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OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
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WASHINGTON, DC

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By email only to mcreid@fcps.edu

Dr. Michelle Reid
Superintendent
Fairfax County Public Schools
Gatehouse Administration Center
8115 Gatehouse Road
Falls Church, Virginia 22042

Re: OCR Docket No. 11-21-5901
Fairfax County Public Schools

Dear Dr. Reid:

This letter is to notify you of the disposition of the above-referenced directed investigation initiated by the U.S. Department of Education, Office for Civil Rights (OCR), of the Fairfax County Public Schools (the Division) on January 12, 2021. OCR opened this investigation to determine whether during the COVID-19 pandemic the Division provided a free appropriate public education (FAPE) to each qualified student with a disability as required by federal law and provided students with disabilities equal access to education. In OCR's letter issued to the Division on May 4, 2021, OCR inquired about what the Division has done to address the effects of any pandemic-related disruptions in services required to meet the individual educational needs of students with disabilities.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability under any program or activity receiving Federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The Division is a public entity that receives funds from the Department and is therefore subject to Section 504, Title II, and their implementing regulations. Accordingly, OCR had jurisdiction to investigate and resolve this directed investigation under Section 504 and Title II.

Based on the evidence obtained through the Division's documents and data, as well as interviews of administrators, OCR found that the Division failed or was unable to provide a FAPE to thousands of qualified students with disabilities in violation of Section 504. Specifically, OCR found that during remote learning, the Division failed or was unable to provide a FAPE to thousands of qualified students with disabilities and failed to conduct evaluations of students with

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by fostering educational excellence and ensuring equal access.*

disabilities prior to making significant changes to their placements and to ensure that placement decisions were made by a group of persons knowledgeable about the students and the meaning of the evaluation data, in violation of the Section 504 regulation at 34 C.F.R. §§ 104.33 and 104.35; (2) directed staff to apply an incorrect standard for FAPE that was not compliant with the Section 504 regulation, and categorically reduced and placed limits on services and special education instruction provided to students with disabilities based on considerations other than the students' individual educational needs, in violation of 34 C.F.R. § 104.33; and (3) failed to develop and implement a plan adequate to remedy the instances in which students with disabilities were not provided a FAPE as required by Section 504 during remote learning. In addition, the evidence obtained to date raised compliance concerns that staffing shortages and other administrative obstacles resulted in non-provision of some FAPE services for students with disabilities; and that the Division did not accurately or sufficiently track services provided to students with disabilities to enable the Department to ascertain the Division's compliance with 34 C.F.R. § 104.33, as required by 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.6(b)).

The Division signed the enclosed Resolution Agreement to address the violations and compliance concerns identified below.

I. Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires public school districts to provide a free appropriate public education (FAPE) to all qualified students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§ 104.34-36. Districts are required to conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. 34 C.F.R. § 104.35(a). Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. § 104.33(b)(2).

In interpreting evaluation data and in making placement decisions, a recipient school district must draw upon information from a variety of sources, establish procedures to ensure that information obtained from all such sources is documented and carefully considered, and ensure that the decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 104.35(c).

In addition, the Section 504 regulation, at 34 C.F.R. § 104.36, requires that school districts establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of IDEA is one means of meeting this requirement.

The Section 504 regulation, at 34 C.F.R. § 104.6(a), provides that when OCR finds that a district has discriminated against persons on the basis of disability, the district shall take such remedial action as OCR deems necessary to overcome the effects of the discrimination. Compensatory services are required to remedy any educational or other deficits that result from a student with a disability not receiving the evaluations or services to which they were entitled.

Additionally, the Section 504 regulation at 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.6(b)) requires districts to keep records and accurate compliance reports in such form determined to be necessary to enable OCR to ascertain whether the district has complied or is complying with the regulations.

II. Summary of OCR’s Investigation

A. Background

The Division is one of the largest school districts in the United States with 198 schools and centers serving more than 178,000 students. Of those, more than 25,000, or 14.4 percent, are students with disabilities. On March 13, 2020, in response to the COVID-19 pandemic, the Governor of the Commonwealth of Virginia issued an Emergency Order closing schools for a two-week period. Then, on March 23, 2020, the Governor ordered all Virginia K-12 schools to close for in-person learning for the remainder of the school year.

B. Methodology

OCR requested data from the Division on May 4, 2021. OCR requested information regarding the Division’s response to the COVID-19 pandemic, actions the Division took to ensure that students with disabilities received a FAPE during remote learning, and what the Division had done to address the effects of any pandemic-related disruptions in services required to meet the individual educational needs of students with disabilities. OCR also conducted interviews of the Division’s [redacted content], as well as the Division’s former Director of the Office of Special Education and Procedural Support (“Director”), who was serving in that role at the outbreak of the COVID-19 pandemic and continued through June 2021.

III. Findings of Fact

A. The Provision of FAPE During Remote Learning

1. The Pivot to Remote Learning: Spring and Summer 2020

Following the emergency closure of schools on March 13, 2020, for the first two weeks the Division posted a variety of learning activities for students on its public website and through its Blackboard learning platform. Learning packets distributed to students during these weeks were focused on review of previously taught content. Then, after a transition period and spring recess, the Division initiated remote learning for all students on April 14, 2020. The remote learning program was limited and looked significantly different than the typical school day. The Division described the instruction offered during this time as a blend of review, practice, and new learning.

It was delivered through a combination of synchronous and asynchronous learning that included weekly instruction packets delivered by mail and virtually. The Division worked to procure and distribute 15,000 laptops at this time for students who were without access to a device at home. The Division's Distance Learning Plan for spring and summer 2020, published on its website, referred to the period from mid-April to June 2020 as Phase 2, which it described as including "Learning packet new instructional content mailed and posted, grades PreK-12; Teacher-directed synchronous and asynchronous learning sessions; Teacher April 14 to June 12 check-ins with asynchronous learning sessions; Teacher check-ins with students and virtual office hours; Continued distribution of laptops and MiFi devices; Ongoing staff training and collaboration."

The Division's Distance Learning Plan set forth the following learning timeframes for spring 2020:

- 2-3 hours per day, 4 days per week of synchronous learning activities (described as participation in virtual, teacher-directed instruction and individualized student support for language arts and mathematics, with integrated science and social studies; engaging with learning content presented through cable television, video web streaming, and the Division's YouTube Channel; and connecting with teachers through virtual office hours)
- 2-3 hours per day, 4 days per week of asynchronous learning activities (described as completing independent work, such as remote learning packets and other activities directed by the teacher for language arts and mathematics, integrated science and social studies, and choice activities for art, music, and physical education); and Flex learning for an amount of time to be determined by the student/family (described as including reading aloud and independent reading for pleasure for suggested minutes based on grade level, being active, and exploring "personal interests/passions").

The Division maintains that remote learning during the spring of 2020 was voluntary, rather than compulsory, meaning students were not required to participate. There was no penalty for not participating, *e.g.*, no truancy or grade penalties. Students did not receive fourth-quarter grades; rather, grading was used only to help students, by bumping up their grades from quarters one through three, primarily at the secondary school level.

On March 23, 2020, the Governor ordered all Virginia schools to remain closed for in-person learning through the end of the 2019-2020 school year. According to the Division, that order required its schools to remain in closed status for the rest of the spring. OCR asked the [redacted content] to explain her understanding of this "closed" status. She answered that if the Division is closed, "that's a different story in terms of providing everything provided when open. They were closed but they didn't want students to have no instruction, so there was a good faith effort to provide as much as possible with a closed Division." She stated that this was the general understanding in the Division. In response to a systemic complaint filed by a group of parents of Division students with disabilities with the Virginia Department of Education (VDOE) in May 2020, the Division asserted that, because it was only "attempting to provide ungraded and nonmandatory extension and enrichment learning activities for all students, [it was] not providing the kind of 'instruction/instructional services' generally to students—nor [were] schools 'open'—in a way that would constitute a full 'school day,' even on a virtual basis."

Despite its asserted “closed status,” the Director told OCR that the Division believed “FAPE was necessary and an obligation.” However, the Division communicated to staff and the student/parent community that FAPE under these circumstances “necessarily look[ed] different.” The Director told OCR that what the Division provided to students receiving special education services through an IEP during spring of 2020 was “FAPE in light of the circumstances.” As she later clarified, the Division understood FAPE at the time to require only “good faith reasonable efforts” to provide the services outlined in a student’s IEP. She explained to OCR that “FAPE in light of the circumstances” meant that they did “the best they could to provide what a student needed to receive a FAPE” in the context of remote learning. She used an example of a student with an IEP requiring physical therapy services, telling OCR that students were not able to have a stander in their home during the pandemic, and that physical therapy therefore looked different.

To ensure equal access and provide “FAPE in light of the circumstances,” the Division announced, on April 16, 2020, that it would be developing a Temporary Learning Plan (TLP) model for its students with IEPs.¹ According to that model, each TLP would “outline [the] special education and related services” that those students would receive through the rest of the spring, even though those services would “look different than what [was then] included in [their] IEP[s].” The Director told OCR that the purpose of the TLP was to ensure students with disabilities had access to remote learning. Information disseminated to staff, including training materials and FAQs provided to parents, explained that the purpose of the TLP was to identify “what goals, accommodations, and services” a student would receive during remote learning.

The TLP was formatted as a one-page letter, and information provided to parents made clear that it was not an IEP or Section 504 plan. Further, while staff were instructed to look to the IEP goals, as well as accommodations and services provided in the IEP, when developing the TLP, the Division made clear that the TLP would not contain the same services and accommodations included in the IEP. According to its April 9, 2020, FAQ, the TLP was instead “a letter which identifies the continuity of learning services and consultation that will be provided to students between now and the end of the school year.”

In an April 27, 2020, letter addressed to parents of Division students, the Department of Special Services explained that it would “be doing [its] best” throughout the spring “to provide FAPE within the constraints of distance learning.” The Division accordingly directed special education case managers to explain to parents that, “[d]uring the closure,” the Division would “continue to provide [their] student with access to instruction and review related curriculum content and [their] child’s specific IEP needs.” For high school students, that would include “the opportunity” for students on IEPs “to move forward in [their] learning to receive credit for high school classes.”

Special education case managers—whom the Division tasks with collecting, monitoring, and processing information regarding individual students—were also made responsible for developing the TLP. They were told to do so with input from any related service providers, as well as parents, but the Division made clear that case managers alone were to make those changes. If parents disagreed with the TLP the case manager proposed, they had the opportunity to request an IEP

¹ Although some documentation from the Division indicated students with Section 504 plans would also receive TLPs, communications from the [redacted content] to school-based Section 504 coordinators clarified that students on Section 504 plans were not included in the TLP requirement.

meeting. The Director acknowledged that the Division did not believe it was feasible to convene IEP meetings for all students. The Division told parents in the FAQs disseminated to the community and provided to staff in training that, by agreeing to the TLP, parents did not waive their or their child’s rights under the IEP. They also told them that IEPs would be implemented “when school resumed.” Case managers were provided the following statement to be used “to explain service delivery methodology on the TLP”:

Services and related services may be delivered in a variety of formats, such as telephone contact, emails, pre-recorded instruction via videos, and/or instruction through video conferencing sessions.

The Division also submitted two charts, one for pre-K through elementary students with disabilities, and another for middle and high school students with disabilities, dated April 17, 2020, each setting forth “suggested times” for services “during Covid-19 closure.” As an example, the chart advised that for virtual related services, including speech, OT [occupational therapy], PT [physical therapy], counseling, etc., a student should receive 30 minutes per month per service, for students who had related services outlined in their IEPs “and require[d] access to virtual related services for maintenance.” In another example, for a student needing adapted physical education, the chart called for her services to be set at “5 minutes per month.”

The Division also submitted copies of sample TLPs, drafted by category of special education placement. Each gave examples of TLPs for specific services, along with suggested amounts. For example, the sample TLP for a middle or high school student learning in the Division’s Adapted Curriculum program called for the student to receive 120 minutes per week of ID [intellectual disabilities] services and 30 minutes per month of speech and language services. The Division also reminded IEP teams that the services provided through a TLP “will look different and may be significantly reduced.”

According to the [redacted content], students with Section 504 plans were not given TLPs; rather, the [redacted content] asserted that the Division continued to implement Section 504 plans. The [redacted content] told OCR that she provided guidance to schools to review every Section 504 plan and convene team meetings as necessary, to ensure that the plan could meet the student’s needs within the new reality of remote learning. When speaking with OCR, the [redacted content] did not refer to “FAPE in light of the circumstances.” Instead, she said that she instructed schools that they needed to be still trying for as close to FAPE as possible. She also acknowledged, however, that the reality was that the overall educational milieu was different and that impacted all students. Several documents the Division provided from that spring—including an April 13, 2020, e-mail to Section 504 school-based coordinators and FAQs issued later that month—were consistent with what the [redacted content] described. One set of Division FAQs regarding students with Section 504 plans from spring 2020 indicated that there were students who were to receive a related service or other special education service or class via their Section 504 plan that might not be able to be implemented within the remote learning setting. The FAQs advised Section 504 case managers to schedule a Section 504 plan meeting to address any needed modifications.

OCR asked the [redacted content] if there was a system to track how many Section 504 plans were reviewed during spring 2020. She stated that she could run a report to show how many meetings

happened, but it would not show whether teams looked at plans together and made a determination whether the needs of the child were being met or any determination made by the team. She noted that there was a professional expectation of staff that they were reviewing each plan, whether or not a parent asked for this to occur.

2. Return to School: 2020-2021 School Year

Following the Governor’s June 9, 2020, order requiring school divisions to deliver new instruction regardless of the operational status of school buildings, and with the evolving perspective that the pandemic was going to last longer than initially anticipated, the Division shifted its approach beginning in the summer of 2020. The Division refers to the 2020-2021 school year as “post-closure,” or the period of “re-opening” and “return to learning,” even though the school year began virtually. These references appear to stem from the fact that the Division maintained that schools remained in closed status through the end of the 2019-2020 school year. While the educational program continued to look different in the fall of 2020 than it did before the emergency closure, the documentation reflects an effort to mirror the typical school day, including time for specialized instruction, special education support in general education classrooms, and teacher and peer-to-peer interaction.

The Director told OCR that, in accordance with guidance from VDOE, the Division discontinued the use of TLPs in the fall of 2020 and focused exclusively on the implementation of IEPs as written. The Director explained to OCR that the Division always saw the TLP as “a temporary provision of services for a short period of time,” and knew it needed to implement IEPs for the 2020-2021 school year. The discontinuation of TLPs was also noted in an FAQ first disseminated to parents on August 20, 2020. The FAQ stated that, as part of the Division’s “re-opening plan,” supports and services for students with disabilities would include: convening IEP and Section 504 team meetings and providing individualized instruction based on IEP goals. It further stated that “Case Managers will review IEPs to determine if services can be delivered within the virtual schedule,” and IEP teams would convene if the “goals, accommodations, or services need to be amended due to the virtual environment.” The Division instructed IEP teams to meet to review IEPs to determine if the plans, as written, could be implemented virtually, and to convene team meetings to make changes as necessary, including contingency planning in the event of a return to in-person learning.

The Director told OCR that IEP teams began this process in the spring of 2020 and completed it in the fall of 2020, such that all IEPs were reviewed by early in the 2020-2021 school year. The [redacted content] told OCR that, in many cases, Section 504 plans were adjusted in the spring or summer of 2020. However, with instruction being “more robust” in the fall of 2020, she instructed school-based staff that they needed to be “re-looking at plans” in August 2020 and convene team meetings as necessary. It is unclear whether Section 504 teams convened in all situations where changes were needed.

The Division provided OCR a copy of a PowerPoint presentation titled “Return to School – Virtual IEP Guidance Document August 2020” and the associated document titled “Return to School – Virtual Individualized Education Program (IEP) Guidance Document for Staff August 4, 2020,” as well as separate August 4, 2020, guidance documents broken out by grade level, including one

for elementary and one for middle and high school students. The speaker notes indicate that the presentation was for case managers. While the written guidance accompanying that presentation included a “Note” saying that “[s]ome” students with disabilities might need “additional time,” both the presentation and the guidance indicated that there was a “maximum number of hours” that could “be documented on the IEP services page”—“no more than” 21 hours per week for elementary students, and “no more than” 24 hours for middle and high school students. Neither the presentation nor the webinar included the same “Note” regarding additional time. And the Division has provided no explanation reconciling the inconsistency.

With regard to related services including speech, OT, PT, and counseling, the presentation stated that for the virtual return to school in fall 2020 the IEP team was to determine the amount of related services based on the student’s instructional time and IEP goals. The presentation stated that related service providers could join synchronous learning sessions, provide small group or individual sessions, review and appraise work samples (e.g., videos, pictures), and/or provide coaching to the parent and teacher.

The guidance accompanying the presentation also indicated that, for some students, IEP goals and objectives should be reduced, both qualitatively and quantitatively, to account for the virtual setting. It accordingly instructed “[c]ase managers [to] focus on goals or objectives that have practical application in the home environment, based on the number of specialized instructional hours determined for each student and can be realistically supported based on the number of days/hours in the week.” The August 4, 2020, “Return to School – Virtual Individualized Education Program (IEP) Guidance Document for Staff” included more detailed examples of the goal changes the Division expected during remote learning. For instance, for a “Current IEP Goal” that expected a student to “answer who, what, when and where questions” after “listening to a text,” “across 4 out of 5 texts per quarter”, the suggested “Virtual Sample Instruction Goal” instead called for the student to “answer who and where questions about the text across 3 out 4 texts over four weeks.” And for a “Current IEP Goal” in math, where the IEP expected that a student would be able to solve “multi-step equation problems” at 90% accuracy over three assessments that quarter, the Virtual IEP would instead aim for solving only “multi-step addition and subtraction problems,” and then with only 80% accuracy over the same three assessments. OCR did not obtain evidence suggesting that the Division anticipated making similar changes to the objectives that students in the regular education curriculum were expected to master at the time, despite also learning remotely.²

In addition, OCR has learned of at least one student whose virtual IEP significantly reduced the level of services he was to receive while learning remotely. According to a federal complaint filed by the Division in July 2021, if the student were learning in person, “[f]or fifteen hours per month,” he “would receive special education services within the general education setting,” as well as “2 hours per month of small, self-contained speech language services.” If services moved online—as

² At the time, the Division was communicating to the public that it did not expect the materials covered that year to change. See Hannah Natanson, *What you need to know about Fairfax public schools this year*, WASH. POST (Aug. 30, 2020), <https://www.washingtonpost.com/education/2020/08/30/fairfax-public-schools-faq/> (asked in August 2020 whether “the school system curriculum changed as a result of the pandemic,” a Division spokeswoman reportedly told the *Washington Post* that it expected “[t]he material being covered [that] year [to be] essentially the same as in other years,” and that “[t]he Standards of Learning set by the Virginia Department of Education [would] remain the foundation of what [was to be] taught in Fairfax classrooms”).

they did for “much” of the 2020-2021 school year—the student could only expect “2.5 hours per week of special education service in the general education setting” and another “hour per month” of his speech language services.” According to the Division, “[b]oth of th[ose] proposals in the [student’s] August 19, 2020 IEP offered [him] an appropriate education in the least restrictive environment.”³

The August 2020 Virtual IEP guidance further noted that there might be a teacher shortage for students placed on home-based instruction, and asked staff to consider recruiting teachers at the attending school to take the assignment.

Other evidence OCR obtained from the fall semester suggests the Division was not fully tracking when students were really receiving services online. For example, during a recorded December 2020 webinar for middle and high school special education lead teachers, teachers expressed concern that during virtual instruction some students would log in, never turn on their camera or microphone, or otherwise engage or participate in instruction, for entire class periods. Nevertheless, according to the recording, the Division was still instructing teachers to count those students present. One teacher on the webinar expressed concern that those students may be struggling or not doing work and were not really part of class.

While some students were able to return for part-time in-person learning for part of the fall of 2020, the Division suspended the return to in-person instruction in December 2020 due to the surge of COVID-19 cases. The return to in-person instruction resumed in late January 2021, with students needing the most intensive support among the first students to return. The Director told OCR that, by March 2021, most students had been given the option to return to in-person instruction. However, documentation showed that the return to in-person was not full-time. For example, a March 18, 2021, elementary principal briefing mentioned a guidance being available titled, “Guidance for 4-Day Support for Students with Disabilities.” An elementary principal briefing dated April 15, 2021, indicated that the Division would not be returning to 5-day in-person learning until the 2021-2022 school year. Moreover, media reports from summer 2021 indicated that the Division also had to delay the start of its summer 2021 instructional program because of a lack of teaching staff. According to those reports, summer instruction, including Extended School Year Services for students with disabilities, would not begin until late July.

The Division conducted a study published in November 2020 that demonstrates the significant impact on Division students with disabilities while learning remotely. The study found that the percentage of students with disabilities in middle and high school who failed two or more classes in the first quarter of the 2020-2021 school year (19%) more than doubled from the same time a year before. The study also found that, overall, the students who struggled the most academically before the pandemic were the ones most impacted by remote learning.

³ Complaint, *Fairfax Cnty. Sch. Bd. v. A.G. by and through his Parents, Mr. G and Ms. G*, No. 21-cv-840 (E.D. Va. July 19, 2021). The district court ultimately resolved the case without addressing the appropriateness of the student’s virtual IEP. See *Fairfax Cnty. Sch. Bd. v. A.G.*, No. 1:21-cv-00840-MSN-JFA, 2022 WL 4016882 (E.D. Va. Sept. 2, 2022).

B. Remediating Pandemic-Related Disruptions in Education Services for Students with Disabilities

1. Spring 2020

The Division provided OCR copies of e-mail correspondence among Division staff from the spring of 2020 through June 2020, including the Director, that indicated that Division administrators were aware that many students with disabilities were not receiving all of the supports and services provided for in their plans. These e-mails included an April 2, 2020, e-mail from the Director to the Assistant Superintendent for Special Services stating that the Division was “one of very few divisions that are committing to ‘new learning’ which will be a distinct disadvantage for sped compensatory.”⁴ An April 3, 2020, e-mail from the Division’s Superintendent to other administrators in preparation for a Facebook event being held that afternoon asked “how do we want to identify students for future compensatory services – the more we can explain that process the more we can save community folks going to the board.” In an April 8, 2020, e-mail, the Director stated to the Assistant Superintendent for Special Services that she had heard that, during the Facebook Live event, the Superintendent “made it sound like we know we are going to do compensatory services” but that she thought he meant “Tier 1” services for identified students “in danger of missed skills.” An e-mail thread of April 9, 2020, discussed whether and how to include a question and answer on the topic “How will requests for compensatory services be managed?” in an FAQ for principals that was being drafted.

On April 16, 2020, the Director sent an e-mail to other Division administrators and counsel concerning an FAQ for parents that was being drafted, stating:

It is premature to discuss remediation for students or to analyze our obligations to students. Compensatory services has been a term used recently, however, that term is a legal standard in special education specifically when there has been a denial of a FAPE. Covid 19 and the closure is not a denial of FAPE by the division. We agree that students with disabilities are a vulnerable population but it is too early to discuss exposure for special education compensatory remediation.

The Division submitted to OCR a copy of an undated FAQ disseminated to parents in the spring of 2020 which noted that “the IEP team should evaluate and discuss the effect of the extended closure on the student’s progress toward their IEP goals.” However, consistent with the Director’s statement that it was premature to consider compensatory services for students, the FAQ stated that compensatory educational services would be determined only after “normal school operations resume.”

Division administrators also discussed the budgetary implications of providing services students

⁴ Although the Director did not elaborate, the Virginia Department of Education had similarly cautioned districts that spring that “[i]f a school division d[id] begin to offer instructional services by alternative means the division w[ould] remain responsible for the free appropriate public education (FAPE) of its students eligible for special education services with an individualized education program (IEP).” Va. Dep’t of Educ., *School Closure Frequently Asked Questions*, Q.78 (last updated June 1, 2020), https://web.archive.org/web/20220120012537/https://www.doe.virginia.gov/support/health_medical/office/covid-19-faq.shtml.

missed in the spring of 2020. On April 21, 2020, the Assistant Superintendent for Special Services asked for a working group to be formed to put together costs and details for “sped compensatory services.” On May 12, the Director sent an e-mail to the Assistant Superintendent for Special Services and the [redacted content], providing an “additional compensatory projection” that listed the amount of OT, PT, and speech and language services that Division students missed since March 13, 2020, and their anticipated cost.

The projection indicated that there were 2,187 students with OT services in their IEPs, who had missed approximately 10,371 total sessions of OT services since March 13, 601 students with PT services in their IEP who had missed approximately 2,535 total sessions of PT, and 7,032 students with speech services in their IEPs who has missed approximately 48,006 total sessions of speech. The Division calculated based on these numbers of missed sessions that compensatory services would cost \$3,045,600 for this time period.

Later internal e-mails discussed preparations of similar figures for a budget presentation to the school board in late June 2020. Although the e-mail correspondence earlier in the spring discussed recovery and compensatory services, in an e-mail dated May 20, 2020, the Assistant Superintendent for Special Services mentioned that “with intervention/support and compensatory services,” the Division “had more items (\$) than the [CARES] grant could cover.” Fiscal year 2021 budget documents on the Division’s school board website indicated the Division had been approved by VDOE for a fiscal year 2021 CARES Act⁵ grant that included \$2.9 million for budget item “Remediation & Recovery,” which was described as being for “Special Ed Compensatory.”

In the same e-mail thread as the May 20, 2020, message described above, the Assistant Superintendent on May 21, 2020, asked other administrators, when they next presented to the school board, “can we refer to the sped compensatory language to [sic] ‘Recovery/Remediation?’” From that point on, the group decided to use the term “Special Education Recovery/Remediation.”

A June 30, 2020, e-mail from the Director to the Assistant Superintendent for Special Services included a modified version of the compensatory services projection described above.

The chart, dated May 13, 2020, was titled “Anticipated Compensatory Costs for Special Education,” and set forth estimates for anticipated “comp claims” and “special education IEP related services missed within the time since distance learning started week of 4/13/20.” Under the category “comp claims,” the chart stated that the anticipated number of students “varied” and the number of services “varied” and included private placements and private tutoring, for a total approximate cost of \$869,393. The second category was titled “Related Service Therapies (OT/PT/Speech)” and listed 9,820 students with approximately 40,608 sessions of services missed since April 13, for a total cost of \$2,030,400. The chart projected \$2,899,793 total anticipated compensatory costs for special education, approximately the amount the Division received through the CARES Act grant.

⁵ The Department awarded grants under the Coronavirus Aid Relief, and Economic Security (CARES) Act for the Elementary and Secondary School Emergency Relief Fund (ESSER Fund) to State educational agencies for the purpose of providing local educational agencies with emergency relief funds to address the impact of COVID-19 on elementary and secondary schools across the Nation.

2. “Recovery Services:” Fall 2020

By early fall of 2020, the Division had launched its “COVID recovery services.” As part of their roll-out, the Division offered staff a series of guidance documents and webinars throughout the fall, clarifying how it understood those services, and explaining how IEP teams were to design and deliver them. Those documents and webinars both make clear that the Division defined and implemented those services specifically to address demonstrated learning loss, not a denial of FAPE. And as the Division told its staff at the time, and OCR later, it did not consider those services to be the same as compensatory education, nor would it treat them the same way.

In August and September 2020, the Division developed two written guidance documents on recovery services: the “FCPS Guidance Document for IEP Teams for COVID Recovery Services” and another document called “Supplemental Document for Recovery Services.” Purportedly adapted from VDOE guidance released on July 28, 2020, both documents were published on the Division’s website and widely disseminated to the Division’s staff.⁶ According to those documents, the goal of offering recovery services was “[t]o mitigate and close the[] gaps” in learning that “some students with disabilities” saw following the shift to virtual instruction the prior spring. As the documents explained, recovery services were designed either to offer “additional services and support” so that those students could “recoup previously learned skills,” or else to provide “new services and supports”—such as mental health services or “services related to a student’s disability to address significant disengagement”—to help those students successfully return to in-person learning.

Eligibility for those services would therefore hinge on demonstrated learning loss. “[E]ach IEP team” was to “consider the student’s rate of skill acquisition and IEP goal progress, and data from a variety of sources,” including “data spanning the continuum of pre-COVID-19 school closure to the return to school with a focus on reducing the impact of the school closure and a return to student progress that is appropriate for the student.” As a first step, the documents called for IEP teams to establish what the Division refers to as a “Pre-COVID 19 baseline,” measuring the student’s “rate of skill acquisition” prior to the spring of 2020. That “baseline” purportedly captured “the rate at which a student makes progress toward a goal when participating in instruction,” and was to be based on variety of sources about the student’s performance, such as progress on IEP goals, objectives, and benchmarks, as well as performance on assessments. Slides from the spring 2021 Division-wide training suggest, however, that only “students who are at or below this baseline are to be **considered** for COVID recovery services” (emphasis in original). The Guidance Document nevertheless indicated that staff should hold team meetings to consider recovery services in response to parent/guardian requests.

Beyond the pre-COVID baseline, the Division’s guidance also advised IEP teams to consider other factors that appear to further limit who would be eligible for recovery services. For example, both the Guidance and Supplemental Documents instructed teams to consider the extent to which the student participated during remote learning or whether the parent declined services or did not make the student available for services during remote learning. The training provided to staff in November 2020 similarly suggested that a student who did not participate in remote learning may

⁶ A version of the FCPS Guidance Document for IEP Teams for COVID Recovery Services remained available on the School Division’s website as of March 30, 2022.

not be eligible for recovery services—a limitation reinforced by several of the examples given in the later Supplemental Document. Moreover, the Guidance Document again advised teams to consider whether services provided by the Division during remote learning were “reasonable in light of the circumstances,” invoking the same understanding of FAPE that the Division had adopted by the end of the prior spring. Asked about these statements in the Division’s guidance, the Director confirmed that the Division continued to apply its “FAPE in light of the circumstances standard” to make recovery services determinations. According to the Director, the question IEP teams were to ask was whether the Division had “offer[ed] FAPE in light of learning from home?” The Director conceded to OCR that the Guidance Document, so written, could result in not giving recovery services, but added that, in reality, the Division “didn’t want to leave a student behind because they didn’t participate,” and that the Division “worked hard to provide” recovery services if a family wanted them.

The Division’s guidance appears less clear about when a student could be found eligible for recovery services. The Guidance Document generally “recommended that schools schedule IEP meetings” to discuss recovery services only “after data [was] collected,” seven to nine weeks into the 2020-2021 school year. Asked whether an IEP team could consider a student for recovery services earlier than that, the Director told OCR that the Division did not prohibit it but did encourage teams to use data from the first nine weeks of in-person instruction. The same timeline was echoed by other Division special education administrators during webinars held that fall.

During those fall webinars, the Division’s special education administrators also made clear to staff that the “recovery services” the Division was providing were not the same as compensatory education, and that IEP teams should steer parents away from discussing compensatory services, and redirect them to recovery services instead. For instance, during a September 21, 2020, webinar for the Division’s middle and high school special education chairs, a Division special education administrator (“Administrator”) acknowledged that “some of you have gotten requests from parents that say ‘I want to talk about recovery services,’ or they maybe have said or attorneys or advocates have said ‘I want to talk about compensatory services.’” The Administrator explained, however, that the two were not the same: “The reason for providing compensatory services involves a denial of FAPE, and/or failure to provide the student with the services and supports outlined in the IEP.” The Administrator went on to advise that if “the parent continues to believe that this is compensatory let them know recovery services are very similar,” but that “when we are looking at recovery services we are considering the services due to the COVID-19 pandemic school closure, and not a denial of FAPE.” A week later, the Director drew the same distinction in a webinar for the Division’s special education lead teachers. “You may have parents,” she noted, “who use the word ‘compensatory services’ in their discussion with you about recovery.” But, she explained, “They are not synonyms. They are not the same thing.”

The Division conveyed the same message several weeks later, in an October webinar for its elementary special education lead teachers. In that meeting, the Administrator again stressed that recovery and compensatory services were not the same, and that at least for spring 2020, the Division was only considering recovery services:

We’ve gotten a lot of questions what is the difference between ‘recovery services’ and ‘compensatory,’ because parents are using ‘compensatory’ a lot. During the

COVID closure we heard, we received a lot of questions from school teams that parents have said their child requires compensatory services because of the COVID school closure... So when you think about compensatory services it's a remedy under IDEA when a student has been denied FAPE. It's when we've failed, or there's an inability by [the Division] to provide FAPE or implement the IEP. We didn't fail. Schools were closed. We had no control over COVID-19 and the school closures and the pandemic that occurred. It wasn't something that [the Division] did on purpose by closing its schools... And if parents—and parents may still bring this up in an IEP meeting—they may want to call it compensatory, we're going to call it recovery.

Two months later, the Division held two virtual “Recovery Office Hours” for its department chairs, administrators, and teachers. In the December 7 webinar for its elementary school staff, the Administrator acknowledged that “people may be angry” about the building closures but added that “this is very different from compensatory,” because “there's no failure on the part of anyone.” Instead, she explained, “recovery services [are] not somebody's fault. Nobody did anything wrong. You know, COVID happened, and this is part of us trying to provide support for students where they have the need, or they haven't recouped skills, or they've shown huge gaps and regression.” The Administrator delivered a similar message for the Division's middle and high school staff two days later. Referring to discussions about recovery services, she again acknowledged that:

...they're tough conversations. But recovery services are so different from compensatory, in the sense that, it's not that we did anything wrong. It happened. The pandemic happened. And we're just trying to determine whether or not a student requires some services to recoup some lost skills or any skills that they've regressed in, versus compensatory where there's a denial of FAPE in some manner.

3. Recovery Services: Spring 2021

The Division continued to stress the same message about recovery services into the spring of 2021, while also acknowledging some unevenness in how IEP teams were handling and documenting those services.

In a January 25, 2021, webinar for special education lead teachers, a Division Program Manager opened a discussion of recovery services with “a reminder ... about IEP teams continuing to think about recovery services for students.” She explained that the Division had “heard from several parent groups that they ha[d] concerns that it's on a parent to bring up the idea of recovery services,” even though “it is [the Division's] responsibility to provide recovery services.” Still, she went on to say, “[r]ecover services are not compensatory services. Recovery services aren't that anybody did anything wrong. Recovery services are just something that a child might require because of the pandemic and the situation that we've been in with virtual schooling for a lot of students.” She also urged teachers “to be just really careful when” recording those services on students' IEPs. As she went on to explain, after running “a SEA-STARS report,”⁷ the Division

⁷ The Division uses an online platform called Special Education Administrative System for Targeting and Reporting Success (SEA-STARS).

had found that for “60% of the students who ha[d] recovery services on the services grid of their IEP, it was just a clerical error.”

A week later, the Program Manager relayed the same message during a webinar for the Division’s special education department chairs. There she again explained that the Division had “heard from a couple parent organizations and seen in some SEA-STARs reports ... some concerns that [parent organizations] feel like parents are having to bring up recovery services,” and that it was the Division’s “responsibility to provide recovery services.” Once again, however, she stressed that “recovery services are not compensatory services.”

By spring 2021, the Division was also making recovery services determinations for Section 504-only students. The [redacted content] told OCR that the Division had provided its Section 504 staff the same Guidance Document as a resource but did not create another document specific to Section 504. According to an e-mail dated January 29, 2021, the [redacted content] advised the Section 504 school-based coordinators that “in the coming days/weeks” they could expect to hear about opportunities to learn more about COVID recovery services. The e-mail stated that the Division had an obligation to consider whether students with disabilities, “in some cases, may have sustained such significant consequences from the adjustments and related loss of educational opportunities during the pandemic that would lead to the consideration of recovery services.” A little under a month later, the [redacted content] followed with another e-mail requesting that by March 1, 2021, the school-based coordinators “provide [their] best estimate of the number of students [they] believe[d] may require recovery services, for whom there is not currently a teacher/staff member in-house who [could] provide those services.” The e-mail advised, however, that the coordinators “only need[ed] to submit information for those students for whom the knowledgeable committee [was] recommending recovery services,” rather than “ALL 504 students.”

4. Student Receipt of Recovery Services

According to the Division, as of May 17, 2021, there were 637 students with disabilities receiving recovery services, out of the approximately 25,000 students with disabilities in the Division. On February 23, 2022, OCR requested an updated total of students with disabilities who had received recovery services. In response, the Division told OCR that by the start of February 2022, approximately 1,070 students had received or had recovery services indicated on their IEP “in some form” and a total of 8 students on Section 504 plans had received recovery services.

The Director told OCR that the Division was monitoring the number of team meetings and the number of IEP amendments and that the numbers that included recovery services “were slower than [they had] anticipated at first.” In response, she said that the Division sent staff from the Division’s Office of Special Education Procedural Support (OSEPS) to the schools to help consider every student for recovery services. Additionally, the Division-wide training on recovery services provided in spring of 2021 was part of the Division’s efforts to increase the number of students considered for recovery services.

The Director explained to OCR that, in some instances, the Division offered recovery services, but the parent felt that the student was not capable of benefitting from additional services at the time.

In those cases, she said, the recovery services remain available to the student should they wish to take advantage of them at a later point. She stated there was no end point for the receipt of recovery services.

The Division submitted to OCR a copy of a memorandum, dated April 13, 2021, from the Department of Special Services to special education elementary lead teachers and middle school and high school department chairs. A section titled “Summer Academy Recovery Services 2020-21” stated that recovery services would be provided during the summer 2021 “for select students with disabilities to address learning needs or regression because of the Spring 2020 school closure and virtual learning [during the 2020-2021] school year.” The memo said that recovery services would be provided “at the ESY site” from June 28 to July 23, 2021, for students requiring them. The memo indicated there might be school teams that set up opportunities for summer recovery services to be delivered at the schools. The memo stated that a database for recovery services would be “coming soon.” The memo further stated that the Department of Special Services would hold “Summer Recovery Academy” from June 21 through August 12, 2021, at various sites throughout the county, “to meet special education and Section 504 obligations for Recovery Services.”

The Director told OCR that the Division did not rule out the provision of compensatory services, where the Division failed to provide an agreed-upon aid or service. The Director also stated, without elaborating, that she was aware of instances where the Division awarded compensatory services requested by the parent/guardian.

IV. Analysis and Conclusions

As described further below, OCR found that the Division failed or was unable to provide a FAPE as required by Section 504 to thousands of qualified students with disabilities in violation of Section 504. Specifically, OCR found that, beginning with the spring 2020 shift to remote learning through the 2020-2021 school year, the Division categorically reduced and/or limited the services and special education that students were entitled to receive through their IEPs or Section 504 plans while learning remotely, in violation of 34 C.F.R. §§ 104.33 and 104.35. In addition, OCR has concerns that staffing shortages and other administrative obstacles may have denied some students with IEPs the services they required for FAPE, such as Extended School Year services for summer 2021 and home-based instruction services in fall 2020. OCR also has concerns that the Division did not accurately or sufficiently track the services that it did provide to students with disabilities for the Department to ascertain its compliance with 34 C.F.R. § 104.33, as required by 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.6(b)). Despite these lapses in the provision of FAPE, OCR also found that the Division has yet to develop and implement a plan adequate to remedy these denials of FAPE.

A. The Division inappropriately reduced and limited services provided to students with disabilities, based on considerations other than the students’ individual educational needs

The preponderance of the evidence supports that, beginning in spring 2020 through the 2020-2021 school year, the Division categorically reduced and/or limited the services and special education

that students were entitled to receive through their IEPs or Section 504 plans while learning remotely. Based on that evidence, OCR finds that throughout that period, the Division failed to appropriately develop and provide students with disabilities instruction and related services during remote learning that were designed to meet their individual educational needs, in violation of §§ 104.33 and 104.35.

1. Spring 2020

The Division’s obligation to provide FAPE to each of its qualified students with a disability has remained in effect throughout the COVID-19 pandemic. The Division therefore had to provide services designed to meet the individual educational needs of each qualified student with a disability to the same extent that it met the needs of their nondisabled peers. 34 C.F.R. § 104.33(b)(1). And it had to design and decide upon those services through the procedures outlined in 34 C.F.R. § 104.35(b). 34 C.F.R. § 104.33(b)(2). According to the evidence OCR has obtained, however, the Division did not meet these requirements during the spring of 2020, in the following respects.

First, after shifting to remote learning in mid-April 2020, the Division adopted and directed staff to apply a diluted standard for FAPE—one that consequently did not comply with the Section 504 regulation. The Division itself acknowledged, both at the time and to OCR since, that it had an obligation to provide students FAPE during the pandemic, including the spring of 2020. The Division has also acknowledged, however, that once school buildings closed that spring, it was simply unable to provide many of the services identified in students’ IEPs or Section 504 plans. The Division has nevertheless taken the position that because it was not offering instruction comparable to that provided in a typical school day, it was not obligated to implement IEPs in full. Instead, it drafted and implemented what it called temporary leaning plans (TLPs), at least for its students with IEPs. And it did so not to ensure that those students received a FAPE, but rather to provide what it called “FAPE in light of the circumstances”—or the best the Division could in “good faith” have provided at the time. As the Department has consistently explained, however, the right to FAPE does not change with a pandemic.⁸ The Division therefore had to make every effort to provide special education and related services to students in accordance with their IEPs or, for those entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504. By the Division’s own admission, its use of TLPs fell short of that standard.

⁸ See, e.g., U.S. Dep’t of Educ., *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, at 2 (Mar. 12, 2020) (“If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.”); see also U.S. Dep’t of Educ., *Non-Regulatory Guidance on Flexibility and Waivers for Grantees and Program Participants Impacted by Federally Declared Disasters*, at 13 (Sept. 2017) (“Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child’s individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504.”); U.S. Dep’t of Educ., *Questions and Answers on Providing Services to Children with Disabilities During an H1N1 Outbreak*, at 3, 4 (Dec. 2009) (explaining that when a child did not receive services during the H1N1 outbreak a district was required under the IDEA and Section 504 to “make a subsequent individualized determination ... to decide whether a child with a disability requires compensatory education”).

Second, partly owing to its use of an incorrect FAPE standard, the services the Division did provide through its TLPs were not designed to meet students' individual educational needs. Instead, the Division directed its IEP teams to draft TLPs that would "look different" from students' IEPs, and that would "be significantly reduced," due to the virtual setting. According to those instructions, the services students could receive through a TLP were not only cut, but limited to suggested amounts—in some cases, as little as 30 or even 5 minutes per month per service. And the Division made clear to its IEP teams that in making those cuts they were to "consider what services student[s] require[d] to support online, distance learning," not what services those students needed online to support their continued progress on their IEPs. IEP teams were told, moreover, that they could make these changes unilaterally—despite in many cases not being able to conduct evaluations before doing so, as the Division acknowledged at the time. In addition, the Division's guidance made clear to staff that for TLPs they could count such things as telephone contacts, e-mails, and pre-recorded videos as services provided.

Third, the Division also did not provide students the placements and services required by their IEPs and Section 504 plans once school buildings closed that spring. In the month following the March 2020 building closure, the Division initially provided only a variety of learning activities and packets for students on its public website and through Blackboard, which for many students with disabilities would have constituted a significant change in their services. But even by April, after the Division transitioned to remote learning, and to its use of TLPs, OCR found that many services were still not being provided at all. By May 13, 2020, according to the Division's own internal tallies at the time, 9,820 students on IEPs had already missed some 40,608 sessions of occupational, speech, or physical therapy during remote learning—over the course of only a single month. Including earlier figures from March, that number rose to over 60,000 sessions missed in just the first two months after school buildings closed. Division documentation indicated that other students with disabilities also had those services on their Section 504 plans.

2. 2020-2021 School Year

During the 2020-2021 school year, the Division continued to direct its IEP teams to categorically reduce and place limits on the services, special education instruction, and educational curriculum that students with IEPs could receive while learning remotely.

The Division told OCR that by the fall of 2020, it returned to implementing IEPs, rather than TLPs. For some students, though, the Division put into place what it called "virtual IEPs." According to the internal guidance the Division prepared and disseminated to its staff in August 2020, case managers were instructed to draft those virtual IEPs based on the goals and services already outlined in the IEP, but to revise them "to focus on goals or objectives" that "the student can achieve and can be realistically supported based on the number of days/hours" in the shortened 4-day week. In practice, however, that meant further reducing the instruction and services that some students on IEPs could receive and what they would be expected to learn during remote learning—beyond the 20% decrease in the school week for live instruction and services.

On the one hand, the Division's guidance to staff apparently capped the services that could be provided in a virtual IEP. For example, in its August 2020 Virtual IEP presentation to staff, Division administrators explained that an elementary student was to receive "no more" than 21

hours per week of services, with no more than one hour of specialized instruction per synchronous instruction day. And according to other evidence OCR has obtained, virtual IEPs could also significantly cut some of the services a student was expected to receive remotely, possibly beyond the categorical limitations. In one case, according to the Division, a student saw his special education services reduced by a third in the general education setting, and his speech language services cut by half.

On the other hand, the Division's documents also indicated a virtual IEP could water down what students were expected to master during remote learning—answering only 'who' or 'where' questions, for example, in response to a text read aloud, but dropping 'what' and 'when'. The documents reflected that a virtual IEP could also lower how much a student was expected to master of that less ambitious material—correctly answering problems involving only multi-step addition and subtraction, for instance, rather than multi-step equations, and then only 80% of the time, rather than 90%. To date, OCR has obtained no evidence suggesting that the Division had similarly downgraded its academic expectations for students without disabilities during the 2020-2021 school year, even though they, too, were learning remotely. To the contrary, in late August 2020, the Division had said publicly that it expected its students to master essentially the same material as in any other year, despite learning online.

B. The Division's provision and tracking of FAPE services during the 2020-2021 school year and following summer raise concerns under Section 504

OCR also has concerns that, due to staffing shortages and other administrative obstacles, the Division was not able to provide certain services that students with disabilities needed to receive a FAPE during the 2020-2021 school year and the following summer. Throughout both periods, the evidence OCR obtained shows that the Division was struggling at the time to find teachers to support its virtual instruction and services. According to the August 2020 Virtual IEP guidance, for instance, that fall the Division was anticipating a teacher shortage for students placed on home-based instruction. The guidance therefore asked staff to consider recruiting teachers at the attending school to take the assignment. According to media reports, similar staffing issues continued through the following summer, reportedly forcing the Division to delay its 2021 Extended School Year services by several weeks. OCR has concerns that these delays and disruptions, while understandable, may nevertheless have deprived students with disabilities of some of the services to which they were entitled by their IEPs.

The evidence OCR reviewed also raised further concerns that the Division may not have been accurately or sufficiently tracking services provided to students with disabilities during remote learning, as required for the Department to ascertain its compliance with 34 C.F.R. § 104.33. For the spring 2020, for example, the [redacted content] told OCR that though she could run a report to show how many meetings Section 504 teams had held to review and revise Section 504 plans, that report would not indicate whether teams looked at plans together, or whether a team had made a determination that the needs of the student were being met—or, for that matter, whether it had made any determination at all. And during the next school year, at a December 2020 webinar, several teachers expressed concern that the Division had instructed them to count students with disabilities present for virtual instruction even when those students were only logging in, but not turning on their cameras or microphones or otherwise engaging in instruction. Based on this

evidence, OCR has concerns that during remote learning the Division may not have been adequately tracking the provision of its services, as required by 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.6(b)), to confirm that its students with disabilities were receiving an education and services consistent with 34 C.F.R. 104.33.

C. The Division failed to adequately remedy denials of FAPE during remote learning

The Division has also neither designed nor implemented a plan adequate to remedy the denials of FAPE that occurred during remote learning. According to the evidence OCR reviewed, as early as April 2020, Division administrators understood that compensatory services would be required for students with disabilities. An April 2, 2020, e-mail among administrators claimed that because the Division was “one of very few divisions that are committing to ‘new learning,’” rather than reviewing what students had already learned, it would “be at a distinct disadvantage for [special education] compensatory.”⁹ Later that spring, Division administrators had even estimated how many students would be owed related services (9,820), and how much those services would likely cost them—around \$3 million, for the more than 60,000 service sessions missed from March 13 to May 13, 2020.

Not long after drawing up those estimates, however, the Division shifted its approach—away from “compensatory services” to its current system of “recovery services.” As the Division told its staff throughout the 2020-2021 school year, it no longer views compensatory services as an appropriate remedy for any pandemic-related disruptions in services that the Division was supposed to provide according to students’ IEPs or Section 504 plans. The Division has instead explained, both to its staff and to OCR, that because it does not regard itself at fault for disruptions caused by the pandemic, it does not believe it denied any students FAPE as result of them, nor consequently owes those students compensatory services. Consistent with that view, Division administrators were explicitly advising their IEP and Section 504 teams to steer parents away from conversations about compensatory services, and to discuss only “recovery services” instead. OCR finds that approach inadequate, in several respects.

First, by refusing even to discuss compensatory services, the Division appears to be applying the same erroneous standard that it used to deny students FAPE in the first place. As already explained, FAPE did not change during the pandemic, nor did districts’ obligation to adequately remedy shortfalls in the services that students with disabilities require for FAPE. Further, providing compensatory services to a student does not draw into question a school’s good faith efforts during these difficult circumstances. It is a remedy that recognizes the reality that students experience injury when they do not receive appropriate and timely initial evaluations, reevaluations, or services, including the services that the school had previously determined they were entitled to, regardless of the reason. For example, a school may need to provide compensatory services for a student who did not receive physical therapy during school closures or for a student who did not receive a timely evaluation.

⁹ The Division appears to have incorrectly assumed that it was only required to provide compensatory services because it was offering “new learning.” As the Department has made clear, the right to FAPE did not change during the pandemic. See *supra* note 8.

Accordingly, for students with disabilities who did not receive those services while learning remotely, the Division was responsible for convening a group of persons knowledgeable about the student to make an individualized determination whether, and to what extent, compensatory services are required.¹⁰ The Division’s efforts to deter parents and staff from so much as discussing compensatory services—even for students that the Division knows did not receive the services they were due—is flatly at odds with the Division’s obligations under Section 504.

Second, the Division’s specific approach to remedial services—what it refers to as “recovery services”—falls short of what is required to remedy denials of FAPE. As the Director made clear, and the Division’s written guidance confirms, “‘recovery services’ and ‘compensatory services’ are not synonyms,” nor are they “the same thing,” in either design or effect. The initial screening methodology that the Division uses to determine whether an IEP or Section 504 team should convene to consider the need for recovery services focuses primarily on regression, leaving behind students who made progress but failed to make adequate progress in light of the child’s circumstances. According to training materials disseminated to Division staff in the winter and spring of 2021, only students who are at or below baseline, according to how they performed on their IEP goals, assessments, etc., before the closure in March 2020, would even be considered for recovery services. Under this “recovery” approach, students who made any progress at all, no matter how minimal, would apparently not be eligible for recovery services. Moreover, that screening methodology altogether fails to consider whether the Division provided the services outlined in an IEP or Section 504 plan—including the tens of thousands of service sessions for PT, OT, and speech language therapy that the Division has acknowledged it did not provide just during the spring of 2020. However, whenever a student with a disability has not received the services or instruction he or she needed for FAPE—even while learning remotely—the Division must convene those students’ IEP or Section 504 teams to consider the student’s need for compensatory education. Yet the Division has not done that. Instead, as a general matter of policy, the Division has refused even to entertain compensatory education for services it did not or could not provide due to the COVID-19 pandemic—apparently based on its erroneous belief that it was responsible for providing only “FAPE in light of the circumstances.”

Even apart from that erroneous standard, the Division appears to have limited students’ ability to receive remedial services in yet other ways. For example, in several webinars early in 2021, Division administrators acknowledged that parents and advocates had voiced concerns that IEP teams were still not raising the possibility of recovery services with parents. Moreover, both the Supplemental Document for Recovery Services and the Guidance Document suggest that students who did not fully participate in remote learning during the spring of 2020 would not be considered for compensatory or remedial services at all. The Director conceded that the Division guidance, as written, could result in not giving recovery services. She nevertheless told OCR that, “in reality,” the Division “didn’t want to leave a student behind because they didn’t participate” and that the Division “worked hard to provide” recovery services if a family wanted them. Yet, as of March 2022, that guidance remained publicly available on the Division’s website, and was still being cited and used in trainings for its staff through the spring of 2021. And as of early February 2022,

¹⁰ For more information, see U.S. Dep’t of Educ., Office for Civil Rights, *Fact Sheet: Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory Services Under Section 504* (Feb. 2022).

only some 1,070 students with IEPs had received recovery services, joined by only 8 students with Section 504 plans – although the Division serves more than 25,000 students with disabilities.

Together this evidence raises concerns that throughout the 2020-2021 school year, school staff were relying on the Division’s written guidance to unduly narrow the number of students considered for remedial services. To date, OCR has received no documentation to support that recovery services are being widely offered in the Division. With so few students having received those services as of February 2022—nearly two years after COVID-19 first closed the Division’s buildings—the evidence strongly suggests that appropriate remedial services still remain unavailable, as a practical matter, to the many thousands of students with disabilities in the Division who may need them.

For these reasons, OCR found that the Division failed to develop and implement a plan adequate to remedy denials of FAPE during remote learning, in a manner consistent with Section 504.

V. Resolution Agreement and Conclusion

To address the violations identified during the investigation, the Division entered into the attached Resolution Agreement which is aligned with the issues investigated and the information obtained by OCR. The Division agreed to create and implement a comprehensive plan which will describe for Division staff, students, and parent/guardians the efforts the Division will undertake to address the compensatory education needs of students with disabilities resulting from the Section 504 violations identified by OCR in this directed investigation. The plan will include a tracking mechanism to ensure all students who need compensatory education receive those services. The Division will also appoint an administrator to oversee the Division’s implementation of the plan and ensure that parents/guardians have a point of contact for addressing questions and concerns.

Based on the commitments made in the Resolution Agreement, OCR is closing the investigation as of the date of this letter. When fully implemented, the Resolution Agreement is intended to address the areas of violation and compliance concerns identified by OCR. OCR will monitor the implementation of the Resolution Agreement until the Division is in compliance with Section 504 and Title II.

This concludes OCR’s investigation. This letter should not be interpreted to address the Division’s compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR’s determination in an individual OCR investigation. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the Division may not harass, coerce, intimidate, discriminate, or otherwise retaliate against any individual because that individual asserts a right or privilege under a law enforced by OCR or has files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for your cooperation in resolving this investigation. OCR looks forward to receiving the Division's first monitoring report by December 9, 2022. If you have any questions regarding this letter, please contact Sara Clash-Drexler at Sara.Clash-Drexler@ed.gov; Samantha Shofar at Samantha.Shofar@ed.gov; and Betsy Trice at Betsy.Trice@ed.gov.

Sincerely,

/s/

Emily Frangos
Regional Director
District of Columbia Office
Office for Civil Rights

Enclosure