

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

**State-Level Complaint 2020:524
Denver Public Schools District 1**

DECISION

INTRODUCTION

On July 13, 2020, 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 1 (District). The State Complaints Officer (SCO) determined that the Complaint identified six allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from July 13, 2019 through July 13, 2020 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to identify and evaluate Student when District was on notice, as early as September 5, 2019, that Student may have a disability and be in need of special education and related services, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).

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.

2. Failed to conduct an initial evaluation as requested by Parents, on or about September 24, 2019, October 10, 2019, and October 24, 2019, to determine if Student qualifies as a child with a disability under the IDEA, in violation of 34 C.F.R. § 300.301.
3. Failed to provide Parents with both prior written notice (PWN) and procedural safeguards following Parents' requests for an initial evaluation on September 24, 2019, October 10, 2019, and October 24, 2019, and failed to provide Parents with PWN following Parents' request for an evaluation on April 16, 2020, in violation of 34 C.F.R. §§ 300.503 and 300.504(a)(1).
4. Failed to provide Parents with sufficient PWN containing the required content on June 8, 2020, in violation of 34 C.F.R. § 300.503.
5. Deprived Parents of meaningful participation in the IEP process by:
 - a. Declining to consider Parents' concerns regarding the development of Student's Contingency Plan for Remote Learning at the April 16, 2020 IEP meeting, in violation of 34 C.F.R. §§ 300.321(a)(1), 300.324(a)(1)(ii), and 300.501(b)-(c).
 - b. Declining to consider Parents' concerns regarding the development of Student's Extended School Year (ESY) Contingency Plan During Remote Learning at the May 27, 2020 and May 28, 2020 IEP meetings, in violation of 34 C.F.R. §§ 300.321(a)(1), 300.324(a)(1)(ii), and 300.501(b)-(c).
6. Failed to properly implement Student's IEP after the District suspended in-person learning as a result of the COVID-19 pandemic, specifically by failing to provide Student with 100 minutes of direct, specialized literacy instruction per week during the weeks of April 20, 2020, May 4, 2020, May 11, 2020, May 18, 2020, and May 25, 2020, in violation of 34 C.F.R. § 300.323.

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 nine-year-old eligible for special education and related services under the primary disability category Specific Learning Disability (SLD) and the secondary disability categories Other Health Impairment (OHI) and Speech or Language Impairment. *Exhibit A*, p. 2. Student attends an elementary school (School) located in District. *Id.* Student is

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

described as a bright and hardworking child with strong social communication skills and a talent for math. *Interview with Special Education Teacher 2; Exhibit A*, p. 4.

2. This dispute started after Student enrolled at School for his third-grade year in August 2019. *Interview with Parents*. Parents expressed concerns regarding Student's challenges with reading, writing, and speech, and allege that District failed to identify and evaluate Student. *Id.* Parents also allege that District failed to provide them with PWN and procedural safeguards after requests for an evaluation, failed to consider their concerns in creating a remote-learning contingency plan, and failed to implement Student's IEP. *Id.*

B. The Beginning of Student's Third Grade Year

3. Student's third grade year began on August 20, 2019. *Interview with Special Education Generalist*. On August 19, 2019, Student completed standardized testing as part of School's practice of assessing incoming students. *Interview with Literacy Teacher*. On the CORE Phonics Survey, he demonstrated areas of concern in all reading and decoding subtests. *Id.*; *Exhibit D*, pp. 14-16. Student was determined to be reading at a pre-kindergarten level using a Reading A to Z passage. *Interview with Special Education Teacher 2*.
4. During the assessment, Parents shared with Literacy Teacher that Student had not previously participated in formal schooling on a regular basis. *Interview with Literacy Teacher*. Instead, Student received homeschool instruction from Parents using an approach referred to as "unschooling," in which educational efforts were focused on Student's intrinsic interests. *Interviews with Literacy Teacher and Parents; Exhibit 9*, p. 3.
5. Additionally, Parents informed Literacy Teacher that Student struggled with reading and writing, which was the reason they decided to enroll him at School. *Interview with Literacy Teacher and Parents*. Student was not able to read or write independently, and he also exhibited difficulties with the articulation of certain sounds, though his speech was generally intelligible. *Id.*
6. Parents also shared with Homeroom Teacher their suspicion that Student may have a learning disability, though Student had not previously been evaluated. *Interview with Parents*. Homeroom Teacher responded that he would like to work with Student in the classroom and revisit their concerns in a couple of weeks. *Id.* Parents agreed with this. *Id.*
7. During the first four weeks of school, Literacy Teacher collaborated with a District literacy tutor (Literacy Tutor) to implement literacy interventions and collect data on Student's progress. *Interview with Literacy Teacher*. Literacy Teacher provided Student with one-on-one and small group support for reading, and she observed that Student made some growth in response to interventions. *Id.* For example, although Student's scores were significantly below grade level on the iStation progress monitoring assessment, testing revealed that between September 5, 2019 and October 2, 2019, Student's reading

comprehension score improved by six points. *Id.*; *Exhibit D*, p. 19. Student’s vocabulary score improved by 43 points to reach grade-level performance. *Id.* By October 2019, Student was reading at Level F on Reading A to Z passages, which is equivalent to a first-grade reading level, with 89% accuracy and 100% comprehension. *Id.*; *Exhibit D*, p. 25.

8. Literacy Teacher explained that a special education referral was not appropriate at this early stage due to a lack of data from Student’s previous schooling, concerns regarding a possible lack of instruction in Student’s previous schooling, and Student’s transition from homeschool to a structured, formal school. *Interview with Literacy Teacher.*
9. In addition, Student began to miss school or arrive late due to experiencing fatigue and nausea, and this affected the ability of staff to work with Student and collect data. *Interviews with Literacy Teacher, Parents, and School Nurse; Exhibit D*, p 29; *Exhibit I*, p. 6. Student was absent nine days and tardy seven days during the first semester. *Id.* From the first day of school through February 19, 2020, Student was absent for 20 days and tardy on 10 days. *Id.*

C. Multi-Tiered System of Supports and Parents’ Requests for Evaluation

10. Although she believed a special education referral was premature, Literacy Teacher determined that Student needed more support, and on September 24, 2019, she made a referral for Student to begin receiving interventions through the Multi-Tiered System of Supports (MTSS). *Interview with Literacy Teacher; Exhibit Q*, pp. 5-10.
11. The referral form documents concerns in the areas of phonics/decoding, reading comprehension, reading fluency, handwriting, math application, writing, language skills, and spelling. *Id.* Literacy teacher also documented more specific concerns regarding Student’s inability to read and write independently at grade level, as well as difficulty with story problems in math due to challenges with reading. *Id.*
12. Also on September 24, 2019, Mother sent Literacy Teacher, Homeroom Teacher, and Literacy Tutor an email regarding her concerns about Student:

As I’ve discussed previously we suspect that [Student] has a learning disability. We’ve put off that discussion so that assessments can be made in the classroom. But in the meantime [Student] went from loving school to now feeling very discouraged about school. I don’t want to see this trend continue. I think he needs more targeted support and an ‘official’ reason he’s struggling, so he just doesn’t think he’s ‘bad at school’...

Exhibit 2, p. 17.

13. In her email, Mother also expressed that she would like to “start tapping into” the “resources” available through School. *Id.*

14. In response to Mother's email and Literacy Teacher's MTSS referral, Parents met with District staff on October 4, 2019 to discuss the MTSS process and Parents' concerns. *Interviews with Parents and Literacy Teacher*. After discussion, Parents and District staff agreed to pursue MTSS before initiating an evaluation. *Id.* They also agreed that Student would begin receiving Tier 2 interventions. *Id.*; *Exhibit D*, p. 9.
15. Parents were not provided with PWN or procedural safeguards at the October 4, 2019 meeting because District staff understood that Parents agreed with the approach they discussed. *Interviews with Literacy Teacher and Parents*. Parents confirmed that they agreed to follow the plan proposed by the District. *Interview with Parents*.
16. At the October 4, 2019 meeting, the MTSS team also decided to refer Student for a speech and language screen in response to Parents' concerns about articulation errors. *Interviews with Parents and Literacy Teacher*. Student was screened by Speech Language Pathologist on October 10, 2019. *Interview with Speech Language Pathologist*.
17. The speech and language screen revealed that Student exhibited articulation errors. *Id.* Speech Language Pathologist recommended Tier 2 supports in the classroom, which commenced following the screen and consisted of providing resources to Student's teachers so that they could provide articulation supports in class. *Id.*
18. When asked about whether a special education evaluation should have been initiated based on the results of Student's speech and language screen, Speech Language Pathologist reported that Tier 2 supports through MTSS were the appropriate response, and Student made progress with those supports, producing fewer articulation errors. *Id.*
19. Following the October 4, 2019 meeting, Parents determined that they did not want to delay Student's initial evaluation under the IDEA. *Interview with Parents*. On October 10, 2019, Mother emailed Homeroom Teacher, Literacy Teacher, Speech Language Pathologist, Special Education Generalist, Special Education Teacher 1, and Literacy Tutor to request that Student be assessed. *Exhibit 2*, p. 20. Mother stated, "We would like to request that [Student's] formal assessment be moved up, so we don't wait another six weeks to decide." *Id.* She requested that assessments be completed "as soon as possible" in literacy, math, communication, fine motor skills, and cognition. *Id.*
20. In response to Mother's email, Special Education Generalist scheduled a phone call with Parents on October 25, 2019. *Interviews with Parents and Special Education Generalist*. During the October 25, 2019 phone call, Parents repeated their request for an evaluation. *Id.* Special Education Generalist reported that she told Parents, if they wanted an evaluation, it could be done, but she also reviewed the eligibility criteria and emphasized the importance of collecting data to make the best decision. *Id.* In addition, Special Education Generalist further explained the MTSS process and told Parents that Student could receive interventions during data collection. *Id.*

21. Parents were not provided with PWN or procedural safeguards in response to their October 10th and October 25th requests for evaluation, and an evaluation was not initiated. *Interviews with Parents and Special Education Generalist*. Special Education Generalist explained that she did not provide PWN or procedural safeguards because she understood that Parents agreed with continuing MTSS and proceeding with a referral in December. *Interview with Special Education Generalist*. However, Special Education Generalist stated that she now understands that Parents should have been provided with both PWN and procedural safeguards in response to their requests for evaluation. *Id.*
22. Parents stated that they agreed to proceed with MTSS because they understood that data collection was required before initiating an evaluation, based on their conversation with Special Education Generalist. *Interview with Parents*.
23. Special Education Instructional Specialist (SEIS) reported that when she began working with School staff in January, she observed that there was some confusion regarding whether MTSS must be completed prior to initiating an evaluation, and she observed that PWN had not been provided in this case. *Interview with SEIS*. SEIS explained that it is not District policy to require MTSS before an evaluation can be completed, although it is best practice to collect data prior to an evaluation. *Id.*
24. The District's IEP Procedural Guidance provides that when a parent requests a special education evaluation for eligibility and the school team determines that a referral is not appropriate, a PWN and Procedural Safeguards notice must be provided to the parent. *Exhibit R*, p. 9. Per District guidance, "[a] Response to Intervention (RTI) process (data collection) cannot be used to delay-deny an evaluation for eligibility." *Id.* Additionally, the guidance provides that PWN must be given to the parents within "a reasonable time before" the District proposes or refuses to initiate or change the identification, evaluation, educational placement, and/or provision of FAPE to a student. *Id.* at p. 12.
25. SEIS was not aware of other occasions in which School or District staff had declined to evaluate without first completing MTSS. *Id.* All staff interviewed expressed that it is not District or School policy to require MTSS before completing an evaluation. *Interviews with Special Education Teacher 1, Special Education Teacher 2, Literacy Teacher, Special Education Generalist, Speech Language Pathologist, and School Psychologist*.
26. SEIS also explained that it is generally district practice to provide PWN within 48 hours of a decision, and that PWN and procedural safeguards should be provided if a parent requests an evaluation and the District declines to initiate an evaluation. *Id.*

D. MTSS Interventions and The Initial Evaluation

27. In October and November of 2019, Student received Tier 2 interventions, which included small group and one-on-one instruction during reading and writing five days per week,

for approximately 30 to 40 minutes per day, provided by the classroom teacher and a paraprofessional. *Interview with Special Education Teacher 2; Exhibit D*, p. 9.

28. On December 13, 2019, Parents and District staff met to discuss the data collected and Student's progress in response to interventions. *Interviews with Literacy Teacher, Special Education Generalist, and Parents*. Student had shown some growth as measured by iStation. *Interview with Literacy Teacher; Exhibit D*, p. 19. For example, from September 2019 to November 2019, Student's reading comprehension score increased by eight points, from 184 to 192. *Id.* His vocabulary score increased by 50 points, from 223 to 273, and he was at grade level in vocabulary by November 2019. *Id.*
29. On a Reading A to Z passage, Student was able to read at Level G, which is equivalent to first grade level, with 79% accuracy and 80% comprehension. *Interview with Literacy Teacher; Exhibit D*, p. 17. However, Student was still significantly below grade level in spelling and text fluency, with scores of 190 and 0, respectively. *Exhibit D*, p. 19.
30. During the December 13, 2019 meeting, Parents requested that District initiate an evaluation, and the District agreed. *Id.* Parent was provided with consent for an initial evaluation on January 7, 2020, and Parent returned a signed consent the same day. *Interviews with Parents and Special Education Generalist*. Because Student was still performing significantly below grade level, the MTSS team agreed to begin implementing Tier 3 interventions during the evaluation process. *Id.*; *Exhibit D*, p. 9.
31. Beginning in December 2019 and throughout the evaluation process, Student received Tier 3 interventions, which consisted of reading and writing instruction four times per week for 30 minutes a session and small group fluency support in math four times per week for 30 minutes a session. *Interview with Special Education Teacher 2; Exhibit D*, p. 9. Student also received interventions for articulation from Speech Language Pathologist. *Interview with Speech Language Pathologist; Exhibit D*, p. 2.
32. Student demonstrated progress in both reading and mathematics. *Id.* For example, he completed the iReady progress monitoring assessment in math, and from October 8, 2019 to January 29, 2020, his score increased by 31 points, from grade level 1 to grade level 2. *Id.*
33. By January 2020, Student was able to read a Level I passage in Reading A to Z with 97% accuracy and 80% comprehension, and he showed mastery in rhyme production and phoneme isolation of final sounds, which were areas of concern in September 2019. *Exhibit D*, pp. 15, 25. From November 2019 to February 2020, his iStation spelling score improved by 23 points, his vocabulary score improved by 25 points, and his reading comprehension score improved by 11 points. *Id.* pp. 19-20.
34. On February 28, 2020, District convened a properly constituted multidisciplinary team (MDT) to discuss the initial evaluation data and determine whether Student was eligible

for special education and related services. *Interview with SEIS; Exhibit E*, pp. 1-4; *Exhibit H*, p. 4.

35. Student's initial evaluation included communicative assessments such as the CELF-5 and Arizona Articulation Proficiency Scale-3, academic performance assessments such as the Wechsler Individual Achievement Test-III and Core Phonics Survey, and a Health Assessment completed by School Nurse. *Exhibit D*, pp. 2-38. In addition, Parents obtained a private evaluation completed by Student's private speech and language provider (Private Provider), which revealed that Student's profile of strengths and weaknesses was consistent with a diagnosis of dyslexia and dysgraphia. *Id.* at p. 37. The results of the private evaluation were included in the District's evaluation report. *Id.* at pp. 30-38.
36. The MDT reviewed the results of the evaluation and found that, based on the available data, Student met the criteria for SLD in basic reading skills and written expression, as well as Speech or Language Impairment and OHI. *Exhibit E*, pp. 1-4.

E. The Initial IEP Meeting and Parent's Request for a Social Emotional Evaluation

37. Due to the COVID-19 pandemic, the District began providing remote instruction to students on April 7, 2020. *Interview with SEIS*.
38. Student's Initial IEP Meeting was scheduled for April 16, 2020. *Exhibit H*, pp. 2-3. On April 10, 2020, Special Education Teacher 2 emailed Parents Notice of Meeting, procedural safeguards, and a draft IEP. *Exhibit L*, p. 71. On April 13, 2020, she also emailed Parents a meeting agenda. *Id.*
39. Prior to the meeting, Parents provided written feedback on the draft IEP, including proposed revisions of the annual goals, which were developed in consultation with Private Provider. *Interview with Parents*.
40. On April 16, 2020, the District convened a properly constituted IEP Team to develop Student's initial IEP. *Exhibit A*, pp. 2, 36. Parents attended the meeting, along with their attorney (Parents' Attorney) and Private Provider. *Id.* at p. 36.
41. At the meeting, the IEP Team discussed and developed annual goals in the areas of communication, reading, writing, and self-determination. *Interview with Parents; Exhibit A*, pp. 13-17.
42. The IEP Team also discussed the Service Delivery Statement portion of the IEP, which provides for Student to receive 60 minutes per week of direct reading instruction from the special education teacher outside of general education and 40 minutes per week of direct writing instruction from the special education teacher inside general education. *Id.*

43. Parents report that they and Private Provider were able to share their concerns and provide feedback throughout the meeting, and that their suggested revisions were incorporated into the annual goals. *Interview with Parents*. Parents agreed with the annual goals and service delivery statement. *Id.*
44. During the IEP meeting, Parents raised concerns regarding Student's mental health and anxiety that Student exhibited at home. *Interviews with Parents and SEIS; Id.* at p. 38. Parents requested that the District complete an evaluation of Student focused on social emotional concerns, and the District agreed to complete an evaluation. *Id.*
45. After consultation with School Psychologist and Manager of Social Work and School Psychology, the District determined that the evaluation would be delayed until the District returned to in-person instruction because the necessary assessments were not valid in a remote setting. *Interviews with School Psychologist and SEIS; Response*, pp. 7-9. On April 29, 2020, District's Attorney shared this information with Parents' Attorney. *Interview with Parents' Attorney; Exhibit 2*, p. 7.
46. School Psychologist prepared PWN regarding the District's decision, but the document was not delivered to Parents or Parents' Attorney due to an oversight. *Interviews with School Psychologist and SEIS*. Parents did not receive a copy of the PWN until August 12, 2020. *Interview with Parents*.

F. The Contingency Plan for Remote Learning

i. District Policies and Practices Regarding Contingency Plans for Remote Learning

47. District developed contingency plans for remote learning for all special education students to document any changes, such as changes in the delivery of services and accommodations, and to document the District's efforts to provide FAPE to the greatest extent possible during the period of remote learning. *Interview with SEIS; Exhibit O*, p. 1. A contingency plan was not intended to replace an IEP but was, instead, a temporary measure to cover instructional changes during remote learning. *Interview with SEIS*.
48. Special education teachers and other providers were instructed to prepare draft contingency plans for remote learning and share and discuss the plans with parents. *Id; Exhibit O*, pp. 7, 14. If parents agreed with the plan, then staff were instructed to implement it. *Id.* If parents did not agree with the plan, then staff were instructed to schedule an IEP meeting to discuss the plan. *Id.*
49. Additionally, District staff were provided with templates for the creation of contingency plans, which were structured as a PWN. *Interview with SEIS; Exhibit O*, pp. 1-15. The templates include sections for each of the student's IEP goals and documentation of whether staff plan to work on the goal during remote learning, 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.*

50. 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 contingency plan, how the family was contacted, and whether the plan was developed through agreement or an IEP meeting. *Id.*

- ii. The Development of Student's Contingency Plan for Remote Learning

51. Prior to the April 16, 2020 IEP meeting, Special Education Teacher 2 prepared a draft Contingency Plan for Remote Learning (CPRL) for Student, which she emailed to Parents on April 13, 2020. *Interview with Special Education Teacher 2; Exhibit L, p. 71.* The draft CPRL was incomplete when Parents received it because Student's annual goals and services had not been finalized. *Interviews with Parents and Special Education Teacher 2.* For example, the draft CPRL did not include service minutes. *Interview with Parents.*
52. Special Education Teacher 2 informed Parents that the draft plan would be discussed during the April 16, 2020 IEP meeting. *Interviews with Special Education Teacher 2 and Parents.* However, the IEP Team ran out of time during the meeting and was not able to discuss it. *Id.* Special Education Teacher 2 offered to reach out to parents after the meeting to create the contingency plan. *Interview with Special Education Teacher 2.*
53. On April 17, 2020 and April 20, 2020, Speech Language Pathologist corresponded with Parents regarding Student's CPRL, and she and Parents determined that Speech Language Pathologist would implement Student's communication goal and services as written in the IEP. *Interviews with Speech Language Pathologist and Parents; Exhibit A, p. 28.* Speech Language Pathologist updated the CPRL to reflect the agreement with Parents. *Interview with Speech Language Pathologist.*
54. The Family Contact Log in the CPRL indicates that Special Education Teacher 2 and Parents developed the plan on April 22, 2020, when an email was sent to Parents about service time and development. *Exhibit A, p. 28.*
55. However, when Special Education Teacher 2 emailed Parents on April 22, 2020, the CPRL was still being developed. *Exhibit L, p. 43.* In her email, Special Education Teacher 2 stated that she would like to start working with Student on Tuesdays and Thursdays from 11:00 a.m. to 11:30 a.m. in a small group via Google Meet. *Id.* However, she did not discuss goals, how she would work on them, or how progress would be monitored. *Id.*
56. Instead, Special Education Teacher 2 said, "I am working on [Student's] contingency plan which will outline how I will support during remote learning. Due to the nature of remote learning, some components of the IEP may differ." *Id.* Special Education Teacher 2 does

not recall further communication with Parents on April 22, 2020. *Interview with Special Education Teacher.*

57. On April 29, 2020, Special Education Teacher 2 met with Parents virtually and provided guidance on navigating general education classroom platforms and using the Read & Write screen reader. *Interviews with Parents and Special Education Teacher 2.* They decided that instead of working on Student's writing goal as written, Special Education Teacher 2 would focus on supporting Student with technology to help him access writing and classroom assignments. *Id.*; *Exhibit A*, pp. 26, 28. This discussion is documented in the CPRL and Special Education Teacher 2's service log. *Id.*; *Exhibit C*, p. 4.
58. During this conversation, Special Education Teacher 2 also discussed with Parents that Student's IEP goals and service minutes would otherwise remain the same. *Interviews with Special Education Teacher and Parents.*
59. The final contact documented in the Family Contact Log is an email sent by Special Education Teacher 2 to Parents on May 7, 2020 to schedule a time to meet with Student weekly to support him with technology. *Exhibit 2*, p. 31. Parents did not respond to this email, and Special Education Teacher 2 did not make further attempts to contact Parents regarding scheduling. *Interviews with Parents and Special Education Teacher 2.*
60. The CPRL created by Special Education Teacher 2 contains all of the annual goals in the April 16, 2020 IEP. *Exhibit A*, pp. 13-17, 26. However, there is a discrepancy between the service minutes in the IEP and the service minutes in the CPRL. *Id.* The IEP requires 40 minutes per week of direct writing instruction, but the CPRL provides for only 30 minutes per week of writing instruction. *Id.*
61. Special Education Teacher 2 could not explain why this reduction in service minutes was made, and she did not discuss it with Parents. *Interviews with Special Education Teacher 2 and Parents.* Special Education Teacher 2 indicated that the discrepancy could have been the result of a typographical error. *Interview with Special Education Teacher.*
62. On May 6, 2020, Parents' Attorney sent a letter to District's Attorney in which she requested confirmation regarding whether the draft CPRL provided to Parents on April 13, 2020 would be finalized and remain in effect during remote learning. *Exhibit 2*, pp. 8-9. *Id.* As of May 6, 2020, Parents had not received a finalized copy. *Id.*; *Interviews with Parent and District's Attorney.*
63. On May 11, 2020, Special Education Teacher 2 emailed District's Attorney a copy of Student's CPRL, as well as procedural safeguards, and she requested that District's Attorney send the documents to Parents' Attorney. *Exhibit Q*, pp. 11-12. District's Attorney reported that due to an oversight, she did not provide the documents to Parents' Attorney. *Interview with District's Attorney.*

64. In a May 21, 2020 letter to District's Attorney, Parents' Attorney reiterated that Parents had still not received a finalized copy of the CPRL. *Exhibit 2*, p. 12. Parents did not receive a finalized copy or PWN until it was provided on June 16, 2020 in response to a records request. *Interviews with Parents and District's Attorney*. SEIS and other staff interviewed were not aware of other occasions in their experience in which PWN or contingency plans were not provided to parents during the period of remote learning. *Interviews with SEIS and Special Education Teacher 1*.

G. Implementation of the April 16, 2020 IEP and CPRL

65. District special education teachers have access to IEPs through the Enrich online program. *Interviews with Special Education Teacher 2 and SEIS*. During the period of remote learning, which began on April 7, 2020, contingency plans were uploaded into Enrich and accessible there. *Id.*
66. Special Education Teacher 2 had access to Student's April 16, 2020 IEP and CPRL through Enrich and was familiar with their contents. *Interview with Special Education Teacher 2*. Special Education Teacher 2 tracked the services provided to Student during remote learning in a service log. *Id.*; *Exhibit C*, pp. 4-6.
67. The April 16, 2020 IEP requires that Student receive 60 minutes per week of direct reading instruction and 40 minutes per week of direct writing instruction, and the CPRL required 60 minutes per week of direct reading instruction and 30 minutes per week of direct writing instruction. *Exhibit A*, pp. 20, 26.
68. During the weeks April 20, 2020, May 4, 2020, May 18, 2020, and May 25, 2020, Student received a total of only 60 minutes per week of specialized instruction from Special Education Teacher 2. *Interview with Special Education Teacher 2; Exhibit C*, pp. 4-6.
69. The service log indicates that Special Education Teacher 2 provided reading instruction during each of those four weeks, but Special Education Teacher 2 reported that she incorporated writing into some of her reading instruction with Student. *Id.*
70. During the week of May 11, 2020, Special Education Teacher 2 was out sick and did not provide any specialized instruction to Student. *Id.*
71. When asked about why she did not provide the instruction required by the April 16, 2020 IEP, Special Education Teacher 2 reported that Parents never responded to her May 7, 2020 email to schedule meetings to support Student's use of technology. *Interview with Special Education Teacher 2*. Special Education Teacher 2 added that she should have made more than one attempt to contact Parents regarding scheduling, and SEIS stated that it is the District's practice that staff make three attempts to contact, on three separate dates, using three different methods. *Interviews with Special Education Teacher 2 and SEIS*.

72. Despite the missed services during the period of remote learning, progress monitoring reports reveal that Student made significant progress. *Interviews with Literacy Teacher, Special Education Teacher 2, and SEIS; Exhibit G*, pp. 12-13; *Exhibit J*, pp. 5-7. From March 2020 to May 2020, Student's scores on the iStation assessment increased 39 points in reading comprehension, and Student was performing at grade level. *Id.* Student remained at grade level in vocabulary, and his score increased four points to 299. *Id.* Per iStation norms, growth of eight or more points in a three-month period is considered high. *Interview with SEIS; Exhibit D*, p. 20.
73. Although Student remained significantly below grade level in spelling and text fluency, his score in spelling increased six points to 209, and his text fluency score increased 21 points, from 0 to 21. *Interviews with Literacy Teacher, Special Education Teacher 2, and SEIS; Exhibit G*, pp. 12-13; *Exhibit J*, pp. 5-7. Overall, Student moved from the category Tier 3 (significantly below grade level) to Tier 1 (grade level), with an overall iStation score of 254. *Id.*

H. The Contingency Plan for ESY

74. At the April 16, 2020 IEP meeting, the IEP Team determined that Student was eligible for ESY after discussion with Parents and Private Provider regarding concerns around generalization and the need for repetition. *Interviews with Parents, SEIS, and Special Education Teacher 2; Exhibit A*, p. 39. Although the District's data indicated only mild regression, the IEP Team agreed to qualify Student for ESY under one predictive factor, generalization. *Id.* The IEP Team agreed to reconvene to discuss service minutes and duration pending developments regarding the COVID-19 pandemic. *Id.*
75. On May 19, 2020, SEIS emailed Parents and Parents' Attorney a draft Contingency Plan for ESY (CPESY). *Interview with SEIS; Exhibit 2*, p. 10. She requested that Parents review the information and offered that they could collaborate via email to discuss questions or concerns, or schedule a meeting. *Id.*
76. On May 21, 2020, Parents' Attorney sent a letter to District's Attorney expressing that Parents objected to the draft CPESY. *Exhibit 2*, pp. 12-13.
77. In response to Parents' Attorney's email, an IEP meeting was scheduled on May 27, 2020 to discuss the draft CPESY. *Interviews with SEIS and Parents.*
78. Notice of Meeting was not provided in advance of the meeting, but the virtual meeting was scheduled at a mutually agreed upon time. *Interviews with Parents and SEIS.* Parents, Parents' Attorney, and Private Provider were all in attendance. *Id.*
79. The IEP Team met over the course of two days, on May 27, 2020 and May 28, 2020, to allow for a full discussion. *Interviews with Parents, SEIS, and Special Education Teacher.*

The IEP Team reviewed the draft CPESY and discussed Parents' concerns. *Id.* Parents requested three changes to the CPESY. *Id.*

80. First, Parents requested that the weekly service minutes in the plan be increased from the 30 weekly reading minutes and 20 weekly writing minutes reflected in the draft. *Id.* After discussion, the IEP Team agreed to provide 60 weekly minutes of reading and 40 weekly minutes of writing equivalent to the service minutes in the April 16, 2020 IEP. *Id.*
81. Second, Parents requested that Student's services be provided through live, virtual instruction, and the IEP Team agreed. *Id.* Third, Parents requested that Student receive extended ESY services for nine weeks instead of the four weeks proposed by the District. *Id.* Parents, Parents' Attorney, and Private Provider argued that without consistent access, children with dyslexia show regression and recoupment needs. *Id.*
82. However, the District's data indicated that Student had not shown regression or recoupment needs over multiple school breaks and during remote learning. *Interviews with SEIS and Special Education Teacher 2.* Parents attributed Student's progress to tutoring sessions with Private Provider. *Interviews with Parents, Special Education Teacher 2, and SEIS.* After discussion, the District declined to provide extended ESY services and offered four weeks of ESY. *Id.* Parents were not in agreement. *Id.*
83. On May 29, 2020, Parents' Attorney emailed District's Attorney and shared her expectation that the PWN would accurately reflect the basis of the disagreement concerning the duration of ESY services. *Exhibit 2*, p. 15. Parents' Attorney provided a statement from Parents regarding their disagreement. *Id.* Parents' Attorney also requested that the PWN reflect Parents' expectation that the ESY teacher use structured literacy and multi-modality/sensory instruction and that the ESY teacher communicate with Special Education Teacher 2. *Id.*
84. On June 8, 2020, District's Attorney provided Parents' Attorney with a copy of the CPESY and PWN. *Exhibit 2*, p. 16.
85. The CPESY and PWN did not include the statements provided by Parents' Attorney in the May 29, 2020 email, and they did not specify the number of minutes of writing instruction that Student would receive during ESY. *Exhibit G*, pp. 10-13. The PWN did include a description of District's refusal to provide ESY for the full duration of the summer, the reasons for the refusal, a description of the bases for the refusal, a statement that Parents have protection under procedural safeguards, and a description of other options considered and the reasons for the rejection. *Id.*
86. In the District's Response, the District offered to reissue an amended PWN containing the language proposed by Parents' Attorney. *Response*, p. 10; *Reply*, p. 8. Parents' Attorney asserts that this issue will be resolved upon issuance. *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 did not fail in its Child Find duty to identify and evaluate Student between September 5, 2019 and December 13, 2019.

The IDEA mandates that school districts have in effect procedures to locate, identify, and evaluate all children with disabilities who may be in need of special education and related services. 34 C.F.R. § 300.111(a). In Colorado, the child identification process “shall include child find, special education referral, initial evaluation, and determination of disability and eligibility for special education.” ECEA Rule 4.02(1)(a)(ii). The district in which the child attends school retains responsibility for child identification. *Id.*

An essential element of child identification is the special education referral, which places upon school districts an affirmative obligation to evaluate a child where there is reason to suspect a qualifying IDEA disability and a need for special education and related services. 34 C.F.R. § 300.111(c); ECEA Rule 4.02(1)(a). The threshold for suspicion of a disability is relatively low, and the inquiry is not whether the child actually has a disability or qualifies for special education services, but whether the child should be referred for an evaluation. *State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001). Suspicion “may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation.” *Smith v. Cheyenne Mountain Sch. Dist. 12*, 2017 WL2791415, at *18 (D. Colo. 2017) (quoting *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)).

The actions of a school district in terms of whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of the information that it knew, or had reason to know, at the relevant time. *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). It should not be based on hindsight. *Id.*; see also *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). School districts must systematically seek out IDEA-eligible students and may not take a passive approach and wait for others to refer students for special education. *Compton Unified Sch. Dist. v. Addison*, 54 IDELR 71 (9th Cir. 2010), *cert. denied*, 112 LRP 1321, 132 S. Ct. 996 (2012).

Remaining vigilant for red flags and referring students who may have a disability and need special education, is part of this ongoing obligation. *Arapahoe County Sch. Dist. 5*, 117 LRP 2988 (SEA CO 12/21/16) (citing *Cincinnati City Schools*, 115 LRP 26069 (SEA OH 5/07/15)). Absent a test in *Cari Rae S.* or the Tenth Circuit defining a relatively low threshold, an analysis of a case’s individual circumstances will determine if they collectively raised a reasonable suspicion that a school district should have referred a student for an initial evaluation. *Weld RE-4 Sch. Dist.*, 119 LRP 5662 (SEA CO 1/2/19) (citing *Clark County Sch. Dist.*, 114 LRP 45477 (SEA NV 8/28/14)).

School districts are not required to evaluate every child showing substandard capacity, “. . . especially at a time when young children are developing at different speeds and acclimating to the school environment.” *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 252 (3d Cir. 2012) (holding that a delay in evaluating a grade schooler with a history of academic and behavioral problems was appropriate in light of the child’s age and progress he made with accommodations and support services). Liability for child find obligations is imposed only where there are clear notifications or a “reason to believe” that a school district should take action. *Id.* at p. 243.

The child identification process is not contravened where a district considers a response to intervention (RTI) prior to referring a student for an evaluation. *See Letter to Ferrara*, 60 IDELR 46 (OSEP 2012). RTI is a “schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors.” *Memo to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011). RTI cannot be used to delay or deny a timely initial evaluation. *Id.*

The findings here show that District did not have a reason to suspect that Student had a qualifying IDEA disability and a need for special education services in the 115 days leading up to his evaluation referral on December 13, 2019. (FF #3-28).

As discussed in FF #s 3-9, when Student entered School on August 20, 2019 it was the first time that he had attended a formal school on a regular basis. Prior to enrollment, he had been homeschooled, and the District had no academic data from his time in homeschool. Parents shared their concerns regarding Student’s reading, writing, and speech in August 2019, and their suspicion that Student may suffer from a disability. Based on the description of Student’s homeschool curriculum, though, District staff had concerns regarding a potential lack of instruction. Also, he was transitioning into a structured, formal school setting for the first time.

Student performed significantly below grade level on the iStation assessment administered on September 5, 2019. However, School had only been in session for 12 days at the time of the assessment. Additionally, Student was absent nine days and arrived late seven times during the first semester. Nevertheless, after instruction and interventions implemented during the first five weeks of school, Student made progress. From September 5, 2019 to October 2, 2019, Student’s reading comprehension score increased by six points. His vocabulary score improved by 43 points to reach grade-level performance. Additionally, Student grew from reading at pre-kindergarten level on Reading A to Z passages to reading at a first-grade reading level with 89% accuracy and 100% comprehension.

On September 24, 2019, when Parents expressed concerns regarding Student’s progress and challenges in school, District staff had only worked with Student for 25 school days. (FF #3, 12-13). They scheduled an MTSS meeting in response to Parents’ email and initiated Tier 2 interventions. (FF #14-15). Parents agreed with the plan. It was not until October 10, 2019 and October 25, 2019 that Parents requested an evaluation. (FF #19-20). Despite Student’s

performance on standardized testing and Parents' concerns and request for evaluation, a 51 calendar-day (37 school day) period of instruction with a new student, to include a transition from homeschool and no previous data, was not sufficient to create a reasonable suspicion that District should refer Student for an initial evaluation at the time of Parents' request. Although the District was not obliged to evaluate Student at this time, the District was required to provide Parents with PWN and procedural safeguards, as discussed in greater detail below.

During the approximately two-month period between Parents' requests for evaluation and the evaluation referral, Student continued to make progress in response to the Tier 2 interventions implemented through MTSS. As shown in FF #s 18, 27-33, Student made progress throughout the MTSS and evaluation process. From September 2019 to November 2019, Student's reading comprehension score increased by eight points, from 184 to 192. His vocabulary score increased by 50 points, from 223 to 273, and he was at grade level in vocabulary by November 2019. From November 4, 2019 to February 3, 2020, his vocabulary score improved by 25 points, his reading comprehension score improved by 11 points, and his spelling score improved by 23 points. Per iStation norms, growth of eight or more points in a three-month period is considered high. Additionally, from August 2019 to January 2020, Student improved from reading at a pre-kindergarten level to Level I, which is equivalent to the end of first grade.

At the MTSS meeting on December 13, 2019, Parents repeated their request for evaluation. (FF #28). District agreed to make the evaluation referral less than four months after Student started school because although Student made progress, he was still performing significantly below grade level. (FF #29-30). Given the lack of academic data from Student's homeschooling, his transition into formal schooling, concerns about a lack of instruction, and his progress in response to interventions, District did not have reason to suspect that Student had a qualifying IDEA disability and a need for special education services in the 115 days leading up to the referral.

Accordingly, the SCO finds and concludes that District did not fail in its duty to identify and evaluate Student between September 5, 2019 and December 13, 2019.

Conclusion to Allegation Nos. 2 and 3: District failed to provide Parents with PWN and procedural safeguards following Parents' requests for an initial evaluation on October 10, 2019 and October 25, 2019, and failed to provide Parents with PWN following Parents' request for an evaluation on April 16, 2020, in violation of 34 C.F.R. §§ 300.503 and 300.504(a)(1).

The parent of a child may request an initial IDEA evaluation, the purpose of which is: (1) to determine whether the child has a disability, and because of the disability needs special education and related services, and (2) to help the IEP team determine the child's specific needs. 34 C.F.R. §§ 300.301(b) and 300.304(b)(1)(i)-(ii); ECEA Rule 4.02(3)(a). If a parent requests an evaluation, the school district has two options: (1) agree to evaluate the child and

obtain parental consent to conduct the evaluation, or (2) deny the request to evaluate and provide parent with written notice explaining its decision. *Poudre School District*, 118 LRP 28104 (SEA CO 2/5/18).

The IDEA “does not require parents to use specific language when requesting an evaluation.” *Renaissance Acad.*, 115 LRP 9496 (SEA OH 2/11/15). However, “school districts should not be expected to recognize and respond to any parental request for testing as a request for a special education evaluation.” *El Paso County Sch. Dist. 3, Widefield*, 60 IDELR 117 (CO SEA 11/1/12).

i. Parents’ Requests for an Initial Evaluation

Here, Parents assert that they requested District evaluate Student on September 24, 2019, October 10, 2019, and October 25, 2019. The SCO finds and concludes that District was obliged to either conduct an initial evaluation or deny the request to evaluate and provide prior written notice after Parents’ requests on October 10 and October 25.

As discussed in FF #s 12-13, on September 24, 2019, Parents emailed District staff and expressed concerns regarding Student’s progress, as well as their desire that he receive more support. Although the IDEA does not require Parents to use specific language when requesting an evaluation, Parents’ email contains a request for supports, not an evaluation. The actions taken by Parents and District following the September 24, 2019 email, described in FF #s 10-16, provide further evidence that Parents did not request an evaluation on September 24, 2019.

In response to Parents’ email, District staff scheduled a meeting with Parents to discuss their concerns and the MTSS process. Parents and District staff met on October 4, 2019, and District staff listened to Parents’ concerns and explained the MTSS process. In their email, Parents requested supports, and District agreed to provide them. The MTSS team agreed to initiate MTSS, Tier 2 interventions, and a speech and language screen, and Parents agreed with the plan. Therefore, the SCO finds and concludes that Parents did not request an evaluation on September 24, 2019.

The SCO next considers Parents’ requests for evaluation on October 10 and October 25. As demonstrated in FF #s 19-22, Parents explicitly requested a special education evaluation on October 10 and October 25.

On October 10, 2019, Parents emailed multiple School staff and requested that a formal assessment “be moved up” and that specific assessments be completed “as soon as possible.” (FF #19). District scheduled a meeting on October 25, 2019 in response to Parents’ email, and in the meeting, Parents repeated their request for an evaluation. (FF #20-22). Instead of providing Parents with consent for an initial evaluation or PWN and procedural safeguards, Special Education Generalist emphasized the importance of data collection.

By October 25, Parents made at least two explicit requests for a special education evaluation. The IDEA required that District initiate the evaluation or provide PWN explaining its decision to not evaluate, along with procedural safeguards. Because the District declined to evaluate Student here, it was obligated to provide PWN and procedural safeguards. The District failed to do so. As now discussed, District acted in violation of 34 C.F.R. §§ 300.503 and 300.504(a)(1) when it failed to provide PWN and procedural safeguards in response to Parents' requests for an initial evaluation on October 10, 2019 and October 25, 2019.

ii. District's Failure to Provide PWN and Procedural Safeguards

The IDEA requires that PWN 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).

Failure to provide prior written notice within a reasonable time before refusing to initiate or change a student's identification 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). Moreover, the IDEA specifically provides that a procedural safeguards notice must be given to parents upon initial referral or parent request for evaluation. 34 C.F.R. § 300.504(a)(1).

Parents here allege that District failed to provide PWN and procedural safeguards following their requests for an initial evaluation on October 10, 2019 and October 25, 2019, and FF #s 19-23 support their allegations. Special Education Generalist admitted that she did not provide these documents to Parents in response to their requests, nor did any other staff. Special Education Generalist and SEIS both acknowledged that PWN and procedural safeguards should have been provided within a reasonable time before District declined to evaluate Student. Thus, the SCO finds and concludes that District failed to provide Parents with PWN and procedural safeguards following Parents' requests for an initial evaluation on October 10, 2019 and October 25, 2019, in violation of 34 C.F.R. §§ 300.503 and 300.504(a)(1).

Parents also allege that District failed to provide PWN after Parents' request for a social emotional evaluation on April 16, 2020, and FF #s 44-46 show that District failed to provide PWN within a reasonable amount of time. Parents requested an evaluation for Student on April 16, 2020, and Parents were not provided with PWN regarding District's decision to delay the

evaluation until August 12, 2020. The IDEA requires that notice be provided so that parents have enough time to fully consider and respond to an action before it is implemented. Here, the decision was made in April. PWN was not provided until nearly four months later, and certainly not within enough time for Parents to fully consider and respond before the evaluation was delayed. Accordingly, the SCO finds and concludes that District failed to provide Parents with PWN within a reasonable amount of time following Parents' request for an evaluation on April 16, 2020, in violation of 34 C.F.R. § 300.503.

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).

For the reasons outlined in the Conclusion to Allegation No. 5, the procedural violations here significantly impeded Parents' opportunity to participate in the decision-making process, in violation of 34 C.F.R. § 300.513(a)(2); *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10th Cir. 1996).

Conclusion to Allegation No. 4: District failed to provide Parents with a PWN containing the required content on June 8, 2020, in violation of 34 C.F.R. § 300.503.

The IDEA requires that PWN include each of the following:

- (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 the district used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, 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 provisions of this part;
- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (7) A description of other factors that are relevant to the district's proposal or refusal.

34 C.F.R. 300.503(b).

PWN must provide sufficient detail to allow parents to participate in their child's educational services decisions in an informed way. See *Douglas County School Dist.*, 118 LRP 35788 (SEA CO

7/6/18); *In re Student with a Disability*, 115 LRP 24735 (SEA IL 05/15/15); *Fern Ridge Sch. Dist. 28J*, 16 IDELR 676 (SEA OR 1990).

Here, Parents assert that the PWN provided by District on June 8, 2020 did not contain the required content under 34 C.F.R. § 300.503, and FF #s 83-85 support their assertion. While the PWN provided by the District contains most of the required components, the SCO finds and concludes that it does not contain a sufficient description of the services proposed under the CPESY because it fails to specify the number of minutes of direct writing instruction to be provided during ESY. Without providing this information regarding proposed services, the PWN fails to provide detail sufficient to allow Parents to participate in Student's educational services in an informed way. Thus, the SCO finds and concludes that District failed to provide a sufficient PWN containing the required content on June 8, 2020, in violation of 34 C.F.R. § 300.503.

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 impede Student's right to a FAPE, impede parent participation, or deprive Student of an educational benefit, in violation of 34 C.F.R. § 300.513(a)(2); *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10th Cir. 1996).

Here, the circumstances surrounding the IEP Team's discussions of Student's ESY services were sufficient to put Parents on notice. (FF #75-83). Parents, their counsel, and their private provider participated in two IEP meetings during which the CPESY was developed. Parents meaningfully participated in the discussion. Parents were aware of and agreed upon service minutes for ESY, and Parents were aware of District's decision regarding the duration of ESY and the bases for that decision. Despite the lack of sufficiently detailed notice, Parents were fully informed regarding the actions taken and refused at the May 27 and May 28 IEP meetings. Finally, District has offered to reissue an amended PWN containing the language proposed by Parents and their attorney. (FF #86). Parents' Attorney asserts that this issue will be resolved upon issuance. Thus, the SCO finds and concludes that this procedural violation did not amount to a violation of FAPE.

Conclusion to Allegation No. 5: District deprived Parents of meaningful participation in the IEP process by failing to timely provide Parents with a copy of the CPRL and PWN notifying them of a change in the provision of FAPE during the COVID-19 pandemic, in violation of 34 C.F.R. § 300.503(a).

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.*

Essential to a parent's ability to participate in the development of his or her child's educational program is the procedural requirement that the school district provide PWN a reasonable amount of time before it makes substantial changes to the student's educational program. 34 C.F.R. § 300.503(a); *Letter to Chandler*, 59 IDELR 110 (OSEP 2012).

With respect to the provision of FAPE during the COVID-19 pandemic, the U.S. Department of Education issued guidance on March 12, 2020 to advise that IEP Teams may, but are not required to, include distance learning plans in a student's IEP to give "the [student's] service providers and the [student's] parents an opportunity to reach agreement as to what circumstances would trigger the use of the [student's] distance learning plan and the services that would be provided during the dismissal." *Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease Outbreak*, 76 IDELR 77 (EDU 2020).

In April 2019, CDE provided guidance regarding the provision of FAPE during suspension of in-person instruction, recommending consultation with parents consistent with federal guidance. *Special Education & COVID-19 FAQs* at www.cde.state.co.us/cdesped/special_education_faqs. The guidance advises, in part: "[r]ecognizing that exceptional circumstances may affect how educational services are provided, FAPE may include special education and related services provided through distance instruction deemed reasonable and appropriate for a specific student, *in consultation with parents . . .*" *Id.* (emphasis added).

i. Parent Participation in the Development of the CPRL

Here, FF #s 51-64 show that Parents were not timely provided with a copy of the CPRL and PWN notifying them of a change in District's provision of FAPE for Student. These actions impeded Parents' ability to monitor and enforce Student's services during remote learning.

As discussed in FF #s 57-58, Special Education Teacher 2 met virtually with Parents regarding the development of Student's CPRL on April 29, 2020. Parents and Special Education Teacher 2 discussed modifying Student's writing goal to focus on supporting access to technology. Special Education Teacher 2 informed Parents that Student's other annual goals and services would remain the same as in the IEP. Parents agreed. However, FF #s 60-61 show that the finalized CPRL does not reflect the changes discussed with Parents. Specifically, there is a discrepancy between the service minutes in the IEP and the service minutes in the CPRL. The IEP requires 40 minutes per week of direct writing instruction, but the CPRL provides for only 30 minutes per week of writing instruction. This change was not discussed with or agreed to by Parents. It was more than likely the result of an oversight, as indicated by Special Education Teacher 2.

The finalized version of the CPRL and PWN was not provided to Parents until after the CPRL was no longer in effect. (FF #62-64). On May 6, 2020, Parent's Attorney made her first request for a copy of the CPRL. On May 21, 2020, Parent's Attorney reiterated that Parents had not been provided with a finalized copy. Parents did not receive a finalized copy until June 16, 2020, after the CPRL had been implemented and was no longer in effect. The failure to provide Parents with a finalized copy of the CPRL and PWN was also due to an oversight.

The combination of the District's modification of Student's services without Parents knowledge and the failure to provide Parents with a finalized copy of the CPRL and PWN notifying them of the change in District's provision of FAPE deprived Parents of the ability to meaningfully participate in the monitoring and enforcement of Student's services. Without a copy of the CPRL and PWN, Parents were not aware of the modified services offered and could not verify that their son was receiving the services to which he was entitled.

Therefore, the SCO finds and concludes that Parents were not timely provided with a copy of the CPRL and PWN notifying them of the change in District's provision of FAPE, in violation of 34 C.F.R. § 300.503(a).

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).

Here, the cumulative effect of this violation and District's repeated failures to provide PWN after Parents' requests for evaluation significantly impeded Parents' opportunity to participate in the decision-making process, as well as interfered with their ability to monitor and enforce Student's IEP, in violation of 34 C.F.R. § 300.513(a)(2); *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10th Cir. 1996). Accordingly, the SCO finds and concludes that District's procedural violations amounted to a violation of FAPE.

ii. Parent Participation in the Development of the CPESY

Parents allege that District failed to consider their concerns in the development of the CPESY, but the findings do not support their allegations. For example, FF #s 74-82 show that Parents' feedback was meaningfully considered. Parents were provided with a copy of the draft CPESY on May 19, 2020 and were invited to collaborate via email to discuss questions or concerns, or to schedule a meeting. When Parents objected to the draft, an IEP meeting was scheduled on May 27, 2020 at the request of Parents, and a second meeting was scheduled on May 28, 2020 to allow for a full discussion. Although Parents were not provided with a Notice of Meeting, in violation of 34 C.F.R. § 300.322(a)(1), the meeting was scheduled at a mutually agreed upon time and virtual location, consistent with 34 C.F.R. § 300.322(a)(2). Parents, Parents' Attorney, and Private Provider were in attendance.

Moreover, Parents confirmed that during the meeting they and Private Provider were given opportunities to share concerns, ask questions, and provide feedback regarding the CPESY. In fact, the District incorporated Parents' feedback into the CPESY by agreeing to increase Student's reading and writing service minutes commensurate with the April 16, 2020 IEP, and by agreeing to provide instruction through live, virtual sessions.

The only proposal that District did not agree to adopt was Parents' request for nine weeks of ESY, which the District declined to provide because Student had not shown regression or recoupment needs over multiple breaks and during remote learning. As discussed in FF #s 7, 18, 27-29, 31-33, 72-73, Student made progress throughout the school year. Meaningful consideration does not require that the District simply agree to Parents' requests. With respect to the duration of ESY, the District did not agree with Parents, but the evidence shows that the IEP Team was receptive to their concerns and requests. (FF #74-82).

For these reasons, the SCO finds and concludes that District provided Parents with meaningful participation in the IEP development process on May 27, 2020 and May 28, 2020.

Conclusion to Allegation No. 6: District failed to properly implement Student's IEP during the period of remote learning by failing to provide Student with 100 minutes of direct, specialized literacy instruction per week during the weeks of April 20, 2020, May 4, 2020, May 11, 2020, May 18, 2020, and May 25, 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 provides that 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. *Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease Outbreak*, 76 IDELR 77 (EDU 2020).

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.

In evaluating the alleged failure to implement here, the SCO must first consider whether Special Education Teacher 2 had knowledge of the IEP. As discussed in FF #s 65-66, all special education teachers in District have access to their students’ IEPs and contingency plans through Enrich. Special Education Teacher 2 reported that she accessed both the April 16, 2020 IEP and CPRL through Enrich, and she was familiar with their contents. Based on this evidence, the SCO finds and concludes that Special Education Teacher 2 had knowledge of the IEP and CPRL. The SCO must next consider whether Special Education Teacher 2 provided Student with specialized instruction as required by the IEP and CPRL.

In this case, Parents allege that District failed to provide Student with 100 minutes of direct, specialized literacy instruction per week during remote learning—specifically, during the weeks of April 20, 2020, May 4, 2020, May 11, 2020, May 18, 2020, and May 25, 2020—and FF #s 67-71 support their allegations. Special Education Teacher 2 admitted that she only provided Student with 60 minutes per week of direct instruction during the weeks of April 20, 2020, May 4, 2020, May 18, 2020, and May 25, 2020, and that she provided no direct instruction to Student during the week of May 11, 2020 because she was out sick. Overall, Special Education Teacher failed to provide a total of 260 minutes of specialized instruction to Student, the bulk of which was direct writing instruction, as indicated by Special Education Teacher 2’s service log.

Accordingly, the SCO finds and concludes that District failed to implement the IEP by failing to provide Student with 100 minutes of direct, specialized literacy instruction per week during the weeks of April 20, 2020, May 4, 2020, May 11, 2020, May 18, 2020, and May 25, 2020. The SCO must now determine whether District’s failure to implement the IEP and CPRL was material.

The SCO acknowledges that during this time period, District and Special Education Teacher 2 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 learning due to a global pandemic. (FF #47-50). Special Education Teacher 2’s failure to implement amounted to a loss of 260 total minutes of specialized instruction over this two-month period, or approximately 4.33 hours. (FF #68-70). Special Education Teacher 2 reports that the 60 weekly minutes of instruction that she provided to Student generally consisted of a combination of reading and writing instruction.

As discussed in FF #s 72-73, progress monitoring during the period of remote learning shows that despite the missing services, Student continued to make significant growth. From March 2020 to May 2020, Student's scores on the iStation assessment improved 39 points in reading comprehension, and Student was performing at grade level in reading comprehension. Student remained at grade level in vocabulary, and his score improved four points to 299. Additionally, his score in spelling improved six points to 209, and his text fluency score improved 21 points. Overall, Student moved from Tier 3 (significantly below grade level) to Tier 1 (grade level).

The findings show that District's failure to implement here constituted only a short gap in services, during the weight of the COVID-19 pandemic, which did not impact student's ability to benefit from his special education program given the demonstrated educational progress. Thus, the SCO finds and concludes that District's failure to implement Student's IEP was not a material violation and denial of FAPE.

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

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

In this case, the SCO finds and concludes that the procedural violations were not systemic in nature. As discussed in FF #s 23-26, District policies require that if a parent requests an evaluation, District staff must initiate an evaluation or timely provide PWN, consistent with the IDEA. The staff interviewed here confirmed their knowledge of District policies, and their understanding that staff did not act consistent with these policies in response to requests for evaluation in October 2019 and April 2020. They were not aware of other occasions in their experience in which staff failed to provide PWN after a parent requested an evaluation.

District policies also require parent participation in the creation of contingency plans for remote learning. (FF #47-50). Family Contact Logs are included in the District's contingency plan templates to document staff compliance with this policy. Special Education Teacher 2 did not act in accordance with District policies and practices when she developed Student's CPRL. (FF #47-50, 51-52, 54-64). However, Special Education Teacher 2 did attempt to initiate the discussion of the CPRL during Student's initial IEP meeting, and she sent a copy of the finalized plan to District's Attorney for delivery to Parents. SEIS and other staff interviewed were not

aware of other occasions in their experience in which PWN or contingency plans were not provided to parents during the period of remote learning. (FF #64).

Special Education Teacher 2 also acknowledged her failure to implement Student's IEP despite familiarity with the document and access to it through Enrich, as well as her failure to make multiple attempts to contact Parents consistent with District practice. (FF #66-71).

The findings during the period of remote learning—due to COVID-19—do not show that District has a widespread practice of failing to provide PWN and contingency plans to parents or failing to implement those plans. Rather, the findings show that many of the violations in this case were the result of oversights and challenges that occurred during a novel and particularly difficult time—a nationwide pandemic. (FF #44-46, 51-52, 54-64, 71). For the above reasons, the SCO thus finds and concludes that the evidence does not demonstrate a systemic violation.

REMEDIES

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

- a) Failing to provide PWN and procedural safeguards following Parents' requests for evaluation, in violation of 34 C.F.R. §§ 300.503 and 300.504(a)(1).
- b) Failing to provide Parents with sufficient PWN containing the required content, in violation of 34 C.F.R. § 300.503.
- c) Failing to provide PWN after changing the provision of FAPE to Student, in violation of 34 C.F.R. § 300.503.
- d) Failing to properly implement Student's IEP, in violation of 34 C.F.R. § 300.323.

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

1. By **October 16, 2020** the District must submit to CDE a proposed corrective action plan (CAP) that effectively addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to reoccur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
 - a. Comprehensive training for all special education personnel at School, in addition to any other School staff deemed appropriate by the District, on the requirements of 34 C.F.R. §§ 300.323, 300.503, and 300.504(a)(1), in accordance with this Decision, to address IEP implementation, parent requests for evaluation, the appropriate use of PWN and procedural safeguards, and the required components of PWN, no later than **November 20, 2020**.

- b. Training materials for the above-described training must be submitted to CDE for review and approval no later than **November 6, 2020**.
 - c. Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets, with roles noted) and provided to CDE no later than **December 4, 2020**. This training may be conducted in-person, or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.
2. The District shall provide Parents' counsel, or Parents, if they are no longer represented by legal counsel, with an amended June 8, 2020 PWN containing the language proposed by Parents' Attorney in her May 29, 2020 email and accurately reflecting Student's service minutes for writing instruction during ESY, by **September 25, 2020**. The District shall provide documentation to the Department that the PWN has been provided, no later than **October 2, 2020**.

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

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

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


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

CONCLUSION

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

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

Dated this 11th day of September, 2020.

A handwritten signature in black ink, appearing to read "Lindsey Watson", with a stylized flourish at the end.

Lindsey Watson
State Complaints Officer

Appendix

Complaint, pages 1-14

- Exhibit 1: IEP, meeting notes, and contingency plans
- Exhibit 2: Email correspondence
- Exhibit 3: PWN and contingency plans
- Exhibit 4: Evaluation reports
- Exhibit 5: Eligibility determination
- Exhibit 6: Service logs
- Exhibit 7: Board policy complaint

Response, pages 1-17

- Exhibit A: IEPs, contingency plans, and meeting notes
- Exhibit B: Recordings not provided because no meetings were recorded
- Exhibit C: Service logs
- Exhibit D: Evaluations
- Exhibit E: Eligibility determinations
- Exhibit F: Requests for consent
- Exhibit G: PWN
- Exhibit I: Grade reports
- Exhibit J: Progress reports
- Exhibit K: Medical information from Parents
- Exhibit L: Email correspondence
- Exhibit M: Contact information for District staff
- Exhibit N: District policies
- Exhibit O: Additional District policies and remote learning documents
- Exhibit P: ESY documentation
- Exhibit Q: Miscellaneous documentation
- Exhibit R: Additional policy documentation

Reply, pages 1-14

- Exhibit 8: Statements from other parents in District
- Exhibit 9: Documentation regarding Student's homeschooling

Telephonic Interviews with:

- Parents: August 19, 2020, August 23, 2020, and August 28, 2020
- School Nurse: August 20, 2020
- School Psychologist: August 20, 2020
- Special Education Generalist: August 20, 2020
- Special Education Teacher 2: August 21, 2020 and August 24, 2020
- Special Education Teacher 1: August 21, 2020
- SEIS: August 21, 2020, August 25, 2020, August 26, 2020, and September 4, 2020

- Literacy Teacher: August 21, 2020
- Speech Language Pathologist: August 21, 2020
- District's Attorney: August 24, 2020
- Parents' Attorney: August 27, 2020