

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

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**State-Level Complaint 2021:521**  
**Denver Public Schools**

**DECISION**

**INTRODUCTION**

On September 21, 2021, the parents (“Parents”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> filed a state-level complaint (“Complaint”) against Denver Public Schools (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified four allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. § 300.153(c), CDE has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from September 21, 2020 through September 21, 2021 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

**SUMMARY OF COMPLAINT ALLEGATIONS**

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

1. Failed to properly implement Student’s IEP in violation of 34 C.F.R. § 300.323, specifically by:

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

- a. Failing to follow Student’s Behavior Intervention Plan (“BIP”) on January 14, 2021 and January 29, 2021;
  - b. Failing to appropriately provide Student’s math and literacy services in the correct location between September 21, 2020 and February 28, 2021; and
  - c. Failing to provide Student with Extended School Year (“ESY”) services in the area of literacy between June and August 2021.
2. Failed to develop an IEP that was tailored to meet Student’s needs during the 2020-2021 school year, specifically as follows:
    - a. Special education and related services in the area of literacy were not based on peer-reviewed research to the extent practicable from September 21, 2020 through May 31, 2021, in violation of 34 C.F.R. § 300.320(a)(4).
  3. Amended Student’s IEP without agreement from Parent and outside of an IEP meeting, in violation of 34 C.F.R. § 300.324(a)(6), specifically by:
    - a. Amending the IEP to change Student’s math and literacy services on or around February 2021; and
    - b. Amending the IEP to change Student’s ESY services on or around May 6, 2021.
  4. Failed to properly determine Student’s eligibility for special education and related services under the disability category of Specific Learning Disability (“SLD”) between September 21, 2020 and present because the District failed to conduct a comprehensive reevaluation in all areas of suspected disability, in violation of 34 C.F.R. §§ 300.304-305, specifically by:
    - a. Failing to consider current assessments and classroom-based observations, as required by 34 C.F.R. § 300.305(a).

### **FINDINGS OF FACT**

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

#### **A. Background**

1. Student attends sixth grade at a District middle school (“Middle School”). *Interview with Parents*. During the 2020-2021 school year, Student completed fifth grade at an elementary

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

school in the District (“School”). *Id.* This Decision concerns events that occurred during Student’s fifth-grade year.

2. Throughout fifth grade, Student was eligible for special education and related services under the disability categories of Specific Learning Disability (“SLD”) and Other Health Impairment (“OHI”). *Interview with Case Manager; Exhibit A*, pp. 1-107. At the beginning of fifth grade, OHI was listed as Student’s primary eligibility category, though SLD later became Student’s primary eligibility category in October. *Exhibit A*, pp. 1, 17.

3. Student was described as friendly, engaging, and artistic. *Interviews with School Psychologist, Parents, Case Manager, and Fifth Grade Teacher*. Student had a lot of friends and enjoyed sharing jokes with his classmates. *Interviews with Case Manager and Fifth Grade Teacher*. At times, Student struggled to stay focused and on task in the classroom. *Id.*

4. Due to the COVID-19 pandemic, all students at School received remote instruction from August 24, 2020 to October 20, 2020 and from November 2, 2020 to January 5, 2021. *Interview with Case Manager*. Students briefly attended School in-person from October 21, 2020 to October 30, 2020. *Id.*

#### **B. Fall 2020 Reevaluation**

5. During Fall 2020, School reevaluated Student in advance of his upcoming eligibility meeting. *See Exhibit A*, p. 1; *Interview with Case Manager*.

6. School Psychologist #2 administered the Wechsler Intelligence Scale for Children-Fifth Edition (“WISC-V”) to assess Student’s intelligence. *Exhibit L*, pp. 1-3. Student’s overall cognitive functioning fell within the average range. *Id.* He had average to high scores in the areas of Verbal Comprehension, Visual Spatial, Fluid Reasoning, and Working Memory. *Id.* However, Student received a very low score for Processing Speed. *Id.*

7. Student’s fourth and fifth grade math teacher (“Math Teacher”) completed the Pragmatic Language Skills Inventory, which found Student to have average social pragmatic skills. *Id.* at pp. 3-4.

8. Case Manager administered several academic assessments. These assessments and the results can be summarized as follows:

- **STAR Reading:** STAR Reading is a computer-based assessment that evaluates a student’s reading ability. Student scored in the 18th percentile, which correlated to a grade equivalent of 3.8. Student was reading one year and three months below grade level. *Id.* at pp. 5-7.
- **DIBELS:** DIBELS is a one-minute timed fluency assessment. When using a fifth-grade level passage, Student read 72 words per minute (“WPM”). The benchmark is to read 130

WPM by the end of fifth grade. Between August to October 2020, Student's fluency increased 1.5 words per minute each week. Student completed the DIBELS assessment nine times during fourth grade using a fourth-grade passage. In August 2019, Student read 48 WPM, and by May 2020, Student read 100 WPM. In October 2020, Student read 106 WPM on a fourth-grade level passage. *Id.* at pp. 7-8.

- Developmental Reading Assessment ("DRA"): The DRA assesses a student's reading level based on fluency, accuracy, and reading comprehension. In August 2020, Student was at level 34. By October, Student was at level 38. The grade-level expectation is to read at a level 50. *Id.* at p. 8
- STAR Math: STAR Math is a computer-based assessment that evaluates a student's math ability. At the time of his reevaluation, Student had completed the assessment three times in the 2020-2021 school year. His score in August 2020 was in the 35<sup>th</sup> percentile; however, his scores in September and October were in the 9<sup>th</sup> and 10<sup>th</sup> percentile, respectively. *Id.* at p. 9.
- Wechsler Individual Achievement Test-Third Edition ("WIAT-III"): The WIAT-III measures a student's individual achievement in various subcategories. Student's results can be summarized as follows:
  - Total Reading: Below Average
  - Basic Reading: Average
  - Reading Comprehension and Fluency: Average
  - Written Expression: Average
  - Mathematics: Average
  - Math Fluency: Below Average

*Id.* at p. 12. Student, however, scored well below average on certain subtests, including Math Fluency-Multiplication (3<sup>rd</sup> percentile), Word Reading (4<sup>th</sup> percentile), Oral Reading Fluency (9<sup>th</sup> percentile), Numerical Operations (9<sup>th</sup> percentile), and Spelling (12<sup>th</sup> percentile). *Id.* at p. 11.

9. Case Manager also reviewed Student's grades in math and reading for the 2020-2021 school year:

- Reading:
  - Unit 1 Mid-Unit Assessment: 6/8
  - Unit 1 End of Unit Assessment: 6/8
- Math:
  - Unit 1 Mid-Unit Assessment: 3/4
  - Unit 1 End of Unit Assessment: 2/4

*Id.* at p. 8.

10. School Psychologist interviewed Student, Parents, and his teachers. She also observed Student in the classroom on three occasions.

11. School Psychologist conducted the Behavior Assessment System for Children, Third Edition (“BASC-3”), Behavior Rating Inventory of Executive Functioning-Second Edition (“BRIEF-2”), and Vineland Adaptive Behavior Scales-Third Edition (“Vineland-3”) to assess Student’s social-emotional functioning. *Id.* at pp. 16-27. School Psychologist also interviewed Student, Parents, and several of Student’s teachers, in addition to observing Student in the classroom. *Id.* at pp. 12-16. Collectively, these interviews, observations, and assessments indicated concerns regarding Student’s social-emotional functioning in the classroom, particularly in the areas of emotional regulation, attention, and executive functioning skills. *Id.* at p. 29.

### C. November 2020 Eligibility Determination

12. A multidisciplinary team (“MDT”) met over the course of three days between October 28, 2020 and November 18, 2020 to review Student’s reevaluation and complete his eligibility determination. *Interview with Case Manager.*

13. The MDT found Student remained eligible for special education and related services under OHI and SLD in the area of reading fluency. *Id.*; *Exhibit M*, pp. 1-3. Parents urged the MDT to find Student eligible for SLD in the additional areas of written expression, mathematical calculation, and basic reading. *Interviews with Parents and Case Manager.* Parents’ hope was that these additional areas of eligibility would allow Student to receive proper intervention and instruction to help close the gap between his achievement and grade-level standards. *Interview with Parents.*

14. District policy requires MDT’s to “[e]nsure research based intervention and progress monitoring for all areas of concern [are] in place.” *Exhibit J*, p. 76 (alteration in original). The policy expressly provides that “[i]f there is not MTSS data or the MTSS process has not begun, the IEP team, in collaboration with the general education team, is responsible for making sure the student is receiving intervention in the area(s) of concern and data is being collected.” *Id.*

15. The MDT did not find Student eligible under SLD in any additional areas. *Exhibit M*, p. 1. Even though Student had achievement gaps in these areas, District staff did not consider Student’s deficits to be significant given his average ratings on the WIAT-III. *Interview with Case Manager.* The MDT recognized that Student scored significantly below average on certain subtests but felt that those areas could be addressed through services and goals. *Id.*

16. More importantly, however, District staff lacked data on Student’s response to scientific, research-based intervention. *Id.* At the time, Student was receiving tier 3 interventions in targeting reading fluency. *Exhibit A*, p. 20. Case Manager indicated Fifth Grade

Teacher would work with Student to complete his math problems after providing the math lesson to the class. *Interview with Case Manager*. However, Student was not receiving any other interventions and was receiving no remedial assistance. *Id.*

17. The District had been monitoring Student's progress on his existing reading and social-emotional wellness goals under his prior IEP but had no other data on Student. *Interviews with Case Manager and Special Education Instructional Specialist ("SEIS")*.

18. On November 19, the District issued a Prior Written Notice ("PWN") detailing why the MDT did not find Student eligible under SLD in the additional areas of written expression, mathematical calculation, and basic reading. *Exhibit C*, pp. 7-10. Though there was "some evidence of an academic skill deficit in these three areas," the evidence "was vague in regards to [Student's] response to scientific based interventions." *Id.* at pp. 8-9. The PWN continued:

Specifically, written expression data indicate that [Student] was meeting grade level expectations as demonstrated by satisfactory performance on grades as well as teacher report from last year in 4<sup>th</sup> grade. [Student's] math achievement met grade level expectations as demonstrated by classroom performance and STAR math last year in 4<sup>th</sup> grade. [Student's] WIAT reading comprehension and pseudoword decoding subtest scores were average. However, the one subtest score in the area of word reading was significantly below average. Multiple STAR Reading assessment results indicate that [Student] is consistently performing in the low average range. Based on current and past classroom performance, [Student] is demonstrating satisfactory performance in reading. Therefore, because the analyses of the data do not support qualifying [Student] in these areas, the decision was made that he did not meet the criteria to be identified with an SLD in these three areas.

*Id.* at p. 9.

#### **D. December 2020 IEP**

19. After the MDT determined that Student remained eligible under SLD and OHI, a properly-constituted IEP Team convened on December 2 and December 4 to develop Student's IEP. *Exhibit E*, pp. 1-6. Parents disagreed with the proposed math goal and requested the District complete an additional assessment in math. *Id.* at FF # 87. Parents also requested the District complete an updated Functional Behavior Assessment ("FBA"). *Id.* The District agreed. *Id.*

20. The December meetings resulted in the IEP dated December 4, 2020 ("December 2020 IEP") and the BIP dated December 7, 2020 ("BIP"). *Interview with Case Manager*. The December 2020 IEP and the BIP were in effect when Student returned to School in-person in January 2021. *Id.*

21. Case Manager, School Psychologist, and Fifth Grade Teacher were informed of Student's December 2020 IEP and BIP and aware of their responsibilities under Student's IEP. *Interviews with Case Manager, School Psychologist, and Fifth Grade Teacher*. Both the IEP and the BIP were available to staff through Enrich. *Interview with Case Manager*.

22. The section of the December 2020 IEP regarding present levels of performance indicated that Student met two of the annual goals under his prior IEP and made progress on the other annual goal. *Exhibit A*, pp. 20-21. This portion of the IEP also contained extensive data from Student's last evaluation on October 27, 2020. *See id.* at pp. 21-27.

23. The December 2020 IEP acknowledged that Student's SLD interfered with his ability to "access and understand content information (literacy, science, social studies, and math) and fully participate in his classes." *Id.* at p. 28. His OHI impacted his executive functioning skills, task initiation, and ability to focus. *Id.*

24. The December 2020 IEP contained six annual goals in the areas of reading, writing, mathematics, self-determination, and social-emotional wellness. *Id.* at pp. 31-36.

25. The December 2020 IEP identified numerous accommodations and modifications designed to help Student access the curriculum. *Id.* at pp. 36-37.

26. Under the December 2020 IEP, Student received the following special education and related services:

- Specialized Instruction:
  - Literacy: 210 minutes per week of direct literacy instruction inside the general education classroom;
  - Math: 60 minutes per week of direct math instruction inside the general education classroom; and
  - Other: 15 minutes per month of direct specialized instruction in writing inside the general education classroom.
- Psychological Services:
  - 120 minutes per month of direct psychological services outside the general education classroom; and
  - 30 minutes per month of indirect psychological services inside the general education classroom.

*Id.* at pp. 40-41.

27. Per the December 2020 IEP, Student spent 98.7% of his time in the general education environment. *Id.* at p. 42.

28. Student's BIP described the target behavior as follows:

"When a teacher gives [Student] an instruction/command/request to engage in an *academic* task, [Student] does not follow the instruction without reminders and engages in off-task behaviors such as walking around the classroom, talking with peers, sitting or standing at his desk, playing with objects, looking around the classroom, and leaving the classroom."

*Exhibit B*, pp. 10-13 (emphasis added). The primary purpose of the target behavior was to avoid non-preferred or difficult academic tasks. *Id.* at p. 10.

29. The BIP outlined setting event strategies, such as use of a behavior chart and a visual schedule. *Id.* at p. 10.

30. Listed antecedent strategies designed to reduce the target behavior included using if/then statements, allowing Student to choose which task he completes first, and chunking assignments into smaller steps. *Id.* at pp. 10-11.

31. The BIP also included behavior teaching strategies, such as providing brief redirects to support compliance, use of role play, and debriefing after noncompliance. *Id.* at p. 11.

32. As reinforcement strategies, the BIP identified positive communication home and rewards using Student's behavior chart. *Id.*

#### **E. Return to In-Person Instruction and Change to Student's Services**

33. On January 5, 2021, School resumed in-person instruction. *Exhibit I*, p. 1. Even though students were able to return to School in-person, the COVID-19 pandemic continued to impact how the District provided services to students. *Interview with SEIS*.

34. In particular, cohort requirements—which limited interactions between a group of students and adult staff to reduce COVID-19 exposure—affected School's ability to provide special education services inside the general education classroom (known as "push in services"). *Id.* To comply with the cohort requirements, Principal decided that School would not provide push-in services; instead, all push-in services would be converted to pull-out services provided outside the general education classroom. *Id.*; *Interview with Case Manager*. Such decisions were made by individual schools and not at the District level. *Interview with SEIS*.

35. Applicable District policy required any changes in services due to the COVID-19 pandemic to be documented in contingency plans. *Id.*; *Exhibit J*, p. 69. Case Manager did not

develop a contingency plan for Student or otherwise document the change from push-in to pull-out. *Interview with Case Manager.*

36. At the time, Case Manager had approximately ten students on her caseload. *Id.* The Principal's decision to convert push-in services to pull-out services affected other students on Case Manager's caseload. *Id.* Similar to Student, Case Manager did not develop contingency plans for these students or otherwise document the change to the setting of the services. *Id.*

37. The parties do not dispute that Student received his math and literacy services outside the general education classroom beginning on January 5 and continuing through the end of the 2020-2021 school year. *Id.; Interviews with Parents.*

#### F. January 2021 Behavior Incidents

38. In January 2021—shortly after he resumed in-person instruction—Student was involved in two incidents that resulted in him being sent to Assistant Principal's office. In the first incident on January 14, 2021, Student was walking in the hallway on the way to recess. *Interviews with Assistant Principal, Fifth Grade Teacher, and Parents.* School staff had placed tape on a water fountain to prevent students from using it. *Id.* Fourth Grade Teacher witnessed Student remove the tape and then pull down his face mask to breathe on another student. *Interviews with Assistant Principal and Fifth Grade Teacher.* Fourth Grade Teacher redirected Student, and Student rolled his eyes at the teacher. *Id.* In response, Fourth Grade Teacher sent Student to Assistant Principal's office. *Id.*

39. Assistant Principal recalled having a brief conversation with Student regarding the importance of wearing masks and not using water fountains due to the COVID-19 pandemic. *Interview with Assistant Principal.* According to her recollection, Student's recess had concluded by the end of their conversation, so Student was sent back to class. *Id.*

40. Parents recalled the event differently. *Interview with Parents.* On the day of the incident, Parents remembered receiving a phone call from Assistant Principal about the incident. *Id.* During the call, Assistant Principal told Parents that Student was required to write an apology letter to the custodian. *Id.*

41. Assistant Principal could not remember whether she made Student write an apology letter or not. *Interview with Assistant Principal.* Though School used apology letters as part of its restorative justice protocol, Assistant Principal said she could not imagine making Student write a letter because Student "hated writing." *Id.* There was no documentation of the incident at the time it occurred. *Id.*

42. The second incident occurred on January 29, 2021. *Interviews with Parents and Assistant Principal.* While at recess, Student knocked over a construction cone being used to divide the playground into zones to keep classes separate due to the COVID-19 pandemic. *Interviews with Parents, School Psychologist, and Fourth Grade Teacher.* Due to staffing

struggles, School Secretary was supervising Student's class at recess. *Id.* School Secretary asked Student to fix the cone, but Student refused to comply. *Interviews with Parents, School Psychologist, Fourth Grade Teacher, and Assistant Principal.*

43. From there, memories of the incident diverge. Assistant Principal recalled School Secretary asking Student to sit out from recess for a few minutes. *Interview with Assistant Principal.* When Student refused, he was sent to Assistant Principal's office. *Id.*

44. Parents remembered School Secretary having Student sit out the remainder of recess. *Interview with Parents.* When recess concluded, Student was not allowed to line up with his class but, instead, was sent to the Assistant Principal's office. *Id.*

45. Regardless, in either account, Student missed recess. *Interviews with Assistant Principal and Parents.* Once in the office, Assistant Principal had a conversation with Student about the importance of staying safe and role played how to have respectful conversations with adults. *Id.* Student then returned to class. *Id.*

46. The School did not document the incident at the time it occurred. *Id.*

47. Student received no other discipline for the events on January 14 or January 29. *Interviews with Assistant Principal and Parents.*

48. Because the District had no contemporaneous documentation and because Assistant Principal did not have a "vivid memory" of the incidents, the SCO finds Parents' specific recollection of the incidents, including Assistant Principal's telephone call, to be the most credible recollection of the events of January 14 and January 29.

49. These incidents are troublesome for Parents, in part, because Student missed recess. *Interview with Parents; Reply*, pp. 2-3. In the past, Parents have requested that School "not take away recess as a consequence as [Student] needs time to move and play to regulate [and] reset his brain so he can focus in [S]chool." *Id.* at p. 3.

#### **G. February 2021 Evaluation Report**

50. In February, Case Manager completed Student's Evaluation Report<sup>3</sup>, with an additional math assessment, an updated math assessment, and a review of Student's recent classroom performance. *Exhibit L*, pp. 38-44. School Psychologist also completed the new FBA in February 2021. *Id.* at pp. 30-37.

51. The Key Math assessment evaluated Student's math proficiency in relation to a nationwide sample of students his age. *Id.* at p. 38. Student scored below average in the subtests for addition and subtraction and multiplication and division. *Id.* at pp. 39-41. This score

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<sup>3</sup> The District referred to this as a "Special Evaluation Report." However, State and Federal regulations recognize only two forms of evaluation: an initial evaluation and a reevaluation. See 34 C.F.R. §§ 301, 303.

corresponded with Student's below average scores in math fluency, specifically multiplication, on the WIAT-III. *Id.* at pp. 11-13. All other subtests fell within the average range, except for one subtest in the above average range. *Id.*

52. On the updated STAR Math assessment, Student scored in the 39th percentile, a significant improvement from his score in the 35th percentile in August 2020 and the 10th percentile in October 2020. *Id.* at p. 42.

53. Case Manager also reviewed Student's recent grades in math:

- Math Assessments
  - Unit 2 Mid-Unit Assessment: 1/4
  - Unit 2 End of Unit Assessment: 2/4
  - Unit 3 End of Unit Assessment: 1/4
  
- Math Exit Tickets
  - 1/6/21: 2/4
  - 1/8/21: 3/4
  - 1/11/21: 3/4
  - 1/13/21: 3/4
  - 1/20/21: 4/4
  - 1/27/21: 4/4
  - 1/28/21: 4/4

*Id.* at p. 44. On the assessments, a score of 1 out of 4 indicates little evidence of reasoning or understanding. *Id.* A score of 2 out of 4 indicates evidence of some reasoning or understanding without a correct answer. *Id.*

54. On February 8, 2021, a properly-constituted IEP Team met to consider the Evaluation Report and the updated FBA. *Interview with Case Manager.* Based on the Evaluation Report, the IEP Team decided to revise Student's current math goal and add a second math goal. *Interview with Case Manager.* The IEP Team did not reconsider Student's eligibility for SLD. *Id.* During this meeting, Parents became aware that Student was receiving his math and literacy services outside the general education classroom. *Interview with Parents.*

#### H. February 2021 IEP

55. The IEP that resulted from the meeting was dated February 8, 2021 and finalized on March 4, 2021 ("February 2021 IEP"). *Exhibit 7*, pp. 1-30; *Exhibit 8*, p. 1.

56. Other than a few changes and additions, the February 2021 IEP essentially duplicated the December 2020 IEP. *See Exhibit A*, pp. 17-43; *Exhibit 7*, pp. 1-30.

57. The February 2021 IEP discussed Student’s present levels of performance, including the results of the Evaluation Report. *Exhibit 7*, pp. 1-11.

58. The February 2021 IEP revised Student’s existing math goal and added an additional math goal. *Id.* at pp. 21-22. One goal targeted Student’s math computation skills and one targeted Student’s math fluency skills. *Id.*

59. Student’s minutes in the Service Delivery Statement remained unchanged from the December 2020 IEP. *Id.* at pp. 27-28. However, the setting for Student’s math and literacy services was changed to outside the general education classroom due to COVID-19 restrictions. *Id.*; *Interviews with SEIS and Case Manager.*

### I. Literacy Curriculum

60. At the beginning of fifth grade, Student was receiving literacy intervention in a small group setting using the Read Well curriculum. *Interviews with SEIS and Case Manager; Exhibit A*, p. 20.

61. During the February 8 IEP Team meeting, Parents expressed concern that the Read Well program was not approved by CDE. *Interviews with SEIS, Case Manager, and Parents.* In response, School staff immediately stopped using Read Well and switched to Voyager Sopris, a CDE-approved intervention program. *Interviews with SEIS and Case Manager; see CDE Exhibit 1.*

62. CDE’s Advisory List of Instructional Programming identifies “evidence-based” instructional programs, as required by the READ Act. *CDE Exhibit 1.* In 2020, CDE performed a review of all instructional programs using a new rubric. *CDE Exhibit 2.* All previously-approved programs were required to reapply for inclusion on the updated list. *Id.*

63. Read Well reapplied for inclusion on the list. *Id.* During the evaluation process, Read Well demonstrated that the program provided scientifically- and evidence-based instruction. *Id.* Ultimately, however, Read Well was not included on CDE’s 2020 Advisory List of Instructional Programming (“Advisory List”) due to its instructional strategies. *Id.*

64. Read Well described itself as a “research-based program” that “provides explicit, systematic daily instruction in the five areas identified by researchers as critical to reading with understanding: phonemic awareness, phonics, comprehension, vocabulary, and fluency.” *CDE Exhibit 3.* On its website, Read Well has a 48-page brochure detailing the research underlying the curriculum. *CDE Exhibit 4.*

## J. Eligibility for ESY Services and IEP Amendments

65. On April 12, 2021, a properly-constituted IEP Team met virtually to determine Student's eligibility for ESY services. *Exhibit E*, p. 19. Parents attended the meeting.

66. Parents and District members of the IEP Team agreed that Student needed ESY services to prevent regression; however, they were unable to agree on the amount of services. *Interview with Parents*. Case Manager proposed 20 hours of literacy services, and School Psychologist proposed 2 hours *per month* of psychological services. *Id.* Parents requested the District pay for a five-week literacy camp for Student. *Id.* However, the District-members of the IEP Team were unwilling to increase their original offer. *Id.* The District's final offer—and the one that was later memorialized in Student's IEP—was 20 hours of literacy services and 6 hours of psychological services. *Id.*; *Interview with Case Manager*.

67. On April 21, 2021, Case Manager amended Student's IEP to incorporate the IEP Team's decision on ESY ("April 21 Amendment"). *Exhibit A*, p. 72. In the amendment, Case Manager described Student's ESY services in the Service Delivery Statement as "20 hours of literacy specialized instruction [and] 2 hours of social emotional specialized instruction." *Id.*

68. Case Manager did not seek or obtain Parents' agreement to amend the IEP outside of an IEP Team meeting, because the amendment reflected the decisions made in the April 12 IEP Team meeting. *Interview with Case Manager*. During their interview, Parents agreed that the April 21 Amendment was proper.

69. On May 6, 2021, Case Manager amended Student's IEP a second time ("May 6 Amendment"). Case Manager revised the description of Student's ESY services to more accurately reflect the decision made in the April 12 meeting. As revised, the description read:

[Student] will receive 20 hours (5 hours per week) of ESY services during the summer of 2021 in the area of reading fluency in a small group setting. [Student] will receive 6 hours (90 minutes per week) of ESY services per month during the summer of 2021 in the area of social skills and executive functioning small group setting.

*Exhibit A*, p. 103. Case Manager also added the ESY services to the chart detailing Student's special education and related services. *Id.* at p. 104. The chart indicated Student would receive the agreed ESY services between June 7, 2021 and July 2, 2021. *Id.*

70. Case Manager did not seek or obtain Parents' agreement to amend the IEP outside of an IEP Team meeting, because she did not view it as a substantive change from the April 21 Amendment. *Interview with Case Manager*. Instead, she simply sent Parents the May 6 Amendment once finalized. *Exhibit 2*, p. 23.

71. No IEP Team meeting was held to discuss the May 6 Amendment. *Id.*

72. On May 26, 2021, Case Manager amended Student's IEP a third time ("May 26 Amendment"). Here, Case Manager completed an amendment form (versus making the changes directly in the IEP itself) to amend the IEP as follows:

Change the dates for ESY psychological services from 6/7/2021-7/2/2021 to 6/1/2021-8/20/2021. [Student] will receive a total of 6 hours of psychological services for ESY – two hours/month for the months of June, July, and August. This was discussed during the IEP meeting on 4/12/2021.

*Exhibit A*, p.107.

73. Case Manager viewed the May 26 Amendment to be just a clerical correction and did not obtain Parents' consent to amend the IEP outside of an IEP Team meeting. *Interview with Case Manager*. Ultimately, Parents received a copy of the May 26 Amendment, as finalized, via email on June 4. *Exhibit 2*, p. 87.

#### **K. Disagreement over ESY Services**

74. On May 10, Parents emailed Case Manager expressing their disagreement with the May 6 Amendment. *Exhibit 2*, p. 54. Specifically, Parents were upset about the dates included in the May 6 Amendment. *Interview with Parents*. During the April 12 IEP Team meeting, District staff said ESY would be "non-traditional" and would be "individualized for [Student]." *Id.* Parents perceived this to mean that they would have flexibility in scheduling Student's ESY services. *Id.* Case Manager did not respond to Parents' email. *Id.*

75. The District notified Parents via email on May 24 that Student had been assigned to a site for ESY services ("ESY site"). *Exhibit 2*, p. 55. Parents were to transport Student to the ESY site five days per week between June 7, 2021 and July 2, 2021. *Id.* Student would receive one hour of literacy services each day. *Interview with Parents*.

76. On May 25, Parents emailed Case Manager, SEIS, and Senior Manager for Elementary Schools to reiterate their concerns about ESY scheduling and, now, the location of the ESY site (which was 7 miles from Student's home). *Exhibit 2*, p. 57. Parents reminded District staff that Student was planning to attend a private five-week literacy camp and that they had been told ESY would be non-traditional and individualized for Student (i.e., scheduled around his availability). *Id.*

77. The same day, Case Manager responded and indicated she or someone from the District would follow-up with Parents by the end of the week. *Id.* at p. 59.

78. On May 28, SEIS responded and reiterated the ESY services the IEP Team agreed upon in the April 12 meeting. *Id.* at p. 83. Parents replied: "We were not involved in the decision to place him in a school in northeast Denver for the summer. Our preference is to follow the decision in the IEP meeting to tailor ESY hours to his needs this summer." *Id.*

79. After not receiving a response, Parents escalated their concerns to the Former Director of Special Education via email on June 3, stating:

One parent driving [Student] 20-30 minutes each way and waiting an hour while he receives his one hour of ESY then driving 20-30 minutes home daily for a month is a hardship for our family and not possible. In addition, we were told there would not be traditional ESY this year and that [Student's] ESY would be tailored to his needs this summer . . . Because of this we went ahead and enrolled him in the [literacy camp] as discussed in our . . . 4/12 IEP meeting[] . . . . Camp runs from 9-1 daily from 6/14-7/16.

*Id.* at p. 85. Parent sent another email to SEIS on June 6, the day before Student was scheduled to begin receiving ESY services. *Id.* at p. 88.

80. Student did not attend ESY as scheduled on June 7. *Interview with Parents.*

81. On July 20, Parents reached out to Director of Special Education (“Director”) to resolve the dispute over Student’s ESY services. *Exhibit 2*, p. 93. Following a telephone conference with Parents, the Director responded:

It is my understanding that the IEP team determined that [Student] did qualify for ESY services in the areas of literacy and social-emotional wellness. The District offered the literacy services to fulfill the obligation during the ESY summer session, June 7-July 2, 2021. It seems that the description of ESY as “non-traditional” led to some confusion as to when and where the services would be provided by the District. . . . Unfortunately, the District does not tailor ESY services to individual family summer schedules.

*Id.* at p. 111.

82. Ultimately, due to their disagreement with the District, Parents chose not to send Student for his ESY services in literacy. As a result, Student did not receive any ESY services for literacy during the Summer of 2021. *Interview with Parents.*

### **CONCLUSIONS OF LAW**

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

**Conclusion to Allegation No. 1: The District failed to properly implement Student’s IEP when it provided Student’s math and literacy services in a different setting than required by the IEP, in violation of 34. C.F.R. § 300.323(c)(2). However, this violation did not result in a denial of FAPE.**

The first allegation accepted for investigation concerns implementation of Student’s IEP during the 2020-2021 school year. In their Complaint, Parents alleged the District failed to properly implement Student’s IEP in three ways:

- (1) By failing to follow Student’s BIP on January 14, 2021 and January 29, 2021.
- (2) By failing to provide Student’s math and literacy services in the correct setting between September 21, 2020 and February 28, 2021; and
- (3) By failing to provide Student’s ESY services in the area of literacy between June and August 2021.

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.* 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. Knowledge of Student’s IEP**

As a preliminary matter, the SCO must determine whether the District satisfied its obligation under 34 C.F.R. § 300.323(d). Here, the findings demonstrate that Case Manager, School Psychologist, and Fifth Grade Teacher were informed of Student’s IEPs—including his BIP—and aware of their responsibilities related to Student’s IEP. (FF # 21.) Student’s IEPs and his BIP were available to these staff members through Enrich. (*Id.*) As a result, the SCO finds and concludes the District complied with 34 C.F.R. § 300.323(d).

Parents’ concerns related to implementation will now be addressed in turn.

#### **B. Implementation of Student’s BIP**

Parents alleged the District failed to properly implement Student’s BIP during incidents that occurred on January 14, 2021 and January 29, 2021. Student’s BIP focused exclusively on Student’s behavior in the classroom. The BIP identified the target behavior as: “When a teacher gives [Student] an instruction/command/request to engage in an academic task, [Student] does

not follow the instruction without reminders and engages in off-task behaviors such as walking around the classroom, talking with peers, sitting or standing at his desk, playing with objects, looking around the classroom, and leaving the classroom.” (FF # 28.) The BIP did not identify any other target behaviors. (*Id.*) And, indeed, the BIP did not provide staff any guidance on how to address Student’s behavior outside the academic setting.

As detailed in the findings, each of these incidents involved noncompliant behavior that occurred outside the classroom. (FF #s 38, 42.) The first incident occurred in the hallway on the way to recess, while the second incident occurred during recess. (*Id.*) At the time of the incidents, Student had not been given an instruction, command, or request to engage in an *academic* task. (*Id.*) Instead, Student had been given instructions to engage in non-academic tasks. (*Id.*) As a result, the BIP was not applicable to either of the situations at hand. Therefore, the SCO finds and concludes that the District did not fail to implement Student’s BIP on either January 14 or January 29.

Nothing in the record indicates that Student had been noncompliant or otherwise punished for similar behavior after these two incidents. These incidents are troubling to Parents because Student missed recess, and Parents recognize the detrimental effect that can have on Student’s learning. (FF # 49.) Here, Student undoubtedly missed recess on both occasions as a result of his noncompliance. (FF #s 38-45.) However, missing recess was a result of *when* the non-compliance occurred and not necessarily the consequence chosen for Student’s non-compliance.

### **C. Implementation of Student’s Math and Literacy Services**

Parents also alleged that the District failed to properly implement Student’s December 2020 IEP by failing to provide his math and literacy services in the proper setting. The December 2020 IEP required Student to receive specialized instruction in math and literacy inside the general education classroom. (FF # 25.) Due to COVID-19 restrictions, Principal determined that special education staff could not provide services inside the general education classroom. (FF # 34.) All push-in services at School were converted to pull-out services. (*Id.*)

Though District policy required such a change to be documented in a contingency plan, Case Manager did not develop a contingency plan for Student. (FF # 35.) The December 2020 IEP remained unchanged until the February 2021 IEP was finalized on March 4, 2021. (FF #s 35, 55, 59.) It is undisputed that once in-person instruction resumed on January 5, 2021, Student received his math and literacy services outside the general education classroom. (FF # 37.) The SCO finds and concludes that the District failed to properly implement Student’s IEP when it provided Student’s math and literacy services outside the general education classroom from January 5 to March 4. This resulted in a violation of 34 C.F.R § 300.323(c)(2).

### Materiality of Failure to Implement

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

"A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard "does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." *Id.*

On March 12, 2020, the U.S. Department of Education issued guidance indicating that, during the COVID-19 pandemic, 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" developed under the IDEA. *Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease Outbreak*, 76 IDELR 77 (EDU 2020). CDE echoed this federal COVID-19 guidance in April 2020, advising that if a district "continues to provide educational services to the general student population during a school closure, it must ensure that students with disabilities have access to the same educational opportunities and FAPE. This means that—to the greatest extent possible—the special education and related services identified in the student's IEP should be provided." *Special Education & COVID-19 FAQs* at [www.cde.state.co.us/cdesped/special\\_education\\_faqs](http://www.cde.state.co.us/cdesped/special_education_faqs) ("CDE FAQs").

The SCO recognizes that District and School staff were continuing to adapt to the COVID-19 pandemic during this time period. Indeed, as of January 5, 2021, School's students had only been in-person for two-weeks over the course of ten months. (FF #s 4, 33.) School staff were balancing the heavy operational weight of COVID-19 with the importance of Student's services. Given its staffing levels, School simply could not provide Student's services inside the general

education classroom and comply with COVID-19 restrictions. (FF # 34.) As a result, School decided it could provide Student’s IEP services—to the greatest extent possible—by moving those services outside the general education classroom. No concerns were raised during this investigation about the delivery of Student’s service minutes, only the setting of the services. As discussed below in response to Allegation No. 2, School should have documented the change in Student’s services differently. Nonetheless, the SCO finds and concludes that the District’s violation was immaterial and did not result in a denial of FAPE. In so finding, the SCO in no way diminishes the importance of the setting for a student’s services but, instead, acknowledges the difficult juggling act schools have faced during COVID-19.

#### **D. Implementation of Student’s ESY Services for Literacy**

In their Complaint, Parents claimed the District failed to provide Student’s ESY services in the area of literacy, resulting in a failure to implement Student’s IEP.

During the April 12 meeting, the IEP Team determined that Student required ESY services to maintain skills and prevent regression. (FF #s 65, 66.) The District offered Student 20 hours of literacy services and 6 hours of psychological services. (FF # 66.) At the time of the meeting, Case Manager did not know the specific dates or locations for ESY services. (*Id.*)

Parents left the meeting feeling that ESY would not be “traditional” and would be “individualized” for Student. (FF # 74.) It appears that, even if those words were used, they were not defined or given appropriate context by the IEP Team, leaving Parents to formulate their own idea of what ESY would look like for Student. Unfortunately, when Parents were notified of the ESY dates and location, it did not match what they had envisioned. (FF #s 75-79.) Instead, the District’s offer of ESY conflicted with Student’s private literacy camp and required Parents to drive 30 minutes each way for Student’s one hour of ESY five days a week. (*Id.*)

Nothing in the IDEA requires school districts to allow parents to choose the dates or location for ESY services. *See* 34 C.F.R. § 300.106. It does not require school districts to accommodate a family’s schedule or make ESY convenient for a family. *Id.*

Here, Parents have not challenged the suitability of the instruction Student would have received during ESY. Instead, Parents have focused solely on the unsuitability of the dates and location for ESY. (FF #s 74-82.) Based on their disagreement with the District’s offer of ESY, Parents chose not to send Student to the ESY site for his literacy services. (FF # 82.) Parents effectively rejected the District’s offer of ESY, and, as a result, Student received no ESY services for literacy. Because Parents unilaterally rejected the District’s offer of ESY services, the SCO finds and concludes that the District did not fail to implement Student’s IEP. No violation of the IDEA occurred.

**Conclusion to Allegation No. 2: The December 2020 IEP developed by the District provided Student specialized literacy instruction using peer-reviewed research to the extent practicable, consistent with 34 C.F.R. § 300.320(a)(4). However, the District based the February 2021 IEP on COVID-19 restrictions rather than on Student’s individualized needs, in violation of 34 C.F.R. § 300.324.**

The second allegation accepted for investigation concerns the suitability of Read Well, the curriculum used for Student’s specialized instruction in literacy. Parents contend Read Well was neither peer-reviewed nor evidence-based.

#### Read Well Curriculum

The IDEA requires a school to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). Developing an IEP that is reasonably calculated is a “fact-intensive exercise” that is “informed not only by the expertise of the school officials, but also by the input of the child’s parents or guardians.” *Id.* at 999.

An IEP must contain—among other components—a “statement of the special education and related services and supplementary aids and services, *based on peer-reviewed research to the extent practicable*, to be provided to a child.” 34 C.F.R. § 300.320(a)(4) (emphasis added). As this section makes clear, special education and related services must be based on peer-reviewed research only to the extent practicable. Moreover, the IEP is not required to identify specific curriculum or methodology for instruction. “[P]arents, no matter how well-motivated, do not have a right under the [IDEA] to compel a school district to provide a specific program or employ a specific methodology . . . .” *Lachman v. Ill. State Bd. of Ed.*, 852 F.2d 290, 297 (7th Cir. 1988).

Here, Parents’ chief complaint with Read Well appears to be that it does not appear on CDE’s Advisory List. (FF # 61.) Though the READ Act may require curricula that appears on the Advisory List, the IDEA contains no such requirement. The IDEA requires only that special education and related services be “based on peer-reviewed research to the extent practicable.” 34 C.F.R. § 300.320(a)(4). Though Read Well was not selected for the Advisory List, the CDE READ Act Team verified that Read Well provided scientifically- and research-based instruction. (FF #s 62, 63.) And Read Well’s website contains an extensive brochure detailing its underlying research. (FF # 64.) School staff responded promptly to Parents’ concerns about Read Well and immediately changed Student’s intervention curriculum. (FF # 61.) For these reasons, the SCO finds and concludes that Student’s specialized literacy instruction was based on peer-reviewed research to the extent practicable, in compliance with 34 C.F.R. § 300.320(a)(4).

### Developing Student's February 2021 IEP Based on COVID-19 Restrictions

In developing an IEP, the IEP Team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child. 34 C.F.R. § 300.324(a)(1). An IEP Team should determine a child's need for special education and related services on an individual basis, given the child's unique needs. *Id.* § 300.320.

CDE guidance makes clear that school districts should continue to develop IEPs on an individualized basis during the COVID-19 pandemic; districts should not develop IEPs based on current COVID-19 restrictions:

A student's initial or annual IEP should be developed based on the student's individualized needs in contemplation of the full instructional options, special education, supplementary aids/services, and related services that are available during normal operating conditions. An IEP based on restrictions or changes in service delivery that are necessary to protect health and safety during the pandemic, rather than one based on a student's individualized needs, would be inconsistent with IDEA.

*CDE FAQs.* Instead of conforming an IEP to the restrictions arising from COVID-19, a district should develop a contingency plan or identify alternative methods of service delivery within the IEP. *Id.* These practices ensure that a student's IEP is developed based solely on a student's individualized needs. CDE Decision 2021:515 (finding a violation of the IDEA where the district changed student's service minutes and setting to conform to COVID-19 restrictions).

Here, the SCO finds error in the way the IEP Team documented the change in setting of Student's math and literacy services. When the setting of Student's services became an issue during the February 2021 IEP Team meeting, the IEP Team attempted to resolve the issue by revising the setting of Student's services in the February 2021 IEP. (FF # 58.) The February 2021 IEP required Student's math and literacy services to be provided outside the general education classroom. This change to Student's IEP was made solely based on then-existing COVID-19 restrictions and not on Student's unique needs.

As a result, the District developed Student's February 2021 IEP—specifically, the setting of his math and literacy services—based on COVID-19 restrictions and not on Student's individualized needs. (*See id.*) For this reason, the SCO finds and concludes that the District failed to tailor the February 2021 IEP to meet Student's individualized needs, in violation of 34 C.F.R. § 300.324.

At the time of this violation, Case Manager had approximately ten students on her caseload. (FF # 36.) At least some of those students were impacted by the Principal's decision to change push-in services to pull-out services. (*Id.*) And, as with Student, Case Manager did not develop contingency plans for these students but, instead, documented the change in setting of services

in the students' IEPs. As a result, the SCO has concerns that the violation of 34 C.F.R. § 300.324 extended to additional students. This concern has been addressed through the remedy at 1(a)(ii) below.

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent's opportunity to participate in the IEP process).

Based on the record, the District's failure to tailor Student's February 2021 IEP to his individualized needs did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefit. If the District had properly documented the change to Student's services—for example, in a contingency plan—Student's services would have been the same as they were under his improperly tailored IEP. Therefore, this procedural violation did not result in a denial of FAPE under 34 C.F.R. § 300.513(a)(2).

The SCO, however, cautions school districts regarding the applicability of this Decision after the COVID-19 pandemic. Outside of the pandemic, a change to the setting of a student's services—which, in turn, affects a student's placement in the least restrictive environment—could result in a denial of FAPE. *See Denver Public Schools*, 119 LRP 16186 (SEA CO 3/4/2019) (finding that one physical location compared to another, even under an identical IEP, can be viewed as a more restrictive placement if "opportunities for interaction with nonhandicapped children would be virtually non-existent") (quoting *Letter to Earnest*, 211 IDELR 417 (OSERS 1986)).

**Conclusion to Allegation No. 3: The District improperly amended Student's IEP on May 6 and May 26, 2021, resulting in procedural violations of 34 C.F.R. § 300.324(a)(6).**

The third allegation accepted for investigation concerns the amendment of Student's IEPs during the 2020-2021 school year. Parents have challenged the February, May 6, and May 26 Amendments but not the April 21 Amendment.

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

1. Changes to the IEP may be made by the entire IEP Team at an IEP Team meeting; or
2. If the parent and the school district agree not to convene an IEP Team meeting, the changes may be made in writing.

34 C.F.R. § 300.324(a)(4), (6).

### February 2021 Amendment

In their Complaint, Parents alleged the District amended Student's IEP, in or around February 2021, to change the setting of Student's math and literacy services. On February 8, 2021, Student's IEP Team met to review additional math assessments and a new FBA. (FF # 54.) During the meeting, Parents became aware that Student was no longer receiving his math and literacy services inside the general education classroom but, instead, was receiving them outside the general education classroom due to COVID-19 restrictions. (FF # 54.) The IEP Team changed the setting of the services in the February 2021 IEP. (FF # 58.)

The change of Student's services in the February 2021 IEP was not an amendment. Instead, the change was made in a *new* IEP that was the result of an IEP Team meeting. Therefore, the SCO finds no violation of 34 C.F.R. § 300.324(a)(6).

### May 2021 Amendments

The Complaint also alleged the District improperly amended Student's IEP in May 2021. As detailed in the findings, Case Manager amended Student's February 2021 IEP on May 6 and on May 26. (FF #s 69, 72.) With the May 6 amendment, Case Manager clarified the description of Student's ESY services and added ESY services to the chart identifying Student's special education and related services. (FF # 69.) The chart indicated Student would receive ESY services between June 7, 2021 and July 2, 2021. (*Id.*)

On May 26, Case Manager amended the February 2021 IEP to correct the dates for Student's ESY psychological services. (FF # 72.) Case Manager's amendment made clear that Student would receive six hours of psychological services for ESY, with two hours each month from June to August. (*Id.*)

Parents did not agree to amend the IEP outside of an IEP Team meeting on either occasion, and no IEP Team meetings were held. (FF #s 69, 72.) The District argues these amendments were made to correct "clerical" errors and that 34 C.F.R. § 300.324(a)(6) should not apply. However, the SCO fails to find the District's argument persuasive, as it has no basis under the law. The IDEA makes no exception to the procedures outlined in § 300.324(a)(6) for "clerical" errors. As a result, the SCO finds the District violated 34 C.F.R. § 300.324(a)(6) with the May 6 and May 26 amendments. This resulted in a procedural violation of the IDEA.

As discussed previously, the SCO must determine whether the procedural violation resulted in a denial of FAPE under 34 C.F.R. § 300.513(a)(2). The improper amendments did not impede Student's right to a FAPE, impede Parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefit. Though completed piecemeal, the amendments simply sought to document what had already been decided in the April 12 IEP

Team meeting. Therefore, this procedural violation did not result in a denial of FAPE under 34 C.F.R. § 300.513(a)(2).

**Conclusion to Allegation No. 4: The District failed to consider whether Student made sufficient progress in response to scientific, research-based intervention when determining Student’s eligibility for SLD, in violation of 34 C.F.R. §§ 300.305(a)(2) and 300.309.**

Parents contend the District failed to consider current assessments and classroom observations when it determined that Student was not eligible for special education and related services under additional areas of SLD.

A student with SLD has a “learning disorder that prevents the child from receiving reasonable educational benefit from general education.” ECEA Rule 2.08(8). To be eligible under the disability category of SLD, a student must meet the following criteria:

- (1) The student does not achieve adequately for the child’s age or to meet state-approved grade level standards and exhibits significant academic skill deficits in one or more of the identified areas when provided with learning experiences and instruction appropriate for the child’s age or state-approved grade-level standards; and
- (2) The student does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the identified areas when using a process based on the child’s response to scientific, research-based intervention.

*Id.* 2.08(8)(b); *see also* 34 C.F.R. § 300.309. As a matter of policy, the CDE will not declare a student to be IDEA-eligible through a state complaint decision. Instead, if a state complaint investigation were to conclude that a school district’s eligibility determination was inconsistent with the IDEA, the CDE would instruct the school district to remedy the deficiencies and concerns noted in the decision and then reconsider the student’s eligibility.

Student is currently eligible under SLD in the area of reading fluency. Parents alleged that Student should also qualify under SLD in the areas of basic reading skills, written expression, and mathematical calculation. The District does not dispute that Student has academic deficits in these areas. The question, however, is whether those deficiencies rise to the level of SLD.

An analysis of the appropriateness of an eligibility determination involves two steps. First, the SCO examines whether the school district followed relevant standards and procedures in making the determination. *See Questions and Answers on IDEA Part B Dispute Resolution Procedures*, Question B-6 (OSERS 2013). Under the second step, the SCO determines whether the eligibility decision was consistent with the data in the record. *Id.*

### Adherence to Standards and Procedures

Accordingly, the SCO will begin by examining whether the District adhered to applicable IDEA procedures regarding evaluations and eligibility determinations. The IDEA has specific and extensive procedural requirements governing how school districts evaluate students and determine eligibility. *See* 34 C.F.R. §§ 300.304-306. The procedures detailing the scope of an evaluation are relevant here.

As part of an evaluation, an IEP team must:

- (1) Review existing evaluation data on the child, including—
  - (i) Evaluations and information provided by the parents of the child;
  - (ii) Current classroom-based, local, or state assessments, and classroom-based observations; and
  - (iii) Observations by teachers and related service providers.

34 C.F.R. § 300.305(a)(1).

In this investigation, Parents have specifically alleged the District failed to consider current assessments and classroom observations. The SCO will address each of these in turn.

Nothing in the findings indicates that the IEP Team failed to consider Student’s current assessments or recent classroom observations. Indeed, an MDT met over three days in October and November 2020 to consider Student’s eligibility. (FF # 13.) Student’s recent reevaluation—which included assessments and classroom observations—was discussed at the meetings. (*Id.*) And, indeed, the PWN resulting from the meeting contains discussion of the reevaluation. (FF # 18.)

### Comprehensiveness of Evaluation

Additionally, the IDEA requires an evaluation to be sufficiently comprehensive to determine whether a student needs specialized instruction as a result of a disability. 34 C.F.R. § 300.304(c)(6).

Here, the MDT relied upon Student’s recent reevaluation to determine Student’s SLD eligibility. (FF #s 13, 18.) Student was evaluated in the areas of general intelligence, communicative status, academic performance, social emotional functioning, and health. (FF #s 7-9.) To assess Student’s academic performance, Case Manager utilized a variety of both general and specialized assessments. (*Id.*) Upon review, CDE Specialist found the reevaluation to be sufficiently comprehensive. Many of the tools used in the reevaluation are recommended by the CDE Specific Learning Disability Guidelines. *See CDE Specific Learning Disability Guidelines,*

at pp. 74-119 (CDE 2019) (hereinafter, “*Guidelines*”), available at [https://www.cde.state.co.us/cdesped/guidelines\\_sld\\_draft\\_2019-02-25](https://www.cde.state.co.us/cdesped/guidelines_sld_draft_2019-02-25).

Overall, the SCO finds and concludes that the District adhered to IDEA procedural requirements regarding the scope of an evaluation.

#### *Consistent with Student-Specific Data*

The SCO next considers whether the eligibility determination was consistent with the data in the record. As noted above, to find a student eligible for SLD, the data must show two things: (1) that Student has significant academic deficits, and (2) that Student made insufficient response to intervention. ECEA Rule 2.08(8)(b); *see also* 34 C.F.R. § 300.309.

As to the first requirement, a score at or below the 12th percentile on norm-referenced assessments is considered a significant deficit. *Guidelines*, p. 62. Available data indicated Student had significant academic deficits in several areas. (FF # 9.)

As for the second requirement, the District plainly lacked any data regarding Student’s response to intervention and, therefore, could not have made an informed decision regarding expanding Student’s eligibility under SLD to additional areas. At the time of the eligibility determination, the District had been providing Student little, if any, intervention in the areas of math and written expression. (FF # 16.) Student’s IEP goals targeted only reading fluency and social-emotional functioning. (FF # 17.) As a result, the MDT had no data regarding Student’s response to intervention in the areas of basic reading skills, written expression, and mathematical calculation. In its PWN, the District noted “the evidence was vague in regards to [Student’s] response to scientific based interventions.” (FF # 18.) The evidence was vague because there was no evidence.

CDE’s *Guidelines* indicate that it is “fundamental” that a Response to Intervention (“RtI”) process be implemented prior to or as part of an evaluation for SLD. *Guidelines*, p. 22. Here, Student’s IEP Team had no RtI system in place. There simply was no plan to address Student’s areas of weakness (outside of reading fluency). Without a plan, the IEP Team never tested Student’s response to intervention.

A school district cannot determine a student’s eligibility for SLD using non-existent data. The very components of SLD eligibility require a district to have data—one way or another—that demonstrates a student’s response to intervention.

The SCO finds and concludes that the District failed to consider whether Student made sufficient progress in response to scientific, research-based intervention when determining Student’s eligibility for SLD, in violation of 34 C.F.R. § 300.309. In doing so, the District also

violated § 300.305(a)(2), by failing to identify what other data was needed to make the eligibility determination.

These violations are procedural in nature and require the SCO to determine whether the procedural violation amounted to a denial of FAPE. Even though the MDT found Student ineligible under additional areas of SLD, the IEP Team added service minutes for math and writing and developed goals in those areas, in recognition of Student's academic deficits in writing and math. (FF #s 24, 26.) As a result, even though the District improperly determined Student's eligibility, the violation neither impeded Student's right to a FAPE nor deprived him of an educational benefit. Additionally, nothing in the record indicated that the violation affected Parents' ability to participate in the decision-making process. As a result, the SCO finds and concludes that the procedural violation did not amount to a denial of FAPE.

**Systemic IDEA Violations: The violations identified in this Decision are not systemic in nature.**

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 violations of 34 C.F.R. §§ 300.323 and 324 are not systemic in nature. The District failed to properly implement Student's IEP, failed to tailor Student's IEP to his unique needs, and failed to properly amend Student's IEP. The first two of these violations (which resulted from the District changing Student's services to comply with COVID-19 cohort restrictions) can be directly tied to the COVID-19 pandemic. The third violation occurred as a result of Case Manager's lack of knowledge regarding the IEP amendment process. Nothing in the record indicates that these issues exist District-wide.

Additionally, the SCO finds and concludes that the District's violations of 34 C.F.R. §§ 300.309 and 305(a)(2) are not systemic in nature. The District has a policy outlining the body of evidence that must be gathered when determining a student's eligibility for SLD. (FF # 14.) Here, the violation stemmed from an eligibility request made by Parents during an eligibility meeting *after* Student's reevaluation was completed. Instead of stepping back and gathering data for this request, the IEP Team tried—and failed—to use the data that was available. Nothing in the record indicates that this issue exists District-wide. For these reasons, the SCO finds and concludes that the violation is not systemic.

## REMEDIES

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

1. Failing to properly implement Student's IEP, in violation of 34 C.F.R. § 300.323;
2. Failing to tailor an IEP to Student's individualized needs, in violation of 34 C.F.R. § 300.324;
3. Failing to properly amend Student's IEP, in violation of 34 C.F.R. § 300.324(a)(6); and
4. Failing to properly determine Student's eligibility for SLD, in violation of 34 C.F.R. §§ 300.305(a)(2) and 300.309.

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

### 1. Corrective Action Plan

- a) By **Friday, December 17, 2021**, the 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:
  - i. SEIS and all District staff involved in the Complaint, in particular Principal and Case Manager, must review this Decision, as well as the requirements of 34 C.F.R. §§ 300.323, 300.324, 300.305, and 300.309. This review must occur no later than **Friday, January 14, 2022**. A signed assurance that the above materials have been reviewed must be completed and provided to CDE no later than **Friday, January 21, 2022**.
  - ii. The District must review the IEPs for all students on Case Manager's caseload during the 2020-2021 school year to verify that any systematic changes made to those IEPs based on then-existing COVID-19 restrictions have been removed or updated. This review must occur no later than **Friday, January 14, 2022**. Evidence that this review has been completed must be documented. Documentation of the review and a signed assurance that the review has occurred must be provided to CDE no later than **Friday, January 21, 2022**. For each affected student, the documentation must include, at a minimum: (a) the student's special education and related services as of September 1, 2020; (b) any changes made to the student's IEP during the 2020-2021 school year as a result of COVID-19 and the date of such changes; (c) the date the changes due to COVID-19 were revised or removed; and (d) the student's current special education and related services. A proposed template for this documentation must be submitted with the CAP by **December 17, 2021** for approval by CDE.

iii. The District must convene Student's MDT from Middle School, at a mutually agreeable date and time, by **Friday, February 25, 2022**, to determine Student's eligibility for SLD in the areas of basic reading, written expression, and mathematical calculation in accordance with this Decision. Prior to determining Student's eligibility, the MDT must ensure it has adequate data to determine whether Student has made sufficient progress in response to intervention, in accordance with 34 C.F.R. § 300.309. The IEP Team must review, and as necessary revise, Student's IEP consistent with the MDT's determination. The District must provide a copy of the evaluation report and eligibility determination to CDE no later than **Friday, March 4, 2022**.

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

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 verify the District's timely correction of the areas of noncompliance.

Please submit the documentation detailed above to CDE as follows:

Colorado Department of Education  
Exceptional Student Services Unit  
Attn.: Rebecca O'Malley  
1560 Broadway, Suite 1100  
Denver, CO 80202-5149

**NOTE:** Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the CDE.

### **CONCLUSION**

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

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

Dated this 19th day of November, 2021.

*Ashley Schubert*

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Ashley E. Schubert  
State Complaints Officer

## Appendix

### **Complaint, pages 1-6**

- Exhibit 1: Parents' Regression Summary
- Exhibit 2: Correspondence

### **Response, pages 1-10**

- Exhibit A: IEPs
- Exhibit B: BIPs
- Exhibit C: PWNs
- Exhibit D: Notices of Meetings
- Exhibit E: Meeting Notes
- Exhibit F: Progress Monitoring
- Exhibit G: Grade, Progress, and Attendance Reports
- Exhibit H: Correspondence
- Exhibit I: Academic Calendar
- Exhibit J: District Policies & Procedures
- Exhibit K: District and School Staff List
- Exhibit L: Evaluation Reports and FBAs
- Exhibit M: Determination of Eligibility

### **Reply, pages 1-13**

- Exhibit 3: Parents' Regression Summary
- Exhibit 4: Evaluations
- Exhibit 5: IEP History
- Exhibit 6: PWN
- Exhibit 7: February 2021 IEP
- Exhibit 8: Correspondence regarding February 2021 IEP

### **CDE Exhibits**

- Exhibit 1: CDE 2020 Advisory List of Instructional Programming
- Exhibit 2: Email Correspondence with CDE Read Act Team
- Exhibit 3: Read Well Advisory Program Description
- Exhibit 4: Read Well Research Base Brochure

### **Telephonic Interviews with:**

- School Psychologist: October 25, 2021
- SEIS: October 26, 2021
- Case Manager: October 27, 2021
- Assistant Principal: October 27, 2021
- Fifth Grade Teacher: October 29, 2021

- Parents: November 1, 2021
- CDE Specialist: November 4, 2021