

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

State-Level Complaint 2022:548
Arapahoe 5 (Cherry Creek) School District

DECISION

INTRODUCTION

On September 29, 2022, the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against the Arapahoe 5 (Cherry Creek) School District (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified one (1) allegation subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), the Colorado Department of Education (“CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from September 29, 2021 through September 29, 2022 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to properly implement Student’s IEP from January 2022 to present, specifically by failing to provide speech/language services as required by Student’s IEP, in violation of 34 C.F.R. § 300.323.

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.

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,² the SCO makes the following FINDINGS:

A. Background

1. Student is a hardworking, kind, and respectful 13-year-old, who enjoys video games and sports. *See Exhibit A*, pp. 32, 34, 104. Student qualifies for special education and related services under the Specific Learning Disability (“SLD”) category, with a secondary disability in Speech or Language Impairment. *Id.*
2. This investigation concerns the 2021-2022 academic year, during which Student attended 7th grade at a District middle school (“School”). *Id.* at p. 102. When classes started in the fall of 2021, Student’s April 22, 2021 IEP was in effect (“2021 IEP”). *Id.* at pp. 102-113.

B. The 2021 IEP

3. The 2021 IEP was developed in conjunction with Student’s triannual reevaluation for eligibility. *See Exhibit A*, pp. 18, 102, 160. At the time, a multidisciplinary team (“MDT”) found Student met the criteria for SLD, but not Speech or Language Impairment. *See id.*
4. The 2021 IEP documented Student’s strengths, preferences, and interests, including that he demonstrates strength in math calculation, that his typing skills have improved, and that he wants to “do well and please others.” *Id.* at p. 104. Student would like to be a professional football player or work in animatronics. *Id.*
5. The 2021 IEP reviewed Student’s present levels of performance, documenting grades and observations from teachers and service providers. *Id.* at pp. 104-105.
6. The Student Needs and Impact of Disability section documented that deficits in expressive language skills impact Student’s ability to fully participate within the general education setting. *Id.* at p. 105.
7. The Parent/Student Input section contained input from Parent that staff should encourage Student to “use the computer to read things to him.” *Id.*
8. The 2021 IEP contained the following annual goals:
 - a. Goal No. 1 – Reading: “Given universal and small group research based instruction in phonological and phonetic strategies, [Student] will improve the

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

ability to apply phonics and use context to confirm word recognition and understanding to comprehend text.” *Id.* at p. 106. Student “will read with sufficient accuracy and fluency to improve from 99 [] words correct per minute to 125 words correct per minute.” *Id.*

- b. Goal No. 2 – Writing: “Given supplemental writing support within the grade-level writing classroom, [Student] will increase overall writing organization including providing a solid topic, provide relevant details and facts, using transitions, internal punctuation, and using solid sentences from 14 to 28 points according to the Monitoring Writing Intervention Progress Rubric (MWIP).” *Id.* at p. 106.
 - c. Goal No. 3 – Communication: “Given direct, specialized instruction and structured tasks, [Student] will improve his expressive language skills from a baseline of 21 to 33[] as measured by the Speech Language Accuracy Scoring Tool using prompts.” *Id.* at pp. 106-107.
9. The 2021 IEP contained accommodations to help Student access the general education environment, including visual/picture cues, breaking assignments down into parts, breaks after 15-20 minutes of sustained work, reduced work and homework, access to a computer for extended writing assignments, and small group settings as needed. *Id.* at pp. 107-108.
10. The 2021 IEP indicated work, tests, and quizzes would be modified to Student’s ability level. *Id.* at p. 108.
11. The Service Delivery section provided for:
- a. 300 minutes/week – direct specialized literacy instruction;
 - b. 30 minutes/month – direct mental health services;
 - c. 30 minutes/month – indirect occupational therapy services (to support classroom accommodations – services to be exited October 2021);
 - d. 360 minutes/semester – direct speech/language services;
 - e. 300 minutes/week – direct specialized math instruction; and
 - f. 240 minutes/week – direct instruction in reading.
- Id.* at pp. 110-111.
12. The IEP Team determined it was appropriate for Student to be placed in the general education class 40 to 79 percent of the time. *Id.* at p. 112.

C. The November 12, 2021 IEP Team Meeting

13. From August through November 2021, Student attended School under the 2021 IEP. *Interviews with Parent and Former Case Manager.* During this time, Student received

literacy and reading instruction in an intensive language arts class. *Interviews with Parent and Former Case Manager; Exhibit G*, p. 143.

14. In October of 2021, Student's language arts teacher informed Parent that Student was performing well, and there was no need for him to continue in the intensive language arts class. *Interviews with Parent and Former Case Manager*. Parent agreed and felt Student could succeed in a co-taught general education language arts class with assistance, so an IEP meeting was scheduled to review existing educational data and determine if revisions were necessary to the 2021 IEP. *Id.*
15. On November 12, 2021, a properly composed IEP Team met to review and revise the 2021 IEP. *Exhibit A*, pp. 60-72, 83. Since the move from the intensive language arts class would necessarily impact Student's least restrictive environment, a review of records was first conducted to determine Student's continued eligibility for special education and related services. *Interview with Former Case Manager*. Based on this records review, a properly composed MDT determined Student continued to qualify for special education and related services under the SLD category, but found Student also met the criteria for Speech or Language Impairment. *Exhibit A*, pp. 81-83; *Interview with Parent*.
16. Following the MDT's decision, the IEP Team determined that Student should be moved out of the intensive language arts class and into the co-taught general education language arts class. *Interviews with Parent and Former Case Manager*. The service delivery of the 2021 IEP was revised to provide for:
 - a. 300 minutes/week – direct specialized literacy instruction;
 - b. 30 minutes/month – direct mental health services;
 - c. 360 minutes/semester – direct speech/language services; and
 - d. 300 minutes/week – direct specialized math instruction.

Id. at p. 68. The IEP Team removed the 30 minutes of indirect occupational therapy services (slated to be exited in October of 2021) and 240 minutes of direct reading instruction. *Id.*

17. The IEP Team determined it was appropriate for Student to be in the general education environment at least 80 percent of the time. *Id.* at p. 69.
18. The Prior Written Notice section documented that, although the IEP Team reviewed the 2021 IEP in November of 2021, Parent requested that the IEP Team meet again to review the 2021 IEP in April of 2022. *Id.*

D. 2021 IEP Implementation: January through May 2022

19. Parent's concern is that District failed to properly implement the 2021 IEP, starting in January of 2022, because District failed to provide Student with 360 minutes of

speech/language services per semester as required by the 2021 IEP. *Complaint*, p. 2; *Interview with Parent*. District concedes Student did not receive the full 360 minutes of speech/language services during the spring of 2022, but indicates Student was provided make-up sessions for the missed services during the summer of 2022. *Response*, p. 3.

IEP Accessibility to Student's Teachers

20. Former Case Manager oversaw the 2021 IEP during the 2021-2022 academic year. *Interview with Former Case Manager*; see *Exhibit A*, p. 48.
21. District uses a system called "Power School" to provide information about students' special education and related services to teachers and service providers. *Interview with Former Case Manager*. "Power School" is an automated system which teachers use to take attendance and obtain information about students. *Id.* "Power School" informs teachers and service providers as to whether students are eligible for services under an IEP and provides access to IEPs and any related documents (e.g., a behavior intervention plan), and contact information for a student's case manager. *Id.*
22. Although not required by District, Former Case Manager also contacts those teachers and service providers for students on her caseload to provide them links to the students' IEPs. *Id.* Former Case Manager indicated that she contacted all of Student's teachers and service providers in this manner to inform them of their responsibilities under the 2021 IEP, both at the beginning of the year and following the changes at the November 2021 IEP meeting. *Id.* Former Case Manager further indicated that, following this, she was the point of contact for Parent, and she collaborated with other teachers and service providers to address issues on the occasions when Parent raised concerns about Student's programming. *Id.*

IEP Implementation: Speech/Language Services (January through April 2022)

23. On February 17, 2022, Parent emailed Former Case Manager to report that Student was not receiving speech/language services, and that Speech Language Pathologist had not seen him since fall of 2021. *Exhibit G*, p. 4. Former Case Manager responded on the same day and indicated that she would check into this concern and get back to Parent. *Id.* at p. 5. Former Case Manager also provided Parent with contact information for the 7th grade special education coordinator and contacted the coordinator on Parent's behalf. *Id.* at pp. 7, 9.
24. Following the email to Parent, Former Case Manager emailed Speech Language Pathologist and asked whether Speech Language Pathologist was working with Student, letting her know that Parent inquired about Student's services. *Id.* at p. 6. On February 18, 2022, upon being contacted by Former Case Manager, the 7th grade special education coordinator also emailed Parent and offered to discuss Parent's concerns, either over the phone or via Microsoft Teams. *Id.* at p. 9.

25. On February 22, 2022, Speech Language Pathologist (who is no longer with District and was unavailable for interview with the SCO) emailed Former Case Manager and indicated that she had not been meeting with Student because of a scheduling conflict. *Id.* at p. 11. Student's academic schedule changed in November of 2021 when he was moved out of the intensive language arts class. *Id.* Due to the scheduling change, Speech Language Pathologist no longer had an "appropriate group" for Student, so she indicated Student needed to be switched to another speech language pathologist. *Id.*
26. Since Student's speech/language services were semesterly, District had not yet failed to implement the 2021 IEP in this respect as the semester had not concluded. *Id.* Speech Language Pathologist indicated that she reached out to another speech language pathologist to start Student's services and that she would reach out to Parent with the new schedule. *Id.*
27. During the 2021-2022 academic year, School offered a telehealth option for speech/language services through Outside Organization. *Interview with Director of Special Education.* In December of 2021, following Student's transfer out of the intensive language arts class, Speech Language Pathologist reached out to arrange for Student to receive his speech/language services through Outside Organization for the spring of 2022. *Exhibit G*, p. 148. Over winter break, however, Speech Language Pathologist became ill and had a "rough start" getting back following the break in January. *Id.* Following Parent's February 17 email, Speech Language Pathologist again reached out to Outside Organization, and provided information about Student's schedule and annual goals. *Id.*
28. On February 22, 2022, the 7th grade special education coordinator emailed and called Parent to let her know that District identified the issue with Student's speech/language services. *See Id.* at p. 13. Speech Language Pathologist spoke with Parent to discuss the issue with Student's academic schedule and telehealth services through Outside Organization. *Id.* at pp. 14, 148. Speech Language Pathologist explained to Parent that the schedule did not allow her to only pull Student from electives for speech/language services.³ *Id.* Parent declined telehealth services and requested that Student continue to receive in-person speech/language services from Speech Language Pathologist, indicating that she was fine with Student being pulled from core classes for speech/language services. *Id.*
29. In March, following discussions with Parent about Student continuing to receive in-person speech/language services from Speech Language Pathologist, Speech Language Pathologist was able to rearrange her schedule to pull Student from art class each week on Wednesdays for 45 minutes each session, so Student would not be pulled from core classes. *Id.* She met with Student each week on Wednesday, but reported that Student was anxious about missing classes, and would often either show up for the last 15 minutes of a session (Speech

³ The SCO cautions District that a change in the delivery of services (such as from in-person to virtual) is an IEP Team decision and must be made through an IEP Team's review and revision of an IEP or through an IEP amendment (provided the parent agrees), consistent with 34 C.F.R. § 300.324. IDEA does not permit a school district to unilaterally and categorically decide to change the delivery of services to address a staff shortage when the change may not be appropriate and tailored to meet the student's individualized needs.

Language Pathologist would sometimes cancel the following session so she could provide Student the full 45 minutes) or miss the session entirely. *Id.*

30. On April 2, 2022, as requested by Parent, a properly constituted IEP Team met to review and revise the 2021 IEP (“2022 IEP”). *Exhibit A*, pp. 33, 50; *Interviews with Parent and Former Case Manager*. Notice of Meeting was provided to Parent on March 1, 2022. *Exhibit A*, p. 50. Former Case Manager emailed Student’s teachers in advance of the IEP meeting and asked that all core teachers and support staff attend. *See Exhibit A*, p. 50; *Exhibit G*, pp. 17, 20, 38. Parent received a draft of the 2022 IEP on April 1, 2022 in advance of the meeting. *Exhibit G*, p. 59.

E. The 2022 IEP

31. The 2022 IEP documents Student’s strengths, preferences, and interests, including that Student feels he is most successful in math, his favorite class is social studies, and he struggles most in science class. *Exhibit A*, p. 34. Student enjoys sports and video games, and he feels like 7th grade was a better year than 6th grade, because he learned in-person rather than via remote learning. *Id.*
32. The 2022 IEP reviews Student’s present levels of performance, documenting grades, results of Student’s April 2021 reevaluation, a review of educational records, Student’s progress toward annual goals, and teacher observations. *Id.* at pp. 34-42. In terms of grades, Student was achieving As and Bs in all classes except science (which was a C-). *Id.* at p. 34. Student was also making progress toward all three of his annual goals. *Id.* at pp. 73-75.
33. The Student Needs and Impact of Disability section documents that Student’s disability impacts his ability to be successful in the general education classroom without accommodations and support from a learning specialist. *Id.* at p. 42. Student needs to continue to develop receptive/expressive language skills in the classroom for improved engagement, comprehension, meaningful interactions, and improved academic success. *Id.*
34. The Parent/Student Input section contains input from Parent, including that Student is enjoying School and has a group of friends, but that he tends to feel “stressed out” when he is pulled from class for services. *Id.*
35. The 2022 IEP contains the following updated annual goals:
 - a. Goal No. 1 – Reading: “By the next annual IEP date, when given core classroom or small group instruction, [Student] will increase reading skills in the areas of decoding and word recognition to increase comprehension from a baseline of 23 words correct/3 minutes at his grade level, to 35 words/correct/3 minutes with at least 80% accuracy at his grade level as measured by a curriculum based measure (such as MAZE).” *Id.* at p. 43.

- b. Goal No. 2 – Writing: “Given supplemental writing support within the grade-level writing classroom, [Student] will increase overall writing organization including providing a solid topic, provide relevant details and facts, using transitions, internal punctuation, and using solid sentences from 21 to 28 points according to the Monitoring Writing Intervention Progress Rubric (MWIP).” *Id.* at pp. 43-44.
- c. Goal No. 3 – Communication: “Given direct, specialized instruction and structured tasks, [Student] will improve his expressive language skills from a baseline of 29 to a target score of 46 as measured by the Speech-Language Accuracy [w]ith Prompts Scoring Tool.” *Id.* at p. 44.

36. The 2022 IEP contains accommodations to help Student access the general education environment, some of which were not contained in the 2021 IEP, such as repetition of instructions and directions, preferential seating close to the point of instruction, and allowing Student to verbally read or process written information. *Id.* at pp. 45, 65-66. Some of the accommodations from the 2021 IEP, such as reduced work/homework and access to a computer for extended writing assignments, were removed. *Id.* The 2022 IEP does not provide for any curricular modifications. *Id.* at p. 45.

37. The Service Delivery section provides for:

- a. 300 minutes/week – direct specialized literacy instruction; and
- b. 360 minutes/semester – direct speech/language services.

Id. at p. 47.

38. The IEP Team determined it was appropriate for Student to be placed in the general education class at least 80 percent of the time. *Exhibit A*, p. 48.

F. 2022 IEP Implementation: May 2022

39. Student’s speech/language services remained at 360 minutes per semester under the 2022 IEP. *Id.* at p. 47. Former Case Manager provided Student’s teachers and service providers with the 2022 IEP (in addition to staff having access through “Power School”); however, Parent is concerned that Student stopped receiving speech/language services in May of 2022, and thus, did not receive the full 360 minutes. *Interviews with Parent and Former Case Manager*.

40. On May 24, 2022, Parent contacted Former Case Manager and indicated that Student reported he did not receive speech/language services during May of 2022. *Exhibit G*, p. 117. Former Case Manager responded via email the next day and indicated she was including

two School special education coordinators and a School assistant principal on the message to address Parent's concerns. *Id.* at p. 118.

41. On May 25, 2022, a special education coordinator emailed District Speech Language Pathologist for input about Parent's concerns. *Id.* at p. 119. The special education coordinator explained that Parent was concerned that Student was not receiving speech/language services, and indicated that Speech Language Pathologist sent a message previously on May 12, 2022 that said, in part: "[District Speech Language Pathologist] [sic] recommended that I get caught up with progress reports and IEPs, so I will not do anymore groups for the remainder of the year, but I will be popping in to see some of our kiddos to do progress monitoring." *Id.* at p. 119.
42. District Speech Language Pathologist responded the same day and indicated that she "certainly did not encourage [Speech Language Pathologist] to not see kids the entire month of May." *Id.* at p. 127. District Speech Language Pathologist indicated that she told Speech Language Pathologist "the last couple of weeks of school are generally spent in more casual groups, collecting progress reporting data." *Id.* Speech Language Pathologist told District Speech Language Pathologist "that she had met all or most of her minutes at that point for her groups, so I let her know catching up on reports and progress reports would be a good use of her time once she had minutes met." *Id.* District Speech Language Pathologist further asked if Student's service minutes were met, as well as whether he was demonstrating progress toward his annual goals. *Id.*
43. On May 25, 2022, Speech Language Pathologist emailed the assistant principal at School and reported that in the beginning of the 2021-2022 academic year, she met with Student every Thursday for 45 minutes. *Id.* at p. 148. During the fall of 2021, when Student was moved out of the intensive language arts class (which Speech Language Pathologist pushed into each week), his academic schedule changed, and she did not have an "appropriate group" for him. *Id.* By that time, however, Student had already exceeded his 360 minutes of direct speech/language services for the fall semester. *Id.*
44. Speech Language Pathologist then summarized the issue with Student's speech/language services which occurred when Student moved out of the intensive language arts class and indicated that in March 2022, following her conversation with Parent, she began meeting with Student again, but "with difficulty" and Student often refused services. *Id.*
45. Speech Language Pathologist indicated Student missed services on April 20 (Student refused services, so Speech Language Pathologist attempted to make up the session on April 21, but Student again refused, citing a project he needed to complete), April 27, and May 4, 2022. *Id.* Speech Language Pathologist indicated that she met with Student for the full 45 minutes on March 30, April 6, and April 13, 2022 but that on other occasions, Student only appeared for a part of the session. *Id.* Speech Language Pathologist did not provide Student with any services during May of 2022. *Id.*

46. Speech Language Pathologist further indicated that although Student refused services on multiple occasions, during the April 2022 IEP meeting, his grades were all As and Bs and he was making progress toward his annual goal in communication, so he was demonstrating improvement despite the missed sessions. *Id.* at pp. 148-149. Following this report, Director of Special Education asked to schedule a meeting with Parent, as well as Schools' principal and assistant principal. *Id.* at p. 164.

G. The June 23, 2022 Meeting and Compensatory Services

47. On June 23, 2022, Parent and District staff met to discuss Parent's concerns regarding the missed speech/language services. *Id.* at p. 211; *Interviews with Director of Special Education and Parent*. At the meeting, Parent and District agreed that (1) Student would receive compensatory "make up" services for the speech/language services missed during the spring of 2022; (2) the "make up" services would be provided during the summer of 2022; (3) a communication plan would be put into place for the 2022-2023 academic year to keep Parent apprised of Student's progress and needs; and (4) a different speech language pathologist at School would work with Student for the 2022-2023 academic year (School employed another part-time speech language pathologist in addition to Speech Language Pathologist). *Exhibit G*, p. 210; *Interviews with Parent and Director of Special Education*.

48. Parent and District agreed that Student would receive a total of six, 45-minute speech/language sessions from a speech language pathologist over the summer of 2022 (calculated for the two sessions documented as refused in April of 2022, and four sessions for services missed in May of 2022) for a total of 270 minutes. *Exhibit G*, pp. 209-210.

49. Following the meeting with Parent, Director of Special Education coordinated with District staff to locate a speech language pathologist who was available to provide the "make up" sessions over the summer. *Id.* at pp. 190-209. On June 26, 2022, Speech Language Pathologist 2 agreed to provide the services to Student, and on July 8, 2022, Speech Language Pathologist 2 coordinated with Parent to schedule the sessions. *Id.* at pp. 213, 224. Speech/language sessions were scheduled for July 14, 15, 18, and 19, and August 4 and 5, 2022. *Id.* at p. 244; *Exhibit C*, pp. 1-4. Prior written notice of the agreement to provide compensatory services was provided to Parent on July 11, 2022. *Exhibit G*, pp. 254, 267-269.

50. Parent and District agree that, following this, Student received six, 45-minute "make up" speech/language sessions on the dates listed above. *Interviews with Parent and Director of Special Education*. Speech Language Pathologist 2's notes from these sessions document sessions with Student on each of the dates. *See Exhibit C*, pp. 1-4. Speech Language Pathologist 2 also requested compensation from District for the summer sessions, and her compensation request reflects six sessions over the summer of 2022. *Exhibit G*, p. 275.

51. Parent indicated that she was “very” satisfied with the compensatory services over the summer and felt Speech Language Pathologist 2 did a “great” job working with Student. *Interview with Parent*. Following the summer sessions, Parent requested that Speech Language Pathologist 2 continue to work with Student (although that was not possible, as Speech Language Pathologist was not stationed at School). *Interviews with Parent and Director of Special Education; Exhibit G*, p. 288.

H. 2022 IEP Implementation: August 2022 to Present

52. Parent’s concern is that District failed to properly implement the 2022 IEP starting in August of 2022, again by failing to provide Student with speech/language services as required by the 2022 IEP. *Complaint*, p. 2. District concedes Student did not receive speech/language services starting in August of 2022, but indicates the failure was not willful, and was instead caused by unexpected staff shortages. *Response*, pp. 3-4.

53. When classes started at School on August 15, 2022, the 2022 IEP was in effect. *Exhibit E*, p. 2; *Exhibit A*, p. 32. The 2022 IEP provided for 360 minutes of direct speech/language services per semester. *Exhibit A*, p. 47. Pursuant to the June 23, 2022 agreement with Parent, Student was supposed to receive those services from a part-time speech language pathologist who was previously stationed at School. *Interviews with Parent and Director of Special Education*.

54. Leading up to the start of the 2022-2023 academic year, School was fully staffed with two speech language pathologists (Speech Language Pathologist and the other part time speech language pathologist). *Interview with Director of Special Education*. After teacher orientation, the part time speech language pathologist unexpectedly resigned, and soon after, Speech Language Pathologist resigned, leaving School without a speech language pathologist. *Id.*

55. District engaged in conversations about reallocating resources to School to address the unexpected staff shortage, but due to District-wide staffing difficulties, there was not another speech language pathologist available to be relocated to School. *Id.*

56. District posted the position in a hiring attempt, advertising the position on a certified teacher pay-scale to make the position more competitive (District speech language pathologists are usually paid on a classified salary scale). *Id.* District attempted to recruit candidates to fill the open positions and proactively called candidates but was unable to quickly find a speech language pathologist for School. *Id.*

57. District investigated alternatives, such as getting a speech language pathology assistant for School, but Director of Special Education indicated that this was challenging because the licensure requirements of a speech language pathology assistant required supervision from a speech language pathologist. *Id.* District inquired if Outside Organization could provide the

supervision necessary for the speech language pathologist assistant on a telehealth basis. *Id.* Outside Organization indicated that it could, and District hired a speech language pathology assistant (the speech language pathology assistant was proceeding through the hiring process at the time the Complaint was filed). *Id.*; *Response*, p. 4. Starting when classes began at School in August of 2022, however, there were no speech language pathologists available for services at School. *Interview with Director of Special Education*.

58. On September 16, 2022, the principal at School emailed all families with a student at School receiving speech/language services under an IEP. *Exhibit I*, p. 1. The message indicated, in part, that due to nationwide and statewide shortages, District was contracting with Outside Organization to provide speech/language services through a blended model, wherein an in-person speech language pathology assistant would provide services to students in conjunction with telehealth services through Outside Organization. *Id.* Although District indicated they were emailing parents to “communicate a change in how services are being provided” during the 2022-2023 academic year at School, the SCO finds that the message neither indicated there were ongoing staffing shortages at School since the beginning of the school year nor that students at School were not receiving speech/language services. *Id.*
59. In October of 2022, District hired a speech language pathologist at School, and as of November 4, 2022, the speech language pathologist has an office and has started providing services (although District is also providing some speech/language services through the blended model with Outside Organization). *Interview with Director of Special Education*. Now that speech language services are in place, District plans to review the IEPs and progress monitoring data for each student at School who missed speech/language services due to the staffing shortages to identify gaps and the possible need for compensatory services on an individualized basis. *Id.*
60. District concedes that Student missed speech/language services during the 2022-2023 academic year and proposed to provide Student with compensatory educational services for the missed speech/language services. *Response*, p. 5. District proposed awarding Student with 360 minutes of direct speech/language services for the services missed due to the staffing shortages at School. *Interview with Director of Special Education; Exhibit J*, p. 1.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District failed to properly implement Student’s IEP from September 2021 through May 2022, in violation of 34 C.F.R. § 300.323. The failure to implement was material and resulted in a denial of FAPE.

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. 2021 IEP Implementation: January through May 2022

Parent’s Concerns

The 2021 IEP was in effect from January through May 2022. (FF #s 2, 15). Parent’s concern is that Student was not provided with the speech language services required by the 2021 IEP from January through May of 2022. (FF # 19). District concedes Student did not receive these services, but indicates Student was provided with compensatory educational services over the summer of 2022 to remedy the missed services. *See id.*

Accessibility to Student’s Teachers

First, the SCO must determine whether District satisfied its obligation under 34 C.F.R. § 300.323(d). Here, Former Case Manager oversaw the 2021 IEP. (FF # 20). Thus, she was responsible for ensuring staff were aware of their responsibilities under the 2021 IEP. *Id.*

Student’s teachers and service providers had access to the 2021 IEP through District’s “Power School” program. (FF # 21). Former Case Manager also took extra steps to provide the 2021 IEP to Student’s teachers and service providers. (FF # 22). Following this, Former Case Manager acted as a point of contact for Parent and collaborated with teachers and service providers about Student’s programming. *Id.* Emails demonstrate that Former Case Manager was responsive to Parent’s concerns, and quick to reach out to teachers and service providers to address any issues that arose concerning Student’s services. (FF #s 23, 39).

For these reasons, the SCO finds and concludes that District ensured teachers and service providers working with Student were informed of their responsibilities under the 2021 IEP, consistent with 34 C.F.R. § 300.323(d).

Speech/Language Services

The 2021 IEP provided for 360 minutes per semester of direct speech/language services from a speech language pathologist. (FF #s 11, 16). Speech Language Pathologist was responsible for providing these services. See (FF # 25).

District concedes that, from January through May 2022, Student did not receive the full 360 minutes of speech/language services he was entitled to under the 2021 IEP. (FF # 19). Speech Language Pathologist indicated that she provided approximately 135 minutes of speech/language services to Student during the fall of 2022 (although she indicated that Student refused services on several occasions), but Speech Language Pathologist did not meet with Student at all during May of 2022. (FF # 45).

For these reasons, the SCO finds and concludes that District failed to implement the 2021 IEP from January through May of 2022 with respect to Student's speech/language services, in violation of 34 C.F.R. § 300.323.

B. 2022 IEP Implementation: August 2022 to Present

Parent's Concerns

The 2022 IEP was in effect in August of 2022 when classes started at School. (FF # 52). Parent's concern is that Student has not received the 360 minutes of direct speech/language services he is entitled to receive each semester under the 2022 IEP. (FF # 51). District concedes Student has not received speech/language services as required by the 2022 IEP during the 2022-2023 academic year due to unexpected staffing shortages at School. *Id.*

Accessibility to Student's Teachers

Again, the SCO must first determine whether District satisfied its obligation under 34 C.F.R. § 300.323(d). Here, Student's case manager oversees the 2022 IEP and is responsible for ensuring teachers and service providers were aware of their responsibilities under the 2022 IEP. See (FF # 20). Due to unexpected staff shortages, there was no speech language pathologist at School when classes started in August of 2022 and thus, no appropriate staff member to inform of Student's speech/language needs. (FF # 51).

For these reasons, the SCO finds and concludes that District failed to ensure teachers and service providers working with Student were informed of their responsibilities under the 2022 IEP, in violation of 34 C.F.R. § 300.323(d).

Speech/Language Services

The 2022 IEP entitles Student to 360 minutes of speech/language services from a speech language pathologist per semester. (FF # 36). Although School was fully staffed with two speech

language pathologists leading into the 2022-2023 academic year, shortly after teacher orientation at School, both speech language pathologists at School resigned, leaving School without a speech language pathologist. (FF # 53). District posted the position with a competitive compensation package and explored alternative options, such as providing speech/language services through a blended model, but District was unable to quickly fill the empty positions. (FF #s 54-56). District concedes that because of these staff shortages, Student missed speech/language services he was entitled to under the 2022 IEP. (FF # 51).

For these reasons, the SCO finds and concludes that District failed to implement the 2022 IEP, from August 2022 through the present, with respect to Student’s speech/language services, in violation of 34 C.F.R. § 300.323.

C. Materiality of Failure to Implement

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

Failure to Implement the 2021 IEP

In this case, District failed to implement the 2021 IEP by providing Student with only 135 of the 360 required minutes of direct speech/language services. (FF #s 11, 16). Although Student achieved passing grades during the spring of 2022 and made progress toward annual goals, the speech/language services were directly tied to his individualized needs. *See* (FF #s 1, 32, 34). Indeed, Student qualifies for special education under the SLD category and has an annual goal targeting communication, and his IEP Team found, most recently in April of 2022, that he needs to continue to develop receptive/expressive language skills in the classroom for improved engagement, comprehension, meaningful interactions, and improved academic success. *Id.*

For these reasons, the SCO finds and concludes—upon consultation with CDE Content Specialist 1—that District’s failure to implement the 2021 IEP involved more than a “short gap” in services and thus was material, resulting in denial of FAPE.

Failure to Implement the 2022 IEP

In this case, as the result of staff shortages, there were no appropriate speech/language service providers at School for Student’s case manager to inform of their responsibilities under the 2022 IEP. (FF #). And, because of those staff shortages, District failed to provide Student with approximately 360 minutes of speech/language services from August 2022 to the present. (FF # 36). The SCO understands that the staffing shortages may have been out of District’s control. However, the IDEA does not excuse a school district’s failure to implement an IEP or other noncompliance based on staffing shortages. *See, e.g., In re: Student with a Disability*, 121 LRP 38674 (SEA KS 10/20/21) (finding an ongoing obligation to provide FAPE pursuant to a student’s IEP during a staffing shortage).

Although District recently hired a speech language pathologist at School, there is no evidence that Student has received any speech/language services during the 2022-2023 academic year. (FF #s 51, 56). Although Student achieved passing grades during the spring of 2022 and made progress toward his annual goals, Student’s speech/language services are directly tied to his individualized special education needs. *See* (FF #s 1, 32, 34).

For these reasons, the SCO finds and concludes—upon consultation with CDE Content Specialist 1—that District’s failure to implement the 2022 IEP involved more than a “short gap” in services and thus was material, resulting in a denial of FAPE.

D. Compensatory Education

Compensatory education is an equitable remedy intended to place a student in the same position she 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).

Compensatory Education – 2021 IEP

Here, although District failed to implement the 2021 IEP, prior to this Complaint, District voluntarily offered Student compensatory educational services to “make up” for the sessions he missed because he was marked as refusing the session, as well as those he missed because Speech Language Pathologist stopped holding groups in May of 2022. (FF #s 46-47). Parent agreed with this plan and indicated that the sessions not only occurred over the summer but also that Speech Language Pathologist 2 did a “great” job. (FF #s 46-47, 50).

Moreover, although Student did not receive the full 360 minutes of speech/language services during the spring of 2022, Speech Language Pathologist provided Student with three full 45-minute speech/language sessions during the spring semester of 2022, not including undocumented sessions where Student only attended for a part of the session (for a total of approximately 135 minutes). (FF # 43). District also offered Student compensatory services over the summer for six 45-minute sessions (a total of 270 minutes). (FF # 47). By doing so, District provided Student with even more speech/language services than he was entitled to under the 2021 IEP (a total of 405 minutes). *See* (FF #s 11, 16).

In consultation with CDE Content Specialist 1, the SCO finds and concludes that District's remedial actions of providing Student with compensatory services over the summer adequately remedied the educational harm to Student caused by District's failure to implement the 2021 IEP, and that an award of compensatory education here is not necessary.

Compensatory Education – 2022 IEP

Here, Student has gone almost an entire semester without receiving any of the 360 minutes of direct speech/language services required by the 2022 IEP. (FF # 51). District concedes that Student requires compensatory educational services to remedy this failure to implement and proposed that he receive 360 minutes of speech/language services. *Id.*

The SCO finds, in consultation with CDE Content Specialist 1, that District's proposal regarding Student's missed services is reasonable and appropriate to address Student's individualized speech/language needs. As discussed above, Student's speech/language services are directly tied to his need for special education and related services, and compensatory services are thus appropriate to place Student in the position he would have been had there not been a violation. The SCO accordingly awards Student 360 minutes of direct speech/language services.

Systemic IDEA Violations: This investigation demonstrates violations that are systemic and will likely impact the future provision of services for all children with disabilities in District if not corrected. 34 C.F.R. § 300.151(b)(2).

Pursuant to its general supervisory authority, CDE must also 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).

In this case, the SCO finds and concludes—based on the Record and in consultation with CDE Content Specialist 1—District's violation is systemic and likely to impact other similarly situated students at School if not addressed.

First, although close to meeting the service minutes for students on her caseload, Speech Language Pathologist indicated she stopped holding groups entirely for May of 2022. (FF # 43). Although District took steps to provide Student with compensatory services, at the time of this Decision, only Student, and not the other impacted students, had received compensatory services. See (FF #s 47-48).

Second, the staffing issues at School likely impacted other students at School who required speech/language services under an IEP, as there was no speech language pathologist available at School, starting in August of 2022. (FF # 59).

For these reasons, the SCO accordingly finds and concludes that the violation noted in this Decision was systemic, although narrowly limited to students at School who: (a) received speech/language services from Speech Language Pathologist in May of 2022; and/or (b) are entitled to speech/language services during the 2022-2023 academic year under an IEP.

Notwithstanding, the SCO recognizes that District acknowledged this systemic concern and agreed to make individualized determinations as to the impact of the violation on these students, and the possible need for compensatory services. (FF # 59). Indeed, District voluntarily addressed the violation as to Student by providing compensatory services before the Complaint was filed. (FF # 60). District was also forthcoming with the CDE about its IDEA violation, conceding the materiality of its failure to implement Student’s services. (FF #s 19, 52, 60). The SCO will accordingly craft a remedy in recognition that District has agreed to remedy this systemic concern for other similarly situated students.

REMEDIES

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

1. Failing to properly implement Student’s IEP, in violation of 34 C.F.R. § 300.323.

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

1. Corrective Action Plan
 - a. By **Monday, January 2, 2023**, District shall submit to CDE a corrective action plan (“CAP”) that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom District is responsible.

- 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. Procedures to Address Systemic Violations and Compensatory Education Services

- a. By **Monday, February 6, 2023**, District must submit to CDE Special Education Monitoring and Technical Assistance Consultant its plan for how District intends to individually determine the extent to which students at School who either (a) were receiving speech/language services from Speech Language Pathologist in May of 2022, and/or (b) are entitled to speech/language services under an IEP during the 2022-2023 academic year.
 - i. This plan must be consistent with OSEP's guidance for determining compensatory services. *See Return to School Roadmap: Development and Implementation of Individualized Educ. Programs in the Least Restrictive Environment under the Individuals with Disabilities Educ. Act, 79 IDELR 232 (OSERS 2021), Questions D4-6.*
 - ii. This plan must also be consistent with CDE's guidance for determining compensatory services. *See Special Education & COVID-19 FAQs (CDE 2021), Compensatory Services, available at https://www.cde.state.co.us/cdesped/special_education_faqs#compensatory.*
 - iii. While the above guidance was written to address the impact of the COVID-19 Global Pandemic, it provides instructive direction to any IEP teams considering a need for compensatory education and/or how to structure such an award.
- b. If CDE Special Education Monitoring and Technical Assistance Consultant and District reach agreement on the plan by **Monday, March 6, 2023**, District must use the plan to make individualized determinations about each Student's need for compensatory services.
- c. If District and CDE Special Education Monitoring and Technical Assistance Consultant cannot reach agreement on a plan by **Monday, March 6, 2023** or the CDE has concerns with District's plan, District will respond within two weeks to any record requests from CDE to allow CDE to determine the compensatory education awards.

3. Compensatory Educational Services for Student and Denial of FAPE

- a. Student shall receive **360 minutes of direct speech/language services**. This instruction must be provided by an appropriately licensed speech language pathologist. All 360 minutes must be completed by **Friday, April 7, 2023**, though Parent and Student may opt out of some or all of the compensatory educational hours if they wish.
- b. Monthly consultation between Provider(s) delivering compensatory services and Student's special education teacher shall occur to evaluate Student's 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. District must submit documentation that these consultations have occurred by **the second Monday of each month** until compensatory services have been completed and no later than one year following the date of this decision. Consultation logs must contain the name and title of the provider, and the date, the duration, and a brief description of the consultation.
- c. To verify that Student has received the services required by this Decision, District must submit records of service logs to CDE by the **Friday, April 14, 2023**, once services begin, until all compensatory education services have been provided. Service logs must contain the name and title of the provider (if services are delivered through a private provider), and the date, the duration, and a brief description of the service. District shall communicate with the private provider to obtain this information if the compensatory services are provided through a contract with a private provider.
- d. By **Monday, January 16, 2023**, District shall schedule compensatory services in collaboration with Parent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. These compensatory services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. These compensatory services must be provided to Student outside of the regular school day (such as before and/or after school, on weekends, or during school breaks) to ensure Student is not deprived of the instruction Student is entitled to (including time in general education). The parties shall cooperate in determining how the compensatory services will be provided. If Parents refuse to meet with District within this time, District will be excused from delivering compensatory services, provided that District diligently attempts to meet with Parents and documents their efforts. A determination that District diligently attempted to

meet with Parents, and should thus be excused from providing compensatory services, rests solely with CDE.

- e. District shall submit the schedule of compensatory services to CDE no later than **Monday, January 23, 2023**. If for any reason, including illness, Student is not available for any scheduled compensatory services, District will be excused from providing the service scheduled for that session. If for any reason District fails to provide a scheduled compensatory session, District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent 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.: CDE Special Education Monitoring and Technical Assistant Consultant
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 District's annual determination under the IDEA and subject District to enforcement action by the Department. **Given the current circumstances surrounding the COVID-19 pandemic, the Department will work with District to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13. If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶13; *See also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 28th day of November, 2022.



Ross Meyers
State Complaints Officer

APPENDIX

Complaint, pages 1-5

Response, pages 1-6

- Exhibit A: IEPs and Other Documentation
- Exhibit B: Grades
- Exhibit C: SLP Notes from Make-up Sessions
- Exhibit D: Student Attendance
- Exhibit E: School Calendar
- Exhibit F: Policies and Procedures
- Exhibit G: Correspondence
- Exhibit H: Response to Data Request
- Exhibit I: September 16, 2022 Email

Telephone Interviews

- Director of Special Education: November 4, 2022
- Former Case Manager: November 9, 2022
- Parent: October 31, 2022