



Wyoming Department of Education

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WYOMING DEPARTMENT OF EDUCATION
SPECIAL PROGRAMS DIVISION
SPECIAL EDUCATION COMPLAINT INVESTIGATION

Complainant:

Case #: C 0122-11

Respondent:

**COMPLAINT DECISION
AND ORDER FOR
CORRECTIVE ACTION**

Date of Decision: May 12, 2011

On March 14, 2011 the Wyoming Department of Education (WDE) received a letter of complaint and supporting documentation filed by _____ (hereinafter "Complainant") alleging violations of special education law with respect to _____ (hereinafter "Student"), by Respondent _____ (hereinafter "District").

Pursuant to 34 C.F.R. §§300.151 through 300.153 of the Federal Regulations implementing the Individuals With Disabilities Education Act (IDEA), WDE conducted an investigation into the allegations raised in the complaint. Consistent with the IDEA, Federal Regulations, and the Wyoming Department of Education Chapter 7 Rules, WDE issues the following Findings of Fact, Conclusions, Decision, and Order for Corrective Action.

Complaint Issues:

Issue #1

Whether the Student was denied a Free Appropriate Public Education (FAPE) pursuant to 34 C.F.R. §§300.17 and 300.101, including:

- a) Whether the Student had a current IEP in place pursuant to 34 C.F.R. §300.323.

- b) Whether the Student's IEP was reasonably calculated to meet the unique educational needs of the Student in accordance with 34 C.F.R. §§300.320 through 300.324.
- c) Whether the District provided special education and related services to the Student in accordance with the IEP pursuant to 34 C.F.R. §§300.34, 300.39, 300.320 and 300.324.
- d) Whether the Student was denied participation in after-school programming in violation of 34 C.F.R. §§300.107 and 300.117.

Issue #2

Whether the Complainant was denied the opportunity to receive a revised copy of the Student's IEP with amendments incorporated pursuant to 34 C.F.R. §300.324(a)(6).

Issue #3

Whether the District appropriately provided the parent with Prior Written Notice pursuant to 34 C.F.R. §300.503.

Investigatory Process:

- Review of records consisting of the following:
 - Original letter of complaint and supporting documents.
 - The Student's special education file.
- Follow up inquiries with the Complainant.
- Follow up inquiries with the District.
- The District and Complainant were given the opportunity to submit additional information to WDE for consideration during the investigation of this complaint.

Applicable Federal Regulations or State Rules:

- 34 C.F.R. §300.17 Free Appropriate Public Education (FAPE)
- 34 C.F.R. §300.34 Related Services
- 34 C.F.R. §300.39 Special Education
- 34 C.F.R. §300.101 Free Appropriate Public Education (FAPE)
- 34 C.F.R. §300.107 Nonacademic Services
- 34 C.F.R. §300.117 Nonacademic Settings
- 34 C.F.R. §300.320 Definition of an IEP
- 34 C.F.R. §300.324 Development, Review, and Revision of IEP

Relevant Time Period:

Pursuant to 34 C.F.R. §300.153(c), WDE has the authority to investigate allegations of violations that occurred not more than one year from the date the Complaint was received. In light of this limitation, the investigation and any findings of noncompliance will be limited to the period commencing March 15, 2010 through March 14, 2011. However, in order to fully understand the needs of the Student, the concerns of the Complainant, and the position of the District, the Student's recent special education history was thoroughly reviewed.

Findings of Fact:

1. At all times relevant to this complaint, the Student was a resident of the District.
2. At the time of this complaint, the Student was attending fourth grade in the District.
3. The Student relocated from another school district in Wyoming to the current District prior to the third grade year.
4. The Student was previously identified as having a Learning Disability as documented in an IEP drafted by the prior school district in April 2009.
5. In the Present Levels of Academic Achievement and Functional Performance section of the Student's second grade IEP drafted in April 2009, the Student was described as reading at grade level in a small group setting in the regular classroom. She was struggling in math, and her lack of confidence and initiative were identified as contributing factors in addition to difficulty with math facts. Writing skills were described as much improved, but in need of monitoring by adults as the Student's slow writing speed presented her greatest challenge. Staying focused in large group activities was identified as the most difficult area. The Student's difficulty in focusing and attending to instruction was due, in part, to poor sensory processing.
6. In anticipation of the move to a new school district, the April 2009 IEP team identified concerns for the team to address as follows:
 - What is an appropriate amount of extra time to give [Student] when she is working on tasks? Does this depend on the amount of effort she has shown during the given work time?

- What is the balance between support and independence the teachers and adults working with [Student] are to give is starting to use adults as a crutch. will play around until someone comes to work with . At this time sees as having limited accountability for own learning.

7. The April 2009 IEP contained the following goals:

- a) Academic Behavior: When given directions by a teacher to begin a task, [Student] will start task without further adult intervention improving from 0/10 times to 5/10 times as measured by an observation data log.
- b) Math 1 of 3 Forward and Backward Number Word Sequence: When prompted by a teacher, [Student] will be able to read numbers both forward and backward to 100 improving from being able to state numbers to and from 20 as measured by classroom based assessments.
- c) Math 2 of 3 Comparing Numbers: When given a series of 12 numbers, using numbers between 1-100, [Student] will be able to put the numbers in order from smallest to greatest, with no reversals, improving from only using numbers between 1 and 30 in a series of 10 numbers as measured by classroom based assessments.
- d) Math 3 of 3 Numbers in the 100s: When asked by a teacher [Student] will be able to read and write any number in the hundreds improving from being able to read numbers up to one hundred ninety-nine as measured by classroom based assessments.
- e) Writing: When given a writing topic, [Student] will write a five sentence paragraph which includes a topic sentence, three detail sentences, and a conclusion sentence, proper punctuation and capitalization improving from two correct sentences as measured by classroom based assessments.
- f) Reading Comprehension: When given a passage at instructional level, third grade, [Student] will be able to retell at least 50% or better of the passage and be able to answer comprehension questions improving from a retell rate of 25% and 6/10 comprehension questions correct to 8/10 questions correct as measured by classroom based assessments.

8. The April 2009 IEP did not contain any benchmarks.

9. The Student moved into the current District prior to commencing her third grade year.

10. The Student's IEP team met on August 24, 2009 to "discuss and accept" the Student's IEP from the prior school district.

11. The IEP team met again on October 27, 2009 to review the Student's IEP. It is not clear if any changes were made to the Student's IEP as a result of this meeting.
12. Prior Written Notice and Consent for Evaluation were completed on December 3, 2009. The District determined that "current assessments would be helpful to the team to drive instructional needs."
13. A psychological evaluation conducted by a Clinical Psychologist in December 2009 reported the Student's Full Scale IQ to be in the Low Average range of overall intellectual ability with a standard score of 83. The Student was also diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD)(Inattentive Type).
14. On March 27, 2010 the Student was administered a series of tests from the Woodcock Johnson III Test of Achievement. performance was average in reading, low average in mathematics, and very low in math calculation skills, written language and written expression.
15. An Evaluation Report dated April 7, 2010 was completed by the team. Results of the reevaluation include:
 - a) Currently, [Student] has an 86% average in reading. has been part of the advanced group since January 2010. averages 132 words per minute on the DIBELS reading assessment. MAP score is currently 207, with a 72 percentile.
 - b) [Student] attends the Resource Room for math instruction. grade equivalency varies from a 1.5 to a 3.0. does well with the skills knows, but can be very hesitant in learning new concepts. MAP scores indicate a RIT of 201 and a 189 standard cut score.
 - c) [Student] currently has an 80% in spelling, which is taught by the Resource Room teacher.
16. The April 2010 Evaluation Report documents the following: "[Complainant] is concerned about [Student's] math skills and feels that has regressed in that area. would like [Student] to receive body warm-ups in the O.T. classroom each day before school to address her sensory weaknesses. [Complainant] would also like [Student] to sit at a separate table in the lunchroom when foods containing peanuts or fish (sic)."
17. An IEP was drafted for the Student in April 2010. The Student's Present Levels of Academic Achievement and Functional Performance were described as follows:
 - In the area of Reading, [Student] has an 86%. has been in the advanced group since January 2010. averages 132 words per minute on the timed reading. MAP score is 207 -- in the 72 percentile.

- In the area of Math, [Student] receives support in the resource room. math level varies between 1.5 and 3.0. has strengths and weaknesses in all areas. When feels like she knows the procedure, completes the work without any difficulty. If she is unsure, she tends to shut down and become resistive to instruction. [Student] does have great strategies for figuring things out (made her own clock to do some time problems.)
- [Student] also struggles in the area of written language. has fabulous ideas but has trouble getting ideas down on paper. [Teacher] goes into the regular classroom to support [Student] during writing. does well when things are broken down for , if she is given some organizational hints and a quiet, smaller setting.
- [Student] participates in the OT morning group very faithfully. also advocates for herself when knows needs some support (fidget props).

18. The April 2010 IEP contained the following annual goals and benchmarks:

Measurable Goal	Benchmarks
[Student] will decrease sensory driven maladaptive behaviors in the classroom.	<ul style="list-style-type: none"> • [Student] will participate in before-school sensory warm-up classes 2 days per week. • [Student] will maintain attention on school tasks at 90% of typical for grade. • [Student] will return attention to tasks when requested 90% of the time. • [Student] will complete the 4th grade level handwriting book in class and in pull-out sessions, with improved control and formation, and will improve overall legibility on written class assignments throughout the year.
Given the Woodcock-Johnson Achievement Test math subtests, [Student] will increase math skills showing a year's growth from a 2.1 grade equivalency to a 3.1 grade equivalency.	<ul style="list-style-type: none"> • None.

19. The April 2010 IEP contains the following services:

SERVICES	FREQUENCY	DURATION	LOCATION	START DATE
Math	4 x/week	60 minutes	Resource Room	04/08/2010
Written Language	4 x/week	30 minutes	Regular Class	04/08/2010
O.T.	2 x/week	20 minutes	OT Room	

20. The IEP indicated that the Student did not need extended school year services in order to receive FAPE.
21. The Student's file does not contain a Prior Written Notice documenting the District's April 2010 proposal to implement a new IEP.
22. On August 25, 2010, the start of the Student's fourth grade school year, the District sent a letter to all classmates' parents making them "aware that a student in your child's class is severely allergic to peanuts and tuna fish." The letter requested that parents take the information into consideration when supplying snack or party food for class activities.
23. The 2010 PAWS results from Wyoming's statewide assessment indicate that the Student's skills are measured to be Proficient in reading, Proficient in math, and Basic in writing.
24. An IEP team meeting was convened on September 21, 2010 to review and/or revise the Student's IEP. The Prior Written Notice documents the following salient information:
- The IEP team met to review [Student's] IEP and to discuss progress in the Resource Room and the 4th grade classroom. [Student] is to receive body warm-ups 4 days per week before school begins. The O.T. will provide these services 2 days per week, and school personnel will provide services the other 2 days per week. The team feels that the use of a paraprofessional isn't necessary at this point.
25. The Complainant provided a list of concerns, suggestions, and questions to the District in a document dated October 24, 2010. The Complainant proposed seven educational areas in which would like to have measurable goals in the Student's IEP that "can be evaluated at regular intervals to determine if additional interventions or fewer interventions are required." The seven educational areas included:
- a) Writing
 - b) Occupational Therapy
 - c) Math
 - d) Spelling

- e) Reading
- f) Homework
- g) Accommodations for peanut allergies

26. The IEP team convened on November 10, 2010 to address the Complainant's proposal. The Prior Written Notice drafted on the same date documents the following salient information:

- At this point in time, [Student] will work in the regular 4th grade classroom without an inclusionary aide during the reading and language arts classes. [Complainant] will be notified of [Student's] progress following a two week time period. [Student] will now be included in the regular classroom for a 30 min. writing period with [Teacher.] This means that her math period with [Teacher] will be reduced by 30 minutes. [Student] will attend the Resource Room from 8:40 to 9:30 each day. [Complainant] would like to be reported to of [Student's] math progress monthly. On Wednesdays, [Student] will receive O.T. services at 9:40 a.m. and will therefore miss part of the writing time with [Teacher]. [Complainant] would like [Student's] math goal to be increased by 1.3 years.
- [School] will now be peanut free due to [Student's] allergy to peanuts. A health plan will be written on an IEP addendum following the district's appointment with [Complainant] and other officials.

27. The Complainant provided the District with a letter dated November 20, 2010 in which she requested that the Student have a formal IEP written with goals that have objective measures. The Complainant expressed her concern that the Student did not have a valid IEP due to the fact that IEP team members did not sign the last proposal. The Complainant specified nine additional requests for the Student's IEP, including the manner in which goals should be drafted and her expectations for monthly reports on all of the Student's objective measures. Also, the Complainant directed that the "school will be made peanut and tuna free."

28. An IEP Amendment dated November 23, 2010 documents the following:

- Following [Student's] IEP meeting, [Complainant] and school district officials met to discuss the possibility of making [School] peanut and tuna free due to [Student's] severe allergies to peanuts, other peanut products and tuna. This team met on 11-23-10 and confirmed that the school would indeed become tuna and peanut free.

- A letter and lists of foods containing the allergens were sent home to each student, and teachers were also provided with the letter and lists. (They were sent home on 11-23-10.)
29. The District and Complainant continued to communicate via email regarding the November IEP proposal. On November 29, 2010 the Complainant indicated that "overall I think things are progressing well."
30. In a February 14, 2011 email, the Complainant indicated: "The IEP that was to be created for [Student] following our November meeting is still not in place, therefore there are not working measurable goals. Although services seem to be in place, there has been no way to measure their effectiveness or whether they are meeting [Student's] needs."
31. On February 15, 2011 the Complainant wrote:
- I would like to have an IEP with clear measurable goals and objectives working toward [Student] doing grade level work (possibly based on the benchmarks). I feel that [Student] is currently not progressing at a satisfactory rate. Since I am not an educator I don't feel that I can come up with appropriate goals for [Student] as I do not know at what level [Student] peers are working.
- For the monthly progress notes, I would like a formal report stating how she is doing for each goal, ie. "[Student] is able to correctly answer multiplication facts through the 5s family with 80% accuracy. We are working on the 6s fact family." This would have a response for each of her 6 goals as well as for the OT handwriting goal. As far as the progress reports I have received it is very difficult for me to really make sense of them since I don't know what "good" scores will be on the measures used. I do know that [Student] has shown some progress but I have no idea where she is in relationship to her peers. I would like additional objectives for the benchmarks for 4th grade ie – writing, time telling, money, fractions, reading (if needed – I think this is one area she is doing well in). These will have to be updated next year for 5th grade.
32. An IEP team meeting was held on February 22, 2011 to revise the Student's IEP. A Prior Written Notice of the same date documents the following proposal:
- A meeting was held to discuss and change several aspects of [Student's] IEP and to review Key Math assessment results. It was also decided by the team that 2-22-11 would be the new annual review date. [Student's] IEP Amendment will further explain those changes.

33. The February 22, 2011 IEP Amendment documents the following changes to the Student's IEP:

- [Teacher] is no longer [Student's] Language Arts teacher. [Teacher] continues to accommodate [Student] in the areas of reading and writing. [Student] will now receive spelling instruction in the 4th grade classroom; spelling lists will be reduced, as needed.
- [Student's] Special Education Services page has changed. [Student] does not receive the extra 15-20 min. writing/spelling session from the Occupational Therapist as was stated on this page of the IEP.
- Math service times have been changed due to schedule changed in the 4th grade classroom. [Student] was attending the Resource Room each day for 40 min. sessions. She now receives math services for 60 minutes 3 days per week. She receives a 40 minute session once weekly; [Student] attends O.T. for a 20 minute session during that math session.
- Several goals have been eliminated, and several new goals have been developed so that we may more closely target [Student's] performance with the district's Standards and Benchmarks. [Student] will be attending the after-school Ascend math tutoring 2 days per week.
- A weekly progress report will be sent to [Complainant] to inform her of [Student's] progress in math and writing.

34. The Student's IEP was redrafted to incorporate the above changes. The Student's Present Levels of Academic Achievement and Functional Performance were described, in relevant part, as follows:

- [Student] has made gains in the area of mathematics since the beginning of the 2010-2011 school year. Given the Star Math assessment in the Fall of 2010, [Student] had a grade equivalency of 3.2; the winter Star Math score indicated 4 months growth with a 3.6 grade level. [Student's] MAPS testing also indicates growth since the fall; [Student's] RIT score increased from a 185 to a 202, with percentile ranks from a 8thile to a 33rdile. [Student] knows her multiplication facts for the following fact families: 0s, 1s, 2s, 5s, 10s, and 11s. Grade equivalencies were obtained by the Key Math assessment given on 2-17-11. These equivalencies are as follows: Overall – 3.2; Number Concepts and Operations – 2.6; Geometry – 4.2; Measurement – 3.4; Algebra – 3.2; and Data Analysis – 3.9. (It was noted that [Student] often stated that

could not do several of the problems on the evaluation, but actually did know how to perform the operations.)

- [Student] is doing wonderfully in Spelling in the Resource Room. has been using the 4th grade word lists and has a 97% average. will now be receiving spelling instruction from [Teacher], her 4th grade teacher. The list will be reduced, and [Student] will be responsible for classroom work and homework. [Teacher] reports that [Student] is progressing in the classroom in the area of writing. [Student] is getting most of the writing done on her own, and [Teacher] holds high standards.
- In 1 handwriting goal she has completed the review of the lower case and today began a review of the cursive capitals. . . . her workbook sent home last week passes my legibility criteria of appropriate size, age level control, and formation.

35. The February 22, 2011 IEP indicates that Extended School Year services are necessary in order for the Student to receive FAPE. The explanation states: "The team will meet during the first part of May 2011 to determine this placement."

36. The IEP contained the following annual goals and benchmarks:

Measurable Goal	Benchmarks
<p>Given the Key Math-3 Diagnostic Assessment each quarter, [Student] will increase overall math score from an over 3.2 grade level to a 4.5 grade equivalency. Grade equivalencies for content standards will increase by 1.3 years.</p> <p>Number Concepts and Operations: 2.6 to a 3.9; Geometry: 4.2 to a 5.5; Measurement: 3.4 to a 4.7; Algebra: 3.2 to a 4.5; Data Analysis and Probability: 3.9 to a 5.2.</p>	<ul style="list-style-type: none"> • Given a set of problems/questions for each benchmark of the content standards, [Student] will orally/graphically solve and communicate understanding with 80% accuracy. (Please see attached Wyoming Mathematics Content and Performance Standards for progress data.) • [27 separate benchmarks were attached for incorporation into the IEP.]
<p>[Student] currently knows the following multiplication facts: 0s, 1s, 2s, 5s, 10s, and 11s. Using the Math Facts in a Flash computerized program and given 40 multiplication or division facts at a given level (2s – 3s, 4s – 5s), [Student] will compute the answer for each within two minutes with 100% accuracy.</p>	<ul style="list-style-type: none"> • None.

Measurable Goal	Benchmarks
[Student] is currently writing an average of 2-3 sentences per journal entry. Given a journal entry, [Student] will respond to the entry in writing. She will respond by writing 5 or more sentences with correct spelling, punctuation, capitalization, and grammar with 80% accuracy.	<ul style="list-style-type: none"> • None.
[Student] scored at a basic performance on the PAWS assessment in the spring, 2010. [Student] will use the writing process and use appropriate strategies to write a variety of expressive and expository pieces. Given a 4 th grade writing rubric, [Student] will score at a proficient performance.	<ul style="list-style-type: none"> • None.
[Student] will demonstrate proficiency with cursive writing. [Student] is writing at about 3 rd grade level in cursive with respect to control, formation and speed. Measured by completion of 4 th grade writing program book, copy from board and near point copy, and writing from dictation exercises.	<ul style="list-style-type: none"> • None.
[Student] will continue to demonstrate functional levels of sensory integration in the school environment. [Student] has demonstrated decreased sensory driven, maladaptive behaviors at school this past quarter compared to last year. She appears to benefit from her current medication regime as well as sensory integration sessions before school. Measured by classroom teacher reports and observation.	<ul style="list-style-type: none"> • [Student] will attend sensory warm-up sessions before school each day. Sessions will include various system challenges, ending with a calming and focusing session before classes begin. • Sensory seeking and avoidance behaviors such as excessive fidgeting, eyebrow plucking, hiding under desk, etc, requiring the instructor to redirect and prompt to stay on tasks, will diminish to less than 5% of daily classroom behaviors.

37. The February 2011 IEP contains the following services:

SERVICES	FREQUENCY	DURATION	LOCATION	START DATE
Math	4 x/week	60 min. 3x week 40 min. 1x week	Resource Room	02/22/2011
O.T.	2 x per week	20 minutes	OT Room	02/22/2011
An inflatable sitting disc will be provided	4 days per week	1 year	Regular Classroom	02/22/2011
[Student] may use fidget toys for sensory	4 days per week	1 year	Regular Classroom	02/22/2011

SERVICES	FREQUENCY	DURATION	LOCATION	START DATE
weaknesses				
[Student's] 4 th grade teacher may act as a scribe for her during writing activities. [Student] may also finish writing tasks in the Resource Room if needed.	4 days per week	1 year	Regular Classroom	02/22/2011
Weekly progress reports will be sent home for all IEP goals, including OT.	1 day per week.	1 year	N/A	
[Student's] 4 th grade spelling list will be reduced, as needed.	1 day per week.	As needed	Regular Classroom	
Ascend computerized math intervention program	2 days per week	40 min. sessions	Computer Lab	

38. On February 23, 2011 the Complainant's advocate wrote to the Director of Special Education, in relevant part, that "[Complainant] is very aware of what an IEP should look like as well as what her parental rights are and she is still wavering regarding utilizing them. Not having the IEP in hand with progress communicated and not changing the goals to be measureable as [Student] moves through elementary school has been very frustrating for her."

39. Staff notes from the Ascend afterschool math program indicate that the Student is attending, but : does not seem to like doing the computerized math work.

40. The Students 4th grade report card evidences the following grades:

Subject Area	Quarter 1	Quarter 2	Quarter 3
Reading	C 82%	A 94%	B 92%
Language Skills	B 87%	C 80%	C 82%
Spelling	A 100%	A 99%	A 95%
Mathematics	A 95%	A 97%	A 98%
Social Studies	A 100%	B 91%	B 92%

41. The District provided Weekly Math Progress Reports for February 28th through March 3rd, March 7th through 11th, March 14th through 17th, March 21st through 25th, March 28th through 31st.
42. The Complainant filed this complaint on March 14, 2011.
43. A monthly progress report was completed on March 21, 2011. Seven of the 27 objectives noted in the February 2011 IEP math goal had been met in the first month. Progress was documented in all areas.

Conclusions:

1. The Student is identified as eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA) by virtue of a learning disability. The Student also has been diagnosed with ADHD and suffers from nut and fish allergies.
2. The District is obligated to ensure that the Student receives FAPE by providing special education and related services reasonably calculated to provide the Student educational benefit. See 34 C.F.R. §§300.17 and 300.101.

Issue #1

3. It is the obligation of the District to have an IEP in place at the beginning of a school year for an eligible student. 34 C.F.R. §300.323.
4. The District met this obligation at the commencement of the 2010-2011 school year, and at all times in the one year period relevant to this complaint.
5. The IDEA does not require the District to obtain a parent's signature on an IEP. "There is nothing in the Act that requires IEP members to sign the IEP, and we believe it would be overly burdensome to impose such a requirement. 71 *Federal Register* 46682.
6. The only mechanism to halt the implementation of an IEP after a District proposal is by requesting a due process hearing through filing a due process complaint. In the event that a parent requests a due process hearing, the "child involved in the complaint must remain in his or her current educational placement." 34 C.F.R. §300.518(a). This safeguard is referred to as "stay-put."
7. The Complainant did not formally object to the implementation of any of the District's proposed IEPs or amendments. A due process complaint or hearing request was not filed

by the Complainant. Therefore, the proposed IEPs and/or amendments became effective after the District's proposal.

8. The Student had a current IEP in place at all times relevant to this complaint.
9. It is the obligation of the District to provide special education and related services reasonably calculated to result in some educational benefit as measured by progress toward IEP goals, or to take steps to address the lack of progress.
10. The District is not required to include annual goals in an IEP that relate to areas of the general curriculum in which a child's disability does not affect the child's ability to be involved in and progress in the general curriculum. *Notice of Interpretation*, Appendix A to 34 C.F.R. Part 300, Question 4 (1999 Regulations).
11. In 2004, Congress eliminated the requirement for a statement of benchmarks or short-term objectives for most students. Benchmarks must be part of IEPs for students who take alternate assessments aligned to alternate standards. In Wyoming, benchmarks are required only for students taking the PAWS-ALT statewide assessment. 34 C.F.R. §300.320(a)(2)(ii).
12. Both the amount and type of service contained in an IEP will be unique to the individual needs of a student. An IEP is not defective merely because it fails to include special education services as requested by a parent if those services are not necessary for the child to receive FAPE. *See Winkelman v. Parma City Sch. Dist.*, 51 IDELR 92 (6th Cir. 2008).
13. The IDEA does not require goals to be written for each specific discipline or to have outcomes and measures on a specific assessment tool. 71 *Federal Register* 46662.
14. Typically, an IEP will lack the specificity of a lesson plan to permit greater flexibility in using many different techniques or methodologies to meet a child's specific educational needs. *See Gill v. Columbia 93 Sch. Dist.*, 31 IDELR 29 (W.D. Mo. 1999).
15. The Complainant requested very specific goals, benchmarks, and services to be included in the Student's IEP. The District was not obligated to include those goals, benchmarks, or services unless they were necessary in order for the Student to receive FAPE.
16. The record supports a conclusion that the District made diligent efforts to incorporate the suggestions of the Complainant into the Student's IEP, even to the extent that documenting progress became difficult due to the frequently changing provision of FAPE for the Student.
17. An IEP is not an educational contract guaranteeing that the student will achieve a certain amount of proficiency. *See Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (1982) (holding that an IEP must provide a "basic floor of opportunity"); *Coale v. State Dept. of Educ.*, 35 IDELR 149 (D. Del. 2001) (unless state law

- imposes a higher standard, a district must only make a "good-faith effort" to assist the child to achieve his or her IEP goals).
18. The most authoritative view is that a child's educational benefit must be more than de minimus -- there must be some tangible gain in abilities. One of the leading cases interpreting Rowley's "some educational benefit" to mean more than "de minimus" is *Polk v. Central Susquehanna Intermediate Unit 16*, 441 IDELR 130 (3rd Cir. 1988). There, the court held that IDEA "calls for more than a trivial educational benefit" and requires an IEP to provide "significant learning" and confer "meaningful benefit."
 19. The 10th Circuit Court of Appeals, the federal Circuit Court of Appeal for Wyoming, has reiterated that a school district is providing a student with appropriate special education programming if the services are reasonably calculated to allow the student to make "some progress" in the IEP. *Thompson RJ-2 School District v. Luke P.*, 50 IDELR 212 (10th Cir. 2008).
 20. Districts are not required to maximize a student's educational performance. For example, in *J.L. v. Mercer Island School District*, 55 IDELR 164 (W.D. Wash. 2010), the District Court noted that the FAPE standard requires that districts offer a student some educational benefit, not that they attempt to remediate a student's deficiencies or maximize her potential. Furthermore, districts need not cater to a parent's preference and place the student in what the parent considers the "better" placement. *Z. W. v. Smith*, 47 IDELR 4 (4th Cir. 2006); and *Bradley v. Ark. Dep't of Educ.*, 45 IDELR 149, 443 F.3d 965 (8th Cir. 2006).
 21. The Student received average and above grades, even in regular education. The Student has met Wyoming statewide assessment expectations in two of three areas by obtaining Proficient scores in Reading and Mathematics. The area in which the Student obtained a Basic score is addressed in the Student's IEP.
 22. In light of the fact that progress was reported on the Student's IEP, obtained average and above scores in general and special education, and she earned Proficient scores in two of three subjects on the PAWS assessment, the record supports a conclusion that the Student made meaningful progress.
 23. It is also the responsibility of the District to provide special education and related services in conformity with the Student's IEP. 34 C.F.R. §300.17. Minor amendments to instructional services, especially with respect to the IEP benchmarks, do not offend the District's duty to provide services consistent with the IEP. See *Van Duyn v. Baker Sch. Dist.*, 47 IDELR 182 (9th Cir. 2007) (Minor failures to implement the IEP exactly as written did not constitute a denial of FAPE because implementation failures were not material.)

24. The exact methodology or instructional strategies used to teach certain skills are typically left to the District. *See Carlson v. San Diego Unified Sch. Dist.*, 54 IDELR 213 (9th Cir. 2010) (The district was not obligated to utilize the parent's preferred instructional method.)
25. Any variations in the implementation of the Student's short-term objectives were not material to the Student's overall progress toward her annual IEP goals.
26. Although made more difficult by the frequently changing IEP, the District provided special education and related services consistent with the Student's IEP. Any changes to implementation strategies did not constitute material changes to the IEP, and were within the purview of the District.
27. The Student, like any other eligible student, has an equal right as nondisabled students to participate in extracurricular and nonacademic activities as determined appropriate and necessary by the IEP team. 34 C.F.R. §§300.107 and 300.117.
28. The Complainant wanted the Student to participate in the Ascend after school computerized math instruction.
29. The Student's IEP team determined that participation in the Ascend math program was appropriate for the Student.
30. The District facilitated the Student's involvement in the Ascend program with attendance reminders, assistance with on task behavior, and instructional assistance.
31. The record supports a conclusion that the Student, at times, made the choice not to attend the Ascend program. The District did not deny the Student an opportunity to participate in this activity.

Issue #2

32. Changes to an IEP may be made either by the entire IEP team at an IEP meeting, or by agreement between the school and the parent. 34 C.F.R. §§300.324(a)(4) and (6).
33. These changes may be made by amending the IEP rather than redrafting the entire IEP. However, upon parent request, a parent must be provided with a revised copy of the IEP with the amendments incorporated. 34 C.F.R. §300.324(a)(6).
34. Review and revision of an IEP must occur periodically, but not less than annually, to determine whether annual goals are being achieved and revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals. *See* 34 C.F.R. §300.324(b)(1).
35. During the one year time period relevant to this complaint, the Student's IEP team met on April 7, 2010, September 21, 2010, November 10, 2010, and February 22, 2011.

36. The Student's IEP was amended in April 2010, September 2010, twice in November 2010, and again in February 2011, when the entire IEP was redrafted at the Complainant's request. In addition, the annual renewal date of the Student's IEP was changed to February 22, 2011, the date on which the amendments were incorporated into a new IEP.
37. There is no evidence to support a conclusion that the Complainant was denied the opportunity to be provided with a revised copy of the Student's IEP with amendments incorporated pursuant to 34 C.F.R. §§300.324(a)(4) and (6).
38. As noted previously, adjustments to curricula or instructional strategies do not amount to a material change in the Student's IEP.

Issue #3

39. The District is required to provide a parent with Prior Written Notice whenever it proposes or refuses "to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to a the child." 34 C.F.R. §300.503(a).
40. It is the United States Department of Education Office of Special Education Program's (OSEP) position that Prior Written Notice is required even if a parent requests a change. *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008). Regardless of which party initiates a change, Prior Written Notice must be issued prior to implementing the change.
41. The purpose of Prior Written Notice is to alert the parent to a school district's proposal or refusal, triggering the parent's right to object to the proposal or refusal through the due process hearing system.
42. The filing of a due process complaint is the only mechanism under the IDEA and federal regulations to halt the implementation of a proposed IEP pursuant to 34 C.F.R. §300.518.
43. The Student's IEP was frequently amended at the request of the Complainant. The District was obligated to provide Prior Written Notice each time it proposed changes, even if the Complainant requested those changes.
44. The District failed to issue a Prior Written Notice when proposing the April 2010 IEP. This is a procedural violation rather than a substantive one.
45. A procedural violation under the IDEA rises to the level of a denial of FAPE only if it impedes the child's right to FAPE, or significantly impedes the parent's right to participate in the IEP process, or causes a deprivation of educational benefit. *W.R. v. Union Beach Bd. of Educ.*, 54 IDELR 62 (3rd Cir. 2011) citing *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007).

46. The record in this matter supports a conclusion that the Complainant continued to be involved and very active in her child's education. There is no evidence to support a conclusion that the Complainant's right to participate in the IEP process was impeded in any way.
47. The Student continued to make academic and behavioral gains throughout the time period relevant to this complaint. There is no evidence to support a conclusion that the Student was denied FAPE or that the procedural violation caused any deprivation of educational benefit.
48. Failing to provide Prior Written Notice to the Complainant prior to implementing the April 2010 IEP does not rise to the level of a substantive denial of FAPE.

Decision:

Issue #1

Whether the Student was denied a Free Appropriate Public Education (FAPE) pursuant to 34 C.F.R. §§300.17 and 300.101, including:

- a) Whether the Student had a current IEP in place pursuant to 34 C.F.R. §300.323.

WDE finds no violation.

- b) Whether the Student's IEP was reasonably calculated to meet the unique educational needs of the Student in accordance with 34 C.F.R. §§300.320 through 300.324.

WDE finds no violation.

- c) Whether the District provided special education and related services to the Student in accordance with the IEP pursuant to 34 C.F.R. §§300.34, 300.39, 300.320 and 300.324.

WDE finds no violation.

- d) Whether the Student was denied participation in after-school programming in violation of 34 C.F.R. §§300.107 and 300.117.

WDE finds no violation.

Issue #2

Whether the Complainant was denied the opportunity to receive a revised copy of the Student's IEP with amendments incorporated pursuant to 34 C.F.R. §300.324(a)(6).

WDE finds no violation.

Whether the District appropriately provided the parent with Prior Written Notice pursuant to 34 C.F.R. §300.503.

WDE find the District is in violation by failing to provide Prior Written Notice prior to implementation of the April 2010 IEP. However, this violation is procedural in nature and does not rise to the level of a denial of FAPE.

Corrective Action Plan:

1. The District shall provide at least one (1) hour of inservice training on the IDEA's requirement of Prior Written Notice consistent with 34 C.F.R. §300.503. The inservice training shall be completed within 30 days of the date of this decision.
2. The District shall provide WDE with the following documentation:
 - a. The date, time, location, agenda and presenters for the training by June 1, 2011; and
 - b. Copies of any materials or handouts used, in addition to sign-in sheets documenting the attendance of special education staff within ten (10) days of completion of the mandatory inservice training.
3. All required submissions must be sent to WDE to the attention of Diana Currah, with a copy to the Complainant.

Note: Although the Student's IEP indicated that Extended School Year (ESY) services would be determined by reconvening the team in May 2011, the District is cautioned about utilizing this approach, especially in light of the fact that the Student was currently participating in before-school programming (sensory warm-ups) and after-school programming (Ascend program). ESY services are special education and related services provided to a child beyond the normal school year pursuant to 34 C.F.R. §300.106. The United States Department of Education has interpreted this provision to mean ESY, if determined necessary in order to provide FAPE, must be available at times other than summer, including before or after regular school hours. The District may want to specifically reconsider the needs of the Student in light of the services she is currently receiving to determine if they are necessary in order for the Student to receive FAPE. If yes, the District must satisfy the ESY obligation.

Caution: Consistent with Conclusion Number 17 above, an IEP is not a contractual guarantee of a certain outcome. Recognizing that the District can never absolutely guarantee that other members of the school community might (even unknowingly) bring nut or fish products into the school environment, it may want to consider the recent Federal Court guidance in the case of P.K. v. Middleton Sch. Dist., 56 IDELR 105 (D.N.H. 2011).

Please direct questions regarding this complaint investigation to the Wyoming Department of Education, Special Programs Division at 307-857-9250 or 800-228-6194.

Sincerely,

A handwritten signature in black ink, appearing to read "Peg Brown-Clark". The signature is fluid and cursive, with the first name "Peg" being more prominent and the last name "Brown-Clark" following in a similar style.

Peg Brown-Clark
State Director of Special Education
Special Programs Division Director

cc:

Superintendent
Board Chair
Cindy Hill, Superintendent of Public Instruction
John Masters, WDE Legal Counsel

Enc: Procedural Safeguards