risk to Student if they occurred in the classroom. In addition, the NEEs presented the potential for disruption of the class, and the NEEs prevented Student from accessing the general education curriculum. Data collected by School staff reveal that Student missed time in general education during NEEs when she was removed from class consistent with the BIP and IEP. (FF #58). Per the NEE Tracker, Student experienced a total of 28 NEEs from August 20, 2019 through February 6, 2020, and Student’s NEEs and recovery totaled 582 minutes during the school day.

In addition to class time missed during NEEs and recovery, FF #59 and 62-63 show that Student left School early on five days, but the evidence does not support that School staff sent Student home. On the contrary, the NEE Tracker and communication logs show that School staff spent hours of additional time counseling Student to help her recover and return to class, and ultimately, the decision to leave belonged to Parents and Student.

As noted above, Student’s removal from the classroom during NEEs is consistent with Student’s IEP, BIP, and NEE Protocol. However, the IEP and BIP also outline plans to mitigate Student’s NEEs and reduce the time spent outside of class, such as providing student with adult support, the use of coping strategies, and self-care breaks to help manage emotions (FF #11-19, 22-23).

Moreover, Mother and Student specifically requested that Student be removed from class prior to an NEE to preserve Student's dignity and provide her with privacy, and the Response Plan for NEEs supported removal from class for designated breaks. (FF #60).

FF #70 shows that when Student misses class time, she is provided with makeup work, and she has the opportunity to catch up on her work during a content support class and Extended Learning Opportunity. Also, based on a review of the data collected in the NEE Tracker, Student has received an average of 224.5 additional minutes of direct psychological services per month outside of general education, on top of the 240 monthly minutes provided in her IEP. (FF #59).

Initially, Student's NEEs were less frequent and shorter in duration, but in the month of January, her NEEs increased to a total of 15 over seven school days, the longest of which was 58 minutes. (FF #37, 51-52). This resulted in a significant increase in time missed in general education.

School districts must be alert to indications that a student needs to be reevaluated, even when a triennial evaluation is not due and even when the parent has not requested a reevaluation, to ensure the student's IEP continues to be reasonably calculated to enable the child to make progress that is appropriate in light of the child's circumstances. *Questions and Answers on Andrew F. v. Douglas Cnty. Sch. Dist. Re-1*, 71 IDELR 68 (EDU 2017); 34 C.F.R. § 300.303(a). A significant escalation in a student's behavior is one such circumstance that may warrant a reevaluation. *See West-Linn Wilsonville Sch. Dist. v. Student*, 63 IDELR 251 (D. Ore. 2014).

FF #53 and 57 show that the District responded appropriately and quickly to the escalation in NEEs by reevaluating Student. The reevaluation was timely completed with an IEP meeting held on February 12, 2020. Additionally, the District increased Student's supports, and Student has gone nearly one month without experiencing an NEE. (FF #55-57).

For these reasons, the SCO finds and concludes that District educated Student in the LRE from August 1, 2019 to present, consistent with 34 C.F.R. §§ 300.114(a).

ii. Missed School Days on December 6, 9, and 10

Parents also assert that Student was kept home from School on December 6, 9, and 10, after Student had been medically cleared to return to School. FF #64-68 support Parents' claim.

School staff confirmed that they requested Student remain at home until a reentry meeting could be scheduled. A reentry meeting did not occur until December 10, 2019 due to scheduling difficulties. Because Student had been medically cleared and School received the report on December 5, 2019, there was no evidence to support safety concerns and additional days out of School on December 6, 9, and 10. There were no disciplinary concerns regarding Student, and the reentry meeting did not result in significant changes to protocol. During these three days,

Student was not provided with any services consistent with her IEP and BIP. Therefore, the SCO finds and concludes that keeping Student out of School on December 6, 9, and 10 resulted in a procedural violation of the IDEA, as the District failed to implement Student's IEP and BIP for three days, in violation of 34 C.F.R. § 300.323.

The failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10th Cir. 1996). Based on the evidence, the above-described violation did not impede Student's right to a FAPE or deprive Student of an educational benefit, in violation of 34 C.F.R. § 300.513(a)(2); *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10th Cir. 1996).

Student missed 60 total minutes of direct psychological services, four core classes (60 minutes each), and two elective classes (45 minutes each) for each of the three days. (FF #67). However, Student was provided with makeup assignments per her request, and other work was excused. (FF #69). Furthermore, the NEE Tracker indicates that Student has received 1,347 minutes of additional, direct psychological service time from August 20, 2019 through February 6, 2020, far above the 60 minutes of direct services missed from December 6th through 9th. (FF #59). Also, as discussed in FF #70, Student's time outside of class does not appear to have impacted her academic performance or her progress toward IEP goals. Student is on the honor roll, and she has made progress toward all of her IEP goals. Accordingly, the SCO finds and concludes that Student was not denied a FAPE.

### **REMEDIES**

The SCO finds and concludes that District committed a procedural violation of the IDEA by failing to implement Student's IEP and BIP for three days, in violation of 34 C.F.R. § 300.323. However, because the procedural violation consists of one documented instance of non-compliance, combined with the remedial action already taken by District, no further remedy is ordered.

### **CONCLUSION**

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

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

Dated this 24th day of March, 2020.

A handwritten signature in cursive script, appearing to read "Lindsey Watson".

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Lindsey Watson  
State Complaints Officer

## Appendix

### **Complaint, pages 1-6**

- Exhibit 1: April 11, 2018 Evaluation
- Exhibit 2: March 18, 2019 IEP
- Exhibit 3: February 5, 2019 FBA and BIP
- Exhibit 4: Response Plan for Non-Epileptic Spells from Hospital dated December 5, 2019
- Exhibit 5: Attendance records
- Exhibit 6: December 10, 2019 Conference Summary
- Exhibit 7: Email correspondence
- Exhibit 8: Additional documentation from communication log

### **Response, pages 1-11**

- Exhibit A: All IEPs in effect for the 2019-2020 academic year, including amendments and meeting notes
- Exhibit B: All BIPs in effect for the 2019-2020 academic year, including amendments and meeting notes
- Exhibit C: Communication log and service logs from August 1, 2019 to present
- Exhibit D: No documentation provided
- Exhibit E: All progress monitoring reports or data, including verification or accommodations and modifications during the 2019-2020 academic year
- Exhibit F: No documentation provided
- Exhibit G: Notice of meeting
- Exhibit H: Prior Written Notice dated January 14, 2020
- Exhibit I: Progress monitoring report
- Exhibit J: Medical documentation received from Parents regarding Student
- Exhibit K: Incident reports and NEE documentation contained in Exhibit E
- Exhibit L: Email correspondence
- Exhibit M: Contact information for District staff
- Exhibit N: District policies relevant to the Complaint allegations
- Exhibit O: Response delivery confirmation

### **Telephonic Interviews with:**

- Director of Special Education: February 27, 2020
- Case Manager 1: February 27, 2020 and March 10, 2020
- Case Manager 2: March 2, 2020 and March 10, 2020
- School Psychologist 2: March 2, 2020
- Assistant Principal: March 2, 2020
- Principal: March 3, 2020
- School Psychologist 1: March 3, 2020 and March 10, 2020
- Special Education Coordinator: March 3, 2020 and March 6, 2020

- Mother: March 6, 2020
- Attendance Support: March 10, 2020