

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

State-Level Complaint 2021:510
Denver Public Schools

DECISION

INTRODUCTION

On April 15, 2021, the parents (Parents) of a student (Student) identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA)¹ filed a state-level complaint (Complaint) against Denver Public Schools (District). The State Complaints Officer (SCO) determined that the Complaint identified three 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. On April 26, 2021, Parents filed an amendment to the Complaint (Amended Complaint), and the SCO determined that the Amended Complaint identified two additional 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 and the Amended 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 April 15, 2020 through April 15, 2021 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 AND AMENDED COMPLAINT ALLEGATIONS

Whether the District violated the IDEA and denied Student a free appropriate public education (FAPE) because the District:

1. Failed to properly implement Student's IEP, specifically by failing to provide Student with the following services, in violation of 34 C.F.R. § 300.323:

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

- a. 150 minutes of direct, specialized literacy instruction per week, from April 15, 2020 to June 2020 and from October 1, 2020 to October 12, 2020;
 - b. Psychological services as required by Student's IEP, from April 15, 2020 to June 2020 and from December 2020 to February 2021.
2. Failed to monitor Student's progress on annual IEP goals from April 15, 2020 to present, in violation of at 34 C.F.R. § 300.320(a)(3).
 3. Failed to review and revise Student's IEP to address the lack of expected progress toward annual goals, from April 15, 2020 to present, consistent with 34 C.F.R. § 300.324(b)(1).
 4. Deprived Parents of meaningful participation in the Individualized Education Program (IEP) process by declining to consider Parents' concerns at the March 17, 2021 and April 12, 2021 IEP meetings, in violation of 34 C.F.R. §§ 300.321(a)(1), 300.324(a)(1)(ii), and 300.501(b)-(c).
 5. Failed to provide Parents with notice of meeting for the March 17, 2021 and April 12, 2021 IEP meetings, in violation of 34 C.F.R. § 300.322(a)-(b).

FINDINGS OF FACT

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

A. Background

1. Student is a ten-year-old eligible for special education and related services under the primary disability category Other Health Impairment (OHI) and the secondary disability category Specific Learning Disability (SLD). *Exhibit A*, p. 21. Student attends an elementary school (School) located in District. *Id.* Student is described as creative and artistic, with good communication skills and strengths in reading comprehension and math problem solving. *Interviews with Parents and Special Education Teacher 1.*
2. This dispute began in response to the suspension of in-person learning as a result of the COVID-19 pandemic, at which time District staff developed contingency plans (CPs) to document their plan to implement IEPs during remote instruction. *Interviews with*

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

Parents, Special Education Instructional Specialist, Special Education Teacher 1, and Special Education Teacher 2.

B. The October 2019 IEP

3. Throughout Student's 4th grade year, and from August 24, 2020 to December 4, 2020 during his 5th grade year, the October 31, 2019 IEP (2019 IEP) was in effect. *Interviews with Special Education Teacher 1 and Special Education Teacher 2; Exhibit A, pp. 1-16.*
4. The 2019 IEP reviews Student's present levels of performance in literacy, documenting his progress toward a literacy goal through increasing his reading fluency from 28 words per minute to 82 words per minute at a third-grade level. *Exhibit A, p. 4.* Student also met or made progress toward his social emotional goals. *Id.* pp. 5-6.
5. The 2019 IEP documents Student's needs and the impact of his disability, including his need to improve reading decoding and fluency to a 4th grade benchmark level, his need to increase engagement in on-task behaviors during whole group instruction, and his need to continue to work toward independently demonstrating problem-solving skills to resolve peer conflict. *Id.* at p. 7.
6. The 2019 IEP contains the following annual goals:
 - Reading Goal #1: "By October 2020, [Student] will read 103 WPM on an unfamiliar 4th grade level text with 95% accuracy, from 78 words with 93% accuracy as measured by oral reading fluency assessments, in order to comprehend the texts at a 4th grade level." *Id.* at pp. 9-10.
 - Social Emotional Wellness Goal #2: "By October 2020, [Student] will increase on-task behavior during whole group instruction from a current baseline of approximately 70% to a goal of at least 90%, as measured by direct observation by the school psychologist." *Id.* at p. 10.
 - Social Emotional Wellness Goal #3: "By October 2020, [Student] will independently demonstrate self-advocacy and problem-solving skills (i.e., problem identification and analysis, brainstorming strategies to solve the problem, selecting and applying a strategy) by generating and using a solution in 5 of 5 opportunities (from 3 of 5 opportunities) to access academic supports or resolve peer conflict, as measured by direct observation from his classroom teacher, special education teacher, and/or school psychologist." *Id.* at pp. 10-11.
7. The 2019 IEP includes accommodations to help Student access the general education curriculum. *Id.* pp. 11-12.

8. The 2019 IEP provides for 30 minutes of daily, specialized literacy instruction to be delivered by a special education teacher inside the general education classroom. *Id.* at p. 14. It also provides for psychological services to be delivered by a school psychologist— 60 direct service minutes per month outside of the general education classroom and 30 direct service minutes per month inside the general education classroom to support engagement in on-task behaviors, problem-solving, and self-advocacy. *Id.*
9. The IEP Team determined that it was appropriate for Student to spend 99.3% of his time in the general education environment and 0.7% of his time outside of general education in order for Student to gain exposure to grade level text and time with peers. *Id.* at p. 15.

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

10. 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.*
11. 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.³ Subsequent executive orders collectively extended the suspension of in-person instruction through the end of the 2019-2020 school year.⁴ District began providing remote instruction to students on April 7, 2020. *Interview with Principal.*
12. 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 District's efforts to provide FAPE to the greatest extent possible during the period of remote instruction. *Interviews with Special Education Teacher 1, Special Education Teacher 2, and Special Education Instructional Specialist; Exhibit N, pp. 1-16.*
13. 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.*
14. 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, Special Education Teacher 1, and Special Education Teacher 2; Exhibit N, pp. 1-16.* If parents agreed with the CP, then staff were

³ 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.

⁴ 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).

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.*

15. Additionally, District staff were provided with templates for the creation of CPs, which were structured as a prior written notice. *Id.* 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.*
16. District staff were instructed that the language in each CP "**must** be tailored to the circumstances of each individual student." *Exhibit N*, pp. 1, 10 (emphasis original).
17. 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.* at pp. 1-16.

D. Student's March 31, 2020 CP

18. A CP was developed for Student on March 31, 2020 (March 2020 CP). *Exhibit G*, pp. 1-2. The March 2020 CP contains each of the annual goals as written in the 2019 IEP and states that each of the goals will be worked on. *Id.*
19. The March 2020 CP documents how the annual goals will be serviced remotely. *Id.* It states that Reading Goal #1 will be serviced through "daily guided reading for 30 minutes, including [L]exia twice a week for 30 minutes," with progress monitored by Special Education Teacher 1 twice monthly for 15 minutes over Google Meet using oral reading fluency prompts. *Id.* Lexia is a research based, CDE-approved reading intervention. *Interviews with Special Education Teacher 1 and CDE Literacy Consultant; 2020 Advisory List of Instructional Programming at <https://www.cde.state.co.us/coloradoliteracy/advisorylistofinstructionalprogramming2020y>.*
20. For Social Emotional Wellness Goal #2, it provides that the goal will be serviced through a weekly consult and monitored through a visual checklist or teacher reports regarding work completion. *Id.* The March 2020 CP provides that Social Emotional Wellness Goal #3 will be serviced through video conference for 15 minutes weekly and supplemented with teacher/parent consultation and homework between direct sessions, with progress monitored once per month via video conference and/or parent and teacher reports. *Id.*
21. The March 2020 CP includes some of the accommodations from the 2019 IEP. *Id.* pp. 2-3.

E. Implementation of the March 2020 CP

22. District special education teachers have access to IEPs through Enrich. *Interviews with Special Education Teacher 1, Special Education Teacher 2, and School Psychologist*. During the period of remote instruction, which began on April 7, 2020, CPs were accessible through a Google drive, and were also uploaded into Enrich and accessible there. *Id.*
23. Special Education Teacher 1 and School Psychologist had access to the 2019 IEP through Enrich. *Interviews with Special Education Teacher 1 and School Psychologist*. They accessed the March 2020 CP through a Google drive. *Id.* Both Special Education Teacher 1 and School Psychologist were familiar with their contents. *Id.*

a. Student's Literacy Services in April and May 2020

24. In spring 2020, Student received remote instruction from April 7, 2020 to May 27, 2020, and the March 2020 CP was in effect throughout this time. *Interviews with Special Education Teacher 1 and School Psychologist*.
25. During remote instruction in spring 2020, all students at School were provided "asynchronous," virtual instruction, meaning that assignments were posted daily in a virtual platform, and students generally worked independently to complete assignments at their own pace. *Interviews with Principal, Special Education Teacher 1, Special Education Teacher 2, and Literacy Teacher*. Literacy and math assignments were mandatory and other assignments were optional. *Id.* Teachers and other providers had daily office hours from 1:00 p.m. to 3:00 p.m. to answer questions. *Id.*
26. The 2019 IEP provides for 150 minutes per week of direct specialized literacy instruction to be delivered by a special education teacher. *Exhibit A*, p. 14. Prior to remote instruction, Special Education Teacher 1 delivered those services by working directly with Student in a small group on fluency, spelling, comprehension, writing, and other literacy activities. *Interview with Special Education Teacher 1*.
27. The March 2020 CP provides for 150 minutes of guided reading per week, but those minutes were not delivered by a special education teacher. *Interview with Special Education Teacher 1; Exhibit G*, pp. 1-3. Instead, in April and May 2020 Student's guided reading consisted of doing independent work on Lexia twice per week, and then completing a reading assignment independently three times per week, which entailed reading and re-reading a passage and answering questions. *Interview with Special Education Teacher 1*. Special Education Teacher 1 provided written feedback, and Student had the option to record himself reading aloud for further monitoring. *Id.*
28. Student's direct literacy instruction was reduced from 600 minutes per month in the 2019 IEP to 30 minutes per month in the March 2020 CP, a reduction of 95%. *Interview with Special Education Teacher 1; Exhibit G*, pp. 1-3. The only direct literacy instruction

provided in the March 2020 CP consisted of Google meetings with Special Education Teacher 1 twice per month for 15 minutes. *Id.*; *Exhibit 9*, pp. 36, 38. During the 15-minute sessions, Special Education Teacher 1 administered oral reading fluency prompts to monitor Student's progress, using a goal level prompt (4th grade level) once per month and a performance level prompt (3rd grade level) once per month. *Id.*; *Exhibit 9*, p. 38.

29. In addition to completing progress monitoring twice per month, Special Education Teacher 1 also met with Student in a small group for 30 minutes once per month to check-in, read aloud, and allow the students to socialize. *Interview with Special Education Teacher 1*; *Exhibit B*, pp. 13-14.
30. Special Education Teacher 1 tracked the services she provided to Student using a calendar, which contained her service schedule. *Interview with Special Education Teacher 1*. She also kept copies of some of the Google meeting links sent to Student for each meeting. *Id.*; *Exhibit B*, pp. 13-14, 18. It was Special Education Teacher 1's practice to document any missed services, and her records show that Student attended all meetings in April and May 2020. *Interview with Special Education Teacher 1*. He also regularly completed his guided reading assignments. *Id.* Thus, the SCO finds that Student received literacy services consistent with the March 2020 CP.
31. Special Education Teacher 1 reduced Student's services because of the format of remote instruction, which involved significantly reduced instructional time and independent work. *Id.* Special education services were reduced for many students at School during remote instruction in spring 2020 due to the structure of the remote setting, but the CPs and any service reductions were tailored to the individual needs of each student. *Interviews with Special Education Teacher 1, Special Education Teacher 2, and Special Education Instructional Specialist*.
32. Special Education Instructional Specialist (SEIS) acknowledged that reducing Student's direct literacy instruction by 95% was not providing FAPE to the greatest extent possible, and she shared that for this reason the District is offering compensatory services to students who experienced learning loss or regression during remote instruction. *Interview with SEIS*. In fact, District policy requires that special education teams determine if all students with IEPs are eligible for compensatory services to account for regression or loss of learning during the period of remote instruction due to the COVID-19 pandemic. *Exhibit N*, p. 70.

b. Student's Psychological Services in April and May 2020

33. The 2019 IEP provides for 90 total minutes of direct psychological services per month to be delivered by a school psychologist, 60 outside of the general education classroom and 30 inside of the general education classroom. *Exhibit A*, p. 14. The March 2020 CP provides a total of 60 minutes of direct psychological services per month to be delivered

outside of the general education classroom, which is a reduction of 30 minutes from the services provided in the 2019 IEP. *Exhibit G*, pp. 1-3.

34. The March 2020 CP did not include 30 minutes of direct services inside the general education classroom due to the format of remote instruction, in which all students completed their assignments remotely and independently instead of meeting as a class. *Interview with School Psychologist*.
35. In April and May 2020 Student's direct psychological services were provided in 15-minute sessions every Wednesday via video conference with School Psychologist. *Interview with Parents and School Psychologist*. During these sessions, School Psychologist focused on teaching and practicing skills in self-advocacy and seeking academic support in the remote setting. *Interview with School Psychologist*. For example, School Psychologist worked with Student to develop a script for emailing his teachers to request help. *Id*.
36. All school psychologists in District track their service minutes in an electronic service log, in which they document the date of service and duration, along with the student's response. *Interview with School Psychologist; Exhibit B*, pp. 1-2; *Exhibit N*, p. 58. School Psychologist tracked her services with Student in April and May 2020, and the service logs indicate that she provided him with services consistent with the March 2020 CP. *Id*.
37. Because of the structure of remote instruction in spring 2020, School Psychologist was not able to observe Student's on-task behavior in whole group instruction as written in Social Emotional Wellness Goal #2. *Interview with School Psychologist*. Therefore, Special Education Teacher 1, Literacy Teacher, and Fourth Grade Math Teacher tracked Student's work completion using a spreadsheet where they recorded completed and missing assignments. *Interviews with School Psychologist, Special Education Teacher 1, Literacy Teacher, and Fourth Grade Math Teacher*. The SCO finds that in April and May 2020 Student received psychological services consistent with the March 2020 CP.

F. The May 29, 2020 Progress Report

a. District Progress Monitoring Policies

38. District policy requires that progress monitoring data collection and recording occur on the frequency identified in the IEP, and that progress reports be sent home with each report card at the end of the quarter or semester. *Interviews with SEIS, Special Education Teacher 1, and Special Education Teacher 2; Exhibit N*, p. 54. Per District policy, it is "best practice for progress monitoring data to generally be collected and recorded at least every two weeks based on five to eight hours of specially designed instruction," though monitoring can be individualized based on the student. *Exhibit N*, p. 56.
39. District guidance for the remote delivery of services during COVID-19 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. *Interviews with SEIS, Special Education Teacher 1, Special Education Teacher 2; Exhibit N*, pp. 1-15, 57-58.

b. Student's Progress in April and May 2020

40. On May 29, 2020, Special Education Teacher 1 emailed Parents a progress report, which covered the period of remote instruction in spring 2020. *Exhibit J*, pp. 51.
41. Despite the reduction in literacy services, the progress report shows that Student made progress on his reading goal. *Exhibit J*, p. 1. On the last oral reading fluency prompt prior to remote instruction, in February 2020, Student read 88 words per minute correctly, and on the end of the year benchmark in May 2020, Student "read 100 words per minute with 100% accuracy when he corrected his words from a 4th grade reading probe." *Id.* Student also read all multi-syllabic words with a silent e correctly. *Id.*
42. The progress report shows variation in Student's progress on his reading goal over the course of the 2019-2020 academic year. *Id.* For example, on an oral reading fluency prompt in April 2020, Student read only 68 words per minute, down from 88 words per minute in February 2020. *Id.* Thus, Student did not meet the first objective of Reading Goal #1, which was to read 91 words per minute by April 2020. *Id.*
43. Student generally showed variation in his progress, which Special Education Teacher 1 attributed, in part, to challenges with attention and staying on task. *Interview with Special Education Teacher 1*. Thus, she monitored the overall trend of his progress, which in the case of the reading goal, was trending upward. *Id.* During the 2019-2020 academic year, Student's performance improved from a baseline of 78 words per minute in September 2020 to 100 words per minute in May 2020. *Id.*; *Exhibit J*, p. 1.
44. As for Social Emotional Wellness Goal #2, the progress report outlines that Student's on-task behavior was not monitored during remote instruction, but his work completion was monitored as provided in the March 2020 CP. *Exhibit J*, p. 3; *Exhibit G*, p. 2. Student consistently completed reading and math assignments. *Exhibit J*, p. 3. Additionally, he actively engaged in video conferencing sessions with School Psychologist. *Id.*
45. For Social Emotional Wellness Goal #3, the progress report documents that, "Due to the nature of remote learning, work...primarily focused on accessing academic supports, rather than resolving peer conflict." *Id.* at p. 5. During remote instruction, Student independently generated solutions to access academic supports four out of five times. *Id.* at pp. 5-6. However, Student showed some regression in his ability to independently use a solution to access academic supports and only did so one out of five times. *Id.* Per the progress report, he "relied on his mother to contact teachers on his behalf." *Id.*

G. The August 2020 CP

46. As a result of the ongoing COVID-19 pandemic, District continued remote instruction for the health and safety of staff and students during the 2020-2021 academic year. *Exhibit N*, pp. 65-66. Thus, staff were instructed to reinstate or revise CPs in fall 2020. *Id.* Student's August 19, 2020 CP (August 2020 CP) was developed during meetings with Parents on August 20, 2020 and September 10, 2020. *Interviews with Special Education Teacher 2 and School Psychologist; Exhibit 9*, pp. 38, 51, 57-60, 61.
47. The August 2020 CP contains each of the annual goals as written in the 2019 IEP and states that each of the goals will be worked on. *Exhibit G*, pp. 6-11.
48. The August 2020 CP documents how the goals will be serviced remotely. *Id.* It states that Reading Goal #1 will be serviced through 30 minutes per day of direct instruction provided by the special education teacher "via Google Meets with [Student] and a small group of students," with additional support through Lexia. *Id.* at p. 7. The literacy service minutes in the August 2020 CP are equal to those in the 2019 IEP. *Id.*; *Exhibit A*, p. 14.
49. As for Social Emotional Wellness Goal #2, it will be serviced through weekly consults with teachers and providers regarding on-task behaviors, providing a weekly virtual checklist through the remote instruction platform and email, and check-ins during sessions with the special education teacher and/or the school psychologist. *Exhibit G*, pp. 6-11.
50. The August 2020 CP provides that Social Emotional Wellness Goal #3 will be serviced through direct video conference with School Psychologist for 25 minutes per week and supplemented with teacher/parent consultation and homework between sessions. *Id.*
51. Additionally, the August 2020 CP includes both the classroom and literacy accommodations in the 2019 IEP to be implemented during remote instruction. *Id.*

H. Implementation of Literacy Services from October 1, 2020 to October 12, 2020

52. The August 2020 CP was in effect from August 24, 2020 to December 4, 2020. *Interview with Special Education Teacher 2*. Parents allege that District failed to implement the literacy services from October 1, 2020 to October 12, 2020. *Interviews with Parents*.
53. Special Education Teacher 2 had access to Student's 2019 IEP and August 2020 CP through Enrich, and she kept paper copies of both. *Interview with Special Education Teacher 2*. Special Education Teacher 2 was familiar with their contents. *Id.*
54. All students at School received remote instruction from August 24, 2020 to October 20, 2020 and from November 2, 2020 to January 11, 2021, with a brief period of in-person instruction from October 21, 2020 to October 30, 2020. *Interviews with Principal, Special Education Teacher 2, and School Psychologist*.

55. During the 2020-2021 academic year, District modified the delivery of remote instruction to more closely resemble a normal school day, with a significant increase in instructional time. *Interviews with Special Education Teacher 2 and Fifth Grade Teacher*. The day started with a virtual morning meeting, followed by live, virtual instruction for writing, reading, science, and math. *Id.* Although students still had some independent work, they received support during independent work periods. *Id.*
56. From October 1, 2020 to October 12, 2020, Special Education Teacher 2 provided Student's literacy instruction virtually over Google Meet in a small group. *Interview with Special Education Teacher 2*.
57. From October 6, 2020 through October 8, 2020, Special Education Teacher 2 pulled Student from his literacy instruction to complete one-on-one assessments with Student for his reevaluation. *Id.* On October 13, 2020 and October 14, 2020, School Psychologist pulled Student from literacy instruction to complete cognitive testing for the reevaluation. *Id.* Student missed 30 minutes of direct literacy instruction for five days. *Id.*
58. On October 9, 2020 and October 12, 2020, Special Education Teacher 2 administered assessments for other students during small group literacy instruction, and thus she did not provide 30 minutes of literacy instruction on those days. *Id.* Instead, Student worked with a paraprofessional on literacy assignments, Lexia, and independent reading. *Id.*
59. Special Education Teacher 2 did not make up the instruction Student missed due to his reevaluation. *Id.* It is School policy that when a provider needs to perform one-on-one assessments as part of a special education evaluation, the provider completes the assessments during the time he or she is regularly scheduled to provide services to the student. *Id.* Accordingly, the SCO finds that District failed to provide Student with a total of 2.5 hours of direct literacy instruction.

I. The October 31, 2020 Progress Report

60. On November 2, 2020, Special Education Teacher 2 emailed Parents an October 31, 2020 progress report for the first trimester of the 2020-21 academic year. *Exhibit J*, pp. 56.
61. The progress report shows that Student experienced regression on his reading goal after the summer break, but consistently made progress through the first trimester. *Interview with Special Education Teacher 2; Exhibit J*, p. 1. He met his reading goal on October 8, 2020 by reading 106 words per minute on a 4th grade level text. *Id.* His accuracy rate was omitted from the report in error, but Special Education Teacher 2 confirmed that he achieved an accuracy rate of 98% on the October 8, 2020 reading prompt. *Interview with Special Education Teacher 2*.
62. As for the social emotional wellness goals, the progress report documents that Student met Social Emotional Wellness Goal #2. *Exhibit J*, p. 3. Observations completed in

October 2020 during whole group instruction for social studies, science, spelling, and math revealed that he engaged in on-task behaviors for 87-90% of the observed intervals. *Id.*

63. Student also made progress toward Social Emotional Wellness Goal #3, but he did not meet it. *Id.* at pp. 5-7. During the first trimester, Student “independently used solutions to access academic support in approximately 4-5 of 5 opportunities (from 3 of 5 opportunities) during live remote learning with his teachers.” *Id.* at p. 5. The progress report documents that during remote instruction, he was working on strategies to access academic support, and that his “independent use of solutions to resolve peer conflict will be monitored when he returns to in-person instruction.” *Id.*

J. Student’s Annual Review and Development of the December 2020 IEP

a. District Policies Regarding Review and Revision of IEPs

64. District policies provide that “after 4-6 data points of inadequate progress, IEP teams should reconvene to propose adjustments to goals, objectives, services, etc. This process would require an IEP amendment to reflect changes. The team could also determine whether a new evaluation is required.” *Exhibit N*, p. 52.
65. District policies also advise that “[a]t a minimum, schools and IEP teams should be examining progress data for all students with IEPs when sending progress reports home to determine whether teams need to convene based on insufficient progress or if goals/objectives have been met,” and if “adequate progress is not made toward goals or objectives schools must not simply repeat the same goal or objective in subsequent IEPs, without documenting consideration of adjusting services to address the lack of progress or other barriers.” *Id.* at pp. 53, 57.

b. Student’s Annual Review

66. A properly constituted IEP Team convened on October 28, 2020, November 13, 2020, November 18, 2020, December 2, 2020, and December 4, 2020, to review Student’s reevaluation, complete his eligibility determination, and develop his IEP. *Interviews with Parents, Special Education Teacher 2, SEIS, and Principal; Exhibit C*, pp. 25-36; *Exhibit E*, pp. 1-3.
67. The reevaluation revealed that Student’s overall cognitive functioning, as well as the areas of verbal comprehension, visual spatial, fluid reasoning, and working memory were in the average to high average categories, but the area of processing speed was in the very low category. *Id.* at p. 28. For academics, the Wechsler Individual Achievement Test, Third Edition, showed that Student was performing in the below average range in basic reading and math fluency. *Id.* at p. 12. Social emotional assessments indicated concerns

from Parents and teachers regarding social emotional, executive, and adaptive functioning at home and at school. *Id.* at pp. 28-29.

68. During the IEP meetings in October and November, the IEP Team reviewed the results of the reevaluation and determined eligibility. *Interviews with Parents, SEIS, and Special Education Teacher 2.* Student's eligibility determination was completed on November 18, 2020. *Exhibit E*, pp. 1-4. The IEP Team determined that, based on the available data, Student met the criteria for SLD and OHI. *Id.*
69. The IEP Team found that reading, writing, math, executive functioning, social skills, and self-determination were areas of need in Student's reevaluation and developed goals and services to address those needs. *Interview with SEIS; Exhibit A*, pp. 38-40.
70. The December 4, 2020 IEP (2020 IEP) was developed during the November 18, 2020, December 2, 2020, and December 4, 2020 IEP meetings. *Interviews with Parents, Special Education Teacher 2, and SEIS; Exhibit C*, pp. 25-36.
71. Student's annual review was due on October 31, 2020, but it was not completed until December 4, 2020. *Interviews with Parents, Special Education Teacher 2, and SEIS; Exhibit A*, pp. 21-47. Thus, the SCO finds that District failed to timely complete his annual review. A total of 20 school days passed between October 31, 2020 and December 4, 2020, and during that time, Student continued to receive services consistent with the August 2020 CP. *Interviews with Special Education Teacher 2 and School Psychologist; Exhibit B*, pp. 16-17.
72. Special Education Teacher 2 and SEIS acknowledged that it is not consistent with District policy to complete a student's annual review 34 calendar days after the deadline. *Interview with SEIS and Special Education Teacher 2.* When asked why the annual review was not timely completed, Special Education Teacher 2 explained that there was disagreement among IEP Team members, and the IEP Team valued parent participation over strict adherence to deadlines. *Interview with Special Education Teacher 2.* SEIS, who facilitated the meetings, echoed the importance of parental input. *Interview with SEIS.*
73. It is Special Education Teacher 2's regular practice to timely complete annual reviews and finalize IEPs within a week of the meeting. *Interview with Special Education Teacher 2.* District monitors and reports on the timely completion of annual reviews, and SEIS has not observed that School special education staff regularly fail to timely complete annual reviews. *Interview with SEIS.*
74. Parents allege that Student's IEP should have been reviewed and revised earlier than October 2020 to address inconsistent progress and regression after the summer break. *Interview with Parents.* However, Special Education Teacher 1 and Special Education Teacher 2 attributed Student's inconsistent progress to his difficulties with attention and focus, as well as to the challenges that all students experienced with remote instruction,

and they pointed to Student's overall progress during the reporting period. *Interviews with Special Education Teacher 1 and Special Education Teacher 2*. The SCO finds that the IEP Team convened when appropriate to address new evaluation data, review Student's progress toward his annual goals, and revise Student's goals to reflect his progress.

K. The December 4, 2020 IEP

75. The 2020 IEP reviews present levels of performance, including that Student met or made progress on reading and social emotional wellness goals and objectives. *Exhibit A*, pp. 24-25.
76. The 2020 IEP discusses the results of the reevaluation, including that Student scored in the below average range in total reading and math fluency, and that Mother and Literacy Teacher expressed concerns regarding Student's executive functioning. *Id.* at pp. 27-28.
77. The 2020 IEP outlines Student's needs and the impact of his disability, including his need to improve reading fluency, basic reading skills, written expression, and math computation skills to 5th grade level, and his need to improve the use of executive functioning skills to access grade level curriculum. *Id.* at p. 32. It describes how Student's SLD impacts his ability to access and understand content information and how his OHI impacts his executive functioning skills, task initiation, organization, and attention. *Id.*
78. The 2020 IEP contains the following annual goals:
 - Reading Goal #1: "By December 2021, [Student] will read 130 words per minute given a 5th grade fluency probe with 95% accuracy, from a baseline of 72 words per minute." *Id.* at pp 35-36.
 - Reading Goal #2: "By December 2021, [Student] will be able to read 8 out of 10 unfamiliar multisyllabic words from a baseline of 2 out of 10 multisyllabic words, including words with common vowel patterns and affixes given a passage or word list." *Id.* at pp. 36-37.
 - Writing Goal #3: "By December 2021, [Student] will write a paragraph that includes a minimum of 5 sentences that are correct with 2 or less errors from a baseline of 5 or more errors including correct punctuation, spelling, organization and capitalization." *Id.* at pp. 37-38.
 - Math Goal # 4: "By December 2021, [Student] will be able to solve 30 single digit multiplication facts in 1 minute from a baseline of 8 facts in 1 minute given a math fluency probe." *Id.* at p. 38.

- Self-Determination Goal #5: “By December 2021, [Student] will independently apply at least 3 executive functioning strategies (e.g., planning, organizing, initiating) in the school setting (from a baseline of 0).” *Id.* at pp. 38-39.
- Social Emotional Wellness Goal #6: “By December 2021, [Student] will independently use a self-regulation/coping strategy when presented with an academic task he perceives to be difficult in 3 out of 5 opportunities (from 1 of 5 opportunities) in the school setting.” *Id.* at p. 39
- Social Emotional Wellness Goal #7: “By December 2021, [Student] will independently demonstrate social problem-solving strategies in 4 out of 5 opportunities to resolve peer conflict (from 2 of 5 opportunities) in the school setting or sessions with a mental health provider.” *Id.* at p. 40.

79. The 2020 IEP includes accommodations to help Student access the general education curriculum. *Id.* pp. 40-41.

80. The 2020 IEP provides for 210 weekly minutes of direct, specialized literacy instruction to be delivered by a special education teacher inside the general education classroom. *Id.* at p. 45. It also provides for psychological services to be delivered by a school psychologist—120 monthly direct service minutes outside of the general education classroom and 30 monthly indirect service minutes inside the general education classroom to support engagement in on-task behaviors, problem-solving, and self-advocacy. *Id.*

81. The 2020 IEP also provides for 60 weekly minutes of direct, specialized instruction in math inside the general education classroom delivered by a special education teacher. *Id.* Additionally, it provides for 15 monthly minutes of indirect services from a special education teacher inside the general education classroom for the purposes of consultation regarding Student’s goals and accommodations. *Id.*; *Interview with Special Education Teacher 1.*

82. The Least Restrictive Environment (LRE) section of the 2020 IEP provides that Student will spend 98.7% of his time in the general education environment and 1.3% of the time outside of general education. *Id.* at p. 46. This section contains an error, which was corrected in the February 8, 2021 IEP. *Exhibit A*, pp. 46, 115.

L. The December 13, 2020 CP

83. The District continued to provide remote instruction throughout December 2020, ending on January 11, 2021. *Interview with Special Education Teacher 2.* Thus, the August 2020 CP was revised on December 13, 2020 to reflect the annual goals, services, and accommodations in the 2020 IEP. *Id.*; *Exhibit 9*, pp 294-302, 305-306.

84. The December 13, 2020 CP (December 2020 CP) contains each of the annual goals from the 2020 IEP and states that each of them will be worked on. *Exhibit G*, pp. 18-23.
85. It documents how the goals will be serviced remotely. *Id.* For example, it states that Social Emotional Wellness Goals #5-#7 will be serviced by School Psychologist via direct videoconference in 30-minute sessions with Student once per week, for a total of 120 minutes per month, as well as 30 minutes per month of teacher consultation. *Id.*
86. The December 2020 CP outlines that the social emotional wellness goals will be progress monitored via videoconferencing and/or teacher/parent report. *Id.* Additionally, the December 2020 CP includes accommodations. *Id.*

M. Additional Assessments and the Development of the February 8, 2021 IEP

87. At the December 2, 2020 IEP meeting, Parents and their attorney (Parents' Attorney) disagreed with Student's math goal and requested that District complete an additional assessment in math, the Key Math-3. *Interviews with Parents, Special Education Teacher 2, and SEIS; Exhibit C*, p. 29. They also requested a new functional behavioral assessment. *Id.* The IEP Team agreed to perform both assessments. *Id.*
88. Parents provided signed consent for additional assessments on December 9, 2020, and District convened a properly constituted IEP Team to discuss the results of the evaluation on February 8, 2021. *Exhibit C*, pp. 2-5; *Exhibit D*, p. 80.
89. The evaluation revealed needs in the areas of math calculation and math fluency. *Id.* at p. 89. Based on the results, the IEP Team determined that it was appropriate to revise Student's current math goal and add a second math goal, with one goal focused on computation and the other on math fluency. *Exhibit C*, p. 3. The other goals and accommodations remained as written in the 2020 IEP. *Exhibit A*, pp. 21-47, 87-116

N. The February 2021 IEP

90. The February 8, 2021 IEP (2021 IEP) reviews present levels of performance and the results of the additional assessments, including Student's needs in math calculation and math fluency. *Exhibit A*, pp. 93-96.
91. The 2021 IEP documents Student's needs and the impact of his disability, including his need to improve his math computation skills. *Id.* at p. 101.
92. The 2021 IEP contains the following math goals, with all other goals remaining as written in the 2020 IEP:
- Math Goal #4: "By December 2021, [Student] will be able to add and subtract multi-digit numbers with regrouping, including adding 3 digit by 3 digit numbers

and subtracting 2 digit by 2 digit numbers with 80% accuracy in 4 out of 5 times, from a baseline of 10% accuracy, given a computation set.” *Id.* at p. 107.

- **Math Goal # 5:** “By December 2021, [Student] will be able to quickly add 40 digits, subtract 40 digits and multiply 30 digits from a baseline of 23 addition facts, 19 subtraction facts, and 8 multiplication facts in 4 out of 5 times, given a one minute timed fluency probe.” *Id.* at p. 108.

93. The number of minutes in the Service Delivery Statement remained as written in the 2020 IEP, but the location for literacy, math, and psychological services was corrected to reflect delivery outside of the general education classroom. *Id.* at pp. 46, 115. The IEP Team determined it was appropriate for Student to spend 85.8% of his time in the general education environment and 14.2% outside of general education. *Id.*

O. The February 19, 2021 Progress Report

94. On February 26, 2021, Special Education Teacher 2 emailed Parents a February 19, 2021 progress report for the second trimester of the 2020-2021 academic year. *Exhibit J*, p. 56.

95. The progress report documents that Student made progress on both of his reading, writing, and math goals. *Id.* at pp. 29-43. For example, he met the first objective of Reading Goal #1, which required reading 92 words per minute when given a 5th grade fluency probe. *Id.* In February 2021, Student read 104 words per minute. *Id.*

96. Due to an error in Enrich, which was used to create the progress report, the document erroneously indicated that Student had not worked on his self-determination goal and social emotional wellness goals. *Exhibit 9*, pp. 670-676.

97. On March 18, 2021, School Psychologist emailed Parents a corrected progress report, which contained narratives for each of Student’s social emotional wellness and self-determinations goals and objectives. *Exhibit 9*, pp. 800-814. For Self-Determination Goal #6, the report indicates that Student made progress by consistently, verbally stating at least one executive functioning strategy on his own in the school setting and one to two strategies with adult prompting, and that Student “completes and submits approximately 75-80% of his assignments.” *Exhibit J*, pp. 37-39.

98. For Social Emotional Wellness Goal #7, Student continues to independently, verbally state a self-regulation/coping strategy that he can use when presented with an academic task perceived to be difficult in at least two of five opportunities in the school setting, and three of five opportunities with adult support. *Id.* at pp. 39-41.

99. Regarding Social Emotional Wellness Goal #8, the progress report documents that Student continues to independently, verbally state a social problem-solving strategy in at least two of five opportunities in the school setting and three of five opportunities with

adult support. *Id.* at pp. 41-43. Additionally, with adult prompting, Student continued to use at least two social problem-solving strategies in the school setting. *Id.*

P. Implementation of Psychological Services from December 2020 to February 2021

100. School Psychologist had access to Student's 2019 IEP, 2020 IEP, August 2020 CP, and December 2020 CP through Enrich, and School Psychologist was familiar with the contents of the documents. *Interview with School Psychologist.*

101. The 2019 IEP and August 2020 CP were in effect from December 1, 2020 to December 4, 2020. *Id.* The 2020 IEP was in effect from December 7, 2020 through February 8, 2021, with the December 2020 CP used during remote instruction from December 18, 2020 to January 10, 2021. *Id.* Student's social emotional goals and the psychological services remained the same from December 4, 2020 to present. *Exhibit A*, pp. 21-47, 87-116

102. Because of the missing data in the February 19, 2021 progress report, Parents allege that Student's psychological services were not implemented from December 2020 to February 2021. *Interview with Parents.* However, the evidence shows that School Psychologist was implementing Student's psychological services consistent with his IEP.

103. From December 2020 to February 2021, School Psychologist continued recording the services provided to Student in an electronic service log, and the service log documents that School Psychologist met with Student on a weekly basis from December 2, 2020 through February 24, 2021, excluding winter break and Student's absence. *Interview with School Psychologist; Exhibit B*, p. 1. Additionally, School Psychologist provided Parents with a corrected progress report containing narratives describing progress on social emotional wellness and self-determination goals. *Exhibit 9*, pp. 800-814.

104. School Psychologist did point out an error in the number of minutes documented for her sessions with Student, from December 9, 2020 to February 3, 2021. *Interview with School Psychologist.* The service log indicates that sessions were 25 minutes each, but the sessions were actually 30 minutes each. *Id.* The error was the result of the transition from the August 2020 CP, which required 25-minute sessions, to the 2020 IEP, which required 30 minutes. *Id.* School Psychologist confirmed that she met with Student for 30 minutes during these sessions because she documented the duration of the sessions in her calendar. *Id.* Thus, the SCO finds that Student received psychological services consistent with his IEPs and CPs from December 2020 to February 2021.

Q. The March 17, 2021 and April 12, 2021 IEP Meetings

105. A properly constituted IEP Team convened for virtual meetings on March 17, 2021 and April 12, 2021 to discuss compensatory services and extended school year (ESY) services. *Interviews with Parents, SEIS, Special Education Teacher 2, and School Psychologist.*

106. Notice was not provided for the meetings. *Interviews with Parents and Special Education Teacher*. Special Education Teacher 2 explained that compensatory services meetings began in spring 2021, and she was not familiar with how to create a formal notice for this type of meeting using Enrich. *Id.* However, the meetings were scheduled through emails with Parents at mutually agreed upon dates and times. *Id.*; *Exhibit 9*, pp. 777; 819-21. The emails clearly explained the purpose of the meetings, and Parents confirmed that they understood the purpose of the meetings. *Id.*; *Interview with Parents*. Additionally, Special Education Teacher 2 sent out links to the meetings in advance, and she included all meeting attendees on the email. *Exhibit 9*, pp. 787, 821.
107. On March 16, 2021, Special Education Teacher 2 emailed all attendees a link to the virtual meeting and a copy of the agenda. *Exhibit 9*, pp. 790-91. The agenda outlined the purpose of compensatory services and the questions to address in determining whether Student should be provided with them. *Id.* at pp. 792-93.
108. The same day, Mother emailed feedback regarding Student’s need for compensatory services and proposals for Student to receive those services through private providers over the summer. *Id.* at 790. In subsequent email exchanges, Special Education Teacher 2 further explained the purpose of the meeting and emphasized that “no compensatory service determination has been or will be made without parental input and participation.” *Id.* at 789, 794-97. Special Education Teacher 2 also offered Mother the chance to make additions to the agenda via email or at the meeting. *Id.*
109. The IEP Team met over the course of two days to allow for a full discussion. *Exhibit A*, pp. 67-81. Parents and Parents’ Attorney attended both meetings. *Interview with Parents, SEIS, and Special Education Teacher 2*; *Exhibit A*, pp. 67, 74. The agenda was shared virtually as the IEP Team moved through the document. *Interviews with Parents, SEIS, and Special Education Teacher 2*.
110. At the March 17, 2021 IEP meeting, Parents and Parents’ Attorney shared concerns that during remote instruction Student did not receive literacy instruction required by his 2019 IEP and showed regression. *Interviews with Parents, SEIS, Special Education Teacher 2, and Principal*; *Exhibit A*, pp. 67-73. Parents requested compensatory services in literacy. *Id.* The IEP Team agreed that Student should receive compensatory services for his reading goal because he did not receive the full literacy services in the 2019 IEP in spring 2020 and because his progress was inconsistent. *Id.* For example, after Student read 106 words per minute in October 2020, he returned to baseline in November 2020 and read 78 words per minute. *Exhibit G*, p. 26.
111. Parents and Parents’ Attorney proposed that District pay for Student to attend a five-week literacy summer camp, which provided a total of 125 hours of service. *Interviews with Parents and Special Education Teacher 2*; *Id.* at p. 72. Special Education Teacher 2 proposed that District provide 10 hours of compensatory services in reading based on

Student's overall growth and variation in progress. *Interview with Special Education Teacher 2; Exhibit A*, p. 72. After discussion, District declined to increase the compensatory services and offered 10 hours. *Interviews with Parents and SEIS*.

112. The discussion regarding compensatory services was continued into a second meeting, and Parents' Attorney requested a proposal for compensatory services prior to the second meeting. *Interviews with Parents, SEIS, and Special Education Teacher 2; Exhibit A*, pp. 72-73. On March 24, 2021, Special Education Teacher 2 emailed Parents a proposal with suggested compensatory services for each of the 2019 IEP goals. *Exhibit A*, p. 819.
113. At the April 12, 2021 IEP meeting, the IEP Team reached consensus that Student should receive compensatory services for both of his social emotional wellness goals in the 2019 IEP. *Interviews with Parents, School Psychologist, SEIS, and Special Education Teacher 2; Exhibit A*, pp. 74-81. However, Parents and District staff disagreed on the amount. *Id.*
114. For Social Emotional Wellness Goal #2, District initially proposed 15 minutes per month with a school psychologist or social worker inside the general education classroom throughout the 2021-2022 school year to support use of executive functioning strategies. *Exhibit 9*, p. 819; *Exhibit A*, p. 77. After Parents shared feedback regarding on-task behavior and regression, District increased the offer to 30 minutes per month. *Interviews with Parents, SEIS, Special Education Teacher 2, and School Psychologist; Exhibit A*, pp. 77-79. Parents requested that services begin during the 2020-2021 academic year, and the IEP Team agreed. *Id.*
115. For Social Emotional Wellness Goal #3, District proposed a maximum of 10, 30-minute sessions of direct psychological services from a school psychologist or social worker in response to reports of peer conflict from Student or staff. *Exhibit 9*, p. 819; *Exhibit A*, p. 77-79. Parents disagreed with the proposal and requested funding for a private summer program to support executive functioning skills. *Interview with Parents, SEIS, and School Psychologist; Exhibit A*, pp. 77-79. After discussion, the District declined to increase the offer but agreed that services would begin during the 2020-2021 academic year. *Id.*
116. Finally, the IEP Team reached consensus that Student should receive ESY services. *Interviews with Parents, SEIS, and Special Education Teacher 2; Exhibit A*, pp. 79-81. However, Parents and District staff disagreed on the amount. *Id.* Parents' Attorney proposed that District pay for a portion of the literacy summer camp suggested by Parents. *Id.* Special Education Teacher 2 proposed 20 hours of ESY services for reading, and School Psychologist proposed 120 minutes per month of psychological services. *Id.* After discussion, the District declined to increase the offer. *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District failed to properly implement Student’s IEP, specifically by failing to provide 150 minutes of direct, specialized literacy instruction per week, from April 15, 2020 to May 27, 2020 and from October 1, 2020 to October 12, 2020, in violation of 34 C.F.R. § 300.323.

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

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

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

“A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard

“does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” *Id.*

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.

CDE also 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).

In this case, Parents allege that District failed to provide Student with 150 minutes of direct, specialized literacy instruction per week, from April 15, 2020 to May 27, 2020 and from October 1, 2020 to October 12, 2020, and that District failed to provide psychological services as required by Student's IEP, from April 15, 2020 to May 27, 2020 and from December 2020 to February 2021. With respect to literacy services, the evidence supports their claim. However, the evidence also shows that District provided psychological services consistent with Student's IEPs and CPs.

i. Knowledge of Student's IEPs and CPs

First, the findings demonstrate that Special Education Teacher 1, Special Education Teacher 2, and School Psychologist were informed of their responsibilities related to implementing Student's IEPs and CPs. (FF #22-23, 53, 100). Special Education Teacher 1, Special Education

Teacher 2, and School Psychologist accessed Student's IEPs and CPs through Enrich and Google drives, kept paper copies, and were familiar with the content of the documents.

ii. Implementation of Student's Literacy Services in Spring 2020

The findings show that District failed to implement the literacy services in Student's IEP to the greatest extent possible during the COVID-19 pandemic, in April and May 2020 (FF #3-9, 18-21, 24-32). The March 2020 CP included Student's reading goal as written in the 2019 IEP. However, the March 2020 CP provided for only 30 minutes per month of direct literacy instruction with a special education teacher, a 95% reduction from the 600 monthly minutes of direct literacy instruction required by the 2019 IEP. The bulk of Student's direct literacy instruction was replaced by independent work on an electronic literacy program and reading assignments. Direct literacy instruction was provided through 15-minute meetings with Special Education Teacher 2 every other week to monitor Student's progress.

The findings demonstrate that Student's literacy services were implemented as written in the March 2020 CP. (FF #24-32). However, the SCO finds that the District did not provide Student with literacy services to the greatest extent possible during the COVID-19 pandemic. Even accounting for the additional 30-minute, monthly small group meetings, Student's direct literacy services totaled 60 minutes per month during April and May 2020, which is still a 90% reduction from the services in the 2019 IEP. Including the monthly small group meetings, Student missed a total of 18 hours of literacy instruction in April and May 2020.

In the context of the COVID-19 pandemic, CDE recently found that a school district provided FAPE to the greatest extent possible where the student's weekly, direct service minutes in literacy were reduced from 200 minutes in the IEP to 80-120 minutes in the 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. *Denver Pub. Schs. Dist. 1*, 120 LRP 36836 (SEA CO 10/30/20). In that case, the student's services were reduced by 40-60%, but the special education teacher continued providing direct services on a daily basis at a reduced level. Here, the direct literacy instruction went from daily to only twice per month, and the total monthly services in the March 2020 CP are equal to what the 2019 IEP provided in just one day—a total of 30 minutes. (FF #3-9, 10-17, 24-32).

Accordingly, the SCO finds and concludes that District failed to implement the 2019 IEP by failing to provide Student with direct literacy instruction to the greatest extent possible in April and May 2020. The SCO must now determine whether District's failure to implement the literacy services in the 2019 IEP was material.

Materiality of the Failure to Implement

The SCO acknowledges that in spring 2020, District and Special Education Teacher 1 were adapting to changing circumstances surrounding the COVID-19 pandemic, and contingency plans were developed as part of the District's efforts to meet its obligation to provide FAPE to the greatest extent possible during remote instruction due to a global pandemic. (FF #10-17). District's failure to implement Student's IEP in April and May 2020 amounted to a loss of 1,080 minutes, or 18 hours, of direct literacy instruction. (FF #8, 18-19, 24-32)

Progress monitoring in May 2020 shows that despite the missed services Student continued to make progress and ultimately met his reading goal in October 2020. (FF #40-43, 60-61, 110). However, as acknowledged by the IEP Team, Student's progress in reading was inconsistent. District acknowledged that Student was not provided FAPE to the greatest extent possible in spring 2020 and offered compensatory services to make up for loss of learning. (FF #32, 110-111). Under the circumstances, the SCO finds that a total of 18 hours of missed literacy services was more than a minor discrepancy.

Therefore, the SCO finds and concludes that District failed to implement a material provision of Student's IEP and deprived Student of a FAPE. Given the degree to which a FAPE was denied, "Student is entitled to compensatory services." *Colorado Department of Education*, 118 LRP 43765 (SEA CO 6/22/18).

Compensatory Education

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

In the context of the COVID-19 pandemic, CDE issued guidance that "[s]chool districts must ensure that individualized determinations are made as to whether and to what extent a student may require compensatory education services to remediate a loss/regression in skills as a result of the inability to provide services during COVID-related disruptions, such as the suspension of in-person instruction." *Id.* CDE provided factors to consider when making this determination. *Id.* Among the relevant factors were "the difference between services identified on the IEP and services offered during closure/ disruption, including amount, frequency, duration, type, and delivery model," and any "changes in the general education curriculum, as well as level and type of instruction for all students during closure/disruption." *Id.* The SCO now explains a

compensatory education package in order to help place Student in the same position with respect to making progress on IEP goals if not for the violation.

Here, the District failed to provide 1,080 minutes of direct, specialized literacy instruction over a 50-day period, representing a 90% reduction from the services required by the 2019 IEP. (FF #8, 18-21, 24-32). Even accounting for the reduced instructional time for all students in spring 2020 due to COVID-19, a 90% reduction in services represents a significant deviation from the 2019 IEP. Over the same period, Student showed some progress and ultimately met his goal, but his progress was inconsistent. (FF #40-43, 60-61, 110). For example, Student showed regression in April 2020, after the summer break, and again in November after he achieved his goal. Much, if not all, of the missed special education instruction would have been delivered in a small group and not one-on-one. Taking into account Student's overall progress and the reduced instructional time for all students in the remote setting, the SCO finds an award of 600 minutes (or 10 hours) of specialized literacy instruction appropriate.

iii. Implementation of Student's Literacy Services in October 2020

The findings show that Student was not provided with 30 minutes of daily direct literacy instruction from a special education teacher as required by the August 2020 CP from October 6, 2020 through October 9, 2020, as well as on October 12, 2020 through October 14, 2020. (FF #52-59). On October 6, 2020 through October 8, 2020, Student did not receive any direct literacy instruction because Special Education Teacher 2 was completing one-on-one assessments with Student. On October 9, 2020 and October 12, 2020, Student received instruction from a paraprofessional because Special Education Teacher 2 was completing assessments with other students. Additionally, on October 13, 2020 and October 14, 2020, Student did not receive direct literacy instruction because he was completing cognitive testing for his reevaluation.

Accordingly, the SCO finds and concludes that District failed to implement the 2019 IEP and August 2020 CP by failing to provide Student with 150 minutes of direct, specialized literacy instruction per week. The SCO must now determine whether District's failure to implement the literacy services was material.

Materiality of the Failure to Implement

In October 2020, Student missed 2.5 hours of instruction because he was completing one-on-one testing with Special Education Teacher 2 for his reevaluation, as well as cognitive testing. (FF #52-59). On October 9, 2020 and October 12, 2020, Student received literacy instruction, but it was provided by a paraprofessional. Progress monitoring in October 2020 shows that Student continued to make growth and met his reading goal, though his progress was inconsistent. (FF #61, 110). Given that only five, 30-minute instructional sessions were missed so that assessments could be completed for Student's reevaluation, the SCO finds that the

failure to implement was a minor shortfall in services, which did not impact Student's ability to benefit from his special education program.

Thus, the SCO finds and concludes that District's failure to implement Student's IEP in October 2020 was not a material violation and denial of FAPE.

iv. Implementation of Student's Psychological Services in Spring 2020 and December 2020 through February 2021

The findings show that District implemented Student's psychological services as written in Student's CPs and IEPs and provided FAPE to the greatest extent possible during the COVID-19 pandemic in spring 2020 and from December 2020 to February 2021. (FF #33-37, 100-104).

Starting with the implementation of psychological services in spring 2020, the March 2020 CP included both of Student's social emotional wellness goals, and it provided 60-minutes of psychological services outside of the general education environment as provided in the 2019 IEP. (FF # 20, 33-37). The March 2020 CP did not include 30 minutes of services inside the general education classroom, as provided in the 2019 IEP, because of the format of remote instruction in April and May 2020, in which students received assignments virtually and completed work independently at their own pace. However, School Psychologist adapted Student's services to the remote setting, focusing on accessing academic support and self-advocacy and monitoring work completion.

The findings show that in April and May 2020 Student received services consistent with the March 2020 CP, and Student made progress toward his goals and on most objectives. (FF #44-45, 62-63). By October 2020, Student met or made progress on both social emotional wellness goals.

As for the implementation of psychological services from December 2020 to February 2021, the findings demonstrate that District implemented Student's psychological services as written in his IEPs and CPs. (FF #100-104). School Psychologist tracked the services provided in her service log and calendar, and the service log indicates that Student received weekly psychological services from December 2020 to February 2021, excluding breaks and absences. Although the February 19, 2021 progress report appeared to indicate Student had not been receiving services in December 2020 and January 2021, School Psychologist corrected the error and provided written narratives regarding Student's progress on each of his goals and objectives.

For these reasons, the SCO finds and concludes that District provided Student with psychological services consistent with his IEPs and CPs from April 15, 2020 to May 27, 2020 and from December 2020 to February 2021.

Conclusion to Allegation No 2: District monitored Student’s progress on annual IEP goals from April 15, 2020 to present, consistent with 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 findings show that District monitored Student’s progress on his annual IEP goals from April 15, 2020 to present. (FF #40-45, 60-63, 94-99). District provided Parents with progress reports at the end of every trimester from April 15, 2020 to the most recent report provided on February 26, 2021. Although progress monitoring was adapted for the remote setting, District staff monitored progress for each of Student’s annual IEP goals as described in his CPs and/or IEPs. The February 19, 2021 progress report erroneously excluded progress monitoring data on Student’s self-determination and social emotional wellness goals, but the error was corrected when School Psychologist provided an updated report on March 18, 2021. (FF #96-99). The corrected report contained written narratives describing Student’s progress on each of his self-determination and social emotional wellness goals and objectives.

For the above reasons, the SCO finds and concludes that District monitored Student’s progress on his annual IEP goals from April 15, 2020 to present.

Conclusion to Allegation No. 3: District failed to timely review and revise Student’s IEP, in violation of 34 C.F.R. § 300.324(b)(1).

The IDEA requires school districts to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174, 580 U.S. ___, 137 S. Ct. 988, 999 (2017). The IDEA does not promise a particular educational or functional outcome for a student with a disability, but it does provide a process for reviewing an IEP to assess achievement and revising the program and services, as necessary, to address a lack of expected progress. *Id.* To that end, school districts have an affirmative duty to review and revise a student’s IEP at least annually. 34 C.F.R. § 300.324(b).

However, the IDEA’s procedures contemplate that a student’s IEP may need to be reviewed and revised more frequently to address changed needs or a lack of expected progress. *See* 34 C.F.R. §§ 300.324(a)(4)-(6), (b); *Andrew*, 137 S. Ct. at 994. The U.S. Department of Education

confirmed a school district's obligation to monitor progress and convene the IEP Team if progress does not occur:

The IEP Team also may meet periodically throughout the course of the school year, if circumstances warrant it. For example, if a child is not making expected progress toward his or her annual goals, the IEP Team must revise, as appropriate, the IEP to address the lack of progress. Although the public agency is responsible for determining when it is necessary to conduct an IEP Team meeting, the parents of a child with a disability have the right to request an IEP Team meeting at any time. *If a child is not making progress at the level the IEP Team expected, despite receiving all of the services and supports identified in the IEP, the IEP Team must meet to review and revise the IEP if necessary, to ensure the child is receiving appropriate interventions, special education and related services and supplementary aids and services, and to ensure the IEP's goals are individualized and ambitious.*

Questions and Answers (Q&A) on U. S. Supreme Court Case Decision *Endrew F. v. Douglas County School District Re-1* (2017) (emphasis added).

Here, the findings show that Student made progress toward his IEP goals, and that the IEP Team convened when appropriate to address new evaluation data, review Student's progress toward his annual goals, and revise Student's goals to reflect his progress.

First, the May 29, 2020 and October 31, 2020 progress reports show that Student met or made progress on his reading and social emotional wellness goals contained in the 2019 IEP. (FF #40-45, 60-63). Even with reductions in services in the March 2020 CP and the transition to remote instruction, he met Reading Goal #1 and Social Emotional Wellness Goal #2, and he made progress on Social Emotional Wellness Goal #3. While the progress reports did show some variation in progress, Special Education Teacher 1 reported that his progress monitoring data generally shows variation, which she attributed to his challenges with attention and focus. Following regression after the summer break, Student made consistent progress through October 2020.

Second, District convened an IEP Team starting on October 28, 2020 to address reevaluation data, review Student's progress toward his annual goals, and revise Student's goals to reflect his progress. (FF #66-70, 74-82). The findings show that the IEP Team reviewed Student's progress and the results of the reevaluation to develop the 2020 IEP, which was responsive to Student's identified areas of need. The reevaluation revealed that Student had areas of need in basic reading, math fluency, and written expression, as well as in social emotional, executive, and adaptive functioning. Based on the data, the IEP Team determined that it was appropriate to develop additional goals in the 2020 IEP in reading, written expression, math, and executive functioning. Additionally, the IEP Team increased direct literacy services by 60 minutes per

week (to a total of 210 minutes weekly) and increased Student's psychological services by 60 minutes per month, totaling 150 minutes monthly. The IEP Team also added 60 minutes of direct specialized instruction in math per week.

Third, when Parents requested an additional assessment in math, District agreed to the request and completed an evaluation focused on Student's academic performance in math. (FF #87-93). During the February 8, 2021 IEP meeting, the IEP Team reviewed and considered the results of the evaluation. Based on the evaluation data, the IEP Team revised Student's existing math goal and added a second math goal to the 2021 IEP to address Student's needs in math computation and fluency. Taken as a whole, the evidence supports that the IEP Team reconvened when appropriate to address the reevaluation, review Student's progress toward his annual goals, and revise Student's goals to reflect his progress.

However, the findings also show that Student's annual review was not timely completed by the date it was due, October 31, 2020. (FF #66, 68-73). District timely convened an IEP Team to complete the annual review on October 28, 2020, but the process was completed over the course of five meetings, the last of which took place on December 4, 2020. The 2020 IEP was finalized 34 calendar days after the annual review was due. 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).

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).

In this case, the findings demonstrate that District's failure to timely review and revise Student's IEP did not impede Student's right to a FAPE or cause a deprivation of educational benefit. (FF ##66, 68-73). The 2020 IEP was developed over the course of five meetings to provide Parents with an opportunity to meaningfully participate in the IEP process. Although the annual review was completed 34 calendar days after the deadline, only 20 school days passed before the 2020 IEP was finalized. During that time, the 2019 IEP remained in place and Student continued to receive services. Additionally, the February 19, 2021 progress report shows that Student made progress on his reading, writing, math, social emotional wellness, and self-determination goals. (FF #94-99). Therefore, the SCO finds and concludes that this procedural violation did not amount to a violation of FAPE.

Conclusion to Allegation No. 4: District provided Parents with a meaningful opportunity to participate and considered Parents' concerns at the March 17, 2021 and April 12, 2021 IEP meetings, consistent with 34 C.F.R. §§ 300.321(a)(1) and 300.324(a)(1)(ii).

The IDEA's procedural requirements for developing a child's IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Sytsema v. Academy School District No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008). To that end, the IDEA requires that parental participation be meaningful, to include carefully considering a parent's concerns for enhancing the education of his or her child in the development of the child's IEP. 34 C.F.R. §§ 300.321(a)(1), 300.322, and 300.324(a)(1)(ii).

Meaningful parent participation occurs where the IEP team listens to parental concerns with an open mind, exemplified by answering questions, incorporating some requests into the IEP, and discussing privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of the student. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 703 (10th Cir. 1998). Meaningful participation does not require that a district simply agree to whatever a parent has requested. *Jefferson County School District RE-1*, 118 LRP 28108 (SEA CO 3/22/18). But parental participation must be more than "mere form." *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014). "It is not enough that the parents are present and given an opportunity to speak at an IEP meeting." *Id.* Evidence that a district "was receptive and responsive at all stages" to the parents' position, even if it was ultimately rejected, is illustrative of parental participation. *Id.*

Parents here allege that District failed to consider their concerns at the March 17, 2021 and April 12, 2021 IEP meetings, but the findings do not support their allegation. (FF #105-116). Rather, the findings show that Parents' feedback was meaningfully considered. Special Education Teacher 2 scheduled the meetings with Parents at a mutually agreed upon date and time, explained the purpose of the meetings, provided an agenda, offered Parents the opportunity to add to the agenda, and provided a proposal for compensatory services prior to the second meeting, consistent with Parents' request.

Parents and Parents' Attorney attended both meetings, and the findings show that they were given the opportunity to share concerns, ask questions, and provide feedback regarding compensatory services and ESY services. (FF #109-116). After discussion, the IEP Team reached consensus regarding the need for compensatory services and ESY services, the subject areas in which the services should be offered, and the period of time during which compensatory services should be offered. The only points of disagreement were the amount of services and how those services should be delivered.

With respect to the amount of services, the findings show that District incorporated Parents' feedback into the compensatory services offer by increasing the amount of psychological services offered for Social Emotional Wellness Goal #2 from 15 minutes per month to 30 minutes per month. (FF #114). Additionally, District agreed to begin offering the services during the 2020-2021 academic year. Parents were given an opportunity to share and discuss their proposal for Student to receive services through a five-week private summer camp, but ultimately the IEP Team did not agree to further increase the offer for compensatory or ESY

services given the progress Student made over the academic year. (FF #109-116). However, meaningful consideration does not require that the District simply agree to Parents' requests. With respect to ESY and compensatory services, District did not agree with Parents, but the evidence shows that the IEP Team was receptive to their concerns and requests.

For these reasons, the SCO finds and concludes that District provided Parents with meaningful participation at the March 17, 2021 and April 12, 2021 IEP meetings.

Conclusion to Allegation No. 5: District failed to provide Parents with notice of meeting for the March 17, 2021 and April 12, 2021 IEP meetings, in violation of 34 C.F.R. § 300.322(a)-(b).

Districts "must take steps to ensure that one or both parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate," including notifying parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed on time and place. 34 C.F.R. § 300.322(a)(1)-(2).

The notice provided to parents must indicate the purpose, time, and location of the meeting and who will be in attendance and inform the parents of "the provisions in § 300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and § 300.321(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act)."

In this case, District failed to provide notice of meeting for the March 17, 2021 and April 12, 2021 IEP meetings. (FF #105-107). Special Education Teacher 2 admitted that although she emailed Parents about the time, date, and purpose of the meetings, she did not provide a formal notice of meeting for the March 17, 2021 and April 12, 2021 IEP meetings. Accordingly, the SCO finds that District failed to provide Parents with notice of meeting for the March 17, 2021 and April 12, 2021 IEP meetings, in violation of 34 C.F.R. § 300.322(a)-(b).

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

Based on the evidence here, this procedural violation did not amount to a violation of FAPE because it did not significantly impede Parents' opportunity to participate in the decision-making process. The findings show that although Parents were not provided with notice of meeting, Special Education Teacher 2 communicated with Parents prior to each meeting to find a mutually agreed upon date and time to meet. (FF #105-107). Additionally, Parents were

informed of the purpose of each meeting in advance of the meeting and were provided with an agenda. Special Education Teacher 2 sent out links to the meetings in advance, and she included all meeting attendees on the email.

For these reasons, the SCO finds and concludes that the procedural violation 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 violations were not systemic in nature. As for the failure to implement in spring 2020, the reduction to Student’s literacy services occurred for less than two months during a novel and particularly challenging time—a nationwide pandemic. (FF #10-17, 18-21, 24-32). In fall 2020, District modified the provision of remote instruction for all students to more closely resemble a normal school day, and special education teachers revised and increased the special education services provided to students. (FF #46-51, 54-55). The service minutes in Student’s August 2020 CP were equal to those in the 2019 IEP. District acknowledged that Student was not provided FAPE to the greatest extent possible in spring 2020, and District made an offer of compensatory services to make up for regression and loss of learning. (FF #32, 110). In fact, District policy requires that special education teams determine if all students with IEPs are eligible for compensatory services to account for regression or loss of learning during the period of remote instruction.

In addition, District policies require timely completion of annual reviews, and District staff confirmed their understanding of these policies, as well as their understanding that staff actions were not consistent with these policies. (FF #71-73). Nothing in the record indicates that District regularly fails to timely review and, as appropriate, revise IEPs. In fact, Special Education Teacher 2 reported that it was her regular practice to timely complete annual reviews. SEIS confirmed that District completes regular compliance monitoring and reporting regarding issues such as the timely completion of annual reviews, and she has not observed recurring issues in this area with special education staff at School. The SCO finds that the violation in this case was an isolated incident.

Likewise, with respect to the failure to provide notice of meeting, Special Education Teacher 2 understood that notice of meeting should be provided, and the violation in this case was due to challenges in using the Enrich program for a novel type of meeting. (FF #105-107). However, Parents agreed upon the time and date of the meeting and were informed of the purpose.

For the above reasons, the SCO thus finds and concludes that the evidence does not demonstrate a systemic violation.

REMEDIES

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

- a) Failing to properly implement Student's IEP, in violation of 34 C.F.R. § 300.323.
- b) Failing to timely review and revise Student's IEP, in violation of 34 C.F.R. § 300.324(b)(1).
- c) Failing to provide notice of meeting, in violation of 34 C.F.R. § 300.322(a)-(b).

To remedy these violations, the District is ordered to take the following actions:

1. By **July 14, 2021**, 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. Special Education Teacher 1, Special Education Teacher 2, and SEIS must review this Decision in its entirety and the requirements of 34 C.F.R. §§ 300.322(a)-(b), 300.323, and 300.324(b)(1) with District's legal counsel, no later than **August 27, 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 **September 3, 2021**.
2. Compensatory Education Services for Denial of FAPE
 - a. District shall provide Student with **10 hours of specialized instruction from a licensed special education teacher** by **November 5, 2021**, to be apportioned as follows:
 - **10 hours of literacy services**
 - b. By **July 21, 2021**, District shall schedule compensatory services in collaboration with Parents. A meeting is not required to arrange this schedule, and the parties

may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. These compensatory services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives.

- c. In developing this instruction, the District will ensure that the special education teacher confers with a general education teacher(s) in literacy for appropriate content on a monthly basis to monitor Student's progress and adjust instruction accordingly. The District must submit documentation that these conferences have occurred by the second Monday of each month until all compensatory education services have been provided.
- d. The parties shall cooperate in determining how the compensatory services will be provided. If Parents refuse to meet with District within this time period, District will be excused from delivering compensatory services, provided that District diligently attempts to meet with Parents and documents its efforts. A determination that District diligently attempted to meet with Parents, and should thus be excused from providing compensatory services, rests solely with CDE.

These compensatory services shall begin by **September 1, 2021** and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory services will be provided.

- e. To document the provision of these services, District must submit records of service logs to CDE by the second Monday of each month until all compensatory education services have been provided. The name and title of the provider, as well as the date, the duration and a brief description of the service, must be included in the service log. If for any reason, including illness, Student is not available for any scheduled compensatory services, District will be excused from providing the service scheduled for that session. If for any reason, the District fails to provide a scheduled compensatory session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parents, as well as notify the Department of the change in the monthly service log.

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.: Rebecca O'Malley
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 CFR § 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 14th day of June, 2021.



Lindsey Watson
State Complaints Officer

Appendix

Complaint, pages 1-8

- Exhibit 1: Background information
- Exhibit 2: Documentation regarding alleged retaliation
- Exhibit 3: ESY data
- Exhibit 4: Contingency plans
- Exhibit 5: Evaluations
- Exhibit 6: PWNs
- Exhibit 7: Progress reports
- Exhibit 8: IEPs and BIPs
- Exhibit 9: Correspondence
- Exhibit 10: Cover letter and IEP proposal

Amended Complaint, pages 1-3

Response, pages 1-12

- Exhibit A: IEPs and BIPs
- Exhibit B: Service logs
- Exhibit C: Records of meetings
- Exhibit D: Evaluations and assessments
- Exhibit E: Eligibility determination
- Exhibit F: Parental consent
- Exhibit G: PWNs
- Exhibit H: Notices of meeting
- Exhibit I: Grade reports and progress reports
- Exhibit J: Progress monitoring reports
- Exhibit K: Documentation from Parents
- Exhibit L: Correspondence
- Exhibit M: District and School staff list
- Exhibit N: District policies

Reply, pages 1-12

Telephonic Interviews with:

- Special Education Teacher 1: May 19, 2021 and May 21, 2021
- Special Education Teacher 2: May 19, 2021, May 24, 2021, and June 8, 2021
- Fifth Grade Teacher: May 19, 2021
- School Psychologist: May 20, 2021 and May 27, 2021
- Principal: May 20, 2021
- Literacy Teacher: May 20, 2021
- SEIS: May 21, 2021

- Parents: May 24, 2021 and May 27, 2021
- Math Teacher: May 27, 2021