

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

State-Level Complaint 2023:611
Jefferson County R-1

DECISION

INTRODUCTION

On November 21, 2023, the Parents (“Parents”) of two students (“Student A” and “Student B”) identified as children with disabilities under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Jefferson County R-1, Jeffco Public Schools (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified three 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.

After reviewing District’s Response, on January 5, 2024, the SCO determined that it was necessary to request additional records to resolve the Complaint. These additional records were provided to the SCO on January 17, 2024. To fulfill the Colorado Department of Education’s (“CDE”) duty to conduct a thorough investigation, the SCO extended the 60-day investigation due to exceptional circumstances, consistent with 34 C.F.R. § 300.152(b)(1).²

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. § 300.153(c), 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 November 21, 2022 to the present for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

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

² See, *Letter to Reilly*, 64 IDELR 219 (OSEP 2014) (noting that it is the state’s responsibility to gather evidence and make a determination in the State Complaint process).

SUMMARY OF COMPLAINT ALLEGATIONS

Whether District denied Students A and B a Free Appropriate Public Education (“FAPE”) because District:

1. Failed to implement Student A’s IEP, from August 2023 to present, in violation of 34 C.F.R. § 300.323, specifically by:
 - a. Failing to make Student A’s IEP accessible to the teachers and service providers responsible for its implementation;
 - b. Failing to provide Student A with the one-to-one adult support required by his IEP; and
 - c. Failing to provide Student A with testing in a one-to-one environment and frequent breaks, as required by his IEP.
2. Failed to implement Student B’s IEP, from August 2023 to present, specifically by:
 - a. Failing to make Student B’s IEP accessible to the teachers and service providers responsible for its implementation; and
 - b. Failing to ensure that Student B’s special education teacher possessed required certifications and licenses, in violation of 34 C.F.R. §§ 300.156, 300.207, 300.323 and ECEA Rule 3.04.
3. Failed to develop, review and revise an IEP that was tailored to meet Student B’s individualized needs from October 2023 to present, specifically by:
 - a. Failing to convene an appropriate IEP team, including a special education teacher of Student B, in violation of 34 C.F.R. § 300.321(a)(3); and
 - b. Failing to include measurable annual math and reading goals designed to enable Student B to be involved in and make progress in the general education curriculum and meet his academic needs, in violation of 34 C.F.R. § 300.320(a)(2).

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,³ the SCO makes the following FINDINGS:

³ The appendix, attached and incorporated by reference, details the entire Record.

A. Background

1. Parents filed this Complaint on behalf of Student A and Student B, who are siblings. *Interview with Parents.*
2. Student A is 15 years old and, during the 2023-2024 school year, attends ninth grade at a District high school ("School A"). *Response*, p. 2. He is identified as a child with an autism spectrum disorder ("ASD"), other health impairment ("OHI"), and speech or language impairment ("SLI"). *Exhibit A*, p. 3.
3. Student A is sweet and loves Godzilla and Spiderman. *Interviews with Parents, Student A's special education teacher and case manager ("Case Manager"), and his geography teacher ("Geography Teacher")*. He is a willing participant in classes and always willing to complete assignments. *Interviews with Case Manager, Geography Teacher, and Student A's science teacher ("Science Teacher")*. However, he has difficulty with focus and work completion and struggles to access grade-level texts. *Id.*
4. Student B is 11 years old and, during the 2023-2024 school year, attends sixth grade at a District middle school ("School B"). *Response*, p. 4. He is identified as a child with multiple disabilities, including ASD, OHI, SLI and an intellectual disability ("ID"). *Exhibit H*, p. 1.
5. Student B is fun and sweet and loves vehicles, especially construction vehicles, as well as music. *Interviews with Parents, Parents' educational consultant ("Advocate"), Student B's speech and language pathologist ("SLP") and his school social worker ("Social Worker")*. He has very limited functional skills, including communication, communicating primarily through repeated phrases. *Id.*

B. Student A's Need for Dedicated Support

6. When Student A enrolled at his prior middle school ("Middle School A") he had been learning online for two years. *Exhibit B*, p. 1. For elementary school, he attended a District school with programming for students with ASD. *Id.* However, no such middle school was available. *Id.*
7. Student A required redirection to stay focused on tasks, especially while working independently. *Exhibit B*, pp. 10-11, 24. If he was unsure about how to complete an assignment and did not have direct adult support, he tended to "make rushed guesses." *Id.* at p. 11. However, he could accomplish "a lot" when tasks were broken down, with scaffolding and adult support. *Id.* at p. 12.
8. Student A is "significantly behind his same-aged peers in reading, writing, comprehension and math skills," scoring consistently at or below the second percentile on all subtests, in the very low range. *Id.* at pp. 6-8.

9. After an incident on a field trip in the spring, Parents believe Student A needs dedicated adult support to ensure he does not eat something to which he is allergic. *Interview with Parents*. They are also concerned about his ability to navigate between classes because he has called them unsure of what to do in various situations including when witnessing a fight or finding money on the ground. *Id.*

C. Student A's April IEP

10. An IEP team at Middle School A met to develop an updated IEP for Student A in April 2023 (“April IEP”). *Exhibit A*, pp. 3-4.
11. At that time, Student A was participating in general education science and social studies classes and co-taught math and English classes with the “assistance of a dedicated adult support professional.” *Id.* at p. 7. General education teachers noted that with the dedicated support, Student A could stay focused on tasks. *Id.* His performance was “greatly improved” with scaffolding and chunking of assignments as compared to when he was working independently. *Id.* Student A was much less likely to be off task with direct support and he was easily redirected. *Id.*
12. With that support, Student had met his reading goal and was making progress on his writing goal, achieving 50% accuracy on the specified rubric. *Id.* However, Student A was making only inconsistent progress on his math goal. *Id.*
13. Specifically relevant here, because of his disability, Student A struggled with comprehending lessons and understanding and following directions as well as organizing and planning for larger projects. *Id.* at p. 8. However, his “academic challenges [were] reduced and participation [was] increased when he [was] provided with direct adult support from a learning specialist or paraprofessional and numerous specific accommodations.” *Id.*
14. Student A has a health plan to address food allergies. *Id.* at p. 9.
15. The April IEP contains seven goals, including one reading, one writing and one math goal. *Id.* at pp. 9-12.
16. For reading, from an unspecified baseline, Student A would analyze information presented within ability level text to “identify the author’s purpose and supporting details” with 75% accuracy. *Id.* at p. 11.
17. Student A’s writing goal also lacked a clear baseline. *Id.* at p. 12. The goal was for him to write a five to eight sentence paragraph “improving his writing conventions and ability to cite evidence” to an average of 80% using a specified rubric. *Id.*

18. For math, from another unspecified baseline, Student A would identify the correct expression and operation and solve five (5) word problems with an average of 80% accuracy. *Id.*
19. The April IEP contains 26 accommodations including outlines for, and chunking of, assignments, auditory presentation of materials and instructions, extended time and frequent breaks for assessments, frequent check-ins during class for understanding and task completion and 1:1 testing. *Id.* at p. 13.
20. The April IEP included services to support Student A while enrolled in an ASD center program where he would have “integrated visual supports/schedules, daily social skills instruction, and functional communication instruction.” *Id.* at p. 16. Student A would “receive dedicated adult support during his entire school day, in all core (science, social studies, ELA, math) and elective classes.” *Id.*
21. Student A’s services outside the general education setting would include:
 - 120 minutes per month (“MPM”) of direct instruction from an SLP to address language and communication goals;
 - 120 MPM of direct instruction from a mental health provider to address social and emotional goals; and
 - 200 minutes per day (“MPD”) of direct instruction from a special education teacher to support “core instruction within the center program” and address Student A’s academic goals.

Id. at pp. 16-17.

22. As such, Student A’s least restrictive environment (“LRE”) was general education 40-79% of the time. *Id.* at pp. 18-19.
23. According to the embedded prior written notice (“PWN”) the IEP team considered reducing the dedicated adult support but decided not to because Student A had “shown increased engagement and progress within the general education environment with dedicated adult support.” *Id.* at p. 19. They considered his adjustment back from remote learning, the appropriateness of his current services and delivery model and his upcoming transition to high school. *Id.*

D. District’s Efforts to Hire Paraprofessionals

24. When District has paraprofessional vacancies, staff is always recruiting, and the position remains posted. *Interview with one of District’s directors of special education (“Director”).*

25. District special education administrators review all vacancies, considering the needs of both the specific students and the programs to determine how urgent the need is. *Id.* For urgent needs, like students who cannot come to school without the support or programs that are short of several paraprofessionals, they look to contract agencies to fill vacancies. *Id.* Center-based programs are often a priority for contractors. *Id.* The ASD program at School A currently has two contracted registered behavior technicians acting as paraprofessionals. *Interview with Case Manager.*
26. If they cannot fill all the vacancies, an assistant director of special education meets with building administrators and special education staff to do resource mapping. *Interview with Director.* Together they closely consider the needs of the students as well as the resources available in the building, like paraprofessionals or other staff who might be able to help in specific settings. *Id.*
27. Although the job has remained posted and they have promoted the opening at job fairs, District has been unable to hire a dedicated paraprofessional for Student A. *Interviews with Director and Case Manager.*

E. Implementation of Student A's Dedicated Support

28. In the absence of a dedicated support person for Student A, Case Manager worked with the assigned assistant director of special education ("Assistant Director") to figure out how they could use existing staff to provide support for Student A in his general education classes. *Interview with Assistant Director.* Together they built a detailed schedule ensuring support for Student A. *Id.; Exhibit R-1, pp. 6, 44.*
29. Student A has not had a 1:1 paraprofessional throughout the 2023-2024 school year. *Interview with Case Manager.* As part of the ASD program, Student A has a visual schedule, including scheduled brain breaks for each class. *Interview with Case Manager.* As needed, students also have point sheets to track behaviors. *Id.*
30. During Student A's first period gym class, there were 18 students supported by a general education teacher and five paraprofessionals, and Case Manager and another special education teacher were frequently present. *Interview with Case Manager; Exhibit R-1, p. 44.*
31. Student A's second period general education biology class had one paraprofessional supporting three students, including Student A. *Id.* With the support of this paraprofessional, Student A has willingly participated in class and been able to access the material. *Interview with Science Teacher.* Between Science Teacher and a paraprofessional, Student is getting all of his accommodations including text to speech, chunked assignments, frequent check-ins and extended time as needed. *Id.*

32. Other than his scheduled brain breaks, he is almost always on task. *Id.* When he is not, he is easily redirected by Science Teacher or the paraprofessional. *Id.* He can complete all of his assigned work and the paraprofessional helps ensure it is submitted. *Id.*
33. For third period, Student A is enrolled in a co-taught English class with both a general education teacher and a special education teacher. *Interview with Case Manager; Exhibit R-1, p. 44.* In addition, Case Manager is also present throughout the class to support the four students, including Student A, from the ASD program. *Id.* With this support and his accommodations, Student A is on task about 85% of the time and able to complete all his assignments. *Interview with Case Manager.*
34. During independent work time, Case Manager pulls her four students to reteach the lesson, break down assignments and help them complete work. *Id.* Student A's assignments are generally shortened while still ensuring he understands the main concepts. *Id.*
35. Student A is enrolled in a special education math class with Case Manager and five other students for fourth period. *Interview with Case Manager; Exhibit R-1, p. 44.* Students start the class working on ability level problems through a computer program, while Case Manager pulls small groups for direct instruction. *Interview with Case Manager.* This is followed by whole group instruction and then more small group work. *Id.* Student is on task about 85 percent of the time, which is average, and he completes all of his assignments. *Id.*
36. Student's fifth period was a general education geography class with one paraprofessional supporting four students, including Student A, from the ASD program. *Interview with Case Manager; Exhibit R-1, p. 44.* Together, Geography Teacher and the paraprofessional implement all Student's accommodations, including ability level texts, frontloading vocabulary, chunking assignments and frequent check ins. *Interview with Geography Teacher.*
37. With this support, Student A is on task as much or more than his general education peers. *Id.* The few times he got off task on his computer, he was easily redirected back to his work. *Id.* With this support, he has been able to access and complete the material. *Id.*
38. For sixth period, Student A is in a life skills class with Case Manager and five other students from the ASD program. *Interview with Case Manager; Exhibit R-1, p. 44.* This is a heavily structured and interactive class where they focus on social skills like making friends and responding to constructive criticism. *Interview with Case Manager.* Student A is on task 90% of the time. *Id.*
39. Student A's final class is a seventh period study skills class with Case Manager and nine other students from the ASD program. *Interview with Case Manager; Exhibit R-1, p. 44.* Case Manager and two paraprofessionals provide the students with individualized support including pre-teaching and re-teaching content as needed. *Interview with Case Manager.*

40. Student A does not get direct support during lunch, but he sits at a peanut free table and a paraprofessional from another program is always present to help keep track of student allergies. *Id.* He does not need any support during passing periods, as he is able to independently navigate to his classes. *Id.*
41. A paraprofessional quit on September 22, 2023. *Response*, p. 4. District was unable to hire a replacement until October 16, 2023. *Id.* For those three weeks, Student A did not have consistent support in his science or geography class, which impacted his engagement. *Id.*
42. During that time, Student A raised his hand more often in geography and asked more questions. *Interview with Geography Teacher.* Geography Teacher tried to sit with the students from the ASD program during any independent work time. *Id.* With her support, Student continued to complete his work, but it was not sustainable for Geography Teacher to spend so much time with just a few students. *Id.*
43. During that same period, Student A was working on a science lab with the support of the paraprofessional. *Interview with Science Teacher.* After that person left, Student A never turned in the assignment, and Science Teacher is not sure what happened. *Id.* Student A received a zero on that assignment. *Id.*
44. During the rest of that three-week period, the science class was working on a group project. *Id.* Student A and the other students from the ASD program were intentionally paired with a strong and patient student. *Id.* The school librarian was also present throughout those class periods to help with the project. *Id.* Between Science Teacher, the librarian, and the peer, Student A was able to get redirection and support as needed and successfully completed the project. *Id.*

F. Implementation of Student A's Testing Accommodations

45. At the start of each semester, Case Manager sends each of her students' teachers a "snapshot" of their IEPs containing the student's goals, accommodations, and services. *Interview with Case Manager.* On Wednesday, August 23, 2023, she emailed Student A's teachers his snapshot as well as a short description of his needs. *Exhibit R-1*, pp. 7-15. Science Teacher and Geography Teacher both received the snapshot, were aware of Student A's needed accommodations, and were able to describe the supports he received in their classes. *Id; Interviews with Science Teacher and Geography Teacher.*
46. Case Manager coordinates with the program's social worker and SLP to prepare the programs paraprofessionals to support their students. *Interview with Case Manager.* In addition to reviewing IEPs with the paraprofessionals, Case Manager meets with them every one to two weeks to discuss different strategies to support students as well as specific student needs. *Id.*

47. Student A takes tests in a small group with a few other students. *Id.* They test in a separate room with fewer distractions, and they are able to take breaks. *Id.* The paraprofessional or other supporting adult reads any questions and potential answers aloud. *Id.* They are also available to help guide Student A to the appropriate section of his notes during open note tests. *Id.*
48. Geography did not have any tests; students showed their comprehension through projects instead. *Interview with Geography Teacher.*
49. Student A has taken most science tests in a nearby empty room with the paraprofessional and two other students. *Interview with Science Teacher.* The paraprofessional reads the tests aloud and facilitates breaks as needed. *Id.* Science Teacher also accommodates the tests by removing some questions or some of the multiple-choice answers, while still ensuring that he can see if Student A has learned the necessary content. *Id.*
50. The science class took one test when there was no paraprofessional. *Id.* Student A did not get his accommodations for that one test and failed. *Id.* At the end of the semester, Science Teacher determined that it would be most fair to drop that test and lost lab from Student A's grade, since he had not received appropriate accommodations at that time. *Id.* As a result, Student A's grade rose rapidly from a D to a B. *Id.*
51. Ultimately, Student A passed all his classes, including earning an A in his general education geography class. *Exhibit G*, p. 13. Although District issued an updated progress report for Student A on December 31, 2023, determining whether he made progress on his academic goals is not possible, since all three lacked measurable baselines. *Exhibit A*, pp. 11-12; *Exhibit G*, pp. 14-22.

G. Student B's 2022 IEP

52. At the start of the 2023-2024 school year, Student B's IEP was from October 18, 2022 ("2022 IEP"), when he was attending a District elementary school ("Elementary School B"). *Exhibit H*, pp. 17-39. At the time, Student B liked to read books and would use both gestures and words to communicate his wants and needs. *Id.* at p. 19.
53. The 2022 IEP includes a summary of the most recent evaluation of Student B. *Id.* at pp. 19-26. He had great difficulty attending to the cognitive assessment, so the resulting full scale IQ score of 30, below the first percentile, might not fully reflect his capabilities. *Id.* at p. 21. However, it was an accurate representation of his daily functioning. *Id.* at p. 22.
54. Student B demonstrated behaviors consistent with an ASD diagnosis, including difficulties with functional communication, attention to learning tasks, emotional regulation, and relating socially to others. *Id.* These behaviors significantly interfered with his daily functioning, necessitating intensive supports in the school setting. *Id.*

55. At the start of the 2022-2023 school year, Student B was given an augmentative and alternative communication (“AAC”) device to allow him to communicate by pushing buttons, instead of verbally. *Id.* at p. 23. This was a new skill for him, but he was showing great interest in learning. *Id.* He could follow one-step directions but did better with visual supports. *Id.*
56. As a result of his disabilities, Student B’s academic abilities were below his peers, necessitating “small group intensive instruction” to develop core academic skills including literacy and math. *Id.* at p. 27. Rote and echolalic speech “negatively impact[ed] his ability to communicate his wants/needs” and participate in an academic setting. *Id.* He struggled with self-regulation and would benefit from support from an occupational therapist in that area. *Id.* Finally, difficulties with attention and social awareness were negatively impacting his academic and social learning. *Id.*
57. The 2022 IEP includes six goals, on which progress would be reported at the end of each trimester. *Id.* at pp. 28-32. This includes a reading goal to participate in reading activities by demonstrating at least four of the listed five behaviors with one prompt over three consecutive weeks. *Id.* at p. 28. This was a new skill; participation was limited. *Id.*
58. The math goal was for Student B to count to 15 using a touch count system, from a baseline of counting to 10 without using such a system. *Id.* at pp. 29-30. His communication goal was to use total communication—including verbal speech, the AAC device, and gestures—to state a want or need, make a comment, or answer a WH-question using at least a two-word utterance in four out of five opportunities, from a baseline of two out of five. *Id.* at pp. 30-31.
59. The 2022 IEP includes two self-determination goals. *Id.* at pp. 31-32. First, from a baseline of 10 seconds without a prompt, Student B would increase his time on task to at least two minutes with fewer than 3 prompts. *Id.* at p. 31. Second, from a baseline of zero, he would utilize headphones to self-regulate in highly frustrating situations 50% of the time with one prompt. *Id.* at p. 32.
60. The final goal in the 2022 IEP was for Student B to identify and name at least three peers and two staff members in his classroom with 80% accuracy, from a baseline of identifying but not naming one of each. *Id.* at pp. 31-32.
61. The 2022 IEP included 10 accommodations, including a visual schedule, breaks, sensory tools, access to headphones and consistent positive reinforcement. *Id.* at p. 32. Student B would receive instruction based on extended evidence outcomes. *Id.*
62. The 2022 IEP included services from four different providers:

- A Special Education Teacher would provide 300 MPD of direct instruction outside the general education classroom and 30 minutes per week (“MPW”) of consultative services to support growth in Student B’s core curricular skills;
- An SLP would provide 180 MPM of direct instruction outside the general education setting and 30 MPM of indirect consultative services to target functional communication and AAC usage;
- An occupational therapist would provide 120 minutes per year of consultative services to provide equipment and train staff to address sensory self-regulation;
- Finally, a mental health provider would provide 120 MPM of direct instruction outside of general education and 15 MPM of indirect instruction.

Id. at pp. 35-36.

63. Student B’s LRE was general education less than 40% of the time, with Student B spending nearly 83% of his time outside of general education. *Id.* at p. 37. The meeting minutes noted that Student B was talking more at home and getting better at staying with the group at school. *Id.* at p. 39.

H. Staffing in Student B’s Classroom

64. Just before the start of the 2023-2024 school year, School B learned that the SSN teacher would not be returning. *Response*, p. 5; *Exhibit R-2*, p. 1. The classroom included seven students (“Students”), including Student B. *Interview with SLP*.
65. The position was immediately posted, and District’s talent acquisition team was informed that this was the most urgent vacancy in District. *Interviews with Director and Assistant Director*. Unfortunately, there were initially no applicants for the open position. *Interview with Assistant Director*. District tried working with contract agencies to hire a replacement teacher, but the identified candidates never worked out. *Interviews with Director and Assistant Director*.
66. Building administration went through a resource mapping process to identify a coverage plan for the classroom and ultimately proposed relying on SLP and Social Worker because they were familiar with Students and the routines. *Interviews with Director and Assistant Director*. Neither is a licensed special education teacher. *Exhibit 3*, pp. 1-2. Assistant Director, herself a former SSN teacher, was available to support and SLP and Social Worker could and did reach out to the former teacher, who remained a District employee, as needed. *Interviews with Assistant Director, SLP and Social Worker*. SLP and Social Worker developed lessons using the same curriculum implemented in all District SSN programs. *Id.*

67. The SSN Students started the day with two general education electives: adaptive PE and choir. *Interviews with SLP and Social Worker*. Social Worker then taught third period math and sixth period science while SLP taught fourth period English and fifth period social studies. *Id.* They alternated teaching the seventh period reading class. *Id.* All classes were supported by program paraprofessionals. *Id.*
68. This was the schedule from the start of the semester. *Id.* When other educators were present, like substitute teachers, building special education teacher (“Learning Specialist”), the dean of students or Assistant Director, they supported Students like an additional paraprofessional while SLP or Social Worker continued to develop and implement the lessons. *Id.*
69. At the start of the year, Learning Specialist was responsible for sharing students’ IEPs with any relevant teachers in the building. *Interview with Social Worker*. Learning Specialist met with all of the teachers before the start of the year to provide IEP snapshots and go over any questions that came up. *Interview with Learning Specialist*. SLP and Social Worker shared information with the program paraprofessionals and gave them tips and information on how to support Students, including Student B. *Interviews with Social Worker and SLP*.
70. District was able to hire a new teacher (“SSN Teacher”) to start on November 13, 2023. *Response*, p. 6; *Exhibit R-2*, p. 84. SSN Teacher has an interim authorization with an alternative interim special education generalist endorsement. *Exhibit M*, p. 1. The semester started 13 weeks earlier and ended four weeks later. *Exhibit P*.
71. SSN Teacher has this interim authorization as part of a training cohort at a local university. *Interview with Director*. The cohort meets regularly and gets ongoing training on how to teach. *Id.* Assistant directors of special education prioritize supporting new teachers, and District pairs them with mentors. *Id.* SSN Teacher has been partnered with a very experienced team at a nearby middle school, and she has participated in multiple District trainings on lesson planning and addressing the needs of SSN students. *Id.*

I. Identification as a Gestalt Language Processor

72. While working with Student B, SLP identified that he was a Gestalt language processor (“GLP”) as opposed to an analytic language processor. *Response*, p. 5; *Exhibit R-2*, pp. 22-25. Analytic language processors learn sounds, then words and then sentences to learn language. *Interview with SLP*; *Exhibit R-2*, p. 23. A GLP initially learns language in sentences or phrases which must then be broken down and paired in different ways to learn language. *Id.* This is also sometimes referred to as natural language acquisition. *Id.*
73. Student B was still an early stage GLP. *Interview with SLP*. To help him make progress, SLP needed to go back to the beginning and give him the space and time to understand language. *Id.* She and the team at School B accomplished this by reducing the expectations on Student B and demonstrating that they were understanding his language. *Id.* She also shared

information with paraprofessionals, general education teachers and any staff he might encounter about how to better communicate with Student B. *Id.*

74. Working with SLP and Social Worker, Student B demonstrated new words and an increasing ability to communicate his needs. *Exhibit V*, pp. 1-4. Working together, Parents and SLP also identified several phrases Student B was using to communicate various things. *Id.* at pp. 5-8.
75. Traditional approaches to teaching reading, including phonics, are similar to the analytical way most people learn language. *Interview with CDE Content Specialist 1*. This suggests that GLPs might have a harder time with traditional academics. *Id.* However, there is no research that suggests that GLPs cannot learn to read through traditional methodologies. *Id.*
76. Further, the research cautions against labeling a student as either a GLP or an analytical language processor. *Id.* Both approaches have merit and individual students may benefit from both in different ways. *Id.* While Student B may have benefited from natural language acquisition, that does not mean he could not benefit from more traditional instruction. *Id.* This is consistent with Student B having made progress with functional communication at both Elementary School B and School B. *Id.*

J. Student B's Progress Under the 2022 IEP

77. While working on his reading goal at Elementary School B, Student B increased his engagement with reading and seemed to be demonstrating one or two of the listed skills, including answering questions, based on the descriptions. *Exhibit O*, pp. 3-4. During his first couple of months at School B, he was not making much progress, demonstrating two of the listed skills. *Exhibit H*, p. 3. Interestingly, he could now hold a book and flip the pages but was struggling to respond to questions. *Id.*; *Exhibit V*, p. 3.
78. Contrary to what is reported, he did not actually make progress on his math goal of counting to 15 at Elementary School B as he needed visual and tactile prompting and breaks and was not able to count past 10. *Exhibit O*, pp. 4-5. It is unclear how he did with this skill at School B since the progress update does not state how high he was counting or how many numbers he was identifying with his AAC device. *Exhibit H*, p. 4.
79. Although they did not identify Student B as a GLP, Elementary School B was also working on increasing his functional communication. *Exhibit O*, pp. 6, 7. During his time there, Student B increased his use of the AAC device and decreased his reliance on “echolalic and rote phrases.” *Id.* p. 7. He also made progress on all three communication objectives. *Id.* pp. 6-8.
80. SLP did not work on Student B’s prior communication goal after identifying him as a GLP and intended to develop new goals “focused on increasing self-generated, flexible language.” *Exhibit H*, p. 4.

81. On his goal to increase time on task, Student B made progress from October 2022 through February 2023, increasing his time on task to five minutes with no more than two adult prompts. *Exhibit O*, p. 8. From February to May 2023, he did not make any additional progress. *Id.* After starting at School B, Student B could only engage in tasks for one minute, the same place he had been in November 2022. *Id.; Exhibit H*, p. 5.
82. Student B also made progress on his social awareness goal at Elementary School B, accurately identifying all the adults in his classroom, three of the five related service providers, and 10 of the 12 peers in his classroom. *Exhibit O*, p. 9. At School B, he could only “name some choice peers.” *Exhibit H*, p. 5. No number is specified and nothing is reported about his ability to identify staff. *Id.*
83. Student B’s final goal was to increase self-regulation through the use of headphones. *Exhibit O*, pp. 9-10. His abilities in this area remained stagnant at School B, with Student B generally opting to put the headphones on his waist instead of his head. *Exhibit H*, p. 5. Social Worker intended to develop a new self-regulation goal using his gestalts, and the team was introducing alternative sensory inputs to help with self-regulation. *Id; Interview with Social Worker*.

K. Development of Student B’s 2023 IEP

84. SLP and Social Worker were responsible for drafting an updated IEP for Student B. *Interviews with Social Worker and SLP*. Learning Specialist consulted on the development of academic goals, which he just copied from the 2022 IEP. *Interview with Learning Specialist*.
85. SLP sent Parents a draft IEP on October 13, 2023. *Exhibit R-2*, p. 28-40. The draft IEP does not include updates on Student B’s progress on his prior academic or communication goals. *Id.* at pp. 31-33. It also includes only two partial goals: a communication goal and a self-regulation goal. *Id.* at pp. 34-35.
86. On October 16, 2023, one Parent, SLP, Social Worker, Assistant Director, an occupational therapist, Learning Specialist and Student B’s gym teacher attended an in-person IEP team meeting for Student B. *Exhibit K*, p. 1; *Interview with Assistant Director*. Advocate attended the meeting virtually. *Interview with Parents and Advocate*.
87. Learning Specialist had to leave before the meeting ended to support another student. *Interviews with Learning Specialist and Parent*. He left just as the team was getting to goals, so he was not present to discuss the proposed academic goals. *Id.*
88. On October 19, 2023, SLP sent Parents and Advocate an updated draft of Student B’s IEP. *Exhibit R-2*, pp. 43-59. The updated draft includes a new reading goal considering that Student B is a GLP and repeats the 2022 math goal. *Id.* at p. 52-53. There is still no social awareness or task engagement goal. *Id.* at p. 50-53.

89. On October 24, 2023, Advocate and Parents sent back feedback on the updated draft. *Id.* at p. 63. Advocate and SLP then exchanged several emails about Parents' concerns including the academic goals and the lack of a task engagement goal. *Id.* at pp. 59-63.
90. Parents requested that a task engagement goal be added back to the IEP because lack of engagement remained a significant need for Student B. *Id.* at p. 66. SLP indicated that the reading goal would measure engagement on a task but declined to add a more general goal because task engagement was not something they "want to target at this stage" because Student B was not yet a stage four GLP. *Id.* Rather than targeting engagement, they would focus on increasing interest. *Id.* Advocate was concerned about using reading to target engagement since reading had historically been a preferred activity. *Id.* at p. 62.
91. The evidence does not support a need to back off on academic expectations or completely change the way a student is taught academics when a student is first identified as a GLP. *Interview with CDE Content Specialist 1.* While it might make sense to briefly modify expectations when a student is making a big jump in communication, it is not appropriate to back off for an entire academic year. *Id.* There are ways to continue properly modeling natural language acquisition while maintaining expectations, for instance asking the student "I wonder where the cow is" instead of "show me the cow." *Id.*
92. Parents also requested that manipulatives be added to the math goal and that objectives be included to show how the goal would be met. *Exhibit R-2*, p. 66. SLP agreed to consult with Learning Specialist about how to modify the goal but reiterated that "[a]cademic goals are so tricky with GLPs" like Student B because they are not yet able to answer direct academic questions. *Id.* Ultimately, SLP and Learning Specialist added objectives to the math goal. *Id.* at p. 61.

L. Student B's 2023 IEP

93. SLP sent Parents a final draft of Student B's new IEP ("2023 IEP") on October 26, 2023. *Id.* at p. 59. Thus, the 2022 IEP was implemented for 10.5 weeks or 48 school days. *Exhibit P.* The 2023 IEP was implemented for 11 school days, or about two weeks, before SSN Teacher started. *Id.*
94. Unlike the initial draft, the 2023 IEP included progress updates on Student B's prior goals, which have been described previously, in section J above. *Exhibit H*, pp. 3-5. An update from an occupational therapist indicated that Student B continues to benefit from indirect services to equip his providers with tools and strategies. *Id.* at p. 5.
95. According to the 2023 IEP, Student B had difficulty attending to tasks, communicating effectively and maintaining sensory regulation, impacting him throughout his school day. *Id.* at p. 6. Because he is a GLP, those talking with Student B should minimize questioning and

“focus on using declarative language” instead. *Id.* at p. 7. He also continued to use an AAC device to develop his communication skills. *Id.*

96. The 2023 IEP includes four goals, with progress monitoring to be completed every six to eight weeks, and progress reports to be sent home once each semester. *Id.* at pp. 7-10.
97. His communication goal focused on increasing self-generated language by using five new gestalts by January 2024 and five semi-unique/combined gestalts by October 2024. *Id.* at p. 7-8. The social emotional goal was to increase self-regulation by naming an emotion in three out of five opportunities and requesting a coping strategy like the sensory room in three out of five opportunities. *Id.* at pp. 8-9.
98. From a baseline of zero, the math goal was for Student B to use a touch count system to count to fifteen and identify the numbers one through fifteen in three out of five trials. *Id.* at p. 9. These two skills are then separated into two objectives. *Id.*
99. Finally, the reading goal was for Student B to stay attentive to a short story by remaining in his “learning zone” for 60% of the book, up from 10%, and expressing one or more shared joy or book related gestalts. *Id.* at p. 10. Again, these two skills are separated into two objectives with only one baseline. *Id.*
100. The 2023 IEP includes all 10 accommodations from the 2022 IEP as well as six new accommodations related to natural language acquisition, including language modeling and acknowledging his phrases as a form of communication. *Id.* at pp. 10, 32. Student B continued to require instruction based on extended evidence outcomes. *Id.*
101. The 2023 IEP included services from four different providers:
 - A Special Education Teacher would provide 1,350 MPW of direct instruction outside the general education classroom and 30 MPW of direct instruction inside the general education classroom. No consultative services are included;
 - An SLP would provide 180 MPM of direct instruction outside the general education setting and 30 MPM of indirect consultative services to target functional communication;
 - An occupational therapist would provide 120 minutes per year of consultative services to provide equipment and train staff to address sensory self-regulation;
 - Finally, a mental health provider would provide 120 MPM of direct instruction outside of general education and 15 MPM of indirect instruction.

Id. at pp. 13-14.

102. Student B's LRE remained general education less than 40% of the time, with Student B spending almost 80% of his time outside of general education. *Id.* at p. 15. The embedded PWN notes that the goals were discussed with Parents and the team declined to add an engagement goal because it was "recommended to decrease 'pressure' and expectation of direct questioning and task engagement/completion" while in the early stages of gestalt language processing. *Id.* Nothing is included about the discussion that took place during the IEP team meeting. *Id.*

103. After the 2023 IEP was finalized, SLP shared an updated snapshot with Student B's gym and choir teachers. *Interviews with SLP and Social Worker.*

M. Student B's Progress under the 2023 IEP

104. At the end of the semester, on December 31, 2023, District completed a progress report for Student B. *Exhibit O*, pp. 12-17. After the development of the 2023 IEP, Student B made progress on both objectives from his communication goal, utilizing one new gestalt and mixing it with other words to generate four semi-unique utterances. *Id.* at pp. 12-13. Student B also made progress on his social emotional goal: naming one emotion and requesting coping strategies to self-regulate after adult modeling. *Id.* at pp. 13-14.

105. He made insufficient progress on his math goal as he could count from memory but did not yet have any real understanding of numbers or quantities. *Id.* at p. 15. Student B had already met his reading goal in two months and was attending to books 100% of the time, because reading was a preferred activity for him. *Id.* at pp. 15-16.

106. After this Complaint was filed, two District employees ("Expert 1" and "Expert 2") with extensive experience serving students with similar needs to Student B, including ASD and an ID, reviewed the 2023 IEP to consider the appropriateness of the goals. *Response*, p. 10; *Exhibit W*, p. 1. These individuals identified that the reading and math goals required clarification, via short-term objectives, to ensure appropriate progress monitoring. *Id.* They also identified a need for writing goals. *Id.* These teachers did not specifically reflect on Parents' desire for a task engagement goal. *Id.*

107. Based on this internal review, District has proposed amending the 2023 IEP to separate the math and reading goals into two goals each with short-term objectives. *Exhibit W*, pp. 1-3, 12-14. They also proposed two writing goals with short-term objectives. *Id.* at pp. 14-16. Parents have requested to postpone any amendment conversations until the resolution of this investigation. *Interview with Parents.*

N. Impact of Teacher Absence on Other Students

108. No objective academic progress data was reported for two of the Students in the program. *Exhibit Y*, pp. 21, 109, 110; *Exhibit Z*, pp. 14-16, 71-74. Another made no progress in two

months on the academic goals developed by District. *Exhibit Z*, pp. 81-84. Limited data was reported for two additional Students, both of whom regressed on at least one goal. *Id.* pp. 54-56, 99-101.

109. During the period where School B's SSN program did not have a special education teacher, SLP and Social Worker developed IEPs for four other Students, besides Student B. *Interviews with SLP and Social Worker; Exhibit Y*, pp. 17, 70, 107, 141. New academic goals were written for one Student whose prior IEP had none. *Exhibit Y*, pp. 132-134, 148-149. The academic goals for the other three Students were copied from their prior IEPs, with the same baselines and goals. *Id.* at pp. 6-9, 26-29, 80-82, 96-98, 113-116; *Exhibit Z*, pp. 42-46.
110. With this Complaint pending, Director, Expert 2 and SSN Teacher met to review the Students' IEPs and consider updates to their academic goals. *Response*, p. 16. This included proposing additional adjustments to Student B's IEP, which were shared with Parents on January 19, 2024. *Exhibit CC*.
111. They also discussed appropriate compensatory services which would allow the Students to meet their updated goals before their next annual review. *Response*, p. 16. District has reached out to all seven families to discuss compensatory services. Based on their goals and needs, District offered a six-week summer program of intensive math and literacy instruction to four Students ("Group A"), including Student B. *Interview with Director*. The summer program will be taught by a licensed special education teacher with the support of sufficient paraprofessionals to meet the needs of Students, including any 1:1 paraprofessionals required by Students' IEPs. *Id.* Based on their unique mobility needs, in consultation with their parents, District has agreed to fund enrollment in a specialized six-week summer program for three additional Students ("Group B"). *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District failed to fully implement the 1:1 supports in Student A's April IEP, in violation 34 C.F.R. § 300.323. However, this failure was not material and did not result in a denial of FAPE.

Parents' concern is that Student A did not get 1:1 adult support throughout his time at School A and that, as a result, his testing accommodations were not implemented.

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." *Endrew 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.* at § 300.323(c)(2). The IDEA does not excuse a district's failure to implement an IEP based on staff shortages. *E.g., El Paso County School District 20*, 122 LRP 39732 (SEA CO 6/5/22) (finding an ongoing obligation to provide FAPE pursuant to a student's IEP during a staffing shortage); *See also 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).

A. Teacher Awareness of the April IEP

To satisfy its implementation obligations, 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." 34 C.F.R. § 300.323(d).

In this case, Case Manager sent Student A's teachers a snapshot of his IEP, along with a narrative description of his needs at the start of the year. (FF # 45.) The Geography Teacher and the Science Teacher were aware of his accommodations. (*Id.*) Case Manager also reviews students' IEPs with the paraprofessionals in her program and meets with them two to four times per month to review how to best support the students. (FF # 46.) Nothing in the Record suggests that providers were unaware of Student A's needs. Thus, the SCO finds and concludes that District complied with the requirements of 34 C.F.R. § 300.323(d).

B. Implementation of Paraprofessional Support

The April IEP includes dedicated adult support for Student A in all his core and elective classes. (FF # 20.) It does not indicate that he will have that level of support during lunch or passing periods. (*Id.*) Unfortunately, District has been unable to hire a dedicated paraprofessional for Student A since the start of the 2023-2024 school year. (FF #s 27, 29.) While District was looking for a dedicated paraprofessional for Student A, Case Manager and Assistant Director developed a schedule to ensure he would have adult support. (FF # 28.) In five of Student A's classes, including his general education courses, he is supported by a paraprofessional or special education teacher who is also supporting two to three other students. (FF #s 30, 31, 33, 36, 39.) In two special education classes, Case Manager teaches six students total, including Student A, without the support of a paraprofessional. (FF #s 35, 38.)

However, Student A has not had a 1:1 paraprofessional at any point this year. (FF # 29.) In addition, after a paraprofessional quit on September 22, 2023, Student A did not receive any paraprofessional support in his science or geography classes for three weeks. (FF # 41.)

Because Student A has not had dedicated adult support in his classes, the SCO finds and concludes that District did not fully implement the supports required by the April IEP, in violation of 34 C.F.R. § 300.323.

C. Implementation of Testing Accommodations

In this case, the April IEP included two specific accommodations for assessments: frequent breaks and 1:1 testing. (FF # 19.) Without a dedicated paraprofessional, Student A has taken his tests in a small group setting, where he is able to take breaks. (FF #s 47, 49.) Student A did not get accommodations on one test in his science class, which he failed. (FF # 50.) Science Teacher later dropped this test from his grade, because of the lack of accommodations. (*Id.*)

Because Student A has taken his exams in a small group setting instead of 1:1, the SCO finds and concludes that District did not fully implement the accommodations required by his April IEP, in violation of 34 C.F.R. § 300.323.

D. 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, instead of dedicated adult support, for most of the semester, Student A received support from an adult who was also supporting two to three other students or from a special education teacher in a small class. (FF #s 30, 31, 33, 35, 36, 38, 39.) In addition to the shared support, as part of the ASD program, he had a visual schedule with built in brain breaks for each class. (FF #

29.) With these supports, he participated in classes, was generally on task and completed all his assigned work. (FF #s 31-38.) While Student A did not test in a 1:1 environment, he still got breaks in the small group where a paraprofessional was able to read questions and answers aloud and help him utilize his notes. (FF #s 47, 49.) Ultimately, with the support provided, Student A passed all his classes. (FF # 51.)

For three weeks, Student A did not have paraprofessional support in science or geography, which did impact his engagement. (FF # 41.) However, during that time, Geography Teacher provided Student A and the other students in the program with additional support and Student A continued to engage in lessons and complete his work. (FF # 42.) Without support, he failed one science test and one lab, both of which were dropped from his final grade. (FF #s 43, 50.) With the additional support of a librarian and a strong peer influence, he successfully completed a third science project. (FF # 44.)

Because Student A was engaged in and passed his classes with the support available, the SCO finds that the provision of small group support instead of 1:1 support did not constitute a material failure to implement, and no denial of FAPE occurred.

Conclusion to Allegation No. 2: District failed to implement the direct and indirect services from a special education teacher in Student B's 2022 and 2023 IEPs, in violation of 34 C.F.R. § 300.323. This violation was a material failure to implement, resulting in a denial of FAPE.

Parents' concern is that Student B did not receive direct instruction from a special education teacher for several months.

A. Teacher Awareness of the 2022 and 2023 IEPs

To satisfy its implementation 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." 34 C.F.R. § 300.323(d).

Here, Learning Specialist shared information about the 2022 IEP with Student B's providers and SLP shared information about the 2023 IEP. (FF #s 69, 103.) SLP and Social Worker also worked together to train the program paraprofessionals and help them support students. (FF # 69.) Nothing in the Record suggests that Student B's providers were unaware of their responsibilities under either the 2022 or 2023 IEP. Thus, the SCO finds and concludes that District complied with the requirements of 34 C.F.R. § 300.323(d).

B. Implementation of Special Education Instruction

In this case, School B's SSN classroom did not have a special education teacher from the start of the year until November 13, 2023. (FF #s 64, 65, 70.) Instead, Social Worker and SLP, who are not

licensed teachers, developed the lessons and provided direct instruction for the class. (FF #s 66, 67.) The SCO recognizes the difficulties districts currently face finding and hiring licensed professionals, as well the steps District took to fill this position. (FF # 65.) Nevertheless, this coverage plan lasted for 13 weeks before District hired SSN Teacher. (FF # 70.)

From the start of the year until October 26, 2023, Student B's 2022 IEP included 300 MPD of direct instruction from a special education teacher outside of general education, as well as 30 MPW of indirect consultation to support Student B's academic growth. (FF #s 62, 93.) This IEP was implemented for 10.5 weeks or 48 days without a special education teacher. (FF # 93.) Thus, the SCO finds that District failed to implement 14,400 minutes of direct instruction and 315 minutes of indirect instruction from a special education teacher under the 2022 IEP.

Under the 2023 IEP, Student B should have received 1,350 MPW of direct instruction outside the general education setting and 30 MPW of direct instruction inside the general education classroom from a special education teacher. (FF # 101.) The 2023 IEP was implemented about two weeks before SSN Teacher started. (FF # 93.) Thus, the SCO finds that District failed to implement 2,700 minutes of direct instruction outside of general education and 60 minutes of direct instruction inside general education under the 2023 IEP.

Candidates with a bachelor's degree who are enrolled in an approved alternative teacher program can be granted interim teaching licenses by applying through CDE. See *CDE Alternative Teacher Candidates*, found at: <http://www.cde.state.co.us/cdeprof/altteacheroverview>. SSN Teacher possesses such interim authorization with a special education generalist endorsement. (FF #s 70, 71.) Thus, since November 13, 2023, the SCO finds that District has implemented Student B's special education instruction.

Because District failed to implement 17,100 minutes of direct instruction outside of general education, 60 minutes of direct instruction inside of general education and 315 minutes of indirect instruction from a special education teacher, the SCO finds and concludes that District failed to implement all of the services in Student B's 2022 and 2023 IEP, 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. 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, Student B spent about 80% of his day outside of general education. (FF #s 63, 102.) Most of that time, or five hours a day, should have included direct instruction from a special education teacher. (FF #s 62, 101.) For 13 weeks, or three months, in a nine-month school year, Student B received no instruction from a special education teacher. (FF #s 64-70.) The SCO finds that the failure to provide the majority of Student B’s services for one third of the year is more than a minor deviation in his services.

The SCO recognizes that Student B may have benefitted from additional time with SLP, who identified him as a GLP. (FF # 72.) During this time, he demonstrated an increased vocabulary and greater ability to communicate his needs. (FF # 74.) However, he was also making progress on his functional communication at Elementary School B, working with a speech therapist for the agreed upon number of hours. (FF # 79.) However, his ability to focus on a task decreased and his math progress was not monitored. (FF #s 78, 81.) SLP also proposed modifying the academic expectations for Student B as a stage 1 GLP (FF #s 73, 90, 92.) The SCO, in consultation with CDE Content Specialist 1, finds that this approach is not supported by the evidence. (FF # 91.)

Overall, the SCO finds that the failure to provide Student B with direct and indirect special education services for three months constituted a material failure to implement the 2022 and 2023 IEPs, resulting in a denial of FAPE.

Conclusion to Allegation No. 3: District failed to convene an appropriate IEP team for Student B and failed to develop appropriate goals to meet his academic needs, in violation of 34 C.F.R. §§ 300.321(a)(3) and 300.320(a)(2). These violations resulted in a denial of FAPE.

Parents’ concern is that District did not develop an IEP that was appropriately tailored to meet Student B’s academic needs.

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

Rowley, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with the IDEA's procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Id.* Taken together, these two prongs assess whether an IEP is procedurally and substantively sound.

A. IEP Development Process

Parents are specifically concerned that District did not convene an appropriate IEP team to develop the 2023 IEP.

In developing an IEP, the IEP Team must consider the strengths of the child, the parent's concerns, evaluation results, and "the academic, developmental, and functional needs of the child." 34 C.F.R. § 300.324(a)(1). An IEP must include a statement explaining how the child's disability impacts the student's involvement and progress in the general education curriculum. *Id.* § 300.320(a)(1)(i). An IEP must include the special education and related services and supplementary aids and services that will be provided to allow the child to (1) attain the annual goals, (2) be involved and make progress in the general education curriculum and (3) participate in nonacademic activities. *Id.* § 300.320(a)(4). The IEP must also contain measurable annual goals designed to: (1) meet the needs that result from the student's disability to enable him or her to be involved in and make progress in the general education curriculum, and (2) meet each of the student's other educational needs that result from his or her disability. *Id.* § 300.320(a)(2).

"Under the IDEA, a public agency must ensure that all individuals who are necessary to develop an IEP that will meet the child's unique needs and ensure the provision of . . . FAPE to the child, participate in the child's IEP Team meeting." *Letter to Rangel-Diaz*, 58 IDELR 78 (OSEP 2011). The IDEA therefore differentiates between mandatory and discretionary IEP Team members. See *Pikes Peak BOCES*, 68 IDELR 149 (SEA CO 4/19/16). Mandatory IEP Team members include parents, at least one regular education teacher, at least one special education teacher, a district representative with knowledge of the district's available resources and the authority to commit those resources, and an individual who can interpret evaluation results. 34 C.F.R. § 300.321(a)(1)-(5); ECEA Rule 4.03(5)(a). Members of the IEP team may be excused from a meeting where their area of the curriculum will be discussed, in whole or in part, if 1) the parties agree in writing and 2) the required member submits, in writing, input on the development of the IEP, before the meeting. 34 C.F.R. § 300.321(e)(2). The special education teacher need not be the student's current special education teacher, but it must be a special education teacher who has worked with the student. *R.B. v. Napa Valley Unified Sch. Dist.*, 48 IDELR 60 (9th Cir. 2007); *See also, New York City Dep't of Educ.*, 45 IDELR 236 (SEA NY 2005); *Toledo Pub. Schs.*, 121 LRP 34535 (SEA OH 08/06/21).

In this case, at the time the 2023 IEP was developed, Student B did not have a special education teacher. (FF #s 64-70.) Lessons were developed and implemented by SLP and Social Worker. (FF

#s 66-68.) Learning Specialist, another special education teacher in the building, shared information about Student B's 2022 IEP with his teachers and occasionally helped in the SSN room. (FF #s 68, 69.) The SCO recognizes the difficulty districts face in meeting the requirements of 34 C.F.R. § 300.321(a) amidst national teacher shortages and appreciates that Learning Specialist had worked at least occasionally with Student B. However, he left before the IEP team discussed the goals in the 2023 IEP. (FF # 87.) Because there was not a special education teacher present while the 2023 IEP team discussed academic goals and services, the SCO finds and concludes that the development process for the 2023 IEP did not comply with IDEA's procedures. *Rowley*, 458 U.S. at 206. Nevertheless, the SCO turns next to the question of whether the academic goals in the 2023 IEP were substantively appropriate. *Rowley*, 458 U.S. at 207.

B. Substantive Adequacy of the IEP

An IEP is "the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 181 (1982)). In developing an IEP, the IEP Team must consider the strengths of the child, the parent's concerns, evaluation results, and "the academic, developmental, and functional needs of the child." 34 C.F.R. § 300.324(a). Along with a statement of the special education and related services to be provided to the student, an IEP must include measurable goals designed to "[m]eet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum" and any other educational needs that result from the child's disability. *Id.* at § 300.320(a)(2). For students working toward alternate academic standards, the goals must include benchmarks or short-term objectives. *Id.* at § 300.320(a)(2)(ii). To allow for the evaluation of a student's progress, IEP goals must be clear and objectively measurable. *Kuszewski v. Chippewa Valley Schs.*, 34 IDELR 59 (E.D. Mich. 2001), *aff'd*, 38 IDELR 63 (6th Cir. 2003, *unpublished*). Appropriate goals should be clear enough that a stranger, or person unfamiliar with the IEP, would be able to implement the goal, monitor student's progress on the goal and determine whether that progress was satisfactory. *Mason City Cmtys. Sch. Dist.*, 46 IDELR 148 (SEA IA 2006).

The IDEA does not promise a particular educational or functional outcome for a student with a disability, but it does provide a process for reviewing an IEP to assess achievement and revising the program and services, as necessary, to address a lack of expected progress or changed needs. 34 C.F.R. § 300.324(a)(2). Thus, whether an IEP is reasonably calculated to allow a student to make appropriate progress is determined prospectively, based on what was known when the IEP was drafted, and not determined by the student's actual progress. *Fuhrmann v. East Hanover Bd. of Educ.*, 19 IDELR 1065 (3d Cir. 1993), *reh'g denied*, 110 LRP 65930 (3d Cir. 06/08/93); and *Adams v. State of Oregon*, 31 IDELR 130 (9th Cir. 1999).

Here, before the 2023 IEP meeting, District did not share an update on Student B's progress on his prior academic goals or proposed academic goals for the coming year. (FF # 85.) During the October 16 IEP meeting, the special education teacher then left before the team discussed any

goals. (FF #s 86, 87.) After the meeting, on October 19, 2023, District sent an updated draft IEP with a new reading goal and the math goal from the 2022 IEP. (FF # 88.) In response to concerns raised by Parents and Advocate, District agreed to modify the math goal in consultation with Learning Specialist but did not add a task engagement goal or modify the reading goal. (FF #s 89-92.)

District also had two experienced teachers review the 2023 IEP. (FF # 106.) These teachers identified that the reading and math goals lacked clarity and needed short-term objectives. (FF #s 106-107.) In addition, two months after the 2023 IEP was developed, on December 31, 2023, Student B had already mastered the new reading goal. (FF #s 104, 105.) This is consistent with Advocate's concern that reading is a preferred activity and together suggests that the goal did not include an accurate baseline. (FF # 90.) He had continued to make insufficient progress on the math goal, which was largely carried over from the 2022 IEP, without new services to support improved progress. (FF #s 58, 98, 105.)

Because the academic goals lacked clarity and appropriate short-term objectives, the District lacked accurate baseline data for the reading goal and there were no changes to support reasonable progress on the repeated math goal, the SCO finds and concludes that the academic goals in the 2023 IEP were not reasonably calculated to address Student B's academic needs, as required by 34 C.F.R. § 300.320(a)(2). This resulted in a denial of FAPE. *See D.S. v. Bayonne Bd. Of Ed.*, 602 F.3d 553, 565 (3d. Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA's procedural requirements).

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

Pursuant to its general supervisory authority, CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in BOCES. 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).

There is nothing in the Record which suggests that the failure to implement Student A's dedicated support had any impact on the provision of services to other students in District. However, the failures to implement Student B's special education services and to develop an appropriate IEP for him were directly tied to the lack of a special education teacher in School B's SSN room. (FF #s 64-70.) The SSN classroom also included six other Students, all of whom also did not have a special education teacher for 13 weeks. (*Id.*) Like Student B, these students also either did not make progress on academic goals or progress was not accurately measured. (FF # 108.) While there was no special education teacher, SLP and Social Worker also wrote new IEPs for four other

students, or a total of five of the seven students in the program. (FF # 109.) This resulted in similar concerns about the appropriateness of the academic goals in these five IEPs. (*Id.*) Thus, the SCO finds that the failures to implement Student B's IEPs and to develop an appropriate IEP were systemic in nature and impacted the appropriate provision of services to all seven students in School B's SSN classroom. As such, the SCO has crafted a collection of remedies, including District's proposed remedies, intended to address the denial of FAPE for Student B and the other Students. (FF # 111.)

Compensatory Services: These violations resulted in a need for compensatory services.

Compensatory services are an equitable remedy designed to restore a student to the position they would be in if the violation had not occurred. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory services need not be an "hour-for-hour calculation." *Colo. Dept. of Ed.*, 118 LRP 43765 (Colo. SEA June 22, 2018). 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 each 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).

Here, Students, including Student B, all of whom were enrolled in a center-based program, went 13 weeks without direct instruction from a special education teacher. During that time, many academic goals went unmonitored, and Students measurably regressed in some goals that were monitored. District acknowledges that the lapse in services may necessitate compensatory services and proposed providing six weeks of services over the summer. (FF # 122.) Upon consultation with CDE Content Specialist 2, the SCO finds and concludes that compensatory services are required to restore Students, including Student B, to the position they would be in, had the violation not occurred. Further, the SCO and CDE Content Specialist 2 find that the six-week programs proposed by District are appropriate to remedy this violation while also recognizing that traditional compensatory services offered during the school year might cause more harm than benefit for Students who are already fatigued by the end of the day.

REMEDIES

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

- a. Failing to properly implement Student B and other Students' IEPs, in violation of 34 C.F.R. § 300.323;
- b. Failing to develop IEPs for Student B and other Students that were appropriately tailored to their needs, in violation of 34 C.F.R. §§ 300.321(a)(3) and 300.320(a)(2).

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

1. Corrective Action Plan

- a. By **Friday, March 1, 2024**, 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 Student B and all other students with disabilities for whom District is responsible. 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 District’s timely correction of the areas of noncompliance.

2. Review of IEPs

- a. No later than **Monday, April 15, 2024**, District must convene IEP teams for each Student, including Student B, at a mutually agreeable date and time. In consideration of the Student’s current academic performance, the IEP team must review and, as necessary, revise the Student’s then current IEP, in accordance with 34 C.F.R. § 300.320, to address the concerns identified in this Decision.
- b. The IEP teams must also consider whether the Student requires any additional compensatory services in addition to the services outlined in Remedy No. 3.
- c. For any given Student, if District and the Student’s parents agree, the IEP can be amended without an IEP team meeting, provided that compensatory services have also been considered. A determination of whether parents have been provided with sufficient information to reach an agreement outside of an IEP team meeting will rest solely with the CDE.
- d. By **Tuesday, April 30, 2024**, District must provide copies of the finalized IEPs and PWNS as well as attendance records from the IEP team meetings or proof of agreement without a meeting to the CDE Special Education Monitoring and Technical Assistance Consultant. Whether standalone or embedded in the IEP, the PWNS must document the conversation between District and parents regarding any need for additional compensatory services.

3. Compensatory Education Services for Group A

- a. Consistent with District’s proposed plan, Group A shall receive a minimum of 125 hours of specialized instruction in literacy and math to be delivered during a six-week summer program. This instruction must be provided by an appropriately licensed special education teacher with the support of any necessary paraprofessionals.

- i. These services must target each Students' identified needs.
 - ii. All compensatory services must be completed no later than **Friday, August 9, 2024**.
 - iii. Parents may opt out of some or all of the compensatory services.
- b. By **Monday, May 15, 2024**, District shall provide the schedule for these compensatory services to CDE and all parents of the Students in Group A.
- c. By **February 28, 2024**, District shall provide CDE with proof that this offer has been communicated to all the parents of Group A, such as an email summary of any conversation or agreement. A determination that any parents declining compensatory services have been provided with sufficient information about what is being offered and why rests solely with the CDE. In the event that CDE determines parents were not given sufficient information, District may be required to provide the parents with additional information at CDE's direction.
- d. Consultation between the provider(s) delivering compensatory services and Director shall occur once every other week to evaluate Students' progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. 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 and title of the provider 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, District must submit records of service logs and updated progress monitoring data to the CDE by **Monday, August 19, 2024**. 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.
- f. These compensatory services will be in addition to any services Students currently receive, or will receive, including ESY, that are designed to advance them toward their IEP goals and objectives. These compensatory services must be provided to Students outside of the regular school day (such as before and/or after school, during free periods, on weekends, or during school breaks) to ensure Students are not deprived of the instruction they are entitled to (including time in general education). If for any reason, including illness, an individual 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 all parents and notify the CDE of the change in the appropriate service log.

4. Compensatory Education Services for Group B

- a. Consistent with District's proposed plan, District shall fund the enrollment of Group B in an agreed upon, specialized, six-week summer program that addresses their identified needs.
 - i. Participation in the summer program must occur prior to Friday, August 16, 2024.
 - ii. Parents may opt out of some or all of the compensatory services.
 - i. If, for some reason, the previously agreed upon program becomes unavailable, District shall pay a comparable amount for the Students in Group B to enroll in another, mutually agreed upon, comparable program. If the parties cannot agree on a program by March 15, 2024, CDE Special Education Monitoring and Technical Assistance Consultant shall select a program by April 8, 2024.
- b. To verify that Group B has participated in the program required by this Decision, District must submit either proof of payment or proof of their parents' choice not to participate in any programs by May 15, 2024. District must submit records of service logs and updated progress monitoring data to the CDE by Monday, August 19, 2024. In addition, District must submit records of service logs and updated progress monitoring data from the program to the CDE by Monday, August 19, 2024. In the event that the program does not provide District with this information, District must provide CDE with updated progress monitoring data for Group B by Friday, September 13, 2024.
- c. By February 28, 2024, District shall provide CDE with proof that this offer has been communicated to all the parents of Group B, such as an email summary of any agreement. A determination that any parents declining compensatory services have been provided with sufficient information about what is being offered and why rests solely with the CDE. In the event that CDE determines parents were not given sufficient information, District may be required to provide the parents with additional information at CDE's direction.
- d. These compensatory services will be in addition to any services Students currently receive, or will receive, including ESY, that are designed to advance them toward

their IEP goals and objectives. These compensatory services must be provided to Students outside of the regular school day (such as before and/or after school, during free periods, on weekends, or during school breaks) to ensure Students are not deprived of the instruction they are entitled to (including time in general education). If for any reason, including illness, an individual 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 funding or the program is cancelled, District and the parents must work together to identify another mutually agreed upon alternative. District must immediately notify the CDE of the change.

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.

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 1st day of February, 2024.



Rachel Dore
State Complaints Officer

APPENDIX

Complaint, pages 1-9

- Exhibit 1: Records

Response, pages 1-16

- Exhibit A: IEP
- Exhibit B: Evaluation
- Exhibit C: None
- Exhibit D: None
- Exhibit E: None
- Exhibit F: Attendance
- Exhibit G: Progress Data
- Exhibit H: IEPs
- Exhibit I: Evaluation
- Exhibit J: None
- Exhibit K: Meeting Documentation
- Exhibit L: None
- Exhibit M: Licensure
- Exhibit N: Attendance
- Exhibit O: Progress Data
- Exhibit P: District Calendar
- Exhibit Q: District Policies
- Exhibit R-1: Correspondence
- Exhibit R-2: Correspondence
- Exhibit S: None
- Exhibit T: Verification of Delivery
- Exhibit U: Visual Schedule
- Exhibit V: Communication Log
- Exhibit W: Correspondence
- Exhibit X: List of Students
- Exhibit Y: IEPs
- Exhibit Z: Progress Data
- Exhibit AA: None
- Exhibit BB: Licensure

Reply, pages 1-10

- Exhibit 2: Correspondence
- Exhibit 3: Licensure

Telephone Interviews

- Parents: January 3, 2024
- Advocate: January 5, 2024
- Case Manager: January 5, 2024
- Social Worker: January 9, 2024
- Learning Specialist: January 9, 2024
- SLP: January 9, 2024
- Director: January 10, 2024
- Assistant Director: January 10, 2024
- Geography Teacher: January 11, 2024
- Science Teacher: January 11, 2024