

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

State-Level Complaint 2022:535
Denver Public Schools

DECISION

INTRODUCTION

On July 28, 2022, the guardian (“Guardian”) 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 Denver Public Schools (“District”) on behalf of Student A 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 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

On September 16, 2022, the SCO extended the 60-day investigation timeline by four days due to exceptional circumstances arising from the number of students involved in the Complaint and the need for additional documents from the District to resolve the Complaint’s 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 July 28, 2021 through July 28, 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 the District denied Student A and his classmates in the multi-intensive classroom (“Students”) a Free Appropriate Public Education (“FAPE”) because the District:

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.

1. Failed to properly implement Student A’s IEP between August 23, 2021 and June 4, 2022, in violation of 34 C.F.R. § 300.323, specifically by:
 - a. Failing to provide Student A the specialized instruction required by his IEP;
 - b. Failing to provide Student A paraprofessional support in general education classes, as required by his IEP; and
 - c. Failing to provide Student A the speech services required by his IEP.
2. Failed to properly implement Student A’s IEP between June 4, 2022 and August 19, 2022, in violation of 34 C.F.R. § 300.323, specifically by:
 - a. Failing to provide Student transportation to and from compensatory services, as required by his IEP.
3. Failed to make an individualized determination of Student A’s need for compensatory speech services on or around May 25, 2022, in violation of 34 C.F.R. § 300.324.
4. Failed to properly implement Students’ IEPs between August 23, 2021 and June 4, 2022, in violation of 34 C.F.R. § 300.323, specifically by:
 - a. Failing to provide Students the specialized instruction required by their IEPs.

FINDINGS OF FACT

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

A. Background

1. Student A is a seventh grader at a District middle school (“School”). *Interview with Guardian*. This investigation concerns the 2021-2022 school year, when Student A was in sixth grade at School. *Id.*
2. Student A is eligible for special education and related services under the disability categories of Autism Spectrum Disorder and Other Health Impairment. *Exhibit A*, p. 1.
3. Student A is a friendly, caring young man who loves to give hugs. *Interviews with Assistant Principal and Guardian*. He loves running and being outside, whether he is riding his scooter or building a fort. *Id.* Student A has difficulty reading grade-level content and gets frustrated when he does not understand the material. *Id.* Without the support he needs, Student A acts

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

out and melts down. *Id.* Frequent prompts help Student A stay on task and respect the personal space of peers. *Id.*

B. Student A's IEP

4. At the beginning of the 2021-2022 school year, Student A's IEP dated April 29, 2021 was in effect. *Exhibit A*, pp. 1-22. This IEP was developed by Student's elementary school near the end of fifth grade. *Id.* at p. 1.
5. Student's A's IEP reviewed his present levels of performance, noting that Student A was significantly behind grade level. *Id.* at pp. 5-8. Recent assessments showed that he was reading at a second-grade level and working on two-digit addition and subtraction. *Id.* at pp. 6-7.
6. As noted in his IEP, Student A's disabilities significantly impacted his cognitive abilities and made it "nearly impossible" for him to access the grade-level curriculum. *Id.* at p. 9. His fine motor and language delays also affected his ability to access the curriculum. *Id.* Student A's disabilities also caused him to struggle staying on task and follow directions. *Id.*
7. Student A's IEP indicated that he required special transportation to and from school. *Id.* at p. 10.
8. The IEP contained six annual goals in the areas of mathematics, reading, communication, writing, and social/emotional wellness. *Id.* at pp. 10-14.
9. The IEP provided Student A numerous accommodations, including, in part, chunking reading assignments into parts, offering graphic organizers, and providing a human scribe. *Id.* at pp. 14-15. Additionally, the IEP required Student to use a modified curriculum based on extended evidence outcomes. *Id.* at p. 15.
10. Under the IEP, Student received the following special education and related services:
 - Specialized Instruction
 - Math: 450 minutes per week of direct specialized math instruction provided by a special education teacher outside the general education classroom;
 - Literacy: 600 minutes per week of direct literacy instruction provided by a special education teacher outside the general education classroom; and
 - Other: 200 minutes per week of direct specialized instruction provided by a special education teacher outside the general education classroom to address Student A's attention, social skills, and advocacy skills.

- Psychological Services
 - 120 minutes per month of direct psychological services provided by a school psychologist outside the general education classroom; and
 - 10 minutes per semester of indirect psychological services provided by a school psychologist outside the general education classroom.
- Occupational Therapy
 - 30 minutes per month of indirect occupational therapy provided by an occupational therapist outside the general education classroom.
- Speech/Language Services
 - 180 minutes per month of direct speech/language instruction by a speech language pathologist (“SLP”) outside the general education classroom; and
 - 10 minutes per semester of indirect speech/language instruction by an SLP outside the general education classroom.

Id. at pp. 19-20. Instruction in the special education classroom was to be 1:1 or in small groups of 2-3 students. *Id.* at p. 19. Additionally, Student A’s IEP specified that he should receive support from a special education teacher or paraprofessional (in a 1:1 or 2:1 ratio) when in the general education classroom. *Id.*

11. Per his IEP, Student A spent less than 40% of the time in the general education classroom. *Id.* at p. 21.

C. Students in the Multi-Intensive Classroom

12. School has a multi-intensive classroom (“MI Classroom”) for students with disabilities that significantly impact their cognitive abilities. *Interview with Special Education Instructional Specialist (“SEIS”).* Typically, the MI Classroom has 13-15 students, one special education teacher, and three paraprofessionals. *Id.*

13. During the 2021-2022 school year, ten students received instruction in the MI Classroom (“Students”), including Student A. *Interviews with Assistant Principal and Guardian.* In this decision, “Students” refers to all students in the MI Classroom during the 2021-2022 school year, including Student A. Students’ IEPs required anywhere from 600 to 1,380 minutes per week of direct specialized instruction. *Exhibit L*, pp. 43, 67, 104, 212, 263, 340, 398, 431, and

532. Depending upon the student, the specialized instruction targeted literacy, reading, and other skills (such as social-emotional and executive functioning skills). *Id.*

14. Like Student A, many of the Students also received direct speech services from an SLP. *Id.* One of Student's IEPs required 180 minutes per month of direct speech services, while six other Students' IEPs specified 120 minutes per month of direct speech services. *Id.* Two of the Students had no speech services in their IEPs. *Id.* at pp. 67 and 340.

D. Staffing Problems in the MI Classroom

15. Shortly before the beginning of the 2021-2022 school year, the special education teacher for the MI classroom resigned. *Response*, p. 1; *Interview with Assistant Principal*. School was able to hire a long-term substitute ("Long-Term Substitute") for the MI Classroom prior to the first day of the school year. *Response*, p. 2; *Interview with Assistant Principal*. Long-Term Substitute held a valid special education license. *Response*, p. 2.
16. Long-Term Substitute taught in the MI Classroom from August 23, 2021 until September 17, 2021, when she resigned from her position. *Id.* During that period, Long-Term Substitute was familiar with Students' IEPs, including Student A's IEP, and provided specialized instruction in accordance with their IEPs. *Id.*; *Interviews with Assistant Principal, SEIS, and Special Education Team Lead ("Team Lead")*.
17. The unexpected departure of Long-Term Substitute left School scrambling to provide coverage for the MI Classroom. *Interviews with Assistant Principal and Team Lead*. While School looked for a replacement, School's three special education teachers taught in the MI Classroom during their planning periods. *Id.* General education teachers covered the remainder of the day. *Interview with Team Lead*. School relied on this rotation of teachers in the MI Classroom from September 20, 2021 until November 2, 2021. *Response*, p. 2.
18. The teachers providing coverage in the MI Classroom were given snapshots of Students' IEPs. *Interview with Team Lead*. However, Team Lead—who was one of the special education teachers filling in—conceded that the teachers did not have time to thoroughly review the IEPs before teaching in the MI Classroom. *Id.* The Students' IEPs were not implemented by the rotation of teachers because no one knew "in depth enough" about the Students' needs or goals to be able to provide the necessary specialized instruction. *Id.*
19. Assistant Principal assumed the case management duties for Students upon Long-Term Substitute's resignation. *Id.*
20. During this time period, School also struggled to fill a paraprofessional position for the MI Classroom. *Interview with Assistant Principal*. From the beginning of the school year until September 29, the MI Classroom only had two of the three paraprofessionals necessary for the classroom. *Id.* The number of paraprofessionals needed for the MI Classroom varies from

year-to-year depending on student needs; however, Students' needs during the 2021-2022 school year necessitated three paraprofessionals. *Id.*

21. Rotating into the MI Classroom was stretching the general education and special education teachers thin, so beginning on November 3, 2021, Assistant Principal took over teaching in the MI Classroom. *Response*, p. 2; *Interview with Assistant Principal*. Assistant Principal taught in the MI Classroom until December 17, 2021. *Response*, p. 2; *Interview with Assistant Principal*. Though Assistant Principal was a former special education teacher, her special education license expired in 2020, and Assistant Principal did not have a Temporary Educator Eligibility authorization ("TEE"). *Response*, p. 2; *Interview with Assistant Principal*.
22. Assistant Principal received and reviewed copies of Students' IEPs prior to teaching in the MI Classroom. *Interview with Assistant Principal*. Assistant Principal indicated she relinquished some of her assistant principal duties in order to focus on the MI Classroom. *Id.* During this time period, Students' IEPs were followed "to the best of [School's] ability with the staff that we had." *Id.*
23. In January 2022, School still had not been able to hire a full-time special education teacher for the MI Classroom. *Response*, p. 3. At that point, School hired a student teacher ("Student Teacher") to cover the MI Classroom. *Id.* Student Teacher held an active substitute teaching license and was working towards her special education license through a program at a local university. *Id.* Student teacher did not have a TEE. *Id.* Student Teacher taught in the MI Classroom from January 4 through May 3, 2022. *Id.*
24. For the first week, Student Teacher shadowed Assistant Principal. *Interview with Assistant Principal*. After that, Student Teacher was the sole teacher in the MI Classroom. *Id.* On approximately four occasions, Assistant Principal and one of Student Teacher's professors observed a lesson taught by Student Teacher and provided her feedback. *Id.*
25. During this time period, Team Lead took over IEP Team meetings for Students. *Interview with Team Lead*. Student Teacher maintained a binder with samples of Students' work for progress monitoring, though no data from that binder was entered into the District's data management system. *Id.*; *Exhibit M*, pp. 1-175.
26. Assistant Principal resumed teaching in the MI Classroom from May 4, 2022, until the school year ended on June 2. *Interview with Assistant Principal*.

E. Delivery of Students' Specialized Instruction

27. It is unclear how much, if any, specialized instruction Students received between September 17—when Long-Term Substitute left—and November 3, 2021—when Assistant Principal took over teaching. The rotational nature of the coverage provided by special education and general education teachers makes it impossible to discern exactly what instruction Students

received, and the teachers' lack of understanding of Students' needs and goals diminishes any instruction they did receive. For these reasons, the SCO finds that neither Student A nor Students received the specialized instruction required by their IEPs between September 17 and November 2.

28. Assistant Principal taught in the MI Classroom from November 3 until December 17, 2021 and, again, from May 4 to June 2, 2022. *Response*, pp. 2-3. Assistant Principal did not have a valid special education license during this time period. *Id.*
29. Student Teacher taught in the MI Classroom from January 4 to May 3, 2022. *Id.* at p. 3. Though she was a licensed substitute teacher, Student Teacher was not a licensed special education teacher. *Id.*
30. From September 20, 2021 to June 2, 2022, Student A specifically missed: (a) 247.5 hours of specialized math instruction; (b) 330 hours of literacy instruction; and (c) 119 hours of instruction targeting attention, social skills, and advocacy skills. *See Exhibit A*, pp. 19-20.
31. School staff could not recall any instances in which Student A or any other Students missed a general education class due to a lack of available paraprofessional support. *Interviews with Assistant Principal and Team Lead*. However, several general education teachers told Guardian that Student A did not always have paraprofessional support in science, social studies, and P.E. *Interview with Guardian; Exhibit H*, p. 5. Also, an email from Assistant Principal acknowledged this concern: "As for the paraprofessional support in the general education setting, we were previously short staffed, but we have a 3rd paraprofessional in our program which makes it possible for [Student A] to receive the full support he needs." *Id.* at p. 173.

F. Delivery of Speech Services

32. From August 21 to October 15, SLP #1 provided speech services to School students, including Student A. *Response*, p. 5; *Interview with Assistant Principal*. SLP #1 resigned on October 15. *Response*, p. 5.
33. While School worked to hire a replacement SLP, SLP #2 provided some speech services to Student A between October 15 and December 17, though she was not able to provide all of the service minutes required by his IEP. *Id.*; *Exhibit D*, pp. 1-2.
34. During Fall 2021, Student received the following speech services:
 - August: 90 minutes
 - September: 135 minutes
 - October: 75 minutes
 - November: 120 minutes

- December: None

Exhibit D, pp. 1-2. Student A's IEP required 180 minutes per month of direct speech services provided by an SLP. *Exhibit A*, p. 20. During Fall 2021, the District failed to provide Student A with 390 minutes of speech services. *See Exhibit D*, pp. 1-2. Because School started on August 23—with only seven school days left in the month—the SCO prorated Student A's speech services for August and found the 90 minutes provided adequate.

35. The District was unable to provide any speech services to Student A or Students during Spring 2021 due to staffing issues. *Response*, p. 5. As a result, the District failed to provide Student A with 900 minutes of speech services in Spring 2021. *See Exhibit D*, pp. 1-2. In total, Student A missed 1,290 minutes of speech services. *Id.*

G. Progress Monitoring

36. The shuffling of coverage for the MI Classroom left staff confused about who was responsible for monitoring Students' progress on annual IEP goals. *Interviews with Assistant Principal and Team Lead*. While Team Lead said Assistant Principal was monitoring Students' progress, Assistant Principal herself was not sure who was handling progress monitoring. *Id.*
37. Once Student Teacher assumed responsibility for the MI Classroom, she maintained a binder of Students' work which the District used to track Students' progress. *Id.* However, it is unclear how or if the Students' work aligned with the annual goals in their IEPs.
38. Regardless, Guardian did not receive any progress reports during the 2021-2022 school year. *Interview with Guardian*. And, indeed, the progress reports produced by the District during this investigation reveal that no data was entered for goals tied to specialized instruction during the 2021-2022 school year for the Students. *Exhibit M*, pp. 1-175.

H. Compensatory Services

39. In Spring 2021, the District acknowledged the specialized instruction Students missed and initiated conversations with parents regarding compensatory services. *Interviews with SEIS and Team Lead*. SEIS and Team Lead looked at Students' individual annual goals and reviewed work samples in Student Teacher's binder to determine whether each Student made progress as expected. *Id.* They also looked at each Student's historical progress on IEP goals to determine whether the student made similar progress during the 2021-2022 school year. *Id.*
40. SEIS and Team Lead determined that three Students made adequate progress during the 2021-2022 school year and did not need compensatory services. *Exhibit N*, p. 1. They also concluded that one Student did not make adequate progress but that the lack of progress was attributable to the student's attendance. *Id.* Similarly, one Student failed to make adequate progress, but SEIS and Team Lead determined that the lack of progress was due to

the student's social-emotional issues. *Id.* That Student was not offered compensatory services. *Id.* Neither of these Students was offered compensatory services. *Id.*

41. SEIS and Team Lead found that five Students—including Student A—did not make adequate progress on their IEP goals during the 2021-2022 school year and needed compensatory services. *Id.*
42. SEIS and Team Lead prepared prior written notices (“PWNs”) detailing the District’s offer of compensatory services for each Student. *Interviews with SEIS and Team Lead.* The PWNs were “drafts” and intended to start the conversation with parents regarding compensatory services. *Id.* If a parent agreed to the District’s offer, the compensatory services would be provided. *Id.* If a parent did not accept the offer of compensatory services, the District would convene the IEP Team to determine each Student’s needs. *Id.*
43. On May 25, 2022, Team Lead sent Guardian a draft PWN with an offer of academic compensatory services “due to the inconsistencies in special education staffing for the 2021-22 school year.” *Exhibit H*, p. 43. Though the email referred to the compensatory services as “proposed” services, it did not provide Guardian any guidance on what would happen if she disagreed with the offer. *Id.*
44. The PWN proposed:
 - 1,920 minutes of specialized literacy instruction to be provided during a one-hour session twice a week for 13 weeks, after school or during breaks, by a qualified provider; and
 - 1,440 minutes of specialized math instruction to be provided during a one-hour session twice a week for 12 weeks, after school or during breaks, by a qualified provider.

Exhibit E, p. 2.

45. Team Lead did not receive a response from Guardian, so, on June 2, Team Lead emailed Guardian to follow up. *Exhibit H*, p. 43. Team Lead asked Guardian to let her know if she accepted or denied the District’s offer of compensatory academic services. *Id.*
46. Guardian responded the following day, asking about the District’s offer for compensatory speech services: “When I know the compensatory time for speech I’ll be better prepared to have an answer. Right now I’m at a complete stand still.” *Id.* at p. 7. Team Lead quickly replied to let Guardian know that “speech [would] be a completely separate PWN and offer that I believe will come in the fall.” *Id.* at p. 48.

47. On June 9, Advocate #1 emailed SEIS, asking about the status of Student A's offer of compensatory speech services. *Id.* at p. 1. SEIS reiterated that offers for speech would be made separately from offers for academics. *Id.* Advocate #1 indicated she understood but wanted to see an offer for Student A's speech services. *Id.* at p. 35.

48. On June 28, SEIS replied:

Basically the plan for speech-language comp ed is that it will be determined by the SLP once they have been hired and the school year has begun. It is my understanding that the SLP hired for [School] will be given extra time so that they can provide not only the minutes written in the IEP but also the comp ed minutes.

Since the offers for compensatory services are coming from the individual departments, any acceptance or discussion of an offer of comp ed for academics will not impact in any way [Student A's] eligibility for comp ed for speech-language.

Id. at p. 68.

49. There was no further communication between Advocate #1, Guardian, and the District regarding Student A's compensatory services. *Interview with Team Lead; see Exhibit H*, pp. 1-535. Guardian filed this Complaint on July 28, 2022. *Complaint*, p. 1. Student A's PWN remains in draft form in the District's data management system. *Interview with SEIS*. Student A did not receive any compensatory academic services over the summer. *Interview with Guardian*.

50. As of August 17—the most recent data available—three of the five Students who were offered compensatory services had accepted the District's offers. *Exhibit N*, p. 1.

51. Student A is receiving speech services from a new speech language pathologist at School; however, the District has not yet provided Guardian an offer of compensatory speech services. *Interview with Guardian*.

52. Guardian alleged the District refused to provide Student A special transportation for compensatory services, even though his IEP required special transportation. *Complaint*, pp. 3-4. Nothing in the record, however, indicates that the District denied Student A transportation or that Guardian even inquired about such transportation. *Exhibit H*, pp. 1-535. Advocate #2 produced an email between SEIS and an unidentified individual, where SEIS stated that the District was "not providing transportation for compensatory services this summer." *Exhibit 5*, p. 1.

CONCLUSIONS OF LAW

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

Conclusion to Allegations No. 1 and No. 4: The District failed to properly implement the IEPs for Students—including Student A—during the 2021-2022 school year, in violation of 34 C.F.R. § 300.323. This violation resulted in a denial of FAPE. The District also failed to ensure staff in the MI Classroom were appropriately licensed, in violation of 34 C.F.R. § 300.207 and ECEA Rule 3.03 and 3.04.

In her Complaint, Guardian alleges that the District failed to properly implement the IEPs of Students during the 2021-2022 school year. Specifically, Guardian contends Students—including Student A—did not receive the specialized instruction required by their IEPs. Additionally, Guardian asserts that Student A did not receive the paraprofessional support and speech services required by his IEP.

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.* 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. Knowledge of Students’ IEPs

As a preliminary matter, the SCO must determine whether the District satisfied its obligation under 34 C.F.R. § 300.323(d). Over the course of the 2021-2022 school year, at least six teachers taught in the MI Classroom. (FF #s 15-25.) Though the teachers had access to Students’ IEPs (including Student A’s IEP), the constant uncertainty regarding coverage for the MI Classroom prevented teachers from familiarizing themselves with the IEPs. (FF #s 16, 18, 22.) As a result, the teachers were not aware of the instruction required by the IEPs or Students’ individual goals. (*Id.*)

For these reasons, the SCO finds and concludes that the District failed to comply with 34 C.F.R. § 300.323(d).

B. Implementation of Students' IEPs

Guardian has alleged the District failed to provide Students the specialized instruction required by their IEPs and failed to provide Student A the paraprofessional support and speech services required by his IEP.

Specialized Instruction for Students

During the 2021-2022 school year, ten Students, including Student A, received specialized instruction in the MI Classroom. (FF # 13.) Their IEPs required anywhere from 600 to 1,380 minutes per week of direct specialized instruction. (FF # 13.) Student A's IEP specified that he receive: (a) 450 minutes per week of direct specialized math instruction; (b) 600 minutes per week of direct specialized literacy instruction; and (c) 200 minutes per week of direct specialized instruction targeting his attention, social skills, and advocacy skills. (FF # 10.) Student A's specialized instruction was to be provided 1:1 or in small groups by a special education teacher outside the general education classroom. (*Id.*)

Under the IDEA, the CDE must establish qualifications to ensure that special education teachers are "appropriately and adequately prepared and trained . . . to serve children with disabilities." 34 C.F.R. § 300.156(a). To that end, the CDE requires "[a]ll special education teachers [to] hold Colorado teacher's certificates or licenses with appropriate endorsements in special education." ECEA Rule 3.04(1)(a)(i). School districts, however, bear responsibility for ensuring their staff comply with state licensing requirements. ECEA Rule 3.03.

As detailed in the Findings of Fact, the District struggled to hire a special education teacher for the MI Classroom. (FF #s 15-26.) Students received instruction from Long-Term Substitute, a licensed special education teacher, from August 22 to September 17, 2021. (FF # 16.) But from September 17, 2021—when Long-Term Substitute resigned—until June 2, 2022—when the school year ended, Students did not receive consistent specialized instruction from a licensed special education teacher. (FF #s 17-26.)

Between September 20 and November 2, a group of special education and general education teachers rotated through the MI Classroom, primarily providing coverage during their planning periods. (FF # 17-18.) Though some of the teachers were licensed special education teachers, others were not and, therefore, could not fulfill the requirements of Students' IEPs. (*Id.*) And, even then, the special education teachers were not familiar enough with Students' IEPs to be able to provide instruction tailored to their individualized needs and annual goals (FF # 18.)

From November 2 to December 17 and from May 4 to June 2, Assistant Principal taught in the MI Classroom. (FF #s 21, 26.) Assistant Principal previously worked as a special education teacher

but her special education endorsement lapsed in 2020. (FF # 21.) As a result, Assistant Principal did not have the license necessary to satisfy the requirements of Students' IEPs.

Finally, from January 4 to May 3, Student Teacher provided instruction in the MI Classroom (FF # 23.) At the time, Student Teacher held a valid substitute teaching license but did not have a special education endorsement. (*Id.*) For that reason, Student Teacher also could not fulfill the requirements of Students' IEPs.

The District's failure to provide appropriately licensed teachers for the MI Classroom deprived Students—including Student A—of the specialized instruction required by their IEPs between September 20, 2021 and June 2, 2022, a period of 33 weeks. During this period, Student A specifically missed: (a) 247.5 hours of specialized math instruction; (b) 330 hours of literacy instruction; and (c) 119 hours of instruction targeting attention, social skills, and advocacy skills. (FF # 30.) As a result, the SCO finds and concludes that the District failed to properly implement the IEPs of Student A and all Students in violation of 34 C.F.R. § 300.323. The District's failure to ensure personnel were appropriately licensed and certified to provide special education instruction in the MI Classroom also resulted in violations of 34 C.F.R. § 300.207 and ECEA Rule 3.03 and 3.04. The SCO understands that the staffing shortage may have been out of the District's control. However, the IDEA does not excuse a 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).

Paraprofessional Support for Student A

Student A's IEP specified that he should receive support from a special education teacher or paraprofessional in the general education classroom. (FF # 10.) For the first two months of the school year, one of the three paraprofessional positions in the MI Classroom remained unfilled. (FF # 20.) The record suggests there were at least some occasions when Student A was in the general education classroom without the support required by his IEP, though there is no way to quantify when Student A was deprived of the adult support. (FF # 31.) Regardless of frequency or duration, the District's inability to support Student A in general education classes resulted in a failure to properly implement Student A's IEP and an additional violation of 34 C.F.R. § 300.323.

Speech Services for Students

Under his IEP, Student A was to receive 180 minutes per month of direct speech instruction by an SLP outside the general education classroom. (FF # 10.) As demonstrated in the Findings of Fact, the District failed to provide Student A with 1,290 minutes of speech services during the 2021-2022 school year. (FF #s 34-35.) This failure resulted in an additional violation of 34 C.F.R. § 300.323. The SCO also finds and concludes that this violation extended to seven other Students in the MI Classroom whose IEPs required speech services. (FF #s 14, 35.)

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. App'x 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. Dist. 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. App'x 202, 205 (2d Cir. 2010).

"A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard "does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." *Id.*

Here, the District failed to provide Students with the specialized instruction required by their IEPs for nearly the entire school year. This instruction was the cornerstone of Students' IEPs. (FF #s 13.) The District also deprived Students of speech services during, at least, the second semester of the school year. (FF #s 14, 35.) These violations—even taken independently—amount to more than a minor discrepancy between the services Students received and those required by their IEPs. For this reason, the SCO finds the District's failure to implement Students' IEPs to be material. This failure denied Students a FAPE. Given the degree to which a FAPE was denied, Students are entitled to compensatory education. *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

D. 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. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010).

Determining appropriate compensatory services requires an in-depth analysis of the impact the District's failure to implement had on each Student. For this reason, the SCO will order the District to work with the CDE to determine each Student's need, if any, for compensatory services. The SCO recognizes that some Students have already accepted and, perhaps, received compensatory services offered by the District. (FF # 50.) However, the SCO addresses this issue in conclusion to Allegation No. 3 below.

Conclusion to Allegation No. 2: The District did not fail to provide Student A transportation to and from compensatory services. No violation of the IDEA occurred.

Guardian next asserts that the District failed to implement Student A's IEP by refusing to provide Student A transportation to and from compensatory services between June 4, 2022 and August 19, 2022.

As noted above, a student's IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2). An IEP must identify the special education and related services necessary to allow the student to advance appropriately towards annual goals, to be involved in the general education curriculum, and to be educated and participate with other nondisabled children. *Id.* at § 300.320(a)(4). Special transportation is one such related service. *Id.* § 300.34. Inclusion of special transportation in Student A's IEP, therefore, indicated that Student A needed transportation to receive a FAPE.

Here, Guardian never responded to the District's offer of compensatory services. (FF #s 43-49.) And nothing in the record indicates Guardian requested special transportation for compensatory services or that the District refused or would have refused to provide Student A transportation to and from compensatory services. (FF # 52.) Advocate #2 produced an email where the District informed an unidentified individual (presumably a parent) that the District was not providing transportation for compensatory services during the summer. (*Id.*) The SCO finds the email unpersuasive. The email has no context, limiting its applicability to this investigation. For example, the email does not indicate whether the IEP for the subject child required transportation as a related service or not. For these reasons, the SCO finds and concludes that the District did not violate the IDEA by refusing to provide Student A transportation to compensatory services.

Conclusion to Allegation No. 3: The District failed to make individualized determination of the Students' need for compensatory services, in violation of 34 C.F.R. § 300.324. This violation resulted in a denial of FAPE.

As indicated above, compensatory education is an equitable remedy intended to place a student in the same position he would have been but for a school district's failure or inability to provide FAPE. *Reid v. Dist. Of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005); *see also Return to School Roadmap* (EDU 2021) ("Roadmap"). Both school districts and the CDE have historically used compensatory services to remedy a denial of FAPE caused by a staffing shortage. Though staffing shortages are not novel, the COVID-19 pandemic exacerbated staffing shortages.

Neither the U.S. Department of Education nor the CDE require school districts to evaluate students for compensatory services within a specific timeframe. CDE guidance provides that, “[a]lthough compensatory education services may be most appropriately determined when schools return to normal operations, the CDE recommends that the need for such services be considered as the situation evolves.” *Special Education & COVID-19 FAQs* at www.cde.state.co.us/cdesped/special_education_faqs (“CDE FAQs”).

An IEP Team must determine a child’s need for special education and related services on an individual basis. 34 C.F.R. § 300.324. The U.S. Department of Education has indicated that “IEP Teams are the appropriate vehicle for addressing the need for, and extent of, compensatory services to address the child’s needs based on any failure or inability to provide appropriate services.” *Roadmap* at Question D-7; *see also CDE FAQs*. Guidance from the CDE states that IEP Teams must “make an individualized determination that includes input and involvement from parents as to whether a student needs compensatory education services.” *CDE FAQs*. To determine whether a student needs compensatory services, IEP Teams should consider: (1) the student’s present levels of academic achievement and functional performance, (2) the student’s previous rates of progress; and (3) the frequency and duration of special education and related services. *Roadmap* at Question D-5. The *CDE FAQs* also direct IEP Teams to review: (1) concerns from parents, the student, and other service providers; (2) input from parents on student’s performance during the disruption of services; and (3) the difference between progress monitoring data before the disruption of services and data collected shortly after student resumed services. *CDE FAQs*.

A. Student A’s Compensatory Services for Speech

In her Complaint, Guardian asserted that the District failed to make an individualized determination of Student A’s need for compensatory speech services. Guardian focused on the District’s delay in determining Student A’s need for compensatory speech services, rather than the methodology of any such determination.

Here, the District was aware as early as October 15, 2021 that Student A was not receiving all of the speech services required by his IEP. (FF #s 32-33.) Though the District provided Student A some speech services during Fall 2021, he received no speech services after December 1. (FF #s 34-35.) The District intended to determine Student A’s need for compensatory speech services once School hired a replacement SLP and the new SLP had an opportunity to evaluate Student A. (FF #s 46-48.) The District stuck to this plan even after Guardian and Advocate #1 requested an offer of compensatory speech services in June 2022. (FF #s 46-51.)

The SCO recognizes the benefit in having Student A’s new SLP evaluate him and provide input on his need for compensatory services. But the District must balance that benefit against the impact of further delay to Student A’s compensatory services. Here, the SCO finds and concludes that

the District unreasonably delayed determining Student A's need for compensatory speech services, in violation of 34 C.F.R. § 300.324. This resulted in a procedural violation of the IDEA.

B. Students' Compensatory Services for Specialized Instruction

This investigation revealed procedural errors in the manner in which the District determined Students' need for compensatory services. As detailed in the Findings of Fact, SEIS and Team Lead reviewed each Student's IEP goals and work samples to determine whether the student progressed as expected during the 2021-2022 school year. (FF # 39.) SEIS and Team Lead found that five of the ten Students did not make adequate progress and prepared draft PWNs with an offer of compensatory services for those Students. (FF #s 41-42.) SEIS and Team Lead were apparently able to ascertain whether Students made adequate progress from Student Teacher's binder of work samples, even though Students' actual progress reports contained no information indicating whether they were making progress or not. (FF #s 37-39.)

The determinations regarding Students' need for compensatory services and the services offered by the District were made solely by SEIS and Team Lead. No IEP Team meeting was held, and parents and guardians were not given an opportunity to provide input. This practice contradicts guidance from both the U.S. Department of Education and CDE. *See Roadmap* ("IEP Teams are the appropriate vehicle for addressing the need for, and extent of, compensatory services to address the child's needs based on any failure or inability to provide appropriate services."); *CDE FAQs* (directing IEP Teams to include input and involvement from parents when determining whether a student needs compensatory services). For this reason, the SCO finds and concludes that the District violated 34 C.F.R. § 300.324. This also resulted in a procedural violation of the IDEA.

C. Denial of FAPE

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation: (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent's opportunity to participate in the IEP process).

Here, the delay in the District's determination of Student A's need for compensatory speech services impeded Student A's right to a FAPE and further denied him the benefit of speech services. For this reason, the SCO finds and concludes that the procedural violation resulted in a denial of FAPE.

Additionally, the District's determination of Students' need for compensatory services (and the amount of any services offered) outside of an IEP Team meeting significantly impeded the opportunity for their parents and guardians to participate in the decision-making process. For this reason, the SCO finds and concludes that this procedural violation also resulted in a denial of FAPE.

However, the SCO has not awarded compensatory education. The IDEA violation arose from the improper manner in which the District determined Students' need for compensatory services. Here, the District made the decisions outside of an IEP Team meeting and without input from parents and guardians. As a result, the SCO has ordered the District to convene Students' IEP Teams to determine whether Students need compensatory services and, if so, the amount and nature of the services needed. This remedy will ensure that Students' compensatory services are determined consistent with existing guidance from OSEP and CDE.

Conclusion regarding Progress Monitoring: The District failed to adequately monitor Students' progress on their annual IEP goals during the 2021-2022 school year, in violation of 34 C.F.R. § 300.320(a)(3). This procedural violation resulted in a denial of FAPE.

Under the IDEA, school districts must provide periodic reports on the progress a student is making toward the student's annual goals. 34 C.F.R. § 300.320(a)(3). As the Findings of Fact demonstrate, the District failed to properly monitor Students' progress on their academic annual goals (such as math, writing, and reading) during the 2021-2022 school year. (FF #s 36-38.) For this reason, the SCO finds and concludes that the District failed to provide Students' parents and guardians with adequate reports on Students' progress, resulting in a procedural violation of 34 C.F.R. § 300.320(a)(3).

A. Denial of FAPE

As noted above, a procedural violation results in a denial of FAPE only where the violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent's opportunity to participate in the IEP process).

Here, the District failed to monitor the progress of all 10 Students in the MI Classroom for the entire school year. (FF #s 36-38.) The lack of progress monitoring undercut the entire purpose of Students' IEPs. "The essential function of an IEP is to provide meaningful opportunities for appropriate academic and functional achievement and to enable the child to make progress." Questions and Answers (Q&A) on U. S. Supreme Court Case Decision *Endrew F. v. Douglas County School District RE-1* (Dep't of Ed. 2017). Indeed, the IDEA requires a school district to offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the child's

circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

Additionally, the lack of progress monitoring significantly impeded the opportunity for Students' parents or guardians to participate in the decision-making process for their children. For this reason, the SCO finds and concludes that the District's procedural violation caused a denial of FAPE.

Systemic IDEA Violations: This investigation does not demonstrate violations that are systemic and likely to impact the future provision of services for all children with disabilities in the District if not corrected.

Pursuant to its general supervisory authority, the 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).

Here, nothing in the record indicates that the District's violations are systemic in nature. The District's failures impacted ten Students in the MI Classroom at School. But the Findings of Fact do not demonstrate that the failures extended beyond the MI Classroom or School. Indeed, the failures appear to stem from the District's inability to hire a replacement special education teacher for the MI Classroom and a replacement SLP for School. For these reasons, the SCO finds and concludes that the violations are not systemic in nature.

REMEDIES

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

- a. Failing to properly implement Students' IEPs, in violation of 34 C.F.R. § 300.323;
- b. Failing to ensure staff were appropriately licensed, in violation of 34 C.F.R. § 300.207 and ECEA Rule 3.03 and 3.04;
- c. Failing to make an individualized determination of Students' need for compensatory education services, in violation of 34 C.F.R. § 300.324; and
- d. Failing to monitor Students' progress, in violation of 34 C.F.R. § 300.323(a)(3).

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

1. Corrective Action Plan

- a. By **Friday, November 4, 2022**, the District shall submit to the 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.
- b. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm the District’s timely correction of the areas of noncompliance.

2. Compensatory Education Services for Denial of FAPE

- a. The District must convene Students’ IEP Teams, at a mutually agreeable date and time, by **Friday, December 2, 2022**. The District must convene the IEP Team for each Student identified in Exhibit L, regardless of whether the District previously determined that the Student did not need compensatory services. The IEP Teams should make individualized determinations of each Students’ need for compensatory services as a result of the District’s failure to implement their IEPs during the 2021-2022 school year.
 - i. The determinations must be consistent with guidance from OSEP and the CDE 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.; Special Education & COVID-19 FAQs (CDE 2021), Compensatory Services, available at https://www.cde.state.co.us/cdesped/special_education_faqs#compensatory.*
 - ii. While the above guidance was written to address the impact of the COVID-19 pandemic, it provides instructive guidance to IEP Teams considering a need for compensatory education and/or how to structure such an award.
- b. The District must document the IEP Team’s determination regarding each Student’s compensatory services in a PWN. The PWN should provide significant detail regarding the discussion at the IEP Team and the basis for the IEP Team’s decision as required by 34 C.F.R. § 300.503. The District must provide a copy of the PWN for each Student’s determination to CDE no later than **Friday, December 9, 2022**.

- c. The District shall submit a schedule of all Students' compensatory services to CDE Special Education Monitoring and Technical Assistance Consultant no later than **Thursday, December 15, 2022**. The District shall schedule compensatory services in collaboration with Students' Parent(s)/Guardian(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)/Guardian(s) refuse to meet with the District within this time, the District will be excused from delivering compensatory services, provided that District diligently attempts to meet with Parent(s)/Guardian(s) and documents such efforts. A determination that District diligently attempted to meet with Student's Parent(s)/Guardian(s), and should thus be excused from providing compensatory services, rests solely with the CDE.
- d. Monthly consultation between the provider(s) delivering compensatory services and Executive Director must occur to evaluate Students' progress in general education and 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 in general education and 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.
- e. To verify that Students have received the services required by this Decision, the District must submit records of service logs to the 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. All compensatory services must be completed by **Friday, August 12, 2023**.
- f. 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 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 Student's Parent(s)/Guardian(s) and notify the CDE of the change in the appropriate service log.

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

Colorado Department of Education
Exceptional Student Services Unit
Attn.: CDE Special Education Monitoring and Technical Assistance 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 the District's annual determination under the IDEA and subject the District to enforcement action by the CDE. **Given the current circumstances surrounding the COVID-19 pandemic, the 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. *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. *Id.*; see also 34 C.F.R. § 300.507(a) and 71 Fed. Reg. 156, 46607 (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 30th day of September, 2022.



Ashley E. Schubert
State Complaints Officer

APPENDIX

Complaint, pages 1-9

- Exhibit 1: Notice of Meeting, IEP, and BIP
- Exhibit 2: PWN
- Exhibit 3: Email Correspondence

Response, pages 1-8

- Exhibit A: Student A's IEPs
- Exhibit B: Student A's PWNs
- Exhibit C: Student A's Notices of Meeting
- Exhibit D: Student A's Service Logs
- Exhibit E: Documentation regarding Compensatory Services for Student A
- Exhibit F: Blank
- Exhibit G: District Policies and Procedures
- Exhibit H: Email Correspondence with Guardian
- Exhibit I: List of Relevant District Staff
- Exhibit J: Verification of Delivery of Response to Guardian
- Exhibit K: List of Students in MI Classroom
- Exhibit L: Students' IEPs
- Exhibit M: Progress Reports for Students
- Exhibit N: Compensatory Services Tracker for Students

Reply, pages 1-6

- Exhibit 4: Data regarding School's Students
- Exhibit 5: Email Correspondence

Telephone Interviews

- Assistant Principal: September 7, 2022
- Guardian: September 15, 2022
- Special Education Instructional Specialist: September 7, 2022
- Special Education Team Lead: September 8, 2022