

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

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**State-Level Complaint 2021:527  
South Central BOCES**

**DECISION**

**INTRODUCTION**

On November 8, 2021, the (“Parents”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”) filed a state-level complaint (“Complaint”) against a member district (“District”) of the South Central BOCES (“BOCES”).<sup>1</sup> The State Complaints Officer (“SCO”) determined that the Complaint identified five (5) 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.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. §300.153(c), 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 8, 2020, through November 8, 2021, for the purpose of determining if a violation of the IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

**SUMMARY OF COMPLAINT ALLEGATIONS**

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

1. Failed to develop, review, and revise an IEP during the 2021-2022 academic year that was tailored to meet Student’s individualized needs, specifically as follows:

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<sup>1</sup> 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.

- a. Failed to include functional and social annual goals in Student’s IEP, in violation of 34 C.F.R. §§ 300.320 and 300.324;
  - b. Failed to include specialized math curriculum in Student’s IEP, in violation of 34 C.F.R. §§ 300.320 and 300.324;
  - c. Failed to include behavioral strategies and supports in Student’s Behavioral Intervention Plan (“BIP”) to adequately address behavioral needs, in violation of 34 C.F.R. § 300.324(a)(2)(i).
2. Failed to properly implement Student’s IEP from August 1, 2021 to present, specifically as follows:
    - a. Failed to provide Student with special education and related services required by Student’s IEP, to specifically include math accommodations, in violation of 34 C.F.R. §§ 300.34, 300.320(a)(4), and 300.323;
    - b. Failed to follow Student’s BIP, in violation of 34 C.F.R. § 300.323.
  3. Failed to provide Parents with periodic reports on Student’s progress between August 1, 2021 and present, in violation of 34 C.F.R. § 300.320(a)(3)(ii).
  4. Failed to ensure that special education teachers working with Student possessed required certifications and licenses during the 2021-2022 academic year, in violation of 34 C.F.R. § 300.156 and ECEA Rule 3.04.
  5. Failed to provide for staff development for special education teachers and paraprofessionals working with Student to assure opportunities for appropriate educational services to children with disabilities, in violation of ECEA Rule 3.05.

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire record,<sup>2</sup> the SCO makes the following FINDINGS:

#### **A. Background**

1. Student is eight years old and currently attends a District elementary school (“School”). *Interview with Parents; Exhibit A*, p. 1. District is a member of the BOCES. *Exhibit A*, p. 1. The BOCES is responsible for providing FAPE to all IDEA-eligible children with disabilities attending a school in its members districts. ECEA Rule 2.02.

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<sup>2</sup> The appendix, attached and incorporated by reference, details the entire record.

2. Student qualifies for special education and related services under the Autism Spectrum Disorder disability category. *Exhibit A*, p. 36. Student is a happy, sweet child who loves being around peers, and enjoys reading and the outdoors. *Interviews with Parents and Special Education Teacher*. She requires support in math and reading and struggles with behavior and communication. *Interviews with Special Education Teacher and Parents; see Exhibit A*, pp. 36-54.
3. This investigation concerns the 2021-2022 academic year, when Student was enrolled in second grade at School. *Exhibit A*, p. 36. The first day of class was August 16, 2021. *CDE Exhibit 1*, p. 1; *Interviews with Special Education Teacher and General Education Teacher ("Ged Ed Teacher")*. At the time, Student's September 2020 IEP ("2020 IEP") was in effect. *Exhibit A*, pp. 1-22. The 2020 IEP was developed at a properly constituted IEP meeting on September 23, 2020. *Id.* at p. 2.

#### **A. The 2020 IEP**

4. The 2020 IEP reviewed Student's present levels of performance and documented the results of a triannual reevaluation completed in September 2020 to determine continuing eligibility. *Id.* at pp. 3-12. Student was reevaluated in the areas of speech and language, intelligence, academics, occupational therapy, behavior, and autism. *Id.*
5. In addition to assessments, the IEP Team compiled observations from teachers, paraprofessionals, and service providers. *Id.* Data from the assessments and observations demonstrated Student made growth in reading and math, but that she was still below grade level and struggled with writing and composition. *Id.* p. 4. Observations and teacher reports showed Student made progress toward her annual goals. *Id.* at p. 5.
6. Student's expressive, pragmatic, and receptive language skills were significantly below those of same-aged peers, although her articulation skills were within normal limits. *Id.* at p. 6. Occupational Therapy ("OT") testing showed that her auditory processing is impacted by high noise environments, that she can become distressed by changes in routine or schedule, and that she withdraws due to those changes. *Id.* pp. 7-8.
7. Regarding behavior, the reevaluation revealed that while adaptive skills were a significant challenge for Student at home, these skills were not assessed at school due to Student having a new teacher. *Id.* at p. 11.
8. The 2020 IEP documented Student's needs and the impact of her disability, including difficulties engaging in small/whole group activities due to challenges expressing herself, and difficulties surrounding loud times during the day and changes in her personal routine/structure. *Id.* at p. 12.

9. The 2020 IEP contained annual goals in reading, mathematics, writing, and language. *Id.* at pp. 12-15. The 2020 IEP also contained several accommodations, including the use of manipulatives for math, in depth probing to pull out Student's knowledge, and access to sensory strategies such as noise cancelling headphones or fidgets. *Id.* at p. 16.
10. The 2020 IEP provided for 60 minutes of monthly indirect occupational therapy services; 90 minutes of direct monthly speech language services; 90 minutes of monthly indirect speech and language "support"; 60 minutes of monthly indirect psychological services; 60 minutes of daily direct "support" in math; 30 minutes of direct daily "support" in writing; 30 minutes of direct daily "support" in social skills, missed work, and reading intervention; and 30 minutes of daily direct "support" in social studies. *Id.* at p. 18.
11. The IEP Team determined it was appropriate for Student to be in general education at least 80% of the time to be exposed to social situations and grade level content. *Id.* at p. 20.

#### **B. The 2020 BIP**

12. The 2020 IEP included a Behavior Intervention Plan ("2020 BIP"). *Id.* p. 23. A functional behavior assessment ("FBA") was completed to identify positive behavior supports using information obtained through file review, observations across school settings, parent/teacher/student feedback, ABC observation data, and special education data. *Id.* at p. 23.
13. The 2020 BIP's strength-based profile section documented Student's skills and interests, positive relationships, pro-social behaviors, and family and community supports. *Id.*
14. The 2020 BIP identified Student's target behavior as escape. *Id.* at p. 23. It described the target behavior as "a series of attention seeking behavior(s) which vary in intensity, in order to escape the activity and obtain a preferred one." *Id.* The function of the target behavior is to escape a non-preferred activity. *See id.*
15. The 2020 BIP identified behaviors at five different levels of intensity, from 1 (calm – Student is sitting quietly, listening or keeping herself occupied by reading or doing another preferred activity) to 5 (Student will cry and/or scream to obtain the attention of those around her, may rip papers or engage in unexpected behavior, possibly accompanied by intentionally hurting herself). *Id.* at p. 24.
16. The strategies/outcomes worksheet envisioned a setting with a visual schedule prominently displayed in the classroom and referenced throughout the day when activities change and ample warnings before transitions to reduce stress. *Id.* at pp. 24-25. Antecedent strategies included providing Student with alternatives when she completes her work early, reminding

Student of activities she can engage in on her own in the classroom if she is not engaging or initiating another activity, and offering breaks when she feels overwhelmed. *Id.*

17. Behavior teaching strategies included teaching Student how to identify emotions through general education initiatives and classroom positive behavior support strategies. *Id.* The desired alternative behaviors included Student raising her hand, communicating when she is finished, and asking for a break. *Id.*
18. Reinforcement strategies included allowing Student to participate in a preferred activity when she communicates that she is finished with the first one. *Id.* If Student engages in an undesired behavior, such as disengaging or playing with things on her desk, staff should verbally redirect her to choose another preferred activity. *Id.*
19. The 2020 BIP did not contain a crisis intervention plan because, “[S]tudent’s behavior does not have the potential to produce harm to self or others.” *Id.* at p. 26.
20. The 2020 BIP indicates behavior would be observed and monitored by the IEP Team. *Id.* at p. 26. Student’s case manager was responsible for ensuring classroom teachers, paraprofessionals, teacher aides, specials teachers, and substitute teachers were aware of the plan. *Id.* at p. 27.
21. The criterion for success provided that by December 18, Student will increase her independent ability to sustain attention to task in the classroom as evidenced by a decrease in the occurrence of target behaviors outlined in the FBA as well as an increase in replacement behaviors outlined in the 2020 BIP. *Id.* at p. 26.
22. The contextual fit section reads that the IEP Team would need to “contact and provide training (informal) to [. . .] special’s teacher, paraprofessionals and teacher’s [assistants] working in the kindergarten classroom to ensure they are familiar with the pattern of behaviors outlined in the FBA as well as replacement behaviors outlined in the BIP.” *Id.*

### **C. The March 3, 2021 IEP Amendment**

23. Student’s maladaptive behavior escalated over time in the school-setting during the 2020-2021 academic year. *Id.* at p. 30. On March 3, 2021, the 2020 IEP was amended to address this behavior. *Id.* Service delivery was modified to provide daily support and supervision for the entire school day from a paraprofessional, under guidance of a special education teacher, in implementing and enforcing the 2020 BIP across settings. *Id.* No changes were made to the 2020 BIP. *See id.*

24. The 2020 IEP and 2020 BIP were in effect for the entire 2020-2021 academic year. *Id.* at pp. 23-28. After the amendment, Student's behavior improved for the remainder of the 2020-2021 academic year. *Interview with Parents.*
25. The 2020 IEP and 2020 BIP were in effect at the beginning of the 2021-2022 academic year, from August 16, 2021, through August 31, 2021. *CDE Exhibit 1*, p. 1; *see Exhibit A*, pp. 1, 23.

#### **D. Implementation of the 2020 IEP (August 16 – August 31)**

##### **Accessibility to Student's Teachers**

26. BOCES holds professional development days for teachers and paraprofessionals at the beginning of the year. *Interview with Special Education Teacher.* Service providers, such as teachers and paraprofessionals, have access to IEPs and BIPs in Special Education Teacher's office and are encouraged to review them. *Id.* For Student, Special Education Teacher emailed Parents prior to the first day of classes to let them know she would collaborate with Student's teachers and supporting staff to ensure she has support at School necessary to remain safe. *Exhibit H*, p. 1.

##### **Full-Day Support from a Paraprofessional**

27. Parents allege BOCES failed to provide Student with support from a paraprofessional for the entire day as required by the 2020 IEP. *Interview with Parents.*
28. The 2020 IEP provided for support from a paraprofessional or special education teacher throughout the entire day under the guidance of a special education teacher. *Exhibit A*, p. 18. The 2020 IEP calculated five full days as 1,676 minutes of support, but five full days of class at School is approximately 1,890 minutes. *See Exhibit 1*, p. 11, *Exhibit A*, pp. 18, 47.
29. Parents assert that during the first two weeks of class, a paraprofessional was only available to support Student in academics, and that one was not provided for specials. *Interview with Parents.* Apart from stating that paraprofessionals were in place at the beginning of school, Special Education Teacher was unable to provide the SCO with specific details about the services Student received during this time. *Interview with Special Education Teacher.*
30. Emails from Special Education Teacher to Director of Special Education on August 16 show there was confusion because the 2020 IEP provided support from a paraprofessional for "the entire day" but the total number of service minutes (1,676/week) did not add up to five full days of class at School (1,890/week). *See Exhibit 1*, p. 11. As written in the 2020 IEP, the total number of minutes was approximately 214 minutes short of a full week at School. *See Exhibit 1*, p. 11.

31. Service logs demonstrate Student received 20 minutes of direct OT services on August 12, and 10 minutes indirect OT services on August 18. *Exhibit E*, p. 7. There are no other logs or records of any services provided to her from August 16 through August 31. *See Exhibit F*, pp. 1-26; *Exhibit E*, pp. 1-17.
32. The SCO finds—based on Special Education Teacher’s limited recollection and inability to describe specifics about Student’s services (despite being responsible for overseeing the paraprofessionals), the lack of service logs, emails demonstrating confusion about implementation, and the discrepancy between five full days of support (1,890 minutes) and the five days of support described in the 2020 IEP (1,676 minutes)—that Student was not provided with a paraprofessional for the entire day between August 16 and August 31. Student thus missed a total of 428 minutes of support ( $1,890 - 1,676 = 214$  minutes x 2 weeks = 428 minutes). *See Exhibit A*, p. 47.
33. On September 1, 2021, a properly constituted IEP Team met to revise the 2020 IEP and develop Student’s September 1, 2021 IEP (“2021 IEP”). *Exhibit A*, p. 36.

### **C. The 2021 IEP**

34. Several BOCES staff attended the IEP meeting in addition to the required members, including Student’s previous special education teacher, a BOCES regional coordinator, and an outside speech therapist (who is a previous BOCES employee). *Id.* at p. 37; *Interview with Director of Special Education*.
35. The 2021 IEP reviews Student’s present levels of performance. *Exhibit A*, p. 38. It indicates that, behaviorally, it is difficult to work with her and other kids at the same time unless she is supported by a paraprofessional. *Id.* Parents reported new behaviors of concern over the summer, such as running away from home, but those behaviors were not observed in school. *Interviews with Parents and Special Education Teacher*.
36. For OT, the 2021 IEP indicates that services focused on creating individual resources to help Student in the school environment. *Exhibit A*, p. 38. The 2021 IEP indicates “social stories” were created to assist her when she experiences difficulties following a new routine and help her when she is feeling overwhelmed and frustrated at school. *Id.* For speech, Parents reported that Student was doing well and talking in more complete sentences, but that she struggled with abstract concepts and understanding the correlation with language. *Id.*
37. The 2021 IEP does not detail how Student performed on her previous annual goals. *See id.* at pp. 26-54. It indicates Parents will be notified of progress toward goals and objectives on a quarterly basis, at annual review meetings, and at any meetings they request. *Id.* at p. 40.

38. The 2021 IEP documents Student’s needs and the impact of her disability, including difficulty engaging in small/whole group activities due to trouble expressing herself and her thinking. *Id.* at p. 39. Student continues to have difficulty dealing with change in her classroom, loud times during her day, and any changes in her personal routine/structure. *Id.*

39. The 2021 IEP contains the following annual goals:

- a. Goal # 1 (Reading): “By Aug. 21, 202[2], when given a grade level passage, [Student] will be able to answer basic comprehension questions, including who are the main characters, what is happening in the story, where is the story taking place with 80% accuracy in 4 out of 5 trials as measured by bi-monthly assessments given by the general or special education teacher/para.” *Id.* at p. 40.
- b. Goal # 2 (Mathematics): “By Aug[.] 31, 2022, [Student] will, when given measuring tools and a variety of measurable items [. . .] be able to determine length, height and or [sic]weight -heavier or lighter when comparing two items- in 4 out of 5 opportunities as measured by bi-monthly assessments by the general or special education teacher/para.” *Id.* at pp. 40-41.
- c. Goal # 3 (Language): “By September 2022, when given a picture or visual, [Student] will use appropriate pronouns when given a) a model and/or b) a question to answer with 80% accuracy as measured by SLP data over three consistent sessions.” *Id.* at pp. 41-42.
- d. Goal # 4 (Language): “By September 2022, [Student] will complete the following objectives to improve her receptive, expressive, and pragmatic language skills with 80% accuracy as measured by data collection with moderate visual and verbal cuing as needed.” *Id.* at pp. 42-43. The objectives include answering comprehension questions after listening to a passage, producing grammatically correct sentences in response to a language task, and using turn taking skills. *Id.* at p. 43.

40. The 2021 IEP contains accommodations to help Student access the general education curriculum. *Id.* at p. 44. Several are general accommodations, such as repeating directions often, and seating Student apart from peers so Student can have space while sitting. *Id.* Two accommodations—teaching concepts one way versus multiple ways and the use of manipulatives—are specific to math instruction. *See id.*

41. The 2021 IEP provides for 60 minutes of indirect OT services each month, 90 minutes of direct speech language services each month, 30 minutes of indirect speech language services each month, 1,890 minutes (the entirety of the day) of direct 1:1 support from a



special education teacher or a paraprofessional each week, and 30 minutes of direct support each week outside the classroom. *Id.* at p. 47.

42. The paraprofessional or special education teacher is meant to support Student throughout the day both academically and behaviorally. *Interview with Special Education Teacher.* Special Education Teacher explained the 30 minutes of direct support outside the classroom each week is to be used as needed and is meant to address times when Student needs to leave the classroom with a paraprofessional for a break after she becomes frustrated and requires a behavioral intervention. *Id.*
43. The IEP Team determined it was appropriate for Student to be in the general education class at least 80% of the time, to have exposure to grade level curriculum. *Exhibit A*, p. 48. Although Student requires specialized instruction and support, the IEP Team determined she can receive supports and accommodations within the general education setting. *Id.*

#### **D. The 2021 BIP**

44. Student's 2021 IEP was accompanied by a Behavior Intervention Plan ("2021 BIP"). *Id.* at p. 50. The 2021 BIP is nearly identical to the 2020 BIP. *See id.* at pp. 23-28, 50-54. E-mails confirm the 2021 BIP's content was copied and pasted from the 2020 BIP. *Exhibit H*, p. 28.
45. BOCES staff report the 2020 BIP was not updated because the 2020 IEP was amended in March of 2021 to address escalations in maladaptive behaviors, and Student's behavior showed improvement during the remainder of the 2020-2021 academic year leading up to the summer. *Interviews with Special Education Teacher and Director of Special Education.* Parents reported seeing new behaviors, such as running away from home, but those behaviors were not seen at school. *Interviews with Parents and Special Education Teacher*
46. While the 2021 IEP provides for support from a 1:1 paraprofessional or special education teacher each day, it does not contain a social emotional goal that relates back to the 2021 BIP. *See Exhibit A*, pp. 1-54; *Consultation with CDE Content Specialist 1.* The 2021 BIP, however, contains descriptions of replacement behaviors that a support paraprofessional will work on with Student, such as Student raising her hand, communicating when she is finished, and asking for a break. *Exhibit A*, p. 51.

#### **E. Implementation of the 2021 IEP and the 2021 BIP (September 1 to Present)**

##### **Accessibility to Student's Teachers**

47. As described above, IEPs and BIPs are maintained in Special Education Teacher's office, and paraprofessionals have access and are encouraged to look at them. *Interview with Special Education Teacher.* Special Education Teacher and General Education Teacher ("Gen Ed

Teacher”) are familiar with the 2021 IEP. *Interviews with Special Education Teacher and Gen Ed Teacher*. Special Education Teacher said one of the paraprofessionals currently working with Student was at the September IEP meeting and learned of the 2021 IEP there, while the others were trained on their responsibilities through informal discussions. *Interview with Special Education Teacher*.

48. Paraprofessional, one of the primary educators working with Student starting in September 2021, reports that she was never trained on the 2021 IEP and does not think she has access to Student’s documents. *Interview with Paraprofessional*. Paraprofessional knew Student previously, has experience working with children with autism, and often communicated with Parents for guidance on addressing Student’s behavioral needs. *Id.* Paraprofessional said there were some infrequent check-ins with Special Education Teacher about Student’s progress. *Id.* Though Paraprofessional indicated she had the skills to support Student, she added that she could have used more support herself. *Id.*

### Math Accommodations

49. Parents allege BOCES failed to provide Student with math accommodations required by the 2021 IEP from September 1, 2021, to the present. *See Complaint, 1-10.*
50. The 2021 IEP contains approximately 26 accommodations, many of which (i.e., access to noise cancelling headphones, use of a timer during class periods) are not specific to a subject, such as math. *Exhibit A, p. 44.* The 2021 IEP contains only two accommodations that specifically reference math instruction (teach concepts one way versus multiple and offer manipulatives). *Id.* Parents assert that Student has not been offered any math accommodations, and that any accommodations that were provided, “are due to paras and parents and haven’t come from the top down.” *Interview with Parents.*
51. Math instruction typically starts with group instruction, where students and the instructor work on concepts together, then it moves to independent practice. *Interview with Special Education Teacher*. A paraprofessional is always with Student and can support Student or modify instruction as needed during both group and individual instruction. *Id.*
52. The accommodations provided during math instruction include: allowing Student to use a method for solving a problem she is familiar with rather than using a new abstract method, repeating instructions, access to sensory strategies (like noise-cancelling headphones), use of a timer to show how much time is remaining in activities, extended wait time for verbal responses, and rewriting problems on a blank sheet of paper so she is not distracted by other things on a page. *Id.*
53. During math instruction, depending on the content, BOCES staff reduce the levels of the questions given to Student for a quality vs. quantity approach. *Interview with Gen Ed*

*Teacher*. Student is also provided with math manipulatives but does not always use them. *Id.* Gen Ed Teacher said Student’s current math grade is “In Progress” which means she is below grade level but working toward grade level and showing progress. *Id.*; *Exhibit G*, p. 1.

54. Paraprofessional is not familiar with the accommodations under the 2021 IEP, but she provides support during math instruction. *Interview with Paraprofessional*. Special Education Teacher provided her with worksheets to work on with Student, and when a math problem has a lot of steps that Student has not learned, Paraprofessional lets Student find an alternate path to the answer using steps she already knows. *Id.* If Student can complete a problem using a method she already knows, she does quite well in math. *Id.*
55. The SCO finds—based on the consistent practices and information described by Special Education Teacher, Gen Ed Teacher, and Paraprofessional—that Student received the math accommodations as required by the 2021 IEP.

### *Behavioral Supports*

56. Parents allege the IEP Team agreed that the paraprofessional working with Student throughout the day would be limited to one of two specific individuals. *Interview with Parents*. Parents indicate Student works better with some people than others, and that they only want her working with two specific paraprofessionals (in part because of a preference for those individuals and in part because Student requires consistency). *Id.* Parents allege that by failing to ensure Student would only work with those two paraprofessionals, BOCES failed to implement the 2021 BIP, and by extension, the 2021 IEP. *Id.*
57. Neither the 2021 IEP nor the 2021 BIP specify the identity of the 1:1 paraprofessional supporting Student, and the 2021 IEP only indicates the support will come from a paraprofessional or a special education teacher. *See Exhibit A*, pp. 36-54. Special Education Teacher wrote in an email to Parents on September 27, 2021:

“You requested for [Student] to have only two paras in the meeting and I was clear that that was not [something] we would be able to do. I am finishing up her IEP today and will get it sent home with [Student] for you review”.

*Exhibit 1*, p. 23.

58. BOCES would like to accommodate Parents’ request for specific individuals and makes efforts to do so, but it cannot guarantee that Student will only work with certain paraprofessionals. *Interview with Director of Special Education; Response*, p. 3. There are occasions when staff members are absent, especially in light of COVID-19, and thus may not be available for Student. *Interview with Director of Special Education*. Emails with Parents

demonstrate that efforts were made over the course of the year to accommodate their requests for specific paraprofessionals. *See Exhibit 1*, pp. 14, 20-23, 54-55, 59.

59. Special Education Teacher, Gen Ed Teacher, and Paraprofessional all said Student has 1:1 support from a paraprofessional or a special education teacher for the entire day of class every day. *Interviews with Special Education Teacher, Gen Ed Teacher, and Paraprofessional*. Special Education Teacher indicates the 30 minutes of direct support outside of the classroom under the 2021 IEP is used as necessary on occasions when Student becomes frustrated and needs to take a break (i.e., walking to the library and back with a paraprofessional). *Interview with Special Education Teacher*.
60. On occasions when Parents are notified that Student will be working with someone other than their two preferred paraprofessionals, Parents remove Student from School. *Interviews with Parents, Director of Special Education, and Special Education Teacher*. Between August 16, 2021 and when the Complaint was received on November 8, 2021, Student was pulled early or absent from School on ten different occasions. *Exhibit P*, p. 1.
61. Because the 2021 IEP does not require that a specific paraprofessional support Student, the SCO finds that BOCES did not fail to implement the 2021 IEP or the 2021 BIP in this respect.

#### **F. Parents' Request for an IEP Meeting**

62. In late September of 2021, Parents requested a meeting with BOCES to discuss Student's behavior and the schedule for paraprofessionals. *See e.g., Exhibit 1*, p. 44. While not all new behaviors described by Parents (e.g., running) were observed in school, over the course of the 2021-2022 academic year, there have been isolated incidents of new and escalating behavior observed where Student attempted to hurt staff or peers. *Interview with Gen Ed Teacher; see Exhibit F*, pp. 1-9.
63. BOCES scheduled an IEP meeting for October 7, 2021, to discuss Parents' concerns. *See Exhibit 1*, pp. 29-31, 38, 39-43, 47-48, 56. On October 4, 2021, Parents asked to cancel the IEP meeting, and indicated they wanted it postponed until everyone present at the September 2021 IEP meeting and all of Student's paraprofessionals could attend. *See id.*; *Interviews with Parents, Special Education Teacher, and Director of Special Education*.
64. BOCES made efforts to secure those people for a meeting, but some of the extra attendees were at the September 2021 IEP meeting for the purposes of transition (and were not required members of Student's IEP team). *Interview with Director of Special Education; Exhibit 1*, p. 38-39. BOCES offered Parents options that would allow some of the staff they requested to attend but finding an available time for everyone was challenging. *See Exhibit 1*, p. 38-39. BOCES reported it was unnecessary for the regional coordinator or Student's

former case manager to attend if the meeting was to discuss concerns about the schedule with paraprofessionals. *Id.*

65. On October 15, 2021, Parents emailed Director of Special Education Director and said they wanted to hold off the IEP meeting and see if the scheduling issues could be resolved. *Id.* at p. 38. Director of Special Education emailed Parents to confirm Parents felt an IEP meeting was unnecessary because scheduling was being worked on outside of the IEP. *Id.* at p 37.

### **G. Progress Monitoring**

66. Parents allege BOCES failed to provide periodic reports on Student's progress toward annual goals as required by the 2021 IEP. *Complaint*, pp. 1-9.
67. A progress report detailing Student's progress toward annual goals was updated on October 14, 2021 by Special Education Teacher. *See Exhibit F*, at pp. 18-20. This is Special Education Teacher's first year as a teacher, and when she generated the progress report, she thought it would automatically be sent to Parents. *Interview with Special Education Teacher*. Progress reports must be sent manually, so Parents were not provided with the progress report until November 29, 2021. *Interviews with Special Education Teacher and Parents*.
68. Nevertheless, Parents were provided with information about Student's progress throughout the 2021-2022 academic year through other means, including a Google document and a Communication Log. *See Exhibit F*, pp. 1-17.

#### **The Google Document**

69. When Student struggles in class and requires a behavior intervention, paraprofessionals enter information about the incident into a Google document that Parents can access. *Response*, p. 4; *see Exhibit F*, pp. 1-9; *Interviews with Special Education Teacher, Gen Ed Teacher, and Paraprofessional*.
70. The Google document contains fields for entering information about behavior incidents, including the date, whether Student was at any point removed from the classroom or specials, the number of times the undesirable classroom behavior was displayed, antecedent to behavior if known, a brief explanation of the behavior, and consequences of the behavior. *Exhibit F*, pp. 1-9. The Google document contains entries starting on September 8, 2021, detailing incidents in which a paraprofessional used a behavioral intervention on a target behavior. *Id.* There are entries for dates in every week from September 8, 2021 to November 8, 2021, the date the Complaint was filed with CDE. *See id.*
71. Most of the incidents described in the Google document involve attention seeking behaviors that are described in the 2021 BIP, such as Student crying and screaming,

intentionally hurting herself, lashing out, regressing in skills, and/or disengaging. *See id.*; *Exhibit A*, p. 50. Paraprofessional, Special Education Teacher, and Gen Ed Teacher report that most of the time, interventions are successful in redirecting her, which is corroborated by the Google document. *See Exhibit F*, pp. 1-9; *Interviews with Paraprofessional, Special Education Teacher, and Gen Ed Teacher*.

### The Communication Log

72. In addition to the Google document, Parents were provided with information about Student's progress using a collaborative Communication Log. *Interviews with Special Education Teacher and Gen Ed Teacher*; *see Exhibit F*, p. 10-17. Like the Google document, the Communication Log contains fields for Student's teachers, paraprofessionals, and Parents to enter notes and observations about Student's performance. *Exhibit F*, p. 10-17.
73. Beginning on September 8, 2021, the Communication Log contains detailed observations about both Student's behavior and academic performance, including observations during math instruction. *See id.* The Communication Log also contains observations and comments from Parents, demonstrating collaboration between Parents and service providers. *See id.* There are entries for dates in every week of classes from September 8, 2021 to November 8, 2021, the date the Complaint was received by CDE. *See id.*

## **H. Qualifications for Special Education Teacher**

74. Parents allege Special Education Teacher lacked the required licenses or certifications during the 2021-2022 academic year. *See Complaint*, pp. 1-9. Special Education Teacher works with Student and serves as Student's case manager. *Interview with Special Education Teacher*; *Exhibit A*, p. 54.
75. Special Education Teacher is licensed by the CDE as a Special Education Generalist (5-21) through an Alternative Teacher License valid through January 22, 2024. *Interview with Special Education Teacher*; *Exhibit K*, p. 1. Special Education Teacher is also licensed by the CDE as a Substitute Teacher (K-12). *Id.*

## **I. BOCES Staff Development**

76. Parents allege BOCES failed to provide staff development to assure opportunities for appropriate educational services to children with disabilities. *See Complaint*, pp. 1-9.
77. BOCES holds a summer in-service for teachers, and paraprofessionals attend an orientation to learn about their responsibilities working with Students with disabilities. *Interview with Director of Special Education*; *Exhibit L*, p. 29. This year, on September 24, BOCES held a professional development day for School staff. *Exhibit L*, p. 31. BOCES also holds a training

for paraprofessionals and general education teachers on how to best use paraprofessionals in the classroom. *Interview with Director of Special Education*.

78. BOCES maintains an electronic list of training and webinars that are available to staff, and Director of Special Education e-mails teachers and paraprofessionals regarding professional development opportunities, such as CDE trainings and workshops. *Id.*; *Exhibit H*, pp. 147, 192; *See Exhibit L*, pp. 1-19.
79. BOCES contains 12 school districts, including District, so global trainings and professional development opportunities can be difficult to organize. *Id.* BOCES district and schools can, however, request that Director for Special Education make a visit for specific trainings or ask Director of Special Education or a school psychologist for guidance on special education questions. *Interview with Director of Special Education*. A training for paraprofessionals with Director of Special Education on progress monitoring and inclusive settings, scheduled at School for November 5, 2021, had to be rescheduled to January 2022 due to COVID-19. *Id.*
80. Finally, BOCES' written policies and procedures are shared with all special education teachers. *Id.* These policies and procedures were built using guidance documents obtained from CDE, and any staff member with questions about the policies and procedures can contact school psychologists or Director of Special Education. *Id.*; *see Exhibit J*, pp. 1-248. Based on a review, the SCO finds the BOCES' written policies and procedures related to the Complaint's allegations to be consistent with the IDEA. *See Exhibit J*, pp. 1-248.

### **CONCLUSIONS OF LAW**

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

**Conclusion to Allegation No. 1: BOCES developed, reviewed, and revised an IEP during the 2021-2022 academic year that was tailored to meet Student's individualized needs.**

The first allegation accepted for investigation suggests that the 2021 IEP was not tailored to Student's individualized needs for three reasons: (1) it did not include academic and functional annual goals, (2) it did not include a specialized math curriculum, and (3) it did not include appropriate behavioral strategies and supports.

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 206-207. If the question under each prong can be answered affirmatively, then the IEP is appropriate

under the law. *Id.* at 207. The inadequacies alleged by Parents are now addressed below considering these legal standards.

#### **A. Development of the 2021 IEP**

An IEP must contain measurable goals designed to: 1) meet the needs that result from the student’s disability to enable him or her to be involved in and make progress in the general education curriculum, and 2) meet each of the student’s other educational needs that result from his or her disability. 34 C.F.R. § 300.320(a)(2). An IEP must also contain —among other components—a “statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to a child.” 34 C.F.R. § 300.320(a)(4). In developing an IEP, the IEP team must also consider the use of positive behavioral interventions and supports to address behavior for a student whose behavior impedes her ability to learn. 34 C.F.R. § 300.324(a)(2)(i).

Here, Student’s 2021 IEP was developed at a properly constituted IEP meeting on September 1, 2021. (FF # 33). The 2021 IEP contains measurable annual goals to address Student’s functional needs, a statement of the services to be provided, and positive behavioral interventions and supports provided through the 2021 BIP. (FF # 39, 41, 44-46). Accordingly, the SCO finds and concludes that the 2021 IEP development process complied with IDEA’s procedures. *Rowley*, 458 U.S. at 206. The second question is whether these annual goals, services, and positive behavioral supports were substantively appropriate. *Id.* at 207.

#### **B. Student’s Annual Goals**

Parents allege the 2021 IEP does not meet Student’s needs because it does not include a social emotional goal.

An IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 999. In essence, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” *Id.* at 1001. IEP goals must be based on a student’s unique needs. *Id.* at 999.

In developing the 2021 IEP, the IEP Team reviewed Student’s present levels of performance, indicating she performs better when supported by a paraprofessional. (FF # 35). She struggles with communication and abstract learning and has trouble engaging in small/whole group activities due to trouble expressing herself and her thinking. (FF # 36, 38). Student has difficulties with changes in the classroom and loud times throughout the day, and recent assessment data demonstrates Student is below grade level in reading and math. (FF # 5, 38).

The 2021 IEP contains four annual goals: one in reading, one in math, and two in language. (FF # 39). Although two language annual goals address communication skills, which are related to



social emotional skills, the SCO finds, in consultation with CDE Content Specialist 1, that these goals are academic in nature because they relate to comprehension and grammar rather than expressive language, such as appropriately asking for a break. *See id.*

Nevertheless, Student is provided with 1:1 support from a paraprofessional or special education teacher under the 2021 IEP to address her need for support throughout the day. (FF # 41). The 1:1 paraprofessional is intended to support Student both academically and behaviorally. (FF # 42). The annual goals section of the 2021 IEP describes the academic skills Student works on with her paraprofessional or special education teacher, and social/emotional skills Student works on are described in the 2021 BIP. (FF # 39, 42, 46).

Under the 2021 BIP, a paraprofessional or special education teacher supports her in practicing replacement behaviors, such as raising her hand, communicating when she is finished, and asking for a break. (FF # 42, 46). Student struggles socially with expressive communication, and in consultation with CDE Content Specialists 1 and 2, the SCO finds that these behavioral supports are appropriately tailored to address her social emotional needs. Student's behavior data is collected using the Google document, and the 2021 BIP provides a measure for tracking success (increase in replacement behaviors and decrease in target behaviors). (FF # 17-18, 21, 44, 46, 69-70).

The SCO accordingly finds and concludes, in consultation with CDE Content Specialist 1 and CDE Content Specialist 2, that BOCES included functional and academic annual goals in the 2021 IEP that are appropriate to address the social-emotional needs of Student's disability.

### **C. Specialized Math Curriculum**

Parents allege the 2021 IEP does not meet Student's needs because it does not provide a specialized alternative math curriculum in 2021 IEP.

Special education and related services must be based on peer-reviewed research only to the extent practicable. 34 C.F.R. § 300.320(a)(4). An IEP is not required to identify specific curriculum or methodology for instruction. *Id.* "[P]arents, no matter how well-motivated, do not have a right under the [IDEA] to compel a school district to provide a specific program or employ a specific methodology . . ." *Lachman v. Ill. State Bd. of Ed.*, 852 F.2d 290, 297 (7th Cir. 1988).

The 2021 IEP does not identify a specialized alternative math curriculum. (FF # 34-43). It does, however, require accommodations in math, specifically for Student to use one method to solve a problem instead of multiple and for Student to be offered the use of manipulatives. (FF # 40). The 2021 IEP also contains several general accommodations that are designed to support Student across academic subjects, such as repeating directions and sitting her apart from other children so she can have space. *Id.*

In consultation with CDE Content Specialist 2, the SCO finds that these accommodations were appropriate to address Student's individualized needs and that she did not require a specialized alternative curriculum. Teaching math in one way versus multiple ways is an appropriate method of making instruction less abstract, and manipulatives further help make lessons more concrete for a student that struggles with abstract concepts. Student struggles with abstract concepts, but she is good at math when she is permitted to solve a problem using a method she knows. (FF # 6, 54). The accommodations provided in math are sufficient to allow Student to access the general math curriculum, and she is currently showing progress and working toward grade level in math. (FF # 53).

For these reasons, the SCO finds and concludes, upon consultation with CDE Content Specialist 2, that the 2021 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances in this respect.

#### **D. Behavioral Supports**

Parents allege the 2021 IEP does not meet Student's needs because it was not revised to consider the use of positive behavioral interventions and supports or other strategies to address new observed behaviors, such as running away from home. (FF # 35).

The IEP team must consider the use of positive behavioral interventions and supports whenever a behavior interferes with the student's ability to benefit from educational programming. 34 C.F.R. § 300.324(a)(2)(i). A BIP can document the "use of positive behavior interventions, supports and other strategies to address the behavior of a child whose behavior impedes the child's learning or that of others." *CDE IEP Procedural Guidance Manual*, p. 121. To be effective, a BIP should detail the target behaviors and the motivation behind these behaviors. *Id.* If a student displays unsafe behaviors, a BIP should also include a crisis intervention plan to address positive intervention and de-escalation strategies. *Id.* IEP teams typically conduct an FBA prior to developing a BIP, but the IDEA does not require that positive behavioral supports be based on an FBA. *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46683 (Aug. 14, 2006).

In this case, Student's behavior sometimes impedes her learning and disrupts the learning of her classmates. *See* (FF # 14-15). As a result, the IEP Team was required to consider positive behavioral interventions and supports in the development of Student's IEP.

Student's 2020 BIP was developed in September of 2020 in conjunction with a triennial reevaluation and development of the 2020 IEP. (FF # 4, 12). As a part of the reevaluation, Student received an FBA in September of 2020. (FF # 12). The FBA identified Student's target behavior, the antecedents and consequences of such behavior, and the strategies implemented to resolve such behavior. (FF # 12-22). The FBA was used to develop Student's 2020 BIP. *Id.*

In March of 2021, due to observed escalation of Student's maladaptive behavior in the school setting, Student's IEP Team met to review and revise Student's 2020 IEP. (FF # 23). Although the 2020 BIP was not altered, the IEP Team amended the 2020 IEP to provide for support from a paraprofessional in the classroom for the entirety of each day to implement the 2020 BIP. *Id.* This change resulted in improvements in Student's behavior for the remainder of the 2020-2021 academic year leading up to summer. (FF # 24).

Over the summer, Parents observed new behaviors, such as running away from home. *See* (FF # 35). At the IEP meeting in September of 2021, Parents expressed concern about these new behaviors, but those behaviors had not been observed in the school setting. *Id.* The IEP Team, including Parents, agreed the 2020 BIP was effective leading up to the summer of 2021, did not revise the 2020 BIP, and instead developed the 2021 BIP by adopting the 2020 BIP's content. *See* (FF # 24, 44). The IEP Team did, however, change the 2021 IEP so Student would receive 1:1 support from a paraprofessional or special education teacher throughout the day. (FF # 41-42).

In consultation with CDE Content Specialist 1, the SCO finds a BIP should be reviewed at least annually, though there is no requirement that a BIP change from year to year if it is effective. The 2020 BIP here was effective in addressing target behaviors observed in the school-setting leading up to summer the year prior, so the IEP Team was justified in adopting the same strategies that were outlined in the 2020 BIP.

The SCO finds further, upon consultation with CDE Content Specialist 1, that the 2021 BIP contains appropriate behavioral strategies and supports to address Student's behavioral needs. Parents and BOCES agreed the 2020 BIP was effective leading up to the summer, after the March 2021 changes to the 2020 IEP. At the September 2021 IEP meeting, Parents raised concerns about Student running away from home, but that behavior was not observed in the school-setting, and the IEP team increased Student's level of behavioral support by providing 1:1 support from a paraprofessional or special education teacher throughout each day.

For these reasons, the SCO finds and concludes that the 2021 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances in this respect.

**Conclusion to Allegation No. 2: BOCES failed to properly implement the 2020 IEP from August 16, 2021 to August 31, 2021, in violation of 34 C.F.R. § 300.323. BOCES also failed to ensure each teacher and provider working with Student was informed of their responsibilities related to implementing the 2021 IEP, in violation of 34 C.F.R. § 300.323(d). Neither of these violations resulted in a denial of FAPE.**

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is "the centerpiece of the statute's education delivery system for disabled

children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student’s IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

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

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

#### **A. Implementation of the 2020 IEP (August 16 – August 31)**

##### Parents’ Concerns

From August 16 through August 31, the 2020 IEP was in effect. (FF # 25). Parents allege Student was not supported throughout the entire day by a paraprofessional. Specifically, they argue that she was supported by a paraprofessional in academics and not in specials. (FF # 27, 29).

##### Accessibility to Student’s Teachers

The SCO must determine whether BOCES satisfied its obligation under 34 C.F.R. § 300.323(d).

Here, BOCES had professional development days for teachers and paraprofessionals at the beginning of the year. (FF # 26). Prior to the beginning of the year, Special Education Teacher collaborated with Student’s teachers and supporting persons to ensure Student was supported

at School. *Id.* Service providers, such as teachers and paraprofessionals, had access to the 2020 IEP in Special Education Teacher’s office and were encouraged to view it. *Id.*

The SCO finds and concludes that BOCES ensured teachers and service providers working with Student were informed of their responsibilities under the 2020 IEP.

#### Full-Day Support from a Paraprofessional

The 2020 IEP provides for support from a paraprofessional for the entire day each day under the guidance of a special education teacher. (FF # 28). Special Education Teacher indicates there were paraprofessionals in place at the beginning of the year, but she has a limited memory of the services Student received during this time and could not provide specific details. (FF # 29). Special Education Teacher also made other statements about the training of Student’s paraprofessionals during the beginning of the 2021-2022 academic year that were not corroborated by other BOCES staff. *See* (FF 47-48). There are no service logs or records to demonstrate Student was supported by a paraprofessional throughout the day during this time, and emails from this time frame demonstrate there was confusion about what constituted an “entire day” under the 2020 IEP. (FF # 30-31).

The SCO finds the evidence does not demonstrate that BOCES provided Student with support from a paraprofessional throughout the entire day during this time, and what evidence does exist on the record supports Parents’ position. The SCO accordingly finds that Student did not receive 428 minutes of support from August 16 through August 31 (approximately two weeks). (FF # 32). Student received only 1,676 minutes of weekly support from a paraprofessional even though a full week of School consists of 1,890 minutes. (FF # 30, 32). The difference in these minutes, multiplied by two, equals 428 minutes.

For these reasons, the SCO finds and concludes that BOCES failed to implement the 2020 IEP in this respect.

#### Materiality of Failure to Implement

The failure to implement a “material”, “essential”, or “significant” provision of a student’s IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with “sister courts . . . that a material failure to implement an IEP violates the IDEA”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an “essential element of the IEP” denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the “significant provisions of the IEP” denies a FAPE). “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn 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.” *Id.* But a child’s educational

progress, or lack thereof, may indicate whether there has been more than a “minor shortfall in the services provided.” *Id.*

Here, Student was unsupported for approximately 428 minutes from August 16 through August 31. (FF # 32). Under the 2020 IEP, the purpose of the support paraprofessional was to assist in implementing the 2020 BIP. (FF # 23). There are no allegations of any behavioral incidents during this time that were not appropriately addressed by BOCES, and Parents did not raise any specific concerns about behavior during this time because Student was not being supported by a paraprofessional.

The SCO accordingly finds and concludes that the failure to implement the 2020 IEP was not material and did not result in a denial of FAPE.

## **B. Implementation of the 2021 IEP and the 2021 BIP (September 1 to Present)**

### Parents’ Concerns

From September 1, 2021 to the present, the 2021 IEP was in effect. (FF # 33). Parents allege that BOCES failed to implement the 2021 IEP, specifically by failing to provide accommodations in math and ensure support was provided from one of two paraprofessionals. (FF # 49, 56).

### Accessibility to Student’s Teacher

The SCO must determine whether BOCES satisfied its obligation under 34 C.F.R. § 300.323(d).

Here, Special Education Teacher and Gen Ed Teacher both stated they were familiar with Student’s 2021 IEP. (FF # 47). Paraprofessional, one of the primary paraprofessionals responsible for supporting Student each day, said she was never informed of her responsibilities under the 2021 IEP and that she has never seen the document (they are available in Special Education Teacher’s office). (FF # 48).

Special Education Teacher engaged in informal discussions with Paraprofessional regarding the 2021 IEP. (FF # 47). However, Paraprofessional indicates she only engaged in infrequent check-ins with Special Education Teacher, and Paraprofessional’s knowledge of how to appropriately intervene for Student comes primarily from previous experience working with other children with autism and information provided by Parents. (FF # 48).

For these reasons, the SCO finds and concludes that BOCES failed to ensure teachers and service providers working with Student were informed of their responsibilities under the 2021 IEP, in violation of 34 C.F.R. § 300.323(d).

### Math Accommodations

Parents allege BOCES failed to provide Student with math accommodations. The 2021 IEP entitled Student to several accommodations related to math instruction. (FF # 50). Most of Student's accommodations in the 2021 IEP are not tied to a specific subject, but the 2021 IEP specifically indicates that during math instruction, staff should teach Student concepts one way versus multiple ways, and Student should be offered the use of manipulatives. *See id.*

Special Education Teacher reported the accommodations provided to Student during math instruction included allowing Student to use a method for solving a problem she is familiar with rather than using a new abstract method, repeating instructions, access to sensory strategies (like noise-cancelling headphones), use of a timer to show Student how much time is remaining in activities, extended wait time for verbal responses, and rewriting problems on a blank sheet of paper so Student is not distracted by other information on a page. (FF # 51-52).

Gen Ed Teacher reported that during math instruction, depending on the content, BOCES staff reduce the levels of the questions given to Student for a quality vs. quantity approach. (FF # 53). Gen Ed Teacher said Student is also provided with math manipulatives, and Student's current grade in math is "In Progress", which means Student is below grade level but working toward grade level and showing progress. *Id.*

While Paraprofessional is not familiar with Student's 2021 IEP, she nonetheless provides support and accommodations for Student during math instruction. (FF # 54). Special Education Teacher provides Paraprofessional with worksheets to work on with Student, and when a math problem has a lot of steps that Student has not learned, Paraprofessional lets Student find an alternate path to the answer using steps she already knows. *Id.* If Student can complete a problem using a method she already knows, she does well in math. *Id.*

Despite Paraprofessional's lack of access to the 2021 IEP, Student has still been receiving math accommodations under the 2021 IEP. For these reasons, the SCO finds and concludes that BOCES did not fail to implement the 2021 IEP in this respect.

### Behavioral Supports

Parents allege that BOCES failed to ensure the paraprofessionals working with Student under the 2021 IEP and the 2021 BIP would be limited to two individuals. (FF # 56).

Neither IDEA nor ECEA requires BOCES to provide a specific provider to Student at Parents' request. *See, e.g., In re: Student with a Disability*, 121 LRP 38662 (SEA KS 2021). Indeed, neither the 2021 IEP nor the 2021 BIP identify any specific staff member who must support Student, and merely indicate support must come from a paraprofessional or a special education teacher. (FF # 41, 57). BOCES made efforts to accommodate Parents' request for specific

paraprofessionals but cannot guarantee only certain individuals would work with Student. (FF # 57-58). Nevertheless, Student has 1:1 support from a paraprofessional or a special education teacher for the entire day of class every day, as was required by the 2021 IEP. (FF # 41, 57, 59).

Moreover, an analysis of the behavioral supports provided over the course of the 2021-2022 academic year demonstrates that the 2021 BIP has generally been effective in addressing Student's behavior. Behavioral incidents that require an intervention are logged on Student's Google document, which is shared with Parents. (FF # 69). Student's service providers record information about behavior incidents on the document, and data, such as the antecedent to behavior and explanation of behavior, is collected to better understand Student's behavioral needs. (FF # 70). The Google document indicates service providers, such as Student's paraprofessionals, were providing behavioral interventions every week since September 8, 2021. *Id.* Behavioral interventions are typically successful in addressing Student's target behaviors, as demonstrated by observations contained in the Google document. (FF # 71).

The SCO accordingly finds and concludes that BOCES did not fail to implement the 2021 IEP or the 2021 BIP. Still, the SCO will craft a remedy to address the violation of 34 C.F.R. § 300.323(d).

**Conclusion to Allegation No. 3: BOCES failed to provide Parents with periodic reports on Student's progress toward annual goals, in violation of 34 C.F.R. § 300.320(a)(3)(ii). However, this violation did not result in a denial of FAPE.**

Under the IDEA, school districts must provide periodic reports on the progress a student is making toward the student's annual goals. 34 C.F.R. § 300.320(a)(3). Parents allege BOCES failed to provide them with periodic reports on Student's progress toward her annual goals.

The 2021 IEP provides that Parents will be notified of Student's progress toward her annual goals and objectives on a quarterly basis, at annual review meetings, and at any meetings requested by Parents. (FF # 37). Special Education Teacher generated a progress report detailing Student's progress toward her annual goals on October 14, 2021, but she admits the progress report was not received by Parents until November 29, 2021. (FF # 67). Accordingly, the SCO finds and concludes that the BOCES violated 34 C.F.R. § 300.320(a)(3).

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



Here, while Parents were not provided with the progress report until November 29, 2021, they were nonetheless kept apprised of Student’s behavior and academic progress through the Google document and Communication Log. (FF # 68-73). While those documents did not explicitly reference Student’s annual goals, the observations contained in the Google document and Communication Log provided Parents with information on Student’s academic and behavioral progress at School. *See id.*

In addition, the progress report here was generated on October 14, 2021, just over a month after the creation of the 2021 IEP and the development of Student’s annual goals. (FF # 67). At the time, Student’s goals were new, and as such, data regarding Student’s progress toward those goals was minimal. *Id.* While it is true that BOCES should have provided the progress report to Parents quarterly, as is required by the 2021 IEP, the information contained in the progress report was not crucial to Parents’ participation in the decision-making process for Student, especially where they were informed of Student’s progress through other means, such as the Google document and Communication Log.

The SCO finds and concludes that this procedural violation did not result in a denial of FAPE.

**Conclusion to Allegation No. 4: BOCES did not fail to ensure that Special Education Teacher possessed required certifications and licenses during the 2021-2022 academic year.**

Parents allege BOCES failed to ensure Special Education Teacher possessed required certifications and licenses during the 2021-2022 academic year.

IDEA requires that State Educational Agencies—here the CDE— “establish and maintain qualifications to ensure that personnel . . . are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.” 34 C.F.R. § 300.156(a). In Colorado, administrative units—here BOCES—are responsible for ensuring personnel are appropriately licensed and certified to provide special education and related services. ECEA Rule 3.03.

In this case, the SCO finds and concludes that Special Education Teacher possessed an appropriate license and endorsement during the 2021-2022 academic year. Colorado law requires special education teachers to hold Colorado teacher’s certificates or licenses with appropriate endorsements in special education. ECEA Rule 3.04(1)(a)(i).<sup>3</sup>

Special Education Teacher is licensed by CDE as a Special Education Generalist (5-21) through an Alternative Teacher License valid through January 22, 2024. (FF # 75). The SCO accordingly finds

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<sup>3</sup> With the adoption of the Every Student Succeeds Act (ESSA) in 2015, the “highly qualified” requirement was eliminated from IDEA and is thus not applicable here. Under ESSA, special education teachers must meet full state certification requirements, or meet emergency, temporary or provisional licensure and have at least a bachelor’s degree. 20. U.S.C. 9214(d)(2)(A)(i).

and concludes that Special Education Teacher held the required licenses or certifications during the 2021-2022 academic year.

**Conclusion to Allegation No. 5: BOCES provided staff development for special education teachers and paraprofessionals to assure opportunities for appropriate educational services to children with disabilities, including Student.**

Parents allege that BOCES failed to provide staff development for special education teachers and paraprofessionals. Under ECEA Rules, BOCES must provide for staff development to assure opportunities for appropriate educational services to children with disabilities. ECEA Rule 3.05.

BOCES provides staff at School with summer trainings and orientations leading up to the start of classes. (FF # 77). BOCES also held a professional development day at School this year in September. *Id.* Information on trainings and workshops are disseminated throughout the year by Director of Special Education, and every member school in BOCES can request specific trainings from Director of Special Education. (FF # 79). This year, a training with paraprofessionals at School was set for November but postponed to 2022 due to COVID-19. *Id.*

The SCO finds and concludes that BOCES provided professional development opportunities for staff to assure opportunities for appropriate educational services to children with disabilities, including Student, consistent with ECEA Rule 3.05.

**Systemic IDEA Violations: This investigation does not demonstrate violations that are systemic and will likely impact the future provision of services for all children with disabilities in BOCES 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).

Here, there is no evidence that the violations are systemic. A review of BOCES’ written policies and procedures reveals no concerns under IDEA, and copies of the policies and procedures are shared with all special education teachers. (FF # 80). While there are issues here related to implementation of the 2020 IEP, training of BOCES personnel regarding responsibilities under the 2020 IEP, and progress monitoring, Special Education Teacher is a new teacher, and there is no evidence that other students have been impacted. *See* (FF # 67).

Student's 2021 IEP was appropriately tailored to Student's needs, the failure to implement was not material, and the violations related to knowledge of the 2021 IEP and progress monitoring did not result in a denial of FAPE. The SCO finds and concludes that the violations here are not systemic in nature.

### **REMEDIES**

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

1. Failing to implement the 2020 IEP from August 16, 2021 to August 31, 2021, in violation of 34 C.F.R. § 300.323.
2. Failing to ensure that each teacher and related services provider was informed of his or her responsibilities related to implementing the 2021 IEP, in violation of 34 C.F.R. § 300.323(d).
3. Failing to provide Parents with periodic reports on Student's progress, in violation of 34 C.F.R. § 300.320(a)(3)(ii).

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

1. **Corrective Action Plan**

- a. By **Friday, February 4, 2022**, BOCES shall submit to CDE a corrective action plan ("CAP") that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom BOCES is responsible. The CAP must, at a minimum, provide for the following:
  - i. Attendance and completion of training provided by CDE on IEP implementation and progress reporting. This training will address, at a minimum, the requirements of 34 C.F.R. §§ 300.320(a)(3)(ii), and 300.323, and the related concerns noted in this decision. Special Education Coordinator and CDE Special Education Monitoring and Technical Assistant Consultant, Rebecca O'Malley, will determine the time, date, and format of the training. This training may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast. This training is mandatory for Special Education Teacher and the school psychologist at School. Such training shall be completed no later than **Monday, May 2, 2022**.

- ii. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to CDE no later than **Friday, May 13, 2022.**
- b. CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to confirm District's timely correction of the areas of noncompliance.

Please submit the documentation detailed above to CDE as follows:

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

**NOTE:** Failure by the District to meet any of the timelines set forth above may adversely affect District's annual determination under the IDEA and subject District to enforcement action by the Department. **Given the current circumstances surrounding the COVID-19 pandemic, the Department will work with BOCES to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

### **CONCLUSION**

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *See* 34 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

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

Dated this 7<sup>th</sup> day of January, 2022.



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Ross Meyers  
State Complaints Officer

## **APPENDIX**

### **Complaint, pages 1-10**

#### **Response, pages 1-9**

- Exhibit A: IEPs/BIPs
- Exhibit B: none
- Exhibit C: none
- Exhibit D: Notice of Meeting
- Exhibit E: none
- Exhibit F: Progress Reports
- Exhibit G: Grade Reports
- Exhibit H: Correspondence
- Exhibit I: Evaluation/Assessment Data
- Exhibit J: BOCES Policies and Procedures
- Exhibit K: Education Certificate
- Exhibit L: Staff Development Opportunities
- Exhibit M: List of Involved Staff
- Exhibit N: none
- Exhibit O: Attendance Record
- Exhibit P: Dates When Student was Removed from School Due to Schedule

#### **Reply, pages 1-71**

- Exhibit 1: Correspondence
- Exhibit 2: IEPs/BIPs
- Exhibit 3: Additional Correspondence
- Exhibit 4: Progress Reports

#### **Telephonic Interviews:**

- Director of Special Education: December 6, 2021
- Gen Ed Teacher: December 10, 2021
- Paraprofessional: December 15, 2021
- Parents: December 13, 2021
- Special Education Teacher: December 9, 2021

#### **CDE Exhibits:**

- CDE Exhibit 1: District Calendar 2021-2022