

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

State-Level Complaint 2021:538
[School District]

DECISION

INTRODUCTION

On December 16, 2021, the parents (“Parents”) of a student (“Student A”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against [School District] (“District”) on behalf of Student and similarly situated students in the District. The State Complaints Officer (“SCO”) determined that the Complaint identified four allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

Two of the allegations accepted for investigation related only to Student A, and two of the allegations were systemic in nature. The allegations specific to Student A were resolved during mediation held on February 2, 2022. As a result, this decision addresses only the systemic allegations.

On January 31, 2022, the SCO extended the 60-day investigation timeline due to exceptional circumstances arising from the number of students involved in the Complaint and the depth of analysis required to resolve the Complaint’s systemic allegations, consistent with 34 C.F.R. § 300.152(b)(1).

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), the Colorado Department of Education (the “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 December 16, 2020 through December 16, 2021 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

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

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to develop IEPs tailored to the individualized needs of students in the District from December 16, 2020 to present, in violation of 34 C.F.R. § 300.324(a), specifically, as follows:
 - a. Failing to consider the language and communication needs of students who are deaf or hard of hearing.
2. Failed to properly implement the IEPs of students in the District from December 10, 2020 to present, in violation of 34 C.F.R. § 300.323, specifically by:
 - a. Failing to provide services by a teacher of the deaf as required by Students’ IEPs.

FINDINGS OF FACT

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

A. 2019-2020 School Year

1. The District began the 2019-2020 school year with two teachers of the deaf/hard of hearing (collectively, “Teachers of the Deaf”). *Interview with Executive Director of Exceptional Student Services (“Executive Director”)*. One of the teachers worked full-time, and the other worked three days a week. *Id.*
2. Around October 2019, the full-time teacher of the deaf (“Teacher of the Deaf #1”) resigned. *Id.* In Spring 2020, the part-time teacher of the deaf (“Teacher of the Deaf #2”) informed the District that she would not be returning for the 2020-2021 school year. *Id.* As planned, Teacher of the Deaf #2 resigned in May 2020. *Id.*
3. During the 2019-2020 school year, the District’s Teachers of the Deaf provided services to 19 District students (“Students”). *Exhibit I*, p. 1; *Exhibit J*, pp. 1-540. The Students attended schools across the District in grade levels ranging from second grade to twelfth grade. *Id.*

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

4. All 19 Students were eligible for special education and related services under the disability categories Hearing Impairment or Deafness. *Id.* These disability categories were primary for some Students and secondary for other Students. *Id.*
5. Depending upon Students' needs, they received their services from the Teachers of the Deaf inside or outside the general education environment. *Id.* Two Students received their Deaf/Hard of Hearing instruction ("DHH instruction") inside the general education environment, while eight Students received this instruction outside the general education environment. *Id.* Eight Students required DHH instruction both inside and outside general education. *Id.* And one Student needed only indirect services from a Teacher of the Deaf. *Id.*
6. The DHH instruction typically targeted Students' self-advocacy and communication skills (though the goals were often labeled as "hearing" goals). *Id.*
7. Four of the 19 Students graduated at the end of the 2019-2020 school year, and one Student moved outside the District over the summer. *Id.*; *Interview with Executive Director.*

B. Beginning of 2020-2021 School Year

8. At the beginning of the 2020-2021 school year, the District enrolled a pre-kindergarten student ("Student A") who was eligible for special education and related services under the Hearing Impairment disability category. *Exhibit A*, pp. 48-70. Student A's IEP DHH instruction was provided by a teacher of the deaf both inside and outside the general education environment. *Id.* at pp. 67-68. At this point, 15 Students in the District required services from a teacher of the deaf. *Id.*; *Exhibit J*, pp. 1-540.
9. However, the District had not hired any replacement teachers of the deaf by the beginning of the 2020-2021 school year. *Interview with Executive Director.* The District indicated it had been unable to find a replacement due to a shortage of teachers of the deaf. *Id.*
10. Without a teacher of the deaf, the District looked for other ways to provide DHH instruction to Students. *Id.* Ultimately, the District hired Educational Audiologist to provide DHH instruction until the District could locate a replacement teacher of the deaf. *Id.*
11. At the time, Educational Audiologist provided contract audiology support to the District (as well as five other school districts). *Id.*; *Interview with Educational Audiologist.* Educational Audiologist met with Students on an as-needed basis and her services were not included in Students' IEPs. *Interviews with Educational Audiologist and Executive Director.* Her support consisted primarily of hearing assessments and equipment maintenance. *Interview with Educational Audiologist.*
12. Typically, teachers of the deaf and educational audiologists support students with hearing loss in different ways. Teachers of the deaf assess the educational performance and needs of students with hearing loss. *Consultation with CDE Specialist.* Even with assistive

technology (like hearing aids and frequency modulation (“FM”) systems), students with hearing loss often have gaps from incidental learning they missed in the classroom. *Id.* The gaps vary by student but frequently impact a student’s vocabulary, spelling, and receptive and expressive language. *Id.*

13. Unlike educational audiologists, teachers of the deaf have extensive knowledge of language acquisition and development. *Id.* Teachers of the deaf use this knowledge to oversee students’ communication needs and language development (whether that language be spoken or signed). *Id.* For example, if a student has difficulty with spelling, the teacher of the deaf can explore whether this is due to the student’s hearing loss (i.e., the student does not hear the words correctly) or not knowing spelling rules. *Id.*

14. Educational audiologists, however, focus on students’ access to their education. *Id.* Educational audiologists often oversee hearing screenings and monitor students’ hearing loss. *Id.* Additionally, educational audiologists ensure students have the right technology (such as FM systems) and train students how to use the technology (such as changing hearing aid batteries). *Id.*

C. Transition of DHH Instruction to Educational Audiologist

15. Educational Audiologist began providing DHH instruction to Students at the beginning of the 2020-2021 school year. *Interviews with Educational Audiologist and Executive Director.* Even though the service provider changed, the District did not seek to amend Students’ IEPs but, instead, waited until each Student’s annual review was held. *Id.* In the interim, Educational Audiologist provided the service minutes and worked on the goals in Students’ existing IEPs. *Interview with Educational Audiologist.*

16. As a result of this decision, some Students’ IEPs continued to include services by a teacher of the deaf for the majority of the 2020-2021 school year. *See Exhibit K*, pp. 1-343. Specifically, Student H’s IEP required DHH instruction by a teacher of the deaf through February 10, 2021, and Student D’s IEP required DHH instruction by a teacher of the deaf through May 14, 2021. *Id.* at pp. 239-250, 326-338.

17. Students’ parents, generally, seemed to be aware that the District did not have a teacher of the deaf, although there was some confusion among parents about how Students’ services were being met and what steps the District had taken to actually find a replacement teacher of the deaf. *Interviews with Parent A, Parent B, Parents C, and Parents D.*

D. DHH Instruction in Student A’s IEP

18. In September 2020, Student A’s IEP Team convened to discuss how the District was going to provide the DHH instruction required by Student A’s IEP. *Exhibit 4.* During that meeting, Executive Director stated that the provider of the DHH instruction would “shift” from a teacher of the deaf to Educational Audiologist. *Id.* An advocate in the meeting cautioned that

the IEP Team needed to discuss Student A's needs before staff availability; Executive Director disagreed, stating that the District had "put together a great IEP." *Id.*

19. At the conclusion of the meeting, Executive Director unilaterally stated that the provider for DHH instruction would change from a teacher of the deaf to Educational Audiologist. *Id.* There was no discussion by District-members of the IEP Team about Student A's actual needs. *Id.* After Parent A and an advocate expressed disapproval, Former Speech Pathologist objected, asserting that Student A needed more expertise beyond Former Speech Pathologist, Educational Audiologist, paraprofessionals, and teachers. *Id.*

20. Later, Student A's IEP Team decided not to change the provider of his DHH instruction to Educational Audiologist. *Interview with Parent A; Exhibit A*, pp. 48-70. In response, the District contracted with a teacher of the deaf ("Virtual Teacher of the Deaf") to provide virtual DHH instruction to Student A during the 2020-2021 school year. *Interviews with Executive Director and Parent A.*

E. Development of Students' IEPs

21. During interviews, Executive Director and Educational Audiologist insisted that Students' IEP Teams considered Students' needs in selecting the service provider for DHH instruction. *Interviews with Educational Audiologist and Executive Director.* However, the SCO finds these assertions are not corroborated by the evidence in the record.

22. None of the IEPs—including any embedded prior written notice—evidence that any such discussion was had. *See Exhibit K*, pp. 1-343.

23. During the September 2020 meeting of Student A's IEP Team, Executive Director told the IEP Team that the services would be changed. *Exhibit 4.* He did not seek any discussion about whether Student A's needs required services by a teacher of the deaf and, instead, rebuffed the suggestion that the IEP Team consider what Student A's needs were (instead of basing his IEP on staff availability). *Id.* Though this meeting fell outside the relevant time period for this investigation, the approach taken by Executive Director in that meeting aligns with other experiences shared by Students' parents. *Interviews with Parent A, Parent B, Parents C, and Parents D.*

24. No parent interviewed recalled their Student's IEP Team discussing whether the Student needed the support of a teacher of the deaf at IEP Team meetings held during the 2020-2021 or 2021-2022 school years. *Id.* The parents of three children indicated they were merely told that their student would receive services from Educational Audiologist until the District hired a teacher of the deaf. *Interviews with Parent A, Parents C, and Parents D.* Another parent did not recall the IEP Team having any discussion about a change to the service provider for the DHH instruction. *Interview with Parent B.* No parent remembered the District explaining the difference between a teacher of the deaf and an educational audiologist. *Interviews with Parent A, Parent B, Parents C, and Parents D.*

25. Coincidental with the District being unable to hire a teacher of the deaf, all of the students in the District who needed services from a teacher of the deaf during the 2019-2020 school year were found to no longer need those services. As a result, the SCO finds that—with the exception of Student A—Students’ IEP Teams changed the service provider for DHH instruction based on staff availability and without considering Students’ individualized needs.

26. Once tasked with writing annual IEP goals, Educational Audiologist relied heavily on the goals previously created by Teachers of the Deaf to draft updated goals for Students. *Interview with Educational Audiologist*. Educational Audiologist did not feel she had the background to create new goals. *Id.* Educational Audiologist did not conduct assessments or rely on other data to identify Students’ needs and develop goals targeting those needs. *Id.*

27. Essentially, Educational Audiologist used variations of five different types of goals. An example of each type of goal follows:

- *Audiogram*: “In order to increase her self-advocacy skills, [Student I] will increase her knowledge of her audiogram from a baseline of 0 features to 4 features by her next annual review, as measured by the educational audiologist.” *Exhibit K*, p. 35.
- *Minnesota Compensatory Skills Checklist*: “By November 2021, in order to increase self-advocacy skills related to [Student J’s] hearing loss, [Student J] will have reached the mastery level on all emerging skills and will have demonstrated emerging skills on 80% of the basic skills on The Minnesota Compensatory Skills Checklist for Students with Hearing Loss, as measured by the Educational Audiologist.” *Id.* at p. 125.
- *Listening Environment*: “[Student B] will practice self-advocacy skills by demonstrating knowledge of factors in the physical environment that can affect communication (background noise, distance, lighting, etc.) and identifying good listening characteristics (preferential seating, use of assistive technologies, etc.) without prompting by increasing his use of these skills from 1 time per month to 4 times per month as observed by the educational audiologist.” *Id.* at pp. 226-227.
- *Explain Hearing Loss and Related Needs*: “[Student F] will be able to explain his hearing loss and his educational needs related to his hearing loss to trusted adults with 75% accuracy before his next annual review.” *Id.* at p. 9.
- *Disability Rights*: “In order to increase his self-advocacy abilities, [Student F] will be able to discuss and describe the six major principles of IDEA.” *Exhibit L*, p. 11.

28. Those Students who were also eligible for special education and related services under the Speech or Language Impairment disability category often received services from a speech language pathologist. *See Exhibit K*, pp. 1-343; *Exhibit L*, pp. 1-278. But no one oversaw language development for the remainder of the Students. *Interview with Educational*

Audiologist. Educational Audiologist assumed that—if a speech pathologist was not involved—a special education teacher was overseeing the Student’s language development. *Id.*

29. Educational Audiologist indicated that, for the most part, she did not change Students’ service minutes. *Id.* However, the Students’ IEPs suggest otherwise. Once Students’ services transitioned to Educational Audiologist during the 2020-2021 school year, approximately one-half of Students’ DHH instruction minutes were decreased, and one-half of Students’ DHH instruction minutes remained the same. *See Exhibit J*, pp. 1-540; *Exhibit K*, pp. 1-343; *Exhibit L*, pp. 1-278. Only Student D’s service minutes increased. *Exhibit L*, p. 247. From the 2020-2021 school year to the 2021-2022 school year, four Students saw even further reductions in their service minutes. *See Exhibit K*, pp. 1-343; *Exhibit L*, pp. 1-278.

30. Under his IEP dated October 11, 2019, Student E received: (1) 480 minutes per month of direct DHH instruction from a teacher of the deaf inside the general education classroom; and (2) 240 minutes per month of direct DHH instruction from a teacher of the deaf outside the general education classroom. *Exhibit J*, p. 108. A prior written notice embedded in that IEP indicated that Teacher of the Deaf #1 would “continue to see [Student E] for 120 minutes weekly within the general education classrooms because he has benefited from positive communication role modeling. The team would like to see [Student E] continue to be successful in his high school career.” *Id.* at p. 110.

31. Yet, in his IEP dated September 23, 2020, Student E received only 120 minutes per month of direct DHH instruction from Educational Audiologist. *Exhibit K*, p. 104. This amounted to an 84% reduction in Student E’s direct DHH instruction. This reduction occurred despite acknowledgment in Student E’s IEP that he did not meet either of his prior annual goals related to his hearing loss. *Id.* at p. 91.

32. Student E’s services were reduced even further under his IEP dated May 11, 2021. *Exhibit L*, pp. 105. Under that IEP, Student E received only 30 minutes per month of direct DHH instruction from Educational Audiologist. *Id.* Once again, Student E’s service minutes were reduced even though he did not meet either of his prior annual goals related to his hearing loss. *Exhibit N*, p. 76.

33. Other Students faced similarly steep declines in service minutes. Student B’s direct DHH instruction minutes decreased from 480 total minutes during the 2019-2020 school year to 60 total minutes during the 2021-2022 school year. *Exhibit J*, p. 303; *Exhibit L*, pp. 216-217. Student B did not meet his self-advocacy goal during the 2020-2021 school year, and his September 14, 2021 IEP offered no rationale for reducing his service minutes. *Exhibit N*, pp. 51-52; *Exhibit L*, pp. 200-218.

34. Student F’s direct DHH instruction minutes decreased from 240 total minutes during the 2019-2020 school year to 30 minutes during the 2021-2022 school year. *Exhibit J*, p. 22; *Exhibit L*, p. 14. Student F did not meet his goals related to his hearing loss during the 2019-2020 or

2020-2021 school years, offering no justification for reducing his service minutes. *Exhibit N*, pp. 1-6.

35. Educational Audiologist's methodology for developing Students' goals and determining their service minutes remained consistent across the 2020-2021 and 2021-2022 school years. *Interview with Educational Audiologist*.

36. By the end of the 2020-2021 school year, only Student A's IEP required services by a teacher of the deaf. *Exhibit K*, pp. 1-343.

F. Provision of DHH Instruction

37. As a result of the one-year time limitation, this investigation can only evaluate the implementation of Students' DHH instruction from December 10, 2020 to present. This time period spans the Spring semester of the 2020-2021 school year and the Fall semester of the 2021-2022 school year.

38. As noted above, 15 Students required DHH instruction from a teacher of the deaf at the beginning of the 2020-2021 school year. *Exhibit J*, pp. 1-540. During Fall 2020, two Students exited special education, and two other Students were receiving only indirect DHH instruction. *Interview with Executive Director*. As of December 10, 2020, 11 Students were receiving DHH instruction (including Student A who was receiving services from Virtual Teacher of the Deaf). The investigation into implementation focuses on these 11 Students.

39. Educational Audiologist's practice was to document services she provided in Frontline Education at the end of the week. *Interview with Educational Audiologist*. If her scheduled services were interrupted (such as by a student's unavailability), Educational Audiologist noted that in Frontline the same day. *Id.*

40. During Spring 2021, none of the 11 Students received all of the DHH instruction required by their IEPs. *Exhibit M*, pp. 5-9. At times, Educational Audiologist did not meet with Students—such as Student B, Student E, and Student F—for entire months. *Id.* Other times, Educational Audiologist provided services in the wrong setting. *See, e.g., id.* at pp. 5-9; *Exhibit K*, p. 82. Where a Student's IEP required services inside general education—such as Student G—Educational Audiologist provided services outside general education. *Exhibit M*, pp. 5-9; *Exhibit K*, p. 82.

41. Educational Audiologist struggled to satisfy Students' service minutes (while still providing support to five other Districts) and often met with Students for longer periods of time. *See id.* In May 2021, Educational Audiologist spent three and one-half hours with Student C on a single day. *Id.* at p. 5. Educational Audiologist routinely met with Student C and Student D for two hours in a single day. *Id.* at pp. 5-9.

42. During Spring 2021, Student A continued to receive support from Virtual Teacher of the Deaf. *Id.* Virtual Teacher of the Deaf typically provided 30 minutes of direct support to Student A remotely each week. *Id.* However, because Student A's IEP required 240 minutes per month, his sessions with Virtual Teacher of the Deaf did not satisfy the requirements of his IEP. *Id.*; *Exhibit A*, pp. 67-68.
43. Student H graduated in May 2021. *Interview with Executive Director.*
44. Similarly, during Fall 2021, none of the remaining 10 Students received all of the DHH instruction required by their IEPs. *Exhibit M*, pp. 1-5. Though Educational Audiologist came closer to satisfying all of Students' minutes in August and September 2021, she was on [personal] leave from mid-October 2021 to February 1, 2022. *Interview with Educational Audiologist.* No one provided audiology services to Students while she was on [personal] leave. *Id.*; *Interview with Executive Director.*
45. The lack of audiology support impacted Students. In October, a piece of Student C's FM system broke. *Interview with Parents C.* While Educational Audiologist was on [personal] leave, no one noticed that Student C's FM system was inoperable. *Id.* Student C was, therefore, without the support of her FM system for approximately three months. *Id.*
46. Student A did not receive any support from Virtual Teacher of the Deaf during Fall 2021. *Exhibit M*, pp. 1-5; *Interview with Parent A.*
47. The table below outlines the DHH instruction the District failed to provide to Students between December 10, 2020 and present. The SCO derived these totals by comparing the requirements of Students' IEPs with the service provider logs produced by the District. See *Exhibit K*, pp. 1-343; *Exhibit L*, pp. 1-278; *Exhibit M*, pp. 1-9. The SCO accounted for changes made to Students' IEPs throughout the school year. Unless otherwise noted, the missing DHH instruction was required to be provided by Educational Audiologist.

<u>Student</u>	<u>Spring 2021</u>		<u>Fall 2021</u>	
	Inside General Education	Outside General Education	Inside General Education	Outside General Education
Student A	900 minutes from a teacher of the deaf		3,840 minutes from a teacher of the deaf	
Student B	360 minutes		120 minutes	
Student C	180 minutes	135 minutes	630 minutes	165 minutes
Student D	600 minutes from a teacher of the deaf	600 minutes from a teacher of the deaf	600 minutes	210 minutes
Student E	240 minutes			90 minutes
Student F	300 minutes		300 minutes	
Student G	360 minutes		270 minutes	
Student H		60 minutes from a teacher of the deaf		
		30 minutes		
Student I	120 minutes	45 minutes	360 minutes	180 minutes
Student J	180 minutes		240 minutes	
Student K	120 minutes			180 minutes
Total	3,360 minutes	870 minutes	6,360 minutes	825 minutes

G. Progress Reports

48. During this investigation, Executive Director repeatedly downplayed the difference between a teacher of the deaf and an educational audiologist. *Interview with Executive Director*. Executive Director asserted that the credentials of the provider did not matter, stating that the “end result [was] the same for students” as long as students made progress on their annual IEP goals. *Id.*

49. However, the District cannot actually demonstrate that Students made progress on the IEP goals related to DHH instruction during the 2021-2022 school year. Educational Audiologist did not complete Students' progress reports before her [personal] leave. *See Exhibit N*, pp. 1-72. Instead, the progress reports contain entries dated January 7, 2022 stating something similar to this entry from Student G's progress report:

In the few weeks that [Student G] and I were able to work together before I went on [personal] leave, he was doing well with his ability to describe his hearing loss with me. When I return in February, we will continue to work to develop these skills so that [Student G] is more comfortable speaking to his needs with other adults in the education setting.

Id. at p. 10. Only a couple of the progress reports contain any data points for the 2021-2022 school year. *Id.* at pp. 1-72.

H. New Teacher of the Deaf

50. In December 2021, the District hired a full-time Teacher of the Deaf ("New Teacher of the Deaf"). *Interview with Executive Director.*

51. New Teacher of the Deaf began providing DHH instruction to all 10 Students in January 2022. *Id.* The District changed the service provider for Students' DHH instruction without convening their IEP Teams or amending their IEPs. *Id.*

52. Executive Director indicated the District intended to amend Students' IEPs this spring to reflect the change in service provider. *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: The District failed to tailor Students' IEPs to their individualized needs, in violation of 34 C.F.R. § 300.324(a). These violations resulted in a denial of FAPE.

The Complaint alleges the District failed to tailor Students' IEPs to their individualized needs by unilaterally changing the provider of Students' DHH instruction to an educational audiologist, without considering Students' language or communication needs.

The IDEA requires a school to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development

process complied with the IDEA's procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Id.*

A. IEP Development Process

An IEP Team should determine a child's need for special education and related services on an individual basis, given the child's unique needs. 34 C.F.R. § 300.320. When developing an IEP, the IEP Team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child. *Id.* § 300.324(a)(1). For students who are deaf or hard of hearing, the IDEA requires the IEP Team to take into account:

the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

Id. § 300.324(a)(2)(iv). Additionally, the IEP Team must develop a communication plan in accordance with ECEA Rule 4.03(6)(a).

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

Here, the record indicates that the District determined Students' special education and related services based on the availability of staff and not based on the Students' individualized needs. The District began the 2020-2021 school year with 15 Students whose IEPs indicated they needed instruction from a teacher of the deaf. (FF # 8.) By the end of the school year, only Student A's IEP required services from a teacher of the deaf. (FF # 36.) The significant reduction in the number of students who needed services from a teacher of the deaf at a time when the District did not employ a teacher of the deaf is unlikely to be coincidental. Despite affirmations from the District otherwise (FF # 21), the record makes clear that the District converted teacher of the deaf services to educational audiology services during each Student's annual IEP Team meeting without any meaningful consideration of whether Students needed services from a teacher of the deaf or, more generally, Students' language and communication needs. (FF #s 23-25.)

The District also failed to develop goals based on Students' individualized needs. Educational Audiologist selected Students' goals from prior goals used by Teachers of the Deaf. (FF #s 26,

27.) She did not develop goals based on assessments or data. (FF # 26.) Instead, because Students had DHH instruction on their IEPs, she added a goal related to that instruction without considering, for example, whether a Student's lack of self-advocacy skills was impacting his or her ability to access his or her education. Ultimately, the goals were standardized, and their selection appeared to be one of process of elimination (i.e., which of the five categories of goals has student not yet met). (FF # 27.)

The record also indicates that Students' service minutes were determined based on staff availability and not based on Student need. (FF #s 29-34.) Students who continued to have demonstrable self-advocacy needs and failed to meet prior self-advocacy goals had their service minutes continually reduced over the 2020-2021 and 2021-2022 school years. (*Id.*) One Student's services were reduced by 96% from the 2019-2020 school year to the 2021-2022 school year, even though he did not meet his goals tied to the DHH instruction. (FF #s 30-32.)

For these reasons, the SCO finds and concludes that the District failed to tailor Students' IEPs to their individualized needs, resulting in a violation of 34 C.F.R. § 300.324(a). *See D.S. v. Bayonne Bd. of Ed.*, 602 F.3d 553, 565 (3d. Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA's procedural requirements).

B. Systemic IDEA Violations

Pursuant to its general supervisory authority, CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in the District. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the state complaint procedures are "critical" to the SEA's "exercise of its general supervision responsibilities" and serve as a "powerful tool to identify and correct noncompliance with Part B." *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46601 (Aug. 14, 2006).

Here, the SCO finds and concludes that the District's violation was systemic in nature. The improper development of Students' IEPs affected all District students with hearing loss (except for Student A whose service provider remained a teacher of the deaf). (FF #s 8, 36.) The District's failure resulted, in large part, from Executive Director's decision to "shift" services to Educational Audiologist and his insistence that an educational audiologist and a teacher of the deaf are somehow interchangeable. (FF #s 10, 18, 48.) Additionally, the District has, in some ways, repeated this mistake by changing the provider of Students' DHH instruction from Educational Audiologist to New Teacher of the Deaf without input from Students' IEP Teams or amendment to Students' IEPs. (FF #s 51, 52.) The IEP Team, including a child's parents, drives the determination of a Student's special education and related services, not the availability of staff. 34 C.F.R. § 300.324(a). Even though Students used to receive services from Teachers of the Deaf, the District cannot unilaterally make the decision to "shift" Students' services once again. Executive Director's misunderstanding or disregard of the importance of decisions being made by the IEP Team makes the District's violation even more concerning, given that other

District staff look to Executive Director for guidance. For these reasons, the SCO finds the District's violation to be systemic.

Conclusion to Allegation No. 2: The District did not properly implement Students' IEPs between December 10, 2020 and present, by failing to provide Students with all the DHH instruction required by their IEPs, in violation of 34 C.F.R. § 300.323. This failure resulted in a denial of FAPE to Students.

The second systemic allegation in the Complaint asserts that the District failed to provide the DHH instruction required by Students' IEPs, resulting in a failure to implement Students' IEPs.

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is "the centerpiece of the statute's education delivery system for disabled children . . . [and] the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student's IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

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

A. Implementation of the DHH Instruction in Students' IEPs

As a preliminary matter, the SCO finds and concludes that the District complied with 34 C.F.R. § 300.323(d). Educational Audiologist was aware of her responsibilities under Students' IEPs. Indeed, Educational Audiologist attended Students' IEP Team meetings, wrote Students' goals, and determined their service minutes. (FF # 26-29, 35.).

However, as detailed in the Findings of Fact, the District failed to provide Students with the DHH instruction required by their IEPs during Spring 2020 and Fall 2021. (FF #s 37-47.) Educational Audiologist indicated that she documented all the services she provided in Frontline. (FF # 39.) A comparison of Educational Audiologist's service log with the requirements of Students' IEPs makes clear that Students' DHH instructional requirements were not met. (FF # 47.) Collectively, Students missed 4,230 minutes of DHH instruction during Spring 2021 and 7,185 minutes of DHH instruction during Fall 2021. (*Id.*) For these reasons, the SCO finds and concludes that the District failed to implement Student's IEPs between December 10, 2020 to present, in violation of 34 C.F.R. § 300.323.

B. Materiality of Failure to Implement

The failure to implement a “material”, “essential”, or “significant” provision of a student’s IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with “sister courts . . . that a material failure to implement an IEP violates the IDEA”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an “essential element of the IEP” denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the “significant provisions of the IEP” denies a FAPE). “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn*, 502 F.3d at 822. The materiality standard “does not require that the child suffer demonstrable educational harm in order to prevail.” *Id.* But a child’s educational progress, or lack thereof, may indicate whether there has been more than a “minor shortfall in the services provided.” *Id.*

Here, the District’s failure impacted the 11 Students. (FF # 40, 44, 47.) With the exception of Student H—who graduated in May 2021—that failure spanned two separate school years and continued for at least a full calendar year. (*Id.*) Student H missed only 90 minutes of services, but the other ten Students lost anywhere from 300 minutes to 4,740 minutes. (FF # 47.)

For many of these Students, DHH instruction was the primary component of their IEPs. The failure undoubtedly affected Students’ abilities to make appropriate academic progress. Students with hearing loss often have gaps resulting from missed incidental learning. (FF # 12.) These gaps often impact students’ language and communication development. (*Id.*) A teacher of the deaf can help identify and “fill” these gaps for students. (*Id.*) If a student were to miss specialized math instruction, the student might not make as much progress in math. But the failure to receive DHH instruction can have a much broader impact on a student’s learning. If a student cannot advocate for his needs in the classroom, how much learning does the student not hear? If a student’s FM system is not working for months at a time, how much growth does the student forfeit? The collective impact of this lost instructional time is overwhelming (especially when compounded by the improper development of Students’ IEPs).

For these reasons, the SCO finds the District’s failure to implement Students’ IEPs to be material. This failure resulted in a denial of FAPE to Students. Given the degree to which a FAPE was denied, Students “[are] entitled to compensatory services.” *Colo. Dep’t of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

C. Compensatory Education

Compensatory education is an equitable remedy intended to place a student in the same position he would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518

(D.C. Cir. 2005). Compensatory education need not be an “hour-for-hour calculation.” *Colo. Dep’t of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child, and ensuring children receive the services to which they are entitled. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010).

Here, the SCO has not offered a minute-for-minute award but, instead, has crafted a compensatory education package designed to help place Students in the same position with respect to making progress on IEP annual goals but for the violation. The District failed to provide all of the required DHH instructional minutes to 11 Students during Spring 2021 and Fall 2021. (FF #s 40, 44.) The majority of Students simply did not receive the required instruction. (FF # 40). However, a few of the Students—Student E, Student F, and Student G—received a portion of the services in the wrong location (i.e. inside general education instead of outside or vice versa). (*Id.*) Those three Students have received proportionately smaller awards of compensatory education in order to give the District some credit for the services those Students received. The compensatory education minutes detailed below shall be provided by a certified teacher of the deaf.

<u>Student</u>	<u>Compensatory Education</u>
Student B	360 minutes
Student C	840 minutes
Student D	1,500 minutes
Student E	110 minutes
Student F	180 minutes
Student G	240 minutes
Student H	60 minutes
Student I	525 minutes
Student J	315 minutes
Student K	225 minutes

Student A has not been awarded any compensatory education because his individual claims were resolved in mediation.

D. Systemic IDEA Violations

As noted above, 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).

Here, the SCO finds and concludes that the District's implementation violation was not systemic in nature. The District's failure to implement Students' IEPs undoubtedly affected all students with hearing loss in the District. (FF #s 38, 40, 44.) With the exception of Student A, all of the Students received DHH instruction from Educational Audiologist. (FF # 38.) This violation appears to have resulted from an overextended staff member and the District's failure to provide coverage during her [personal] leave. Nothing in the record indicates that this implementation violation extended to Students' other special education and related services or to other students in the District. For these reasons, the SCO finds and concludes that implementation violation is not systemic.

REMEDIES

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

1. Failing to tailor IEPs to Students' individualized needs, in violation of 34 C.F.R. § 300.324; and
2. Failing to properly implement Students' IEPs, in violation of 34 C.F.R. § 300.323.

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

1. By **Tuesday, March 29, 2022**, the District shall submit to CDE a corrective action plan ("CAP") that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Students and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
 - a. Attendance and completion of training provided by CDE on proper development and implementation of IEPs. This training will address, at a minimum, the requirements of 34 C.F.R. §§ 300.323 and 300.324(a). Executive Director and CDE Special Education Monitoring and Technical Assistant Consultant Rebecca O'Malley will determine the time, date, and format of the training. This training may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast. This training is mandatory for

Executive Director, Director of Exceptional Student Services, and all special education teachers, case managers, and any service providers who support Students. Such training shall be completed no later than **Tuesday, April 12, 2022.**

- i. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to CDE no later than **Tuesday, April 19, 2022.**
- b. CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to confirm District's timely correction of the areas of noncompliance.

2. Review of IEP

- a. The District must convene Students' IEP Teams, at a mutually agreeable date and time, by **Monday, May 2, 2022.** Each IEP Team should review and revise Student's current IEP and determine what, if any, additional annual goals are necessary to meet Student's needs consistent with 34 C.F.R. § 300.320(a)(2)(i)(A)-(B). The IEP Teams should take into consideration the Student's communication and language needs, as specified in 34 C.F.R. § 300.324(2)(iv). The resulting IEP must accurately reflect the services Student will receive. The District must submit each Notice of Meeting and IEP to CDE by **Monday, May 9, 2022.**
 - i. New Teacher of the Deaf, in conjunction with Students' case managers, shall determine whether additional assessments or data or IEP Team members are needed to adequately consider Students' communication and language needs and/or to develop any additional annual goals. If additional assessments or data are needed, such information must be obtained prior to the IEP Team meeting. Any additional IEP Team members should be included in the IEP Team meeting.

3. Compensatory Education Services for Denial of a FAPE

- a. Student B shall receive **360 minutes of direct DHH instruction** provided by a licensed teacher of the deaf. All 360 minutes must be completed by **Thursday, December 1, 2022**.
- b. Student C shall receive **840 minutes of direct DHH instruction** provided by a licensed teacher of the deaf. All 840 minutes must be completed by **Thursday, December 1, 2022**.
- c. Student D shall receive **1,500 minutes of direct DHH instruction** provided by a licensed teacher of the deaf. All 1,500 minutes must be completed by **Thursday, December 1, 2022**.
- d. Student E shall receive **110 minutes of direct DHH instruction** provided by a licensed teacher of the deaf. All 110 minutes must be completed by **Thursday, December 1, 2022**.
- e. Student F shall receive **180 minutes of direct DHH instruction** provided by a licensed teacher of the deaf. All 180 minutes must be completed by **Thursday, December 1, 2022**.
- f. Student G shall receive **240 minutes of direct DHH instruction** provided by a licensed teacher of the deaf. All 240 minutes must be completed by **Thursday, December 1, 2022**.
- g. Student H shall receive **60 minutes of direct DHH instruction** provided by a licensed teacher of the deaf. All 60 minutes must be completed by **Thursday, December 1, 2022**.

- h. Student I shall receive **525 minutes of direct DHH instruction** provided by a licensed teacher of the deaf. All 525 minutes must be completed by **Thursday, December 1, 2022**.
- i. Student J shall receive **315 minutes of direct DHH instruction** provided by a licensed teacher of the deaf. All 315 minutes must be completed by **Thursday, December 1, 2022**.
- j. Student K shall receive **225 minutes of direct DHH instruction** provided by a licensed teacher of the deaf. All 225 minutes must be completed by **Thursday, December 1, 2022**.
- k. Monthly consultation between the provider(s) delivering compensatory services and Executive Director must occur to evaluate Students' progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. The District must submit documentation that these consultations have occurred **by the second Monday of each month**, once services begin, until compensatory services have been completed. Consultation logs must contain the name of the Student, the name and title of the provider(s), and the date, the duration, and a brief description of the consultation.
 - i. The monthly consultation requirement does not apply to Student B or Student H.
- l. To verify that Students have received the services required by this Decision, the District must submit records of service logs to CDE by the **second Monday of each month** until all compensatory services have been completed. The name of the Student, the name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log.
 - i. **Within fourteen calendar days** of each Student's IEP Team meeting as required by paragraph 2 above, the District shall schedule compensatory services in collaboration with Student's parent(s). A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. These compensatory services shall begin as soon as possible and will be in addition to any services Students currently receive, or will receive, that are designed to advance Students toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory services will be provided. If the parent(s) refuse to meet with the District within

this time, the District will be excused from delivering compensatory services, provided that the District diligently attempts to meet with the parent(s) and documents such efforts. A determination that the District diligently attempted to meet with a Student's parent(s), and should thus be excused from providing compensatory services, rests solely with CDE.

- ii. The District shall submit the schedule of all Students' compensatory services to CDE no later than **Friday, May 20, 2022**. If for any reason, including illness, Students are not available for any scheduled compensatory services, the District will be excused from providing the service scheduled for that session. If for any reason the District fails to provide a scheduled compensatory session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Student's parent(s) and notify CDE of the change in the appropriate service log.

Please submit the documentation detailed above to CDE as follows:

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

NOTE: Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by CDE. **Given the current circumstances surrounding the COVID-19 pandemic, CDE 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 C.F.R. § 300.507(a) and *Analysis of Comments and Changes to the 2006 Part B Regulations*, 71 Fed. Reg. 156, 46607 (August 14, 2006).

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

Dated this 1st day of March, 2022.



Ashley E. Schubert
State Complaints Officer

Appendix

Complaint, pages 1-8

- Exhibit 1: Progress Report for Student A
- Exhibit 2: IEP for Student A
- Exhibit 3: IEP for Student A
- Exhibit 4: Videorecording of September 2020 Meeting

Response and Supplemental Response, pages 1-7

- Exhibit A: IEPs for Student A
- Exhibit B: Blank
- Exhibit C: Blank
- Exhibit D: Service Provider Log
- Exhibit E: Procedural Manual
- Exhibit F: Email Correspondence
- Exhibit G: Blank
- Exhibit H: Blank
- Exhibit I: List of Students
- Exhibit J: Students' 2019-2020 IEPs
- Exhibit K: Students' 2020-2021 IEPs
- Exhibit L: Students' 2021-2022 IEPs
- Exhibit M: Service Provider Log
- Exhibit N: Students' Progress Reports

Telephonic Interviews with:

- Executive Director: February 9, 2022
- Educational Audiologist: February 9 and 15, 2022
- Parent A: February 7, 2022
- Parent B: February 8, 2022
- Parents C: February 11, 2022
- Parents D: February 14, 2022
- Former Speech Pathologist: February 14, 2022