

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><b>[Parent], on behalf of [Student],</b> Complainant,</p> <p>vs.</p> <p><b>BOULDER VALLEY SCHOOL DISTRICT RE-2,</b> Respondent.</p>	
<b>AGENCY DECISION</b>	

On April 22, 2021, [Parent] (Complainant) filed a due process complaint with the Colorado Department of Education (CDE), Exceptional Student Services Unit, against Boulder Valley School District RE-2 (District). On April 22, 2021, CDE referred the complaint to the Office of Administrative Courts (OAC). Krishinevsky & Raykin, Attorneys at Law, represented Complainant in this proceeding. Semple, Farrington, Everall & Case, P.C., represented the Respondent District.

A prehearing conference was conducted by the undersigned Administrative Law Judge (ALJ) on June 3, 2021. Igor Raykin, Esq. appeared for Complainant. Robert Montgomery, Esq. appeared for District. At the prehearing conference, the parties set the hearing for October 26 – 29, 2021 in Denver, Colorado and extended the decision deadline to December 3, 2021. At hearing the parties requested to provide the ALJ with written closings on November 12, 2021, and the decision deadline was extended to December 17, 2021.

Complainant originally filed this due process complaint on September 18, 2020, but withdrew the complaint prior to hearing on December 18, 2020. (EA 2020-0036). Complainant refiled his due process complaint on April 22, 2021. The refiled complaint contains the same substantive allegations but expands the time period through December 2020. Complainant alleges that District violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, *et. seq.*, and accompanying regulations at 34 C.F.R. Section 300, *et. seq.*, and the Colorado Exceptional Children's Educational Act (CECA), Colo. Rev. Stat. Section 22-20-101, *et. seq.*, by failing to provide [Student] (Student) with a free appropriate public education (FAPE). More specifically, Complainant alleges Student was denied a FAPE, Student was not provided instruction in the least restrictive environment, District changed his placement without a group of persons knowledgeable about Student when he was changed to online instruction, District failed to provide prior written notice regarding the change to online instruction, District did not include the

parents in decisions to provide instruction online/remote, and District predetermined Student's instruction would be provided online/remote. Although the complaint does not provide a timeframe for the allegations, the ALJ determined the allegations relate to the period in which District was providing instruction remotely, which was established as March 30, 2020 through December 2020 (relevant time period). District relied upon its response to the allegations filed in the previous complaint, EA 2020-0036.

On June 14, 2021, Complainant filed an unsigned amended complaint without a corresponding motion or request to amend. Because District had already responded to the initial complaint, the amended complaint was unsigned, and Complainant failed to file a motion requesting to amend the complaint, the ALJ rejected the June 14, 2021 amended complaint. On July 19, 2021, Complainant filed an unopposed motion to amend the complaint and his first amended complaint. Complainant sought leave to include factual information regarding District's provision of some compensatory services after the filing of the initial complaint. The ALJ granted the motion. District provided a response to the first amended complaint on July 30, 2021. District denies Complainant's allegations and affirmatively states that it implemented Student's Individualized Education Program (IEP) which was reasonably calculated to provide a FAPE in the least restrictive environment (LRE), that it did not change or predetermine Student's placement or LRE, and did not commit any procedural violations.

Hearing was held before the undersigned ALJ on October 26 – 29, 2021 via Google Meet video conferencing. The proceedings were transcribed by a court reporter provided by CDE. At hearing, Samantha Baker, Esq. represented Complainant. Robert Montgomery, Esq. represented District. At hearing the ALJ admitted into evidence Complainant's Exhibits 1 – 6, 9, 13, 21 and 22 and District's Exhibits J, O, S, T, Z, II, KK, MM – OO, and QQ – YY. Complainant testified on his own behalf. Complainant also called [Student's Sibling], [Former Caregiver 1], [Former Caregiver 2], and [Special Education Teacher 1]. District called [Director of Health Services], [Former Special Education Director], [Case Manager], [Speech Language Pathologist], [Occupational Therapist], and [Special Education Director].

## **ISSUES PRESENTED**

The ALJ must determine whether Complainant has established, by a preponderance of evidence, the Respondent denied Student a FAPE when, from March 30, 2020 through December 2020, when Student received educational services remotely via online format.

The ALJ must also determine whether Complainant has established, by a preponderance of the evidence, Respondent failed to provide educational services in the least restrictive environment and changed Student's placement without prior written notice or meaningful participation of Student's parents, and if so, whether any of these procedural violations denied Student a FAPE.

If the ALJ determines Student was denied a FAPE due to substantive or procedural violations, the ALJ must determine whether Student is entitled to an award of compensatory services.

### **FINDINGS OF FACT – STIPULATED FACTS**

The following findings are drawn from the parties' stipulation of facts:

1. The Student is a student at [High School], a District school.
2. The Student qualifies for special education services pursuant to the Individual with Disabilities Education Act (IDEA).
3. The Student qualifies for special education in the disability categories of multiple disabilities, including intellectual disability and speech or language impairment.
4. The Student had an Individualized Education Program (IEP) dated February 2, 2020 (2020 IEP) with six goals, each of which contained objectives.
5. The Student qualified for extended school year services for the following goals on the 2020 IEP: (1) writing; (2) language; (3) vocational/career skills; (4) reading; and (5) math.
6. The 2020 IEP was in effect from February 2020 through February 2021.
7. The Student's IEP contained a Behavior Support Plan.
8. The Student's 2020 IEP provided for a total of 1,140 direct service minutes from a special education teacher each week.
9. The 2020 IEP indicated the Student is in a special education environment 52.7% of his school day.
10. The Student's special education teachers were [Special Education Teacher 1] and [Special Education Teacher 2].
11. The 2020 IEP provided for a total of 140 direct service minutes from a speech language pathologist each month.
12. The Student's speech language pathologist is [Speech Language Pathologist].
13. Spring break at District in the 2019-2020 school year was from March 16, 2020 through March 27, 2020.
14. On March 18, 2020, Governor Polis issued Executive Order D 2020 007 ordering the suspension of "normal in-person instruction from March 23, 2020-April 17,

2020.” On May 21, 2020, Governor Polis extended the suspension of in-person instruction through June 20, 2020 in Executive Order D 2020 074.

15. On or about March 21, 2020, the United States Department of Education issued guidance on providing distance instruction for students with disabilities.

16. The Student participated in an extended school year (ESY) program during the summer of 2020.

17. In August of 2020, District implemented a District-wide phase plan for a return to in-person instruction.

18. Phase 1 did not permit in-person instruction.

19. On September 14, 2020, a contingency learning plan was added to the Student’s IEP.

## **FINDINGS OF FACT**

### *Background*

20. In 2019-2020 school year, Student was a fifteen year old 10<sup>th</sup> grader at [High School] and during the 2020-2021 school year he was an 11<sup>th</sup> grader.

21. Student is identified with intellectual disabilities and speech or language impairment. Specifically, Student is a person diagnosed with [ ], which over the years, has affected his hearing, vision, learning, and digestion.

22. Student’s IEP identifies areas of impact related to his disabilities as: writing skills, language skills, vocational/career skills, reading skills, math skills, and independent living skills.

23. Student is generally a polite, funny, and social young man who loves the movie “Cars” and listening to music, especially, “Life is a Highway.”

24. Student’s mother and father [ ].

### *IEP Goals and Progress*

25. The IEP prior to February 2020 contained a number of goals. Several of February 2019 goals were either modified or carried over. In relevant part the February 2020 IEP states the goals and progress from the February 2019 IEP are in relevant part as follows:

- a. Goal 1 Writing, Objective 1 – Student typing his name with 60% accuracy with maximal prompting (progress made, goal modified).
- b. Goal 3 Social Emotional Wellness, Objective 1 – Demonstrating safe transitions between preferred and non-preferred activities 4 out 5

times with no more than two prompts (progress made).

- c. Goal 3 Social Emotional Wellness, Objective 2 – Demonstrating safe transitions between classes 3 out of 5 opportunities with no more than one prompt (goal continued).
- d. Goal 4 Reading, Objective 1 – When given a short story, answering four “wh” questions with 60% accuracy (progress made, goal modified).
- e. Goal 5 Mathematics Objectives 1 and 2 – Counting money with 75% accuracy (limited progress, goals continued).
- f. Communication Goals, Objective – Increasing speech intelligibility (progress made).
- g. Independent Living Skills, Objective – Using wallet to obtain money and coins to make purchases in the community (goal continued).

Ex. 1.

26. The February 2, 2020 IEP lists the following goals:

- a. Goal 1 Writing – In order to be successful as an employee, it is important to be able to communicate by emails.

Objective – September 2021, Student will use a computer mouse and be able to log in to a computer with his login and password with 2 or less prompts given a visual model, showing the keys that need to be typed in 2/4 trials with 100% accuracy.

Baseline: Student can navigate to the login and password and click on the appropriate boxes with 2-3 prompts.

By February 2021, Student will use a computer mouse and be able to log in to a computer with his login and password with 2 or less prompts given a visual model in 3/4 trials with 100% accuracy.

Baseline: Student can navigate to the login and password and click on the appropriate boxes with 2-3 prompts.

- b. Goal 2 Language – In order for people to be as independent as possible as adults it is important for them to improve their functional communication skills.

Given tactile/verbal/visual cues, Student will produce key multisyllabic words (e.g. of personal or academic importance) with 60% accuracy.

Baseline: Student is producing multisyllabic words (e.g. "Colorado") with approximately 40% accuracy.

Given tactile/verbal/visual cues, Student will use his intelligibility strategy of slowing down on 3 of 5 opportunities when he is not understood.

Baseline: Student is slowing down on approximately 1-2 of 5 opportunities when he is not understood.

Using verbal and/or other modalities, Student will convey a novel message intelligibly to conversation partner successfully 70% of opportunities, across 3 data collection sessions.

Baseline: Student is conveying a novel message intelligibly approximately 50% of opportunities.

- c. Goal 3 Vocational/Career Skills – Adults need to have appropriate emotional regulation in order to be safe and successful in the retail/service industry.

By February 2021, Student will demonstrate safe behaviors when transitioning from a preferred to non-preferred activity with two or fewer prompts in 4/5 opportunities.

Baseline: Student requires 2-3 prompts when transitioning from preferred to non-preferred.

By February 2021, Student will demonstrate safe behaviors when transitioning between classes (walking rather than running, staying with group) in the building with one or no prompts in 3/5 opportunities.

Baseline: Student requires 1-2 prompts to walk with adult when transitioning between classes.

- d. Goal 4 Reading – In order for people to be as independent as possible as adults it is important for them to understand environmental print and relay information.

By February 2021, when given a short story or article at the 1.0 reading level that is read aloud while Student follows along and highlights important information with support, Student will be able to achieve 80% accuracy in answering four "who," "what," "when," "where" and "why" multiple choice questions in 4/5 opportunities and 2 or fewer prompts.

Baseline: Student is able to answer "wh" questions with 60%

accuracy and 3-4 prompts.

By February 2021, Student will be able to recognize 15 functional words in print with 100% accuracy in 4/5 opportunities.

Baseline: Student can identify 8 functional community words.

- e. Goal 5 Mathematics – In order to live as independently as possible adults need to be responsible with money.

By February 2021, Student will demonstrate 1:1 correspondence through counting money \$1-\$10 with 75% accuracy in 3/4 opportunities.

Baseline: Student demonstrates 1:1 correspondence consistently with \$1-\$4.

By February 2021, when given an item \$10 or less and a number line, Student will be able to determine the correct amount needed to purchase, determining the next dollar, with 75% accuracy in 3/4 opportunities.

Baseline: Student demonstrates 1:1 correspondence consistently with \$1-\$4.

- f. Goal 6 Independent Living Skills – In order to live as independently as possible, people need to improve their skills in the area of independent living skills.

Student will demonstrate improved dexterity and independence by mastering the following skills in 2 of 3 trials over at least three data sessions.

- hang his coat on a hanger
- slice a variety items with a serrated knife
- tie his shoes

(in order to meet his shoe tying objective Student will need to wear shoes with laces to school. They need to be shoes with thick/wide laces (as on sneakers or sports shoes) vs. dress shoes or hiking boots).

Student will access a wallet in order to obtain or store coins, cards and/or bills when paying for items in the community in 2 of 3 trials over at least three data sessions.

Ex. 1.

27. The February 2, 2020 IEP specified the LRE for Student was 40% to 79% in general education classes. Specifically, 47.3% general education environment and

52.7% outside general education environment.

28. District completed a progress report in May 2020. That report in relevant part states the following:

- a. Goal Writing – Objective 1 – Student has not been observed working on this goal in the online learning environment. However, with support he joins online learning every school day. The information is saved on his computer. *Progress Made.* Objective 2 no information. *Student did not work on this objective.*
- b. Goal Language – During in school learning, we worked on these goals in the context of the classroom as well as 1:1 therapy. Visuals really helped; we worked on intelligibility and multisyllabic words when describing pictures in a book, for example. Since the transition to home learning in March, we have worked on these goals in the context of describing preferred images (e.g. car parts like "antenna"), and in group conversation (e.g. in describing personal photos). More concrete data is pending. *Progress Made* on all three objectives.
- c. Goal Vocational/Career Skills – When utilizing his star chart and clear firm direction in the school setting, Student makes successful transitions. The online learning environment has been quite challenging for Student, however he has shown up to class every day, on time without fail. We brainstormed and implemented many practices to help Student stay engaged such as music video breaks and connecting through student led interests. *Progress Made* Objective 1 and did not work on Objective 2 (physically transitioning between classrooms safely).
- d. Goal Reading – Objective 1 – *Progress Made.* Objective 2 – *Student did not work on this objective.*
- e. Goal Mathematics – Objective 1 – *Progress Made.* Objective 2 – *Student did not work on this objective.*
- f. Goal Independent Living Skills – Confounding variables related to COVID-19 and the home setting impacted reliability and accuracy of data, however the therapist was able to gather the following information through Home Learning engagement and feedback: Per parent report, Student has been working on learning the overhand knot as a first step to shoe tying. He has regularly attended cooking and science groups during online learning and participated with meal prep as appropriate at home. He participates in home work chores which may include hanging up his coat. Due to "safer at home" measures, Student has not used a wallet in a store since the COVID-19 closures. Objective 1 – *Progress Made.* Objective 2 – *Student*



*did not work on this goal.*

Ex. 13.

29. District completed a progress report in July 2020. That report in relevant part states the following:

- a. Goal Writing – *Student did not work on this goal* during extended school year (ESY).
- b. Goal Language – Student seen via Google Meet sessions during ESY. We worked on introducing Student to the Snap + Core communication program. Student utilized intelligible speech to direct clinician's actions to select specific buttons on the device. Great to see Student this summer, and look forward to continuing to work together in the fall. *Progress Made* on objectives one and three. *Student did not work on objective 2* during ESY.
- c. Goal Vocational/Career Skills – *Student did not work on this goal* during ESY.
- d. Goal Reading – Objective 1 – Student was seen by Google Meet for ESY. Student was able to answer four "who," "what," "when," "where" and "why" multiple choice questions with around 50-60% accuracy for each question. *Progress Made*. Objective 2 – *Progress Made*.
- e. Goal Mathematics – *Student did not work on this goal* during ESY.
- f. Goal Independent Living Skills – *Student did not work on this goal* during ESY.

Ex. 13.

30. On August 26, 2020, Student's IEP was amended to add District's Contingency Plan for service delivery to include District's Phases for online/remote and in-person learning related to the COVID-19 pandemic. Speech and occupational service minutes were to be proportional with the general education schedule changes. Ex. 5.

31. District completed a progress report in Fall 2020. That report in relevant part states the following:

- a. Goal Writing
  - i. October – We have only worked on this goal in-person. Student requires prompting to press down on the shift key for capital letters and is able to do so. We are currently

working on his password only as he is already logged into his Chromebook with his login information saved. He requires prompting for each key on the keyboard. He can act silly when logging in and will sometimes continue pressing on the key over and over again. Once redirected he can type in the correct password with one prompt per letter while pointing to the key. Student operates the mouse pad and mouse when using independently.

- ii. November – In-person, Student continues to require prompting for each letter and to press each letter only once when typing in his password.
  - iii. December – Student started entering his password at home with the support of his mom for the first week in December. At school we practice logging into the computer daily. He is lifting his finger off the key when cued to avoid typing in the same character multiple times. He is mastering how to use the shift button for capital letters as well. He continues to require visual prompting for each letter and number.
- b. Goal Language – Teacher notes – I have noticed improvements in Student’s speech this fall in a number of ways: Going through our daily routines Student is eager to help ‘read’ our wearing a mask social story and participate in Calendar, weather and counting the days of the month. He also likes to read aloud (by repeating from a model) for the class in some of our reading practice as well.
- c. Goal Vocational/Career Skills
- i. Objective 1 – October – Student is successful in transitioning from preferred to non-preferred activities with the help of his star chart and a warning to help him prepare for the transition- example- in 3 minutes break will be over and we will begin math class. November and December unchanged.
  - ii. Objective 2 – October: 2020 – Student needs reminders prior to transitions and is doing well with one or two prompts. He still runs ahead without warning and needs to be reminded to stop.

November: 2020 – Student needs reminders prior to transitions and is doing well with one or two prompts. He still runs ahead without warning and needs to be reminded to stop.

December: 2020 – Student has run ahead of the group on several occasions in the past two weeks and has not been responding to staff prompts to stop. We have new staff that

started working at [High School] with Student. I feel he may be testing his boundaries with them. His safety has never been an issue as we all wear radios and someone is always there at the destination he is moving towards.

d. Goal Reading

- i. Objective 1 – October – Student does not participate in online learning on Tuesdays when we focus on reading our weekly articles. He is still reading short stories by paras but it is difficult to measure his accuracy.

November – Student does not participate in online learning on Tuesdays when we focus on reading our weekly articles. He is still reading short stories by paras but it is difficult to measure his accuracy.

December – Student is averaging 70% accuracy in answering comprehension questions on short stories and/ or articles depending on engagement. Focused attention 80%. Not engaged 60%.

- ii. Objective 2 – October – Did not work on this goal - it works best when we are able to access the community and Student can see the signs.

November – Student is able to recognize the following sight words (paired with pictures): Men, women, boy, girl, stop, slippery when wet.

December – Student is able to recognize the following sight word vocabulary (paired with pictures): Men, women, boy, girl, stop, walk, don't walk, slippery when wet (road sign), bus, bike, and fire.

Ex. 22.

32. Student's February 2021 progress report in relevant part states the following

- a. Goal Writing – Objective 1 – September 2020 deadline – Student requires prompting to type in each letter while a staff person points to the letter. He has only worked on entering his password, as his login information is saved on his computer, the team thought it best to focus on his password. *Insufficient progress made.*

Objective 2 – *Progress Made.*

Overall – We have recently broken down Student's password into

individual letters on a ring (OT suggestion) and he is doing much better in typing in his password. In 4 out of 4 trials Student can type in his password with up to 2 errors (with redirection he will hit the backspace button and type the correct letter). Sometimes he presses down too long on the key and hits a letter multiple times. At other times he doesn't press down on the key firmly enough. He now quickly knows how to press the shift key to type a capital B, and knows where it is on the keyboard, he then types the next 2 letters of his password (sometimes confuses i with l) followed by the last three numbers and one number. Student does require prompting but is learning his letters and how to type in his password. This has been a challenging goal for Student and we decided to focus solely on typing in his password, as his username is saved onto his computer. *Progress made.*

- b. Goal Language – Objective 1 – Given cues, Student is producing key multisyllabic words with 60% or more accuracy. Cues include providing visuals to represent the number of syllables and verbal cues for how/where specific sounds are produced. Examples of key multisyllabic words include "washing machine" and "coffee maker" in a unit on common household items, and "antenna" and "windshield wipers" in a unit about car parts (given Student's love of cars). *Objective Met.*

Objective 2 – We have made use of visuals such as a car moving slowly, as well as clinician modeling (e.g. speaking slowly) to work on this goal. During structured activities and given cues, Student is slowing down on approximately 50% of opportunities. *Progress Made.*

Objective 3 – During structured activities, Student is conveying a novel message to his conversation partner in 3 out of 5 opportunities. He is doing so through verbal means as well as through the use of his speech-generating device (SGD). Regarding the former, Student is producing sentences of approximately 3-5 words that are intelligible. For example, in a reading activity (about trains) where Student commented on the pictures, he conveyed messages such as, "Let's sit in the front!" and "Train going New York City!" In another activity, in which he was to verbally describe which Minion he wanted chosen from a variety of Minions, he provided phrases such as "writing on pad" (for the Minion writing on a pad). Regarding the use of his SGD, given moderate-minimum assistance, Student is able to navigate from page to page. He can independently select buttons to label (e.g. vehicles) and comment (e.g. about emotions or preferences). I look forward to continuing to train Student on the use of his device! *Objective Met.*

- c. Goal Vocational/Career Skills – Objective 1 – is continuing with good transitions in 4/5 opportunities with two prompts or fewer. *Objective Met.*

Objective 2 – We have had several occasions in the past 2 weeks where Student has run ahead of the group and not responded to verbal prompting to stop or wait. Examples include running ahead to the gym and running into the building after lunch without requesting to go inside. *Insufficient progress made.*

- d. Goal Reading – Objective 1 – Student continues to be able to answer WH questions, with 80% accuracy on a topic of interest. If he is not engaged or interested his accuracy is at 60%. *Limited progress.*

Objective 2 – Student can identify the following community signs: men, women, boy, girl, stop, walk, don't walk, slippery road (road sign), bus, bike lane, buckle up, elevator, do not enter, exit, open (restaurant), stairs, wash hands, airplane (airport), and railroad crossing. *Objective Met.*

- e. Goal Mathematics – Objective 1 – Student is continuing to be able to demonstrate 1:1 correspondence counting money using one dollar bills to \$10 with at least 75% accuracy in 4/4 opportunities. *Objective met.*

Objective 2 – Student has not met this goal. He is just catching on to the dollar up strategy and can correctly identify the next dollar up strategy to \$5 with 75% accuracy in 2/4 documented opportunities. *Insufficient progress made.*

- f. Goal Independent Living Skills – Objective 1 – Student has met two of the three criteria for this objective (hanging his coat on a hanger and using a serrated knife). Hanging his coat on a hanger: Given a verbal prompt ("Student hang up your coat") Student will independently lay his coat on a flat surface, obtain a hanger and place the hanger in the coat sleeves. He is independent with engaging and zipping up the zipper on his winter coat (other zippers with smaller pulls have not been tested and could be more challenging to engage). Slicing items using a serrated knife: Student holds his knife properly and is able to cut items such as a banana, potato or play dough ropes using a serrated steak knife. Slicing items that require additional force, such as steak or a melon with a hard rind, has not been the expectation for this goal. While cooking in life skills class has been limited in the context of COVID-19 health restrictions, Student has demonstrated this skill with playdough, some cooking activities or items from his lunch. Tying shoes: Student needs hand over hand help to complete the entire sequence

of tying a bow with shoelaces. Currently, given verbal cues and physical cues for hand placement, Student can pull an overhand knot or two loops for the bow tight. He will place the tabs from the shoelaces into the lace holes with minimal assistance. Other steps within the sequence require full assistance. *Objective met for 2 of 3 items.*

Objective 2 – Student will access a wallet in order to obtain or store coins, cards and/or bills when paying for items in the community in 2 of 3 trials over at least three data sessions. Objective status: *Progress made, objective not met as written.*

33. The ALJ finds as fact Student made progress on each of the six goals stated in the February 2020 IEP prior to the February 2021 IEP.

#### *Learning Experience*

34. District closed its schools and provided no services for any student on March 13, 2020, the Friday before Spring Break.

35. Following Spring Break (March 16 through 20, 2020), District remained closed to all students until Monday, March 30, 2020 when remote services began for all students in the School District.

36. District communicated with parents regarding how educational services would be delivered after Governor Polis's executive order to close schools on March 28, 2020.

37. Student's teacher spoke with his mother on March 30, 2020 to provide information on how to access the online/remote learning environment. Ex. M.

38. District did not issue a prior written notice in March 2020 prior to switching to online/remote learning.

39. Student's teachers documented daily services regarding how they provided online/remote learning, including how the services related to Student's IEP plan. Ex M.

40. District continued to provide instruction to all students via online/remote learning through the end of the 2019-2020 school year.

41. The change to online/remote learning was difficult for teachers, service providers, students, and family members.

42. Student experienced difficulties adapting to online/remote learning. As Student's teachers learned how to use the new online/remote learning environment, Student's service delivery changed to address Student's specific needs, including minimizing Student's time with large groups, offering smaller group activities, and additional one on one online/remote sessions geared towards Student's interests,

including relating material to the movie “Cars.”

43. Student’s teachers provided play money, a wallet, worksheets, a shoe tying practical device, and other educational materials to Student’s home.

44. For the 2020-2021 school year, District developed a plan with multiple phases to describe the method students would receive educational services based on a determination regarding public health concerns related to COVID-19. During the course of the year, the plan was updated and modified. Ex. II.

45. District began the 2020-2021 school year with all students receiving educational services online/remote in accordance with Phase 1 of District plan. Ex. II.

46. [High School]’s schedule for all students included that Mondays were teacher development days for teachers to plan and no students attended any classes. Students attended classes Tuesday through Friday from 8:30 a.m. to 2:55 p.m.

47. On September 8, 2020, District began Phase 2, which allowed small groups of students receiving special education services to go to the school building twice per week to receive in-person assistance from a para-professional while receiving instruction from the teacher/service provider online/remotely.

48. On September 29, 2020, District began to include students receiving special education services and bilingual services into the physical school building. Students were still limited to two days per week in the physical school building.

49. On September 29, 2020, Student was allowed to attend in-person sessions four days a week. Student was the only student at [High School] allowed to be in the physical school building four days a week.

50. Speech therapy was provided by [Speech Language Pathologist] during the relevant time period. Ex. O.

51. Student received services online/remote weekly in both individual and group sessions. Session notes demonstrate that in some sessions Student was more engaged than others, but [Speech Language Pathologist] employed a variety of techniques and utilized Student’s interest in “Cars.” Ex. O.

52. Student began receiving some in-person speech services on October 22, 2020. Ex. O.

53. [Speech Language Pathologist] provided speech therapy services for Student during the summer of 2020 for ESY.

54. [Speech Language Pathologist] provided an additional session each week starting in March 2021 due to the challenges with online/remote learning. Ex. VV.

55. [Occupational Therapist] provided occupational therapy (OT) services for

Student during the relevant time period.

56. Student's OT services are provided indirectly and incorporated into lessons provided by Student's teachers and para-professionals.

57. Student's OT services relate to Goals 3 and 6 and were impacted the greatest due to COVID-19. For example, Student could not go into the community to practice purchasing items and using his wallet. However, [Occupational Therapist] provided instruction to staff and Student's parents during the pandemic so Student could work on his objectives related to hanging his coat, slicing food items, and tying his shoes. Ex. OO.

58. Student's teacher used the play money and wallet related to his OT services for lessons that simulated real world purchasing situations while Student was at home.

59. From the end of March 2020 through the end of the 2019-2020 school year, Student's schedule remained the same as it has been in January and February 2020, including his general education and special education classes and time.

60. For the Fall 2020, Student's schedule included 75 minutes in a unified general/special education physical education class, 75 minutes in a special education class, 40 minute lunch, 75 minutes in a special education math class, a 75 minutes in a special education class, and 45 minutes in an advisory period. The physical education, lunch period, and advisory period were time periods when general education students and Student were together.

61. District did not issue a prior written notice during the fall 2020 semester regarding Student's online/remote learning or in-person learning.

## **CONCLUSIONS OF LAW AND DISCUSSION**

Complainant asserts that District violated the IDEA, 20 U.S.C. Section 1400, *et. seq.*, and accompanying regulations at 34 C.F.R. Section 300, *et. seq.*, and the Colorado Exceptional Children's Educational Act (CECA), Colo. Rev. Stat. Section 22-20-101, *et. seq.*, and accompanying regulation at 1 CCR Section 301-8, *et. seq.*, by failing to provide a FAPE. More specifically, Complainant alleges that District failed to provide a FAPE from March 2020 through December 2020 when educational services were provided via online/remote platform; that the switch to online/remote learning was a significant change in placement requiring input from the parents prior to the change in compliance with 34 C.F.R. Section 300.116, failed to provide notice of a change in placement in violation of 34 C.F.R. Section 300.503, failed to include the parents in the decision to switch to online/remote services in violation of 34 C.F.R. Section 300.322, and failed to educate Student in the least restrictive environment in violation of 34 C.F.R. Section 300.114.

The burden of proof in an IDEA challenge rests with the party challenging a deficiency in the school district's efforts. *Thompson R2-J School District v. Luke P.*, 540



F.3d 1143, 1148 (10th Cir. 2008). In this case, Complainant has the burden of proving all the alleged violations as pled in his complaint and that he is entitled to relief as provided for in the IDEA.

### COVID-19 PANDEMIC

COVID-19 is an infectious disease caused by SARS-CoV-2, a virus first discovered in December 2019. *Basics of COVID-19*, Ctrs. For Disease Control & Prevention (CDC), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html> (last visited November 2, 2021). In January 2020, the United States confirmed its first laboratory case of the COVID-19 in California. By the end of the January 2020, the U.S. Secretary of Health and Human Services declared a public health emergency. *CDC Museum COVID-19 Timeline*, CDC, <https://www.cdc.gov/museum/timeline/covid19.html> (last visited November 26, 2021). On March 11, 2020, the World Health Organization declared COVID-19 a pandemic. *Id.* On March 13, 2020, President Donald J. Trump declared a nationwide emergency. *Id.* Although decisions regarding education instruction are made at the local level, in recognition of the number of educational institutions throughout the United States closing their doors to in-person learning, on March 21, 2020, the U.S. Department of Education issued its first guidance regarding remote or distance learning for students with disabilities. *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, U.S. Department of Education, Office for Civil Rights and Office of Special Education and Rehabilitation Services, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf> (last visited November 26, 2021).

On March 5, 2020, Governor Jared Polis announced Colorado's first two positive cases of COVID-19. *One Year Later: A Colorado COVID 19 Timeline*, Rocky Mountain Public Broadcasting Station, <https://www.rmpbs.org/blogs/news/one-year-later-a-colorado-covid19-timelines/> (last visited November 26, 2021). On March 10, 2020, Governor Polis declared a State of Emergency regarding COVID-19. *Id.* By March 13, 2020, the first Coloradoan died as a result of COVID-19. *Id.* On March 18, 2020, Governor Polis issued executive order D 2020 007 ordering the suspension of all normal in-person educational instruction from March 23, 2020 through April 17, 2020; which was later extended through the end of the school year by executive order D 2020 041.

On March 25, 2020, Governor Polis issued executive order D 2020 017 putting into effect a state-wide stay at home order as the number of known COVID-19 cases reached 1,000 people. Colorado Department of Public Health and Environment (CDPHE) issued an Update Public Health Order 20-24 implementing the Governor's stay at home order on March 26, 2020. The Governor's amended Executive Order D 2020 0017 and the CDPHE's Order required all Coloradans to stay home except for necessary travel and activities and if outside of one's residence to maintain social distance. CDPHE's Order defines Necessary travel and activities specific to education the following: "K-12 public school and private schools for the purpose of providing meals, housing, facilitating or providing materials for distance learning, and providing other essential services to students, provided that Social Distancing Requirements are observed." *Colorado Public*

*Health Order 20-24* (March 26, 2020). By April 3, 2020, more than 100 people in Colorado had died due to COVID-19. *Id.* As of November 26, 2021, Colorado has seen 820,431 cases of COVID-19 and 9,314 deaths as a result of COVID-19. *Colorado COVID-19 Data*, Colorado Department of Public Health <https://covid19.colorado.gov/data> (last visited November 26, 2021).

On March 14, 2020, the Board of County Commissioners for Boulder County declared a local disaster emergency due to COVID-19. <https://documents.bouldercolorado.gov/WebLink/DocView.aspx?id=172246&dbid=0&repo=LF8PROD2> (last visited November 26, 2021). The City of Boulder issued a stay home order on March 23, 2020. [https://www-static.bouldercolorado.gov/docs/Emergency\\_Order\\_2020-6\\_Stay\\_at\\_Home-1-202003231822.pdf](https://www-static.bouldercolorado.gov/docs/Emergency_Order_2020-6_Stay_at_Home-1-202003231822.pdf) (last visited December 14, 2021). In the Boulder City order, people in Boulder were ordered to stay at home except for essential travel and activities. Similar to the State of Colorado Stay Home Order, the Boulder City Order limits applied to educational activities during the stay at home order as: “Educational institutions – Including public and private K-12 schools, colleges, and universities for purposes of facilitating distance learning or performing essential functions, provided that social distancing of six feet per person is maintained to the greatest extent possible.” Emergency Order 2020-6 (March 23, 2020). As of November 26, 2021, Boulder County has seen 34,258 cases of COVID-19 and 458 deaths due to COVID-19. *Colorado COVID-19 Data*.

COVID-19 is a pandemic unlike anything seen in modern history. The effects of the COVID-19 pandemic have rippled through the entirety of the life of not only the people of Colorado, but the United States and the world. At the beginning of the COVID-19 pandemic, health officials and scientists were learning on a daily basis about the COVID-19 virus, including how it was transmitted, the medical impact upon patients, how to treat it, and who was affected by the virus. The learning continues as the COVID-19 virus changes. This due process complaint begins with the start of the COVID-19 pandemic in Colorado through the first six months, when information was scarce and changing rapidly.

It is not the role of this Court to determine how to best protect Student or the public from COVID-19 or any other disease; however, the Court must view the allegations of this case in terms of the circumstances occurring during the time period related to the allegations. As such, the Court will consider relevant factual information related to COVID-19 when determining whether Student was denied a FAPE.<sup>1</sup>

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<sup>1</sup> See, U.S. Department of Education guidance (March 12, 2020).

Q1: If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child’s individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504. The Department understands there may be exceptional circumstances that could affect how a particular service is provided. In addition, an IEP Team and, as appropriate to an individual student with a disability, the

## Free Appropriate Public Education (FAPE)

The IDEA defines a FAPE as

- special education and related services that -
- (a) Are provided at public expense, under public supervision and direction, and without charge;
  - (b) Meet the standards of the SEA, including the requirements of this part;
  - (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
  - (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of [§§ 300.320 through 300.324](#).

34 C.F.R. Section 300.17.

In *Board of Ed. Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 186 (1982), the United States Supreme Court held that the appropriateness of a public entity's actions under the IDEA are to be determined according to the following two-fold standard: "First, has the state complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* at 206-207. In 2017, in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 580 U.S.\_\_\_\_, 137 S. Ct. 988 (2017), the Supreme Court provided further guidance to determine whether an IEP is reasonably calculated to enable Student to make progress in light of his circumstances. The qualification that an IEP is "reasonably calculated" to enable progress reflects:

A recognition that crafting an appropriate program of education requires a prospective judgment by school officials [and] contemplates that this fact-

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personnel responsible for ensuring FAPE to a student for the purposes of Section 504, would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)). SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504. (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)).

<https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/> (last visited December 13, 2021).

intensive exercise will be informed not only by the expertise of school officials, but also by input of the child's parents or guardians. Any review of the IEP must appreciate that the question is whether the IEP is *reasonable* not whether the court regards it as ideal.

*Id.* at 999 (citations omitted).

Complainant does not argue Student's February 2020 IEP was not reasonably calculated to benefit Student and meet his specific needs, but rather Complainant alleges the implementation of the IEP through online/remote learning was not effective for Student to receive a FAPE. Complainant argues Student was not engaged during online/remote learning and that Student did not learn anything. Complainant contends Student would have and could have made more progress if he had been in the school environment five days a week from March 2020 through December 2020. This Court must review the educational services provided by District and determine whether Student was denied a FAPE. The Court concludes Complainant has not met his burden.

While Student did not complete all of his goals, Student made progress on each goal, was able to successfully meet five of out thirteen objectives, and made progress on the remaining eight objectives before the February 2021 IEP review and meeting. The goals were reasonably calculated to challenge Student and to address his specific needs as identified by the entire IEP team, which included both parents. The credible evidence establishes that while online/remote learning was a challenge and fast adjustment for not just Student, but also for his teachers, services providers, and his family, Student's educational services were provided and tailored to Student's needs. Specifically, there are numerous examples of District staff adjusting the number of students in the virtual classroom with Student to meet his individual needs, adjusting curriculum to appeal to Student's love of the movie "Cars," and allowing Student to go to the physical school building four days a week, when no other student in District was in a physical classroom that many days per week.

Some of Student's goals could not possibly be addressed during a global pandemic when not only were schools closed to in-person learning, but also, travel was restricted and stores were closed. The ALJ concludes that it was impossible, due to state-wide restrictions, for Student to work on portions of Goal 3 and 6 while the physical school building and portions of the community were closed from March 2020 through September 2020, but District provided ample evidence that it delivered educational services for Goals 3 and 6 when Student and other students returned to the physical classroom and staff could take Student back into the community. While Student did not work on each goal throughout the entire year related to the February 2020 IEP, the ALJ concludes that District provided services related to each goal a various points from February 2020 through February 2021 and thus, providing Student a FAPE.

Complainant argues District could have allowed Student to attend school in-person or have a para-professional come to his house to provide services. Complainant's arguments are unpersuasive. From March 2020 through June 2020, Governor Polis

closed all schools and put in place stay at home orders limiting every Coloradan's travel outside of their home. It was a global pandemic, with information changing rapidly and public health orders in place restricting District from doing just what Complainant is arguing. Exceptions to the public health orders relied upon by Complainant did not provide District with the ability to allow either small groups of students into its school buildings or to require a staff member go to an individual student's home. This Court does not have jurisdiction to overturn or second guess the public health orders.

In light of the extraordinary circumstances occurring in March 2020 through December 2020, and the significant evidence of Student's progress during this time, the ALJ concludes Student was provided a FAPE from March 2020 through December 2020.

### Least Restrictive Environment

Complainant argues Student should have been in the physical school classroom in order to receive education in the least restrictive environment and Student did not receive all of his general education minutes while online/remote learning. 34 C.F.R. Section 300.114 defines least restrictive environment requirements as:

(a) General.

(1) Except as provided in § 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§ 300.115 through 300.120.

(2) Each public agency must ensure that –

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the **regular educational environment** occurs only 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.

(Emphasis added.) "Regular educational environment" has routinely been regarded to "encompasses regular classrooms and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate." 71 Fed. Reg. 46,585 (2006).

Complainant's argument fails for a number of reasons, least of which is that from March 2020 through June 2020, if Student were physically at school, the physical school setting would have been the most restrictive educational setting because no other students were physically present. From March 2020 through June 2020, Student continued with his previous class schedule resulting in the only change being the receipt of instruction online/remote. There has been no evidence presented, that a change occurred for Student's participation in general education versus special education

classes. For the Fall 2020 semester, the evidence is clear that Student participated in a unified physical education class for 75 minutes daily as well as a common lunch for 40 minutes and advisory for 75 minutes, both of which were scheduled with general education students. The Court declines to calculate a minute for minute comparison of actual minutes received due to inadequate evidence regarding the school day minutes for all students during the two semesters (evidence suggests that the school day was modified for the Fall 2020 for all students since no classes were provided on Mondays but the Court does not have information regarding how the length of the school day may have been altered for either semester at issue). In any case, the amount of educational minutes per day does appear to have been altered for all students due to the changes associated with online/remote delivery and thus, the minutes in Student's IEP must be viewed proportional to the actual revised school day. The evidence suggests District provided educational services to Student in both the general education and special education setting proportional to the modified school day for all students as required by his IEP.

The ALJ concludes that Student received his education in the least restrictive environment, consistent with the requirements of his IEP for March 2020 through December 2020.

Significant Change in Placement without  
Parental Involvement/Pre-determination/Prior Written Notice

Complainant alleges the change to online/remote learning in March 2020 and continuing through the Fall 2020 semester constituted a significant change in placement which required District to gather input from IEP team members, including the parents, prior to the change. Complainant contends that District failed to do so, violating IDEA, 34 C.F.R. Section 300.116 and ECEA, 1 CCR Section 301-8, 2220-R-4.03 (8).

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that -

(a) The placement decision -

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

34 C.F.R. Section 300.116. Colorado defines placement as a decision made by the Child's IEP team (including the parents) and means the provision of special education and related services and does not mean a specific place, such as a specific classroom or specific school. 1 CCR Section 301-8, 2220-R-4.03 (8). Although the COVID-19 pandemic changed the way in which educational services were delivered, IDEA nor ECEA require District to hold an IEP meeting to make changes to the methods or ways it is delivering a student's special education services.

While not binding upon this Court, the CDE has issued guidance to school districts regarding the provision of services for students with a disability during the COVID-19 pandemic. In the guidance, it specifically addresses the change to online/remote learning and its effect upon educational services for students with a disability regarding the procedure requirements of the IDEA.

The CDE guidance states:

**Q2: Are prior written notices (PWNs) required in response to any of the Governor’s executive orders directing all P-12 school districts and the Charter School Institute (CSI) to close school buildings to normal in-person instruction?**

No. CDE is not recommending that schools systematically provide a PWN to all IDEA-eligible students with disabilities in response to any of the Governor’s executive orders requiring the suspension of in-person learning.

[https://www.cde.state.co.us/cdesped/special\\_education\\_faqs#priornotices](https://www.cde.state.co.us/cdesped/special_education_faqs#priornotices) (last visited December 13, 2021). The CDE guidance further provided additional clarification that when an IEP is amended to include changes not related to Student’s disability, but rather temporary changes to address the delivery of services as a result of district-wide health and safety priorities, such a change does not require a prior written notice.<sup>2</sup> The CDE’s acknowledgement that the procedural requirement of a prior written notice is not

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<sup>2</sup> **Q7. If a student’s IEP is developed, revised, or amended to include a contingency learning plan, is prior written notice required?**

Prior written notice (PWN) must be provided to the parents of a child with a disability before the school proposes or refuses to make a change to the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. In this situation, the contingency learning plan was developed to address temporary changes in the delivery of services that were necessary to protect health and safety during a pandemic. These *temporary* changes are not driven by the disability-related needs of the student; rather, the changes are based on the school or district-wide need to prioritize health and safety. Therefore, any contingency learning plan developed in accordance with the IEP does not constitute a material change in services or a substantial change in placement and would not require PWN. That said, OSEP encourages schools to “ensure that parents are fully informed of how their child’s special education and related services needs are addressed during remote learning.” *Q & A on Implementation of the Individuals with Disabilities Education Act (IDEA) Part B Procedural Safeguards in the current COVID-19 Environment* (OSEP 6/30/20).

If, however, the student’s IEP is revised to address changing needs or a lack of expected progress, the school must issue prior written notice because this would constitute a change to the provision of FAPE. Among other requirements, PWN must provide an explanation for why the school proposes or refuses to take the action, a description of each evaluation procedure, assessment, record, or report used by District as a basis for the action, and a description of other options the IEP team considered and the reasons why those options were rejected.

[https://www.cde.state.co.us/cdesped/special\\_education\\_faqs#priornotices](https://www.cde.state.co.us/cdesped/special_education_faqs#priornotices) (last visited December 13, 2021).



necessary when schools switched to online/remote learning is consistent with the definition for education placement.

Complainant's evidence does not demonstrate that District changed or altered the kinds of services to be provided to Student by the IEP. The ALJ concludes the change in delivery method to online/remote learning during March 2020 through December 2020, particularly in light of the Governor's Orders to close all schools to in-person learning from March 2020 through June 2020, was not a change in placement and therefore, District was not required to gather input from IEP team members prior to the change to online/remote learning. District did not violate procedural requirements related to a placement determination in March 2020 or with the amendment in August 2020 with the addition of the Phase-in service delivery plan.

Complainant alleges District should have provided prior written notice before implementing online/remote learning in March 2020 and the Phase-in plan in the Fall 2020. Since the ALJ has concluded the change in delivery of educational services is not a significant change in placement, the ALJ further concludes that no prior written notice was required, no parental input was required, and predetermination was not an issue regarding implementation of the March 2020 switch to online/remote learning and the Fall 2020 amendment regarding temporary District-wide changes in delivery method for educational services for Student.

### **Conclusion**

The ALJ concludes Student received a Free Appropriate Public Education from March 2020 through December 2020 when services were switched to fully online/remote in March 2020 and partially online/remote from October 2020 through December 2020. The ALJ further concludes that District complied with all procedural requirements from March 2020 through December 2020. In this case, the ALJ concludes that District did not violate either the procedural or substantive requirements of the IDEA and ECEA and that it did provide Student with a FAPE. Therefore, District is not responsible for providing compensatory educational services.

### **Provision of Additional Services**

Although this Court has found District provided Student with a FAPE and no compensatory services are necessary, the Court will address the steps District has taken in an attempt to provide Student with additional educational services that may have been impacted by the COVID-19 pandemic. District offered to provide Student with additional services related to community activities, occupational therapy, and speech therapy on Mondays when school was not in session due to a school-wide reduced scheduled during the 2020-2021 Spring semester. However, Complainant did not accept the offer of providing services on Mondays. Consequently, District provided an additional speech therapy session weekly; additional occupational therapy related to community outings; and additional math, language arts, and reaching services during Student's regular free periods from March 2021 through May 2021. The information presented by the parties



regarding the additional services does not alter the findings and conclusions in this Decision.

### **ORDER**

The ALJ concludes that Complainant failed to meet his burden of proof establishing that District violated the IDEA and ECEA and failed to provide Student with FAPE. No relief is warranted and the complaint is dismissed.

This Decision is the final decision, except that any party has the right to bring a civil action in an appropriate court of law, either federal or state, pursuant to 34 C.F.R. Section 300.516.

**DONE AND SIGNED** this 17<sup>th</sup> day of December 2021

/s/ HEIDI L. KUTCHER  
Administrative Law Judge