

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

State-Level Complaint 2024:549
Arapahoe 5 (Cherry Creek) School District

DECISION

INTRODUCTION

On May 2, 2024, the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Arapahoe 5 (Cherry Creek) School District (“District”). The Colorado Department of Education (“CDE”) determined that the Complaint identified one allegation subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. Therefore, the CDE has jurisdiction to resolve the Complaint.

The CDE extended the 60-day investigation due to exceptional circumstances on June 28, 2024, consistent with 34 C.F.R. § 300.152(b)(1).

RELEVANT TIME PERIOD

The CDE has the authority to investigate alleged noncompliance that occurred no earlier than one year before the date the Complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, findings of noncompliance shall be limited to events occurring after May 2, 2023. Information prior to May 2, 2023 may be considered to fully investigate all allegations.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to implement Student’s Individualized Education Program (“IEP”) from August 2023 to present, in violation of 34 C.F.R. § 300.323, specifically by:
 - a. Failing to make Student’s IEP accessible to teachers or service providers responsible for its implementation;
 - b. Failing to provide Student with the speech language pathology (“SLP”) minutes required by her IEP; and

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.

- c. Failing to provide Student with the paraprofessional support required by her IEP.

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,² the CDE makes the following findings of fact (“FF”):

A. Background

1. Student is twelve years old and attends sixth grade at a District middle school (“School”). *Exhibit A*, p. 20. She qualifies for special education and related services under the Speech or Language Impairment and Autism Spectrum Disorders disability categories. *Id.*
2. She is passionate, affectionate, and kind. *Interviews with Parent, speech language pathologist (“SLP”), and speech language pathologist liaison (“SLP Liaison”).* She enjoys drawing, swimming, and cooking. *Interviews with Parent and SLP.* She is eager to communicate but struggles with functional speech. *Interviews with Parent, SLP, and SLP Liaison.*
3. This investigation involves implementation of SLP services and paraprofessional support during the 2023-2024 school year under an IEP dated November 2, 2022 (the “2022 IEP”).³ *Complaint*, pp. 4-5; *Exhibit 1*, pp. 1-18; *Exhibit A*, pp. 1-18. The 2022 IEP was developed when Student attended fifth grade at a District elementary school. *Exhibit 1*, p. 1; *Exhibit A*, p. 1.

B. The 2022 IEP

4. The 2022 IEP documents Student’s strength with independence, routines, and expectations, as well as her interest in working on the computer and reading books about princesses. *Exhibit A*, p. 4. It documents present levels of performance, noting she is a strong visual learner who completes work independently and with the assistance of a paraprofessional. *Id.* She made progress on all three annual goals created in November 2021. *Id.* at pp. 4-6.
5. Student’s disabilities “may significantly impact her ability to access grade-level curriculum and instruction as it is presented in the general education setting.” *Id.* at p. 8. Her speech-language needs “may also significantly impact her ability to effectively express her thoughts, ideas, wants, and needs with both peers and adults.” *Id.* She requires specialized instruction to support written expression and reading comprehension, and she may need modified assignments in reading or writing. *Id.*

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

³ District admitted in its Response that the 2022 IEP was not reviewed and revised at least annually. *Response*, pp. 3-4. This admission is closely related to the allegation accepted for investigation—it involves the same IEP, timeframe, and documents—and thus is critical to consider in determining whether District provided Student a FAPE. All individuals interviewed for this investigation had the opportunity to further address the annual review issue, and District also filed a related Supplemental Response on June 6, 2024.

6. Student has unique communication needs, using a “total communication approach” which involves verbal communication, gestures, actions, and pictures. *Id.* at p. 9. She responds with one-word or in short phrases which impacts her ability to communicate for safety needs. *Id.*
7. The 2022 IEP has three annual goals for reading, math, and communication. *Id.* at pp. 9-12.
8. The 2022 IEP lists accommodations, including for paraprofessional support. *Id.* at pp. 12-13.
9. Special education services include, in part:
 - Speech Language: 200 direct minutes per month outside general education
 - Speech Language: 30 indirect minutes per month inside general education*Id.* at p. 16. Student spends 79.8 percent of her time in general education. *Id.* at p. 17.

C. District’s Policies, Procedures, and Practices

10. District has standard board policies regarding special education programs. *Exhibit I*, pp. 14-15. District also has a user guide with guidance for completing IEP forms within Enrich. *Id.* at pp. 16-356. Additionally, District has a special education procedure manual which includes guidance on IEP implementation and annual reviews. *Id.* at pp. 357-416.
11. At the start of the school year District case managers are required to provide a student’s IEP snapshot to, and meet with, all teachers and service providers responsible for implementing the student’s IEP. *Interview with Assistant Superintendent of Student Populations (“Director”)*. Ongoing access to IEPs is available for them through Enrich and PowerSchool. *Id.*
12. District IEP teams are required to review a student’s IEP at least once per year to determine if annual goals are being achieved and revise the IEP as necessary. *Id.* Parent participation is a priority. *Id.* If a parent disagrees with a consensus decision among all other IEP team members, the IEP team works to understand the disagreement through open dialogue. *Id.* The IEP team is expected to explain that District is responsible for ensuring a timely IEP review if consensus is not reached. *Id.* The IEP team must timely “finalize” the IEP, document any disagreements in a prior written notice, and inform the parent of their procedural rights. *Id.*
13. District provided a full-day professional development for all special education staff, including from School, at the start of this school year. *Id.* This included guidance on implementation and annual reviews. *Id.* District special education teachers also convene once per quarter for professional development within their respective areas of expertise. *Id.*

D. The 2022 IEP’s Annual Review

14. The 2022 IEP’s annual review was due on or before November 1, 2023. *Exhibit A*, p. 1. The annual review was not completed until May 17, 2024. *Exhibit L*, pp. 8-9, 13-36, 38; *Exhibit N*.

15. In October 2023, Student’s case manager (“Case Manager”) scheduled the annual review for November 10 in collaboration with Parent and his advocate (“Advocate”) who had limited availability. *Exhibit J*, pp. 229-235. It was canceled when Case Manager was admitted to the hospital. *Id.* at p. 158; *Interview with Case Manager*. On November 16 Case Manager tried to reschedule the annual review but Parent never responded. *Exhibit J*, pp. 146, 148-149, 157.
16. Instead, on November 29 Advocate requested a “separate meeting” for unrelated concerns. *Id.* at pp. 140-141, 154. Parent, Case Manager, assistant principal (“Assistant Principal”), and special education coordinator (“Coordinator”) met on December 7. *Id.* at pp. 135, 204-205.
17. The annual review was held on January 19 and February 12, 2024, but the 2022 IEP persisted in “draft form.” *Exhibit D*, pp. 2-4; *Exhibit J*, p. 94. The special education services and LRE sections were not completed because Parent disagreed, in part, with a decrease in SLP minutes. *Exhibit A*, pp. 28-29, 35-36, 48; *Exhibit D*, pp. 2-4; *Exhibit J*, p. 94. Parent returned a “draft” he received after the February 12 meeting to Case Manager on April 1. *Exhibit J*, p. 94.
18. Case Manager was concerned about “upsetting” Parent, especially if the “final draft does not say exactly what he wants/likes.” *Id.* at pp. 92-94. She was “not sure how to respond to making his changes” and was “confused about what [to] do.” *Id.* The IEP team aimed to foster “open communication, collaboration, and mutual understanding among all to ensure the final IEP reflects [Student’s] needs and goals” while also addressing Parent’s concerns. *Id.* at p. 94.
19. Special education mental health director (“Mental Health Director”) told Case Manager to set a meeting “long enough to review the issues and finalize the IEP.” *Id.* at p. 93. Parent wanted his input added outside of a meeting—indicating there “is no guarantee the IEP will be agreed on and finalized”; he “will not negotiate on [his input]”; and his “position will not change”—and he demanded certain staff not participate in IEP meetings. *Id.* at pp. 19-23, 68.
20. District attempted to schedule the annual review in April, and Parent did not respond with availability but asked in separate emails to meet about unrelated concerns. *Exhibit D*, pp. 67-71; *Exhibit J*, pp. 38-40, 60-61. The annual review concluded on May 6 and May 17, 2024. *Exhibit L*; *Exhibit M*; *Exhibit N*. District’s efforts to secure Parent and Advocate’s attendance at the final meeting were unsuccessful due to their limited mutual availability. *Exhibit L*, pp. 1-12. Advocate thanked the IEP team for having “gone above and beyond to get this done.” *Id.* at p. 3. The new IEP reduced direct SLP minutes from 200 to 120 per month. *Id.* at p. 30.
21. District concedes that it did not timely “finalize the IEP.” *Response*, p. 3; *See also Supplemental Response*. In “hindsight” District recognizes it should have “finalized the IEP” based on Student’s needs with respect to service minutes and LRE and documented the disagreements in a prior written notice. *Response*, p. 3. The 2022 IEP remained in effect throughout the 2023-2024 school year. *Interviews with Case Manager, SLP and SLP Liaison*.

E. IEP Implementation: Accessibility and Responsibilities

22. One week prior to the school year starting on August 7, Case Manager met with Student’s teachers and service providers, and provided them with snapshots of the 2022 IEP. *Interviews with Case Manager and SLP; Exhibit H.* She also highlighted and wrote on the 2022 IEP’s snapshots for paraprofessionals. *Interview with Case Manager.* Case Manager followed this same procedure any time a new paraprofessional was assigned to work with Student. *Id.*
23. SLP received the 2022 IEP consistent with this process and reviewed Student’s prior evaluations since her annual review was approaching in November 2023. *Interview with SLP.* Student’s teachers and service providers, including SLP and paraprofessionals, had ongoing access to the 2022 IEP through Enrich. *Interviews with Case Manager, SLP, and SLP Liaison.*

F. IEP Implementation: SLP Services

24. The 2022 IEP requires 200 direct SLP minutes per month outside general education and 30 indirect SLP minutes per month inside general education. *Exhibit A*, p. 16. Across ten school months, this totals 2,000 direct minutes and 300 indirect minutes. *Id.; Exhibit H.* Parent’s concern is that Student did not receive these services. *Interview with Parent; Complaint*, p. 4. District concedes that Student did not receive all required direct SLP minutes. *Response*, p. 9.

Student’s Direct SLP Services

25. SLP did not “[provide] 200 minutes per month” due to “[her] difficulties with scheduling and managing [her] caseload.” *Exhibit J*, pp. 1-2; *Interview with SLP.* SLP received support from other speech-language pathologists and a clinical fellowship supervisor. *Interview with SLP.* As a department lead, SLP Liaison answers questions and provides formal support to speech language staff if they reach out. *Interview with SLP Liaison.* SLP Liaison met with SLP and the clinical supervisor in February 2024 because SLP was not “reaching out enough for help or initiating that support.” *Id.* She was “not concerned about [SLP] not meeting minutes” and since service logs are an expectation, she “assumes positive intent that minutes are met.” *Id.*
26. SLP kept a detailed log in Google Sheets—contemporaneously with direct services she provided outside general education—with the date, minutes, group type, activity and goal targets, and data/notes. *Exhibit E; Interview with SLP.* SLP credibly described how she tracked services and elaborated on the log’s details, such as assisting with Student’s understanding of math-specific vocabulary or working with her to identify emotions and practice perspective taking through game-based learning with “Blooket” and “Crazy Kingdom.” *Interview with SLP.*
27. Student did not receive direct SLP services in one month, received less than 200 minutes in each of seven months, and received more than 200 minutes in each of two months. *Exhibit E*, pp. 5-7. In total, crediting SLP for 95 minutes from December 12 and April 16 where SLP was available and Student was dismissed early, SLP provided 1,395 of the required 2,000 direct SLP minutes. *Id.; Interview with SLP.* Based on these facts, the state complaints officer (“SCO”) finds that Student did not receive direct SLP services consistent with the 2022 IEP.

Student's Indirect SLP Services

28. SLP credibly described providing 30 indirect SLP minutes per month during the school year, meeting and consulting with Student's teachers. *Interview with SLP*. SLP conferred with Student's science teacher, occupational therapist, and Case Manager at least once per month to discuss her speech-related needs. *Id.*; *Interview with Case Manager*; *Exhibit J*, pp. 204, 236.
29. For instance, after observing Case Manager work with Student on answering "WH" questions, SLP offered ways to rephrase questions to better elicit a response. *Interviews with SLP and Case Manager*. SLP also worked with Case Manager on "speech cueing techniques to use during reading practice." *Id.*; *Exhibit D*, p. 4. Further, SLP often met with Case Manager to discuss how certain science or social studies curriculum could be modified to meet Student's speech-language needs. *Interviews with SLP and Case Manager*. Based on these facts, the SCO finds that Student received indirect SLP services consistent with the 2022 IEP.

Other Students' Direct SLP Services

30. SLP conceded she did not provide 35 other students—17 at School and 18 at another school ("Other Students")—with all direct SLP minutes required by their IEPs. *Interview with SLP*; *Exhibit O*. SLP attributed this to challenges with scheduling and managing a caseload, along with a physical split between the two schools. *Interview with SLP*. SLP Liaison was not aware Other Students had also missed service minutes. *Interview with SLP Liaison*. Accordingly, the SCO finds that Other Students did not receive direct SLP services consistent with their IEPs.
31. District submitted a summation of SLP's service minutes and the progress monitoring for Other Students. *Exhibit O*; *Exhibit P*. As reflected by the progress reports—and considering only those Other Students who were not absent for more than 25 percent of the school year and received less than 80 percent of required minutes—skipped services impacted an ability to make appropriate progress on relevant SLP annual goals for:

- Student A: received 980 of 1,560 minutes.
- Student B: received 1,190 of 1,440 minutes.
- Student C: received 300 of 1,680 minutes and had 28 absences.
- Student D: received 375 of 960 minutes.
- Student E: received 390 of 510 minutes.
- Student F: received 1,005 of 1,740 minutes.
- Student G: received 1,305 of 1,920 minutes.

Exhibit O; *Exhibit P*.

G. IEP Implementation: Paraprofessional Support

32. To “create consistency in [Student’s] school day” the 2022 IEP provides that a “maximum of 2 paraprofessionals per day will support [her] across all school environments due to safety concerns.” *Exhibit A*, p. 12. “The 2 paras will be consistent unless there are unforeseen circumstances, for example absence of a para or a para resigns.” *Id.* Parent will be notified “if there is a para change for example if a para resigns.” *Id.*
33. Parent’s concern is that his preferred paraprofessional was not always assigned to Student and that a male paraprofessional supported Student when she used the restroom. *Interviews with Parent, Case Manager, SLP Liaison, and Director; Complaint*, p. 5; *Exhibit J*, pp. 110, 187.
34. The 2022 IEP did not require a specific paraprofessional. *Exhibit A*, pp. 1-18. Student did not need assistance with toileting, but she was always escorted by either Parent’s preferred paraprofessional or Case Manager (both female) any time she needed to use the restroom. *Exhibit D*, p. 8; *Exhibit J*, p. 224; *Interviews with Director, SLP Liaison, and Case Manager*.
35. During the 2023-2024 school year, as reflected in a paraprofessional support chart created by Case Manager as she wrote staff schedules, five paraprofessionals, including Parent’s preferred paraprofessional, supported Student during electives (physical education first semester and art second semester) and Science. *Exhibit G*, p. 5; *Interview with Case Manager*.
36. Student received paraprofessional support for the first two weeks of school in Case Manager’s independent learning classroom (“ILC”). *Interview with Case Manager*. This support was discontinued as it was a “very structured environment” and with up to only four students in ILC this level of support was not necessary for Case Manager. *Id.* Parent wrote in February that Student was “progressing well and safe with [Case Manager].” *Exhibit J*, p. 110.
37. Despite staff shortages, the paraprofessional support Student received in electives and Science was consistent overall. *Exhibit G*, p. 5; *Interview with Case Manager*. For instance, two paraprofessionals (including Parent’s preferred paraprofessional) supported Student in electives from August through late February. *Exhibit G*, p. 5. Parent’s preferred paraprofessional left School on February 27. *Id.*; *Interview with Case Manager*. Parent was made aware of this change on February 28 through a “back and forth” communication book. *Exhibit J*, p. 123. Parent acknowledged the staffing shortage but reminded staff that it “won’t change [his] positions about Para’s and staff who we don’t want to be with [Student].” *Id.*
38. Student never displayed elopement or safety concerns, but Case Manager indicated the 2022 IEP’s language requiring paraprofessional support “across all school environments” should be adjusted to reflect it is not required in ILC. *Interview with Case Manager*. Because paraprofessional support was not provided “across all school environments”—namely ILC—the SCO finds that she did not receive paraprofessional support consistent with the 2022 IEP.

H. Attendance, Grades, and Progress on Annual Goals

39. Student regularly attended school, and she earned all As and Bs in classes during the 2023-2024 school year apart from a C in Functional Language Arts during the third quarter. *Exhibit F; Exhibit G, p. 8; Interviews with Case Manager and SLP.*
40. The 2022 IEP's annual communication goal provides: "Given targeted small group instruction, [Student] will improve Receptive Language, Expressive Language, Pragmatic Language and Articulation by answering questions, responding to social greetings, use complete simple sentences and produce /sh/, /ch/ and /th/ in the initial and final position of words from 37 to 65 as measured by the Speech-Language Accuracy Scoring Tool." *Exhibit A, p. 11.* The scoring tool assigns points for objectives based on percent accuracy of a skill completed. *Id.* at p. 12.
41. Student made progress on this goal between October 2022 and April 2024. *Exhibit G, pp. 3-4.* In May 2023, the end of fifth grade, she reached a baseline data point of 47. *Id.* at p. 3. In December 2023, the midpoint of sixth grade, she reached a baseline data point of 62. *Id.* She surpassed the target with baseline data points of 67 and 69 in March and April 2024. *Id.* Importantly, she did not plateau or stagnate even though this goal was developed in November 2022. *Id.* at pp. 3-4. For instance, there was still reasonable room for growth within each objective as she generally scored in the 51 to 80 percent range. *Id.* Finally, Student made progress on, but did not meet, reading and math goals during this school year. *Id.* at p. 7.
42. Overall, Student's receptive and expressive language skills have improved significantly. *Exhibit L, pp. 6-7.* In February 2019, she communicated almost exclusively with an augmentative and alternative communication ("AAC") device. *Id.* at p. 6. Per the new IEP, as of May 2024, she is "communicating exclusively in spoken language, without use of an AAC device." *Id.* at p. 7.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District did not properly implement Student's 2022 IEP during the 2023-2024 school year, as required by 34 C.F.R. § 300.323. No denial of FAPE occurred. District did not properly implement Other Students' IEPs during the 2023-2024 school year, as required by 34 C.F.R. § 300.323. A denial of FAPE occurred for Students A through G.

A. Legal Requirements

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 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 district must ensure that each teacher and related services provider has access to the IEP and 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).

B. 2022 IEP: Accessibility and Responsibilities

The SCO must determine whether District satisfied its obligation under 34 C.F.R. § 300.323(d). Here, Student’s teachers and service providers had access to the 2022 IEP and were informed of their specific responsibilities related to its implementation, consistent with District practice. (FF #s 10-11, 22-23). The SCO finds and concludes that District complied with 34 C.F.R. § 300.323(d).

C. 2022 IEP: Implementation

The SCO must determine whether District satisfied its obligation under 34 C.F.R. § 300.323(c)(2).

i. Speech Language Services

The 2022 IEP requires 200 direct SLP minutes and 30 indirect SLP minutes per month. (FF # 9). Thus, Student was entitled to 2,000 direct SLP minutes and 300 indirect SLP minutes for the 2023-2024 school year. (FF # 24). Student received 1,395 direct minutes and 300 indirect minutes. (FF #s 25-29). For this reason, the SCO finds and concludes that District did not implement the 2022 IEP in this respect during the 2023-2024 school year, as required by 34 C.F.R. § 300.323(c)(2).

ii. Paraprofessional Support

The 2022 IEP requires that a “maximum of 2 paraprofessionals per day will support [Student] across all school environments due to safety concerns.” (FF #s 8, 32). “The 2 paras will be consistent unless there are unforeseen circumstances, for example absence of a para or a para resigns.” (*Id.*). Parent will be notified “if there is a para change for example if a para resigns.” (*Id.*)

Parent’s concern is that his preferred paraprofessional was not always assigned to Student, and that a male professional supported her when she used the restroom. (FF # 33). Neither is required by the 2022 IEP, but Parent’s preferred paraprofessional worked with Student until her resignation in February and only female staff escorted Student to the restroom. (FF #s 34-35, 37).

Overall, Student received paraprofessional support consistent with the 2022 IEP. (FF #s 35-37). However, she only received paraprofessional support in Case Manager’s ILC for two weeks. (FF #s 36, 38). Thus, the SCO finds and concludes that District did not implement the 2022 IEP in this respect during the 2023-2024 school year, as required by 34 C.F.R. § 300.323(c)(2).

D. 2022 IEP: Materiality of Noncompliance

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. The failure to implement a “material”, “essential”, or “significant” provision of a student’s IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with “sister courts . . . that a material failure to implement an IEP violates the IDEA”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an “essential element of the IEP” denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the “significant provisions of the IEP” denies a FAPE).

“A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.” *Van Duyn ex rel. Van Duyn*, 502 F.3d at 822. 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.*

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).

Here, District did not provide 605 direct SLP minutes or paraprofessional support in ILC. (FF #s 25-27, 36, 38). However, this did not interfere with Student’s ability to derive an education benefit. (FF #s 39-42). Indeed, she made progress on all 2022 IEP annual goals over the course of the 2023-2024 school year. (FF #s 40-41). She did not surpass the communication goal until March 2024 (there was still room for growth within each of its objectives), and she did not meet the reading or math goals. (FF # 41). She continued to improve her receptive and expressive language skills overall, from needing an AAC device in 2019 to now communicating verbally. (FF # 42). Student also attended school regularly and excelled academically. (FF # 39).

Moreover, Student still received 1,395 direct SLP minutes, which amounts to 69.75 percent of the total required minutes. (FF # 27). This is close to what Student would have been entitled to, given the reduction in direct SLP minutes from 200 to 120 per month in the new IEP, had District finalized the IEP as required in November 2023. (FF #s 20, 27). Finally, Student received paraprofessional support across all other “school environments” apart from ILC. (FF #s 35-38). Importantly, Student did not display any safety concerns in ILC or elsewhere. (FF # 38). Parent

was pleased with her progress and safety in ILC with Case Manager, a “structured environment” with few other students present. (FF # 36). Therefore, the SCO finds and concludes that District’s noncompliance with IEP implementation was not material and did not result in a denial of FAPE.

E. Other Students

i. Implementation of Speech Language Services

The SCO must determine whether District satisfied its obligation under 34 C.F.R. § 300.323(c)(2).

Here, Other Students’ IEPs required direct SLP minutes. (FF # 30). They did not receive these minutes consistent with their IEPs. (*Id.*) Thus, the SCO finds and concludes that District did not implement their IEPs during the 2023-2024 school year, as required by 34 C.F.R. § 300.323(c)(2).

ii. Materiality of Noncompliance

The SCO must now determine whether this noncompliance was “material” and thus resulted in a denial of FAPE. *Woodstock Bd. of Educ.*, 370 Fed. App’x at 205. A student’s progress toward achieving annual IEP goals can show that an IEP implementation failure was not “material.” *Id.* Also, a minor discrepancy between the services provided and services required under an IEP is not enough to amount to a denial of FAPE. *T.M. v. Dist. of Columbia*, 64 IDELR 197 (D.D.C. 2014).

Here, the noncompliance spanned the 2023-2024 school year, involved an “essential element” of the IEPs, and impacted an ability to make appropriate progress on relevant SLP annual goals for Students A through G. (FF #s 30-31); *See Neosho R-V Sch. Dist.*, 315 F.3d at 1027. Thus, the SCO finds and concludes the noncompliance is material and results in a denial of FAPE for them.

iii. Compensatory Services

Compensatory services are an equitable remedy intended to place a student in the same position he would have been if not for noncompliance. *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. 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).

Here, the SCO finds and concludes that an award of compensatory services—specifically direct speech language services—is necessary to place the following Other Students in the positions they would have been in if not for noncompliance: **Student A** (405 minutes); **Student B** (175 minutes); **Student C** (500 minutes); **Student D** (290 minutes); **Student E** (60 minutes); **Student F** (365 minutes); and **Student G** (305 minutes). In determining each award, the SCO considered whether there was no progress, insufficient progress/regression, or indeterminate progress due to a lack of reports, as well as attendance.

Conclusion Regarding Annual IEP Review: District did not review the 2022 IEP at least annually, as required by 34 C.F.R. § 300.324(b). No denial of FAPE occurred.

District has conceded that the 2022 IEP was not reviewed and revised at least annually. (FF # 21).

A. Annual Review: Legal Requirements

Under the IDEA, school districts must review and revise a student’s IEP at least annually. 34 C.F.R. § 300.324(b). This obligation exists even when a student’s needs have not changed or a student has made expected progress on annual goals. *Id.* Parent participation is essential to IEP development, and parents are required members of the IEP team. *Id.* § 300.321(a)(1).

An IEP meeting “serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child.” *Letter to Richards*, 55 IDELR 107 (OSEP 2010). “The IEP Team should work towards a general agreement, but . . . [i]f the team cannot reach agreement, the public agency must determine the appropriate services” *Id.* If the IEP team cannot reach a consensus, the district must make the decision and provide parents with prior written notice of its proposals and refusals. *Id.* Indeed, parents do not have “veto power” over IEP team decisions. *Garden Grove Unified Sch. Dist.*, 115 LRP 20924 (SEA CA 05/05/15).

An IEP meeting may be conducted without a parent in attendance if the district is unable to convince the parents that they should attend. 34 C.F.R. § 300.322(d). If this occurs, the district must keep a record of its attempts to arrange a mutually agreed time and place, such as records of telephone calls or copies of correspondence sent to the parents. *Id.* And although an IEP may be amended by agreement obtained through email correspondence, developing, reviewing, and revising an annual IEP via email is inconsistent with the collaborative process contemplated by the IDEA. *Denver Public School District 1*, 77 IDELR 266 (SEA CO 10/30/2020).

B. Annual Review: The 2022 IEP

Here, the annual review was due on or before November 1, 2023. (FF # 14). It was not done until May 17, 2024. (*Id.*). Driving this drawn-out delay was District’s decision to hand Parent the keys to the IEP process and take a back seat. (FF #s 14-21). This decision was grounded in a desire to achieve consensus among the entire IEP team and afford meaningful parent participation. (FF # 18). District members of the IEP team just did not know how to properly proceed once presented with Parent’s disagreements, demands, and disposition. (*Id.*). Thus, the SCO finds and concludes that District did not timely review and revise the 2022 IEP as required by 34 C.F.R. § 300.324(b).

The SCO recognizes a tension that can exist for school districts—especially in contentious situations—between affording meaningful parent participation and ensuring IDEA timelines are met. *See Doug C. v. Hi. Dep’t of Educ.*, 720 F.3d 1038, 1046 (9th Cir. 2013) (holding that when confronted with complying with one IDEA procedural requirement or another, school districts must make a reasonable determination of which course of action promotes the central purpose

of the IDEA which is “to provide disabled students a free appropriate public education and to protect the educational rights of those students”). Here, when faced with disagreement during the annual review process District was required to “put an offer of FAPE on the table in the form of a proposed IEP—and do so in a timely manner.” *Mesa Valley Sch. Dist. 51*, 119 LRP 5665 (SEA CO 12/17/18). Then, District was required to provide Parent with prior written notice of its offer. *Garden Grove Unified Sch. Dist.*, 115 LRP 20924 (SEA CA 05/05/15). A parent who disagrees with a district’s offer of FAPE may seek resolution through IDEA’s three formal dispute resolution options. *Mesa Valley Sch. Dist. 51*, 119 LRP 5665 (SEA CO 12/17/18).

Parent’s demand here that the 2022 IEP be revised by email with his requested changes, and without a meeting, “is inconsistent with the collaborative process contemplated by the IDEA.” *Denver Public School District 1*, 77 IDELR 266 (SEA CO 2020). If a parent does not respond to well-documented attempts to schedule a meeting, like Parent did at times in this case, a school district must schedule the meeting, provide the parent with notice of the meeting, hold the meeting (with or without the parent), and review and revise the IEP. *Id.*; 34 C.F.R. § 300.322(d). Had District followed these or similar processes sooner in this case, it would have complied with the IDEA requirements for parent participation and the timely review and revision of the 2022 IEP.

C. Procedural Noncompliance

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, procedural noncompliance is only actionable to the extent it impedes the child’s right to a FAPE, significantly impedes the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE or causes a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

Here, the 2022 IEP’s annual review was more than 6.5 months late. (FF # 14). District undoubtedly did not fulfill its IDEA obligation to put an offer of FAPE on the table in a timely manner. (*Id.*). Nevertheless, under the facts of this specific situation, the SCO finds that this noncompliance did not impede Student’s right to a FAPE, significantly impede Parent’s opportunity to participate in the decision-making process or cause a deprivation of educational benefit.

First, the 2022 IEP remained in place and Student received services until the annual review was done. (FF # 21). Had District timely completed the annual review she would have been entitled to less direct SLP services than under the 2022 IEP. (FF # 20). Second, Student showed progress on the 2022 IEP’s annual goals (surpassing the communication goal in March 2024). (FF #s 40-41). Although the communication goal was developed in November 2022, she never plateaued and there was room for growth within each of its objectives. (*Id.*) Third, her receptive and expressive language skills have improved from requiring an AAC device in 2019 to now being an exclusively verbal communicator. (FF # 42). Fourth, she attended school regularly and excelled academically. (FF # 39). Finally, District started the annual review process in October and the 2022 IEP had mostly been reviewed and revised by the IEP team, including Parent and Advocate, by February. (FF #s 15-17). It was reviewed and revised across four meetings to consider all

concerns raised by Parent and Advocate. (FF # 18). Accordingly, the SCO finds and concludes that the procedural noncompliance with 34 C.F.R. § 300.324(b) did not result in a denial of FAPE.

Systemic IDEA Noncompliance: This investigation demonstrates noncompliance that is systemic 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, the CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in 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, District has a special education procedure manual detailing IEP implementation and annual review requirements consistent with IDEA. (FF # 10). Director credibly described District’s related practices and procedures and an understanding of IDEA requirements. (FF # 11). District hosted an IDEA training for all special education staff at the start of the 2023-2024 school year. (FF # 13).

The noncompliance with IEP implementation impacted Other Students and thus the SCO finds and concludes that it is systemic. (FF # 30). SLP experienced challenges with scheduling and managing her caseload, and the physical split between schools. (*Id.*). SLP understands IEP implementation, as evidenced by her candor and service logs. (FF #s 25-31). District leadership—including SLP Liaison—contributed to the noncompliance by assuming “positive intent” rather than diligently ensuring SLP was sufficiently supported. (FF # 25). SLP Liaison met with SLP and her clinical supervisor in February 2024 because SLP was not “reaching out enough for help or initiating that support.” (*Id.*) A quick review of SLP’s service logs alone at that time would have reflected challenges with service delivery not only for Student but also Other Students. (FF #s 26-27, 30-31). Despite the meeting, SLP Liaison was not aware of these challenges. (FF #s 25, 30).

District, and not any one individual service provider, is ultimately responsible for ensuring the provision of a FAPE for all IDEA-eligible students in District. 34 C.F.R. § 300.1. Since District has written practices and procedures that were not followed by multiple staff—and the systemic noncompliance for Other Students is addressed in this Decision—no further remedy is required.

The noncompliance with IEP annual reviews is unique to Student and thus the SCO finds and concludes that it is not systemic. (FF #s 14-21). This was the result of her IEP team not following District’s written practices and procedures to ensure meaningful parent participation. (FF # 18).

REMEDIES

The SCO concludes that District did not comply with the following IDEA requirements:

- a. Implementing the IEP, as required by 34 C.F.R. § 300.323.

- b. Reviewing and revising the IEP at least annually, as required by 34 C.F.R. § 300.324(b).

To demonstrate compliance, District is ORDERED to take the following actions:

1. Corrective Action Plan

- a. By **Thursday, August 1, 2024**, District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the noncompliance noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom District is responsible. 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. Final Decision Review

- a. Director, Case Manager, SLP, SLP Liaison, Assistant Principal, Coordinator, and Mental Health Director must review this Decision. This review must occur no later than **Thursday, August 1, 2024**. A signed assurance that this Decision has been reviewed must be completed and provided to the CDE no later than **Thursday, August 8, 2024**. If the individuals identified in this paragraph are no longer employed by District when the review occurs, staff occupying identical roles must review the Decision. If District no longer has any of these roles, District may substitute the individual occupying the role with similar responsibilities.

3. Compensatory Services for Other Students

- a. Students A through G shall receive direct speech language services provided by an appropriately licensed speech language pathologist or speech language pathologist assistant under the supervision of an appropriately licensed speech language pathologist outside the general education setting in these amounts: **Student A** (405 minutes); **Student B** (175 minutes); **Student C** (500 minutes); **Student D** (290 minutes); **Student E** (60 minutes); **Student F** (365 minutes); and **Student G** (305 minutes). These services must be designed to advance Students A through G toward current annual IEP goals.
- b. All compensatory services must be provided to Students A through G no later than **one year from the issue date of this Decision**.
- c. By **August 16, 2024**, District shall schedule compensatory services in collaboration with the parents of Students A through G. A meeting is not required to arrange these schedules, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. District shall submit the schedules of

compensatory services, to include the dates, times, and durations of planned sessions, to the CDE no later than **August 21, 2024**. If District and parents cannot agree to schedules by August 16, 2024, the CDE will determine the schedules for compensatory services by **August 26, 2024**.

- i. The parties shall cooperate in determining how compensatory services will be provided. If parents refuse to meet with District within this time, District will be excused from delivering compensatory services, provided that District diligently attempts to meet with parents and documents such efforts. A determination that District diligently attempted to meet with parents, and should thus be excused from providing compensatory services, rests solely with the CDE.
 - ii. The parents may opt out of some or all the compensatory services.
- c. Monthly consultation between the provider(s) delivering compensatory services and SLP Liaison (or a speech language pathologist who is also a team lead) shall occur to evaluate progress towards IEP goals for Students A through G 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.
- d. To verify that Students A through G have received the services required by this Decision, District must submit records of service logs to the CDE **by the second Monday of each month** until all compensatory services have been furnished. 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.
- e. These compensatory services will be in addition to any services Students A through G currently receive, or will receive, that are designed to advance them toward IEP goals and objectives. These compensatory services must be provided to Students A through G outside of the regular school day (such as before and/or after school, on weekends, or during school breaks) to ensure they are not deprived of the instruction they are entitled to (including time in general education). If for any reason, including illness, Students A through G are 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 parents and notify the CDE of the change in the appropriate service log.

- f. If the CDE determines, in its sole discretion, that additional information or action is necessary to verify or ensure that Students A through G receive the compensatory services required by this Decision, it may require District to provide additional information—such as a student’s IEP, class schedule, or other documentation—or take any additional actions deemed necessary by the CDE.

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
201 East Colfax Avenue
Denver, CO 80203

NOTE: If District does not meet any of the timelines set forth above, it may adversely affect District’s annual determination under the IDEA and subject District to enforcement action by the CDE.

CONCLUSION

The Decision of the CDE 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 8th day of July, 2024.



Brandon Edelman, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1-9

- Exhibit 1: IEP

Response, pages 1-11

Supplemental Response, pages 1-7

- Exhibit A: IEPs
- Exhibit D: IEP Meeting Documents
- Exhibit E: Service Logs
- Exhibit F: Attendance Records
- Exhibit G: Progress Reports
- Exhibit H: District Calendar
- Exhibit I: Policies
- Exhibit J: Correspondence
- Exhibit K: District Staff Contact Information/Response Delivery Verification
- Exhibit L: IEP and Related Documents
- Exhibit M: IEP Meeting Recording
- Exhibit N: IEP Meeting Recording
- Exhibit O: Other Students' Information
- Exhibit P: Other Students' Progress Reports

Telephone Interviews

- Parent: May 29, 2024
- Director: May 30, 2024
- SLP Liaison: May 30, 2024
- SLP: May 30, 2024
- Case Manager: June 4, 2024