

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

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**State-Level Complaint 2021:520**  
**Denver Public Schools**

**DECISION**

**INTRODUCTION**

On September 20, 2021, (“Parents”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”) filed a state-level complaint (“Complaint”) against Denver Public Schools (“District”).<sup>1</sup> The State Complaints Officer (“SCO”) determined that the Complaint identified three (3) allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

On September 29, 2021, upon the agreement of both parties, the SCO extended the 60-day investigation timeline to allow the parties to participate in mediation. However, mediation resulted in impasse, and, on October 15, 2021, the SCO resumed the investigation.

**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 September 20, 2020, through September 20, 2021, for the purpose of determining if a violation of the IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

**SUMMARY OF COMPLAINT ALLEGATIONS**

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

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

1. Failed to provide Parents with adequate prior written notice (“PWN”) of the action proposed by District regarding Student’s reevaluation and the provision of FAPE to Student on or about August 23, 2021, in violation of 34 C.F.R. § 300.503;
2. Determined Student’s educational placement in August and September of 2021 outside of a properly convened IEP meeting, in violation of 34 C.F.R. §§ 300.116(a)(1), 300.321(a)(1), 300.327 and 300.501(c)(1);
3. Failed to make an offer of FAPE and provide special education and related services in accordance with an IEP from August 23, 2021 to the present, in violation of 34 C.F.R. § 300.323.

### **FINDINGS OF FACT**

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

#### **A. Background**

1. Student is seven years old and attended kindergarten at a District elementary school (“School”) during the 2020-2021 academic year. *Exhibit A*, p. 3. Student attended School remotely for that entire academic year because of the COVID-19 pandemic. *Interviews with Kindergarten Teacher and Parents*.
2. Student qualifies for special education and related services under the Other Health Impairment and Speech or Language Impairment disability categories. *Exhibit 3*, p. 4. Student is passionate, loves all things musical, and enjoys being around her friends, teachers, and peers. *Interviews with Parents and Kindergarten Teacher*. Academically, Student requires support in all content areas, and she sometimes struggles with behavior and attendance to tasks. *Interview with Kindergarten Teacher; see Exhibit A*, pp. 1-19.
3. Student has a complex medical history, to include diagnoses of [Diagnosis], Hypothyroidism, Reactive Airway Disease (“RAD”), Bronchomalacia, and Asthma. *Exhibit F*, pp. 1-2; *Interview with Parents*. Asthma is a chronic lung disease, characterized by attacks of breathing difficulty. *Exhibit F*, p. 2. Asthma can be aggravated by allergy, cold, emotions, exercise, or viral illness. *Id.* RAD is a chronic condition, similar to Asthma, in which air passages become periodically obstructed, making breathing difficult. *Id.* Obstruction occurs when overly sensitive airways react to certain triggers like allergens, exercise, or illness. *Id.*
4. As a result of these medical conditions, Student has historically been more susceptible to respiratory illness. *Interview with Parents; see id.* In February of 2020, a month before the

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

advent of the COVID-19 pandemic, Student was hospitalized after contracting Influenza-A. *Interview with Parents*. Student had to be given steroids at the hospital for the Influenza-A, and upon leaving the hospital, she quickly contracted Strep Throat. *Id.* Due to these significant health issues, Student would often miss a week at a time from School during Kindergarten, and during preschool, she missed as many as 40 days of school due to illness. *Interviews with Special Education Teacher and Parents*.

5. Parents are uncomfortable sending Student to School in-person, because of fears that she may be more susceptible to severe illness resulting from COVID-19. *Interviews with Parents, Kindergarten Teacher, Special Education Teacher, Online School Principal, Director of Special Education, Special Education Information Specialist ("SEIS")*.

### **B. Student's Special Education Services during the 2020-2021 Academic Year**

6. On March 18, 2020, the Governor of the State of Colorado issued an executive order requiring all public and private elementary and secondary schools in Colorado to suspend in-person instruction due to the COVID-19 pandemic.<sup>3</sup> Subsequent executive orders collectively extended the suspension of in-person instruction through the end of the 2019-2020 school year.<sup>4</sup> District moved to remote instruction on April 7, 2020, which continued through the remainder of the 2019-2020 academic year. *Exhibit C*, p. 7. District continued mandatory remote instruction during the 2020-2021 academic year, from August 24, 2020 to October 5, 2020, and from November 30, 2020 to January 5, 2021. *Id.*
7. During the suspension of in-person instruction, IDEA-eligible students were provided a Contingency Learning Plan ("CLP"), which described how each student would receive FAPE to the greatest extent possible during times of remote instruction. *Exhibit 2*, p. 10; *Exhibit 15*, p. 1; *Interviews with Parents and Special Education Teacher 1*. CLPs were not intended as replacements for IEPs, and were instead, a temporary measure to cover instructional changes during remote instruction. *See Exhibit 2*, p. 10.
8. When mandatory remote instruction ended on January 5, 2021, District offered families the choice to return their children to in-person instruction or enroll them in a virtual learning option through their current schools. *Exhibit 2*, p. 10. If IDEA-eligible students selected the virtual learning option, they would receive FAPE through the development of what District referred to as a "Virtual IEP Plan." *Id.*

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

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

a. The February IEP

9. From February 2021 to present, Student's February 2021 IEP ("February IEP") has been in effect. *See Exhibit 3, pp. 2-20; Interviews with Parents and Kindergarten Teacher.* The February IEP was developed at a properly constituted annual IEP meeting on February 23, 2021. *See Exhibit 3, pp. 2-20; Interviews with Parents and Kindergarten Teacher.*
10. The February IEP reviews Student's present levels of performance, documenting her progress toward goals in reading, writing, mathematics, independent living skills, and self-determination. *Exhibit 3, pp. 5-6.* She showed some progress toward the majority of her annual goals, and she met one of her goals in reading and one of her goals in mathematics. *Id.* Some annual goals, such as in self-determination, were specific to behavior in the school-setting, so they were not monitored during periods of remote instruction. *Id.* at p. 6.
11. The February IEP documents Student's needs and the impact of her disability, including her need to increase phonological awareness, phonemic awareness, decoding skills, number sense, social language skills, and her need for support with fine motor abilities and attendance to tasks. *Id.* at p. 8.
12. The February IEP contains new annual goals for Student in reading, writing, mathematics, communication, independent living skills, and self-determination. *Id.* at pp. 9-13. The February IEP also contains accommodations and modifications to help Student access the general education curriculum. *Id.* at pp. 14-15.
13. The February IEP provides for 450 minutes of weekly direct specialized instruction in phonemic awareness and letter knowledge, 300 minutes of weekly direct specialized instruction in number sense and counting skills, 450 minutes of weekly direct specialized instruction in independent living skills and ability to stay on task, 60 minutes of monthly direct physical therapy services, 60 minutes of monthly direct occupational therapy services, 240 minutes of monthly direct small group speech therapy, and 60 minutes of yearly indirect consult support once Student returns to in-person learning. *Id.* at p. 17.
14. The IEP Team determined it was appropriate for Student to be in the general education class less than 40% of the time, to have greater time for specially designed instruction. *Id.* at p. 19. The February IEP indicates she will receive in-person services through School. *Id.* at p. 2.
15. At the meeting, Parents indicated that, until Student was vaccinated for COVID-19 and thus ready to return to in-person instruction at School, they wanted to continue with remote instruction.<sup>5</sup> *Interviews with Parents and Kindergarten Teacher; see Exhibit A, pp. 7, 16, 19.*

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<sup>5</sup> Vaccinations for COVID-19 were only made available for children between the ages of 5- and 11-years old beginning on November 5, 2021. *CDE Exhibit 1.*

Student's former kindergarten special education teacher and case manager ("Kindergarten Teacher") indicated District proposed a discussion around the possibility of homebound services as an alternative to remote instruction, but Parents were only interested in remote options due to Student's health conditions. *Interview with Kindergarten Teacher.*

16. The February IEP does not address any COVID-19 safety measures or precautions but indicates Student will return to in-person instruction once she is vaccinated for COVID-19. *See generally Exhibit A; Exhibit A, pp. 7, 16, 19.*
17. Although written for in-person instruction, the February IEP was implemented virtually through School for the remainder of the 2020-2021 academic year. *Interviews with Parents and Kindergarten Teacher.* Student's prior IEP was likewise implemented virtually during the 2020-2021 academic year in times when families could opt between in-person and remote instruction. *Id.*
18. Kindergarten Teacher indicated that although remote instruction was discussed at the meeting, nothing definitive was planned for the 2021-2022 academic year. *Interview with Kindergarten Teacher.* Parents, by contrast, understood the plan as Student being able to attend School remotely during the 2021-2022 academic year until Student was vaccinated for COVID-19. *Interview with Parents.*

b. Amendment of the February IEP

19. On April 12, 2021, Kindergarten Teacher sent Parents an email containing what District identified as Student's "Virtual IEP Plan." *Exhibit 16*, p. 1. The email indicated that, "[b]ecause [Student] had an IEP meeting this spring, we needed to update her Virtual IEP[.] I have attached an updated copy. Would you please take a peek and let me know if you approve it as written?" *Id.*
20. Titled "PWN of Virtual IEP Plan," the document provides: "District *proposes to amend the Service Delivery Statement section of your student's IEP* to include the following language: 'During periods when parents have affirmatively selected [Student] into virtual school, [Student's] IEP will be implemented in accordance with the attached Virtual IEP Plan.'" *Exhibit 2*, p. 2 (emphasis added).
21. The "Virtual IEP Plan" explains the reason for this proposal as follows:

"District recognizes that some families may not be comfortable sending their children to school for in-person learning during the COVID-19 Coronavirus pandemic. To address this concern, the District has currently offered a Virtual Learning option which provides full-time school. As you have enrolled your student in

the Virtual Learning option, during this time the District is ready, willing, and able to provide your student a FAPE through the development of a Virtual IEP Plan.”

*Id.* at p. 10.

22. The “Virtual IEP Plan” provides that District’s proposal to implement it was based on the February IEP and Parents’ “choice to enroll Student in school virtually.” *Id.*
23. The “Virtual IEP Plan” lists each of Student’s annual goals in reading, writing, mathematics, communication, independent living skills, and self-determination, consistent with the February IEP. *Id.* at pp. 2-5. For each annual goal, it describes how the goal will be met in a virtual environment, or else how the service will be otherwise offered to provide a FAPE. *Id.* The “Virtual IEP Plan” also discusses how each goal will be progress monitored remotely. *Id.*
24. Although the “Virtual IEP Plan” purportedly describes how Student’s services will be offered virtually to provide FAPE, many services in the “Virtual IEP Plan” are listed as consultative services rather than minute-for-minute specialized academic instruction. *See id.*, pp. 2-11; *Exhibit C*, p. 6. Thus, total specialized instruction is different under the “Virtual IEP Plan” than it would be under the February IEP. *Exhibit C*, p. 6.
25. The “Virtual IEP Plan” discusses each of the accommodations and modifications from the February IEP and describes how each will be implemented remotely (including any accommodations that were only needed in the virtual environment) or how the need will be met to the same extent to provide a FAPE. *Exhibit 2*, pp. 5-8. It also lists and specifies any accommodations from the February IEP that are related to physical attendance, and therefore cannot be provided virtually (i.e., preferential seating). *Id.*
26. The “Virtual IEP Plan” contains a weekly service delivery schedule that corresponds with the services from the February IEP, but it does not list specific minutes for each service Student is to receive. *See id.* at p. 9. Instead, the “Virtual IEP Plan” discusses minutes of consultative services in the context of Student’s annual goals and objectives and describes how District intends to provide an offer of FAPE through consultative services. *Id.*
27. The SCO finds the “Virtual IEP Plan” changes the amount of special educational services Student is to receive under the February IEP, by describing the service minutes in terms of consultative services rather than minute-for-minute special education services. *See id.* at pp. 2-5. Although the “Virtual IEP Plan” does not explicitly address least restrictive environment (“LRE”) with respect to time in the general education environment, under the “Virtual IEP Plan” Student was to receive only remote instruction. *See id.* at pp. 2-11.
28. The “Virtual IEP Plan” specifically distinguishes itself from a CLP:

“[a CLP] was to specify how [Student’s] special education services would be provided during remote learning. During times when remote learning has ceased and students can return to school either in-person or virtually, the District no longer proposes to implement a Contingency Plan and will return to implementing non-contingency IEP through a Virtual IEP Plan in order to provide FAPE.”

*Id.* at p. 10.

29. Although District identifies the document as a “Virtual IEP Plan,” the SCO finds, given the language, its intent and effect was to modify the February IEP. *See id.* at pp. 2-11. The “Virtual IEP Plan” explicitly identifies itself as a proposal to amend the February IEP. *Id.* at p. 2. The “Virtual IEP Plan” indicates the Service Delivery section of the February IEP will be modified to include language about the “Virtual IEP Plan,” although those changes were never made in the February IEP. *Id.* at p. 2; *see Exhibit A*, pp. 1-19. For these reasons, the SCO finds the “Virtual IEP Plan” was an amendment (“Amendment”) to the February IEP.
30. Neither the Amendment nor the February IEP indicate that Student attending School remotely was limited to the 2020-2021 academic year. *See Exhibit A*, pp. 1-19; *Exhibit 2*, pp. 1-11. District provided Parents with the Amendment near the end of the 2020-2021 academic year, and the Amendment was drafted to modify the February IEP, which was in effect during the 2021-2022 academic year. *Exhibit A*, p. 1. Given the Amendment, the SCO finds Parents were reasonable to understand that Student would attend School remotely during the 2021-2022 academic year. *See Exhibit 2*, pp. 1-11.
31. On May 21, 2021, a week before the last day of class, Kindergarten Teacher sent Parents a document titled “Re: Prior Written Notice of Rejection of Compensatory Services Due to COVID-19.” *CDE Exhibit 2*, p. 1; *Exhibit C*, pp. 6-7. The document indicates that Student’s IEP Team, including Parents, determined that compensatory services were not necessary because data collected during times of remote instruction showed she was offered all services in an appropriate manner and did not experience a disruption to FAPE. *Exhibit C*, pp. 6-7; *Interview with Parents*.

### **C. District’s Online School**

32. In the Spring of 2021, District decided not to offer remote instruction options at all elementary schools for the 2021-2022 academic year, and instead opened Online School, a centrally run virtual elementary school. *Interviews with Director of Special Education and Online School Principal*.

33. From May of 2021 forward, Online School Principal began laying the infrastructure for Online School. *Interview with Online School Principal*. At the time, few details about Online School were available, even to District staff (including the name of the school, assigned staff, and available services). *Interviews with Online School Principal, Director of Special Education, Kindergarten Teacher; Response*, p. 2.
34. District used a variety of methods to inform families of its plan to open Online School, including announcements, emails, and robocalls. *Interviews with Special Education Director, Parents, and Online School Principal; Exhibit 8*, pp. 1-2. The announcements indicated that families who would like to enroll their student in Online School for the 2021-2022 academic year should indicate their intent to enroll no later than June 4, 2021. *Exhibit 8*, p. 1.
35. District also developed a frequently asked questions document regarding in-person vs. remote instruction that appeared on District’s website and indicated District would need to work with families of IDEA-eligible students individually to determine if the remote instruction options would be appropriate. *See Id.* at p. 2; *CDE Exhibit 3*.
36. Although the announcements indicated students could attend Online School virtually, Parents were unsure about what services would be offered because details were sparse. *Interviews with Online School Principal, Director of Special Education, Parents; see Exhibit 9*, pp. 1-2; *Exhibit 10*, pp. 1-3; *Exhibit J*, p. 7. Announcements did not explicitly address students with “Virtual IEP Plans” or make it clear to families that District did not intend to offer remote instruction at schools beside Online School. *Interviews with Parents and Online School Principal; see Exhibit 8*, pp. 1-2; *Exhibit 10*, pp.1-3.
37. Parents intended for Student to return to in-person instruction as soon as she was vaccinated and were reluctant to commit to a full year at Online School, especially when it was unclear what services would be available. *Interviews with Parents and Online School Principal*. As a result, Parents did not ask to have Student enrolled in Online School prior to June 4, 2021, and they approached the 2021-2022 academic year under the impression that Student would attend School virtually consistent with the February IEP as modified by the Amendment. *Interviews with Parents and Online School Principal; see Exhibit 10*, pp. 1-3.
38. Initially, District budgeted for approximately 300 students at Online School. *Interview with Online School Principal*. Over 400 students enrolled during the initial enrollment period, and additional families requested enrollment in August 2021, bringing the total interest to as many as 550 students. *Id.* To accommodate the unexpected surge, District created an administrative transfer process for enrollment, quickly onboarded additional special education staff, and called in the special education staff approximately one month before the first day of classes to process the additional requests. *Id.*



39. Under District policy and procedures, any K-12 student had the option to seek enrollment at Online School. *Exhibit I*, p. 41. Under the policies and procedures for enrollment at Online School, however, transfer of an IDEA-eligible student from a brick-and-mortar school to an online program constituted a significant change of placement, which required consideration of reevaluation and a decision by a student's IEP Team as to whether the student could appropriately access FAPE in a virtual environment. *Id.* District policies and procedures do not permit an IDEA-eligible student to enroll in Online School by other means, such as by an agreement or an IEP amendment. *See id.*; *Interview with Director of Special Education*.

#### **E. Student's 2021-2022 Academic Year**

40. In August 2021, Parents learned that School would not be offering remote instruction, to include instruction outlined in the Amendment. *Interviews with Parents and Online School Principal*; *See Exhibit 10*, p. 1-3. Instead, Parents were informed via email and phone that the only way Student could access services virtually would be to enroll at Online School. *Interviews with Parents and Online School Principal*; *Exhibit 10*, p. 1. Parents were inquiring about the possibility of Student attending Online School as early as August 6, 2021. *See Exhibit J*, p. 51.

41. Parents requested that Student be enrolled in Online School, and on September 2, 2021, received an email confirming Student's enrollment. *Exhibit 7*, pp. 3-5. The confirmation indicated that since Student had an IEP, a team of service providers would begin a review process to ensure her special education needs could be met in an online environment. *See id.* at p. 4. The enrollment confirmation further indicated that Parents should plan on approximately four to six weeks for the review to be completed (possibly longer depending on the number of reviews that needed to be completed), and that Student should attend her current school in-person until the review process was finished. *Id.* at p. 4.

42. Parents asked whether Student could attend Online School while awaiting the reevaluation, or else receive remote instruction through School under the February IEP as modified by the Amendment, but neither alternative was accepted by District. *Interviews with Parents and SEIS*; *see, e.g., Exhibit J*, p. 6. Parents were told remote instruction was not being offered at School, and that Student could not attend Online School until her "special evaluation"<sup>6</sup> was complete and a team determined whether her needs could be met in a virtual environment. *Interviews with Parents and SEIS*.

43. The first day of class at School for the 2021-2022 academic year was August 23, 2021. *CDE Exhibit 4*, p. 1. Parents, still concerned about Student's safety given her underlying health conditions, did not feel safe sending her to attend classes in-person as instructed by District. *Interviews with Parents*. Instead, Student remained at home, and received no educational

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<sup>6</sup> District referred to this as a "special evaluation." However, State and Federal regulations recognize only two forms of evaluation: an initial evaluation and a reevaluation. *See* 34 C.F.R. §§ 300.301; 300.303.

services while Parents continued to communicate with District regarding enrollment in Online School. *Interviews with Parents*.

#### **F. Prior Written Notices Regarding Remote Instruction**

44. On September 24, 2021, District issued a PWN (“September 24 PWN”) regarding Parents’ request to have Student enrolled in Online School. *Exhibit C*, p. 3. The September 24 PWN is titled “Prior Notice and Consent for Special Evaluation” and explains that a change from a brick-and-mortar school to an online school constitutes a significant change in placement, which requires consideration of reevaluation and a decision by an IEP Team as to whether Student’s needs could be met in an online environment. *Id.*
45. The September 24 PWN indicates District sought to evaluate Student in general intelligence, communicative status, academic performance, social and emotional status, health, and motor abilities. *Id.* It further indicates Parents were provided with a copy of the Procedural Safeguards Notice. *Id.* It outlines the procedures, tests, records, or reports the request for reevaluation would be based on, and describes other options considered and rejected (such as completing the reevaluation through a records review), and other factors considered by the IEP Team (other options were rejected because consideration of a reevaluation is required for a change from a brick-and-mortar school to an online program under District policy). *See id.* at p. 4. The September 24 PWN indicates Parents may obtain procedural safeguards or assistance in understanding the information by contacting District. *Id.* Parents signed the consent form for the reevaluation on September 24, 2021. *Id.* at p. 5.
46. On September 27, 2021, District issued a second PWN (“September 27 PWN”) regarding Parents’ request to have Student attend School remotely under the February IEP as modified by the Amendment. *See id.* at p. 2; *Interviews with Special Education Teacher and SEIS*. The September 27 PWN provides that Parents, “do not feel comfortable sending [Student] to in-person learning due to health concerns. The [School] team is willing and able to serve [Student] in the school based on her current IEP.” *Exhibit C*, p. 2.
47. The September 27 PWN indicates that District’s refusal was based on “[n]o new information shared.” *Id.* In the section for “[o]ther options considered and reasons rejected” it provides: “[n]o new information shared.” *Id.* Under the “[a]ny other factors considered” section, it provides: “[t]he team stands ready and willing to take appropriate action if the family has new information.” *Id.* Nothing in the September 27 PWN indicates it was meant to address Parents’ request to have Student attend School remotely, and Parents’ request was characterized merely as “[p]lacement.” *Id.* The September 27 PWN indicates that Parents may contact Special Education Teacher if they need assistance understanding the information or wish to obtain a copy of the procedural safeguards. *Id.*

48. SEIS helped Special Education Teacher prepare the September 27 PWN because Special Education Teacher is new to special education, but SEIS personally reviewed and approved the September 27 PWN before it was sent to Parents. *Interview with SEIS.*
49. Special Education Teacher indicated its purpose was to “show [Parents] we’re here whenever [Parents] are comfortable – we are here for them,” while SEIS indicated its purpose was to address Parents’ request to have Student attend School under the February IEP as modified by the Amendment, and that it had nothing to do with Online School. *Interview with SEIS.*
50. Unsure what the September 27 PWN meant, Parents thought it referred to their request to have Student enrolled at Online School. *Interview with Parents.* Parents were never provided with Student-specific information explaining why District deemed it appropriate for Student to return in-person despite her health conditions. *Id.* Special Education Teacher confirmed that the September 27 PWN was not accompanied by any other information related to Student’s health condition and/or COVID-19. *Interviews with Parents and Special Education Teacher.*
51. SEIS indicated Parents’ request to have Student attend School remotely under the February IEP as modified by the Amendment was denied because District is not offering remote instruction at School during the 2021-2022 academic year. *Interview with SEIS.* SEIS indicated this information should have appeared in the September 27 PWN, and its omission was an oversight. *Id.*
52. The September 27 PWN indicated the “team stands ready and willing” to receive Student in-person, but the SCO finds that this decision was not based on Student’s individualized health and safety needs. *Interviews with Kindergarten Teacher and SEIS.* Moreover, although District is following health and safety guidance from local health organizations regarding COVID-19 and safe reopening of schools, the SCO finds further that District did not make an individualized determination that the safety procedures being used at School would keep Student safe given her unique health conditions. *Interviews with Parents, Kindergarten Teacher, Special Education Teacher, Director of Special Education, and SEIS.*
53. Parents were never provided information regarding the safety procedures used at School to keep students safe from COVID-19—Student-specific or otherwise—beyond the safety information that was available to all families on District’s website. *Interviews with Parents, Kindergarten Teacher, Director of Special Education, Special Education Teacher, and SEIS.*

#### **G. Student’s Reevaluation and District’s Determination Regarding Online School**

54. The September 24 PWN states that Student’s IEP Team considered collecting additional data through formal assessments but declined that option because additional assessments

were not required to determine access to a fully remote learning environment. *Exhibit C*, p. 4. It also stated that Student’s IEP Team considered a full record review but rejected that option due to the “need to gather levels of independence and engagement for Student.” *Id.* Although the September 24 PWN indicates Student’s IEP Team made this determination, Parents were not included, and there was not an associated IEP meeting. *Interview with Parents.*

55. On October 20, 2021, Student’s IEP Team met to discuss enrollment at Online School. *Interviews with Parents, Special Education Teacher, and SEIS.* Her enrollment was rejected because District determined she could not attend remote instruction independently on a full-time basis. *Interviews with Special Education Teacher and Parents.* Parents were told that she can attend School in-person to access services. *Interviews with Parents and SEIS.*
56. District’s position is that Student can return to School to receive in-person educational services under the February IEP and that Parents are unilaterally rejecting its offer of FAPE. *Response*, pp. 1-7. District was unable to produce or describe any Student-specific data to support its position. Parents remain hesitant to send Student to School in-person, and thus, as of November 9, 2021, she has been isolated at home and has not received any special education services during the 2021-2022 academic year. *Interview with Parents.*
57. On November 4, 2021, the SCO requested that Director of Special Education provide information or documentation as to whether any other IDEA-eligible students on the waitlist are currently not receiving services. *Interview with Director of Special Education.* Director of Special Education indicated she was unsure if any other IDEA-eligible students are on the waitlist and not receiving services, but that the information would be provided to the SCO. *Id.* Online School Principal indicated that as of November 10, 2021, there are other students on the waitlist to enroll at Online School. *Interview with Online School Principal.* On November 9, during an additional interview, the SCO again requested this information from District’s legal counsel, but to date, the information has not been provided to CDE.

### **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 provide Parents with proper PWN within a reasonable time before its actions in August 2021, in violation of 34 C.F.R. § 300.503. This violation resulted in a denial of FAPE.**

Parents allege that District failed to provide adequate PWN of its action proposed in August 2021, specifically related to Student’s enrollment at Online School and their requests for remote instruction. *See* (FF # 44).

Under IDEA, PWN must be provided to the parents of a child with a disability within a reasonable time before the public agency:

- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

34 C.F.R. § 300.503(a).

PWN must include: (1) a description of the action proposed or refused by the district; (2) an explanation of why the district proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report used by the district as a basis for the action; (4) statement that the parents of a child with a disability have protection under the procedural safeguards, and the means by which a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the information; (6) a description of other options the IEP team considered and the reasons why those options were rejected; and (7) a description of any other factors relevant to the district's proposal or refusal. 34 C.F.R. § 300.503(b)(1-7).

Adequately identifying the specific action being proposed or refused is essential because the primary purpose of PWN is to help parents understand the basis for disagreement and whether to seek resolution of the dispute through the available procedural safeguards. *See Letter to Boswell*, 49 IDELR 196 (OSEP 2007); *Douglas Cnty. Sch. Dist.*, 118 LRP 35788 (SEA CO 7/6/18).

Even if PWN contains all the required content, failure to provide PWN within a reasonable time constitutes a procedural violation that may result in a denial of FAPE. *See El Paso County Sch. Dist. 2*, 113 LRP 44602 (SEA CO 08/15/13). The notice must be provided so that parents have enough time to fully consider and respond to the action before it is implemented. *Letter to Chandler*, 59 IDELR 110 (OSEP 2012). While the IDEA and its implementing regulations do not provide a specific timeline within which a school district must provide PWN, a school district must provide the notice a reasonable time before it implements the proposed change. 34 C.F.R. § 300.503(a); 71 Fed. Reg. 46691 (Comments to the 2006 federal IDEA regulations); *Letter to Chandler*, 59 IDELR 110 (OSEP 2012); *see, e.g., SEA CO 2013:509*. "This provides parents, in the case of a proposal or refusal to take action, a reasonable time to fully consider the change and respond the action before it is implemented." *Letter to Chandler*, 59 IDELR 110 (OSEP 2012).

Here, Parents entered the 2021-2022 academic year reasonably expecting Student would attend School remotely according to the February IEP as modified by the Amendment. (FF # 30). In August of 2021, Parents were told that, due to the opening of Online School, Student must attend School in-person, or else apply for enrollment at Online School. (FF # 40).

Classes started at School on August 23, 2021, but Student did not attend because Parents were concerned about her health and safety during in-person instruction. (FF # 43). On September 2, 2021, District informed Parents that Student's enrollment at Online School was complete, but that she would not be able to attend until she received a "special evaluation," and a team determined whether she could appropriately access services remotely. (FF # 41). District issued Parents two PWNs for Parents' proposals regarding Student's remote instruction, on September 24 and September 27, 2021. (FF # 44, 46).

i. The September 24 PWN

The September 24 PWN informed Parents that District proposed to evaluate Student to determine if her special education needs could be met in an online environment, and whether Online School would be an appropriate placement. (FF # 44). It indicates that a change to an online school from a brick-and-mortar school constitutes a significant change in placement that requires consideration of reevaluation. *Id.*; see ECEA Rule 4.03(8)(b)(ii).

The September 24 PWN describes the areas in which District sought to reevaluate Student, and outlines the procedures, tests, records, and reports the proposal was based on. (FF # 45). It indicates Parents were provided with procedural safeguards, and describes other options considered and rejected by the IEP Team, as well as other factors that were considered. *Id.* The September 24 PWN also provides information on how to obtain a copy of the procedural safeguards and/or obtain assistance understanding the information contained in the PWN. *Id.* For these reasons, the SCO finds and concludes that the content of the September 24 PWN meets the requirements of 34 C.F.R. § 300.503(b).

In terms of timing, however, the September 24 PWN was not provided to Parents within a reasonable time after District's proposal. Parents entered the 2021-2022 academic year expecting Student to attend School remotely under the February IEP as modified by the Amendment. (FF # 30). Prior to the first day of class, when District told Parents that Student could not attend School remotely, Parents requested enrollment in Online School. (FF # 42). District indicated Student's enrollment was complete on September 2, 2021, but the September 24 PWN that explained District's proposal was not provided until 22 calendar days later. (FF # 44). For these reasons, the SCO finds and concludes that the September 27 PWN was not provided to Parents within a reasonable time, in violation of 34 C.F.R. § 300.503(a).

ii. The September 27 PWN

The September 27 PWN addresses Parents' request for Student to attend School remotely pursuant to the February IEP as modified by the Amendment. (FF # 46). The September 27 PWN indicates that Parents may contact Special Education Teacher if they need assistance understanding its information or wish to obtain a copy of the procedural safeguards. (FF # 47).

The September 27 PWN does not, however, provide a detailed description of the action that was refused by District. (FF # 46-47). Although it acknowledges that Parents do not feel safe sending Student to School for in-person instruction, it does not explain that its purpose is to address Parents' request to have her attend School remotely under the February IEP as modified by the Amendment. (FF # 46). Parents thought it referred to their request to have Student attend Online School. (FF # 50).

The September 27 PWN informs Parents that Student should appear in School for in-person instruction but does not explain what data or reasoning District relied upon to reach this recommendation. *See* (FF # 46-47). It also fails to identify other options that were considered and rejected or describe other factors that were relevant to District's refusal. *See id.* For these reasons, the SCO finds and concludes that the September 27 PWN failed to include all content required by 34 C.F.R. § 300.503(b).

In terms of timing, the September 27 PWN was not provided to Parents within a reasonable time after District rejected their request. Parents entered the 2021-2022 academic year expecting Student to attend School remotely under the February IEP as modified by the Amendment. (FF # 30). Prior to the first day of class, District told Parents that Student could not attend School remotely, and that Student must attend in-person. (FF # 40). The first day of class was August 23, 2021, but the September 27 PWN did not go out to Parents until 35 calendar days later. (FF # 43, 46). For these reasons, the SCO finds and concludes that the September 27 PWN was not provided to Parents within a reasonable time of District's refusal, in violation of 34 C.F.R. § 300.503(a).

iii. Substantive Violation for the September 27 PWN

Procedural violations of IDEA are only actionable to the extent that they impede the child's right to FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

Here, District's procedural violations significantly impeded Parents' ability to participate in the decision-making process and deprived Student of educational benefit.

Parents were concerned about Student's health and safety if she returned to in-person instruction. (FF # 3-5). District was aware of these concerns, and Parents reasonably understood the plan for the 2021-2022 academic year would be for Student to attend School remotely, as she did during the 2020-2021 academic year. (FF # 17, 30). In August of 2021, District told Parents that Student must attend School in-person, but District did not convene an IEP meeting to discuss this change from remote instruction to in-person instruction. (FF # 41).

The September 27 PWN did not contain an explanation of the data or reasoning to support the recommendation that Student return to School in-person. (FF # 47). Parents remained hesitant to send Student to School in-person, and consequently Student remained at home and isolated. (FF # 56). As of November 9, 2021, Student had received no special education or related services during the 2021-2022 academic year, approximately 56 total school days. *See id.*

For these reasons, the SCO finds and concludes the failure to provide adequate and timely PWN impeded Parents' ability to participate in the educational decision-making process for Student and caused a deprivation of educational benefit, resulting in a denial of FAPE.

**Conclusion to Allegation No. 2: District determined Student's educational placement outside of a properly convened IEP meeting, in violation of 34 C.F.R. §§ 300.116(a)(1), 300.321(a)(1), 300.327 and 300.501(c)(1).**

Parents allege that District determined Student's educational placement outside of a properly convened IEP meeting, specifically by making decisions that impacted educational placement without them. *See* (FF # 44).

Placement—a term used to denote the provision of special education and related services—is determined by the IEP Team, including parents, and must be individualized, as well as based on the IEP. 34 C.F.R. § 300.116; ECEA Rule 4.03(8)(a); *Questions and Answers on Andrew F. v. Douglas County School Dist. Re-1*, 71 IDELR 68 (EDU 12/7/17). Specifically, school districts must ensure that the placement decision is made by a group of persons, including parents, and other persons knowledgeable about the child, and the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a); *See also* 34 C.F.R. §§ 300.321(a)(1), 300.327 and 300.501(c)(1).

In this case, District opened Online School in the Spring of 2021, and quit offering remote instruction at School for the 2021-2022 academic year. (FF # 32). At the time, Student was receiving remote instruction through School under the February IEP as modified by the Amendment. (FF # 30). In August of 2021, District informed Parents via email and phone that Student must attend School in-person under the February IEP, and that the Amendment would not be followed. (FF # 40-41). Parents were not part of District's decision to stop offering remote instruction at School, and the change was not discussed at a properly constituted IEP meeting. *See* (FF # 32).

The SCO finds that this change from remote instruction to in-person instruction, or vice versa, would necessarily impact Student's educational program and services. *See* ECEA Rule 4.03(8). Specifically, a change between remote and in-person instruction constitutes a significant change of placement. *Id.* at 4.03(8)(b)(ii). Any significant change in placement must be made by the IEP team—including the parents of the child—and in consideration of a reevaluation. *Id.*



When District stopped offering remote instruction through School, the February IEP as modified by the Amendment was still in effect. (FF # 29-30). That IEP was written to be implemented remotely instead of in-person. (FF # 19-29). Also, Student's services are written as consultative services rather than direct in-person minute-for-minute special education (like they were in the February IEP). (FF # 24, 26). In August of 2021, District informed Parents that Student must return to in-person instruction, but District did so without convening an IEP Team meeting, without consideration of reevaluation, or otherwise reviewing and revising Student's IEP to provide for in-person instruction. (FF # 32-36).

For these reasons, the SCO finds and concludes that District made decisions that impacted Student's educational placement without including Parents, in violation of 34 C.F.R. §§ 300.116(a)(1), 300.321(a)(1), 300.327 and 300.501(c)(1).

ii. Substantive Violation

Procedural violations of IDEA are only actionable to the extent that they impede the child's right to FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

As discussed above, Parents are essential members of the IEP Team. In this case, District's actions significantly impeded their ability to participate in the decision-making process for Student, which resulted in a denial of educational benefit.

First, District made a decision over the Summer of 2021 to stop offering remote instruction at School. (FF # 32). District's decision, one made without Parents, impacted Student's educational placement by changing the amount of educational services Student would receive. *See* (FF # 32-36). Second, District did not convene an IEP meeting, or otherwise review and revise Student's IEP, which was modified by the Amendment and written for remote instruction. *Id.* Third, District failed to consider Parents' concerns regarding Student's health and safety given her underlying health conditions in light of the COVID-19 pandemic. (FF # 43, 50, 52-53).

Parents remained hesitant to send Student to School in-person, and Student remained isolated at home without receiving special education and related services. (FF # 56). The SCO finds and concludes that Parents were denied participation in the decision-making process, leaving Student without educational services. This resulted in a denial of FAPE.

**Conclusion to Allegation No. 3: District failed to make an offer of FAPE and provide special education and related services in accordance with an IEP from August 23, 2021 to the present, in violation of 34 C.F.R. § 300.323.**

Parents allege District failed to make an offer of FAPE and provide special education and related services in accordance with an IEP during the 2021-2022 academic year. (FF # 44).

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

A school district must ensure that “as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child’s IEP.” *Id.* § 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.” *Id.* § 300.323(d).

In this case, at the beginning of the 2021-2022 academic year, Student’s February IEP as modified by the Amendment was in effect. (FF # 29-30). It provides for Student to attend School remotely. (FF # 29-30). District did not implement the February IEP as modified by the Amendment, and, as a result, Student remained at home, isolated, and without any special education or related services for more than 56 school days. *See* (FF # 56).

District did not change or otherwise revise the February IEP as modified by the Amendment consistent with IDEA’s procedures. *See* 34 C.F.R. § 300.324(a). If District intended to revise that IEP to provide for in-person instruction, under the circumstances, it should have convened an IEP meeting. *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act*, 121 LRP 33345 (OSERS 09/30/21) (advising that an IEP developed to deliver only remote instruction services during school closures due to COVID-19 would need to be reviewed at an IEP Team meeting before a transition to in-person instruction for the upcoming school year).

Moreover, to the extent parents have health and safety concerns about their child returning to in-person instruction, as Parents did with Student here, the IEP Team must also make an individualized determination about the child’s health and safety during in-person instruction, and any COVID-19 safety measures required to keep the child safe must be included in the child’s IEP. *Id.* For these reasons, the SCO finds and concludes that District failed to implement

the February IEP as modified by the Amendment. The SCO must now determine whether District's failure to implement was material.

i. Materiality of Failure to Implement

The failure to implement a "material", "essential", or "significant" provision of a student's IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with "sister courts . . . that a material failure to implement an IEP violates the IDEA"); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an "essential element of the IEP" denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the "significant provisions of the IEP" denies a FAPE). "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007).

Here, Student has not received any of the special education or related services contained in the February IEP as modified by the Amendment during the 2021-2022 academic year. (FF # 56). As of November 9, 2021, Student missed a total of approximately 56 days of school, and the violation is ongoing. Therefore, the SCO finds and concludes that District failed to implement a material provision of the February IEP as modified by the Amendment 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).

ii. Compensatory Education

Compensatory education is an equitable remedy intended to place a student in the same position she 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).

Here, Student has not received any service minutes since the first day of class on August 23, 2021. In consideration of Student's age and individualized needs, and upon consultation with CDE Content Specialist 1, the SCO finds and concludes that a minute for minute calculation for all services missed would be burdensome on Student. Instead, the SCO awards the following: (a) 25 hours of specialized literacy instruction to increase phonemic awareness and letter knowledge, (b) 15 hours of specialized literacy instruction to increase number sense and counting skills, (c) 25 hours of specialized other instruction to increase independent living skills and ability to stay on task, (d) 1 hour of direct physical therapy services for stair navigation

provided by a physical therapist, (e) 1 hour of direct occupational therapy services to support fine motor skills for academic tasks, and (f) 4 hours of direct small group speech language therapy.

Student's IEP team met on October 20, 2021, and ultimately decided Student could not enroll in Online School and should instead return to School in-person. (FF # 55). Because District has not obtained sufficient data about Student's present levels of academic achievement and functional performance to properly determine her needs, the SCO, in consultation with CDE Content Specialist 1, will include a remedy to ensure Student is reevaluated and her IEP is reviewed and revised accordingly.

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

Pursuant to its general supervisory authority, CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in 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).

Here, when District decided to open Online School, it stopped offering remote instruction at other elementary schools for the 2021-2022 school year. (FF # 32). The SCO finds that special education services for other IDEA-eligible elementary children, like Student, may have been negatively impacted while awaiting reevaluation and a review by an IEP Team to determine if they can enroll at Online School. The SCO requested, but did not receive, information from District to determine if other IDEA-eligible students, given COVID-19 health and safety concerns, were not receiving services while waiting for a spot at Online School. (FF # 57). Online School Principal indicated that, as of November 10, 2021, he was aware of other IDEA eligible students who were currently on the waitlist for Online School. *Id.*

The SCO finds and concludes that, upon consultation with CDE Content Specialist 1, the collective nature of the violations here are systemic in nature (though narrowly limited to this specific situation involving COVID-19 and the opening of Online School).

### **REMEDIES**

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

1. Failing to provide Parents with adequate PWN of the action proposed by District regarding Student's reevaluation and the provision of FAPE to Student, in violation of 34 C.F.R. § 300.503.
2. Determining Student's educational placement outside of a properly convened IEP meeting, in violation of 34 C.F.R. §§ 300.116(a)(1), 300.321(a)(1), 300.327 and 300.501(c)(1).
3. Failing to make an offer of FAPE and provide special education and related services in accordance with an IEP from August 23, 2021 to the present, in violation of 34 C.F.R. § 300.323.

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

1. Corrective Action Plan

- a. By **Monday, January 4, 2022**, District shall submit to CDE a corrective action plan ("CAP") that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom District is responsible. The CAP must, at a minimum, provide for the following:
  - i. By **Tuesday, March 1, 2022**, District must identify and provide CDE the names of all similarly situated District students who (a) are IDEA-eligible, (b) have missed more than ten (10) days of school in the current 2021-2022 academic year, and (c) either were or are on the waitlist to enroll at Online School for the 2021-2022 academic year. By **Monday, May 2, 2022**, District shall verify to CDE that the issue involving the areas of noncompliance identified in this Decision have been corrected, to include an individualized determination whether each student identified as meeting conditions (a)-(c) above requires compensatory education to make up for lack of progress toward annual IEP goals due to missed services. CDE will then conduct follow up activities as appropriate.
- b. Attendance and completion of training provided by CDE on proper issuance of PWN, proper determination of educational placement, and the requirements of FAPE under IDEA. This training will address, at a minimum, the requirements of 34 C.F.R. §§ 300.116, 300.321, 300.323, 300.327, 300.501, 300.503; and the related concerns noted in this decision. Special Education Coordinator and CDE Special Education Monitoring and Technical Assistant Consultant, Rebecca O'Malley, will determine the time, date, and format of the training. This training may be conducted in-person or through an alternative technology-based

format, such as a video conference, web conference, webinar, or webcast. This training is mandatory for Special Education Teacher, Special Education Informational Specialist, Director of Special Education, and all District Coordinators (or District equivalent). Such training shall be completed no later than **Friday, April 1, 2022**.

- i. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to CDE no later than **Friday, April 8, 2022**.
- c. CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to confirm District's timely correction of the areas of noncompliance.

## 2. IEP Meeting and Reevaluation

- a. By **Friday, March 4, 2022**, District must conduct a comprehensive evaluation of Student in all possible areas of need. Consent for the evaluation must be obtained no later than **Monday, January 4, 2022**. Although District may determine the appropriate evaluations and evaluators, the evaluation must be conducted in all areas of suspected need. Evidence that this evaluation has occurred—including consent to evaluate, PWN, and the evaluation report—shall be provided to CDE by **Monday, April 4, 2022**.
  - i. If Parents do not provide consent to this evaluation within 10 days of receiving the request to evaluate, District will be excused from conducting the evaluation ordered in this decision. District will document its attempts to secure parental consent for the evaluation and will make efforts to provide alternative options for virtual evaluations where possible, to address Parents' concerns about possible exposure to COVID-19.
  - ii. Student's IEP team shall consider the results of the evaluation and tailor Student's IEP to meet Student's individualized needs, consistent with 34 C.F.R. § 300.324. To evidence that the IEP team considered this evaluation and appropriately tailored Student's IEP, the District shall provide a copy of Student's final IEP to CDE by **Monday, May 2, 2022**.

3. Compensatory Educational Services and Denial of FAPE

- a. Student shall receive **25 hours of specialized literacy instruction** to increase phonemic awareness and letter knowledge each week outside the general education classroom. This instruction must be provided by an appropriately licensed special education teacher. All 25 hours must be completed by **Friday, April 1, 2022.**
- b. Student shall receive **15 hours of specialized instruction** to increase number sense and counting skills outside the general education classroom setting. This instruction must be provided by an appropriately licensed special education teacher. All 15 hours must be completed by **Friday, April 1, 2022.**
- c. Student shall receive **25 hours of specialized other instruction** to increase independent living skills and ability to stay on task outside the general education classroom setting. This instruction must be provided by an appropriately licensed special education teacher. All 25 hours must be completed by **Friday, April 1, 2022.**
- d. Student shall receive **1 hour of direct physical therapy services** for stair navigation provided outside the general education classroom. This therapy must be provided by an appropriately licensed physical therapist. This hour must be completed by **Friday, April 1, 2022.**
- e. Student shall receive **1 hour of direct occupational therapy services outside** the general education classroom to support fine motor skills for academic tasks. These therapy services must be provided by a license occupational therapist. This hour must be completed by **Friday, April 1, 2022.**
- f. Student shall receive **4 hours of direct small group speech language therapy** outside the general education classroom setting. This therapy must be provided by an appropriately license speech language pathologist or speech language pathology assistant. All 4 hours must be completed by **Friday, April 1, 2022.**
- g. Monthly consultation between Provider(s) delivering compensatory services and Student's Special Education Teacher shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. District must submit documentation that these consultations have occurred by **the second Monday of each month** until compensatory services have been completed and no later than one year following the date of this decision. Consultation logs must contain the name and

title of the provider, and the date, the duration, and a brief description of the consultation.

- h. All compensatory educational services must be completed by **Monday, August 1, 2022**, though Parent and Student may opt out of some or all of the compensatory educational hours if they wish. Given the COVID-19 pandemic and Parents' concerns about Student's health, these services must be offered remotely unless Parents agree otherwise.
- i. To verify that Student has received the services required by this Decision, District must submit records of service logs to CDE by the **second Monday of each month**, once services begin, until all compensatory education services have been provided. Service logs must contain the name and title of the provider (if services are delivered through a private provider), and the date, the duration, and a brief description of the service. District shall communicate with the private provider to obtain this information if the compensatory services are provided through a contract with a private provider.
- j. By **Friday, January 7, 2022**, 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. The parties shall cooperate in determining how the compensatory services will be provided. If Parents refuse to meet with District within this time, District will be excused from delivering compensatory services, provided that District diligently attempts to meet with Parents and documents their efforts. A determination that District diligently attempted to meet with Parents, and should thus be excused from providing compensatory services, rests solely with CDE.
- k. District shall submit the schedule of compensatory services to CDE no later than **Friday, January 21, 2022**. 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 District fails to provide a scheduled compensatory session, District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent and notify CDE of the change in the appropriate service log.



Please submit the documentation detailed above to CDE as follows:

Colorado Department of Education  
Exceptional Student Services Unit  
Attn.: Becky 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 District's annual determination under the IDEA and subject District to enforcement action by the Department. **Given the current circumstances surrounding the COVID-19 pandemic, the Department will work with 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 3<sup>rd</sup> day of December 2021.



Ross Meyers  
State Complaints Officer

## **APPENDIX**

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

- Exhibit 1: Authorization of Release of Information
- Exhibit 2: RE: Prior Written Notice of Virtual IEP Plan
- Exhibit 3: February 23, 2021 IEP
- Exhibit 4: Email Confirmation of Administrative Transfer
- Exhibit 5: Email from Director of Special Education
- Exhibit 6: Enrollment Confirmation
- Exhibit 7: Additional Correspondence re Administrative Transfer
- Exhibit 8: RE: Planning for Fall Return
- Exhibit 9: Email Discussing Availability of Services at Online School
- Exhibit 10: Correspondence Between Parent and Principal

### **Response, pages 1-7**

- Exhibit A: February 23, 2021 IEP
- Exhibit B: none
- Exhibit C: PWN
- Exhibit D: Consent for Special Evaluation
- Exhibit E: none
- Exhibit F: Evaluations and Assessments
- Exhibit G: none
- Exhibit H: Progress Report
- Exhibit I: Correspondence
- Exhibit J: District Policies and Procedures
- Exhibit K: List of Staff with Knowledge Concerning Allegations
- Exhibit L: none
- Exhibit M: District Policies re PWN
- Exhibit N: Email re COVID-19 Guidance
- Exhibit O: PWN of Evaluation Form
- Exhibit P: PWN of Rejection of Online School Form
- Exhibit Q: Safety Guidance for Schools

### **Reply, pages 1-11**

- Exhibit 11: Virtual IEP Email
- Exhibit 12: Procedural Safeguards Notice
- Exhibit 13: August 11, 2020 PWN of Virtual IEP Plan
- Exhibit 14: Contingency Learning Plan Email

- Exhibit 15: PWN of Contingency Learning Plan
- Exhibit 16: Virtual IEP Email 2

**Telephonic Interviews:**

- Director of Special Education: November 4, 2021
- Kindergarten Teacher: November 9, 2021
- Parents: November 9, 2021
- Online School Principal: November 10, 2021
- SEIS: November 15, 2021
- Special Education Teacher: November 11, 2021

**CDE Exhibits:**

- CDE Exhibit 1: Vaccines for Children and Teens
- CDE Exhibit 2: 2020-2021 District Calendar
- CDE Exhibit 3: Remote Learning FAQ
- CDE Exhibit 4: 2021-2022 District Calendar
- CDE Exhibit 5: OSEP – Return to School Roadmap