

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

State-Level Complaint 2022:529
Boulder Valley School District RE-2

DECISION

INTRODUCTION

On June 30, 2022, the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Boulder Valley School District RE-2 (“District”). 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 C.F.R. §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. § 300.153(c), the Colorado Department of Education (the “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 June 30, 2021 through June 30, 2022 for the purpose of determining if a violation of the IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to properly implement Student’s IEP between April 19, 2022 and present, in violation of 34 C.F.R. § 300.323, specifically by:
 - a. Failing to provide Student’s specialized instruction and related services.

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

FINDINGS OF FACT

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

A. Background

1. For a portion of the 2021-2022 school year, Student was enrolled in eighth grade at a District middle school (“School”). *Interview with Parent*. However, Student was on a homebound placement and did not attend School in person. *Id.*
2. Student is eligible for special education and related services under the disability categories of Autism Spectrum Disorder (“ASD”) and Serious Emotional Disability (“SED”). *Exhibit A*, p. 1.
3. Student is a loyal, caring, creative young woman with a quirky sense of humor. *Interview with Parent*. Student excels at art and has robust language skills. *Id.* She struggles with depression and becomes frustrated that she cannot always control her behavior. *Id.*

B. Enrollment in District

4. During the 2020-2021 school year, Student’s prior school district (“Prior District”) placed Student in a private center-based program for students with ASD (“Private Program”). *Id.* Private Program frequently restrained Student and, due to behavioral challenges, Student accessed little, if any, academics. *Id.* Student’s mental health declined throughout the year, and Student refused to attend Private Program for the final five weeks of the 2020-2021 school year. *Id.*
5. Parent moved to the District before the 2021-2022 school year began. *Id.* However, due to Student’s ongoing mental health challenges, Parent did not enroll Student in the District (or any other school district) until February 2022. *Id.*
6. Due to an administrative issue, the District did not process Student’s enrollment until April 2022. *Exhibit H*, pp. 12-14. Once she was enrolled, Interim Director of Special Education (“Interim Director”) scheduled an IEP Team meeting. *Interview with Interim Director*.

C. Student’s IEP

7. On April 18, 2022, the District convened an IEP Team to review Student’s IEP from Prior District and develop an appropriate initial IEP for the District. *Interviews with Interim Director and Parent*. The resulting IEP was dated April 18, 2022 (“IEP”). *Exhibit A*, pp. 1-15.

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

8. The section of the 2021 IEP regarding present levels of performance contained information from Student's Prior IEP and a recent interview with Parent. *Id.* at p. 3. That information indicated Student performed below grade level in all academic areas and engaged in "severe maladaptive behaviors" in the school setting. *Id.* Student could stay focused on a non-preferred activity for only five minutes at a time. *Id.* at p. 5. Leading up to the IEP Team meeting, Student had been hospitalized, leaving District staff with little access to meet with or assess Student. *Exhibit H*, pp. 8-9. The IEP indicated her struggle with depression and suicidal ideation. *Exhibit A*, p. 4.
 9. Per the IEP, Student's disabilities had a "pervasive impact on her ability to succeed in a less restrictive environment." *Id.* at p. 7. The maladaptive behavior resulting from Student's disabilities made it difficult to maintain her safety and the safety of her peers in a school setting. *Id.*
 10. The IEP contained five annual goals in the areas of self-determination and social/emotional wellness. *Id.* at pp. 8-11.
 11. The IEP included numerous accommodations, such as a structured routine, access to rest periods, and use of fidgets. *Id.* at p. 11.
 12. Under the IEP, Student received the following special education and related services:
 - Specialized Instruction: 360 minutes per week of direct specialized instruction provided through homebound instruction by a special education teacher.
 - Mental Health Services: 90 minutes per month of direct mental health services provided virtually by a school psychologist or social worker.
 - Occupational Therapy: 120 minutes per semester of indirect occupational therapy provided by an occupational therapist to provide support for District staff on Student's sensory needs.
- Id.* at p. 13.
13. The IEP indicated that Student qualified for extended school year services. *Id.* at 11. Though not expressly noted in the IEP, the IEP Team agreed that Student's special education and related services would continue, unchanged, throughout the summer. *Interview with Interim Director.*
 14. Per the IEP, Student was in a homebound/hospital placement and spent no time in the general education environment. *Exhibit A*, p. 14.

D. The District's Homebound Program

15. When an IEP Team places a student in the District's homebound program, Director of Special Education for Special Programs ("Special Programs Director") receives notification from the director of special education for the student's geographic area. *Interview with Special Programs Director.* Special Programs Director coordinates the District's homebound program. *Id.*
16. The District's homebound program operates as an extension of each student's school of origin. *Id.* That means the homebound program supports a class being taught at the student's school. *Id.* The homebound teacher works directly with the school to create a schedule and develop the instructional material. *Id.*
17. Once Special Programs Director receives notification of a student's homebound placement, he determines whether an existing homebound teacher can meet the student's needs or whether the District needs to hire a new homebound teacher. *Id.* Typically, Special Programs Director assigns a homebound instructor and begins a student's homebound instruction within two weeks, although that is not always possible. *Id.*
18. The homebound program runs throughout the school year. *Id.* Most homebound teachers have a contract for the school year and do not provide homebound instruction during the summer. *Id.* When students need homebound instruction over the summer, the District has occasionally been able to extend the contract for an existing teacher but often has to hire new teachers. *Id.*
19. Though Special Programs Director coordinates homebound instruction, he does not facilitate or oversee related services for students in the homebound program. *Id.* Instead, the special education director for the region and the student's school coordinate related services. *Id.*; *Interview with Interim Director.* Special Programs Director referred to the coordination of related services for homebound students as a "work in progress." *Interview with Special Programs Director.*

E. Implementation of Student's IEP

20. Following the IEP Team meeting, Interim Director notified Special Programs Director of Student's homebound placement. *Interviews with Interim Director and Special Programs Director.* Special Programs Director began working to assign a homebound teacher to Student; however, at the time, the District did not have a homebound teacher who could meet Student's needs. *Interview with Special Programs Director.* Special Programs Director posted an open position for a homebound teacher. *Id.* Because only six weeks remained in the school year, Special Programs Director hoped to find a teacher to finish the school year and provide Student's ESY services over the summer. *Id.*

21. When the school year ended on May 26, the District had not yet hired a homebound teacher for Student. *Id.* Special Programs Director continued trying to hire a teacher in June but was unsuccessful. *Id.* In late June, Special Programs Director heard that Student was being placed in another state and suspended his search for a homebound teacher. *Id.*
22. District staff offered little explanation as to why Student did not receive the related services required by her IEP, specifically the virtual mental health services. *Interviews with Interim Director and Special Programs Director; District's Response*, pp. 1-3. Though the District needed to hire a homebound teacher for Student, School already had a school psychologist and/or social worker to provide Student's mental health services. *Interview with Interim Director.*
23. Instructional Specialist served as Student's case manager for purposes of the IEP Team meeting, but Student did not have a case manager following the meeting. *Id.* Ordinarily, the homebound teacher would be the case manager; however, because Student did not have a homebound teacher, she did not have a case manager. *Id.* Student was new to the District and did not have an established relationship with any School staff. *Interviews with Interim Director and Parent.*
24. District staff did not recall connecting Parent or Student with any School staff to facilitate delivery of Student's related services. *Interview with Interim Director.* No one contacted Parent or Student to provide those services virtually and it is unclear whether the school psychologist or social worker was aware of Student's IEP. *Id.; Interview with Parent.*

F. Student's Transfer

25. On July 1, Student was moved to an out-of-state psychiatric facility ("Psychiatric Facility") following a suicide attempt. *Interview with Parent.* Student remained in Psychiatric Facility until August 25, 2022. *Id.* As of the date of this Decision, Student is transitioning back to the District. *Id.*
26. The District acknowledges that it did not provide Student any of the specialized instruction or related services required by her IEP prior to her placement in Psychiatric Facility. *District's Response*, p. 2; *Interviews with Interim Director and Special Programs Director.* Over the course of eleven weeks, the District failed to provide Student with 3,960 minutes (or 66 hours) of specialized instruction and 270 minutes (or 4.5 hours) of mental health services.
27. Student did not receive any instruction at Psychiatric Facility. *Interview with Parent.* Though Psychiatric Facility provides specialized instruction during the school year, it typically does not provide any instruction to patients over the summer. *Id.*

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 failed to properly implement Student’s IEP, in violation of 34 C.F.R. § 300.323. This violation resulted in a denial of FAPE to Student and was systemic in nature.

In her Complaint, Parent contends the District failed to properly implement Student’s IEP following the IEP Team meeting held on April 18, 2022. Indeed, the District concedes in its Response that it did not provide Student with any special education or related services from April 18 to July 1. (FF # 25.)

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is “the centerpiece of the statute’s education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student’s IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

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

A. Student’s Specialized Instruction

Student’s IEP required the District to provide Student 360 minutes per week of specialized instruction from a special education teacher. (FF # 12.) Student’s IEP Team determined that this specialized instruction would continue during ESY as well. (FF # 13.) As detailed in the Findings of Fact, Student did not receive any specialized instruction during the last six weeks of the school year or during ESY. (FF # 26.) This failure was not caused by a District staff member being unaware of his or her responsibilities under Student’s IEP; instead, the failure resulted from the District’s inability to timely hire a homebound teacher for Student. (FF #s 20-21.) As a result, the SCO finds that the District complied with 34 C.F.R. § 300.323(d).

Due to the lack of an available homebound teacher, the District failed to provide Student with specialized instruction for eleven weeks. (FF #s 20-21, 26.) During this period, Student missed 3,960 minutes (or 66 hours) of one-on-one instruction from a special education teacher. (FF # 26.) In its Response, the District argues that this failure entitled Student to compensatory services

but did not amount to a violation of the IDEA. The SCO disagrees. Though the inability to hire a homebound teacher may have been out of the District's control, it does not change the fact that the District did not implement Student's IEP. For these reasons, the SCO finds and concludes that the District failed to fully implement Student's IEP, resulting in a violation of 34 C.F.R. § 300.323.

B. Student's Psychology/Social Work Services

Student's IEP required the District to provide Student 90 minutes per month of psychology/social work services. (FF # 12.) As an initial matter, the SCO cannot find that Student's service providers were aware of their responsibilities under Student's IEP. Interim Director—who facilitated Student's IEP Team meeting—was unaware of any District staff member contacting or working with School staff following development of Student's IEP. (FF # 24.) Even though School had a school psychologist or social worker during the relevant time period, nothing in the record indicates that this individual was aware of his or her responsibilities under Student's IEP. (FF #s 22, 24.) Therefore, the SCO concludes that the District failed to comply with 34 C.F.R. § 300.323(d), at least with regard to School's school psychologist or social worker.

Lack of communication between District administration and School staff deprived Student of the mental health services required by her IEP. Even though School had the necessary staff and Student's IEP permitted the services to be provided virtually, the Findings of Fact indicate that Student received no mental health services. (FF #s 22-26.) The District has offered no explanation as to why the services were not provided to Student. (FF #s 22-24.) Regardless, over the course of 11 weeks, Student missed 270 minutes (or 4.5 hours) of one-on-one services from a school psychologist or social worker. (FF # 26.) This resulted in a second violation of 34 C.F.R. § 300.323.

C. Materiality of Failures to Implement

The failure to implement a "material", "essential", or "significant" provision of a student's IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with "sister courts . . . that a material failure to implement an IEP violates the IDEA"); *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). "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." *Id.* But a child's educational progress, or lack thereof, may indicate whether there has been more than a "minor shortfall in the services provided." *Id.*

Under her IEP, Student received specialized instruction from a homebound teacher and virtual services from a school psychologist or social worker (as well as indirect occupational therapy

services). (FF # 13.) The District failed to implement the key components of Student’s IEP, resulting in a material failure to implement. (*Id.*) The fact that Student enrolled in the District near the end of the school year did not diminish the importance of her services. Indeed, at the time of her IEP Team meeting, six weeks—or more than 15%—of the school year remained.

Because she was homebound, Student had little, if any, interaction with anyone outside of her family. Student’s IEP reflected her struggle with depression and past suicidal ideation. (FF # 8.) The District’s failure to implement Student’s IEP denied Student the benefit of her IEP whatsoever.

For these reasons, the SCO finds this implementation failure to be material. This failure resulted in a denial of FAPE to Student. Given the degree to which a FAPE was denied, “Student is entitled to compensatory services.” *Colo. Dep’t of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

D. Compensatory Education

Compensatory education is an equitable remedy intended to place a student in the same position he would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education need not be an “hour-for-hour calculation.” *Colo. Dep’t of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child, and ensuring children receive the services to which they are entitled. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010). The SCO now explains a compensatory education package in order to help place Student in the same position with respect to making progress on IEP goals if not for the violation.

Here, the District failed to provide Student 3,960 minutes of specialized instruction and 270 minutes mental health services over an eleven-week period. (FF #s 13, 26.) As a result of the District’s failure, Student did not receive any special education or related services and was denied all benefit of her IEP. Under her IEP, Student receives two hours of specialized instruction three days per week for a total of six hours of specialized instruction. The SCO finds an award of 2,400 minutes of specialized instruction to be appropriate. This award would allow Student’s specialized instruction to extend to four days per week to help place Student in the position she would have been but for the District’s violation. With regard to mental health services, the SCO finds an award of 120 minutes of mental health services appropriate.

E. Systemic IDEA Violation

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

B.” Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46601 (Aug. 14, 2006).

This investigation demonstrates a violation that is systemic and will likely impact the future provision of services for all children with disabilities in the District if not corrected. The District’s failure to provide Student’s specialized instruction was caused by an inability to hire a homebound teacher. This failure was not within the District’s control and not a systemic violation.

However, the District’s failure to provide Student’s mental health services stemmed from a lack of proper procedure regarding related services for students in homebound placements. Currently, the District waits to assign a case manager until a homebound teacher has been selected. (FF # 23.) If the District has difficulty hiring a homebound teacher—as it did in this case—no individual oversees the student’s related services in the interim. (*Id.*) Indeed, it is unclear whether school staff even become aware of an IEP before a case manager is assigned. (FF # 24.) The District’s practice is particularly problematic where a student does not have an existing relationship with school staff (versus a student who attended in person and is now on a homebound placement). For these reasons, the SCO finds and concludes that the District’s failure to implement is systemic in nature.

REMEDIES

The SCO concludes that the District violated the following IDEA requirement:

- a. Failing to properly implement an IEP, in violation of 34 C.F.R. § 300.323.

To remedy this violation, the District is ORDERED to take the following actions:

1. Corrective Action Plan

- a. By **Monday, September 26, 2022**, the District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible.
- b. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm District’s timely correction of the areas of noncompliance.

2. Planning Meeting

- a. By **Friday, September 9, 2022**, the District shall hold a planning meeting with Parent to discuss and prepare for Student's return to the District. This meeting shall include, at a minimum, Director of Special Education, Special Programs Director, and Parent. The meeting may be held virtually but must be scheduled at a mutually agreeable time for all participants. A signed assurance that the meeting occurred must be provided to CDE no later than **Wednesday, September 14, 2022**.

3. District Procedures

- a. The District must develop written procedures regarding implementation of IEPs for students in homebound/hospital placements, in accordance with 34 C.F.R. § 300.323. Such procedures should outline the steps the District will take after a student is placed on homebound/hospital to ensure the student has an interim case manager and related services are timely implemented, as well as the related concerns addressed in this decision. The District must develop these procedures and submit them to the CDE for approval by **Monday, October 24, 2022**.

4. Compensatory Education Services for Denial of a FAPE

- a. Student shall receive **2,400 minutes of direct specialized instruction**. This instruction must be provided by a special education teacher from the District. The instruction must be 1:1, be provided in person, and be in alignment with Student's IEP goals. All 2,400 minutes must be completed by **Wednesday, May 31, 2023**.
- b. Student shall receive **120 minutes of direct mental health services**. These services must be provided by a District psychologist or social worker. The services may be provided virtually. All 120 minutes must be completed by **Monday, November 14, 2022**.
- c. Monthly consultation between the provider(s) delivering compensatory services and Director of Special Education shall occur to evaluate Student's progress towards her IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. The District must submit documentation that these consultations have occurred **by the second Monday of each month**, once services begin, until compensatory services have been completed. Consultation logs must contain the name and title of the provider and the date, the duration, and a brief description of the consultation.
- d. To verify that Student has received the services required by this Decision, the District must submit records of service logs to the CDE by the **second Monday of**

each month until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log.

- i. **By Monday, September 26, 2022,** the District shall schedule compensatory services in collaboration with Parent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. If they cannot agree to a schedule by September 26, 2022, the CDE will determine the schedule for compensatory services by **Monday, October 10, 2022.** The parties shall cooperate in determining how the compensatory services will be provided. If Parent refuses to meet with the District within this time, the District will be excused from delivering compensatory services, provided that the District diligently attempts to meet with Parent and documents such efforts. A determination that the District diligently attempted to meet with Parent, and should thus be excused from providing compensatory services, rests solely with the CDE.
- ii. The District shall submit the schedule of compensatory services to the CDE no later than **Friday, September 30, 2022.** If for any reason, including illness, Student is not available for any scheduled compensatory services, the District will be excused from providing the service scheduled for that session. If for any reason the District fails to provide a scheduled compensatory session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent and notify the CDE of the change in the appropriate service log.

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

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Special Education Monitoring and Technical Assistance Consultant
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 the CDE. **Given the current circumstances surrounding the COVID-19 pandemic, the CDE will work with the District to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶ 13. If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶ 13; *see also* 34 C.F.R. § 300.507(a) and 71 *Fed. Reg.* 156, 46607 (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 29th day of August, 2022.



Ashley E. Schubert
State Complaints Officer

APPENDIX

Complaint, pages 1-4

Response, pages 1-3

- Exhibit A: IEP
- Exhibit B: Blank
- Exhibit C: Notice of Meeting
- Exhibit D: Blank
- Exhibit E: Blank
- Exhibit F: School calendar
- Exhibit G: District policies and procedures
- Exhibit H: Email correspondence

Reply, pages 1-2

Telephone Interviews

- Interim Director of Special Education: August 12, 2022
- Director of Special Education for Special Programs: August 12, 2022
- Parent: August 10, 2022