

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

State-Level Complaint 2022:509
Santa Fe Trail BOCES

DECISION

INTRODUCTION

On February 23, 2022, the (“Parent”) 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 Santa Fe Trail BOCES (“BOCES”).¹ The State Complaints Officer (“SCO”) determined that the Complaint identified one (1) allegation subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

On March 21, 2022, BOCES provided the Colorado Department of Education (“CDE”) with its Response. The SCO determined the Response contained additional information about Student’s IEP—closely related to but beyond the scope of the original allegation accepted for investigation—that was critical to consider in determining whether BOCES denied Student a Free Appropriate Public Education (“FAPE”). This required the SCO to expand the scope of the investigation.

On March 22, 2022, the SCO extended the 60-day investigation timeline due to exceptional circumstances arising from the unanticipated necessity of providing additional time for BOCES to respond to the additional allegation, including the need to review additional documentation and interview additional witnesses. 34 C.F.R. § 300.152(b)(1).

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), the CDE has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from February 23, 2021, through February 23, 2022, for the purpose of determining if a violation of IDEA occurred. Additional information

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.

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 FAPE because BOCES:

1. Failed to develop, review, and revise an IEP tailored to Student's individualized needs, from February 23, 2021 to present, in violation of 34 C.F.R. §§ 300.320 and 300.324.
2. Failed to properly implement Student's IEP, from October 1, 2021 to the present, by limiting Student to one (1) hour of instruction each day unless accompanied by Parent, in violation of 34 C.F.R. § 300.323.

FINDINGS OF FACT

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

A. Background

1. In November of 2020, Student enrolled in 12th grade at a District junior/senior high school ("School"). *Interviews with Parent and Former Special Education Teacher*. District is a member of BOCES. *Response*, p. 1. BOCES is responsible for providing FAPE to all IDEA-eligible children with disabilities attending a school in its member districts. ECEA Rule 2.02.
2. Student is twenty years old and qualifies for special education and related services under the autism spectrum disorder disability category. *Exhibit A*, p. 1. Student entered BOCES with a September 4, 2020 IEP ("2020 IEP") developed in a former district. *Exhibit N*, pp. 8-31, 38-41.

B. The 2020 IEP

3. The 2020 IEP documented Student's strengths, preferences, and interests, including that he enjoys watching and listening to videos on YouTube, and that he can communicate his wants and needs using short two- or three-word phrases. *Id.* at p. 10.
4. The 2020 IEP reviewed Student's present levels of performance, documenting his progress toward annual goals and observations from his service providers. *Id.* at pp. 10-19.
5. The 2020 IEP indicated Student has significant academic, communication, and social/emotional needs, and he requires instruction in daily living skills and a 1:1 support paraprofessional throughout the day. *Id.* at p. 16. Except for short two- or three-word

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

phrases, Student is non-verbal, and he has little impulse control, which sometimes results in unsafe behaviors directed toward himself or others. *Id.*

6. The Parent/Student Input section provided that Parent was hoping to find a day program that offers social interaction and life skills that might be a good fit for Student. *Id.* at p. 16.
7. Due to the severity of Student's disability, the 2020 IEP did not contain a career employment goal or post-school education/training goal but instead an independent living skills goal for Student to increase his independence in daily living, such as personal hygiene, identification of money, personal safety, and community safety. *Id.* at pp. 18-19.
8. The 2020 IEP contained annual goals in reading, mathematics, writing, independent living skills, social/emotional wellness, and speech/language. *Id.* at pp. 20-24.
9. The 2020 IEP contained accommodations grouped by classroom (e.g., clear and consistent directions, predictable schedule, time to become familiar with unfamiliar staff/peers) and behavior (e.g., consistent expectations, high frequency rate of reinforcement, preparation for unexpected changes in routine). *Id.* at pp. 24-25.
10. The 2020 IEP contained modifications, including the use of the Colorado Academic Standards Extended Evidence Outcomes. *Id.*
11. The Service Delivery section provided for:
 - a. 180 minutes per week of direct specialized instruction in math;
 - b. 110 minutes per week of direct specialized instruction in written expression;
 - c. 1,000 minutes per week of direct specialized social/emotional instruction;
 - d. 200 minutes per week of specialized instruction in independent living skills;
 - e. 100 minutes per week of specialized academic access instruction;
 - f. 180 minutes per week of indirect specialized instruction in reading;
 - g. 20 minutes per month of indirect adapted physical education;
 - h. 60 minutes per quarter of indirect specialized speech/language services; and
 - i. 30 minutes per quarter of indirect specialized occupational therapy services.

Id. at pp. 28-29.
12. The IEP Team determined it was appropriate for Student to be in the general education environment less than 40 percent of the time. *Id.* at p. 30.

C. The 2020 BIP

13. The 2020 IEP included a Behavior Intervention Plan (“2020 BIP”). *Id.* at pp. 38-41. The 2020 BIP was developed through interviews with teaching staff and Parent, behavioral data, observations, and a review of records. *Id.* at p. 38.
14. The strength-based profile section documented Student’s skills and interests and positive relationships, including that he enjoys YouTube and is very affectionate toward staff. *Id.*
15. The 2020 BIP identified target behaviors as physically acting out (hitting, pinching, head butting) to gain access to a preferred activity, particularly when transitioning from a preferred activity to a work task, or to gain a preferred activity before work tasks. *Id.*
16. The 2020 BIP identified setting event strategies, such as providing Student opportunities to make choices across his day, providing him processing time for transitions from highly desired activities, and for staff working with Student to build a relationship with him and pair themselves with reinforcement and fun activities. *Id.* at p. 39.
17. Antecedent strategies included staying calm with positive body language, ignoring excess behavior, and removal of “problem items” if needed. *Id.* Alternative behavior teaching strategies included pairing visual and verbal prompts using a “First, Then” approach (“First we do matching and then you have 5 minutes on iPad”), using timers for work and break time, and “matching vocabulary and actions for break and work.” *Id.*
18. The 2020 BIP included reinforcement strategies such as verbal and physical reinforcement during work activities using specific language to describe the behavior (e.g., “[Student] you have matched all five letters. You are working hard. High five!”) and varying the type of reinforcement, the people giving reinforcement, and the place Student receives reinforcement to promote generalizations of behavior. *Id.*
19. The Crisis Intervention Plan section indicated that, “school crisis procedures will be followed, which includes ensuring the safety of all students and staff, contacting district security and/or law enforcement, and contacting parent to inform of the situation and behavior.” *Id.* at pp. 39-40.
20. Upon entering BOCES on November 2, 2020, Former Special Education Teacher and Parent met virtually to discuss Student’s enrollment and made the decision to adopt the 2020 IEP and 2020 BIP. *See Id.* At p. 3; *Interviews with Parent and Former Special Education Teacher.*

D. Adoption of the 2020 IEP and 2020 BIP

21. As an initial matter, the SCO reviewed existing BOCES policies and procedures—on IEP development, review, and revision; IEP implementation; and transfers—and finds them to be consistent with IDEA requirements. *Exhibit AC*, pp. 1-86.

22. Former Special Education Teacher drafted a prior written notice and consent for Parent to sign (“2020 PWN”), which indicated the 2020 IEP and 2020 BIP were being adopted because they were current and meeting Student’s academic and behavioral needs. *Exhibit N*, p. 3.
23. Although BOCES adopted the 2020 IEP, the 2020 PWN contained a Comparable Service Delivery Statement which modified Student’s services. *Interviews with Parent and Former Special Education Teacher*; See *Exhibit N*, pp. 1-31. The Comparable Service Delivery Statement provided that, in lieu of 1,590 minutes of weekly direct services, 740 minutes of monthly indirect services, and 90 minutes of quarterly indirect services, Student would instead receive:
- a. 2 hours per week of direct specialized instruction in reading/writing;
 - b. 2 hours per week of direct specialized instruction in math;
 - c. 15 minutes per month of indirect specialized speech/language services;
 - d. 15 minutes per month of indirect specialized occupational therapy services; and
 - e. 15 minutes per month of indirect specialized behavioral services.

Exhibit N, p. 2.

24. Student was not entitled to any general education instruction or time at School beyond the specialized instruction detailed above. See *id.*; *Interviews with Parent and Former Special Education Teacher*.
25. The 2020 PWN did not explain the reduction in service minutes or describe how the reduced service minutes would be considered comparable to those under the 2020 IEP. *Id.* at pp. 1-3. Former Special Education Teacher said the reduction in service minutes was intended to be temporary. *Id.*; *Interview with Former Special Education Teacher*.
26. When Student enrolled in District, a teacher in Student’s former district (“Former District Teacher”) called Former Special Education Teacher. *Interview with Former Special Education Teacher*. Former District Teacher told Former Special Education Teacher that Student was transitioning from a “specialized autism-only classroom” and he might initially benefit from a shortened school day until he adjusted to being at School. *Id.* Former Special Education Teacher said she reduced the service minutes on a “trial run” basis to give him time to adjust to School before attending for a full day. *Id.* Former Special Education Teacher indicates the reduction was calculated “based on the availability of resources in the community” as she was not sure if School had the resources to meet Student’s needs. *Id.*
27. Director of Special Education indicates there is a specific BOCES procedure that should be followed any time a student’s school day is shortened. *Interview with Director of Special Education*. Specifically, IEP Team decisions to shorten a student’s school day must be approved by Director of Special Education. *Id.* The IEP Team must determine if alternative

accommodations or modifications might be used in lieu of a shortened day. *Id.* If a shortened day is deemed necessary, then the IEP must document the reason for the shortened day, as well as detail the plan and/or criteria for what it will take for the student to get back to a full day. *Id.* Director of Special Education also requires checkpoints to mark a student's progress toward those benchmarks. *Id.*

28. In this case, Director of Special Education was not in her current role during the 2020-2021 academic year and does not know whether her predecessor reviewed a request to shorten Student's school day, but her understanding is that the BOCES procedure was not followed. *Id.* Director of Special Education concedes that a service delivery statement that only provides for a single hour of instruction each day is "extremely unusual." *Id.*
29. The 2020 PWN, 2020 IEP, and 2020 BIP did not document the reasoning for the shortened day or describe a plan or criteria for what it would take Student to return to a full day. *See Id.* at pp. 1-3. Similarly, there was neither a description of data relied upon to calculate the Comparable Service Delivery Statement nor a date for the IEP Team to review the data and determine if increasing Student's time in School would be appropriate. *See Id.* at pp. 1-3.
30. In December of 2020, Student began attending School on a "trial basis," receiving the services described in the 2020 PWN. *Interviews with Parent and Former Special Education Teacher.* On the second day, Student exhibited physical violence toward multiple staff members, and BOCES asked Parent to keep him home while other options were considered. *Id.*

E. The January IEP

31. On January 6, 2021, a properly constituted IEP Team met to discuss Student's behavior and educational placement and develop a new IEP ("January IEP"). *Id.*; *Exhibit T*, p. 3. Staff from a BOCES educational program designed for students with severe academic or behavioral issues ("Separate School") also attended the meeting. *Exhibit N*, p. 45.

Separate School

32. Separate School is designed to provide a structured, therapeutic, and educational environment for students who are unable to function in a regular classroom. *Interview with Behavioral Specialist Counselor; Exhibit A*, p. 3. Separate School is available for all districts within BOCES and is meant for students who are unable to access education and/or are a danger to themselves or others despite modifications and accommodations. *Interviews with Behavioral Specialist Counselor and Director of Special Education.*
33. At the January 6, 2021 IEP meeting, the IEP Team determined that School lacked the resources necessary to meet Student's behavioral needs and put Student on a temporary 30-day placement at Separate School to monitor behavior and develop positive behavioral

supports. *Exhibit N*, p. 46. Former Behavioral Specialist Counselor would work with Student and develop positive behavioral intervention strategies that could later be used to train School staff to work with Student. *Interviews with Former Special Education Teacher, Former Behavioral Specialist Counselor, and Parent*.

34. The IEP Team also discussed the possibility of Student applying for admission at a residential treatment facility (“Residential Facility”) operated by the local community-centered board, and plans were made to contact Residential Facility to inquire about a possible future bed. *Interviews with Former Special Education Teacher, Former Behavioral Specialist Counselor, and Parent*.
35. No formal assessments were ordered at the IEP meeting, and consent for formal assessments was not requested from Parent. *See Exhibit S*, pp. 1-8; *Interviews with Former Special Education Teacher and Parent*.

The January IEP

36. The January IEP documented Student’s strengths, preferences, and interests, including that he likes being read to and riding his bike. *Exhibit N*, p. 46.
37. The January IEP documented Student’s present levels of performance by incorporating the same information from the 2020 IEP. *Id.* at pp. 46-47.
38. The Parent/Student Input section reported that Parent did not have any concerns at the January 2021 IEP meeting, although meeting notes indicate Parent said she did not want Student to stay at Separate School through graduation. *Id.* at p. 48; *Exhibit AA*, p. 2. Parent and Former Behavioral Specialist Counselor also remember Parent asking to have Student’s service minutes increased at the meeting, however that request was not documented in the January IEP. *Interviews with Parent and Former Behavioral Specialist Counselor*.
39. The January IEP included both a post-school education and employment goal, which indicated that after leaving the school system, Student would receive hands-on training to “work in a sheltered environment.” *Exhibit N*, pp. 48, 50. Student’s independent living skills goal was to “live at home or with family and [sic] participate in daily routines.” *Id.* at p. 48. The January IEP further indicated over the course of the next year Student would complete the coursework required for a Certificate of Completion to help him gain admission into an on-the-job training with the community center. *Id.* p. 50.
40. The January IEP contained new annual goals for Student in reading, math, communication skills, motor skills, and behavior. *Id.* at pp. 52-54.

41. The accommodations in the January IEP were nearly identical to those contained in the 2020 IEP (one accommodation related to the school nurse was removed). *See Id.* at pp. 25, 55.
42. The January IEP contained modifications to the general education curriculum identical to those contained in the 2020 IEP. *See Id.*
43. The service delivery of the January IEP was identical to the service delivery described in the Comparable Service Delivery Statement of the 2020 PWN. *Id.* at p. 57.
44. The January IEP did not explain why the IEP Team kept Student at a shortened day or how the service minutes were calculated, and there was no explanation of when or under what criteria service minutes could be increased. *See id.* at pp. 42-60. Former Special Education Teacher said the IEP Team kept Student at one hour of class each day because that was “what he was able to handle at [School] during those two days” (referring to Student’s “trial run” at School in early December 2020). *Interview with Former Special Education Teacher.*
45. The IEP Team determined it was appropriate for Student to be in the general education environment less than 40 percent of the time. *Exhibit N*, p. 57.
46. The Prior Written Notice section indicated the IEP Team considered placing Student in the general education classroom 40 to 49 percent of the time, but that was rejected due to behavior concerns with staff and peers. *Id.* at p. 59.
47. The January IEP went into effect after the meeting, and Student began attending Separate School for one hour each day, four days per week. *Interviews with Parent and Former Behavioral Specialist Counselor.* A meeting was scheduled for March 3, 2021 to discuss the results of the 30-day Separate School placement. *Interviews with Parent, Former Special Education Teacher, and Former Behavioral Specialist Counselor; Exhibit AA*, p. 1.

F. 30-Day Separate School Placement (January through March 2021)

48. From January 6, 2021 through March 2, 2021, Former Behavioral Specialist Counselor supported Student at Separate School on a 1:1 basis and observed his behavior. *Interview with Former Behavioral Specialist Counselor.*
49. These observations were not documented in service logs, but Former Behavioral Specialist Counselor and Parent agree that Student’s behavior was largely manageable during this time, although he required frequent interventions. *See Exhibit O*, pp. 1-43; *see Exhibit P*, pp. 1-21; *see Exhibit Q*, pp. 1-6; *Interviews with Parent and Former Behavioral Specialist Counselor.* On March 3, 2021, Parent and BOCES staff met to discuss Student’s progress. *Exhibit AA*, p. 1.

G. March 3, 2021 IEP Team Meeting

50. On March 3, 2021, a properly composed IEP Team met to discuss Student's progress. See *Exhibit AA*, p. 1. Former Behavioral Specialist Counselor reported Student was doing well during his one hour of instruction each day. *Id.*; *Interviews with Former Behavioral Specialist Counselor and Parent*. Nevertheless, Student's service delivery was not modified to increase his time at Separate School. *Interviews with Parent and Former Behavioral Specialist Counselor*; see *Exhibit N*, pp. 42-60; see *Exhibit A*, pp. 1-19.
51. Student's possible admission to Residential Facility was discussed, and it was reported that Residential Facility would not consider his admission without an adaptive behavior assessment and a long-term care assessment. *Interviews with Former Behavioral Specialist Counselor, Former Special Education Teacher, and Parent*; *Exhibit AA*, p. 1. The IEP Team proposed to evaluate Student for adaptive behavior, and Parent signed consent for an adaptive behavior assessment on March 11, 2021. *Exhibit S*, p. 3.
52. The IEP Team decided Paraprofessional with ABA training would work with Student at Separate School and learn positive behavioral intervention strategies from Former Behavioral Specialist Counselor so that Paraprofessional could continue to work with Student at School after Student left Separate School. *Interviews with Former Behavioral Specialist Counselor, Parent, and Former Special Education Teacher*. Former Behavioral Specialist Counselor and Paraprofessional worked with Student for the remainder of the 2020-2021 academic year. *Id.*
53. An IEP meeting was scheduled for April 5, 2021 to discuss the results of the assessment and review the January IEP. See *Exhibit T*, pp. 5-6; *Interviews with Special Education Teacher, Former Behavioral Specialist Counselor, and Parent*. Former Behavioral Specialist and School Psychologist also drafted a new BIP ("2021 BIP") to be reviewed at the meeting. *Exhibit Y*, pp. 1-3.

H. The 2021 BIP

54. The 2021 BIP indicates it was developed through IEP record review, classroom observations, and a Functional Behavior Assessment ("FBA"). *Id.* at p. 1. However, there is no evidence an FBA was conducted or otherwise ordered or discussed by the IEP Team. See *Exhibit A*, pp. 1-60; *Exhibit N*, pp. 1-88; *Exhibit Q*, pp. 1-6; *Exhibit S*, pp. 1-8; *Exhibit Y*, pp. 1-3; *Interviews with Former Behavioral Specialist Counselor and Parent*.
55. The strength-based profile section documented Student's skills and interests, including that he enjoys YouTube and likes cookies and chips. *Exhibit Y*, p. 1.
56. The target behaviors are the same as those identified in the 2020 BIP, except that the 2021 BIP also indicates Student may display refusal to comply behavior if he does not want to leave a preferred task for a non-preferred one. *Id.*; *Exhibit N*, p. 38.

57. The setting event strategies are largely the same as those in the 2020 BIP, although new ones include staff only approaching Student from his right side and “staff will not give contact ‘high 5s’ because Student may grab the staff’s hand and pinch them.” *Exhibit Y*, p. 1; *Exhibit N*, pp. 38-39.
58. The antecedent strategies are the same as in the 2020 BIP, except for one new strategy: visual schedule of daily preferred and non-preferred activities to accomplish each day. *Exhibit Y*, p. 1; *Exhibit N*, pp. 38-39.
59. The behavior teaching strategies are identical to those in the 2020 BIP. *Exhibit Y*, p. 1; *Exhibit N*, pp. 38-39. The reinforcement strategies are the same as in the 2020 BIP, although the 2021 BIP does not explain how staff should reinforce verbally and physically if they are not supposed to make physical contact (i.e., a high five) for fear of Student grabbing or pinching (the example of giving Student a high five was removed). *Exhibit Y*, p. 1; *Exhibit N*, pp. 38-39.
60. The 2021 BIP indicates Student has a crisis plan, however, no details are provided regarding the plan. *Exhibit Y*, p. 2.

I. The April 5, 2021 IEP Meeting

61. On April 5, 2021, a properly constituted IEP Team met to discuss the 2021 BIP and the results of the adaptive behavioral assessment. *See Exhibit A*, pp. 3-4; *Exhibit T*, pp. 5-6.
62. School Psychologist administered the Adaptive Behavior Assessment System, Third Edition (“ABAS-3”) by obtaining observations of Student’s behavior from Parent and Former Behavioral Specialist Counselor. *Id.* at pp. 3-4. ABAS-3 results demonstrated Student’s adaptive skills were in the “extremely low range” in both the home and school settings. *Id.*
63. Although the 2021 BIP was mentioned at the meeting, discussions were limited to whether the document was completed. *Interviews with Former Behavioral Specialist Counselor, Parent, and Special Education Teacher.*
64. Former Behavioral Specialist Counselor reported Student was doing well behaviorally but added he did not think Student was ready to return to School. *Interviews with Former Behavioral Specialist Counselor and Special Education Teacher.* Student’s service delivery was not modified, and the IEP Team determined he would remain at Separate School in the Fall. *See Exhibit A*, p. 17; *Interviews with Parent, Former Special Education Teacher, Former Behavioral Specialist Counselor, and Special Education Teacher.*
65. Former Behavioral Specialist Counselor said Student made progress toward his annual goals during the Spring of 2021. *Interview with Former Behavioral Specialist Counselor.* Upon

review, however, the SCO finds the progress monitoring data in the record does not support this claim as there is no data to suggest Student made any progress toward his annual goals in the Spring of 2021. *See Exhibit O*, pp. 1-43.

66. The IEP Team determined Student did not qualify for extended school year (“ESY”) because he did not show any regression. *Id.* at pp. 41-43; *Exhibit A*, p. 15.
67. For the remainder of the 2020-2021 academic year, Paraprofessional and Former Behavioral Specialist Counselor worked with Student at Separate School, where he attended for an hour each day under the January IEP. *Interviews with Parent and Former Behavioral Specialist Counselor*.
68. Over the summer, Former Behavioral Specialist Counselor left Separate School. *Interview with Former Behavioral Specialist Counselor*. BOCES assigned Special Education Teacher to work with Student and Paraprofessional when classes started in the Fall of 2021. *Response*, p. 3.

J. The Fall of 2021 (August and September)

69. Classes started at Separate School on August 16, 2021, but Student was not in attendance. *Interviews with Parent, Behavioral Specialist Counselor, and Special Education Teacher; Exhibit C*, p. 1. Separate School Principal contacted Parent about Student’s registration, and Parent registered Student, but he missed the first three weeks of class. *Response*, p. 3; *Interview with Parent*.
70. Student’s first day of class at Separate School was scheduled for September 7, 2021, however, Paraprofessional called in sick. *Response*, p. 3-4. Separate School notified Parent that someone else could work with Student, but Parent declined to bring Student in. *Id.* at p. 4; *Interview with Parent*. Paraprofessional subsequently missed the remainder of that week and then unexpectedly resigned. *Response*, p. 4. Parent decided not to have Student attend Separate School until a new plan was put in place. *Interviews with Parent and Special Education Teacher*.
71. Behavioral Specialist Counselor replaced Paraprofessional on Student’s team, and both Special Education Teacher and Behavioral Specialist Counselor were assigned to be with him on a 2:1 basis for safety reasons. *Interviews with Parent, Behavioral Specialist Counselor, and Special Education Teacher*.
72. On September 14, 2021, Student began attending Separate School with Special Education Teacher and Behavioral Specialist Counselor under the January IEP, but attendance was irregular as he only attended Separate School twice before an annual IEP review meeting on

September 21, 2021. *Exhibit M*, p. 27; *Interviews with Parent, Behavioral Specialist Counselor, and Special Education Teacher*.

K. The September 21, 2021 IEP Meeting

73. On September 21, 2021, a properly constituted IEP Team met to review the January IEP and develop a new IEP (“September IEP”). *Exhibit A*, pp. 26, 28. Staff familiar with Student, such as Former Behavioral Specialist Counselor, who worked with Student in the Spring of 2021, and School Psychologist, who helped develop the 2021 BIP, also attended. *Id.* at p. 28; *Interviews with Former Behavioral Specialist Counselor and Behavioral Specialist Counselor*.
74. The IEP Team discussed behavior, and Parent asked for time at Separate School to be increased to a full day. *Exhibit A*, p. 29. *Interviews with Behavioral Specialist Counselor, Special Education Teacher, and Parent*. The BOCES members of the IEP Team indicated it would be best to start with an hour each day, and “increase if he showed good behavior.” *Interview with Behavioral Specialist Counselor*.
75. Special Education Teacher said Student only attended a few days during the Fall of 2021 – “we hadn’t seen him very much – we wanted a longer period of time to make sure he was comfortable.” *Interview with Special Education Teacher*.

L. The September IEP

76. The September IEP documents Student’s strengths and interests, reporting that he likes YouTube – “[h]e especially likes Dora the Explorer, Blues Clues, and Dinosaur Train”. *Exhibit A*, p. 29.
77. The September IEP reviews present levels of performance by documenting skills he can perform (e.g., can identify number 1-20, he can sit quietly and listen to a book read to him, and can correctly sequence the letters in his name) and behaviors (Student has a history of grabbing, pinching, hitting people when he is upset, he also pinches very hard when he does not appear to be upset, he has been cooperative with completing activities the few times he has been at Separate School this year). *Id.* The September IEP also indicates Student received a Completion Certificate from School in May of 2021. *Id.*
78. The Student Needs and Impact of Disability section reports he will receive support in reading, math, speech, motor skills, and behavior management. *Id.* Behaviorally, he “will continue to increase positive relationships with others by decreas[ing] aggressive behaviors toward others.” *Id.*

79. The Parent/Student Input section provides “[Parent] would like to have [his] time at school increased. He is currently attending school for one hour a day due to concerns with his aggression.” *Id.*
80. The Post-School Goals indicate that after exiting the school system, Student’s education will focus on increasing his adaptive skills such as his ability to communicate, his physical stability, and other similar skills development so he can successfully participate in on-the-job training at the community center. *Id.* at p. 32.
81. The September IEP contains updated annual goals in math, behavior, speech/language, and motor skills, but the annual reading goal remained unchanged from the January IEP. *Id.* at pp. 33-37. Relevant here, the new annual behavior goal provides, “[i]n order to work in a sheltered environment, [Student] will increase his positive relationships with others by 100% ([Student] will not physically hurt others).” *Id.* at p. 35.
82. The September IEP contains accommodations from the January IEP, such as the behavioral accommodations, although many were removed. *Id.* at p. 38; *Exhibit N*, p. 55. No new accommodations were added. *Exhibit A*, p. 38; *Exhibit N*, p. 55
83. The September IEP contains the same modifications to the general curriculum as the January IEP. *Exhibit N*, p. 55; *Exhibit A*, p. 38.
84. The Service Delivery section of the September IEP provides for:
- a. 105 minutes per week of direct specialized instruction in reading;
 - b. 105 minutes per week of direct specialized instruction in math;
 - c. 30 minutes per week of direct specialized instruction in behavior;
 - d. 15 minutes per month of indirect specialist services in reading;
 - e. 15 minutes per month of indirect specialized services in math;
 - f. 15 minutes per month of indirect specialized behavior services;
 - g. 15 minutes per month of indirect specialized speech/language services; and
 - h. 15 minutes per month of indirect specialized fine motor services.

Exhibit A, p. 43.

85. The IEP Team determined it was appropriate for Student to be in the general education environment less than 40 percent of the time. *Id.* at p. 44.
86. The Prior Written Notice section indicates the IEP Team considered placing Student in the general education environment 40 to 79 percent of the time, but that was rejected because of behavior concerns. *Id.*

M. Implementation of the September IEP

87. Following the September 21, 2021 IEP meeting, Student attended Separate School under the September IEP. *Interviews with Parent, Behavioral Specialist Counselor, and Special Education Teacher*. Parent raised concerns that BOCES failed to implement the September IEP by prohibiting Student from attending Separate School unless she accompanied him. *Complaint*, p. 4.

IEP and BIP Accessibility to Student's Teachers

88. Student was always supported on a 2:1 basis by Special Education Teacher and Behavioral Specialist Counselor for safety reasons while attending Separate School. *Interviews with Special Education Teacher and Behavioral Specialist Counselor*. Both staff were at the September 2021 IEP meeting and were familiar with the September IEP from their involvement in its development. *Id.*; *Exhibit A*, p. 28. Both staff also had access to the September IEP. *Interviews with Special Education Teacher and Behavioral Specialist Counselor*.

89. However, neither Behavioral Specialist Counselor nor Special Education Teacher were familiar with the 2021 BIP, and instead referenced behavioral language contained in the January IEP. *Id.* This behavior language carried over from the 2020 IEP and did not contain the behavior teaching strategies and reinforcement strategies contained in the 2021 BIP. *Exhibit N*, pp. 46-47; *Exhibit N*, pp. 46-47. Neither staff member was aware there was a behavior plan that was supposed to be attached to the January IEP. *Id.* Similarly, when these staff were asked to describe a typical intervention, their descriptions did not match the strategies contained in the 2021 BIP. *Interviews with Special Education Teacher and Behavioral Specialist Counselor*.

IEP Implementation September 21 – October 18, 2021

90. After the September 21, 2021 IEP meeting, Student attended Separate School five times, bringing his total attendance for the Fall of 2021 to nine days. *See Exhibit M*, pp. 27-31. Parent explains that sometimes Student had appointments or was sick but admits she often did not feel it was worth taking him for a single hour. *Interview with Parent*. On occasions when Student attended Separate School, he often exhibited lack of impulse control that resulted in physical violence to Parent or staff, and his behavior showed an overall pattern of escalation that was not manageable by staff. *Interviews with Parent, Special Education Teacher, and Behavioral Specialist Counselor*.

91. On October 18, 2021, Student choked Special Education Teacher in the parking lot on the way into the building upon entering Separate School, and Parent was asked to immediately take him home. *Id.*; *Exhibit C*, p. 16.

92. After the incident, there was a virtual meeting between Director of Special Education, Principal, Special Education Teacher, and Behavioral Specialist Counselor. *Interviews with Director of Special Education, Special Education Teacher, and Behavioral Specialist Counselor*. Separate School staff were uncomfortable working with Student given the increasing incidence of violent behavior, so Director of Special Education suggested that Parent be asked to attend Separate School with Student. *Interview with Behavioral Specialist Counselor; Response*, p. 5.
93. Director of Special Education explained this was because the BOCES team had heard Student's behavior had also escalated at home, and the BOCES team indicated it could "work together hands on" with Parent. *Interview with Director of Special Education*. Director of Special Education concedes, however, that this was the first time anything like this had been attempted and that BOCES generally tries to avoid involving parents in providing services. *Id.*
94. After the meeting, Principal called Parent with Special Education Teacher and Behavioral Specialist Counselor. *Interviews with Behavioral Specialist Counselor, Parent, Special Education Teacher, and Director of Special Education*. BOCES claims the "intent was not that Parent was obligated to attend with Student, nor [was it intended] for Student to be excluded from school if Parent was unwilling to attend with him." *Response*, p. 5.
95. Parent did not feel she could disagree, and she understood that Student was not allowed to attend Separate School unless she attended with him. *Interview with Parent*. Behavioral Specialist Counselor said the BOCES team agreed that for Student to receive further services Parent would have to attend with him. *Interview with Behavioral Specialist Counselor*.
96. In an email to Director of Special Education on October 30, 2021, Principal wrote, "I called [Parent]. I let her know that we would need her to attend class with [Student] and sit next to him while [Special Education Teacher] and [Behavioral Specialist Counselor] provide instruction." *Exhibit I*, p. 44. Principal added, "I explained that in order to keep the staff safe, this would be the plan we need to follow." *Id.* The SCO finds, based on this information, that Student was prohibited from attending Separate School without Parent's presence.

N. October 19, 2021 to Present

97. Although Parent initially indicated she would accompany Student to Separate School she declined to do so, and Student never again attended Separate School. *Interviews with Behavioral Specialist Counselor, Parent, Special Education Teacher, and Director of Special Education*. Student currently receives some instruction at home from Parent but is not receiving any services through a formal educational program. *Interview with Parent*. During the Fall, Student made no progress toward his annual goals, and due to issues with attendance, no progress monitoring data was obtained. *Interviews with Special Education Teacher and Behavioral Specialist Counselor; see Exhibit B*, pp. 1-29.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: BOCES failed to develop, review, and revise an IEP tailored to Student's individualized needs, from March 3, 2021 to present, in violation of 34 C.F.R. § 300.324. This violation resulted in a denial of FAPE.

The first allegation accepted for investigation suggests that BOCES failed to develop, review, and revise an IEP tailored to Student's individualized needs.

The IDEA requires school districts to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 69 IDELR 174, 580 U.S. ___, 137 S. Ct. 988, 999 (2017). The IDEA does not promise a particular educational or functional outcome for a student with a disability, but it does provide a process for reviewing an IEP to assess achievement and revising the program and services, as necessary, to address a lack of expected progress or changed needs. *Id.* To that end, school districts have an affirmative duty to review and revise a student's IEP at least annually. 34 C.F.R. § 300.324(b).

However, the IDEA's procedures contemplate that a student's IEP may need to be reviewed and revised more frequently to address changed needs or a lack of expected progress. *Id.*; *Endrew*, 137 S. Ct. at 994. In conducting a review of the child's IEP, the IEP Team must also consider special factors, such as the use of positive behavioral interventions and supports, and other strategies for a child whose behavior impedes the child's learning or that of others. 34 C.F.R. §§ 300.324(a)(2)(i) and 300.324(b)(2).

A. The January IEP

Student's IEP Team developed the January IEP prior the start of the SCO's jurisdiction. (FF # 31). However, the January IEP was still in effect when the SCO's jurisdiction started on February 23, 2021. (FF # 47). On March 3, 2021, the IEP Team met to review the January IEP and address Student's 30-day placement at Separate School. (FF # 50).

Reduction in Specialized Instruction

Under the January IEP, Student was entitled to 240 minutes of weekly direct specialized services and 45 minutes of monthly indirect specialized services, and he was limited to a maximum of one hour at Separate School, four days each week. (FF #s 23, 43). Student's service minutes were significantly reduced upon enrolling at School in November 2020 as reflected in the January IEP. *Id.* This reduction, and the 30-day Separate School placement, were intended to be temporary. (FF #s 25, 33).

However, at the March 3, 2021 IEP meeting, no changes were made to the service delivery statement or January IEP despite Student doing well behaviorally one hour per day at Separate School. (FF # 50). Student remained at Separate School without an end date set, or criteria established to determine when and how Student could increase his time at Separate School each day. *Id.*

The SCO finds, in consultation with CDE Content Specialists 1 and 2, that a single hour of instruction each day was insufficient to enable Student to make progress appropriate in light of his disability. *Andrew F.*, 137 S. Ct. at 999. Student requires consistency and reinforcement, and one hour of instruction each day falls short of what he requires to enable him to make progress.

Although the January IEP was in effect only a couple months at the time of the March 2, 2021 IEP meeting, Student was not making progress toward annual goals and there was no Student-specific data to suggest an hour each day at Separate School would be sufficient for him to make progress. (FF #s 23, 25-26, 43-44). Nevertheless, no changes were made to the January IEP. (FF # 50). The January IEP does not explain when or how Student could increase his time or document the IEP Team's reason for the continued shortened day. (FF #s 50-52).

On April 5, 2021, the IEP Team met again to review Student's progress, discuss the results of the behavioral assessment, and review the January IEP and 2021 BIP. (FF # 61). At the time of the meeting, Student was still not making progress toward any of his annual goals. (FF # 65).

Nevertheless, no changes were made to the January IEP and Student remained at Separate School for a single hour each day, four days each week. (FF # 64). No new academic assessments were ordered to better understand Student's needs, and no details about Student's progress were documented in the January IEP. *See* (FF #s 61-66). The IEP Team also determined Student did not qualify for ESY, reasoning that since Student's scores on objectives remained at the baseline, he did not show regression. (FF # 66). Again, the January IEP did not describe when and how Student could increase his time at Separate School or otherwise document the IEP Team's decision to keep Student at a shortened day. *See* (FF #s 61-66).

For these reasons, and in consultation with CDE Content Specialist 2, the SCO finds and concludes that BOCES failed to review and revise the January IEP from March 3, 2021 to September 21, 2021 to address Student's lack of progress, in violation of 34 C.F.R. § 300.324(b)(1)(ii)(A).

Positive Behavioral Supports and Interventions

In March of 2021, BOCES reviewed and revised the 2020 BIP to develop the 2021 BIP. (FF # 53). While the 2021 BIP indicates it was developed through an FBA, an FBA was never performed. (FF # 54). The 2021 BIP is also almost identical in content to the 2020 BIP, with only a few minor additions, such as one new target behavior, and two new setting event strategies. (FF #s 54-60). While the IEP Team ordered an adaptive behavior assessment at the March 3, 2021 IEP meeting,

the purpose of that assessment was to qualify Student for Residential Facility and not to better understand his positive behavioral supports needs. (FF # 51). There is no evidence any changes were made to the 2021 BIP based on the results of the ABAS-3. See (FF #s 54-60).

The purpose of Student's 30-day placement at Separate School was ostensibly for Former Behavioral Specialist Counselor to develop new positive behavioral supports, but the 2021 BIP does not contain new teaching or reinforcement strategies (the strategies it contains were carried forward from the 2020 BIP). (FF #s 33, 59). In addition, despite BOCES knowing Student has a history of impulse control and physical violence toward others, the 2021 BIP does not contain a crisis intervention plan. (FF # 60). The IEP Team determined Student's time at Separate School could not be increased due to behavior, yet the 2021 BIP was not revised based on Student's individualized behavioral needs to enable him to fully participate in Separate School. (FF #s 50, 54-60, 64).

At the April 5, 2021 IEP meeting, Former Behavioral Specialist Counselor reported Student was doing well behaviorally, but added he did not think Student was ready to return to School. (FF # 64). While this was ostensibly because of behavior, the IEP Team took no steps to better understand Student's individualized needs. See (FF #s 61-66). The 2021 BIP remained almost identical to the 2020 BIP, and the IEP Team's reasoning was not documented. (FF #s 54-60).

The SCO accordingly finds, in consultation with CDE Content Specialist 1, that BOCES failed to review and revise the January IEP, specifically the 2021 BIP, from April 5, 2021 to September 21, 2021, to address behavior, in violation of 34 C.F.R. §§ 300.324(a)(2)(i) and 300.324(b)(2).

B. The September IEP

On September 21, 2021, Student's IEP Team reviewed the January IEP and developed the September IEP. (FF # 73). Notably, most of the September IEP content was carried forward from the January IEP. (FF #s 76-86). No new accommodations or modifications were developed, and many existing accommodations were removed. (FF #s 81-82). Although several annual goals were updated, Student did not achieve any of his previous annual goals. (FF # 65). Moreover, the SCO finds, in consultation with CDE Content Specialist 1, the updated behavior goal is unmeasurable. (FF # 81).

The IEP Team determined Student was still not showing progress toward any annual goals and Parent asked to have his time at Separate School increased, but the IEP Team again declined to increase his specialized instruction. (FF # 74-75). This was not because the data demonstrated Student could not handle more than one hour each day – starting in March of 2021, Former Behavioral Specialist Counselor consistently indicated during IEP meetings that Student was performing well at Separate School. (FF #s 50, 64). The evidence demonstrates Student's specialized instruction at Separate School was not increased at the September IEP meeting because of staff concerns about behavior and a lack of resources at Separate School. (FF # 74-

75). Despite this, no changes were made to Student's behavioral supports. See (FF #s 74-86). Indeed, the IEP Team did not appropriately address Student's behavioral needs which resulted in a shortened school day.

The SCO finds and concludes, in consultation with CDE Content Specialists 1 and 2, that BOCES failed to review and revise the January IEP from September 21, 2021 to present to address lack of progress and behavior, in violation of 34 C.F.R. §§ 300.324(a)(2)(i), 300.324(b)(1)(ii)(A), 300.324(b)(2).

B. Substantive Violation

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, from March of 2021 to the present, BOCES failed to review and revise Student's IEPs to address his lack of progress and behavior. Throughout his time at Separate School, Student only received, at most, one single hour of instruction each day for a maximum of four days each week. (FF #s 43, 84). Student made no progress toward annual goals, and his behavior escalated without being addressed. (FF # 65, 97).

For these reasons, the SCO finds and concludes this failure to review and, as appropriate revise, the January IEP, the 2021 BIP, and the September IEP, from March 2021 to the present, impeded Student's right to a FAPE and deprived Student of an educational benefit. 34 C.F.R. § 300.513(a)(2). This violation will be remedied below.

Conclusion to Allegation No. 2: BOCES failed to properly implement Student's IEP, from October 1, 2021 to the present, in violation of 34 C.F.R. § 300.323. This failure to implement was material and resulted in a denial of FAPE.

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is "the centerpiece of the statute's education delivery system for disabled children . . . [and] the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student's IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

A school district must ensure that “as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child’s IEP.” *Id.* at § 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.* at § 300.323(d).

A. Implementation of the September IEP (October 2021 to present)

Parent’s Concerns

The September IEP was in effect beginning on September 21, 2021. (FF # 87). Parent alleges BOCES failed to implement the September IEP by prohibiting Student from attending Separate School unless accompanied by Parent. *Id.*

Accessibility to Student’s Teachers

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

Behavioral Specialist Counselor and Special Education Teacher were responsible for implementing the September IEP while Student was at Separate School. (FF # 88). Both were aware of their responsibilities under the September IEP given involvement in its development, and both had access to the document. *Id.* Neither, however, was familiar with the 2021 BIP. (FF # 89).

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 September IEP, specifically the 2021 BIP, in violation of 34 C.F.R. § 300.323(d).

Implementation of Specialized Instruction

The September IEP provides for 105 minutes per week of direct specialized instruction in reading, 105 minutes per week of direct specialized instruction in math, 30 minutes per week of direct specialized instruction in behavior, 15 minutes per month of indirect specialist services in reading, 15 minutes per month of indirect specialized services in math, 15 minutes per month of indirect specialized behavior services, 15 minutes per month of indirect specialized speech/language services, and 15 minutes per month of indirect specialized fine motor services. (FF # 84).

On occasions when Student attended Separate School, he received the special education and related services he was entitled to under the September IEP. (FF # 87). However, on October 18, 2021, due to a behavioral incident, BOCES prohibited Student from attending Separate School unless he was accompanied by Parent. (FF #s 91-96).

The September IEP does not require Parent to attend Separate School with Student or otherwise be involved in the provision of his special education and related services. *See* (FF #s 76-86). Indeed, BOCES effectively conditioned Student’s ability to access a FAPE (i.e., implementation of the September IEP) on Parent being present to participate in the delivery of his limited specialized instruction at Separate School. This is inconsistent with the spirit of IDEA.

The SCO accordingly finds and concludes that BOCES failed to implement the September IEP, from October 18, 2021 to the present, by failing to provide Student with his special education and related services, in violation of 34 C.F.R. § 300.323.

Implementation of the 2021 BIP

During interviews, neither Special Education Teacher nor Behavioral Specialist Counselor was aware there was a 2021 BIP, and both staff members thought Student’s behavior plan was behavioral language contained in the January IEP. (FF # 89). These staff members did not implement the 2021 BIP, and the strategies they described from the January IEP did not match those described in the 2021 BIP. *Id.* The SCO accordingly finds and concludes that BOCES failed to properly implement the September IEP, specifically the 2021 BIP, in violation of 34 C.F.R. § 300.323.

B. Materiality of Failure to Implement

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

“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, from October 18, 2021 to the present, Student has not been provided with the special education and related services he is entitled to under the September IEP. (FF # 97). Also, BOCES was not implementing the 2021 BIP during the Fall of 2021. As a result, Student was limited to a single hour at Separate School four days a week; and, since the October incident, Student has not been receiving any formal education aside from what Parent is able to provide at home. *Id.* This complete failure to implement the September IEP and 2021 BIP is more than a minor shortfall.

The SCO accordingly finds and concludes that the failure to implement the September IEP and 2021 BIP was material and resulted in a denial of FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19.

C. Compensatory Education

Compensatory education is an equitable remedy intended to place a student in the same position she would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education need not be an "hour-for-hour calculation." *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child, and ensuring children receive the services to which they are entitled. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010).

The violations described in this Decision are not easily remedied. From March 3, 2021 forward, BOCES failed to review and revise Student's IEP to account for behavior needs and address lack of progress. From October 18, 2021 to the present, BOCES failed to implement the September IEP. As a result, what little is known about Student's present levels of academic achievement and functional performance is derived from the 2020 IEP, which is over a year out of date.

Upon consultation with CDE Content Specialist 2 and in consideration of Student's age and individualized needs, the SCO finds awarding the full amount of missed services would be overly burdensome. Instead, the SCO awards the following compensatory educational services based upon the amount of missed time (calculated as approximately 20 weeks of class) and the service delivery of the 2020 IEP (divided in half so as to not burden Student): 30 hours of specialized math instruction, 18 hours of specialized instruction in written expression, 167 hours of specialized social/emotional instruction, 33 hours of specialized instruction in independent living skills, 17 hours of specialized academic access instruction, and 30 hours of indirect specialized instruction in reading, 3 hours of adapted physical education, 2 hours of indirect specialized speech/language services, and 1 hour of indirect specialized occupational therapy services.

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. BOCES’ written policies and procedures with respect to IEP development, review, and revision; IEP implementation; and adoption of a transfer student’s IEP are consistent with IDEA. (FF # 97). Instead, the SCO finds the issues in this case were unique to Student due to staff not following BOCES policies and procedures. For instance, Director of Special Education concedes that an IEP that limits a student to a single hour of instruction each day is extremely unusual in the BOCES, and that the shortened day for Student should have been reviewed by Director of Special Education. (FF # 27). Had BOCES procedure been followed, there would have been a determination as to whether any other accommodations or modifications might be effective in lieu of a shortened day, and a clear framework for when and how Student’s day might be increased detailed in Student’s IEP. *Id.*

For these reasons, 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 develop, review, and revise an IEP tailored to Student’s individualized needs, from March 3, 2021 to present, in violation of 34 C.F.R. §§ 300.320 and 300.324.
2. Failing to properly implement Student’s IEP, from October 2021 to the present, in violation of 34 C.F.R. § 300.323.

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

1. Corrective Action Plan
 - a. By **Monday, July 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 development, review, revision and IEP implementation. This training will address, at a minimum, the requirements of 34 C.F.R. §§ 300.320, 300.321, 300.323, and 300.324, and the related concerns noted in this Decision. Director of Special Education and CDE Special Education Monitoring and Technical Assistance Consultant, 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 staff at School and Separate School, and Director of Special Education. If these individuals are no longer employed with BOCES, BOCES may substitute individuals occupying identical roles to demonstrate compliance with this remedy. Such training shall be completed no later than **Monday, September 5, 2022.**
 - ii. Attendance and completion of training provided by CDE on behavior. This training will address, at a minimum the development of positive behavioral supports, and the related concerns noted in this Decision. Director of Special Education and CDE Content Specialist, 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 Behavioral Specialist Counselor, Former Behavioral Specialist Counselor, School Psychologist, and Director of Special Education. If these individuals are no longer employed with BOCES, BOCES may substitute individuals occupying identical roles to demonstrate compliance with this remedy. Such training shall be completed no later than **Monday, September 5, 2022.**
 - iii. Evidence that these trainings 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 **Monday, October 3, 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 BOCES' timely correction of the areas of noncompliance.

2. IEP Meeting and Reevaluation

- a. By **Monday, July 25, 2022**, BOCES must conduct a comprehensive evaluation of Student in all possible areas of need. Consent for the evaluation must be obtained no later than **Monday, July 4, 2022**. Although BOCES may determine the appropriate evaluations and evaluators, the evaluation must be conducted in all areas of suspected need. Evidence that this evaluation has occurred—including consent to evaluate, PWN, and the evaluation report—shall be provided to CDE by **Monday, August 15, 2022**.
 - i. If Parent does not provide consent to this evaluation within 10 days of receiving the request to evaluate, BOCES will be excused from conducting the evaluation ordered in this decision. BOCES will document its attempts to secure parental consent for the evaluation.
 - ii. Student’s IEP team shall consider the results of the evaluation and tailor Student’s IEP to meet Student’s individualized needs, consistent with 34 C.F.R. § 300.324. To evidence that the IEP team considered this evaluation and appropriately tailored Student’s IEP, BOCES shall provide a copy of Student’s final IEP to CDE by **Monday, September 5, 2022**.

3. Compensatory Educational Services and Denial of FAPE

- a. Student shall receive **30 hours of specialized instruction in math**. This instruction must be provided by an appropriately licensed special education teacher. All 30 hours must be completed by **Monday, May 8, 2023**.
- b. Student shall receive **18 hours of specialized instruction in written expression**. This instruction must be provided by an appropriately licensed special education teacher. All 18 hours must be completed by **Monday, May 8, 2023**.
- c. Student shall receive **167 hours of specialized social/emotional instruction**. This instruction must be provided by an appropriately licensed special education teacher, counselor, or social worker. All 167 hours must be completed by **Monday, May 8, 2023**.
- d. Student shall receive **33 hours of specialized instruction in independent living skills**. This instruction must be provided by an appropriately licensed special education teacher. All 33 hours must be completed by **Monday, May 8, 2023**.

- e. Student shall receive **17 hours of specialized academic access instruction.** This instruction must be provided by an appropriately licensed special education teacher. All 17 hours must be completed by **Monday, May 8, 2023.**
- f. Student shall receive **30 hours of indirect specialized instruction in reading.** This instruction must be provided by an appropriately licensed special education teacher. All 30 hours must be completed by **Monday, May 8, 2023.**
- g. Student shall receive **3 hours of adapted physical education.** All 3 hours must be completed by **Monday, May 8, 2023.**
- h. Student shall receive **2 hours of indirect specialized speech/language services.** These services must be provided by an appropriately licensed speech/language pathologist or speech/language pathologist assistant. All 2 hours must be completed by **Monday, May 8, 2023.**
- i. Student shall receive **1 hour of indirect specialized occupational therapy services.** These services must be provided by an appropriately licensed occupational therapist. The 1 hour must be completed by **Monday, May 8, 2023.**
- j. Monthly consultation between Provider(s) delivering compensatory services and Student's Special Education Teacher shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. BOCES must submit documentation that these consultations have occurred by **the second Monday of each month** until compensatory services have been completed and no later than one year following the date of this decision. Consultation logs must contain the name and title of the provider, the date, duration, and a brief description of the consultation.
- k. All compensatory educational services must be completed by **Monday, May 8, 2023,** though Parent and Student may opt out of some or all of the compensatory educational hours if they wish.
- l. To verify that Student has received the services required by this Decision, BOCES must submit records of service logs to CDE by the **second Monday of each month,** once services begin, until all compensatory education services have been provided. Service logs must contain the name and title of the provider (if services are delivered through a private provider), the date, duration, and a brief description of the service. BOCES shall communicate with the private provider to obtain this information if the compensatory services are provided through a contract with a private provider.

- m. By **Monday, August 8, 2022**, BOCES shall schedule compensatory services in collaboration with Parent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. These compensatory services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory services will be provided. If Parent refuses to meet with BOCES within this time, BOCES will be excused from delivering compensatory services, provided that BOCES diligently attempts to meet with Parent and documents their efforts. A determination that BOCES diligently attempted to meet with Parent, and should thus be excused from providing compensatory services, rests solely with CDE.
- n. BOCES shall submit the schedule of compensatory services to CDE no later than **Monday, September 5, 2022**. If for any reason, including illness, Student is not available for any scheduled compensatory services, BOCES will be excused from providing the service scheduled for that session. If for any reason BOCES fails to provide a scheduled compensatory session, BOCES will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent and notify CDE of the change in the appropriate service log.

Please submit the documentation detailed above to CDE as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn.: CDE Special Education Monitoring and Technical Assistance Consultant
1560 Broadway, Suite 1100
Denver, CO 80202-5149

NOTE: Failure by the BOCES to meet any of the timelines set forth above may adversely affect BOCES' annual determination under the IDEA and subject BOCES 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 9th day of May, 2022.



Ross Meyers
State Complaints Officer

APPENDIX

Complaint, pages 1-7

- Exhibit 1: Emails and Documentation

Response (Combined), pages 1-13

- Exhibit A: IEPs
- Exhibit B: Progress Monitoring
- Exhibit C: Service Logs
- Exhibit D: none
- Exhibit E: none
- Exhibit F: none
- Exhibit G: none
- Exhibit H: none
- Exhibit I: Correspondence
- Exhibit J: List of Staff
- Exhibit K: Calendar
- Exhibit L: Verification of Delivery to Parents
- Exhibit M: Additional Documentation
- Exhibit N: IEPs 20/21
- Exhibit O: Progress Monitoring 20/21
- Exhibit P: Service Logs 20/21
- Exhibit Q: Evaluation Data
- Exhibit R: none
- Exhibit S: Parental Consent
- Exhibit T: NOM
- Exhibit U: none
- Exhibit V: Additional Correspondence
- Exhibit W: List of Additional Staff
- Exhibit X: Verification of Delivery to Parents (2)
- Exhibit Y: BIP
- Exhibit Z: SOP
- Exhibit AA: Meeting Notes (combined)
- Exhibit AB: Procedural Guidance
- Exhibit AC: Policies and Procedures

Telephonic Interviews:

- Behavioral Specialist Counselor: April 11, 2022

- Director of Special Education: April 19, 2022
- Former Behavioral Specialist Counselor: April 12, 2022
- Former Special Education Teacher: April 13, 2022
- Parent: April 20, 2022
- Special Education Teacher: April 12, 2022