

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

State-Level Complaint 2021:501
Jefferson County School District R-1

SECOND AMENDED DECISION

BACKGROUND

The parent (“Parent”) of a child (“Student”) identified as child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Jefferson County School District R-1 (“District”) on January 11, 2021.

The SCO determined that the Complaint identified 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. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

The Colorado Department of Education (“CDE”) has authority to investigate alleged violations of the IDEA that occurred not more than one year from the date the original complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, this investigation will consider only events that occurred not earlier than January 11, 2020 to determine whether a violation of the IDEA occurred. 34 C.F.R. § 300.153(c). Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

SUMMARY OF COMPLAINT ALLEGATIONS

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

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.

1. Failed to properly implement Student's IEP between January 11, 2020 and March 2020, specifically by:
 - a. Failing to provide the special education and related services required by Student's IEP, consistent with 34 C.F.R. §§ 300.34, 300.320(a)(4), and 300.323;
2. Failed to properly implement Student's IEP between March 2020 and May 2020 after the District suspended in-person learning due to the COVID-19 pandemic, specifically by:
 - a. Failing to provide the special education and related services required by Student's IEP, consistent with 34 C.F.R. §§ 300.34, 300.320(a)(4), and 300.323;
3. Failed to evaluate Student in all areas of suspected disability in May 2020, consistent with 34 C.F.R. §§ 300.303 and 300.304(c)(4);
4. Failed to develop an IEP in May 2020 that was tailored to meet Student's individualized needs, specifically by:
 - a. Failing to include an adequate behavioral intervention plan and by removing three of Student's goals despite his lack of progress, consistent with 34 C.F.R. § 300.324;
5. Determined Student's educational placement in May 2020 without considering the results of the May 2020 reevaluation or Parent's concerns, consistent with 34 C.F.R. §§ 300.116 and 300.324(b)(1).
6. Denied Parent meaningful participation in the May 15, 2020 IEP meeting where Student's IEP was developed, consistent with 34 C.F.R. §§ 300.321(a)(1) and 300.324(a)(1)(ii);
7. Failed to provide Parent with adequate prior written notice of the action taken by the District at Student's IEP meeting held on May 15, 2020, consistent with 34 C.F.R. § 300.503;
8. Failed to properly implement Student's IEP between the beginning of the 2020-2021 school year and September 8, 2020, specifically by:
 - a. Failing to provide the special education and related services required by Student's IEP, consistent with 34 C.F.R. §§ 300.34, 300.320(a)(4), and 300.323;
9. Failed to conduct a manifestation determination review ("MDR") within ten school days of the District's decision to change Student's placement on or around September 28, 2020, consistent with 34 C.F.R. § 300.530(e);

10. Failed to place Student in an appropriate interim alternative education setting from September 28, 2020 to the present, in violation of 34 C.F.R. §§ 300.530(g) and 300.531;
11. Failed to provide Parent with adequate prior written notice of the District’s decision to change Student’s placement on or around September 28, 2020, consistent with 34 C.F.R. § 300.503;
12. Failed to provide Parent with the procedural safeguards in conjunction with the District’s decision to change Student’s placement on or around September 28, 2020, consistent with 34 C.F.R. § 300.504(a)(3);
13. Amended Student’s IEP in September or October 2020 without agreement from Parent and outside of an IEP meeting, in violation of 34 C.F.R. § 300.324(a)(6); and
14. Failed to properly implement Student’s IEP between September 9, 2020 and the present, specifically by:
 - a. Failing to provide the special education and related services required by Student’s IEP, consistent with 34 C.F.R. §§ 300.34, 300.320(a)(4), and 300.323.

FINDINGS OF FACT

After thorough analysis of the entire record,² the SCO makes the following FINDINGS OF FACT (“FF”):

A. Background

1. Student is a seventh grader who receives remote instruction from a separate school operated by the District (“Separate School”). *Interview with Parent*. Separate School provides an individualized education in a therapeutic environment to support students’ social-emotional health. *Interview with Assistant Director of Special Education #1 (“Assistant Director #1”)*.
2. Student is eligible for special education and related services under the disability categories of Serious Emotional Disability (“SED”) and Other Health Impairment (“OHI”). *Exhibit A*, p. 33.
3. Parent and District staff describe Student as a personable, funny young man. *Interviews with Parent, Middle School Psychologist (“M.S. Psychologist”), Separate School Psychologist (“S.S. Psychologist”), Middle School Enrichment Teacher (“M.S. Enrichment Teacher”), and Middle School Learning Specialist (“M.S. Learning Specialist”)*. Student wants to do in well in school but has difficulty staying focused. *Id.* Social interactions

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

cause Student anxiety, and he often succumbs to peer pressure. *Id.* Student additionally struggles to regulate his emotions. *Id.*

B. Student's October 2019 IEP and BIP

4. Student's IEP dated October 11, 2019 ("2019 IEP") was in effect in January 2020, as Student began the second half of his sixth-grade year. *Exhibit A*, pp. 1-13. Under the 2019 IEP, Student qualified for special education and related services under SED only. *Id.* at 1.
5. The 2019 IEP reviewed Student's present levels of performance, noting that Student was generally motivated to work but struggled to advocate for himself in the classroom. *Id.* at pp. 4-5. Student also experienced anxiety related to social interactions with his peers and required support to engage with his peers. *Id.*
6. As noted in the 2019 IEP, Student's SED "impact[ed] his ability to perform and access his academics consistently. He struggle[d] with non-preferred task completion, getting his needs met appropriately, regulating his emotions, building relationships with adults, and interacting with peers appropriately." *Id.* at p. 7.
7. The 2019 IEP contained four goals targeting Student's reading, math, self-determination, and social/emotional wellness skills:
 - Reading: "[B]y Feb[.] 2020, [Student] will increase his accuracy and reading comprehension b[y] using decoding strategies . . . in order to read a DRA level 50 or other comparable measure with 95% accuracy and comprehension." *Id.* at p. 8.
 - Math: "When given direct instruction in multiplication and division, [Student] will be able to multiply and divide within 100 using different strategies . . . from a baseline of 20% accuracy to 80% accuracy." *Id.*
 - Self-Determination: "[Student] will get his needs met appropriately (e.g. in space, raising hand quietly, waiting patiently) instead of shouting out, leaving classroom, or refus[ing] to work, from a baseline of 20% [of] the time to 70% of the time throughout the day and as measured by direct observations." *Id.*
 - Social-Emotional Wellness: "When presented with a situation known by [Student] to be anxiety or frustrating producing for him (non-preferred task, unexpected obstacle, task perceived as too difficult), he will independently demonstrate an appropriate emotional response through finding a solution to his problem or using a strategy to regulate back to an expected emotional state (take a break, talk with a teacher, etc.) and return to the academic setting with 70% accuracy as measured by direct observation." *Id.* at p. 9.

8. Under the 2019 IEP, Student received the following special education and related services:
 - Special Education: 480 minutes per week of direct instruction inside the general education classroom; and
 - Mental Health Services: 75 minutes per month of direct services. *Id.* at p. 12.
9. Per the 2019 IEP, Student spent at least 80 percent of the time in the general education classroom. *Id.* at p. 13. This was a change from Student’s current placement at Separate School. *Id.* at p. 1.
10. Student’s BIP (“2019 BIP”)—also dated October 11, 2019—identified Student’s verbal aggression and threats of harm towards self and others as the target behaviors. *Exhibit B*, p. 1. The function of the target behaviors appeared to be for attention and work avoidance. *Id.*
11. The 2019 BIP outlined setting event strategies, such as clear expectations for academics and behavior and a predictable routine. *Id.*
12. Listed antecedent strategies designed to reduce the target behaviors included preparing Student for transitions and having him check in with a mental health provider when he felt anxious. *Id.*
13. The 2019 BIP also included behavior teaching strategies, such as using positive praise and positive behavioral interventions and supports. *Id.*
14. The 2019 BIP did not contain a crisis intervention plan but, instead, noted that Student’s “behavior [did] not have the potential to produce harm to self or others therefore a crisis plan is not required.” *Id.* at p. 2.
15. Student enrolled at Middle School in Fall 2019. *Interview with M.S. Psychologist*. At that time, M.S. Psychologist received notification of Student’s IEP. *Id.* M.S. Psychologist then provided a copy of Student’s IEP, containing his BIP, to other school staff members. *Id.*; *Interview with M.S. Learning Specialist*. Staff also had electronic access to the 2019 IEP.

C. Implementation of the 2019 IEP in January to mid-March 2020

16. In January 2020, Student attended Middle School in the morning five days a week. *Interview with M.S. Psychologist*. After lunch, Student went to the District’s Transitional Program from 1:15-3:45 p.m. *Id.*
17. Transitional Program is a District program where students report to a physical site to access online courses while awaiting a more permanent placement. *Interview with*

Assistant Director #1. Special education teachers are available on-site to assist students as needed, though students primarily work independently. *Id.*

18. Ideally, students spend 45 days or less at Transitional Program before beginning at a more permanent placement. *Id.* As stated in the 2019 IEP, the District intended to gradually increase Student’s time at Middle School, with the hope that he would be able to attend Middle School full time after 45 days at Transitional Program. *Exhibit A*, p. 12.
19. Student’s schedule at Middle School included science, math, and an elective. *Id.* at p. 17. All of Student’s instruction occurred inside the general education classroom. *Interviews with M.S. Psychologist and M.S. Learning Specialist.*
20. During this time period, the District’s data management system identified Transitional Program Learning Specialist as Student’s case manager. *Interviews with M.S. Psychologist, M.S. Learning Specialist, Assistant Director #1, and Assistant Director #2.* There was confusion—between Transitional Program staff and Middle School staff—regarding who was responsible for ensuring Student received his service minutes and for monitoring his progress on his IEP goals. *Id.* Due, at least in part to this confusion, Student’s teachers and service providers failed to complete any progress monitoring between January and March 2020. *Exhibit M*, pp. 1-4. The progress reports are literally devoid of data and commentary. *Id.*

Special Education Instruction

21. At Middle School, Student received direct special education instruction inside his general education math class. *Interview with M.S. Learning Specialist.* There, M.S. Learning Specialist worked with Student to break down the general education math instruction to make it more manageable for him. *Id.* Math class met five days a week for 45 minutes per class, for a total of 225 minutes per week. *Id.*
22. Two days a week, Student attended an enrichment class taught by a learning specialist (“M.S. Enrichment Teacher”). *Interview with M.S. Enrichment Teacher.* Enrichment served as a homeroom, where students received handouts and completed homework. *Id.* Sometimes M.S. Enrichment Teacher taught social-emotional lessons, such as on how to be a good friend; however, these lessons were provided to the entire student body. *Id.* For these reasons, the SCO finds and concludes that the only special education instruction Student received at Middle School occurred in his math class.
23. At Transitional Program, Student was completing online courses in math (5th grade level) and foundational reading (4th grade level). *Id.* at p. 23. The District did not produce any logs indicating whether Transitional Program provided Student any special education instruction, and Transitional Program Learning Specialist—who is no longer employed by the District—refused to participate in an interview. Nonetheless, any

special education instruction Student received at Transitional Program would have been outside the general education classroom.

24. As noted above, Student's IEP required 480 minutes per week of special education instruction inside the general education classroom. *Exhibit A*, p. 12. Between January 11 (the beginning of the relevant time period for this investigation) and March 13 (when the District suspended in-person learning), Student received only 225 minutes of special education instruction per week. As a result, Student missed 255 minutes per week during this time period.
25. In total, the SCO finds and concludes that Student missed 1,785 minutes of direct special education instruction in a two-month period.

Mental Health Services

26. When Student arrived at Middle School each morning, he checked in with M.S. Psychologist. *Interview with M.S. Psychologist*. These check-ins lasted five to ten minutes, and then Student headed to class. *Id.* Student also had a "go pass" he could use to leave class to see M.S. Psychologist as needed. *Id.* Other than the check-ins, Student did not have any scheduled sessions with M.S. Psychologist. *Id.*
27. M.S. Psychologist produced logs of the services she provided to Student. *Exhibit C*, pp. 1, 6. Even excluding the time M.S. Psychologist spent in Student's re-entry meeting, Student received more than 75 minutes of mental health services in January. *Id.*
28. Student was absent February 21 through February 28 due to a hospitalization. *Exhibit N*, p. 14; *Interview with Parent*. Prior to this absence, M.S. Psychologist provided Student 55 minutes of mental health services in February. *Exhibit C*, pp. 1, 6.
29. As discussed below, the District suspended in-person instruction in mid-March due to the COVID-19 pandemic. Through March 13, Student had received at least 60 minutes of mental health services and was on track to receive all 75 minutes during March. *Id.*
30. The District did not produce any documents indicating that Student received mental health services at Transitional Program between January 11 and March 13. *See Exhibit C*. Additionally, Student's mental health provider at Transitional Program was not available for an interview due to medical leave.
31. As noted above, Student's IEP required 75 minutes per month of direct mental health services. *Exhibit A*, p. 12. The SCO finds and concludes that the District failed to provide Student with 20 minutes of required mental health services during February.

D. Suspension of In-Person Learning Due to COVID-19 Pandemic

32. On March 12, 2020, the District announced the closure of all District schools for two weeks, from March 16 through March 27, to slow the spread of COVID-19. *Interview with Assistant Director of Special Education #2 (“Assistant Director #2”).* The closure included the District’s spring break, which was originally scheduled for March 23 to March 27. *Id.*
33. On March 18, the Governor of the State of Colorado (“Governor”) issued an executive order requiring all public and private elementary and secondary schools in Colorado to suspend in-person instruction due to the COVID-19 pandemic.³ Subsequent executive orders collectively extended the suspension of in-person instruction through the end of the 2019-2020 school year.⁴
34. The District informed staff that they should continue to fully implement students’ IEPs during remote instruction by providing students all the services (and service minutes) specified in each IEP’s service delivery statement. *Interview with Assistant Director #2.* In some cases, the District amended IEPs but only where necessary. *Id.*
35. The District did not amend Student’s IEP, so Student was still entitled to receive 480 minutes per week of special education instruction inside the general education classroom and 75 minutes per month of mental health services. *Exhibit A*, p. 12.
36. Middle School and Transitional Program began remote instruction on March 30. *Interview with Assistant Director #1.* During remote instruction, Middle School Math Teacher (“M.S. Math Teacher”) taught live classes via Google Meet. *Interview with M.S. Learning Specialist.* This class included general education students, as well as students with disabilities. *Id.* M.S. Math Teacher began class by teaching a new topic or reviewing a prior lesson. *Id.* The class then worked through a few problems together. *Id.* Afterwards, M.S. Learning Specialist split off into a breakout room to assist any students with disabilities who needed more help and who sought out her help. *Id.*
37. M.S. Math Teacher and M.S. Learning Specialist also hosted office hours over Google Meet. *Id.* Office hours were open to the entire class; anyone who needed extra help with a topic or an assignment was free to attend. *Id.* Student attended office hours on only a couple occasions between March 30 and May 13, receiving a total of 80 minutes of special education instruction. *Exhibit C*, pp. 7-8.

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

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

38. In total, the SCO finds and concludes that the District failed to provide Student with 3,760 minutes of special education instruction during the eight weeks of remote instruction.
39. On March 31, M.S. Psychologist emailed Parent requesting consent to provide Student's mental health services via teletherapy. *Exhibit O*, p. 231. In her response on April 2, Parent stated:

We're going to decline mental health services during this time. [Student] is meeting weekly with his [private] therapist over Skype and that seems to be sufficient for now. If this changes in the future I'll let you know.

Id.

40. Parent never retracted this statement or otherwise requested that the District resume providing Student mental health services during the 2019-2020 school year. *Interviews with Parent and M.S. Psychologist*. As a result, Student did not receive any mental health services after the District suspended in-person instruction. *Id.*
41. During remote instruction, the District failed to perform any progress monitoring. *Exhibit M*, pp. 1-4. Because the District also failed to perform progress monitoring from January to March 2020, no progress monitoring exists for the second half of Student's sixth grade year. *Id.*

E. Student's Re-Evaluation

42. On February 24, Transitional Program Learning Specialist sent a consent to evaluate form to Parent via email. *Exhibit O*, p. 55. The form requested consent to evaluate Student in the areas of academic performance, social and emotional wellness, and health. *Id.* at p. 56. The email included a copy of the procedural safeguards. *Id.*
43. The District initiated the re-evaluation because Student had been struggling at Middle School. *Interview with Assistant Director #2*. As Student's time at Middle School increased, Student began having more behavioral issues. *Interviews with Assistant Director #2 and M.S. Psychologist*. When Student became frustrated in class, he would simply walk out of class and hide somewhere else in school to avoid his work. *Id.* On another occasion, Student also threatened to knock down another student to steal his belt. *Exhibit F*, p.5. Because Middle School struggled to support Student, the District decided to proceed with the re-evaluation. *Interview with Assistant Director #2*.
44. Parent provided consent to evaluate on March 10. *Exhibit L*, pp. 28-29. Shortly thereafter, the District began evaluating Student.

45. M.S. Learning Specialist completed the Kaufman Test of Educational Achievement (“KTEA”), measuring Student’s abilities in math, reading, written language, and oral language. *Exhibit L*, p. 11; *Interview with M.S. Learning Specialist*. The results of the KTEA indicated that Student was performing below average in math and written language; Student’s reading skills were average. *Exhibit L*, pp. 11-13; *Interview with M.S. Learning Specialist*.
46. M.S. Learning Specialist also analyzed Student’s performance under the District’s Measures of Academic Progress (“MAP”) over the course of the 2019-2020 school year. *Exhibit L*, p. 14. Student scored in the 1st percentile for language, the 13th percentile for reading, and the 6th percentile for math. *Id.*
47. M.S. Psychologist evaluated Student’s social and emotional wellness using the Behavior Assessment System for Children – Third Edition (“BASC-3”) and the Adaptive Behavior Assessment System – Third Edition (“ABAS-3”). *Id.*, pp. 16-26. The results of both indicated that Student continued to need mental health services. *Id.* at p. 27; *Interview with M.S. Psychologist*. In particular, Student’s elevated scores on the BASC-3 in the areas of Conduct Problems, Aggression, and Externalizing Behaviors suggested Student needed “direct support around his social skills and self-regulation techniques.” *Exhibit L*, p. 27. Student’s scores in the areas of Self-Esteem, Sense of Inadequacy, and Depression also warranted close monitoring. *Id.*
48. On May 14, M.S. Learning Specialist e-mailed the District staff involved in Student’s evaluation, noting “I am concerned that [Student’s] evaluation appears to be incomplete and we are scheduled to meet with him and mom tomorrow morning at 9.” *Exhibit O*, p. 395. M.S. Psychologist replied that she would complete her portion of the evaluation and forward a draft to Parent. *Id.* at p. 394.
49. M.S. Psychologist sent a draft version of the evaluation report to Parent on May 14. *Id.* at p. 397. The evaluation report itself indicates it was completed on May 21. *Exhibit L*, p. 11.
50. During the re-evaluation, Parent never informed the District that she had concerns about Student qualifying under a different disability category or that she suspected he had any other disabilities. *Interview with Parent*. Similarly, District staff did not suspect Student had any other disabilities. *Interviews with M.S. Psychologist, M.S. Learning Specialist, Assistant Director #2*.

F. Consideration of Re-Evaluation and May 15 IEP Team Meeting

51. The District issued a notice of meeting on May 5 for the virtual IEP Team meeting scheduled for May 15. *Exhibit K*, p. 1.

52. On May 15, the District convened a properly constituted IEP Team to review Student's 2019 IEP in light of the re-evaluation. *Exhibit A*, p. 16; *Interviews with M.S. Learning Specialist and Assistant Director #1*. The IEP Team discussed the results of Student's re-evaluation and determined that Student also qualified for special education and related services under the disability category of OHI based on an ADHD diagnosis. *Interviews with M.S. Learning Specialist and Assistant Director #1*.
53. Additionally, the IEP Team decided that—based on the academic and mental health needs identified in the re-evaluation—Student would be better served in a smaller, more structured environment with additional therapeutic supports. *Id.* As a result, the IEP Team changed Student's placement to a separate school. *Id.*
54. Parent participated in the meeting by asking questions about the evaluation, discussing Student's goals, and providing input on Student's accommodations. *Id.* According to Assistant Director #1 and M.S. Learning Specialist, the IEP Team incorporated at least one of Parent's suggestions for accommodations into the IEP. *Id.* District staff recall Parent always being an active participant in Student's IEP Team meetings. *Id.*
55. Parent acknowledged that the District members of the IEP Team allowed her to participate but noted that she was not allowed to choose Student's placement. *Interview with Parent*.

G. Student's 2020 IEP

56. Student's 2020 IEP was finalized on May 21 following the May 15 IEP Team meeting. *Exhibit A*, pp. 15-31. Under the 2020 IEP, Student is eligible for special education and related services under the disability categories of SED and OHI. *Exhibit A*, p. 15.
57. The portion of the 2020 IEP dedicated to Student's present levels of performance contained, nearly verbatim, the results of the academic assessments in the re-evaluation. *Id.* at pp. 17-24. The 2020 IEP indicated that Student did not meet his social-emotional wellness goal but did not state whether Student satisfied the other three goals in the 2019 IEP. *Id.* As Student's day at Middle School lengthened, the frequency of his behavioral outbursts increased. *Id.* at p. 17.
58. The 2020 IEP noted that Student's SED and OHI caused him "difficulty with coping with the academic and social demands in a general education class." *Id.* at p. 24. Student became frustrated when faced with non-preferred activities, and, once frustrated, Student often left class. *Id.* "Even in a smaller environment [Transitional Program] he still [continued] to struggle with the social and academic demands." *Id.*
59. The "Parent/Student Input" section of the 2020 IEP reads: "[Parent] states that day to day it is difficult to tell if [Student] will cooperate in going to school at all. His performance and attendance are based off his mood." *Id.* at p. 24.

60. During the 2019-2020 school year, Student did not meet any of his IEP goals. *Interview with M.S. Learning Specialist*. The IEP Team continued Student’s 2019 social-emotional wellness goal, reworked his 2019 reading and math goals, and developed a new self-determination goal. *See Exhibit A*, pp. 8-9, 24-26. None of the District staff interviewed recalled the development of Student’s goals with specificity, and Transitional Program Learning Specialist—who drafted the IEP—refused to participate in an interview. *Interviews with M.S. Learning Specialist, M.S. Enrichment Teacher, and Assistant Director #1*.
61. The 2020 IEP contained four goals targeting the same areas as the 2019 IEP:
- Reading: “[Student] will improve his reading comprehension skills to a DRA level 50 or other comparable measure, by correctly answering reading comprehension questions including ones with inferences and figurative language, with 80% accuracy in 3 out of 4 trials on [sic] by 5/14/21.” *Exhibit A*, p. 25.
 - Math: “Given an algebraic expressions [sic] with one missing variable (adding, subtracting, multiplying and dividing) within a word problem, [Student] will replace the variable and solve with 80% accuracy in 4 of 5 trials.” *Id.* at pp. 24-25.
 - Self-Determination: “In order to increase appropriate peer interactions, when given direct instruction by the mental health provider, [Student] will demonstrate problem solving skills around interpersonal relationships or hypothetical peer situations as evidenced by decision-making/self-control strategies in 3 out of 5 consecutive trials.” *Id.* at p. 26.
 - Social-Emotional Wellness: “When presented with a situation known by [Student] to be anxiety or frustrating producing for him (non-preferred task, unexpected obstacle, task perceived as too difficult), he will independently demonstrate an appropriate emotional response through finding a solution to his problem or using a strategy to regulate back to an expected emotional state (take a break, talk with a teacher, etc.) and return to the academic setting with 70% accuracy as measured by direct observation.” *Id.* at p. 9.
62. Under the 2020 IEP, Student received the following special education and related services:
- Special Education: 1,800 minutes per week of direct instruction outside the general education classroom; and
 - Mental Health Services: 90 minutes per week of direct services. *Id.* at p. 29.
63. Per the 2020 IEP, Student spent 100 percent of his time outside the general education environment at a separate school. *Id.* at pp. 30-31. The IEP Team thought a separate

school would offer Student greater mental health services, more opportunities to practice positive behavior strategies, and more interventions for dysregulation. *Id.* at p. 30.

64. The 2020 IEP noted that Student would “continue to receive interim services at [Transitional Program] until a location has been identified and enrollment has started.” *Id.* at p. 29. During that interim period, Student was to receive up to 720 minutes per week of educational support from a special education teacher and 60 minutes per month of mental health services. *Id.*
65. The 2020 IEP contains a Prior Written Notice (“PWN”) indicating that the IEP Team considered placing Student in the general education classroom 80-100 percent of the time but rejected this option due to Student’s difficulty with self-regulation. *Id.* at p. 31.
66. The IEP Team made minor revisions to Student’s BIP (“2020 BIP”). *Exhibit B*, pp. 4-6. Student’s verbal aggression and threats of harm towards himself and others remained the target behaviors. *Id.* at p. 4.
67. The setting event strategies remained unchanged from the 2019 BIP. *Id.* at pp. 1, 4.
68. Under antecedent strategies, the IEP Team added go pass—a system that M.S. Psychologist had already implemented with Student during the 2019-2020 school year. *Id.* at p. 4; *Interview with M.S. Psychologist*.
69. The IEP Team added clear directives to the 2020 BIP under behavior teaching strategies. *Exhibit B*, pp. 4-5.
70. Like the 2019 BIP, the 2020 BIP did not contain a crisis intervention plan but, instead, noted that Student’s “behavior [did] not have the potential to produce harm to self or others therefore a crisis plan is not required.” *Id.* at p. 5.

H. Beginning of 2020-2021 School Year

71. The District began the 2020-2021 school year on August 24, 2020. *Exhibit P*, p. 2. At the time, Student remained on the waitlist for Separate School. *Interviews with Assistant Director #1 and Parent*.
72. Student attended Transitional Program for the first two weeks of the school year while he waited for a spot at Separate School. *Id.* Due to the COVID-19 pandemic, Student attended Transitional Program remotely and continued to complete his online courses, just as he would if he were attending Transitional Program in person. *Id.*
73. Transitional Program Learning Specialist continued to serve Student’s case manager at the beginning of the 2020-2021 school year. *Interview with Assistant Director # 1*.

Because Transitional Program Learning Specialist was the primary author of Student's 2020 IEP, she was aware of her obligations under Student's IEP and would have been the primary staff person implementing Student's IEP. *Id.*

74. On September 8--approximately two weeks after the 2020-2021 school year began--Separate School notified Parent that a spot was available for Student. *Id.*

I. Student's Hospitalization and Arrest

75. Later that same day, Student was hospitalized at Psychiatric Hospital and placed on a mental health hold. *Interview with Parent*. According to Parent, Student was hospitalized due to threats of self-harm. *Id.* Student's private therapist advised Parent that Student would have more access to behavioral therapy under his insurance if such therapy were recommended following an inpatient hospital stay. *Id.*
76. On or around September 12 or September 13, Student was involved in an altercation with another patient at Psychiatric Hospital. *Id.* The patient alleged that Student assaulted patient. *Id.* Ultimately, Student was arrested on September 13 and charged with Second-Degree Assault-Strangulation and Felony Menacing. *Interviews with Parent and Student's Guardian Ad Litem ("GAL"); Exhibit O*, p. 587. The arresting officer specified an arrest-only charge of Second-Degree Assault-Causing Injury with a Deadly Weapon; however, Student was never actually charged with this crime. *Interview with GAL*.
77. The District was notified of the pending juvenile proceedings on September 16. *Exhibit O*, p. 679. On September 18, the District's Director of Judicial Services informed Parent that Student could not attend Separate School until the District completed a threat assessment. *Id.* at p. 677.

J. Threat Assessment

78. Meanwhile, on Monday, September 21, Separate School completed a building-level threat assessment ("BLTA") based on the alleged assault at Psychiatric Hospital. *Exhibit D*, pp. 1-8. The BLTA concluded that a district-level threat assessment ("DLTA") was warranted due to Student's behavior. *Id.* at p. 6. The BLTA indicated that Student would be suspended and directed staff to "[f]ollow discipline procedures per Code of Conduct." *Id.*
79. A team of District staff ("DLTA Team") convened on Thursday, September 24 to complete the DLTA. *Exhibit D*, pp. 8-13. The purpose of the DLTA "is to intervene with students who pose a threat for targeted violence." *Id.* at p. 9.
80. Student, Parent, and GAL participated in a portion of the meeting. *Id.*; *Interviews with Parent, GAL, Manager of Judicial Services, and Assistant Director #1*. During this portion

of the meeting, the DLTA discussed the events leading to Student's hospitalization and asked Student questions about the incident that occurred at Psychiatric Hospital. *Interviews with Manager of Judicial Services and Assistant Director #1.*

81. As Parent and Student were being excused, a staff member from Separate School mentioned having Student return in-person to Separate School on the following Tuesday and expressed excitement about having Student back at Separate School. *Interviews with Manager of Judicial Services and GAL.* This comment gave Parent and Student false hope of a quick return to Separate School. *Interviews with Parent and GAL.*
82. The comment by the Separate School staff member was problematic because the DLTA had not determined what its recommendation would be regarding Student's return to school. *Interview with Manager of Judicial Services.* Typically, the DLTA Team does not make a recommendation regarding a student's safety until it meets separately after excusing the parents and students. *Id.*
83. Ultimately, the DLTA recommended that Student receive remote instruction due to his history of "concerning behaviors" and the incident at Psychiatric Hospital. *Id.* Manager of Judicial Services indicated the "concerning behaviors" included Student's past aggressive physical and threatening behaviors, as well as his "history of unsuccessful enrollment" at District schools. *Id.* Manager of Judicial Services considered Student to have a "history of unsuccessful enrollment" because he had been "in and out" of Middle School and Separate School. *Id.* He assumed Student could not "meet expectations" at Middle School, resulting in Student being sent to Separate School. *Id.*
84. At the time of the DLTA, the District believed Student had been admitted to Psychiatric Hospital due to threats of self-harm and Parent's belief that she could only obtain more intensive therapy from insurance by having a referral following an inpatient hospitalization. *Id.; Exhibit D, p. 11.*
85. Shortly thereafter, the District received a copy of the police report for the incident at Psychiatric Hospital. *Interview with Manager of Judicial Services.* According to Manager of Judicial Services, the police report indicated Student was hospitalized for homicidal ideation concerning his stepfather. *Id.* The SCO was not provided a copy of the police report and, therefore, could not determine what the police report actually contained. *Id.* During her interview, Parent asserted that Student has never experienced homicidal ideation. *Interview with Parent.*
86. As next steps, the DLTA Meeting Summary recommended scheduling an IEP Team meeting and a safety plan meeting for the following week. *Exhibit D, p. 12.* The Meeting Summary noted that the "Discipline [O]ffice has no reservations about [Student] returning." *Id.*

87. The same day as the DLTA, S.S. Psychologist emailed Parent, notifying her that Student's IEP Team meeting would be held virtually on September 28. *Exhibit K*, p. 3. The email did not identify who would be attending the IEP Team meeting or inform Parent of the purpose of the meeting or that she could invite others. *Id.*

K. Amending Student's 2020 IEP

88. Student's IEP Team met virtually on Monday, September 28. *Interviews with S.S. Psychologist and Assistant Director #1*. Based on the recommendation from the DLTA Team, the IEP Team determined that Student would receive remote instruction from Separate School for the time being. *Id.* No documentation exists in the record from this IEP Team meeting.
89. On Friday, October 2, Parent emailed Assistant Director #1 expressing concern that Student was still having trouble accessing his online classes. *Exhibit O*, p. 749. Even though the District moved Student to remote instruction on Monday, September 28, he had not been able to access any of his online classes. *Id.*
90. Assistant Director #1 responded, indicating that District staff "want[ed] to meet again to talk through the plan for [Student]" and informing Parent that the meeting would be held virtually on Monday, October 5. *Id.* at pp. 746-47. The email did not indicate whether it would be an IEP Team meeting or provide any other information about the meeting. *Id.*
91. Student's IEP Team met virtually on October 5. *Interview with Assistant Director #1*. The IEP Team amended the Service Delivery Statement in the 2020 IEP ("IEP Amendment"). *Exhibit A*, p. 32. The IEP Amendment indicated that "[d]ue to safety concerns and pending the results of the juvenile proceedings [Student] will receive remote services for academics and mental health." *Id.* The IEP Amendment indicated that the IEP Team considered in-person learning but rejected that option due to safety concerns. *Id.* No PWN was sent to Parent following the IEP Team meeting. *See Exhibit A*.
92. As amended, the Service Delivery Statement specified that Student would receive 180 minutes of direct academic minutes per week in the areas of language arts, math, science, social studies, and art. *Id.* at p. 48. The remote instruction would be either synchronous or asynchronous. *Id.*
93. At the time of the IEP Amendment, Separate School was operating on a hybrid schedule due to COVID-19. *Interview with Assistant Director #1*. Students who selected in-person instruction received in-person instruction two days a week, for a total of 180 minutes per week. *Id.*
94. The IEP Amendment reduced Student's mental health services from 90 minutes per week to 60 minutes per week "via group and 1:1 support." *Exhibit A*, p. 48. The IEP

Team made this reduction because, at the time, Student was receiving outside therapy 2-3 times per week. *Interview with S.S. Psychologist.*

95. The amended Service Delivery Statement provided Student’s schedule for remote instruction. *Id.* p. 47-48. Under that schedule, Student received the following:

<u>Monday</u>	<u>Tuesday</u>	<u>Wednesday</u>	<u>Thursday</u>
8:00-8:30 Homeroom with Separate School Homeroom Teacher	8:00-8:30 Homeroom with Separate School Homeroom Teacher	8:00-8:30 Homeroom with Separate School Homeroom Teacher	8:00-8:30 Homeroom with Separate School Homeroom Teacher
Independent work time (complete math/social studies/art)	Independent work time (complete math/social studies/art)	Independent work time (complete math/social studies/art)	
9:50-10:10 Office hours with Separate School Math Teacher	9:50-10:10 Office hours with Separate School Math Teacher	9:50-10:10 Office hours with Separate School Math Teacher	
11:00-11:45 Art with Separate School Art Teacher	10:15-12:10 Meet with Learning Center Language Arts Teacher and then attend Language Arts	Independent work time (complete math/art work/any unfinished language arts or science work)	10:35-12:10 Language Arts with Learning Center Language Arts Teacher
12:30-1:00 Mental Health Check-in with Separate School Psychologist	Lunch		Lunch
Independent work time (complete social studies/art)	12:40-2:15 Science with Learning Center Science Teacher		12:40-2:15 Science with Learning Center Science Teacher

Id. Fridays were reserved for independent work. *Interview with Assistant Director #1.*

96. On October 5, the District also sent a letter (“Letter”) to Parent citing Colorado Revised Statute § 22-33-105(5)(a). *Exhibit O*, p. 829. Under the statute, whenever a student is charged with a crime of violence, a school district shall determine whether the student has exhibited behavior that is:

detrimental to the safety, welfare, and morals of the other students or of school personnel in the school and whether educating the student in the school may disrupt the learning environment in the school, provide a negative example for other students, or create a dangerous and unsafe environment for students, teachers, and other school personnel.

C.R.S. § 22-33-105(5)(a). If the school district determines that the student should not be educated in the school, the school district may suspend or expel the student. *Id.* Alternatively, the school district may:

wait until the conclusion of the juvenile proceedings to consider the expulsion matter, in which case it shall be the responsibility of the district to provide the student with an appropriate alternate education program, including but not limited to an online program or online school . . . or a home-based education program during the period pending the resolution of the juvenile proceedings.

Id. The Letter indicated that the District had “affirmatively determined” that Student posed a danger to the school environment. *Exhibit O*, p. 829. The District opted to “reserve moving forward with disciplinary expulsion until the conclusion of the criminal proceedings.” *Id.* In the interim, Student would receive remote instruction from Separate School. *Id.*

97. Student’s GAL later informed the District that Student had not been charged with a crime of violence under Colorado law, as not all second-degree assault qualifies as a crime of violence. *Interview with GAL; Exhibit O*, p. 1066. The District did not alter its stance on the safety threat posed by Student after receiving this information. *Interviews with GAL and Assistant Director #2.*
98. In October, Parent and GAL requested the District conduct an MDR. *Exhibit O*, p. 752-53. After several follow-up requests from GAL, the District responded more than three weeks later: “Since we are not going down the route of discipline and we did not suspend him we will not be conducting a [m]anifestation determination.” *Id.* at 834, 909, 910. During interviews, the District indicated it declined to complete an MDR because it believed it had not changed Student’s placement when it required Student to attend Separate School remotely. *Interview with Assistant Director #1.*

L. Student’s Remote Instruction

99. Following the IEP Amendment, S.S. Psychologist circulated a copy of Student’s IEP Amendment to Student’s teachers and service providers. *Interview with S.S. Psychologist.* Student began receiving the remote instruction outlined in the IEP Amendment on October 6. *Interview with Parent.* He continued to receive remote

instruction in accordance with this schedule throughout fall 2020. *Interviews with Parent and Assistant Director #2.*

100. Under Student's schedule, he received 400 minutes of academic instruction each week, in excess of the 180 minutes required by the IEP Amendment. *See Exhibit A, p. 47.* Though Student received live instruction for language arts and science, his math and social studies were asynchronous only. *Id.*; *Interview with Assistant Director #2.*
101. Beginning on October 12, S.S. Psychologist met with Student one-on-one for 30 minutes each week. *Interview with S.S. Psychologist; Exhibit C, pp. 3, 5.* During this time, S.S. Psychologist checked in with Student and asked about his schoolwork. *Interview with S.S. Psychologist.* They also discussed any issues at home that were frustrating him. *Id.* S.S. Psychologist and Student talked about ways to respond when he was feeling escalated. *Id.*
102. S.S. Psychologist's log indicated that she provided services to Student each week without fail. *Exhibit C, p. 3.* However, her log also suggested that she provided virtual services to Student on days he clearly was not receiving online learning (such as September 21, September 28, and October 5). *Id.* When asked whether Student received all his mental health services, S.S. Psychologist responded that she thought Student missed some services due to absences (both his and hers). *Id.* S.S. Psychologist no longer works for the District and, therefore, did not have her files available to verify the specific dates of services. *Interview with S.S. Psychologist.*
103. For these reasons, the SCO finds and concludes that S.S. Psychologist's log lacks credibility. Based on her statements, the SCO will assume that S.S. Psychologist missed Student's therapy at least once, depriving Student of 30 minutes of individual mental health services.
104. S.S. Psychologist left the District on or around November 1. *Id.* At that time, Separate School Social Worker ("S.S. Social Worker") began providing Student's one-on-one mental health services. *Id.* S.S. Social Worker's log contains notes of the sessions and identifies where Student missed therapy and/or where therapy was rescheduled. *Exhibit C, p. 4.* S.S. Social Worker provided Student all his required individual therapy between November 2020 and January 2021. *Id.*
105. According to S.S. Psychologist, Student also received 30 minutes of group therapy during his homeroom each week. *Id.* However, neither S.S. Psychologist nor Assistant Director #1 could identify who provided that therapy to Student. *Interviews with S.S. Psychologist and Assistant Director #1.* The therapy sessions are logged under S.S. Psychologist's name even though she did not provide those services. *Exhibit C, p. 3; Interview with S.S. Psychologist.* The District did not produce any other documents referencing the group

therapy sessions. *Id.* As a result, the SCO cannot determine what, if any, group therapy sessions Student received.

106. The SCO finds and concludes that over the ten weeks between October 6, 2020 and January 11, 2021, Student missed 300 minutes of group therapy and 30 minutes of individual therapy, for a total of 330 missed minutes of mental health services.
107. During this investigation, the District produced no progress reports or other progress monitoring data for Student from October 6 to the present. *See Exhibit M and Exhibit N.*
108. During Fall of 2020, the District began exploring options for out-of-district placements for Student. *Interviews with Assistant Director #1 and Assistant Director #2.* Though the District presented a couple of options for out-of-district placements to Parent in December 2020, Parent declined, expressing concern about the impact such a placement would have on Student. *Interview with Assistant Director #1.*
109. Student currently receives 100 percent synchronous instruction from Separate School. *Interview with Assistant Director #2.*
110. The District continues to have internal discussions about Student's educational placement but, to date, the District's Security and Safety Department has continued to recommend that Student receive remote instruction because his therapy focuses on de-escalation and does not address homicidal ideation. *Interview with Manager of Judicial Services.*

CONCLUSIONS OF LAW

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

Burden of Proof

As a preliminary matter, the SCO first addresses the burden of proof. Throughout its Response, the District asserts that "the burden of proof in an IDEA challenge rests with the party claiming a deficiency in the school district's efforts." *See Response*, p. 6 (citing *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008)). Though the burden of proof asserted by the District applies in due process hearings, it plainly does not apply in state complaint investigations. In *Letter to Reilly*, OSEP stated:

Unlike due process hearings, State complaints are investigative in nature, rather than adversarial, and do not include the same procedural rights accorded to parties in an impartial due process hearing. Therefore, the Department believes that it is not consistent with the IDEA regulation for an SEA to treat a State complaint like a due process complaint and assign the burden of proof to either party. Under 34 C.F.R. § 300.152, once a State complaint is properly filed, it is

solely the SEA's duty to investigate the complaint, gather evidence, and make a determination as to whether a public agency violated the IDEA. It is not the burden of the complainant -- or any other party -- to produce sufficient evidence to persuade the SEA to make a determination one way or another.

Letter to Reilly, 64 IDELR 219 (OSEP 2014). Consistent with OSEP guidance and previous state complaint decisions, the CDE applies the preponderance of the evidence standard in making a determination as to whether a violation of IDEA occurred and will not assign the burden of proof to either party. *St. Vrain Valley Sch. Dist. Re-1J*, 119 LRP 30200 (CO SEA 5/1/2019); *Adams Cty. Sch. Dist. 50, Westminster*, 115 LRP 33569 (CO SEA 5/26/2015).

Conclusion to Allegation No. 1: The District failed to implement Student's IEP between January 11, 2020 and March 13, 2020 by failing to provide Student all the special education instruction required by the 2019 IEP. This failure resulted in a denial of FAPE.

In her Complaint, Parent alleges the District failed to fully implement Student's 2019 IEP between January 11 and March 13, 2020.

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).

A. Implementation of Student's 2019 IEP

As detailed in the Findings of Fact, the District failed to fully implement Student's 2019 IEP. (FF #s 21-31.) This failure, however, was not due to Student's teachers and service providers being unaware of their responsibilities under Student's 2019 IEP. Indeed, M.S. Psychologist indicated she was informed of Student's IEP when Student enrolled in Middle School during Fall 2019. (FF # 15.) She then provided hard copies of the IEP to M.S. Learning Specialist and M.S. Enrichment Teacher. (*Id.*) Student's teachers and service providers also had electronic access to the 2019

IEP. (*Id.*) Therefore, the SCO finds and concludes that the District complied with 34 C.F.R. § 300.323(d).

The 2019 IEP required the District to provide Student 480 minutes per week of special education instruction inside the general education classroom and 75 minutes per month of mental health services. (FF # 8.) Yet, Student only received 225 minutes per week of special education instruction—all of which occurred during his general education math class. (FF #s 21-25.) The record does not indicate that Student received any special education instruction at Transitional Program. (FF # 23.) But any special education instruction Student received at Transitional Program would have occurred outside the general education classroom and, therefore, would not satisfy Student’s IEP. (FF # 8.)

The District failed to provide Student with 255 minutes of special education instruction during each of the seven weeks between January 11 and March 13. (FF # 24.) In total, Student missed 1,785 minutes. (FF # 25.) Additionally, the District failed to provide Student with 20 minutes of mental health services during February. (FF # 31.)

B. Failure to Monitor Progress

Under the IDEA, school districts must provide periodic reports on the progress a student is making toward the student’s annual goals. 34 C.F.R. § 300.320(a)(3). The District plainly failed to provide Parent periodic reports on Student’s progress towards his IEP goals. As noted in the Findings of Fact, the progress reports produced by the District are devoid of information. (FF # 20.) Other than a baseline datapoint for some of Student’s goals, the progress reports contain no data or commentary regarding Student’s progress (or lack thereof). (FF # 20.) As a result, the SCO finds and concludes that the District violated 34 C.F.R. § 300.320(a)(3).

C. 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). The materiality standard “does not require that the child suffer demonstrable educational harm in order to prevail.” *Id.* But a child’s educational progress, or lack thereof, may indicate whether there has been more than a “minor shortfall in the services provided.” *Id.*

Here, the District failed to implement the primary component of Student’s IEP. Over this two-month period, the District provided Student only 47 percent of the required special education instruction. This failure denied Student the opportunity to make appropriate academic progress. Indeed, Student did not meet any of his annual goals during the 2019-2020 school year. (FF # 60.) The District also failed to provide Student with 20 minutes of mental health services. For these reasons, the SCO finds the District’s failure to implement Student’s IEP to be material. This failure resulted in a denial of FAPE to Student. Given the degree to which a FAPE was denied, “Student is entitled to compensatory services.” *Colo. Dep’t of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

D. Compensatory Education

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

Here, the District failed to provide Student 1,785 minutes of special education instruction and 20 minutes of mental health services over a two-month period. By any measure, this mistake is significant. Over the same time period, Student made minimal, if any, progress towards his IEP goals and struggled to stay focused in class. The deficiency in service minutes likely impacted Student’s ability to make academic progress and stay regulated during class. Much, if not all, of the missed special education instruction would have been in a small group setting and not one-on-one. As a result, the SCO finds an award of 1,200 minutes (or 20 hours) of compensatory special education instruction and 15 minutes of mental health services appropriate.

Conclusion to Allegation No. 2: The District failed to properly implement Student’s IEP after the District suspended in-person instruction due to the COVID-19 pandemic. This failure resulted in a denial of FAPE.

In her Complaint, Parent also alleges the District failed to implement the 2019 IEP after the District suspended in-person instruction due to the COVID-19 pandemic. The legal framework discussed in response to Allegation No. 1 also applies to this allegation.

With respect to implementation of an IEP during the COVID-19 pandemic, the U.S. Department of Education issued guidance on March 12, 2020, providing that school 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.” *Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease Outbreak*, 76 IDELR 77 (EDU 2020). CDE echoed this federal 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*, available at www.cde.state.co.us/cdesped/special_education_faqs.

After the suspension of in-person instruction in this case, the District directed staff to fully implement students’ IEPs remotely. (FF # 34.) Parent declined remote mental health services (FF # 39), so the District was not obligated to provide those services to Student. The District did not amend Student’s IEP (FF # 35); therefore, the District was still obligated to provide Student 480 minutes per week of direct special education instruction.

A. Implementation of Student’s 2019 IEP

As detailed in the Findings of Fact, the District failed to fully implement Student’s 2019 IEP. (FF #s 32-38.) Each of Student’s teachers and service providers were informed of their responsibilities under Student’s 2019 IEP. (FF # 15.) The SCO finds and concludes that the District complied with 34 C.F.R. § 300.323(d) and that the District’s failure to implement Student’s IEP was not due to a lack of knowledge on the part of his teachers and service providers.

Here, Student received only 80 minutes of special education instruction during the eight weeks of remote instruction. (FF # 37.) As a result, the District failed to provide Student with 3,760 minutes of special education instruction. (FF # 38.) As the record makes clear, the only special education instruction available to Student required him to self-identify as he needed extra assistance and actively seek out that help. (FF #s 36-37.) At the time, Student had an IEP goal targeting his ability to seek out assistance to get his needs met. (FF # 7.) The SCO recognizes that the District and Middle School staff were responding to a global pandemic, but expecting a student with a disability-related need in the area of self-advocacy to request help to receive special education services contradicts the IDEA. The District chose not to amend Student’s IEP (FF # 35) and, therefore, remained responsible for implementing his IEP in full.

B. Failure to Monitor Progress

Under the IDEA, school districts must provide periodic reports on the progress a student is making toward the student’s annual goals. 34 C.F.R. § 300.320(a)(3). During the COVID-19 pandemic, guidance from CDE indicated that “[s]chools should make reasonable, good faith

efforts to continue to collect and report progress on IEP goals to parents consistent with the schedule identified on the student's IEP" Colo. Dep't of Ed., *Special Education & COVID-19 FAQs*, Progress Monitoring Q1, *available at* www.cde.state.co.us/cdesped/special_education_faqs. CDE suggested Parents and other IEP Team members "collaborate and partner to identify flexible data collection strategies that can be used to track progress." *Id.* at Q2.

As noted under Allegation No. 1, the progress reports produced by the District lack any information regarding Student's progress (or lack thereof). (FF # 41.) Indeed, nothing in the record suggests the District even attempted to monitor Student's progress after the suspension of in-person instruction. As a result, the SCO finds and concludes that the District violated 34 C.F.R. § 300.320(a)(3).

C. Materiality of Failure to Implement

As discussed in depth under Allegation No. 1, a material failure to implement a student's IEP amounts to a denial of 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).

Once again, the District failed to implement the primary component of Student's IEP. Except during remote instruction, the District provided Student only 2 percent of the required special education instruction. This failure limited Student's ability to make appropriate academic progress. For these reasons, the SCO finds the District's failure to implement Student's IEP to be material. This failure resulted in a denial of FAPE to Student. Given the degree to which a FAPE was denied, "Student is entitled to compensatory services." *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

D. Compensatory Education

As discussed more thoroughly in response to Allegation No. 1, compensatory education is designed to place a student in the same position he would have been but for the school district's violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

Here, the District essentially failed to provide Student special education after the suspension of in-person instruction. Student made minimal, if any, progress towards his IEP goals and struggled to stay engaged in remote instruction. The deficiency in service minutes impacted Student's ability to make academic progress. Indeed, Student did not make meet his annual goals in the 2019 IEP. (FF # 60.) Because M.S. Learning Specialist made all the special education instruction optional (FF #s 36, 37), Student did not benefit from the specialized instruction in the same way he would have if class had been in-person.

Much, if not all, of the missed virtual instruction would have been in a small group setting and not one-on-one. As a result, the SCO finds an award of 2,520 minutes (or 42 hours) of special education instruction appropriate.

Conclusion to Allegation No. 3: The District evaluated Student in all areas of suspected disability during the May 2020 re-evaluation, consistent with 34 C.F.R. §§ 300.303 and 300.304(c)(4).

Parent’s Complaint alleges the District failed to evaluate Student in all areas of suspected disability during the re-evaluation completed in May 2020.

During the course of an evaluation, the IDEA requires students to be assessed “in all areas related to the suspected disability.” 34 C.F.R. § 300.304(c)(4). Prior to his re-evaluation, Student qualified for special education and related services under SED. (FF # 4.) After his re-evaluation, Student also qualified under OHI, due to a prior diagnosis of ADHD. (FF # 51.) Nothing in the record indicates that there were any other areas of suspected disability. As a result, the SCO finds and concludes that the District evaluated Student in all areas of suspected disability, as required by 34 C.F.R. §§ 300.303 and 300.304(c)(4).

Conclusion to Allegation No. 4: The District failed to tailor the 2020 IEP to Student’s individualized needs, in violation of 34 C.F.R. § 300.324(a)(2)(i). This violation resulted in a denial of FAPE.

This allegation suggests the 2020 IEP was not tailored to Student’s individualized needs for two reasons:

- (1) The IEP Team removed three of Student’s annual goals despite his lack of progress; and
- (2) The 2020 IEP did not include an adequate behavior intervention plan.

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

The inadequacies alleged by Parent are addressed below in light of these legal standards.

A. Annual Goals

An IEP must contain measurable goals designed to: 1) meet the needs that result from the student's disability to enable him or her to be involved in and make progress in the general education curriculum, and 2) meet each of the student's other educational needs that result from his or her disability. 34 C.F.R. § 300.320(a)(2).

Here, the 2020 IEP contained annual goals targeting Student's social-emotional functioning and academics—both areas impacted by Student's disabilities. (FF # 61.) Accordingly, the SCO finds and concludes that the 2020 IEP development process complied with IDEA's procedures under the first prong of *Rowley*. The next question is whether these annual goals were substantively appropriate.

The SCO finds and concludes that the annual goals in the 2020 IEP were tailored to meet Student's unique behavioral needs. The IEP Team chose to continue Student's reading goal from the 2019 IEP in the 2020 IEP. (FF #s 7, 61) Although repeating an annual goal can indicate a denial of FAPE in certain circumstances, the SCO finds that, here, the repetition of the goal is more indicative of the District's failure to implement Student's IEP during the 2019-2020 school year. Moreover, during the 2019-2020 school year, Student received no special education instruction for reading. (See FF # 22.)

The 2020 IEP contained a new math goal even though Student did not meet the math goal in the 2019 IEP. (FF # 61.) M.S. Learning Specialist—who provided Student special education instruction in math—incorporated the old goal into the new goal but within a broader context. (FF #s 7, 61.)

Student's self-determination goal was modified to reflect recent triggers for Student's behavioral incidents at Middle School. (FF # 61.) Finally, Student's social-emotional wellness goal was continued from 2019 to 2020. (FF #s 7, 61.) However, the IEP Team significantly increased Student's mental health services under the 2020 IEP, giving Student more of an opportunity to focus on his self-determination and social-emotional goals. (FF # 62.)

For these reasons, the SCO finds the annual goals under Student's IEP to be adequately tailored to Student's unique behavioral needs.

B. BIP

Where a student's behavior impedes his learning or the learning of others, the IEP Team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.324(a)(2)(i). The regulations do not require an IEP Team to use a particular tool or assessment when considering positive behavioral support; however, "conducting a functional behavioral assessment typically precedes developing positive

behavioral intervention strategies.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46683 (Aug. 14, 2006). Development of a BIP is an “acceptable way of considering a child’s behavioral needs”, though not required. *Coleman v. Wake Cnty. Bd. of Educ.*, 120 LRP 4253, at *9 (E.D. N.C. 2020). To be effective, a BIP should detail the target behaviors and the motivation behind these target behaviors. *CDE IEP Procedural Guidance Manual*, p. 121. If a student displays unsafe behaviors, a BIP should also include a crisis intervention plan to address positive intervention and de-escalation strategies. *Id.*

Here, the 2020 IEP contained positive behavioral interventions and supports. (FF #s 65-69.) Under the first prong of the *Rowley* standard, the SCO finds and concludes that the IEP development process complied with the IDEA’s procedures. However, the sufficiency of those behavioral interventions and supports must still pass the second prong of *Rowley*.

Under the second prong of *Rowley*, the SCO finds and concludes that the 2020 BIP was not substantively appropriate, because it was not tailored to adequately meet Student’s unique behavioral needs. Before the District suspended in-person instruction due to COVID-19, Student’s behavioral incidents gradually increased. (FF # 43.) The strategies provided in the 2019 BIP had not been effective. Yet, despite Student’s continued behavior problems, the IEP Team made only minimal changes to the 2019 BIP. (FF # 66-70) The IEP Team added a go pass as an additional antecedent strategy (FF # 68), but M.S. Psychologist had already been using a go pass during the 2019-2020 school year. (FF # 26.) Additionally, under behavior teaching strategies, the IEP Team added clear directives. (FF # 69.) These two changes alone hardly seem adequate in the face of Student’s continued behavior challenges and the impact those challenges were having on his ability to access his education. For these reasons, the SCO finds and concludes that the District violated the IDEA’s substantive requirement related to the development of the 2020 IEP at 34 C.F.R. § 300.324(a)(2)(i). *See D.S. v. Bayonne Bd. of Ed.*, 602 F.3d 553, 565 (3d. Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA’s procedural requirements).

Conclusion to Allegation No. 5: The District considered the re-evaluation and Parent’s concerns when it determined Student’s educational placement during the May 15 IEP Team meeting, consistent with 34 C.F.R. §§ 300.116 and 300.324(b)(1).

In her Complaint, Parent contends Student’s IEP Team failed to consider the re-evaluation or Parent’s concerns when it determined Student’s educational placement during the IEP Team meeting held on May 15, 2020.

The IDEA specifies that IEPs should be reviewed and revised, at least annually, to address, among other considerations, the results of any re-evaluation and information provided by the parents about the child. 34 C.F.R. § 300.324(b)(1). Decisions regarding a child’s placement must be made by individuals with knowledge of the child, including the child’s parents. *Id.* § 300.116.

Additionally, a significant change in placement must be made upon consideration of a re-evaluation. *ECEA Rule 4.03(8)(b)(ii)(B)*.

As detailed in the Findings of Fact, the IEP Team considered the results of Student's May 2020 re-evaluation when it met on May 15. (FF #s 52, 53.) Based on the results of the re-evaluation, the IEP Team determined that Student qualified for special education and related services under an additional disability category. (FF # 52) Additionally, based on the academic and mental health needs identified in the re-evaluation—the IEP Team changed Student's placement to a separate school. (FF # 53.)

During the meeting, Parent indicated that she wanted Student to be placed at Middle School. (FF # 55.) Ultimately, the District-members of the IEP Team disagreed with Parent, believing that Student needed a smaller, more structured environment with access to greater therapeutic supports. (FF # 53.) The PWN evidenced that Parent's concerns were heard, even if Student was not placed at Middle School. (FF # 65.)

For these reasons, the SCO finds and concludes that the District considered both the re-evaluation and Parent's concerns during the May 15 IEP Team meeting, in compliance with 34 C.F.R. §§ 300.116 and 300.324(b)(1).

Conclusion to Allegation No. 6: Parent meaningfully participated in the May 15 IEP meeting, consistent with 34 C.F.R. §§ 300.321(a)(1) and 300.324(a)(1)(ii).

Parent's Complaint contends the Student's IEP Team denied her the opportunity to meaningfully participate in the IEP Team meeting held on May 15, 2020.

The IDEA requires that parental participation be meaningful, to include carefully considering parents' concerns for enhancing the education of the child. 34 C.F.R. §§ 300.321(a)(1), 300.322, and 300.324(a)(1)(ii). Meaningful consideration 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 Unified Sch. Dist. No. 233*, 144 F.3d 692, 703 (10th Cir. 1998). Meaningful consideration does not require that a school district simply agree to whatever a parent has requested. *Jefferson Cnty. Sch. Dist. 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.*

An IEP meeting "serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child." *Letter to Richards*, 55 IDELR 107

(OSEP 2010). “The IEP Team should work towards a general agreement, but . . . [i]f the team cannot reach agreement, the public agency must determine the appropriate services” *Id.*

Here, Parent had an opportunity to meaningfully participate in the IEP Team meeting on May 15. As the Findings of Fact indicate, Parent asked questions about the re-evaluation, discussed Student’s goals, and provided input on Student’s accommodations. (FF #s 54, 55.) According to Assistant Director #1 and M.S. Learning Specialist, the IEP Team incorporated at least one of Parent’s suggestions for accommodations into the IEP. (FF # 54.) Parent and the District members of the IEP Team disagreed on the best placement for Student, and Parent was frustrated she could not choose Student’s placement. (FF # 55.) However, under the IDEA, parents do not have the right to make unilateral decision concerning their child’s placement. The evidence in the record suggests the IEP Team worked towards general agreement but was unable to reach an agreement. The SCO finds and concludes that Parent meaningfully participated in the IEP Team meeting, consistent with 34 C.F.R. §§ 300.321(a)(1) and 300.324(a)(1)(ii).

Conclusion to Allegation No. 7: The District provided Parent with adequate prior written notice of the action taken at Student’s IEP Team meeting on May 15, 2020, consistent with 34 C.F.R. § 300.503.

Parent’s Complaint alleges the District failed to provide her with adequate PWN following the IEP Team meeting on May 15, 2020.

Under the 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). 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). But, for changes made at an IEP Team meeting, the PWN must be sent after the meeting, not before. *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46691 (2006). Providing PWN before the meeting would suggest that the decisions were made before the meeting and without parental input. *Id.*

PWN notice must include a description of the action proposed or refused by the district; an explanation of why the district proposes or refuses to take the action; a description of each

evaluation procedure, assessment, record, or report used by the district as a basis for the action; a description of other options the IEP team considered and the reasons why those options were rejected; and a description of any other factors relevant to the district's proposal or refusal. 34 C.F.R. § 300.503(b)(1)-(3) and (6)-(7). It must also include a statement that the parents of a child with a disability have protections under the procedural safeguards and the means by which to obtain a copy if the notice is not for an initial evaluation, and sources for parents to contact to obtain assistance in understanding the procedural safeguards. *Id.* § 300.503(b)(4)-(5).

Here, Parent contends the District failed to provide PWN of the action taken at the IEP Team meeting on May 15, 2020. However, the District provided PWN within the final version of the 2020 IEP. (FF # 65.) The PWN contains all of the required content and, given that the 2020 IEP was not implemented until the 2020-2021 school year, afforded Parent adequate time to fully consider the action before implementation. (*Id.*)

Conclusion to Allegation No. 8: The District failed to implement Student's IEP during the two weeks Student attended Transitional Program in Fall 2020, in violation of 34 C.F.R. § 300.323(c)(2). This violation did not result in a denial of FAPE.

In her Complaint, Parent claims the District failed to properly implement Student's 2020 IEP between August 24, 2020 and September 7, 2020—the two weeks Student attended Transitional Program before Separate School had an opening for Student.

The legal framework outlined in the discussion of Allegation No. 1 concerning implementation of an IEP applies equally here. The IDEA specifies that special education and related services must be made available to a student as soon as possible following the development of an IEP. 34 C.F.R. § 300.323.

A. Implementation of 2020 IEP

The 2020 IEP was developed at the end of the 2019-2020 school year and, therefore, would not have been implemented, at the earliest, until the beginning of the 2020-2021 school year. The 2020 IEP recognized that a placement might take time and, as a result, specified that Student would receive *up to* 12 hours of support from a special education teacher and 60 minutes per month of mental health services. (FF # 64.)

Though the District had all summer to secure a placement for Student, Separate School was still not ready to accept Student on the first day of the school year. (FF # 72.) As a result, Student continued to complete online courses as part of Transitional Program. (*Id.*) But, due to COVID-19, Student completed these courses at home and without assistance from Transitional Program teachers. Transitional Program Learning Specialist—who was Student's case manager in Spring 2020 and helped write Student's 2020 IEP—was still Student's case manager at the

beginning of the 2020-2021 school year. (FF # 73.) Transitional Program Learning Specialist was aware of her obligations under Student’s IEP and would have been the primary staff person implementing Student’s IEP. (*Id.*) Therefore, the SCO finds that the District complied with 34 C.F.R. § 300.323(d).

The SCO finds and concludes that the District failed to properly implement the 2020 IEP during this two-week period in violation of 34 C.F.R. § 300.323. Specifically, the District failed to provide Student with 30 minutes of mental health services—the amount his IEP would have required for those two weeks. Because the IEP noted that Student would receive *up to* 12 hours of special education support, the SCO does not find that the District failed to implement this portion of Student’s IEP.

B. Materiality of Failure to Implement

As discussed in depth under Allegation No. 1, a material failure to implement a student’s IEP amounts to a denial of 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, the District failed to provide Student with 30 minutes of mental health services during a two-week period. The SCO finds and concludes that this failure was only a minor discrepancy that had little, if any, impact on Student. Therefore, the District’s failure to implement Student’s IEP did not result in a denial of FAPE.

Conclusion to Allegation No. 9: No disciplinary change of placement occurred. As a result, the District was not required to conduct a manifestation determination.

Parent’s Complaint also alleges the District failed to conduct an MDR within 10 school days of Student’s disciplinary change of placement on or around September 28, 2020.

Discipline of a student with a disability may result in a change to the child’s placement and entitle the student to procedural protections under the IDEA. *See* 34 C.F.R. §§ 300.530, 300.536. Within ten school days of a disciplinary change in placement, a school district must perform an MDR. *Id.* § 300.536(a). The student’s behavior must be determined to be a manifestation of the student’s disability if: (1) the behavior in question was “caused by, or had a direct and substantial relationship to” the student’s disability, or (2) the behavior in question was a result of the school district’s failure to implement the student’s IEP. *Id.* § 300.530(e)(1). Such a determination triggers additional obligations for the school district. *Id.* § 300.530(f). On the contrary, if the behavior is *not* a manifestation of the student’s disability, the school district may discipline the student in the same manner as a non-disabled student. *Id.* § 300.530(c). The

district must, however, ensure the student continues to receive educational services as specified in 34 C.F.R. § 300.530(d).

Before analyzing whether the District was obligated to conduct an MDR, the SCO must determine whether a disciplinary change of placement occurred and, if so, the date the change of placement happened.

A disciplinary change of placement occurs if: (1) a student has been removed from his current educational placement for more than 10 consecutive school days, or (2) a student has been subjected to a series of short-term removals that total more than 10 school days and constitute a pattern. *Id.* § 300.536(a).

Here, no disciplinary change of placement occurred. At no time did the District discipline Student or otherwise indicate that Student had violated the code of conduct. Instead, on September 18, the District notified Parent that—due to safety concerns arising from the incident at Psychiatric Hospital—Student could not return to Separate School until the District completed the DLTA. (FF # 77.) On September 24, the DLTA determined that Student posed an ongoing safety threat. (FF #s 79, 83.) As a result, Student’s IEP Team met on September 28 to discuss next steps. (FF # 88.) Based on these Findings of Fact, the SCO finds that the removal was not based on a violation of the code of conduct. Student’s temporary removal was due solely to safety concerns. As a result, the SCO finds and concludes that no disciplinary change of placement occurred under 34 C.F.R. § 300.530.

Conclusion to Allegation No. 10: Because no disciplinary change of placement occurred, the District was not required to provide educational services consistent with 34 C.F.R. § 300.530(b)(2).

In her Complaint, Parent alleges the District failed to provide Student educational services after his tenth day of removal from his educational placement.

Once a student has been removed from his educational placement for ten school days in the same school year, school districts must provide educational services during any subsequent days of removal. 34 C.F.R. § 300.530(b)(2). Only a disciplinary change of placement triggers the requirements for provision of educational services under 34 C.F.R. § 300.530(b)(2). *Id.* §

300.530(b)(1). Therefore, because no disciplinary change of placement occurred in this case, the District was not obligated to provide educational services under § 300.530(b)(2).

Conclusion to Allegation No. 11: The District failed to provide Parent with adequate PWN following Student’s change of placement on October 5, resulting in a procedural violation of 34 C.F.R. § 300.503.

In her Complaint, Parent contends the District failed to provide her with PWN after Student’s IEP Team changed his placement on or about September 28, 2020.

As discussed in response to Allegation No. 7, the IDEA requires PWN to be provided to the parents of a child with a disability within a reasonable time before the school district changes the educational placement of the child, among other situations. 34 C.F.R. § 300.503(a).

During the IEP Team meeting on October 5, Student’s IEP Team amended Student’s IEP to specify that Student would be receiving remote instruction from Separate School. (FF #s 91-93.) This change occurred due to the recommendation from the DLTA and not due to COVID-19. (FF # 91.) The District did not subsequently provide Parent with a PWN. (*Id.*) Though the IEP Amendment contains some of the content required by a PWN, it does not contain all the required content. As a result, the SCO finds and concludes that the District failed to provide Parent with adequate PWN following Student’s change of placement.

A procedural violation results in a denial of FAPE if it: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). The District’s violation had none of these impacts and, therefore, did not result in a denial of FAPE.

Conclusion to Allegation No. 12: Because no disciplinary change of placement occurred, the District was not obligated to provide Parent with the procedural safeguards notice under 34 C.F.R. § 300.530(h).

In her Complaint, Parent contends the District failed to provide her with a copy of the procedural safeguards notice at the time of Student’s disciplinary change of placement, on or around September 28, 2020.

The IDEA requires school districts to provide parents a copy of the procedural safeguards notice on the date a disciplinary change of placement occurs. 34 C.F.R. § 300.530(h). As discussed in response to Allegation No. 9, no disciplinary change of placement occurred. Therefore, the District was not obligated to provide Parent with a copy of the procedural safeguards under § 300.530(h).

Conclusion to Allegation No. 13: The District amended Student’s IEP during an IEP Team meeting, consistent with 34 C.F.R. § 300.324(a)(6). However, the District committed a procedural violation by failing to provide Parent with proper notice of the meeting, in violation of 34 C.F.R. § 300.322(b).

In her Complaint, Parent alleges the IEP Amendment on October 5, 2020 occurred outside an IEP Team meeting and without Parent’s approval.

Under the IDEA, an IEP may be amended in one of two ways:

- (1) By the entire IEP Team at an IEP Team meeting, or
- (2) In a written document outside an IEP Team meeting, as long as parents and the school district agree.

34 C.F.R. § 300.324(a)(6).

As the Findings of Fact indicate, the IEP Amendment occurred on October 5 during an IEP Team meeting. (FF # 91.) Even if Parent did not agree with the substance of the IEP Amendment, which limited Student to remote instruction, her disagreement did not render the IEP Amendment improper. Indeed, as noted above, “[t]he IEP Team should work towards a general agreement, but . . . [i]f the team cannot reach agreement, the public agency must determine the appropriate services” *Letter to Richards*, 55 IDELR 107 (OSEP 2010). Therefore, the SCO finds and concludes that the District complied with 34 C.F.R. § 300.324(a)(6) when it amended Student’s IEP during a properly-composed IEP Team meeting.

However, under the IDEA, school districts must notify parents of IEP Team meetings “early enough to ensure they have an opportunity to attend.” 34 C.F.R. § 300.322(a)(1). Notice of the meeting must indicate: (i) the purpose, time and location of the meeting, (ii) the attendees, and (iii) inform parents that they may invite other individuals. *Id.* § 300.322(b)(i)-(ii).

As to the IEP Team meetings held on September 28 and October 5, the District provided Parent enough notice to ensure Parent could attend. But the notices did not contain all of the content required by § 300.322(b). (FF # 90.) Specifically, the notices for both meetings failed to indicate the specific purpose of the meeting, identify the attendees, or inform Parent of her right to invite other individuals. (*Id.*). Indeed, it is not clear from the District’s communications whether Parent would have understood that the October 5 meeting was, indeed, an IEP Team meeting. As a result, the SCO finds and concludes that the District violated the procedural requirements of 34 C.F.R. § 300.322(b).

A procedural violation results in a denial of FAPE for a child if the 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).

Here, the procedural violation had no impact on Student's education. Parent was able to participate in the meetings despite the District's insufficient notice. Therefore, the SCO finds that the procedural violation did not result in a denial of FAPE.

Conclusion to Allegation No. 14: The District failed to properly implement Student's 2020 IEP between October 6 and the present, resulting in a denial of FAPE to Student.

The final allegation in Parent's Complaint contends the District failed to properly implement Student's IEP between September 9 and the present by failing to provide the special education and related services required by Student's IEP.

A. Implementation of 2020 IEP

The legal framework regarding implementation of IEPs discussed in response to Allegation No. 1 also applies to this allegation. In earlier allegations, the SCO has addressed the provision of special education and related services up to and including October 5. For purposes of this allegation, the SCO will consider implementation of Student's IEP from October 6 to January 11.

Following the IEP Amendment on October 5, S.S. Psychologist circulated a copy of Student's IEP Amendment to Student's teachers and service providers. (FF # 99.) Therefore, the SCO finds that the District complied with 34 C.F.R. § 300.323(d) by ensuring that Student's teachers and service providers were aware of their responsibilities under the 2020 IEP.

The SCO finds and concludes that the District failed to properly implement the 2020 IEP between October 6 through January 11 in violation of 34 C.F.R. § 300.323. During this time period, Student received all of the instructional minutes required by the 2020 IEP. However, the District failed to provide Student with 330 minutes of mental health services. (FF # 106).

B. Failure to Monitor Progress

Under the IDEA, school districts must provide periodic reports on the progress a student is making toward the student's annual goals. 34 C.F.R. § 300.320(a)(3). The District plainly failed to provide Parent periodic reports on Student's progress towards his IEP goals. Based on the record, the District has not completed any progress monitoring since Student began remote instruction. (FF # 107.) Even though it may be more difficult to monitor Student's progress remotely, the District is still obligated to do so. The SCO finds and concludes that the District violated 34 C.F.R. § 300.320(a)(3).

C. Materiality of Failure to Implement

As discussed in depth under Allegation No. 1, a material failure to implement a student's IEP amounts to a denial of 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, the District failed to provide Student with 330 minutes of mental health services over a ten-week period. Given Student's SED, his mental health services are an essential component of his IEP. Because the District continues to serve Student remotely due to safety concerns, Student's mental health services are more important than ever. The District's failure to provide these services denied Student the opportunity to make appropriate progress on his annual goals related to social/emotional wellness and self-determination. For these reasons, the SCO finds the District's failure to implement Student's IEP to be material. This failure resulted in a denial of FAPE to Student. Given the degree to which a FAPE was denied, "Student is entitled to compensatory services." *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

D. Compensatory Education

Compensatory education is intended to place a student in the same position he would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

Here, Student missed 330 minutes of mental health services. (FF #s 102-105.) Specifically, Student missed 30 minutes of one-on-one therapy and 300 minutes of group therapy. (*Id.*) The SCO finds an award of 30 minutes of one-on-one therapy and 200 minutes of group therapy appropriate.

Systemic IDEA Violations

Pursuant to its general supervisory authority, CDE must 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).

Here, the SCO finds and concludes that the District's three violations for failure to implement Student's IEP, in violation of 34 C.F.R. § 300.323(c)(2), are systemic in nature. The District's failure to implement Student's IEP stems from a lack of direction and communication amongst Student's teachers and service providers. Because Student attended two District schools, it was imperative that the staff from both schools communicate to ensure Student's needs were being met. The District has no policy outlining who should take the lead in these situations. These facts suggest this violation might not be unique to Student. For that reason, the SCO finds and concludes that this violation is systemic.

REMEDIES

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

- a. Failing to fully implement an IEP, in violation of 34 C.F.R. § 300.323(c)(2);
- b. Failing to tailor an IEP to the student's individualized needs, in violation of 34 C.F.R. § 300.324(a)(2)(i);
- c. Failing to provide PWN, in violation of 34 C.F.R. § 300.503; and
- d. Failing to provide proper notice of the meeting, in violation of 34 C.F.R. § 300.322(b).

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

1. By **Friday, April 9, 2021**, 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 the District is responsible. The CAP must, at a minimum, provide for the following:
 - a. Attendance and completion of a training provided by CDE on the following: (a) tailoring IEPs to students' needs, with a specific focus on tailoring BIPs to students' needs; (b) implementation of IEPs; and (c) procedural requirements of the IDEA (prior written notice, procedural safeguards, and notice of meetings). The training in (a) and (c) must include: Assistant Director #1, Assistant Director #2, M.S. Psychologist, M.S. Learning Specialist, and M.S. Enrichment Teacher. The training in (b) must include: Assistant Director #1; Assistant Director #2; all special education and mental health staff at Separate School, Transitional Program, and Middle School; and any case managers (to the extent they do not fall within the earlier categories). This training will address, at a minimum, the concerns noted in this Decision and the requirements of 34 C.F.R. §§ 300.323(c)(2), 300.324(a)(2)(i) 300.503, 300.322(b), 300.530, and 300.324(a)(2)(i). Special Education Director and CDE Senior Consultant Beth Nelson will determine the date, time, and format for this training (i.e., video conference, web conference, webinar, or webcast). The training must be completed by Friday, June 11, 2021.
 - b. Complete a functional behavior assessment ("FBA") by **Friday, May 7, 2021**. If, for any reason, Student refuses or is otherwise unable to participate in the FBA, the District shall be excused from completing the FBA but must still convene Student's IEP Team in accordance with (1)(c) below. The FBA must include:

- i. Consultation with a behavioral specialist who has demonstrated experience in this area;
 - ii. Detailed identification of Student's negative behaviors, including intensity, duration, and a detailed assessment of antecedents and consequences;
 - iii. A detailed summary statement concerning the function of Student's behavior;
 - iv. Confirmation of the summary statement through formal observation of behavior, antecedents, and consequences; and
 - v. Development of competing behavior summary to identify desired behavior, common reinforcing consequences, and alternative behaviors.
- c. Convene Student's IEP Team, at a mutually agreeable date and time, by **Friday, May 21, 2021**. In consideration of the FBA, Student's IEP Team should: (a) review the suitability of Student's current educational placement; and (b) review and revise Student's current BIP. The IEP Team should ensure Student's educational placement is made consistent with the IDEA's least restrictive environment requirements, as set forth in 34 C.F.R. § 300.114. The revised BIP should be tailored to Student's unique behavioral needs and should address Student's educational placement for the 2021-2022 school year, in accordance with 34 C.F.R. § 300.324(a)(2)(i).
- d. Implementation of service logs documenting all special education and related services provided to Student for the remainder of the 2020-2021 school year. To verify that the District is fully implementing Student's current IEP, the District must submit records of service logs to CDE by the second Monday of each month (through June 2021). The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log.
- e. 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 the District's timely correction of the areas of noncompliance.

2. District Policies and Procedures

- b. **By Friday, May 7, 2021** the District must submit written procedures establishing a process for the assignment of case managers for students with disabilities who are simultaneously enrolled in or attending more than one District school or program. Such procedures should detail steps that will be taken by the two schools or programs to ensure a student's IEP is fully implemented, that appropriate progress monitoring occurs, and that the programs collaborate on development of IEPs and BIPs.

3. Compensatory Education Services for Denial of a FAPE

- b. Student shall **receive 3,720 minutes (or 62 hours) of special education instruction**. This instruction may be provided by the District or through a contract between the District and an appropriately licensed and endorsed special education teacher, at the District's expense. If Parent and the District do not agree to a licensed provider, CDE will select a licensed provider. All 3,720 minutes must be completed by **Friday, December 17, 2021**. Up to 50 percent of these services may be provided remotely; the remainder must be provided in-person. The special education instruction can be one-on-one or in a small group setting. Should the Colorado COVID-19 dashboard move Jefferson County to Level Orange, Level Red, or Level Purple, the District should contact CDE to discuss any necessary changes to the provision of Student's compensatory education services.
- c. Student shall receive **245 minutes (or 4 hours and five minutes) of mental health services**. These services may be provided by the District or through a contract between the District and an appropriately licensed mental health provider at the District's expense. If Parent and the District do not agree to a licensed provider, CDE will select the licensed provider. All 245 minutes must be completed by **Friday, August 13, 2021**, though Parent and the licensed provider are free to allocate the services however they see fit (i.e., weekly sessions, monthly, etc.). Up to 50 percent of these services may be provided remotely; the remainder must be provided in person. Forty-five minutes of the mental health services must be one-on-one, and 200 minutes of the services must be in a small group setting. Should the Colorado COVID-19 dashboard move Jefferson County to Level Orange, Level Red, or Level Purple, the District should contact CDE to discuss any necessary changes to the provision of Student's compensatory education services.
- d. To verify that Student has received the services required by this Decision, the District must submit records of service logs to CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log. The District shall communicate with the licensed provider to obtain this information.
- e. By **Friday, April 30, 2021**, the District shall schedule compensatory services in collaboration with Parent. 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 Parent refuses to meet with the District within this time, the District will be excused from delivering compensatory services, provided that the District diligently attempts to meet with Parent and documents efforts. A determination that the District diligently attempted to meet with Parent, and should thus be excused from providing compensatory services, rests solely with CDE.

- f. The District shall submit the schedule of compensatory services to CDE no later than **Friday, May 7, 2021**. If for any reason, including illness, Student is not available for any scheduled compensatory services, the District will be excused from providing the service scheduled for that session. If for any reason the District fails to provide a scheduled compensatory session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with 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.: Beth Nelson
1560 Broadway, Suite 1100
Denver, CO 80202-5149

Failure by 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 CDE.

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶ 13; Rule 2620-R-2.07(9)(c). If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶ 13; see also 34 C.F.R. § 300.507(a); 71 Fed. Reg. 156, 46607 (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

The Decision, dated March 12, 2021, is hereby amended this 8th day of April, 2021.



Ashley E. Schubert
State Complaints Officer

Appendix

Complaint, pp. 1-7

- Exhibit 1: 2020 BIP
- Exhibit 2: 2020 BIP and 2020 IEP
- Exhibit 3: 2020 BIP
- Exhibit 4: 2020 IEP
- Exhibit 5: Progress Report
- Exhibit 6: Safety Plan
- Exhibit 7: Draft 2020 IEP Amendment
- Exhibit 8: Crime of Violence Letter
- Exhibit 9: Email Correspondence
- Exhibit 10: Email Correspondence
- Exhibit 11: Email Correspondence
- Exhibit 12: Email Correspondence
- Exhibit 13: Email Correspondence
- Exhibit 14: Email Correspondence
- Exhibit 15: IEP and BIP from Prior School District

Response,

- Exhibit A: IEPs
- Exhibit B: BIPs
- Exhibit C: Service Logs
- Exhibit D: Threat Assessments
- Exhibit E: Blank
- Exhibit F: Discipline Records
- Exhibit G: Blank
- Exhibit H: Procedural Safeguards Correspondence
- Exhibit I: Blank
- Exhibit J: PWNs
- Exhibit K: Notices of Meetings
- Exhibit L: Evaluation Results
- Exhibit M: Progress Monitoring
- Exhibit N: Grade and Attendance Reports
- Exhibit O: Email Correspondence
- Exhibit P: District Calendars
- Exhibit Q: District Policies

Reply, pages 1-7

- Exhibit 16: Email correspondence

Telephonic Interviews

- M.S. Psychologist: February 18, 2021
- S.S. Psychologist: February 19, 2021
- GAL: February 23, 2021; February 24, 2021
- M.S. Learning Specialist: February 23, 2021
- M.S. Enrichment Teacher: February 23, 2021
- Assistant Director #1: February 23, 2021
- Assistant Director #2: February 23, 2021
- Parent: February 24, 2021
- Manager of Judicial Services: February 25, 2021