

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 2019:570**  
**Mesa County Valley School District 51**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on November 11, 2019 by the parents (Parents) of a child (Student) identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup>

The State Complaints Officer (SCO) granted extensions of the 60-day investigation timeline for exceptional circumstances and for mediation. Mediation resulted in an impasse on February 7, 2020, and the SCO thus resumed the investigation.

Based on the written Complaint, 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.<sup>2</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate allegations of 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 November 11, 2018 through November 11, 2019 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**

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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.*

<sup>2</sup> Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

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

1. Failed to properly implement Student's IEP dated April 15, 2019, specifically as follows:
  - a. By failing to provide Student with an assistive technology device and service consistent with Student's IEP, from August 1, 2019 to the present, in violation of 34 C.F.R. § 300.323.

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire record,<sup>3</sup> the SCO makes the following FINDINGS:

#### **A. Background**

1. Student is a fifteen-year-old eligible for special education and related services under the disability category of Autism Spectrum Disorder (ASD). *Exhibit 1*, p. 1. Student attends the ninth grade at a high school (School) located in District, where he is in a Significant Needs Autism (SNA) program. *Interviews with Mother and Director of Special Education*.
2. ASD impacts his ability to communicate and access the general education curriculum. *Exhibit A*, p. 39. Student is nonverbal, and his IEP and Behavioral Intervention Plan (BIP) require a "dynamic screen, speech-generating communication device/voice output communication device." *Interviews with Statewide Assistive Technology Augmentative and Alternative Communication (SWAAAC) Coordinator, Assistive Technology Tech, Mother, and Case Manager 2; Exhibit A*, pp. 44-50, 60-64. The terms "Augmentative Alternative Communication (AAC)," "tablet," "voice output communication device," and "icon to speech software" are used interchangeably in the IEP and BIP. *Id.*
3. Student's primary method of communication is through the Proloquo2Go program on an iPad. *Interviews with Mother and Case Manager 1*. Proloquo2Go is a communication application with icon to speech technology. *Interviews with Mother, Speech Language Pathologist, Case Manager 1, Assistive Technology Tech, and CDE Speech Language Consultant*. Icons containing an image and the word or words represented by that image are displayed on a screen, and when an icon is selected by the user, the program generates a voice that speaks the word or words in the icon aloud. *Id.*
4. Proloquo2Go offers a dynamic screen, meaning that the program responds to a selected icon by opening new folders with additional icon options for the user to select to string

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<sup>3</sup> The appendix, attached and incorporated by reference, details the entire record.

words together in a sentence. *Id.* The program is customizable and its vocabulary is organized into electronic folders by categories, such as household or school items. *Id.*

5. Student has been using an iPad and Proloquo2Go for communication since elementary school, when District staff first provided him with an iPad. *Interviews with Mother, Speech Language Pathologist, and Director of Special Education.* Student also uses an iPad with Proloquo2Go at home. *Interview with Mother.*
6. This dispute started as Student transitioned into the ninth grade in August of 2019. *Interviews with Mother and Father.* Parents allege that District failed to provide Student with an iPad as required by his IEP and BIP. *Id.* As a result, Parents filed this Complaint. *Id.*

#### **B. The April 15, 2019 IEP**

7. An IEP developed on April 15, 2019 governed Student's special education programming from August 1, 2019 to present, the time period covering the allegation accepted for investigation. *Interviews with Case Manager 2, Director of Special Education, and Speech Language Pathologist.*
  - a. Teacher and Staff Knowledge of the IEP
8. Prior to Student's transition into ninth grade, SNA program staff attended a transition IEP meeting for Student and visited Student at his middle school. *Interviews with Case Manager 1 and Mother.* After this process was completed, Special Education Teacher was hired to fill a position in School's SNA program. *Interview with Case Manager 2.* Case Manager 2 worked with Student in middle school, and she was selected to supervise Special Education Teacher and serve as Student's case manager during ninth grade. *Id.*
9. At the beginning of the 2019-2020 academic year, Case Manager 2 met with Special Education Teacher to discuss Student's IEP. *Id.* Case Manager 2 supervised Special Education Teacher's work by communicating with her on a regular basis via email, completing frequent check-ins, and observing her work. *Id.*
10. All District case managers and special education teachers have access to IEPs through the Enrich online program. *Id.* Case managers provide teachers and other service providers with snapshots of their students' IEPs containing goals and accommodations. *Interview with Director of Special Education.* Paraprofessionals have access to the IEPs through snapshots and a working file in the special education classroom. *Interviews with Director of Special Education and Paraprofessional.* In addition, District case managers and special education teachers review the IEPs with paraprofessionals. *Id.*
11. Case Manager 2 and Special Education Teacher accessed Student's IEP through Enrich. *Interview with Case Manager 2.* Prior to the first day of the 2019-2020 academic year, SNA program staff met to discuss Student's needs. *Interview with Paraprofessional.*

b. IEP Contents

12. Student's need for a "dynamic screen, speech-generating communication device" is documented throughout the IEP. *Exhibit A*, pp. 37-50. The IEP provides that Student requires assistive technology and uses a "dynamic screen speech-generating communication device/voice output communication device to communicate his wants and needs." *Id.* at p. 44. The IEP also requires that "[a]ll staff need to be trained to use this form of communication when talking to [Student]." *Id.* Relevant accommodations in the IEP include "assistive technology for voice output communication." *Id.* at p. 50.
13. The IEP contains several annual goals that require the use of an AAC. *Interview with Case Manager 2; Exhibit A*, p. 46, 51. For instance, Writing Goal 4 states that Student will express his preferences and details to describe himself, and others close to him, in three to four words using his AAC and an arrangement of icons with 70% accuracy in three out of five trials, given verbal and gestural support. *Exhibit A*, p. 46.
14. Social/Emotional Wellness Goal 5 provides that Student will identify and use various strategies, such as those outlined in the BIP, for dealing with discomfort and frustration prior to engaging in self-injurious or aggressive behaviors. *Id.* at p. 47. Social/Emotional Wellness Goal 7 states that Student will access an AAC with no more than two verbal prompts to request breaks from frustrating tasks and to request help from staff prior to engaging in aggressive behaviors. *Id.* at pp. 47-48.
15. Speech/Language Goal 8 reads, "[g]iven modeling, support, video modeling, and social stories, along with augmentative communication tools, [Student] will demonstrate the ability to express his thoughts, needs, and ideas to peers and adults, 75% of the time." *Id.* at p. 48.
16. Other related goals include Reading Goal 1, which requires that Student demonstrate understanding of an adapted text when read aloud to him by identifying three or more details of the text accurately, out of three possible options, in three out of five trials. *Id.* at p. 44. Reading Goal 2 requires that, in order to expand reading skills to seven or more sight words, Student will identify given sight words out five possible options in three out of five trials with verbal and gestural support. *Id.* at p. 45.
17. Mathematics Goal 3 states that Student will increase his understanding of number sense by demonstrating that he can correctly label quantities of a given number up to 15, using manipulatives, icons, stamps, or other alternatives to handwriting, in three out of five opportunities with verbal and gestural support. *Id.* at pp. 45-46.
18. The Service Delivery Statement provides for an average of 2,272.5 minutes per week of services, with an occupational therapist providing an average of 7.5 minutes weekly, a speech language therapist providing an average of 45 minutes weekly, and an adapted

physical education teacher providing an average of 25 minutes weekly. *Id.* at p. 55. The remainder of Student's services were to be provided by the special education teacher. *Id.*

c. IEP Implementation

19. When Student started ninth grade at School, he was provided with an iPad and Proloquo2go to use for communication, and staff were trained on using the iPad consistent with IEP requirements. *Interviews with Mother, Paraprofessional, Case Manager 2, and Speech Language Pathologist.*
20. On August 29, 2019, Student damaged the iPad. *Interviews with Speech Language Pathologist, Case Manager 2, and Paraprofessional; Exhibit E*, pp. 1-2. Speech Language Pathologist contacted SWAAAC Coordinator to request a repair or replacement, and SWAAAC Coordinator declined and offered a Core Board to replace the iPad. *Id.*
21. Student was then provided with individual picture symbols and Core Boards. *Interviews with Case Manager 2, Speech Language Pathologist, Autism Behavior Analyst, and Paraprofessional.* He was not provided with a "dynamic screen speech-generating communication device/voice output communication device" as required by the IEP. *Interviews with Mother, Director of Special Education, Special Education Coordinator, Case Manager 2, Speech Language Pathologist, and Paraprofessional.*
22. A Core Board is a laminated sheet of icons, and each icon contains an image and the word or words that the image represents. *Interviews with Speech Language Pathologist, Assistive Technology Tech, and CDE Speech Language Consultant.* Core Boards are comprised of commonly used words, and they are used in conjunction with fringe strips, which are laminated strips containing a smaller number of icons organized by categories, such as school items, feelings, places, and activities. *Id.; Exhibit 3; Exhibit K*, pp. 1-9.
23. The layout of the icons in the Core Board is not the same as the layout used in Proloquo2Go. *Id.* Further, the images used in the Core Board icons are not the same as the images used in the Proloquo2Go icons. *Interviews with Speech Language Pathologist and CDE Assistive Technology Consultant; Exhibit 4*, pp. 1-23; *Exhibit K*, pp. 1-9
24. To use the Core Board, a student points to the icon, independently or with assistance, and a teacher or paraprofessional speaks the word or words selected by the student. *Interviews with Speech Language Pathologist, Autism Behavior Analyst, Paraprofessional, and CDE Speech Language Consultant.*
25. Speech Language Pathologist provided Student with a number of Core Boards tailored to different settings, and Student had access to a Core Board with larger icons. *Interview with Speech Language Pathologist.* Student had to be instructed on how to use the Core Board, which required "learning a new system." *Id.* Speech Language Pathologist stated that he quickly learned to "give [staff] an icon when he wanted something." *Id.*

d. Student's Progress Without an iPad

26. Paraprofessional indicated that Student was better able to complete work using the Core Board and individual picture symbols than with an iPad, but added that she only worked with him for a short time before the iPad was damaged. *Interview with Paraprofessional*. The SCO finds this position to be inconsistent with progress monitoring data.
27. Progress monitoring reports document that Student made insufficient progress on five goals—Reading Goal 1, Reading Goal 2, Mathematics Goal 3, Social/Emotional Wellness Goal 5, and Social/Emotional Wellness Goal 7—from August 12, 2019 through October 11, 2019 and from October 15, 2019 through December 20, 2019. *Exhibit D*, pp. 1-6.
28. Reading Goal 1 requires that Student demonstrate understanding of an adapted text when read aloud to him by identifying three or more details of the text accurately out of three possible options in three out of five trials, and progress monitoring notes for August 12, 2019 through October 11, 2019 reflect that Student was unable to identify three or more details given appropriate prompting or visual aids. *Id.* at p. 1.
29. Reading Goal 2 requires that, in order to expand reading skills to seven or more sight words, Student will identify given sight words out five possible options, in three out of five trials, with verbal and gestural support. *Id.* However, progress monitoring notes for August 12, 2019 through October 11, 2019 indicate that Student was unable to identify seven or more new sight words given appropriate prompting or visual aids. *Id.* at p. 2.
30. Mathematics Goal 3 states that Student will increase his understanding of number sense by demonstrating that he can correctly label quantities of a given number up to 15, using manipulatives, icons, stamps, or other alternatives to handwriting, in three out of five opportunities. *Id.* Progress monitoring notes from August 12, 2019 through October 11, 2019 reflect that Student did not demonstrate an understanding of basic number sense as it pertains to quantities. *Id.*
31. Social/Emotional Wellness Goal 5 requires that Student identify and use strategies, such as those outlined in the BIP, to deal with discomfort and frustration prior to engaging in self injurious or aggressive behaviors in three out of 5 trials given verbal, gestural, and partial physical prompting. *Id.* at p. 3. The IEP documents that Student was able to use an AAC to express discomfort or frustration, or to request breaks. *Exhibit A*, p. 40. However, progress monitoring notes from August 12, 2019 to October 11, 2019 reflect that, when prompted to use gestures and an adaptive topic board to express discomfort, he “[did] not utilize these strategies before engaging in self-injurious or aggressive behaviors towards others.” *Exhibit D*, p. 3.
32. Social/Emotional Wellness Goal 7 requires that Student “access his AAC with no more than two verbal prompts to request breaks from frustrating tasks and to request help from staff prior to engaging in aggressive behaviors” toward himself and others in three

out of five opportunities. *Id.* at p. 5. Progress monitoring notes from August 12, 2019 through October 11, 2019 indicate that Student did not achieve this goal. *Id.* When prompted, Student would “occasionally” gesture using his topic board icons that he wanted to sit on the beanbag chair or go on a bike ride after an academic task, but he did not make the request “before engaging in aggressive behaviors.” *Id.*

33. Objective 1 for Writing Goal 4 requires that Student express preferences and details to describe himself, others close to him, and his personal preferences in two to three words using his AAC and arrangement of icons with 60% accuracy in three out of five trials given verbal and gestural support. *Id.* at p. 3. Progress monitoring notes for August 12, 2019 through October 11, 2019 reflect that Student made progress and used his “topic board” when prompted to express preferences, but he did not use his topic board to describe personal attributes about himself or others close to him, even when prompted. *Id.* The progress notes do not specify accuracy when expressing preferences. *Id.*
34. Finally, Speech/Language Goal 8 requires that, given video modeling, support, social stories, and augmentative communication tools, Student demonstrate the ability to express thoughts, needs, and ideas to peers and adults 75% of the time. *Id.* at p. 5. The IEP documents Student’s ability to express his wants and needs using an AAC, and progress monitoring notes from August 12, 2019 through December 20, 2019 show that he made some progress on this goal. *Id.* at p. 6; *Exhibit A*, p. 39. However, when Student used visuals in the classroom to request objects/actions, “he did not always follow through with his request.” *Id.* Rather, he was “approximately 42% accurate when requesting and following through (example: “I want lunch” and then sitting at the table to eat).” *Id.*

### **C. The April 16, 2019 BIP**

35. A BIP developed on April 16, 2019 governed Student’s behavior interventions from August 1, 2019 to present. *Interviews with Case Manager 1 and Case Manager 2.*
  - a. Teacher and Staff Knowledge of the BIP
36. Case Manager 2 and Special Education Teacher accessed Student’s BIP through Enrich. *Interview with Case Manager 2.* District case managers provide teachers and service providers with a snapshot of each BIP that includes a brief history of the student, and they also review the BIP with service providers. *Interview with Director of Special Education.* Case Manager 2 and Special Education Teacher met to discuss Student and the BIP at the beginning of the school year, as did SNA program staff. *Interviews with Case Manager 2 and Paraprofessional.*

#### **b. BIP Contents**

37. A functional behavioral assessment (FBA) of Student was completed on March 28, 2019 to address self-injurious behaviors and aggressive behaviors toward others. *Exhibit A*, p. 58. The FBA concluded that Student engages in target behaviors to avoid sensory pain, to gain access to preferred activities, and to gain adult attention. *Id.* at p. 59.
38. Student's need to use an AAC for communication is noted throughout the BIP. *Id.* pp. 60-64. For example, the BIP outlines setting event strategies, such as "access to AAC in all settings for communication of wants and needs to prevent engagement of target behaviors as a means of gaining access to a preferred item or activity." *Id.*
39. Listed antecedent strategies to decrease the likelihood of target behaviors include front loading expectations through "video modeling on [Student's] tablet prior to transitions or new tasks" to help reduce disruptive behaviors and increase on-task behaviors. *Id.* The antecedent strategies also require that staff "ensure that [Student] has access to his communication device to ask for wants and needs to decrease the likelihood of [Student] using aggressive or maladaptive behaviors to communicate his needs." *Id.*
40. At least five of the behavior teaching strategies require use of a dynamic screen, speech-generating communication device. *Id.* For instance, the BIP reads that staff should offer redirection and modeling of how to use the "icon to speech software" on Student's "tablet" to express wants or needs, and "model how to pro socially request comfort using icon to speech software." *Id.* This section also requires that Student have an icon that states something "hurts" or when he needs to use the bathroom, which he will be taught to point to on the "voice output communication device provided by SWAAAC." *Id.*
41. Reinforcement strategies provide for Student to access choice foods or choice music when he makes requests appropriately by using "icon to speech" communication accurately. *Id.*
42. Criterion for success state that Student will increase the number of times he uses safety and calming strategies taught to him or uses the "AAC to access his wants and needs instead of engaging in targeted behaviors." *Id.*
43. Finally, the BIP lists the supports, resources, and training needed for staff to implement the BIP, including a "SWAAAC voice output communication device or dynamic screen speech-generating communication device" and an understanding of how to access and use an AAC device in order to support Student. *Id.*

c. BIP Implementation

44. Case Manager 2, Speech Language Pathologist, and Paraprofessional report no changes in Student's behavior following the loss of the iPad on August 29, 2019, but they acknowledged that Student engaged in target behaviors on an ongoing basis. *Interviews with Case Manager 2, Speech Language Pathologist, and Paraprofessional.*



45. The SCO finds that data collected by SNA program staff in an Antecedent, Behavior, and Consequence Form (ABC Form) reveal that target behaviors significantly increased in frequency and duration starting the third week of the first semester, when the iPad was damaged. *Exhibit D*, pp. 85-110. During the first week of school, Student engaged in target behaviors such as hitting others, scratching, and pinching on two occasions, and these behaviors lasted for no more than three minutes. *Id.* at p. 85. During the second week of school, Student engaged in target behaviors on three occasions. *Id.*
46. However, starting the third week of the first semester, the ABC Form shows that Student engaged in target behaviors multiple times per day on most days of the week. *Id.* For example, during the third week of the semester, Student engaged in target behaviors 35 times. *Id.* at pp. 85-88. On August 30, 2019 alone, Student engaged in target behaviors ten times during the school day, and his behaviors included hitting others, property destruction, throwing things, biting, pinching, scratching, and charging. *Id.* at p. 88.
47. In the weeks that followed, Student engaged in target behaviors anywhere from nine to 22 times per week, and the duration of his behaviors was as long as 48 minutes for a single recorded incident, with multiple incidents lasting 20 minutes or more. *Id.* at pp. 89, 91, 95, 97, 99, 101, 107, 109. Behaviors during these incidents included hitting others, kicking, pinching, scratching, biting, property damage, throwing things, hitting objects, disrobing, yelling, charging, hair pulling, and elopement. *Id.* at pp. 85-100.
48. On November 4, 2019, Parents removed Student from School after Student was injured while reportedly exhibiting aggressive behaviors toward staff. *Interviews with Mother and Director of Special Education*. Student has not returned to School since that date. *Id.*
49. Following the filing of the Complaint, District admitted that Student was not provided with an iPad for communication from August 29, 2019 through the date of his removal from School. *Interviews with Director of Special Education, Autism Behavior Analyst, and Mother; Response*, pp. 1-6. District made an iPad available to Student as of November 7, 2019, and District offered 247 hours of compensatory education. *Id.* Parents refused to return Student to School and requested homebound services, which District declined to provide because Student's IEP could not be implemented in the home setting. *Id.*

### **CONCLUSIONS OF LAW**

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

**Conclusion to Allegation No. 1: District's failure to provide Student with an assistive technology device and service as required by the IEP, from August 29, 2019 through November 4, 2019, resulted in a denial of a FAPE.**

- i. **Implementation under the IDEA**

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

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

Where the definition of a FAPE specifically references delivery of special education and related services consistent with an IEP, the failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19. However, not every deviation from an IEP's requirements results in a denial of a FAPE. *See, e.g., L.C. and K.C. v. Utah State Bd. of Educ.*, 125 Fed. Appx. 252, 260 (10th Cir. 2005) (holding that minor deviations from IEP's requirements which did not impact student's ability to benefit from 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.*

The failure to implement a “material,” “essential,” or “significant” provision of a student’s IEP amounts to denial of a FAPE. *Id.* (concluding consistent with “sister courts . . . that a material failure to implement an IEP violates the IDEA”). See also *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).

ii. Implementation of Student’s IEP and BIP

Parents allege that District failed to provide Student with a dynamic screen, speech-generating communication device as required by his IEP and BIP.

The SCO must first consider whether District staff had knowledge of the IEP and BIP. As discussed in FF #8-11, 19 and 36, SNA program staff were informed of their responsibilities related to implementing the IEP and BIP, including Student’s need for a dynamic screen, speech-generating communication device to communicate. At the beginning of the 2019-2020 academic year, Case Manager 2 met with Special Education Teacher to discuss Student and his IEP, and Case Manager 2 communicated with Special Education Teacher on a regular basis. Case Manager 2 and Special Education Teacher accessed the IEP and BIP through Enrich. All SNA program staff met at the start of the school year to discuss IEP and BIP requirements, and staff were trained on how to use Student’s iPad for communication consistent with the IEP and BIP.

Based on this evidence, the SCO finds and concludes that District staff had knowledge of the IEP and BIP. However, the SCO must also consider whether District staff provided Student with assistive technology as required by the IEP and BIP.

As outlined in FF #2, 12-15, 20-21, 38-43 and 48-49, the IEP and BIP required District to provide Student with a “dynamic screen, speech-generating communication device.” District admits that it did not provide Student with an iPad after it was damaged on August 29, 2019, and District did not provide Student with a “dynamic screen, speech-generating communication device” until an iPad was made available on November 7, 2019. The evidence shows that, consistent with District’s admission, Student was not provided with an iPad during this time.

Accordingly, the SCO finds and concludes that District failed to implement the IEP and BIP from August 29, 2019 to November 4, 2019 because it failed to provide Student with a “dynamic screen, speech-generating communication device” as required by the IEP and BIP. The SCO must now determine whether District’s failure to implement the IEP and BIP was material.

The IEP states that Student requires assistive technology—a “dynamic screen, speech-generating communication device/voice output communication device”—to communicate his wants and needs. (FF #12). As discussed in FF #3, 5, 12-13, 19 and 38-43, Student used an iPad to communicate on a regular basis since elementary school, and it was his primary means of

communication. The iPad was the only dynamic screen, speech-generating communication device provided to Student. His need for a “dynamic screen, speech-generating communication device/voice output communication device” to communicate, achieve IEP goals, and comply with BIP strategies is explicit throughout the IEP and BIP. (FF #2, 12-15, 31-34, and 38-43).

Specifically, FF #13-15 and 38-43 show that some IEP goals and BIP strategies could not be achieved without a dynamic screen, speech-generating communication device because the use of an AAC was explicitly embedded into the goals as a way to measure progress. For example, Objective 1 for Writing Goal 4 requires that Student express preferences and details to describe himself and others in two to three words using an AAC and arrangement of icons with 60% accuracy in three out of five trials. Likewise, Social/Emotional Wellness Goal 7 requires that Student “access his AAC with no more than two verbal prompts to request breaks from frustrating tasks and to request help from staff prior to engaging in aggressive behaviors.”

Similarly, Social/Emotional Wellness Goal 5 requires the use of BIP strategies prior to Student engaging in self-injurious or aggressive behaviors, and as detailed FF #38-43, BIP strategies frequently incorporated use of a dynamic screen, speech-generating communication device. The FBA found that Student engages in target behaviors to avoid pain and gain access to preferred activities and adult attention, and the BIP requires that Student have access to an AAC in “all settings for communication of wants and needs to prevent engagement of target behaviors as a means of gaining access to a preferred item or activity.” Also, Student’s success was to be measured by the number of times he used the “AAC to access his wants and needs instead of engaging in targeted behaviors.” The BIP also requires that staff model for Student how to appropriately use his AAC and reinforce his use of the device.

District provided Student with Core Boards after the iPad was damaged on August 29, 2019, but the evidence shows that these were not a sufficient substitute. As discussed in FF #21-25, a Core Board is a laminated sheet of icons and not a “dynamic screen, speech-generating communication device” as required by the IEP and BIP. Speech Language Pathologist admitted that, in order to use the Core Board, Student had to learn a new system. The icons are not the same as those used in Proloquo2Go and the iPad, and the layout is not the same.

As a result, the evidence at FF #27-32 shows that Student made insufficient progress on multiple IEP goals, including those requiring an AAC. For instance, he made insufficient progress on Social/Emotional Wellness Goals 5 and 7, both of which require an AAC. The IEP confirms Student’s ability to use an iPad to communicate his wants and needs, express discomfort, and request breaks, but progress monitoring shows that Student did not successfully use a Core Board to communicate this same information. Insufficient progress is documented not just during the period of Student’s absence, which began on November 4, 2019, but also during the progress monitoring period from August 12, 2019 to October 11, 2019.

Furthermore, FF #45-47 demonstrate that Student's target behaviors significantly increased in frequency and duration beginning in the third week of school, when the iPad was damaged. When Student had access to the iPad during the first two weeks of school, he engaged in two to three target behaviors per week. However, starting during the third week of school and continuing through November 4, 2019, Student engaged in target behaviors multiple times per day on multiple days per week. Many behavior incidents lasted over 20 minutes, decreasing the amount of time that Student spent receiving instruction and services.

In sum, District's failure to provide Student with a dynamic screen, speech-generating communication device impeded Student's ability to achieve his IEP goals, communicate appropriately, receive instruction, and apply the strategies in his BIP, from August 30, 2019 through November 4, 2019. Accordingly, the SCO finds and concludes that District failed to implement material provisions of the IEP and BIP by failing to provide Student with a dynamic screen, speech-generating communication device to communicate his wants and needs.

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

### iii. 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. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Many courts have rejected a "cookie-cutter" approach to compensatory education in which awards are based solely on the hours of services missed. *Id.* at p. 523; *See also Colorado Department of Education*, 118 LRP 43765 (SEA CO 6/22/18) (noting that "compensatory education is not an hour-for-hour calculation"). 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, crafted in consultation with CDE Specialists and in consideration of this legal framework, calculated to help place Student in the same position with respect to making progress on IEP goals if not for the violation.

In this case, FF #20-24 and 48-49 show that District failed to provide Student with a dynamic screen, speech-generating communication device for 42 days, from August 30, 2019 through November 4, 2019. Accounting for a 7.25 hour school day, this totals 304.5 hours of education time during which Student was unable to communicate using assistive technology required by the IEP and BIP. However, compensatory education is not a minute-for-minute reimbursement. Recognizing that this violation was an ongoing deprivation of FAPE, and accounting for the

amount of services that can be provided within one year of the issuance of this Decision, while also avoiding being overly burdensome on Student, the SCO crafted the following remedy.

District shall schedule compensatory services in collaboration with Parents by April 15, 2020. 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. Compensatory services will take effect at the beginning of the Extended School Year period for District, June 8, 2020. District will provide Student with 93 hours of compensatory services, consisting of academic access, social/emotional, reading, math, written expression, and speech language services. The minutes assigned to each service represent a share equal to that service's proportion of total weekly minutes of specialized instruction, which was 2,272.5 minutes per week as outlined in the IEP. (FF #18).

Accordingly, a special education teacher shall provide Student with the following services:

- 4 hours of academic access services;
- 11 hours of social/emotional services;
- 11 hours of reading instruction;
- 54 hours of math instruction; and
- 11 hours of written expression instruction.

Additionally, a speech language pathologist shall provide Student with 2 hours of speech language services.

### **REMEDIES**

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

- a) Failing to implement an IEP and BIP, in violation of 34 C.F.R. § 300.323.

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

1. By **Tuesday, April 21, 2020**, District must submit to CDE a proposed corrective action plan (CAP) that effectively addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to reoccur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
  - a. Comprehensive training for all special education personnel at School, all SWAAAC personnel, and Special Education Coordinator, in addition to any other School staff deemed appropriate by District, on the requirements of 34 C.F.R. § 300.323 in accordance with this Decision to address implementation of IEPs and

BIPs, in particular with respect to the provision of assistive technology to students when required by the IEP and BIP, no later than **Tuesday, September 1, 2020**.

- b. Training materials for the above-described training must be submitted to CDE for review and approval **at least 30 days prior to the delivery of training**.
  - c. Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets, with roles noted) and provided to CDE no later than **September 8, 2020**. This training may be conducted in-person, or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.
2. **Compensatory Education Services for Denial of FAPE**
- a. District shall provide Student with **91 hours of specialized instruction from a special education teacher** by **Friday, February 19, 2021**, to be apportioned as follows:
    - i. **4 hours of academic access services;**
    - ii. **11 hours of social/emotional services;**
    - iii. **11 hours of reading instruction;**
    - iv. **54 hours of math instruction; and**
    - v. **11 hours of written expression.**
  - b. District shall provide Student with **2 hours of direct speech and language therapy** by **Friday, February 19, 2021**. These compensatory services shall be provided by a licensed speech and language therapist.
  - c. **By April 15, 2020**, District shall schedule compensatory services in collaboration with Parents. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. These compensatory services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives.

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

**These compensatory services shall begin by June 8, 2020** 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.

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

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

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

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



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

### **CONCLUSION**

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

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

Dated this 31 day of March, 2020.



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Lindsey Watson  
State Complaints Officer

## Appendix

### **Complaint, pages 1-4**

- Exhibit 1: April 15, 2019 IEP
- Exhibit 2: April 16, 2019 BIP

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

- Exhibit A: Notices of Meeting and IEPs and BIPs in effect for the 2018-2019 and 2019-2020 academic years
- Exhibit B: Service logs and other documentation of services from August 1, 2019 to present
- Exhibit C: Prior written notices
- Exhibit D: Grade reports and IEP progress reports for the 2019-2020 academic year
- Exhibit E: Email correspondence
- Exhibit F: Emails and case report summary
- Exhibit G: Incident reports and emails
- Exhibit H: Additional email correspondence
- Exhibit I: Attendance records
- Exhibit J: September 6, 2017 reevaluation of Student and consent
- Exhibit K: Photos of CORE Language Board

### **Reply, pages 1-5**

- Exhibit 3: Photo of CORE Language Board
- Exhibit 4: Proloquo2Go communication pages
- Exhibit 5: Photo of Student
- Exhibit 6: Photos of Student's communication with Parents and USB flash drive with video of Student using iPad and Proloquo2Go
- Exhibit 7: Communication notebook
- Exhibit 8: Private evaluation of Student

### **Telephonic Interviews with:**

- Director of Special Education: March 4, 2020
- Speech Language Pathologist: March 4, 2020
- Case Manager 1: March 6, 2020
- Autism Behavior Analyst: March 9, 2020
- Case Manager 2: March 9, 2020
- Paraprofessional: March 9, 2020
- SWAAC Coordinator: March 11, 2020
- Assistive Technology Tech: March 11, 2020
- Special Education Coordinator: March 11, 2020
- Mother: March 13, 2020
- Father: March 13, 2020
- Advocate: March 13, 2020