

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 2021:511  
Boulder Valley School District RE-2**

**DECISION**

**INTRODUCTION**

On April 26, 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 Boulder Valley School District RE-2 (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified two (2) allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

**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 April 26, 2020, through April 26, 2021, for the purpose of determining if a violation of the IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

**SUMMARY OF COMPLAINT ALLEGATIONS**

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

1. Improperly changed Student’s disability category on or about March 15, 2021, because the District failed to conduct a comprehensive reevaluation in all areas of suspected disability, in violation of 34 C.F.R. §§ 300.303-306 and ECEA Rule 4.02(6), 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 consider Parents' input, in violation of 34 C.F.R. § 300.305(a);
  - b. Failing to use assessments and other evaluation materials that are valid and reliable, in violation of 34 C.F.R. § 300.304(c)(1)(iii); and
  - c. Failing to ensure that assessments or other evaluation materials were administered in accordance with any instructions provided by the producer of assessments, in violation of 34 C.F.R. § 300.304(c)(1)(v).
2. Convened an IEP meeting on April 12, 2021 without all required IEP team members, specifically Parents, in violation of 34 C.F.R. § 300.321.

### **FINDINGS OF FACT**

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

#### **A. Background**

1. Student is fourteen years old and attended eighth grade at School during the 2020-2021 academic year. *Interviews with Parent, Special Education Coordinator, Special Education Teacher, and School Psychologist*. Student attended remotely for the entire academic year, in part because of the COVID-19 pandemic and in part because her family moved out of Colorado in December of 2020. *Id.* District returned to in-person learning for all middle school students starting January 12, 2021 (although children like Student in School's Intensive Learning Center program returned to in-person learning four days each week starting November 10, 2020). *CDE Exhibit 2; CDE Exhibit 5*.
2. During eighth grade, Student qualified for special education and related services under the categories of Intellectual Disability, Orthopedic Impairment, Speech or Language Impairment, and Multiple Disabilities. *Exhibit A*, p. 1; *Exhibit N*, p. 1. Student was first identified as IDEA-eligible in fifth grade. *Interview with Parents; Exhibit B*, p. 9-11.
3. As an infant, Student was diagnosed with cerebral palsy and fetal alcohol syndrome. *Exhibit B*, p. 1, 6. Student does not have binocular vision and cannot judge distance. *Id.* at p. 13; *Interviews with Special Education Teacher and School Psychologist*.
4. Student is a hard worker, dedicated, and a loving child. *Interview with Parents*. Academically, she is not at grade level in any subject, but she has high social skills and shows strength with expressive language. *Interview with Special Education Teacher*. Within the Intensive Learning Center program, where she accessed her reading, writing, and math in eighth grade, she was

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

a peer mentor to other children and was known for her joyful personality and cheerful attitude. *Interviews with School Psychologist and Special Education Teacher; Exhibit B*, p. 6.

5. On March 4, 2021, Special Education Teacher sent Parents a prior written notice and request for consent for Student's triennial reevaluation. *Exhibit E*, pp. 1-3. Parents consented to the reevaluation and District made plans to reevaluate in Communicative Status, Motor Abilities, Academic Performance, and General Intelligence. *Id.* at p. 1.
6. Due to Student residing outside Colorado and the COVID-19 pandemic, District conducted assessments virtually. *Interview with Parents, Special Education Coordinator, Special Education Teacher, School Psychologist*. Parents' concerns with the reevaluation center on the intellectual ability assessments. *See Complaint*, pp. 1-9.

## **B. The March 2021 Reevaluation**

### Communicative Status

7. Speech-Language Pathologist administered the Clinical Evaluation of Language Fundamentals – 5<sup>th</sup> Edition ("CELF-5") on March 9, 2021. *Exhibit B*, p. 9. Speech-Language Pathologist also conducted a records review, reviewed therapy data for Student, and compiled observations and teacher input regarding Student's verbal abilities. *Id.* at pp. 9-13.
8. Speech-Language Pathologist administered four subtests and derived a Core Language Score of 83, indicating Student was in the borderline/marginal/at-risk range of language functioning. *Id.* Speech-Language Pathologist indicated that Student's language skills improved significantly from her initial evaluation in 2018, and that her articulation, voice, fluency, and pragmatic language skills were informally found to be age-appropriate and not areas of concern. *Id.* p. 11-12. Speech-Language Pathologist indicated Student made significant growth in speech and language skills and met all speech and language goals. *Id.* at p. 10.

### Motor Abilities

9. Physical Therapist administered Functional Gross Motor Testing and performed a student interview and records review on March 9, 2021. *Exhibit B*, p. 21. Student's motor skills were assessed over Google Meet, and she verbally indicated she did not have difficulty with physical tasks at School. *Id.* She was able to stand on one leg, step over objects safely, complete a sit to stand from a typical chair easily, and reach outside her base of support while seated, showing appropriate stability. *Id.* A records review indicated she participated in cross country and track, and she told Physical Therapist she could run the one mile. *Id.*

10. On March 10, 2021, Occupational Therapist evaluated Student for Occupational Therapy needs using the WOLD Sentence Copying Test, a teacher consult, and observations. *Id.* at pp. 21-23. Occupational Therapist indicated Student presented with functional fine or visual motor skills, and Student was able to independently navigate her computer and applications to access and complete schoolwork. *Id.* at p. 23. Occupational Therapist further indicated Student showed good keyboard awareness and continued to show improvement on typing speed, but outlined possible accommodations, such as access to appropriate technology for written output, that would benefit Student. *Id.*

#### Academic Performance

11. School Psychologist administered the Woodcock-Johnson Normative Update Test of Academic Achievement – Fourth Edition on March 10, 2021. *Id.* at pp. 20-21. Student scored in the extremely limited range in Basic Reading, Letter-Word Identification, Passage Comprehension, and Applied Problems. *Id.* at pp. 20-21.

12. On March 11, 2021, Special Education Teacher conducted a review of records, student interview, teacher feedback, IXL Math diagnostics, Unique Learning System Reading and Math assessments, District-approved and curriculum-based benchmark assessment data, and classroom observation. *Id.* at pp. 13-19. Results of the academic assessment indicated Student needed interventions in all subjects as she did not score at grade level in any subject. *Id.* at pp. 13-19; *Interview with Special Education Teacher.*

#### Records Review Regarding Student's 2018 General Intelligence Assessments

13. Student was previously assessed for general intelligence in 2018. *Exhibit B*, p. 6. At that time, Student completed 12 subtests from the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”) to evaluate cognitive ability. *Id.* Scores indicated she was in the very low to extremely low range for cognitive skills when compared to others her age, although she was noted to have strengths in verbal reasoning skills and nonverbal reasoning skills. *Id.*

14. In 2018, Student's mother completed observations for the Adaptive Behavior Assessment System – Third Edition (“ABAS-3”) to comprehensively assess Student's adaptive skill needs. *Id.* The results indicated Student performed in the extremely low range overall, as well as in the Conceptual and Practical Composites. *Id.* at pp. 6-7. Based on the results of the WISC-V and ABAS-3, Student qualified for special education services with an intellectual disability. *Id.*

15. In March 2021, Student was assessed for intellectual ability. *See Exhibit B*, pp. 6-9. School Psychologist performed a records review and administered the WISC-V and the ABAS-3. *Id.* Parents' concern is that School Psychologist failed to properly administer the intellectual

ability assessments, thereby failing to conduct a comprehensive reevaluation to properly determine the extent of Student's cognitive abilities. *See Complaint*, pp. 1-9.

General Intelligence: WISC-V

16. School Psychologist administered the WISC-V on March 11, 2021. *Id.* Student was living outside of Colorado and attending School remotely, so School Psychologist only administered two subtests of the WISC-V, the Verbal Comprehension Index subtests – Similarities and Vocabulary. *Id.* at p. 7. School Psychologist chose those two subtests because they were the easiest to administer remotely, and Student's visual issues made administration of other subtests difficult. *Id.* at p. 7; *Interview with School Psychologist*.
17. Student completed the WISC-V during her normally scheduled classes, which she accessed virtually from home. *Interview with School Psychologist*. School Psychologist administered the WISC-V over Google Meet rather than using the Pearson software (Pearson is the publisher of the WISC-V) because using the Pearson software would have required providing Student with an iPad. *Id.* School Psychologist indicated she did not rely on a professional facilitator as that would have required sending assessment materials to Student's out-of-state residence, and she did not involve Parents in the WISC-V. *Id.* Although School Psychologist did not indicate she had Student span the room during the assessment, she indicated there were no distractions nor anyone else in the room. *Id.*
18. Student scored at the 25th percentile and in the low average range for verbal reasoning (Similarities) and at the 5th percentile in Vocabulary. *Id.* School Psychologist indicated Similarities is highly indicative of a child's overall cognitive ability but noted Vocabulary can be influenced by environmental factors and academic progress. *Id.* School Psychologist also noted that Student benefited from a great deal of verbal encouragement and extra processing time to think through her answers. *Id.* However, she indicated that even though the WISC-V administration was non-standardized due to the virtual environment and extra encouragement, the scores were an accurate representation of Student's verbal skills. *Id.*

General Intelligence: ABAS-3

19. On March 11, 2021, School Psychologist asked Student's mother, Special Education Teacher, and Paraprofessional to complete observations regarding Student's adaptive skills for the ABAS-3. *Exhibit B*, pp. 7-8; *Interviews with Parents, School Psychologist, and Special Education Teacher*. Special Education Teacher scored Student in the average range in Conceptual, Social, and Practical Composites, and Paraprofessional scored Student in the average range for the Social and Practical Composites, and low average for Conceptual. *Exhibit B*, p. 7-8. Student's mother scored Student in the extremely low range in the Conceptual and Social Composites, and below-average for Social. *Id.* at p. 8.

20. In the evaluation summary, School Psychologist indicated that data from both the WISC-V and the ABAS-3 suggested Student was cognitively performing in the low average range. *Exhibit V*, p. 24. During interviews, both Parents and Special Education Teacher indicated School Psychologist told them that the data demonstrated Student no longer qualified for an intellectual disability. *Interviews with Parent and Special Education Teacher*.

### **C. The March 15, 2021 Eligibility Meeting**

21. On March 15, 2021, a properly composed Multi-Disciplinary Team (“IEP team”) met to discuss the March 2021 reevaluation and determine Student’s continued eligibility. *Exhibit F*, p. 1.

22. The IEP team reviewed the March 2021 reevaluation results. *Interviews with Special Education Teacher, School Psychologist, and Parent*. Parents and Special Education Teacher stated that when School Psychologist discussed the results of the general intelligence assessments, School Psychologist indicated Student no longer qualified for an intellectual disability. *Interviews with Special Education Teacher and Parents*. They also stated that the IEP team proposed to remove intellectual disability category from Student’s eligibility, at which point Parent disagreed and halted the discussion. *Id.*

23. School Psychologist denied that she said Student would not qualify for an intellectual disability, stating that the IEP team was merely proposing to discuss the evaluation results and what they might mean for Student. *Interview with School Psychologist*. The SCO finds, based on the similarity between Parents and Special Education Teacher’s accounts, that School Psychologist told Parents Student would not qualify for intellectual disability and that the IEP team had proposed to remove intellectual disability from Student’s eligibility at the March 15, 2021 meeting. *Interviews with Parents and Special Education Teacher*.

24. Upon learning that the IEP team was proposing to remove intellectual disability from Student’s eligibility, Parent indicated she disagreed with the reevaluation and the IEP team’s proposal, and the meeting ended. *Interviews with Special Education Teacher and Parent*. The IEP team did not determine Student’s eligibility or finalize Student’s IEP at the meeting. *See, generally, Exhibit A*, pp. 1-21; *Exhibit M*; pp. 1-4; *Exhibit N*, pp. 1-30; *Interviews with Parents, Special Education Teacher, Special Education Coordinator, School Psychologist*.

### **D. Parents’ Concerns with the General Intelligence Assessments**

25. Parents expressed several concerns regarding the general intelligence assessments: (1) only two subtests of the WISC-V were administered to determine cognitive ability; (2) the administration of the WISC-V was non-standardized; (3) Special Education Teacher did not properly complete ABAS-3 observations; and (4) Paraprofessional did not have enough

knowledge of Student to be a reliable source of adaptive behavior observations. *Interview with Parents; Complaint*, pp. 1-9.

26. The SCO consulted with two CDE content specialists regarding the WISC-V and ABAS-3 to determine whether they were properly administered according to the instructions given by the publisher of the assessments, as well as whether they were appropriate to evaluate Student's cognitive ability. *Interviews with CDE Specialist 1 and CDE Specialist 2*.
27. As an initial matter, the SCO finds that the WISC-V and the ABAS-3 are standard assessment tools that are widely considered appropriate and reliable for evaluating an intellectual disability, provided they are administered correctly. *Interviews with CDE Specialist 1 and CDE Specialist 2*. The WISC-V is a standard cognitive assessment that shows whether a child exhibits cognitive difficulties, and the ABAS-3 is an adaptive skill assessment that demonstrates whether a child has adaptive difficulties across multiple environments (both of which are requirements for finding a child qualified for an intellectual disability in Colorado). *Interview with CDE Specialist 2; Exhibit M*, p. 1.

*Parents' First Concern: Administration of Two Subtests of the WISC-V*

28. Parents' first concern is that School Psychologist only administered two WISC-V subtests to assess cognitive ability. *Interview with Parents; Complaint*, pp. 1-9.
29. Though District did not ultimately determine that Student was no longer eligible for special education with an intellectual disability based on the WISC-V (as discussed below), a change to a child's eligibility category must be supported by data. *Interviews with CDE Specialist 1 and CDE Specialist 2*. The SCO finds that, in consultation with CDE content specialists, a cognitive assessment that only considers two subtests does not provide a complete picture of a child's cognitive ability. *Id.* The SCO also finds that it would be improper to remove an intellectual disability from a child's IEP based on the results of two WISC-V subtests, particularly where Student was previously found eligible for an intellectual disability based on data from a complete cognitive assessment performed in 2018. *Id.*
30. The SCO finds further, based on consultation with CDE content specialists, a concern that the two subtests administered here were verbal. *Id.* Verbal subtests are the subtests most heavily rooted in crystallized knowledge (i.e., learned knowledge). *Interview with CDE Specialist 2*. Unlike other WISC-V subtests, verbal subtests are more heavily impacted by intervention. *Id.* As such, a child can show improvement due to interventions, but can still demonstrate cognitive concerns in other areas more rooted in innate cognitive ability. *Id.*
31. Moreover, in this case verbal skills were an area of historical strength for Student. *Interviews with Parents, School Psychologist, and Special Education Teacher*. If District considered removing intellectual disability from Student's eligibility, it would have been

more appropriate to probe areas of historical weakness to determine if those areas were still a concern, rather than extrapolating from scores in an area where Student historically showed strength. *Interviews with CDE Specialist 1 and CDE Specialist 2*. For these reasons, the SCO finds that it was improper to propose finding Student ineligible for an intellectual disability on the administration of only two verbal WISC-V subtests.

32. Nevertheless, the SCO acknowledges the added layer of complexity surrounding the virtual assessment of students during COVID-19. *Id.* Due to complexities surrounding assessments during COVID-19, most evaluations administered during COVID-19 should be interpreted with caution. *Interview with CDE Specialist 2*. In this case, the SCO finds that it would have been more appropriate for District to rely on existing data in areas where it was unable to obtain new reliable data—such as overall cognitive ability—instead of reaching conclusions based on incomplete data from the 2021 virtual assessment. *Id.* Such an approach would be consistent with the CDE’s COVID-19 guidance on reevaluations which provides that due to the pandemic school districts may conduct reevaluations using existing data. *CDE Exhibit 4*.

*Parents’ Second Concern: Non-Standardized Administration of the WISC-V*

33. Parents’ second concern is that School Psychologist’s administration of the WISC-V was non-standardized because she administered the assessment virtually and provided Student extra time and encouragement. *Interview with Parents; Complaint*, pp. 1-9.
34. The SCO finds that, for a child of Student’s age with severe cognitive concerns, a virtual assessment was inadvisable. *Interview with CDE Specialist 2; CDE Exhibit 1*. Pearson (the producer of assessments) provides that a professional facilitator is recommended for a virtual assessment but adds that in times when social distancing is necessary (such as the COVID-19 pandemic), using a professional facilitator for a virtual assessment may not be safe or feasible. *CDE Exhibit 1. Id.; Interview with School Psychologist*. Independent examinee participation, however, is not recommended for younger children with low cognitive ability, such as Student. *CDE Exhibit 1; Interview with CDE Specialist 2*.
35. A virtual assessment must also be performed over the Pearson’s platform rather than Google Meet, as it was done here. *Interview with CDE Specialist 2*. Pearson explicitly provides that use of the WISC-V via tele practice without using the Pearson platform is not recommended. *CDE Exhibit 1*. To the extent the administration was, as School Psychologist indicated, non-standardized, the administrator of the assessments should also report the assessment results with caution. *Id.; Interview with CDE Specialist 2*.
36. Student was also provided with extra time and encouragement by School Psychologist during the administration. *Interview with School Psychologist; Exhibit B*, p. 7. Extra accommodations fall outside standardized norms and make the results of the assessment

less reliable, and the need to provide extra time and encouragement is itself indicative of cognitive concerns. *Interview with CDE Specialist 2.*

37. Since School Psychologist's March 2021 administration of the WISC-V was not conducted in accordance with instructions provided by Pearson, the SCO finds the administration was not performed according to the instructions from the producer of the assessment.

*Parents' Third Concern: Special Education Teacher's ABAS-3 Observations*

38. Parents third concern is that Special Education Teacher incorrectly administered the ABAS-3 by completing observations that asked about Student's ability to complete tasks "independently" as if she was receiving support from an adult. *Interview with Parents; Complaint, pp. 1-9.*
39. Observers under the ABAS-3 should complete observations of a child's independent abilities by thinking about the child as if he or she was unassisted by an adult. *Interview with CDE Specialist 2.* Thus, it would be an improper administration if an observer filled out ABAS-3 observations as if the child had adult support. *Id.*
40. Here, after Parents expressed disagreement with the reevaluation, District asked Special Education Teacher to complete a second administration of the ABAS-3 on April 23, 2021. *Exhibit N, pp. 6-7.* On the second administration, Special Education Teacher again scored Student in the average range in the Social Composite but scored Student in the low average range for Practical and Conceptual. *Id.* at p. 7.
41. Special Education Teacher indicated that her scores were different during the second administration because she was thinking about how Student would perform in a novel situation. *Interview with Special Education Teacher.* Student performs significantly better on tasks with which she is familiar or if it is part of a regular routine. *Id.* Student struggles when confronted with an unfamiliar task or a break to her routine, so her ability to perform familiar tasks could be reduced in a new setting, such as a new school in a new state. *Interviews with Special Education Teacher, School Psychologist, Special Education Coordinator, and Parents.*
42. Special Education Teacher indicated that when she completed observations for the second administration of the ABAS-3 she considered how Student would perform in a new setting because she was transitioning into high school in a different state. *Interview with Special Education Teacher.* Special Education Teacher also indicated that she filled out the observations as if Student were not receiving supports from an adult but suggested she might not have done so for some sections during the first administration. *Id.*

43. School Psychologist also suggested Special Education Teacher did not necessarily score Student as if she were not receiving supports for the March 2021 administration for sections regarding her independent abilities. *Interview with School Psychologist*.
44. For these reasons, the SCO finds that Special Education Teacher improperly completed the ABAS-3 in March 2021 by filling out sections about Student's independent abilities as if she had adult support. However, the SCO finds that Special Education Teacher properly completed the ABAS-3 in the same respect in April 2021.

*Parents' Fourth Concern: Paraprofessional's Knowledge of Student*

45. Parents' fourth concern is that Paraprofessional did not know Student well enough to be a reliable source of adaptive observations. *Interview with Parents; Complaint*, pp. 1-9.
46. The ABAS-3 must be completed by parents, family members, teachers, daycare staff, supervisors, or counselors who are familiar with the daily activities of the individual being evaluated. *Interview with CDE Specialist 1; CDE Exhibit 3*.
47. The evaluation report states that Paraprofessional knew Student for several years prior to the 2021 ABAS-3 administration, but Parents assert Paraprofessional only knew her on a part-time basis for a couple months. *Exhibit B*, pp. 6-8; *Interview with Parents*. Special Education Teacher, Student's primary special education teacher for two years, indicated Student started working with Paraprofessional during the 2019-2020 academic year. *Interview with Special Education Teacher*. The SCO finds Special Education Teacher's account most reliable in that Paraprofessional knew Student for one year prior to the March 2021 reevaluation. Thus, Paraprofessional was sufficiently familiar with Student to observe her for the ABAS-3 assessment. *Interview with CDE Specialist 2*
48. Moreover, the SCO finds that the ABAS-3 would have been complete with only observations from Special Education Teacher and Parents because the assessments only need to show whether Student has adaptive issues across multiple settings to evaluate for an intellectual disability. *Id.* Including a third observer, such as a paraprofessional that observes a student in settings like lunch and recess, is a best practice that can provide additional helpful data but not a requirement. *Id.* For these reasons, the SCO finds that it was not improper for Paraprofessional to observe Student for the ABAS-3.

**E. The Independent Education Evaluation ("IEE")**

49. After the March 15, 2021 eligibility meeting, Parents spoke to Special Education Director and Special Education Coordinator regarding next steps. *Interviews with Special Education Coordinator and Parents*. Parents were advised that if they disagreed with the reevaluation,

they could seek an IEE. *Id.* Parents obtained an IEE from an out-of-state Private Provider, and they were reimbursed for the cost by District. *Id.*

50. On April 4, 2021, Private Provider administered the IEE, which included the WISC-V. *Exhibit B*, p. 2. Private Provider also compiled family history and background information, and Private Provider conducted interviews with Student and Parents. *Id.*

51. Student was assessed in-person and completed ten of the WISC-V subtests. *Id.* at p. 2. Her performance yielded a Full-Scale IQ (“FSIQ”) score and five primary composite index scores. *Id.* The FSIQ score was 60, which is in the extremely low range of intellectual ability, but Private Practitioner indicated Student’s scores on the Verbal Comprehension Index subtests were significantly higher than her performance in other areas. *Id.* Given the variation among Student’s Index scores, Private Practitioner indicated her General Ability Index (“GAI”) was a better estimate of her overall intellectual functioning than her FSIQ score, as the GAI is not directly influenced by tasks involving working memory or visual-perceptual processing speed. *Id.* Student’s calculated GAI score was 68, which falls within the Extremely Low range of intellectual functioning. *Id.* Private Practitioner indicated Student’s FSIQ and GAI scores were consistent with her developmental and educational history. *Id.* at p. 4.

52. Since Student’s eligibility and IEP had not yet been finalized, an IEP meeting was scheduled for April 12, 2021. *Interviews with Special Education Teacher and Parent.*

#### **F. The April 12, 2021 Meeting**

53. The IEP meeting set for April 12, 2021 was postponed due to scheduling conflicts. *Interviews with Parents, Special Education Teacher, and School Psychologist.* Parents’ concern is that an IEP meeting was held on that date without them, and that educational decisions for Student were made at the meeting. *Interview with Parents; see Complaint*, pp. 1-9.

54. Special Education Teacher, School Psychologist, and Special Education Coordinator all indicated that a meeting did occur regarding Student on April 12, 2021, and that the meeting did not include Parents. *Interviews with Special Education Teacher, School Psychologist, and Special Education Coordinator.* All District staff indicated that the purpose meeting was to discuss data obtained during the reevaluation and IEE, and the plan moving forward. *Id.* All District staff further indicated that no educational decisions were made about Student at the meeting, and that final decisions regarding eligibility and Student’s IEP were left until a later meeting with Parents. *Id.*

55. When asked what educational decisions were made at the April 12, 2021 meeting, Parents merely indicated that District staff made the decision to finalize Student’s eligibility at a later meeting with Parents. *Interview with Parents.* For these reasons, the SCO finds that the

April 12, 2021 meeting between District members of the IEP team was not an IEP meeting and that no educational decisions were made with respect to Student at the meeting.

#### **G. The May 17, 2021 IEP Meeting**

56. On May 17, 2021, a properly constituted IEP team, including Parents, met to discuss the reevaluation, the IEE, and Student's continuing eligibility. *Exhibit F*, p. 4; *Interviews with Parents, Special Education Teacher, School Psychologist, and Special Education Coordinator*.
57. Based on Student's high scores in verbal skills on both administrations of the WISC-V, her performance on the speech/language assessment, and her progress data, the IEP team determined that she did not continue to qualify for specialized instruction under the Speech/Language Impairment disability category. *Id.*; *Exhibit N*, pp. 1, 29.
58. The IEP team also found that Student no longer qualified for special education services as a child with an Orthopedic Impairment, indicating that Student's cerebral palsy required accommodations and not specialized instruction. *Exhibit N*, p. 29.
59. The ITP team discussed the new WISC-V scores, Student's adaptive behavior skills, and the discrepant ABAS-3 scores between home and school environments. *Id.* Average to low average scores on the ABA-3 in the school setting would typically indicate that adaptive behavior is not an area of need, but upon input from Parents, the IEP team determined that if Student were in a novel setting her adaptive behavior would be greatly impacted by poor problem-solving skills. *Id.* Her elevated (average to low average) scores on the ABAS-3 in the school environment were attributed to routine and consistency as well as the specialized instruction she was receiving, and the IEP team ultimately determined adaptive behavior was an area of weakness. *Id.* The IEP team found that Student qualified for special education and related services under the intellectual disability category. *Id.*
60. Once the IEP team agreed on eligibility, the IEP team drafted an IEP for Student's 2021-2022 academic year. *Interviews with Special Education Coordinator and Special Education Teacher*. Although a draft IEP was written and discussed during that meeting, the meeting ended without finalizing the document. *Id.*

#### **H. Subsequent Changes to Student's IEP**

61. After the May 17, 2021 meeting, Student's IEP team, including Parents, collaborated regarding the final language of the IEP. *Interviews with Special Education Teacher, School Psychologist, Special Education Coordinator, and Parents*. Although Paraprofessional was sufficiently familiar with Student to perform the ABAS-3 observations, the IEP team omitted these observations from the IEP given Parent's concerns in this respect. *Id.*

62. The IEP team also made other changes to the language of the IEP based on Parents' input, including, in part, the removal of the descriptor "significantly" and the adjustment of the phrase "taking notes" to "copying notes as needed". *Id.* The IEP was finalized at the end of the 2020-2021 academic year, and Parents indicated during interviews with the SCO that they are satisfied with Student's special education programming and services. *Id.*

### I. District Policy and Procedures

63. The SCO requested an interview with District's Special Education Director, but due to a lapsed contract at the end of the 2020-2021 academic year Special Education Director was unavailable. Instead, the SCO spoke to Special Education Coordinator, who served as an interim director of special education and had familiarity with both the facts of this case and District policies and procedures. *Interview with Special Education Coordinator.*

64. Special Education Coordinator indicated that in prior years District had a special education practitioner's manual that contained written policies and procedures related to IEP meetings and eligibility determinations, but that it is currently unavailable because of copyright issues. *Id.* District "hopes" to update the manual after November 2021, when the copyright issue is anticipated to resolve. *Id.* Special Education Coordinator indicated all District staff involved with special education are expected to be familiar with IDEA and ECEA requirements, and that the director of special education and special education coordinators in District are available to answer questions and provide guidance. *Id.*

65. Special Education Coordinator indicated District staff adhered to policy in this case, but that the reevaluation of Student was a highly unusual and unique situation due to COVID-19 and Student's physical location outside of Colorado. *Id.* Special Education Coordinator further indicated that, to his knowledge, nobody on the IEP team had ever performed a reevaluation under similar circumstances. *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 failed to ensure that the reevaluation assessments or other evaluation materials were administered in accordance with instructions provided by the producer of assessments, resulting in a procedural violation of 34 C.F.R. § 300.304(c)(1)(v).**

#### i. Parent Input

The IDEA's procedural requirements for developing a child's IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Systema v. Academy School District No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008). As part of a reevaluation,

the IEP team must, “review existing evaluation data on the child including *evaluations and information provided by the parents on the child.*” 34 C.F.R. § 300.305(a)(1)(i) (emphasis added). The IDEA requires that parental participation be meaningful. 34 C.F.R. §§ 300.321(a)(1), 300.322, and 300.324(a)(1)(ii).

Meaningful parent participation occurs where the IEP team listens to parental concerns with an open mind, exemplified by answering questions, incorporating some requests into the IEP, and discussing privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of the student. *O’Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 703 (10th Cir. 1998). Meaningful participation does not require that a district simply agree to whatever a parent has requested. *Jefferson County School District RE-1*, 118 LRP 28108 (SEA CO 3/22/18). But parental participation must be more than “mere form.” *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014). “It is not enough that the parents are present and given an opportunity to speak at an IEP meeting.” *Id.* Evidence that a district “was receptive and responsive at all stages” to the parents’ position, even if it was ultimately rejected, is illustrative of parental participation. *Id.*

Here, the Record reflects that District properly considered Parents’ input as part of Student’s eligibility determination and throughout the creation of Student’s IEP.

First, when Parents expressed concern that the March 2021 WISC-V was administered improperly, District halted the eligibility discussion and postponed the meeting so Parents’ concerns could be addressed. (FF #22, 24, 52). Special Education Director and Special Education Coordinator subsequently spoke to Parents about the concerns, and Parents were advised about their right to seek an IEE, which District paid for at public expense. (FF #49).

Second, once Parents obtained the IEE, the IEP team considered the results. (FF #56, 59). Although the IEP team was prepared to move forward with changes to Student’s eligibility at the March 15, 2021 meeting, it changed its recommendation on May 17, 2021, in part because of the IEE results. *See* (FF #22-23, 56, 59). The IEP team also relied on statements from Parents regarding Student’s ability to function in novel situations, which ultimately led the IEP team to determine her adaptive skills were an area of concern despite higher than typical scores on the adaptive behavior assessments. (FF #59). As a result, the IEP team ultimately found Student eligible as a child with an intellectual disability, a conclusion arrived at as a direct result of Parents’ input. *See id.*

Third, District considered Parents’ concerns regarding the ABAS-3 assessment. (FF #40-42, 59, 61). Parents expressed concern that Special Education Teacher failed to follow instructions when she completed ABAS-3 observations, and as a result Special Education Teacher reperformed the assessment. *See* (FF #40). Parents likewise expressed concern that Paraprofessional did not know Student well enough to give reliable observational data on the ABAS-3. (FF #61). Although District and Parents disagreed on whether Paraprofessional had

sufficient knowledge regarding Student’s adaptive skills, District omitted Paraprofessional’s observations from the evaluation report and Student’s IEP at Parents’ request. *Id.*

Finally, District considered Parents’ input as part of the changes made to Student’s IEP after the May 17, 2021 meeting. (FF #61-62). Once eligibility was finalized, District engaged in a back and forth with Parents regarding the final language of Student’s IEP and, while District did not make every change Parents proposed, District made several changes to the language based on Parents’ input. *See id.* For these reasons, the SCO finds that District properly considered Parents’ input consistent with the requirements of 34 C.F.R. § 300.305(a).

ii. Valid and Reliable Assessment Materials

Parents’ concern with the March 2021 reevaluation is that District failed to use valid and reliable assessment materials to reevaluate Student, specifically those used to evaluate intellectual ability. Under the IDEA, public agencies must ensure that assessment and other evaluation materials used to assess a child “are used for the purposes for which the assessments or measures are valid and reliable.” 34 C.F.R. §300.304(c)(1)(iii).

In this case, the SCO finds and concludes that the WISC-V and the ABAS-3 are both considered to be standard assessment tools for examining intellectual ability, and both are likewise considered to be valid and reliable when properly administered. (FF #27). Specifically, in consultation with CDE content specialists, the SCO finds that the WISC-V and ABAS-3 are commonly used by many school districts across Colorado to evaluate intellectual ability, and there is nothing of concern about the use of the assessment tools themselves. *See id.*

Still, the SCO cautions District that its proposal to change Student’s eligibility under intellectual disability based on only two verbal WISC-V subtests administered under non-standardized conditions would have been improper. (FF #22-23). A significant change to eligibility must be supported by reliable data sufficient to understand a student’s abilities and justify the change. (FF #29). Here, the non-standardized administration of only two verbal subtests of the WISC-V did not provide District with a complete picture of Student’s cognitive abilities or provide reliable results. (FF #29-32, 34-37). This is particularly true where Student’s historical data is discrepant with new assessment results. *See id.* Under the circumstances, it would have been more appropriate for District to rely on existing data in areas where it was unable to obtain new reliable data—such as overall cognitive ability – as recommended under the CDE’s COVID-19 guidance. (FF #32).

Nevertheless, the SCO finds and concludes that District used valid and reliable assessment tools to evaluate Student, consistent with the requirements of 34 C.F.R. § 300.304(c)(1)(iii).

iii. Assessment Administration in Accordance with Instructions

Parents' concern is that District failed to administer the WISC-V and ABAS-3 in accordance with instructions from Pearson, resulting in invalid data about Student's cognitive abilities. Public agencies must ensure that evaluations and assessments "are administered in accordance with any instructions provided by the producer of assessments." 34 C.F.R. § 300.304(c)(1)(v).

In this case, District's March 2021 administration of the WISC-V and ABAS-3 was not conducted in accordance with instructions from the producer of assessments. *See* (FF #33-43).

First, the WISC-V was not administered according to the instructions of Pearson. (FF #33-37). Had School Psychologist referenced instructions from Pearson, the producer of the WISC-V, regarding the proper methodology for teleassessments, she would have known that if the WISC-V is administered remotely, it must be done using the Pearson software as opposed to Google Meet. (FF #35). Pearson also cautions against teleassessment for young subjects with cognitive difficulties (such as Student) in a global pandemic, when using a professional facilitator is not feasible, and an examinee must participate independently. (FF #34).

Second, the ABAS-3 was likewise improperly administered during the March 2021 reevaluation. (FF #38-44). The ABAS-3 asks subjects to complete observations regarding a student's independent abilities as if that student is acting without adult support. (FF #39). By completing those sections as if Student had been receiving support from an adult, Special Education Teacher failed to properly follow the instructions from the producer of the assessment. (FF #39-44).

Since District did not ensure the administration of the March 2021 intelligence assessments was conducted in accordance with the instructions from the producer of assessments, it violated 34 C.F.R. § 300.304(c)(1)(v), resulting in a procedural violation. A procedural violation results in denial of a FAPE for a child if the violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

Here, the SCO finds that the procedural violation did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process, nor cause a deprivation of educational benefit. First, District did not change Student's eligibility on March 15, 2021. (FF #24). While District did propose to drop Student's eligibility as a child with an intellectual disability, final decisions regarding eligibility were not made at the March 15, 2021 meeting, which was postponed when Parents expressed disagreement with the results of the reevaluation. *Id.*

Second, prior to the May 17, 2021 eligibility determination, District took steps to cure the issues with the March 2021 reevaluation. *See* (FF #40, 49). On April 23, 2021, Special Education

Teacher reperfomed the ABAS-3. (FF #40). During the second administration, Special Education Teacher scored Student as if Student was not receiving supports, and also took into account Student's ability to perform tasks in a novel situation, as Student struggles with tasks in new environments and with new people. (FF #41-42). By completing the ABAS-3 again, District effectively replaced the improperly administered ABAS-3 with more reliable data, curing the deficiencies of the original ABAS-3 before they had an impact on Student. *See id.*

Third, with regard to the WISC-V, District advised Parents of their right to obtain an IEE, Parents obtained an IEE at public expense, and District considered the IEE in Student's eligibility determination. (FF #49, 56, 59). Confounding variables such as the COVID-19 pandemic and Student's physical location outside of Colorado admittedly made the administration of the WISC-V more difficult than is typical, and when Parents obtained a full battery WISC-V from Private Practitioner, District relied on the results of the IEE to determine Student continued to be eligible under intellectual disability. (FF #32, 56, 59). Student now has a finalized IEP, and Parents indicated they are satisfied with Student's special education programming. (FF #60).

#### iv. Systemic Violation

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, Student's reevaluation was completed under extremely unusual circumstances. (FF #32, 65). District staff indicated that this is the first and only time they had encountered a situation where District needed to reevaluate a child who was living completely outside of Colorado during a global pandemic. (FF #65). While the District's access to written policies and procedures is concerning, the SCO finds there is no evidence to suggest this type of issue has arisen before for other students, and the record suggest Student's situation was unique. The SCO therefore finds and concludes there is no evidence that this violation is systemic in nature.

Nevertheless, to ensure District has access to its written policies and procedures moving forward, the SCO will require a status update of its special education practitioner's manual.

#### **Conclusion to Allegation No. 2: District did not convene an IEP meeting on April 12, 2021 without all required IEP members.**

Parents' concern is that District held an IEP meeting on April 12, 2021, and made educational decisions about Student at the meeting, without Parents.

“Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate – including (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed on time and place.” 34 C.F.R. § 300.322(a).

The IEP Team must include the parents of the child, and the IDEA requires school districts to ensure that the parents of each child are members of any group that makes decisions about their child's educational placement. 34 C.F.R. § 300.321(a), 34 C.F.R. § 300.327 and 34 C.F.R. § 300.501(c)(1). However, District staff may meet in advance of an IEP meeting to discuss potential placements for the child. *See, e.g., T.P. v. Mamaroneck Union Free Sch. Dist.*, 51 IDELR 176 (2d Cir. 2009); *Schoenbach v. District of Columbia*, 46 IDELR 67 (D.D.C. 2006); and *M.C.E. v. Board of Educ. of Frederick County*, 57 IDELR 44 (D. Md. 2011).

Here, District staff held a meeting regarding Student without Parents on April 12, 2021, but it was not an IEP team meeting and no educational decisions or changes to educational programming were made at the meeting. (FF #53-55). Rather, the only decision made was that the final decisions regarding Student’s eligibility and IEP would be made at a later meeting that included Parents. *Id.*

Accordingly, the SCO finds and concludes that the April 12, 2021 meeting was not an IEP meeting that required all members of Student’s IEP team, including Parents, and thus District did not violate the requirements of 34 C.F.R. § 300.321.

### **REMEDIES**

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

1. Failing to ensure that assessments or other evaluation materials used for Student’s reevaluation were administered in accordance with any instructions provided by the producer of assessments, in violation of 34 C.F.R. § 300.304(c)(1)(v).

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

1. Corrective Action Plan
  - a. By **Tuesday, July 27, 2021**, the District shall submit to CDE a corrective action plan (“CAP”) that adequately addresses the violation 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:

1. Special Education Director and all District staff involved in the Complaint, in particular School Psychologist, must review this Decision, as well as the requirements of 34 C.F.R. § 300.304. This review must occur no later than **Friday, August 13, 2021**. A signed assurance that the above materials have been reviewed must be completed and provided to CDE no later than **Friday, August 20, 2021**.
- 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.
- c. By **Tuesday, November 30, 2021**, District shall submit to CDE a status update regarding its special education practitioner's manual. The CDE will conduct follow up activities related to the special education practitioner's manual as appropriate.

Please submit the documentation detailed above to CDE as follows:

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

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

### **CONCLUSION**

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue 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 25<sup>th</sup> day of June, 2021.



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Ross Meyers  
State Complaints Officer

## **APPENDIX**

### **Complaint, pages 1-9**

- Exhibit 1: IEP Draft and Reevaluation Data

### **Response, pages 1-5**

- Exhibit A: Student's IEP Draft
- Exhibit B: Evaluation Data
- Exhibit C: Progress Data
- Exhibit D: none
- Exhibit E: Prior Written Notice and Parent Consent
- Exhibit F: Notice of Meetings
- Exhibit G: Eligibility Determinations
- Exhibit H: Correspondence
- Exhibit I: none
- Exhibit J: District Policies and Procedures
- Exhibit K: List of Staff with Knowledge Concerning Allegations
- Exhibit L: May 2021 Updated Reevaluation Report
- Exhibit M: May 2021 Eligibility Determination
- Exhibit N: May 2021 Finalized IEP
- Exhibit O: May 2021 Progress Report

### **Reply, pages 1-2**

#### **Telephonic Interviews:**

- Parents: June 1, 2021
- School Psychologist: June 3, 2021
- Special Education Coordinator: June 7, 2021
- Special Education Teacher: June 3, 2021

#### **CDE Exhibits:**

- CDE Exhibit 1: *Telepractice and the WISC-V*, PEARSON ASSESSMENTS, <https://www.pearsonassessments.com/professional-assessments/digital-solutions/telepractice/telepractice-and-the-wisc-v.html> (last visited June 10, 2021).
- CDE Exhibit 2: *Here's when school districts plan to return to in-person learning*, 9NEWS, <https://www.9news.com/article/news/education/back-to-learning/heres-when-school->

districts-plan-to-return-to-in-person-learning/73-bb5a7be3-71aa-406d-a5ec-b670526c4d12 (last visited June 13, 2021).

- CDE Exhibit 3: *Adaptive Behavior Assessment System-II (ABAS-II) ABAS III*, CENTRE FOR RESEARCH EXCELLENCE IN BRAIN RECOVERY (UNSW), [http://movingahead.psy.unsw.edu.au/documents/research/outcome%20measures/paediatric/Psychological%20Status/Website%20ABAS-III%20Paeds%20\(Completed\).pdf](http://movingahead.psy.unsw.edu.au/documents/research/outcome%20measures/paediatric/Psychological%20Status/Website%20ABAS-III%20Paeds%20(Completed).pdf) (last visited June 14, 2021).
- CDE Exhibit 4: *Special Education & COVID-19 FAQs*, COLORADO DEPARTMENT OF EDUCATION, [http://www.cde.state.co.us/cdesped/special\\_education\\_faqs](http://www.cde.state.co.us/cdesped/special_education_faqs) (last visited June 15, 2021).
- CDE Exhibit 5: *Preparing for the return of students to in-person learning in January*, DISTRICT, <https://www.bvsd.org/about/news/news-article/~board/district-news/post/preparing-for-the-return-of-students-to-in-person-learning-in-january> (last visited June 15, 2021).