

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

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**State-Level Complaint 2020:531  
Denver Public Schools District 1**

**DECISION**

**INTRODUCTION**

On August 26, 2020, the parents (Parents) of a student (Student) identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA)<sup>1</sup> filed a state-level complaint (Complaint) against Denver Public Schools (District). The State Complaints Officer (SCO) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from August 26, 2019 through August 26, 2020 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

**SUMMARY OF COMPLAINT ALLEGATIONS**

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

1. Failed to offer an IEP tailored to Student's unique needs in literacy after the District suspended in-person learning as a result of the COVID-19 pandemic, from March 1, 2020 to present, in violation of 34 C.F.R. § 300.324(a).
2. Failed to monitor Student's progress on annual IEP goals from February 23, 2020 to present, in violation of at 34 C.F.R. § 300.320(a)(3).

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

## **FINDINGS OF FACT**

After thorough and careful analysis of the entire record,<sup>2</sup> the SCO makes the following FINDINGS:

### **A. Background**

1. Student is an eleven-year-old eligible for special education and related services under the disability category Autism Spectrum Disorder (ASD). *Exhibit A*, p. 1. Student attends an elementary school (School) located in District. *Id.* Student is a compassionate and artistic child who enjoys helping others and demonstrates talent in math and working with technology. *Interviews with Parents, Special Education Teacher, Literacy Teacher, and Math Teacher; Exhibit A*, p. 3.
2. This dispute began in response to the suspension of in-person learning as a result of the COVID-19 pandemic. *Interviews with Parents, Special Education Teacher, Principal, and Special Education Instructional Specialist.* District staff developed contingency plans (CPs) to document their plan to implement IEPs during remote instruction. *Interview with Special Education Instructional Specialist.* Parents assert that District failed to meet Student's literacy needs through his CP and monitor progress during the period of remote instruction, which began on April 7, 2020 and concluded on October 9, 2020. *Interview with Parents.*

### **B. The April 2019 IEP**

3. Throughout Student's fourth-grade year, the 2019-2020 academic year, his April 18, 2019 IEP (2019 IEP) was in effect. *Interview with Special Education Teacher; Exhibit A*, p. 38.
4. The 2019 IEP reviews Student's present levels of performance in literacy, documenting that Student improved his performance on the i-Ready Diagnostic assessment in reading from 409 at the beginning of the year to 456 at midyear, exceeding typical growth expectations. *Exhibit A*, pp. 40-42. Student met or made progress on all IEP goals for the 2018-2019 academic year. *Id.*
5. The 2019 IEP documents Student's challenges with disengagement during reading instruction and while working independently, including his need for one-on-one support 40% of the time for on-task minutes in reading and writing. *Id.* at p. 41. Per the 2019 IEP, Student needs a significant level of support to complete writing tasks and requires an adult to provide sentence starters and help him brainstorm answers. *Id.*

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<sup>2</sup> The appendix, attached and incorporated by reference, details the entire record.

6. Additionally, the 2019 IEP reviews observational and progress monitoring data, as well as the results of a Functional Behavioral Assessment (FBA) completed on April 5, 2019. *Exhibit A*, pp. 40-48; *Exhibit D*, p. 3.
7. Among the findings, the FBA revealed that Student's most common targeted behavior was noncompliance, and the most common antecedents were being directed to work or working on literacy/reading and math, suggesting that Student has escalated most often "when academic demands are placed on him" and when "he is expected to engage in an academic or non-preferred task." *Exhibit A*, pp. 43-47. The most frequent response to behaviors was providing Student with choices, followed by redirections to calming activities or snacks. *Id.* The FBA concluded that he engages in behaviors due to delays in emotional management and problem-solving, as well as a desire to escape non-preferred or challenging work/tasks, and to obtain tangible rewards. *Id.*; *Exhibit D*, p. 9.
8. The 2019 IEP identifies Student's needs and the impact of his disability, such as how Student's disability impacts his engagement in classroom assignments and learning opportunities, leading to increased behaviors. *Exhibit A*, p. 49.
9. The 2019 IEP contains the following goals:
  - Reading Goal #1: "[Student] will improve his ability to read a grade-level, non-preferred text from reading a level K/24 with 92% accuracy to reading a level R/40 with 97% accuracy, as measured by the special education teacher using running records." *Id.* at pp. 50-54.
  - Writing Goal #2: "[Student] will increase his ability to write a grade-level paragraph, including a topic sentence, details from the text, explanations of the text evidence, and a concluding sentence from 0/3 trials to 2/3 trials, as measured by the special education teacher using work samples." *Id.*
  - Mathematics Goal #3: "[Student] will increase his ability to participate in math, in a similar manner to his peers (i.e. attending to a whole group lesson, participating in the lesson such as raising his hand, and completing independent or group work), from being on-task for an average of 55 minutes with adult support 45% of the time to being on-task an average of 70 minutes with adult support 25% of the time as measured by the special education [teacher] using data collection." *Id.*
  - Social/Emotional Wellness Goal #4: "By 4/2020, [Student will] improve his ability to engage in non-preferred tasks by using previously taught self-regulation strategies (e.g. deep breaths, positive self-talk, etc.) in order to begin the task within 2 minutes, and remain focused on the task for at least 10 minutes from a

baseline of 1/5 to 4/5 opportunities, as measured by psychologist observations and teacher data.” *Id.*

- **Communication Goal # 5:** “By 4/2020, [Student] will improve his ability to verbalize and act out a logical solution to a social problem- presented by a hypothetical situation, (i.e. if the problem is feeling left out on the playground, [Student] would share that he would ask a group of kids if he could join their activity and be able to act that out) independently, from a baseline of 1/5 opportunities provided to 4/5 opportunities provided, as measured by the speech-language pathologist, through informal therapy data.” *Id.*

10. The 2019 IEP includes accommodations to help Student access the general education curriculum, such as access to adults throughout the day, a visual schedule, a rewards system, extended time, a word processor for writing, and frequent breaks. *Id.* at pp. 54-55.
11. The Service Delivery Statement provides 200 weekly minutes of direct, specialized, literacy instruction from the special education teacher outside of the general education setting. *Id.* at pp. 58-59.
12. The Service Delivery Statement also provides for daily paraprofessional support in the general education setting, including direct behavioral support for task initiation, providing incentives and help during difficult tasks, providing positive encouragement, and helping Student maintain organization in the classroom. *Id.*
13. The 2019 IEP incorporates strategies outlined in Student’s April 19, 2019 Behavioral Intervention Plan (BIP), including use of a daily visual schedule, opportunities for breaks, access to a reward system, and adult support. *Exhibit B*, pp. 22-25.
14. The IEP Team determined that it was appropriate for Student to spend 80.01% of his time in the general education environment and 19.99% of his time outside of general education in order for Student to gain greater access to the general education curriculum and his peers while receiving paraprofessional support to help him access instruction. *Exhibit A*, p. 60.

### **C. Suspension of In-Person Instruction due to COVID-19**

15. Due to the COVID-19 pandemic, District made the decision to move to an extended spring break for all District schools, which began on March 16, 2020 and ended on April 6, 2020. *Interviews with Principal and Special Education Instructional Specialist.*
16. On March 18, 2020, the Governor of the State of Colorado issued an executive order requiring all public and private elementary and secondary schools in Colorado to suspend

in-person instruction due to the COVID-19 pandemic.<sup>3</sup> Subsequent executive orders collectively extended the suspension of in-person instruction through the end of the 2019-2020 school year.<sup>4</sup> District began providing remote instruction to students on April 7, 2020. *Interview with Principal.*

17. District developed CPs for remote instruction for all special education students to document any changes, such as changes in the delivery of services and accommodations, and to document the District's efforts to provide FAPE to the greatest extent possible during the period of remote instruction. *Interviews with Special Education Teacher, Special Education Instructional Specialist, and Senior Manager; Exhibit M, p. 1.*
18. CPs were developed based on the special education and related services outlined in each student's IEP. *Id.* A CP was not intended to replace an IEP but was, instead, a temporary measure to cover instructional changes during remote instruction. *Interview with Special Education Instructional Specialist.*
19. Special education teachers and other providers were instructed to prepare draft CPs for remote instruction and to share and discuss the plans with parents. *Interviews with Special Education Instructional Specialist and Senior Manager; Exhibit M, p. 7.* If parents agreed with the CP, then staff were instructed to implement it. *Id.* If parents did not agree with the CP, then staff were instructed to schedule an IEP meeting to discuss the plan. *Id.*
20. Additionally, District staff were provided with templates for the creation of CPs, which were structured as a prior written notice. *Interviews with Special Education Teacher and Special Education Instructional Specialist; Exhibit M, pp. 1-15.* The templates include sections for each of the student's IEP goals and documentation of whether staff plan to work on the goal during remote instruction, how the goal will be serviced remotely, and how progress for the goal will be monitored remotely. *Id.* If a goal will not be worked on, the template requires that staff provide a rationale. *Id.*
21. District staff were instructed that the language in each CP "**must** be tailored to the circumstances of each individual student." *Exhibit M, p. 1 (emphasis original).*
22. The template also provides sections for documenting accommodations, the weekly service schedule, and a Family Contact Log, in which staff should document contacts with parents to develop the CP, how the family was contacted, and whether the plan was developed through agreement or an IEP meeting. *Id.*

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<sup>3</sup> See *Colo. Exec. Order No. D 2020 007* (Mar. 18, 2020), [https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20007%20Ordering%20Suspension%20of%20Normal%20In-Person%20Instruction\\_0.pdf](https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20007%20Ordering%20Suspension%20of%20Normal%20In-Person%20Instruction_0.pdf).

<sup>4</sup> See *Colo. Exec. Order No. 2020 041* (April 22, 2020), <https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20041%20P-12%20Closure%20Extension%20End%20of%20Year.pdf> (noting all intervening orders).

#### **D. Development of Student's April 6, 2020 CP**

23. On March 27, 2020, Special Education Teacher emailed Parents to schedule a meeting to discuss Student's CP. *Exhibit K*, p. 43.
24. On April 7, 2020, Parents and Special Education Teacher met virtually to develop Student's CP. *Interviews with Parents and Special Education Teacher; Exhibit A*, p. 68. During the meeting, Special Education Teacher discussed the April 6, 2020 CP (April 2020 CP) with Parents, as well as what instruction would look like in the remote setting. *Interview with Special Education Teacher*. Although Parents had some concerns regarding Student's ability to engage in remote instruction, Parents did not object to the CP during the meeting. *Interviews with Parents and Special Education Teacher*.
25. The April 2020 CP contains each of the annual goals as written in Student's 2019 IEP and states that all goals will be worked on, except for Mathematics Goal #3 because it was designed to address Student's participation during in-person math lessons in a manner similar to his peers. *Exhibit A*, pp. 64-70. This section of the April 2020 CP reads that Special Education Teacher will monitor completion of math work during remote instruction. *Id.*
26. The April 2020 CP documents how the annual goals will be serviced remotely. *Exhibit A*, pp. 64-70. With respect to literacy, the April 2020 CP states that for Reading Goal #1 and Writing Goal #2, Student will meet with Special Education Teacher for 20 minutes four days per week. *Id.* It also outlines that Student will complete 15-20 minutes of daily instruction in Read Naturally Live to work on reading fluency and comprehension skills. *Id.*
27. Special Education Teacher made an individualized determination to use Read Naturally Live to target Student's reading goal during remote instruction. *Interview with Special Education Teacher*. The SCO finds that Read Naturally Live is an online literacy intervention that meets Student's literacy needs as identified in the 2019 IEP by focusing on fluency, phonics skills, and comprehension. *Id.* At the start of remote instruction, Special Education Teacher completed an assessment of Student using the program, and she focused her instruction on identified areas of need. *Id.*
28. The April 2020 CP documents how progress will be monitored remotely for each of Student's goals. *Exhibit A*, p. 65. For example, the April 2020 CP indicates that Student's reading and writing goals will be monitored through the Read Naturally Live program and through work samples. *Id.*
29. The April 2020 CP outlines the service minutes to be provided to Student, as well as the delivery method. *Exhibit A*, pp. 64-70. For example, the April 2020 CP provides, "The special education teacher will meet with [Student] 1:1 via Google Meet for 20-30 minutes four days a week for individual, direct instruction."

30. Student's weekly, direct service minutes in literacy were reduced from 200 in the 2019 IEP to 80-120 in the April 2020 CP as a result of the remote instructional format, which reduced all students' daily work to approximately three hours of independent work, down from the seven-hour school day during in-person instruction. *Interviews with Special Education Teacher and Literacy Teacher; Exhibit A*, p. 59, 64-66.
31. The April 2020 CP provides that a special education paraprofessional will meet with Student for 30-40 minutes daily, broken up into one morning and one afternoon session, to provide academic and behavioral support via Google Meet. *Exhibit A*, p. 64.
32. Additionally, the April 2020 CP includes the accommodations outlined in the 2019 IEP, as well as the assistive technology to be provided to Student, such as access to text-to-speech and speech-to-text software. *Id.* at p. 67. Special Education Teacher reviewed with Parents how the accommodations would work in the remote setting. *Interview with Special Education Teacher*.
33. The April 2020 CP incorporates strategies outlined in Student's April 19, 2019 BIP, including use of a visual schedule, opportunities for breaks, access to a reward system, and adult support. *Exhibit B*, pp. 22-25. For example, Special Education Teacher created a weekly schedule for Student, which a paraprofessional reviewed with Student during morning check-ins, and Student's reward system was modified to provide opportunities for Student to earn time to play online games with staff. *Interviews with Parents and Special Education Teacher*.
34. Special Education Teacher sent a copy of the finalized April 2020 CP to Parents on April 24, 2020, and Parents did not respond with any objections. *Interviews with Parents and Special Education Teacher; Exhibit K*, p. 149.

**E. District Progress Monitoring Policies and Student's Engagement Challenges**

35. District policy requires that progress monitoring data collection and recording occur on the frequency identified in the IEP, and that progress monitoring data be sent home with each report card at the end of the quarter or semester. *Interviews with Special Education Teacher, Special Education Instructional Specialist, and Senior Manager; Exhibit I*, p. 17. Per District policy, it is best practice for progress monitoring data to be collected and recorded at least every two weeks based on five to eight hours of specially designed instruction, which can be individualized based on the student. *Exhibit I*, p. 15.
36. District guidance for the remote delivery of special education services during the COVID-19 pandemic provides that special education teams still need to document services using regular methods, and that the method for progress monitoring should be documented in the CP. *Exhibit M*, p. 95.

37. In spring 2020, Student received remote instruction from April 7, 2020 to May 29, 2020. *Interviews with Parents and Special Education Teacher.*
38. All students were provided “asynchronous,” virtual instruction, meaning that assignments were posted twice per day, along with a recorded morning video, and students generally worked independently to complete assignments at their own pace. *Interviews with Literacy Teacher and Math Teacher.* Teachers assigned approximately 1.5 hours of literacy work and 1.5 hours of math/humanities work daily, and teachers and other providers had office hours to answer questions during scheduled, 30-minute periods. *Id.*
39. Parents reported that during remote instruction in spring 2020, Student often disengaged by refusing to complete work, turning off his camera, closing his computer, walking away, or sleeping. *Interview with Parents.* According to Parents, the remote setting made it easier for Student to disengage, and it was more difficult for teachers and other providers to reengage Student. *Id.*
40. Student’s teachers and providers acknowledged that Student engaged in these behaviors during remote instruction, but they reported that the frequency of behaviors in the remote setting was similar to the in-person setting. *Interviews with Special Education Teacher, Literacy Teacher, Math Teacher, and School Psychologist.* They admitted that reengagement was more challenging remotely and often required simply waiting on Student to return to his computer. *Id.*
41. Special Education Teacher instructed staff to provide Student with options for participating, such as typing responses into an electronic chat box or giving a thumbs up or down to demonstrate that he was still engaged when his camera was off. *Id.*
42. Parents and Special Education Teacher were in regular communication regarding Student’s behavior challenges during remote instruction, and Parents described that Special Education Teacher was generally “responsive” to their concerns and provided suggestions and strategies. *Interviews with Parents and Special Education Teacher.*
43. Special Education Teacher provided Parents with supports to implement BIP strategies at home. *Interviews with Special Education Teacher and Parents; Exhibit K, p. 102.* For example, Special Education Teacher sent home a behavior board that Student uses at school and emailed Parents to explain how the board is used to help Student earn time toward a preferred activity. *Id.* She provided directions for Student’s incentive and reward plan and offered to schedule time to discuss it. *Id.* She also sent Parents an activity checklist and discussed using it throughout the school day so that Student could track completed work and feel less overwhelmed by his workload. *Id.*
44. Parents printed and laminated the checklist provided by Special Education Teacher and used it with Student on a daily basis. *Interview with Parents.* Parents report that the



checklist was “helpful” and “motivating” for Student. *Id.* Student refused to use the behavior board. *Id.* According to Parents, other helpful strategies at home included use of a rewards system. *Id.*

**F. Student’s Progress During Remote Instruction in Spring 2020**

45. On May 29, 2020, Special Education Teacher emailed Parents a copy of Student’s May 27, 2020 progress report, which covered the period of remote instruction in spring 2020. *Exhibit K*, p. 199. Consistent with District policy, Parents were provided with progress reports at the end of each semester. *Interviews with Parents and Special Education Teacher; Exhibit I*, pp. 15, 17; *Exhibit M*, p. 95.
46. Despite Student’s challenges in the remote setting, the May 27, 2020 progress report shows that Student made progress on his reading and social/emotional wellness goals. *Exhibit I*, pp. 1-14. For example, on Reading Goal #1, Student engaged with the lessons in Read Naturally Live and improved his words correct per minute on an unfamiliar reading passage from 33 at the beginning of remote instruction to 53 at the end of remote instruction. *Id.* He also received passing scores on comprehension questions for each passage he read. *Id.*
47. However, Student made insufficient progress on Writing Goal #2. *Id.* Per the progress report, Student’s work samples from remote instruction did not reflect Student writing a full paragraph. *Id.* For example, in one writing sample reviewed, Student submitted a factually accurate response but provided only a single statement to answer a question without following the instructions for writing a paragraph. *Id.*
48. The SCO accordingly finds that during remote instruction in spring 2020, progress was monitored for Student’s reading, writing, and social/emotional wellness goals consistent with the methods outlined in the April 2020 CP. *Id.*; *Exhibit A*, pp. 64-70.
49. As documented in the April 2020 CP, Student did not work on Mathematics Goal #3, but Special Education Teacher did monitor Student’s completion of math assignments. *Id.*; *Exhibit A*, p. 66. During spring 2020, Student submitted 34 out of 36 math assignments. *Interview with Special Education Teacher; Exhibit I*, p. 19. When Student had technical challenges submitting his work, Special Education Teacher created a Google folder that Student could use for saving and submitting his work. *Id.* Special Education Teacher did not document Student’s completion of math assignments in his progress report. *Interview with Special Education Teacher; Exhibit I*, pp. 1-14.
50. As for Communication Goal #5, the progress report indicates that the goal was not directly targeted because Student met the goal. *Exhibit I*, pp. 12-13. According to Speech Language Pathologist, Student met this goal at the end of February 2020. *Interview with Speech Language Pathologist*. When asked why the goal was not revised after Student

met it, Speech Language Pathologist explained that it was because she expected the goal to be revised during Student's annual IEP review. *Id.*

51. Speech Language Pathologist acknowledged that she should have monitored Student's progress during remote instruction in spring 2020, consistent with District policy. *Id.*
52. Although Speech Language Pathologist did not target Communication Goal #5 during remote instruction, she did take progress notes on her sessions with Student, which she kept in a service log. *Id.*; *Exhibit B*, pp. 19-21. Speech Language Pathologist used her notes to provide a summary in the progress report. *Id.*; *Exhibit I*, pp. 12-13. The report reads that Student regularly attended a weekly, virtual, social skills group and that his participation fluctuated, with Student sometimes showing his answers and other times contributing verbally, similarly to other group members. *Exhibit I*, pp. 12-13.

#### **F. Development of the June 17, 2020 IEP**

53. On March 10, 2020, the District convened a properly constituted IEP Team to review the results of Student's triennial reevaluation and to complete Student's annual IEP review, which was due by April 18, 2020. *Exhibit G*, p. 4. Notice of Meeting was provided to Parents on February 6, 2020. *Id.*
54. During the meeting, the IEP Team reviewed Student's strengths, present levels of performance, and the results of the reevaluation. *Interviews with Special Education Teacher and Speech Language Pathologist; Exhibit A*, pp. 71-74.
55. The March 6, 2020 reevaluation included communicative assessments such as the Pragmatic Language Skills Inventory; academic performance assessments such as Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2), Word Identification and Spelling Test (WIST), and Test of Written Language-Fourth Edition; and social emotional assessments such as the Behavior Assessment System of Children, Third Edition and Autism Spectrum Rating Scales. *Exhibit D*, pp. 1-60. In addition, the reevaluation included interviews with Student's outside providers, a health report completed by the school nurse, a motor assessment, and the completion of an Autism Diagnostic Observation Schedule-2. *Id.*
56. With regard to literacy, the evaluation revealed that on the CTOPP-2 Student scored below average for phonological awareness and rapid symbolic naming and poor for phonological memory, indicating that Student may have difficulty with reading fluency and comprehension. *Id.* On the WIST, Student scored in the poor range across assessed areas, indicating that he requires explicit instruction in basic phonics skills. *Id.*
57. The evaluation also included a review of behavioral data and the 2019 FBA, which indicated that Student would benefit from behavior supports including one-on-one

and/or small group support for academic instruction, choices for tasks, wait time, and frequent adult check-ins and support. *Id.*

58. After reviewing the results of the reevaluation, the IEP Team found that, based on the available data, Student met the criteria for ASD. *Exhibit A*, pp. 71-74. The IEP Team also considered the eligibility category Serious Emotional Disability (SED), but the IEP Team did not complete the SED eligibility checklist within the allotted meeting time. *Id.*
59. District closure due to the COVID-19 pandemic resulted in a delay in scheduling a second IEP meeting to complete the eligibility checklist and annual review. *Interview with Special Education Instructional Specialist*. The District convened a properly constituted IEP Team for IEP meetings on April 8, 2020, May 6, 2020, and June 17, 2020. *Interviews with Special Education Teacher, Parents, Speech Language Pathologist, School Psychologist, and Special Education Instructional Specialist*. Each of these meetings was spent discussing Student's eligibility under the disability category SED. *Id.* The April 8 meeting was rescheduled after Parents requested legal counsel, and the May 6 meeting was rescheduled because Parents requested the presence of additional District staff. *Id.*
60. Prior to the June 17, 2020 IEP meeting, Special Education Teacher sent Parents a copy of Student's June 17, 2020 IEP (2020 IEP), but the 2020 IEP was not discussed during the meeting. *Id.*; *Exhibit K*, p. 182.
61. At the conclusion of the June 17, 2020 IEP meeting, the IEP Team found that, based on the available data, Student did not meet the criteria for SED. *Id.*; *Exhibit A*, p. 87. The IEP Team discussed how the IEP would be written, and Parents' Attorney suggested that the IEP Team communicate by email. *Id.* District staff agreed. *Id.* Parents reported that after several contentious meetings to determine eligibility, they did not wish to participate in another meeting to complete the annual review. *Interview with Parents*.
62. On June 24, 2020, Special Education Teacher emailed Parents an updated draft of the 2020 IEP. *Exhibit K*, p. 474. In her email, Special Education Teacher stated, "I think most of the work can be done by email if you prefer, but we can schedule a meeting to review everything, as well." *Id.*
63. Parents responded on June 30, 2020 that they were still reviewing the IEP draft and would reply soon with comments. *Id.* Parents did not address Special Education Teacher's offer to meet. *Id.*
64. On August 3, 2020, Principal emailed Parents and expressed the need to finalize Student's IEP in time for the start of the school year. *Id.* at p. 468. Principal asked for Parents to share any questions and stated that staff would be available starting August 10 to schedule an IEP meeting. *Id.* No further attempts were made to schedule an IEP meeting with Parents. *Interview with Special Education Teacher; Exhibit K*. For example,

District did not inform Parents that they were scheduling a meeting, ask Parents for available times to meet, or send a notice of meeting to Parents. *Id.*

65. On August 11, 2020, Parents replied that they would provide comments and questions by the end of the following week. *Exhibit K*, p. 473. They did not respond to Principal's offer to schedule an IEP meeting. *Id.*
66. On August 12, 2020, Parents emailed Special Education Teacher, Principal, Senior Manager, Special Education Instructional Specialist (SEIS), School Psychologist, and Speech Language Pathologist a copy of the draft IEP containing suggested edits and comments. *Id.* at p. 317; *Exhibit 6*, pp. 1-22. Parents provided additional comments, questions, and requests in the body of their email. *Id.* For example, Parents requested that District staff consult with an ASD specialist "to administer" Student's IEP and provide appropriate support. *Id.* They also requested that an ASD specialist review the IEP. *Id.*
67. Special Education Teacher replied that "the team" would review Parents' comments and questions and get back to Parents by the following Monday. *Exhibit K*, p. 316. Parents were not invited to meet. *Id.* Special Education Teacher, Speech Language Pathologist, and School Psychologist reviewed the comments and questions. *Id.* SEIS, Senior Manager, and Principal were also consulted. *Id.* at pp. 316, 330. Neither Parents nor a general education teacher participated in the District's review of the feedback, and Parents did not excuse the participation of a general education teacher. *Interviews with Special Education Teacher and Parents.*
68. On August 18, 2020, Special Education Teacher emailed Parents a copy of Student's finalized 2020 IEP. *Exhibit K*, p. 540. Special Education Teacher wrote, "If anything needs to be added or readdressed in the IEP itself, we can do so through an amendment. It is important that [Student] starts the year with a finalized IEP so we can develop an appropriate contingency plan for remote instruction." *Id.*
69. In her email, Special Education Teacher also addressed Parents' comments and questions and described where changes had been made to the 2020 IEP in response to feedback. *Id.* Edits were made consistent with the Parents' suggestions, including corrections to the Present Levels of Performance section and the Service Delivery Statement. *Id.* Also, language was added to the Service Delivery Statement reflecting that the special education team would consult with a District ASD specialist. *Id.*
70. When asked why greater efforts were not made to schedule an IEP meeting to complete the annual review, Special Education Teacher reported that Parents did not respond to two emails offering a meeting, and the IEP needed to be finalized before the beginning of the school year. *Interview with Special Education Teacher.* Nevertheless, District did not move forward with scheduling an IEP meeting after Parents failed to respond to their

emails. *Id.* SEIS acknowledged that District policies require IEPs to be reviewed and revised at least annually, with a properly constituted IEP Team. *Interview with SEIS.*

### **G. The June 17, 2020 IEP**

71. The 2020 IEP reviews Student's present levels of performance, including that Student made progress in his reading skills and was measured at 89% accuracy on an instructional level text. *Exhibit A*, p. 4. With regard to writing, the IEP documents Student's challenges with resistance to expanding his ideas or adding to his writing work, but the IEP notes that prior to remote instruction, Student was able to write a multi-sentence paragraph with the use of a graphic organizer. *Id.*
72. The 2020 IEP discusses the results of the reevaluation, including Student's challenges in phonological awareness, rapid symbolic naming, and phonological memory. *Id.* at p. 5. The 2020 IEP also documents that he continues to benefit from the support of an additional adult in the general education classroom to help him regulate his emotions and behavior, and that Student's needs in reading can increase noncompliance across settings and result in the loss of learning opportunities. *Id.* at pp. 6, 9.
73. The 2020 IEP contains the following goals:
- Reading Goal #1: "[Student] will improve his overall reading fluency from 59 words correct per minute at the fourth grade level to 85 [words correct per minute] at the fifth grade level as measured by an oral reading fluency probe." *Id.* at pp. 10-15.
  - Writing Goal #2: "[Student] will improve his ability to write a grade-level paragraph by including a topic sentence, thorough body paragraphs that include reasons/details/facts, and a concluding sentence with the support of graphic organizers appropriate to the type of writing from 1 out of 5 opportunities to 3 out of 5 opportunities." *Id.*
  - Social/Emotional Wellness Goal #3: "By annual review, [Student] will improve his ability to follow an adult direction or appropriately advocate for a strategy (e.g. ask for help, ask for snack/fidget, take break, use alternate option for completing task, etc.) within 2 minutes of the directive, from a baseline of 3/10 opportunities to 8/10 opportunities, as measured by behavioral data and psychologist and/or special educator observations." *Id.*
  - Communication Goal #4: "By annual review, [Student] will improve his ability to communicate (verbally or nonverbally-via provided choices) when he is experiencing frustration, in both small group and the general education setting, and what he needs to be successful/complete the task, from a baseline of 1/10

opportunities to 8/10 opportunities, as measured through observation by the SLP, school psychologist and general education teacher.” *Id.*

- Communication Goal #5: “By annual review, [Student] will demonstrate improved perspective taking skills, by independently initiating conversations on probable topics of interest to others and maintaining that conversation for at least 2 conversation turns through asking on topic questions/making comments, from a baseline of 1/5 opportunities to 4/5 opportunities, in the general education setting, as measured by the SLP through observation data.” *Id.*
- Self-Determination Goal #6: “[Student] will decrease his need for 1:1 additional adult support by participating independently, utilizing regulation strategies, and completing assignments without additional adult support from 35% of the time to 75% of the time.” *Id.*

74. The 2020 IEP contains accommodations and modifications to help Student access the general education curriculum, such as access to adults throughout the day, a visual schedule, a rewards system, a word processor for writing, frequent breaks, and reduced assignment length. *Id.* at pp. 15-16.

75. The Service Delivery Statement provides 240 weekly minutes of direct, specialized instruction in literacy from the special education teacher outside of the general education setting. *Id.* at pp. 19-20.

76. The Service Delivery Statement also includes daily paraprofessional support in the general education setting to provide direct behavioral support for task initiation, incentives and help during difficult tasks, and positive encouragement, as well as helping Student maintain organization in the classroom. *Id.*

77. The 2020 IEP incorporates strategies outlined in Student’s June 18, 2020 BIP, including use of a daily visual schedule, opportunities for breaks, access to a reward system, and high levels of adult supervision and support. *Exhibit B*, pp. 1-4.

78. The Least Restrictive Environment section of the 2020 IEP provides that Student will spend 77.7% of his time in the general education environment and 22.3% of his time outside of general education in order for Student to receive appropriate direct instruction and feedback for developing skills in communication, social/emotional wellness, and academic skills. *Exhibit A*, p. 21.

#### **H. The August 2020 CP**

79. As a result of the ongoing COVID-19 pandemic, District made the decision to continue remote instruction for the health and safety of staff and students, from August 24, 2020 through October 16, 2020. *Interviews with SEIS and Principal; Exhibit M*, p. 52.

80. District staff developed CPs to document their efforts to provide FAPE to the greatest extent possible during the period of remote instruction. *Interviews with SEIS and Special Education Teacher; Exhibit M*, pp. 52-57.
81. On August 14, 2020, Special Education Teacher emailed Parents to schedule a time to discuss Student's CP for the fall. *Exhibit K*, p. 427.
82. On August 21, 2020, Parents met with Special Education Teacher and Principal to discuss Student's CP. *Interviews with Parents, Special Education Teacher, and Principal; Exhibit K*, p. 154. Parents requested that District provide in-person special education services for literacy and asserted that Student's needs cannot be met in the remote setting. *Id.* Special Education Teacher and Principal declined to provide in-person services, citing District policy and health and safety concerns resulting from the COVID-19 pandemic. *Id.* at pp. 137, 154. Parents, Special Education Teacher, and Principal did not complete the discussion regarding the CP. *Interviews with Parents, Special Education Teacher, and Principal.*
83. On August 24, 2020, Special Education Teacher emailed Parents a draft of the August 24, 2020 CP (August 2020 CP) and requested notification if Parents wished to schedule a meeting to review the CP. *Exhibit K*, p. 66. Parents responded with feedback regarding the August 2020 CP, emphasizing their request for in-person instruction, but they did not request a meeting. *Id.* pp. 430-31.
84. The August 2020 CP includes all of the goals and objectives contained in Student's 2020 IEP, and states that all goals will be worked on and how they will be serviced remotely. *Exhibit A*, pp. 26-37. The August 2020 CP also describes how progress will be monitored for each goal. *Id.*
85. Further, the August 2020 CP outlines the service minutes to be provided to Student and the method of delivery. *Id.* With respect to direct instruction in literacy, the August 2020 CP provides for 225 minutes of direct, specialized instruction—a reduction from the 240 minutes outlined in the 2020 IEP. *Id.*
86. The August 2020 CP contains updated supports to address Student's behavior needs in the remote setting, including the strategies in Student's June 18, 2020 BIP. *Id.* For example, it documents that a paraprofessional will be available to Student remotely throughout the school day, providing one-on-one social/emotional and academic support as needed. *Id.*
87. The August 2020 CP also includes the accommodations and modifications outlined in the 2020 IEP. *Id.* at pp. 15-16, 34-35. The August 2020 CP provides that Student will be allowed to take breaks as needed, every 20 minutes throughout the day, and that Student can use a timer and a visual schedule to help manage his time. *Id.*

## **I. Student's Progress During Remote Instruction in Fall 2020**

88. In fall 2020, Student received remote instruction from August 24, 2020 through October 9, 2020. *Interviews with Parents, Special Education Teacher, and Fifth Grade Teacher.*
89. District's instructional format changed in the fall from primarily independent work to live instruction provided virtually to the whole class, breakouts for group work, and less independent work. *Interview with Fifth Grade Teacher.*
90. To support Student, a paraprofessional was present virtually throughout general education instruction and during Student's independent work. *Interviews with Special Education Teacher and Fifth Grade Teacher.* Special Education Teacher created a Google meeting room for Student and the paraprofessional to use when Student needs breaks. *Id.* Special Education Teacher met with Student and developed a signal that Student would use, the sign language letter "T", to indicate that he needed a break during live instruction. *Id.*
91. The progress monitoring period for the first semester has not yet concluded, but all of Student's goals are being monitored, as shown in preliminary progress monitoring data. *Interviews with Special Education Teacher, Speech Language Pathologist, and School Psychologist, Exhibit I, pp. 21-32.* Also, Student's behavior is being tracked in his incident log and in an on-task behavior log. *Id.; Exhibit N, p. 3.*
92. Fifth Grade Teacher reports that Student kept his camera off most of the time during the first two weeks of school, but generally kept it on following that period. *Interview with Fifth Grade Teacher.* However, Student's participation has been minimal. *Id.* During the seven weeks of remote instruction, Fifth Grade Teacher reported that Student turned in only two assignments in literacy. *Id.* The assignments that were turned in met expectations. *Id.*
93. To further support Student, Special Education Teacher worked with him to develop alternative ways to communicate his needs through emojis, and she encouraged Student and Parents to use the activity log. *Interview with Special Education Teacher; Exhibit K, p. 58.* Special Education Teacher consulted with Student's paraprofessional regarding responses to Student's behavior, including providing guidance to allow wait time and remind Student of expectations. *Interview with Special Education Teacher.* She also consulted with Autism Specialist regarding Student's incentive plan, and modified Student's incentives. *Interviews with Special Education Teacher and Autism Specialist.*
94. Although refusal behaviors continued to occur multiple times per day on most days, Student's incident log shows that refusals to work declined from lasting all day during the first two weeks of school to often lasting 30 minutes or less in duration. *Id.* Parents report that Student was putting forth greater effort, but they attribute any improvement to their outside provider. *Interview with Parents.*



95. Student returned to in-person instruction on October 12, 2020. *Interviews with Parents, Fifth Grade Teacher, and Special Education Teacher.*

### **CONCLUSIONS OF LAW**

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

**Conclusion to Allegation No. 1: District developed an appropriate CP to implement Student’s IEP, to the greatest extent possible, after the District suspended in-person instruction as a result of the COVID-19 pandemic, from March 1, 2020 to October 9, 2020, consistent with 34 C.F.R. § 300.324(a). However, District failed to timely review and revise Student’s IEP, and failed to convene a properly constituted IEP Team to review and revise the IEP, in violation of 34 C.F.R. §§ 300.321(a), 300.321(e), 300.322(a)-(d), and 300.324(b)(1).**

The IDEA requires that districts offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174, 580 U.S. \_\_\_\_ (2017), 137 S. Ct. 988, 999.

An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with the IDEA’s procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law.

The instruction offered to a child “must be ‘specifically designed’ to meet [the] child’s ‘unique needs’ through an ‘individualized education program.’” *Id.* (alteration in original) (quoting 20 U.S.C. §§ 1401(29), (14)). An IEP should take into account a “child’s present levels of achievement, disability, and potential for growth.” *Id.*

With respect to a school district’s provision of FAPE during the COVID-19 pandemic, the U.S. Department of Education issued guidance on March 12, 2020, which states that if districts continue to provide educational opportunities to the general student population during a school closure, districts “must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.” *Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease Outbreak*, 76 IDELR 77 (EDU 2020). Districts “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 the IDEA. *Id.*

CDE echoed this federal COVID-19 guidance in April 2020, advising that if a district “continues to provide educational services to the general student population during a school closure, it must ensure that students with disabilities have access to the same educational opportunities

and FAPE. This means that—to the greatest extent possible—the special education and related services identified in the student’s IEP should be provided.” *Special Education & COVID-19 FAQs* at [www.cde.state.co.us/cdesped/special\\_education\\_faqs](http://www.cde.state.co.us/cdesped/special_education_faqs).

CDE emphasized that “[e]nsuring compliance with IDEA should not, however, prevent any school from offering educational programs and services through remote or virtual instruction. Indeed, ‘school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically,’ and that ‘[m]any disability-related modifications and services may be effectively provided online.’” *Id.*, citing *Supplemental Fact Sheet* (OSERS 3/21/20).

Additionally, the U.S. Department of Education advised that IEP Teams may, but are not required to, include distance learning plans in a student’s IEP to give “the [student’s] service providers and the [student’s] parents an opportunity to reach agreement as to what circumstances would trigger the use of the [student’s] distance learning plan and the services that would be provided during the dismissal.” *Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease Outbreak*, 76 IDELR 77 (EDU 2020).

i. The 2019 IEP and April 2020 CP

In this case, FF #s 3-14 and 23-33 show that the 2019 IEP was tailored to Student’s unique needs in literacy, and that District developed an appropriate CP to implement the 2019 IEP and provide Student with FAPE to the greatest extent possible during remote instruction. In developing the 2019 IEP, the IEP Team considered Student’s present levels of achievement, disability, and potential for growth. The IEP Team reviewed progress monitoring and observational data documenting Student’s progress on diagnostic assessments in reading and his need for adult support to complete writing tasks. The IEP Team also considered the results of an FBA, which revealed Student’s challenges with disengagement during reading instruction and while working independently.

The 2019 IEP contains goals to address Student’s needs in literacy, with measurable targets above Student’s baselines. (FF #9). Special Education Teacher, Speech Language Pathologist, and School Psychologist created a CP to document how these annual goals, accommodations, and services would be delivered in the remote setting to the greatest extent possible. (FF #23-33). The April 2020 CP contains the annual reading and writing goals as written in the 2019 IEP, and the service delivery methods were adapted to instruction in the remote setting. Special Education Teacher selected Read Naturally Live for remote instruction because it is an online literacy intervention program that addresses reading fluency and comprehension, and Special Education Teacher focused her instruction on areas of need identified by the program.

The 2019 IEP and April 2020 CP provide accommodations to address the impact of Student’s disability and help him access the general education curriculum, including the strategies

outlined in Student's BIP. (FF #10, 12-13, 31-33). The April 2020 CP also provides two sessions of paraprofessional support per day to assist with Student's behavior and academic work.

During the period of remote instruction in spring 2020, Student made progress toward his reading goal. (FF #46). The SCO acknowledges that Student made insufficient progress toward his writing goal, and that Student's disengagement affected his completion of writing work. (FF #39-40, 47). However, prior to remote instruction, Student was able to write a multi-sentence paragraph with the use of a graphic organizer. (FF #71). The eight weeks of remote instruction in spring 2020 represented a drastic change during an unprecedented and challenging time for teachers and students—a global pandemic, and FF #s 23-33 and 40-44 show that District staff adapted supports and instruction to meet Student's needs in the remote setting to the greatest extent possible. District acted in accordance with U.S. Department of Education and CDE guidance to ensure that Student had access to the same educational opportunities provided to all students in the remote setting. District also provided FAPE to the greatest extent possible during the suspension of in-person instruction by providing distance instruction virtually and by modifying Student's services accordingly.

For these reasons, the SCO finds and concludes that District met Student's individualized needs in literacy by developing an appropriate CP to implement the 2019 IEP to the greatest extent possible during the period of remote instruction, from April 7, 2020 to May 29, 2020.

ii. Development of the 2020 IEP

The IDEA requires that districts ensure that the IEP Team reviews a child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. 34 C.F.R. § 300.324(b)(1)(i). The IDEA also requires that the IEP Team revise the IEP, as appropriate, to address the following: any lack of expected progress toward annual goals and in the general education curriculum; the results of any reevaluation; information about the child provided to, or by, the parents; the child's anticipated needs; or other matters. 34 C.F.R. § 300.324(b)(1)(ii).

As provided in 34 C.F.R. § 300.321(a), the IEP Team for each student with a disability generally must include:

- (1) The parents of the child;
- (2) Not less than one general education teacher of the child (if the child is or may be participating in the general education setting);
- (3) Not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child;
- (4) A district representative who: is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with

- disabilities; is knowledgeable about the general education curriculum; and is knowledgeable about the availability of district resources;
- (5) An individual who can interpret the instructional implications of evaluation results;
  - (6) Other individuals who have knowledge or special expertise about the child, including related services personnel as appropriate; and
  - (7) Whenever appropriate, the child with the disability.

Parent participation is essential to IEP development, and parents are required members of the IEP team. 34 C.F.R. § 300.321(a)(1). The U.S. Department of Education issued guidance on September 28, 2020 emphasizing the need for districts to continue to take steps, consistent with 34 C.F.R. § 300.322(a)(1)-(2), to ensure that one or both parents attend or are afforded the opportunity to participate in IEP Team meetings during the pandemic, by notifying them of the meeting early enough to ensure that they can attend and by scheduling the meeting at a mutually agreed upon time and place. *Questions and Answers on Implementing Part B during COVID-19* (2020). “If face-to-face meetings are not feasible or practicable, the Department encourages the use of the flexibility included in 34 C.F.R. § 300.328 which allows [districts] to conduct initial and annual IEP Team meetings through alternate means,” such as telephone and video conference. *Id.* See also 34 C.F.R. §§ 300.322(c) and 300.328.

An IEP meeting may be conducted without a parent in attendance if the district is unable to convince the parents that they should attend. 34 C.F.R. § 300.322(d). If this occurs, the district must keep a record of its attempts to arrange a mutually agreed on time and place, such as detailed records of calls made or attempted and the results of those calls; copies of correspondence sent to the parents and any responses received; and detailed records of visits made to the parent’s home or place of employment and the results of those visits. *Id.*

Here, FF #s 53-61 show that on March 10, 2020, April 8, 2020, May 6, 2020, and June 17, 2020, the District convened a properly constituted IEP Team for the purposes of reviewing Student’s reevaluation and reviewing and revising Student’s IEP. However, Student’s IEP was not reviewed, revised, and finalized until August 18, 2020—four months after Student’s annual review was due. (FF #61-68). Accordingly, the SCO finds and concludes that District failed to timely review and revise Student’s IEP in violation of 34 C.F.R. § 300.324(b)(1).

Further, FF #s 61-70 demonstrate that when District reviewed and revised Student’s IEP, it failed to convene a properly constituted IEP Team by failing to include Parents and a general education teacher. Although Special Education Teacher and Principal sent two emails to Parents offering to schedule an IEP meeting, District staff failed to make substantial attempts to arrange a meeting at a mutually agreed upon time and place. In their emails, Special Education Teacher and Principal never proposed a specific time and place to meet. When District staff received Parents’ feedback on the 2020 IEP, they made no attempts to schedule a meeting to discuss the feedback. Instead, they reviewed the feedback without the presence of Parents or a general

education teacher. Then, Special Education Teacher sent Parents a finalized version of the 2020 IEP and offered that any changes could be made through amendment. No further attempts were made to schedule an IEP meeting.

Although an IEP may be amended by agreement obtained through email correspondence, developing, reviewing and revising an annual IEP via email is inconsistent with the collaborative process contemplated by the IDEA. To comply with the IDEA, District should have informed Parents that they were scheduling an IEP meeting, asked Parents for available times to meet, and sent a notice of meeting. District should have also made several well-documented attempts to schedule an IEP meeting, such as through phone, email, or mail. If Parents did not respond to attempts to schedule a meeting, District should have scheduled an IEP meeting and provided Parents with the required notice of meeting. Then, District should have held the meeting—with or without Parents—and developed the IEP. Had the District followed this or a similar process, it would have complied with IDEA requirements for parent participation, IEP team membership, and timely development, review and revision of Student's annual IEP.

For the reasons explained above, the SCO finds and concludes that District failed to convene a properly constituted IEP Team to review and revise Student's IEP by failing to include Parents and a general education teacher, in violation of 34 C.F.R. §§ 300.321(a), 300.321(e), and 300.322(a)-(d).

The failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10th Cir. 1996).

While the findings demonstrate that District committed procedural violations by failing to timely review and revise Student's IEP and by failing to convene a properly constituted IEP Team, FF #s 53-69 show that the procedural violations did not amount to a violation of FAPE. The evidence shows that District convened a properly constituted IEP Team on four occasions to review Student's reevaluation and to review and revise Student's IEP. During these meetings, the IEP Team reviewed Student's strengths, present levels of performance and the evaluation, along with eligibility. Two of the meetings occurred prior to the revision deadline. The meeting on April 8, 2020 was postponed after Parents requested to have counsel present.

After the fourth IEP meeting, Parents and their attorney requested that District send the draft IEP via email. District staff agreed with Parents' request, but they should not have done so. As noted above, IEP development by email is inconsistent with the collaborative process contemplated in the IDEA. An IEP may be amended through email, but an IEP must be developed during an IEP meeting with a properly constituted IEP Team.

Although District did not schedule an IEP meeting to complete the annual review, Parents also did not respond to emails sent in June and August offering to meet. In fact, Parents reported that they requested to revise the IEP via email because they did not wish to meet. Consistent with their request, Parents were able to participate in the development of the IEP via email. They were given approximately seven weeks to review and consider the draft IEP, and Parents responded with detailed feedback. District failed to convene a properly constituted IEP Team to review Parents' feedback, but District staff considered and adopted some feedback, in addition to sending a description of how it was considered. As discussed in greater depth below, an IEP tailored to Student's needs was in place at the beginning of the 2020-2021 academic year. (FF #71-78).

Therefore, the SCO finds and concludes that District's procedural violations did not amount to a violation of FAPE.

iii. The 2020 IEP and August 2020 CP

In this case, FF #s 71-78 and 80-87 show that despite the issues with IEP development, the 2020 IEP was tailored to Student's unique needs in literacy, and District developed an appropriate CP to implement the 2020 IEP and provide Student with FAPE to the greatest extent possible during remote instruction.

The 2020 IEP reviews and demonstrates consideration of Student's present levels of achievement, disability, and potential for growth. (FF #71-72). During meetings in March, April, May, and June, the IEP Team reviewed progress monitoring data along with the results of Student's triennial reevaluation. (FF# 53-61). The 2020 IEP highlights the results of the reevaluation, including Student's challenges in phonological awareness, rapid symbolic naming, and phonological memory. (FF #71-72). The 2020 IEP also documents Student's need for adult support in the general education classroom to help him regulate his emotions and behavior.

The 2020 IEP contains updated goals with measurable objectives to address Student's needs in reading fluency, writing, communication, and social/emotional wellness as identified in the reevaluation. (FF #73). Special Education Teacher, Speech Language Pathologist, and School Psychologist developed a CP to document how Student's annual goals, accommodations, and services would be delivered in the remote setting. (FF #80-87). The August 2020 CP contains Student's annual reading and writing goals and objectives as written in the 2020 IEP, and the August 2020 CP provides for 225 minutes of direct, specialized literacy instruction.

The 2020 IEP and August 2020 CP provide accommodations to address the impact of Student's disability and help him access the general education curriculum, including the strategies outlined in Student's BIP. (FF #74, 76-77, 86-87). In response to Student's challenges in the remote setting and the changing instructional format, the August 2020 CP provides for paraprofessional support remotely throughout the day.

Progress monitoring is not yet completed for the fall semester, but initial data indicate that although Student is exhibiting regular disengagement and refusal, the duration of his behaviors and degree of disengagement have improved over time. (FF # 91-94).

For these reasons, the SCO finds and concludes that District offered an IEP tailored to Student's unique needs in literacy and developed an appropriate CP to implement the 2020 IEP to the greatest extent possible during the period of remote instruction, from August 24, 2020 to October 9, 2020.

**Conclusion to Allegation No. 2: District failed to monitor and report Student's progress on his annual IEP goals for communication and math, from April 7, 2020 to May 29, 2020, in violation of at 34 C.F.R. § 300.320(a)(3).**

Under the IDEA, school districts must provide periodic reports on the progress a student is making toward the student's annual goals. 34 C.F.R. § 300.320(a)(3). During the COVID-19 global pandemic, guidance from CDE indicated that "[s]chools should make reasonable, good faith efforts to continue to collect and report progress on IEP goals to parents consistent with the schedule identified on the student's IEP . . . ." *Special Education & COVID-19 FAQs at www.cde.state.co.us/cdesped/special\_education\_faqs*. CDE suggested Parents and other IEP Team members "collaborate and partner to identify flexible data collection strategies that can be used to track progress." *Id.*

Here, the District provided Parents with a progress report for the third semester of the 2019-2020 academic year, which encompassed remote instruction in spring 2020. (FF #45). As shown in FF #s 46-48, the District completed progress monitoring for Student's annual goals in reading, writing, and social/emotional wellness. However, FF #s 49-52 demonstrate that District failed to monitor and report progress on Student's annual goals in math and communication.

With respect to Student's math goal, Special Education Teacher monitored Student's completion of math assignments as outlined in the April 2020 CP. (FF #49). However, Special Education Teacher failed to provide any information regarding Student's completion of math assignments in the May 27, 2020 progress report, depriving Parents of information regarding Student's progress during remote instruction.

As for Student's communication goal, Speech Language Pathologist admitted that because Student met the goal, she did not target the goal and monitor progress as required by the April 2020 CP. (FF #50-52). Still, Speech Language Pathologist did keep progress notes regarding each of her sessions with Student and summarized those notes in the May 27, 2020 progress report.

From August 24, 2020 to present, progress has been monitored on all of Student's annual goals, and staff are tracking Student's behavior in both an incident log and an on-task behavior log. (FF #91).

District policy requires that progress monitoring data collection and recording occur on the frequency identified in the IEP, and that progress monitoring continue during the period of remote instruction as documented in the CP. (FF #35-36). During remote instruction in spring 2020, District staff failed to do so. For these reasons, the SCO finds and concludes that during the period of remote instruction in spring 2020, District failed to monitor and report progress on Student's annual goals in math and communication, in violation of 34 C.F.R. § 300.320(a)(3).

The failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10th Cir. 1996).

Although the findings demonstrate that District committed a procedural violation by failing to monitor and report progress on Student's annual goals for math and communication, FF #s 45-52 and 91 show that the procedural violation did not amount to a violation of FAPE. In spring 2020, District monitored and reported progress on Student's reading, writing, and social/emotional wellness goals, and Special Education Teacher monitored Student's completion of math assignments consistent with the April 2020 CP. Speech Language Pathologist did not target or revise Student's communication goal after he met it, but she did keep progress notes regarding his sessions with her and summarized those notes in Student's progress report. These violations occurred over eight weeks at the height of the COVID-19 pandemic, and District is now monitoring progress on all of Student's annual goals, as well as tracking his behavior.

Therefore, the SCO finds and concludes that District's procedural violations did not amount to a violation of FAPE.

**Systemic IDEA Violations: This investigation does not demonstrate violations that are systemic and will likely impact the future provision of services for all children with disabilities in the District if not corrected. 34 C.F.R. § 300.151(b)(2).**

Pursuant to its general supervisory authority, CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the District. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the State Complaint Procedures are "critical" to the SEA's "exercise of its general supervision responsibilities" and serve as a "powerful tool to identify and correct noncompliance with Part B." *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46601 (Aug. 14, 2006).

In this case, the SCO finds and concludes that the procedural violations were not systemic in nature. As discussed in FF #s 35-36 and 70, District policies require annual review and revision of IEPs by a properly constituted IEP Team, as well as regular progress monitoring and



reporting. Staff interviewed confirmed their understanding of District policies, as well as their understanding that staff actions were not consistent with these policies. (FF #51, 70). Nothing in the record indicates that District regularly fails to timely review and revise IEPs with a properly constituted IEP Team or that the District regularly fails to monitor progress. The District's decision to develop Student's IEP via email was made in response to the request of Parents and their attorney and not as part of a regular District practice. The findings indicate that these violations likely resulted from the District struggling under the weight of the COVID-19 pandemic. These facts support finding that these violations are not systemic.

Therefore, the SCO finds and concludes that District's procedural violations did not amount to a violation of FAPE.

### REMEDIES

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

- a) Failing to timely review and revise Student's IEP, in violation of 34 C.F.R. § 300.324(b)(1).
- b) Failing to convene a properly constituted IEP Team to review and revise Student's IEP, in violation of 34 C.F.R. § 300.321(a), 300.321(e), and 300.322(a)-(d).
- c) Failing to monitor progress, in violation of 34 C.F.R. § 300.320(a)(3).

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

1. By **November 20, 2020** the District must submit to CDE a proposed corrective action plan (CAP) that effectively addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to reoccur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
  - a. Principal, Special Education Teacher, SEIS, Senior Manager, and Speech Language Pathologist must review this Decision in its entirety and the requirements of 34 C.F.R. §§ 300.320(a)(3), 300.321(a), 300.321(e), 300.322(a)-(d), and 300.324(b)(1), with District's legal counsel, no later than **January 29, 2021**. In the event that these individuals are no longer employed, the District may substitute individuals in the same roles.
  - b. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **February 5, 2021**.

The Department will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance.

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

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

**NOTE:** Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the Department. **Given the current circumstances surrounding the COVID-19 pandemic, the Department will work with the District to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

### CONCLUSION

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

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

Dated this 30th day of October, 2020.



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Lindsey Watson  
State Complaints Officer

## Appendix

### **Complaint, pages 1-5**

- Exhibit 1: June 17, 2020 IEP
- Exhibit 2: Progress reports
- Exhibit 3: August 2020 CP
- Exhibit 4: Email correspondence
- Exhibit 5: Photos of Student
- Exhibit 6: Parent feedback and correspondence regarding the June 17, 2020 IEP

### **Response, pages 1-8**

- Exhibit A: IEPs, CPs, and meeting notes
- Exhibit B: BIP and service logs
- Exhibit C: Eligibility determinations
- Exhibit D: Evaluations
- Exhibit E: Parental consent
- Exhibit F: Prior written notice
- Exhibit G: Notice of Meeting
- Exhibit H: Grade reports and progress reports
- Exhibit I: Progress monitoring reports
- Exhibit J: Documentation from Parents
- Exhibit K: Email correspondence
- Exhibit L: Contact information for District staff
- Exhibit M: District policies and procedures
- Exhibit N: Behavior logs
- Exhibit O: Miscellaneous documentation

### **Reply, pages 1-4**

#### **Telephonic Interviews with:**

- Parents: October 5, 2020, October 11, 2020, and October 22, 2020
- Principal: October 5, 2020
- SEIS: October 6, 2020 and October 16, 2020
- Literacy Teacher: October 6, 2020
- Autism Specialist: October 7, 2020
- Senior Manager: October 8, 2020
- Math Teacher: October 8, 2020
- School Psychologist: October 8, 2020 and October 9, 2020
- Speech Language Pathologist: October 9, 2020
- Special Education Teacher: October 9, 2020 and October 16, 2020
- Fifth Grade Teacher: October 14, 2020