

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

State-Level Complaint 2021:524
San Juan BOCES

DECISION

INTRODUCTION

On October 29, 2021, the parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against the San Juan BOCES (“BOCES”). The State Complaints Officer (“SCO”) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. Therefore, the 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 October 29, 2020 through October 29, 2021 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to conduct a functional behavioral assessment (“FBA”) or revise Student’s behavior intervention plan (“BIP”) after finding Student’s behavior to be a manifestation of his disability at the manifestation determination meeting held on August 26, 2021, in violation of 34 C.F.R. § 300.530(f)(1).

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

2. Failed to review and revise Student's IEP between August 1, 2021 and present to address Student's behavior, in violation of 34 C.F.R. § 300.324(a)(2)(i) and (b)(1).

FINDINGS OF FACT

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

A. Background

1. Student attends ninth grade at a District high school ("School"). *Interview with Case Manager*. District is a member of the BOCES. *Interview with BOCES Special Education Director ("Director")*. The BOCES is responsible for providing a FAPE to all IDEA-eligible children with disabilities attending a school in its member districts. ECEA Rule 2.02.
2. Student is eligible for special education and related services under the disability category of Serious Emotional Disability ("SED"). *Exhibit A*, pp. 7, 23, 37.
3. Student enjoys athletics and spending time with his friends. *Interview with Case Manager*. Student acts impulsively and is influenced by peers. *Id.* In the classroom, Student struggles to stay on task and is often distracted by his cell phone. *Id.*

B. Spring 2021 Eligibility Determination and April IEP

4. In the 2020-2021 school year, Student attended a District middle school ("Middle School") for eighth grade. During Spring 2021, Middle School reevaluated Student in advance of his upcoming eligibility meeting. *See Exhibit A*, p. 1.
5. After the multi-disciplinary team determined that Student was eligible under SED, Student's IEP Team convened to develop Student's IEP. *Id.* at pp. 1-5. The IEP Team meeting resulted in an IEP dated April 7, 2021 ("April IEP") and a BIP dated April 6, 2021 ("April BIP"). *Exhibit A*, pp. 6-22.
6. The section of the April IEP regarding present levels of performance indicated that Student's functional grade level across content areas varied from first to third grade. *Id.* at p. 9. When Student first began at Middle School in seventh grade, he spent 80% or more of his time in the general education environment. *Id.* at p. 8. As his eighth-grade year progressed, Student started receiving more small-group and 1:1 service time, resulting in improved academic performance and behavior. *Id.*

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

7. The April IEP acknowledged that Student's SED, as well as his ADHD, made "it difficult for him to access the general education curriculum." *Id.* at p. 9. Student was "highly distractable in class" and "impulsive in his actions and his verbalizations." *Id.* Student often acted without thinking and was sometimes "not even aware that he [was] doing something wrong." *Id.*

8. The April IEP contained four annual goals in the areas of reading and writing, math, and social-emotional skills. *Id.* at pp. 13-14.

9. The April IEP identified several accommodations designed to help Student access the curriculum, including taking breaks and shortening assignments. *Id.* at p. 16.

10. Under the April IEP, Student received the following special education and related services:

- Social-Emotional Instruction:
 - 5.5 hours per week of direct social-emotional instruction during a pull-out class in the special education classroom; and
 - 1 hour per week of behavioral support inside the general education classroom.
- Specialized Instruction:
 - Math: 3.75 hours per week of direct instruction outside the general education classroom; and
 - Reading and Writing: 3.75 hours per week of direct instruction outside the general education classroom.

Id. at p. 18. Student also received six minutes per week of indirect support via consultation between special education staff and general education staff in the areas of reading and writing, math, and social-emotional skills. *Id.*

11. Per the April IEP, Student spent 40-79% of his time in the general education environment. *Id.* at p. 19.

12. Student's April BIP was based on an FBA completed on April 6, 2021. *See Exhibit C*, pp. 1-8. The April BIP identified two problem behaviors:

- "During structured whole class time, [Student] may engage in refusal behavior (e.g., roam the halls, truancy, hood up, head down, profanity, playing with materials) in order to avoid academic work that he finds too difficult."
- "During unstructured transition times (hallways, playground, cafeteria), [Student] may engage in inappropriate behaviors (e.g., PDA with girlfriend, participating in drug use,

profanity, fighting) in order to gain attention from peers as well as adult redirections. Impulsivity”

Exhibit B, p. 1.³

13. The BIP outlined setting event strategies, such as escorting Student to and from class, active supervision at all times, and daily check-ins, to decrease the likelihood of the problem behaviors. *Id.* at p. 1.

14. Listed antecedent strategies designed to reduce the target behavior included giving him time and space to vent, delayed or escorted transitions, and redirections to start and continue work in class. *Id.*

15. The BIP also included behavior teaching strategies, such as modeling replacement behaviors for profanity, giving ample processing time, and providing Student opportunities to reflect on behaviors after he was calm. *Id.*

16. As reinforcement strategies, the BIP identified use of rewards, withholding of social opportunities, and access to a safe break place with an escort. *Id.*

C. Beginning of 2021-2022 School Year

17. Student began his ninth-grade year at School on August 16, 2021. *Interview with Assistant Principal #1*. At the time, Student’s April IEP and April BIP were in effect. *Interview with Case Manager; Exhibit A*, pp. 6-22; *Exhibit B*, pp. 1-2. Case Manager provided Student’s IEP and BIP to other School staff members via email or at in-person meetings. *Interview with Case Manager*.

18. At the beginning of the year, Student was enrolled in the following courses:

- Content Mastery of Communications (“Content Mastery”)
- Math 1
- Basic U.S. History
- Speech
- Spanish 1
- P.E.

Exhibit A, p. 26. Content Mastery, Math 1, Basic U.S. History, and Speech were special education classes, while Spanish 1, and P.E. were general education classes. *Interview with Case Manager*. Case Manager taught Student’s Content Mastery and Math 1 classes. *Id.*

³ The word “impulsivity” appeared at the end of the description of the second problem behavior in the April BIP. *Exhibit B*, p. 1.

19. Content Mastery is a behavioral support class for students with behavioral challenges. *Id.* In the class, Case Manager uses the WhyTry? program, among other curricula, to teach social-emotional skills. *Id.* During the remainder of class, students can work on other class assignments or get help from Case Manager as needed. *Id.*
20. Within the first week of School, Student had minor behavioral issues, such as refusing to follow teachers' instructions and arguing with teachers. *Exhibit E*, p. 3.
21. On August 24, 2021, Student arrived at Content Mastery before the other students. *Id.* Student told Case Manager that he had a knife in his backpack. *Id.* Student said he did not feel safe carrying the knife and asked if Case Manager could hold it for him. *Id.* The week before, Student had witnessed—but not participated in—a fight involving his []. *Id.* Student feared the other students involved in the fight might retaliate against Student and brought the knife for protection. *Id.*
22. Case Manager confiscated the knife and informed Assistant Principal #1. *Id.* The District suspended Student for four days for a violation of the School's Code of Conduct. *Interview with Assistant Principal #1.* This incident occurred only seven days into the new school year. *Id.*
23. Under District policy, the knife constituted a "dangerous weapon." *Interviews with Director, Assistant Principal #1, and School Psychologist #1.* Possession of a dangerous weapon on School grounds is an expellable offense in the District. *Id.* As a result, School Psychologist #1 and Assistant Principal #1 determined that the District needed to hold a manifestation determination review ("MDR") before Student was referred for expulsion proceedings. *Id.* Assistant Principal #2 contacted Parent the same day to inform her of the incident and let her know that an MDR would be held. *Exhibit K*, pp. 278-79.

D. First MDR

24. At 3:51 p.m. on August 24, the District sent an electronic notice that an MDR would be conducted on August 26 at 3:30 p.m. *Id.* at p. 444. The notice was sent to School staff, as well as Parent. *Id.*
25. The District convened an MDR meeting on August 26, 2021. *Exhibit G*, pp. 1-5. Parent and Advocate #1 attended the MDR meeting, as well as Assistant Principal #2, Case Manager, and School Psychologist #1. *Id.* at p. 15.
26. The MDR team reviewed the information in Student's file, including his IEP and his BIP. *Interviews with Case Manager and School Psychologist #1.* Additionally, the team considered Student's history of fighting and impulsivity, as noted in his BIP. *Interview with School Psychologist #1.* In the end, the team felt Student impulsively brought the knife to School out of fear that he might be retaliated against. *Interviews with Case Manager and School Psychologist #1.* Even though no one was aware of the knife, Student turned it in on his own, showing he

had no intent to act. *Id.*; *Interview with Director*. As a result, the MDR team determined that Student's behavior was a manifestation of his disability. *Exhibit G*, pp. 1-5.

27. The team discussed revising Student's BIP. *Interviews with Case Manager and School Psychologist #1*. However, the team decided against revision for several reasons. *Id.* The BIP itself was recent and was based on an April 2021 FBA. *Id.* The 2021-2022 school year had just begun; staff were still getting to know Student, and he was still adjusting to high school. *Id.* Finally, the BIP, as written, identified impulsivity and fighting as problem behaviors. *Id.*

28. Student returned to his placement on August 30, following the completion of his suspension. *Interview with Case Manager*.

E. First Harassment Incident

29. On September 13, 2021, Student sent a female classmate text messages threatening a fight in retaliation for a fight that allegedly occurred the prior weekend. *Exhibit E*, p. 3; *Interviews with Assistant Principal #1 and Case Manager*. Assistant Principal #1 deemed the text messages to constitute harassment, and Student received a one-day out-of-school suspension as a result. *Exhibit E*, p. 3; *Interviews with Assistant Principal #1 and Case Manager*.

F. September 2021 IEP

30. Due to an error in the District's IEP management system, Case Manager thought he needed to hold Student's annual IEP review meeting in September 2021. *Interview with Case Manager*; *Exhibit K*, pp. 208-209. As a result, Student's IEP Team met on September 14. *Interview with Case Manager*. This meeting was scheduled before the incident on September 13. *Id.*

31. The IEP Team meeting resulted in an IEP dated September 14, 2021 ("September IEP"). *Exhibit A*, pp. 23-36.

32. The section of the September IEP regarding present levels of performance indicated that Student was currently failing all of his classes except P.E. *Exhibit A*, p. 26. Student had not met any of his IEP goals, and, in fact, Case Manager could not even assess Student's progress on his goals due to lack of work completion. *Id.* at pp. 26-27; *Interview with Case Manager*.

33. The Student Needs and Impact of Disability portion of the September IEP remained unchanged from the April IEP, reiterating that Student was "highly distractable" and "impulsive in his actions and his verbalizations." *Id.* at p. 28.

34. The September IEP contained two annual goals in the areas of math and social-emotional skills. *Id.* at pp. 30-32.

35. The September IEP retained the accommodations identified in the April IEP designed to help Student access the curriculum. *Id.* at p. 32.

36. Under the September IEP, Student received the following special education and related services:

- Social-Emotional Instruction:
 - 2 hours per week of direct social-emotional instruction during Content Mastery.
- Specialized Instruction:
 - Math: 2 hours per week of direct instruction outside the general education classroom; and
 - Reading and Writing: 2 hours per week of direct instruction outside the general education classroom.

Id. at p. 34. This was a significant reduction in Student's services from the April IEP, where Student received, in total, 6.5 hours per week of social-emotional instruction/support, 3.75 hours per week of direct math instruction, and 3.75 hours per week of direct reading and writing instruction. *Id.* at p. 18.

37. Per the September IEP, Student spent 40-79% of his time in the general education environment. *Id.* at p. 35.

38. Student's April BIP was not updated at the September 14 IEP Team meeting. *Interview with Case Manager.*

G. Second Harassment Incident and Second MDR

39. On September 15—two days after the first harassment incident—Assistant Principal #1 observed Student harassing another classmate. *Interview with Assistant Principal #1.* During a transition between classes, Student made homophobic or transphobic comments to an LGBTQ classmate. *Id.; Exhibit E*, p. 3. Student spoke with a loud voice, and he and another student blocked the classmate's exit. *Interview with Assistant Principal #1; Exhibit E*, p. 3. School suspended Student for five days for the second harassment incident. *Interview with Assistant Principal #1; Exhibit E*, p. 3.

40. At that point, Student had received three suspensions during the 2021-2022 school year, totaling ten days. *Interview with Assistant Principal #1; Exhibit E*, p. 3. Assistant Principal #1 and School Psychologist #1 determined a second MDR needed to be held. *Interviews with Assistant Principal #1 and School Psychologist #1.*

41. On September 16, School Psychologist #1 asked Scheduling Coordinator to schedule an MDR on September 17 and invite School Psychologist #1, Assistant Principal #1, Assistant Principal #2, and Parent. *Exhibit K*, p. 285. At 9:59 a.m. that day, Scheduling Coordinator sent an electronic calendar invite for the MDR to be held on September 17 at 1:00 p.m. *Id.* at p. 55.
42. Scheduling Coordinator emailed the MDR invitees at 10:18 a.m. on September 17, to let them know that Parent “emailed me and said that she could not attend today as she has a [d]octor’s appointment.” *Id.* at p. 281. School Psychologist #1 replied: “We will hold the meeting today as scheduled and continue it at a later date with the parent.” *Id.*
43. Despite the short notice and Parent’s inability to attend, the District convened the MDR team on September 17. *Exhibit G*, pp. 16-20. Neither Parent nor Advocate #1 attended the meeting. *Interview with Assistant Principal #1.*
44. The MDR team reviewed the information in Student’s file, including his IEP and his BIP. *Interview with School Psychologist #1.* The team considered the characteristics of Student’s SED. *Id.* The team found it important that Student acted on his own volition, without provocation in an aggressive, bullying manner. *Id.*; *Exhibit G*, p. 18. For these reasons, the team decided that Student’s behavior on September 13 and 15 were not caused by and did not have a direct and substantial relationship to his disability. *Exhibit G*, pp. 18.
45. The team found that Student’s behavior was not a result of the District’s failure to implement his IEP or BIP, because “[Student] persists in inappropriate behavior despite staff interventions.” *Id.*
46. Ultimately, the team determined that Student’s behavior was not a manifestation of his disability. *Id.* at pp. 18-19. The team again discussed revising Student’s BIP. *Interviews with Case Manager and School Psychologist #1.* However, the team felt that the BIP remained relevant and adequately addressed the behaviors staff were seeing from Student. *Id.*
47. It is unclear which staff members from the BOCES or the District attended the MDR. During the investigation, two versions of the MDR documentation were provided to the SCO, each with a different list of team members. *Id.* at pp. 6-10, 16-20. Both lists include individuals—such as Parent and Advocate—who did not attend the meeting. *Id.*
48. On September 22—five days after the second MDR—School Psychologist #1 informed Parent of the outcome of the second MDR and also told Parent that Student could return to School on September 23 following completion of his suspension. *Exhibit K*, p. 286.
49. Though the MDR documentation indicated that Parent was provided with the PWN (contained in the MDR documentation) on September 17, it is clear that Parent did not learn the outcome of the second MDR until School Psychologist #1 contacted her on September 22. *Id.* at p. 286.

H. Discipline Review Hearing

50. The same day, the District realized Student needed to be referred for a discipline review hearing (“DRH”). *Id.* at pp. 286-287. Under District policy, a student who has been suspended for ten or more days in a school year must be referred for a DRH. *Interview with Assistant Superintendent.*

51. Assistant Principal #1 asked School Psychologist #1 to call Parent back and let her know that Student could not return to School the following day because he had been referred for a DRH. *Exhibit K*, pp. 286-87.

52. In response, School Psychologist #2 cautioned: “I understand the district has a process with the DRH but keeping him out of school beyond the suspensions limits his FAPE. The school will need to consider how they will plan on making up that lost time due to not holding a DRH before his suspensions have expired.” *Id.* at p. 289. It is unclear why School did not initiate the DRH process sooner. *Interview with Assistant Superintendent.*

53. Regardless, District policy required Parent to receive 10-days’ notice of the DRH, unless Parent specifically waived the notice requirement. *Id.* Here, School prepared a waiver for Parent to sign and informed Parent of the waiver. *Id.* Due to a miscommunication and transportation issues, Parent did not sign the waiver. *Interviews with Assistant Principal #1 and Case Manager.*

54. On October 6, 2021, the District held a DRH to determine whether Student should receive any additional discipline. *Interviews with Assistant Superintendent and Assistant Principal #1.*

55. The Hearing Officer issued his recommendation on October 7 (the “Recommendation”). *See Exhibit H*, pp. 3-7. In part, the Hearing Officer recommended that Student “continue in his suspension up to the maximum amount determined by law which is 25 days. During that time the school district will continue to provide alternative educational services.” *Id.* at p. 7. The Recommendation noted that, at the time of the hearing, Student “was on his 13th day of suspension.” *Id.* at p. 4.

56. On October 12, Superintendent accepted the Hearing Officer’s Recommendation. In her decision (“Decision”), Superintendent stated that Student “will receive an additional 15 days of suspension, no higher than 25 days. During this time [the District] will continue to provide alternative education services.” *Id.* at p. 2.

57. On October 14, Assistant Superintendent notified Parent of the Superintendent’s Decision and the Hearing Officer’s Recommendation. *Id.* at p. 1.

58. Neither the Recommendation nor the Decision indicated whether the additional 15 days of suspension should be applied retroactively (i.e., beginning on September 23, when Student’s initial five-day suspension ended) or prospectively (i.e., beginning on October 12, when

Superintendent issued the Decision). *See id.* at pp. 1-7. However, the District applied the days prospectively, suspending Student for an additional 15 days from October 14—when Parent was notified—through November 3. *Exhibit K*, p. 416.

59. Ultimately, Student was out of School from September 15 through November 3. Excluding holidays and parent-teacher conferences, Student missed 32 days of School as a result of the two harassment incidents. His time off School far exceeded the five-day suspension plus the additional 15-day suspension.

60. Due to a COVID-19 outbreak, all students at School attended online from October 27 through November 4. *Interview with Assistant Principal #1*. No school was held on November 5 due to a previously scheduled professional development day. *Id.* All students, including Student, resumed in-person instruction on November 8. *Id.*

I. Services During Student's Removal

61. According to Case Manager, Student had access to his coursework through Google Classroom throughout his removal from School. *Interview with Case Manager*. It is unclear, however, how much work was actually available to Student on Google Classroom, given that the remainder of his classmates were attending School in-person.

62. For his Content Mastery courses, Student was supposed to be completing journal entries online. *Id.*; *Exhibit K*, pp. 448-50. Student had access to Khan Academy, a website with free online courses, for math. *Id.* However, on October 26, Case Manager emailed Student's other teachers, stating "While [Student] is out of school, I just wanted to confirm that [Student] has access to your Google Classroom so that he is still able to be serviced while he is out. The plan is that he going to be returning on November 4." *Id.* at p. 452. This email suggested that, as of October 26, Case Manager did not even know if Student had access to materials for Speech and P.E. *See id.*

63. In an email on October 5, Social Worker indicated that Student "[was] not doing his online work, and he really wasn't producing much work when he was in person." *Id.* at p. 226.

64. While Student was suspended, Case Manager contacted Parent or Student at least eight times to see if Student was accessing the work available in Google Classroom. *Exhibit K*, pp. 448-450. Case Manager tried to ensure Student had access to the online resources, though Student was still not interested in completing whatever assignments were available online. *Id.*

65. No social-emotional or other behavioral services were provided by the BOCES or the District during Student's removal. *Interviews with Assistant Principal #1, Case Manager, and Director*. During her interview, Director indicated that Social Worker was checking in on Parent and Student during Student's removal. *Interview with Director*. Social Worker's service log does not indicate that she ever made contact with Student or otherwise provided him with any services. *See Exhibit D*, p. 2.

J. Student's Return to School

66. On November 3, Student's IEP Team met virtually to plan for Student's return to School. *Interview with Case Manager*. The IEP Team meeting resulted in an IEP dated November 3, 2021 ("November IEP") and a BIP dated November 4, 2021 ("November BIP"). *Exhibit A*, pp. 37-51.

67. The IEP Team updated the section of the November IEP regarding present levels of performance as follows:

While at the middle school last year [Student] was service[d] through 80% or more regular education environment and as the year progressed, the IEP team proposed that he receive more small group, 1:1 service time, changing his least restrictive environment.

At the high school, [Student] will not receive 1:1 support, but will be given the opportunity to demonstrate the ability to function without this support. It will be reintroduced if that support is determined as a need based on future behaviors. A behavior plan[] is being developed that will encompass [Student's] behavioral needs while at school. . . . [Student] will not be able to bring or use his cell phone device in any of his classes.

Id. at p. 40. The November IEP also reflected the decision to give Student more opportunities for physical breaks, by adding a weightlifting class to his schedule (in addition to his existing P.E. class). *Id.*; *Interview with Case Manager*.

68. The Student Needs and Impact of Disability portion of the November IEP remained unchanged from the April IEP and the September IEP. *Exhibit A*, p. 42.

69. The November IEP retained the two annual goals in math and social-emotional skills from the September IEP and added a third goal in reading. *Id.* at pp. 44-46.

70. The November IEP did not change the accommodations identified in both the April IEP and the September IEP. *Id.* at p. 47.

71. Under the November IEP, Student received the following special education and related services:

- Social-Emotional Instruction:
 - 2 hours per week of direct social-emotional instruction during Content Mastery.

- Specialized Instruction:
 - Math: 2 hours per week of direct instruction outside the general education classroom; and
 - Reading and Writing: 1 hours per week of direct instruction outside the general education classroom.

Id. at p. 49. Neither Student’s social-emotional instruction nor math instruction service minutes changed from the September IEP to the November IEP. *Id.* at p. 34. However, his reading and writing instruction were reduced by one-half. *Id.*

72. Per the November IEP, Student spent 40-79% of his time in the general education environment. *Id.* at p. 35.

73. The November BIP kept the two problem behaviors identified in the April BIP, specifically related to Student’s refusal behavior and inappropriate behavior during transitions. *Exhibit B*, pp. 1, 7. The November BIP also added a third problem behavior:

During structured whole class time, [Student] spends a good deal of the class period on his cell phone looking at social media and listening to music. He engages in texting and/or snap chatting other students in the school, which has created conflict with him and other students. Multiple instances of conflict were reported due to his cell phone use in and out of the class with other students.

Id. at p. 7.

74. The November BIP outlined setting event strategies, such as structured breaks and an additional P.E. class, to decrease the likelihood of the problem behaviors. *Id.* at p. 8. The November BIP eliminated certain prior strategies, such as escorting Student to and from class and active supervision at all times. *Id.*

75. Listed antecedent strategies designed to reduce the target behavior included giving him time and space to vent, redirections to start and continue work in class, one break each class period, and eliminating cell phone use. *Id.*

76. The BIP also included behavior teaching strategies, such as modeling replacement behaviors for profanity, giving ample processing time, and providing Student opportunities to reflect on behaviors after he is calm. *Id.*

77. As reinforcement strategies, the BIP identified use of rewards, withholding of social opportunities, breaks, and no cell phone use. *Id.*

K. BOCES Policies

78. The relevant portion of the BOCES policy regarding MDRs states that:

The MDR meeting must be conducted within 10 calendar days from the date the decision was made to expel or suspend for more than ten school days. The parent has the right to request a different date for the meeting if our proposed date doesn't work for them, however, it must be held within ten days of the decision to take disciplinary action. If the parent cannot attend on any date within that time period, you have to hold the MDR meeting anyway, making arrangements for the parent to participate by phone if they can.

Exhibit J, p. 1.

79. The BOCES does not have a separate policy or procedure regarding providing services to students following the tenth day of removal in a school year. *Interview with Director; see Exhibit J, pp. 1-9.* Instead, the BOCES relies on a discipline guidance document from CDE. *Interview with Director.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: The BOCES did not fail to conduct an FBA or revise Student's BIP after the first MDR determined Student's behavior was a manifestation of his disability.

The first allegation accepted for investigation concerns whether the BOCES failed to conduct an FBA or revise Student's BIP after Student's behavior was found to be a manifestation of his disability at the first MDR.

Discipline of a student with a disability may result in a change to the child's placement and entitle the student to procedural protections under the IDEA. *See* 34 C.F.R. §§ 300.530, 300.536. Within ten school days of a disciplinary change in placement, an MDR must be held. *Id.* § 300.530(e)(1). The student's behavior must be determined to be a manifestation of the student's disability if: (1) the behavior in question was "caused by, or had a direct and substantial relationship to" the student's disability, or (2) the behavior in question was a result of the school district's failure to implement the student's IEP. *Id.*

Such a determination triggers additional obligations for the school district. *Id.* § 300.530(f). If the district has not previously completed an FBA, the student's IEP Team must conduct an FBA and implement a BIP for the student. *Id.* Alternatively, where a BIP has already been developed, the IEP Team must review the BIP "and modify it, as necessary, to address the behavior." *Id.* Afterwards, the school district should return the student to his or her prior placement. *Id.*

Here, neither an additional FBA nor a revision to Student's BIP were necessary following the first MDR. The first MDR, held on August 26, concerned Student's possession of a knife at School. (FF #s 21-26.) The MDR concluded that this behavior was a manifestation of Student's SED (FF # 26), triggering the requirements of § 300.530(f).

At the time of the first MDR, Student's most recent FBA and BIP were from April 2021. (FF #s 5, 12.) During the MDR, the team discussed whether to conduct a new FBA or revise the April BIP. (FF # 27.) Student brought the knife to School on the seventh day of his freshman year. (FF # 22.) School staff hardly knew Student at that point. (FF # 27.) The behaviors staff observed during those seven days aligned with the April FBA and April BIP. (*Id.*) Staff had no reason to believe that either of those documents were no longer representative of Student's behaviors. The April BIP indicated that Student struggled with impulsivity. (*Id.*) The MDR team felt Student impulsively brought the knife to School out of fear of retaliation. (FF # 26.) Ultimately, the MDR team determined that neither a new FBA nor a revision to the April BIP was necessary. (FF # 27.)

For these reasons, the SCO finds and concludes that 34 C.F.R. § 300.530(f) did not require the BOCES to conduct an FBA or revise Student's BIP following the first MDR.

Conclusion to Allegation No. 2: The BOCES failed to review and revise Student's IEP between August 1, 2021 and present to address Student's behavior and lack of progress, in violation of 34 C.F.R. § 300.324(a)(2)(i) and (b)(1).

The second allegation accepted for investigation concerns whether the BOCES failed to review and revise Student's IEP to address Student's behavior.

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. *Andrew 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. *See id.* §§ 300.324(a)(4)-(6), (b); *Andrew*, 137 S. Ct. at 994.

Here, Student displayed disruptive behaviors from the outset of the school year. (FF #s 20, 21.) These behaviors increased in frequency, until he was suspended for a third time on September 15—less than one month into the school year. (FF #s 21, 29, 39, 40.) By then, Student was failing all of his classes except P.E. (FF # 32.) Student struggled with work completion so much

that Case Manager could not even determine whether Student was making progress on his annual goals. (*Id.*)

On September 14, Case Manager convened Student's IEP Team due to an error in the District's IEP management system which indicated Student was due for his annual review. (FF # 30.) The IEP Team did not meet as a result of Student's increasing behaviors or worsening academic performance. (*Id.*)

Nothing in the September IEP evidenced that the IEP Team gave any consideration to Student's academic or behavioral struggles. In fact, the resulting IEP suggests the opposite. For example, even though Student continued to struggle academically, the September IEP reduced Student's specialized instruction in math and reading from 7.5 hours per week to 4 hours per week. (FF #s 10, 36.) And Student's overall social-emotional services were reduced from 6.5 hours per week to 2 hours per week. (*Id.*) The IEP Team made no changes to Student's April BIP during the September meeting, because School staff were still getting to know Student, and Student was still adjusting to high school. (FF #s 27, 38.)

The IEP Team took no steps to better understand why Student was struggling academically or behaviorally. No additional evaluations—either academic or behavioral—were completed. Though Student was admittedly new to School staff, School staff could have seen this as an opportunity to learn more about his needs to serve him better, since the April IEP and April BIP did not seem to be effective in high school.

On November 3, Student's IEP Team met to prepare for his return to School. (FF # 66.) The resulting IEP sought to address Student's inability to focus by prohibiting Student from using his cell phone during class and giving Student more opportunities for physical breaks during the day. (FF # 67.) At the time of this meeting, Student had not been in School since September 15. (FF # 59.) Despite this, the IEP Team chose to further reduce Student's services under his IEP. (FF # 71.) Specifically, Student's direct reading and writing instruction was reduced from 2 hours per week to 1 hour per week. (*Id.*) At the same time, the IEP Team added a reading and writing goal, where there was none previously. (FF # 69.) These changes directly contradict one another and are indicative of the haphazard manner in which Student's IEPs have been revised.

An additional target behavior was added to Student's BIP regarding cell phone usage at School. (FF # 73.) But, again, this change was made without seeking any additional information about Student's behavior, such as a new FBA.

Despite Student's ongoing academic and behavioral challenges, the IEP Team did little, if anything, to try to understand the root of the challenges and better ways to address them at School. Even though Student's IEP Team has reviewed and revised Student's IEP twice this year, the revisions fail to reflect Student's needs, as exemplified by the continual decline in Student's services despite his increasing academic and behavioral struggles. For these reasons, the SCO

finds and concludes that the BOCES failed to review and revise Student's IEP between August 1, 2021 and present to address Student's behavior and lack of progress, in violation of 34 C.F.R. § 300.324(a)(2)(i) and (b)(1).

Procedural Violations

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).

The BOCES' failure to review and revise Student's IEP to address his behavior and lack of progress impeded Student's right to a FAPE and likely resulted in a deprivation of educational benefit. As a result, the SCO finds and concludes that the BOCES' procedural violation resulted in a denial of FAPE. Here, the SCO has awarded compensatory education below for the BOCES' failure to provide Student services during his removal. No additional award of compensatory education is necessary. Instead, the SCO has crafted a remedy designed to ensure the BOCES develops an IEP and a BIP that meet Student's individualized needs.

Systemic IDEA Violation

Pursuant to its general supervisory authority, CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the district. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the State Complaint Procedures are "critical" to the SEA's "exercise of its general supervision responsibilities" and serve as a "powerful tool to identify and correct noncompliance with Part B." *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46601 (Aug. 14, 2006).

In this case, the BOCES' failure to review and revise Student's IEP is not systemic. Here, the failure stemmed from the IEP Team's acceptance of Student as a troublemaker without looking deeper to determine how Student's disability was impacting him at School and whether his educational needs were being met at School. No evidence in the record supports finding that this same error occurs throughout the BOCES. For these reasons, the SCO finds and concludes that the violation is not systemic.

Conclusion regarding Notice and Scheduling of the Second MDR: The BOCES failed to provide Parent with adequate notice of the second MDR and conducted the second MDR without all required team members, in violation of 34 C.F.R. § 300.530(e). These violations resulted in a denial of FAPE.

Notice of Meeting

Parents have a right, under the IDEA, to invite additional participants to an MDR. 34 C.F.R. § 300.530(e)(1). This right necessitates that school districts notify parents early enough to ensure that parents and their invited attendees have an opportunity to participate. *Id.*; 34 C.F.R. § 300.322(a)(1). Failing to adequately inform parents of an MDR may result in a violation of the IDEA. *See CDE 2019:563; Cherry Creek Sch. Dist. #5*, 56 IDELR 149 (SEA CO 01/24/11).

On September 15, Student received a five-day suspension for a second incident of harassment. (FF # 39.) At that point, Student had been suspended three times during the school year, for a total of ten days. (FF # 22, 29, 39.) The District determined that a second MDR needed to be held. (FF # 40.) At 9:59 a.m. on September 16, the BOCES notified Parent that an MDR was scheduled for September 17 at 1:00 p.m. (FF # 41) The BOCES provided Parent with only 27-hours' notice of the meeting. (*Id.*) This short period of time was insufficient to ensure Parent and anyone she wanted to invite could attend the meeting. This untimely notice resulted in a procedural violation of the IDEA.

Required Members of MDR Team

The IDEA requires that a manifestation determination be made by the student's parent and relevant members of the student's IEP Team. 34 C.F.R. § 300.530(e)(1). No provision of the IDEA explicitly permits school district to conduct an MDR without one of the student's parents present. *See id.* §§ 300.530-300.531. Indeed, the plain language of the IDEA makes a parent a required attendee at an MDR. *See id.*

Even if the IDEA permitted an MDR to be held without a parent present, the protections for parent participation at an IEP Team meeting arguably extend to an MDR. For typical IEP Team meetings, the IDEA specifies that the school district take steps to ensure that the student's parents are present or afforded the opportunity to participate. *Id.* at § 300.322(a). Such steps include: (1) notifying parents early enough to ensure they have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed upon time and place. *Id.* An IEP Team meeting may be held without a parent only if the school district is unable to convince the parent to attend. *Id.* § 300.322(d). Even then, the school district must keep records detailing its efforts to arrange a mutually agreed upon time and place for the meeting. *Id.*

Parent received notice of the second MDR on September 16. (FF # 41.) On the morning of September 17, Parent notified the BOCES that she would be unable to attend due to a doctor's appointment. (FF # 42.) Instead of rescheduling the meeting, the District proceeded with the MDR as scheduled, with School Psychologist #1 noting that that the team would "continue it at a later date with the parent." (*Id.*) This, of course, did not occur, and the MDR was held and completed on September 17 without Parent present. (FF # 43.) In doing so, the District conducted an MDR without a required member of the MDR team, in violation of 34 C.F.R. § 300.530(e). Neither the District nor the BOCES made any effort to schedule the meeting at a mutually agreeable time and place. (FF #s 41-43.)

Though the BOCES acted as if time was of the essence, it was not. Under § 300.530(e), the BOCES only needed to conduct the manifestation determination "[w]ithin 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct." The manifestation determination did not need to happen on September 17.

A fundamental misunderstanding of what constitutes a disciplinary change of placement may have resulted in this violation. A disciplinary change of placement occurs if: (1) a student has been removed from his current educational placement for more than 10 consecutive school days, or (2) a student has been subjected to a series of short-term removals that total more than 10 school days and constitute a pattern. *Id.* § 300.536(a). Such a pattern exists where the removals involve "substantially similar" behavior and where other factors—such as the length of each removal, total amount of time removed, and the proximity of removals—support the existence of a pattern. *Id.* § 300.536(a)(2)(i)-(iii). The school district must determine whether a series of removals constitutes a pattern on a case-by-case basis; this determination is inherently subjective. *Id.* § 300.536(b)(1); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46729 (Aug. 14, 2006).

Here, Student's disciplinary change of placement occurred on September 29. In August, the District suspended Student for four days for possession of a dangerous weapon. (FF # 22.) Student was suspended twice in September for harassment. (FF #s 29, 39.) On September 13, Student received a one-day suspension for threatening a fight. (FF # 29.) And, on September 15, Student received a five-day suspension for making homophobic and/or transphobic comments to a classmate. (FF # 39.) The two September removals constitute a pattern under 34 C.F.R. § 300.536(a). Both removals occurred in very close proximity to one another and involved substantially similar behavior. These two removals totaled only six days. But, with the District's *de facto* extension of Student's suspension pending the DRH, the removals exceeded ten days. (FF # 51, 56-59.)

Under this pattern, Student's disciplinary change of placement occurred on his eleventh day of removal on September 29. Therefore, the BOCES only needed to conduct the MDR within 10 school days of September 29. The BOCES's sense of urgency and need to press on without

Parent present was unnecessary. Even if Parent had not dutifully attended all IEP Team meetings in the past, the BOCES was obligated under the IDEA to make an effort to ensure Parent could participate. By holding the September 17 MDR without Parent present, the BOCES failed to comply with 34 C.F.R. § 300.530(e)(1), resulting in a procedural violation of the IDEA.

BOCES Policy regarding MDRs

Within the scope of this investigation, the SCO notes that current BOCES policy incorrectly states the timeframe in which an MDR must occur. The policy instructs that an “MDR meeting must be conducted within 10 calendar days from the date the decision was made to expel or suspend for more than ten school days.” (FF # 78.) However, the IDEA only requires that an MDR be conducted within 10 *school* days from the date of student’s change of placement. 34 C.F.R. § 300.530(e). The remedies below address this error in the BOCES’ policy.

Second MDR Team’s Decision-Making Process

During the second MDR, the team determined that Student’s behavior was not a manifestation of his disability based on its assessment that Student acted on his own volition, without provocation. (FF #s 44, 46.) This analysis by the MDR team was misguided. In determining whether a student’s conduct was caused by or had a direct and substantial relationship to the student’s disability, the question is not whether the student knew right from wrong or whether the student chose to act a certain way. Instead, the focus must be directly on the relationship between the behavior and the student’s disability.

Procedural Violations

As noted above, a 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).

Parent was unable to attend the MDR, given the short notice and the District’s unwillingness to schedule the meeting at a mutually agreeable time and place. (FF # 43.) Additionally, Parent was unable to invite any additional participants, such as Advocate #1, to the MDR. (*id.*) As a result, the SCO finds that these procedural violations significantly impeded Parent’s opportunity to participate in the decision-making process at the second MDR, resulting in a denial of FAPE.

As a matter of policy, CDE will not overturn an MDR through a state complaint decision. Indeed, the IDEA mandates that MDRs be completed by an MDR team, including District staff, IEP team members, and the parents, who know the student best. 34 C.F.R. § 300.530(e). In the

past, CDE has directed school districts to conduct a new MDR that remedies the deficiencies identified in state complaint decisions. *See, e.g., CDE 2019:563; Cherry Creek Sch. Dist., 119 LRP 437679 (SEA CO 6/22/18)*. Here, however, such action seems unnecessary given the award of compensatory education outlined below. Instead, the SCO will craft remedies which focus on preventing recurrence of a similar situation in the future.

Systemic IDEA Violation

Pursuant to its general supervisory authority, CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the district. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the State Complaint Procedures are “critical” to the SEA’s “exercise of its general supervision responsibilities” and serve as a “powerful tool to identify and correct noncompliance with Part B.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46601 (Aug. 14, 2006)*.

In this case, the BOCES’ failure to conduct the MDR with all required team members is not systemic in nature. Applicable BOCES policy identifies parents as team members for MDR meetings and specifies that parents have the right to request a different date for the MDR meeting. (FF # 78.) Here, School Psychologist #1 disregarded the BOCES’ policy by refusing to reschedule the MDR to accommodate Parent’s doctor’s appointment and proceeding without her present. (FF # 42.) No evidence in the record indicates that this same error occurs throughout the BOCES. For these reasons, the SCO finds and concludes that the violation is not systemic.

Conclusion regarding Notice of Disciplinary Change of Placement: The BOCES failed to notify Parent of the decision to change Student’s placement based on disciplinary removals, in violation of 34 C.F.R. § 300.530(h).

On the date a removal becomes a disciplinary change of placement, the school district must notify parents of the decision and provide parents a copy of the procedural safeguards notice. 34 C.F.R. § 300.530(h).

Here, BOCES or District staff informed Parent of each of Student’s suspensions and communicated regarding when Student could return to School. However, after Student’s last suspension, Student remained out of School waiting on the DRH. (FF #s 50-51.) On September 29—one week before the DRH—Student’s removal became a disciplinary change of placement. Neither the BOCES nor the District notified Parent of the disciplinary change of placement or provided her with the procedural safeguards. This resulted in a procedural violation of 34 C.F.R. § 300.530(h).

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

Here, the SCO finds and concludes that the procedural violation did not result in a denial of FAPE. The failure to provide notice of the disciplinary change of placement likely had no impact on Student's right to a FAPE and did not significantly impede Parent's opportunity to participate in any decision-making process. Indeed, the transition between a removal and a disciplinary change of placement is an automatic one that requires no parent input. Finally, though other actions by the BOCES deprived Student of an educational benefit, the failure to comply with 34 C.F.R. § 300.530(h) did not.

Conclusion regarding Services during Removal: The BOCES failed to provide Student educational services after his tenth day of removal during the 2021-2022 school year, in violation of 34 C.F.R. §§ 300.530(b)(2) and 300.530(d).

Once a student has been removed from his or her educational placement for ten days in the same school year, the IDEA requires a school district to provide educational services during any subsequent days of removal. 34 C.F.R. § 300.530(b)(2). Such educational services must allow the student "to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." *Id.* § 300.530(d)(1)(i). The student must also receive "as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur." *Id.* § 300.530(d)(1)(ii). After the tenth day of removal—for removals that are not a change of placement—school personnel, in consultation with at least one of the student's teachers, determine the "extent to which services are needed" to provide a FAPE. *Id.* § 300.530(d)(4). If the removals result in a change of student's placement, the IEP Team must determine what services are necessary for the student to progress toward meeting his or her IEP goals. *Id.* § 300.530(d)(5).

Here, September 22 was Student's tenth day of removal during the 2021-2022 school year. However, his disciplinary change of placement did not occur until September 29. Nonetheless, beginning on September 23, the BOCES was obligated to provide Student educational services and behavioral services to allow Student to participate in the general education curriculum and progress towards his IEP goals. After September 29, the BOCES was required to convene Student's IEP Team to determine what those services should look like.

The BOCES failed to provide Student with educational or behavioral services to allow Student to participate in the general education curriculum from September 23 through November 3.

Though Student had access to Google Classroom, it is unclear what resources were available to Student in Google Classroom other than journal entries. (FF #s 61-63.) Student also had access to self-paced, online math lessons. (FF # 62.) Given Student's disabilities and his needs, the SCO finds and concludes that these resources were not adequate to allow Student to continue participating in the general education curriculum and progress on his IEP goals.

Moreover, once Student's removal became a disciplinary change of placement, the BOCES failed to convene Student's IEP Team to determine what services were necessary for Student. This failure excluded Parent from the decision-making process.

The SCO finds and concludes that the BOCES violated 34 C.F.R. §§ 300.530(b)(2) and 300.530(d) by failing to provide Student adequate educational services after his tenth day of removal during the 2021-2022 school year.

In this case, a showing of educational harm is not required to conclude that Student is entitled to compensatory services. Instead, it is sufficient to consider the timely provision of educational services, comparing the services Student should have received to the services Student actually received. *See Holman v. Dist. of Columbia*, 67 IDELR 39 (D.D.C. 2016) (stating that "[t]he 'crucial measure' under the materiality standard is the 'proportion of services mandated to those provided' and not the type of harm suffered by the student."). In this case, the BOCES offered Student virtually no services between September 24 to November 3. The scant services that were available to Student did little, if anything, to allow him to participate in the general education curriculum or make progress on his IEP goals. The difference between what should have been provided and what was provided is sufficient to demonstrate educational harm in this case. Consequently, this failure resulted in a denial of FAPE to Student. Given the degree to which a FAPE was denied, "Student is entitled to compensatory services." *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

Compensatory Education

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

Here, over a six-week period, the District failed to provide Student with virtually any access to his education. Based on the record, Student only had access to prompts for journal entries and an online math program. (FF #s 61-63.) Student had no access to the remainder of his classes and received no specialized instruction or behavioral support. (FF #s 61-63, 65.) By any measure, this mistake is significant and will likely impact Student's ability to make progress on his annual goals this school year. Thus, the SCO finds an award of (a) 180 minutes of direct specialized social-emotional instruction; (b) 180 minutes of direct specialized math instruction; and (c) 180 minutes of direct reading/writing instruction to be appropriate.

Systemic IDEA Violation

As noted above, pursuant to its general supervisory authority, CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in the BOCES. 34 C.F.R. § 300.151(b)(2). In this case, the BOCES does not have a specific policy or procedure regarding providing educational services during periods of removal. (FF # 79.) The BOCES' actions in this case did not demonstrate understanding of the need for services and how those services must be determined. For example, even after Student's change of placement, the BOCES did not schedule an IEP Team meeting to determine Student's services, as required by 34 C.F.R. § 530(d)(5). Additionally, during interviews, District staff recognized no deficiency in the extremely limited services that were made available to Student. The SCO, therefore, finds that the evidence supports a systemic violation regarding the provision of education services after the tenth day of removal.

REMEDIES

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

- 1) Failing to review and revise Student's IEP to address Student's behavior and lack of progress, in violation of 34 C.F.R. § 300.324(a)(2)(i) and (b)(1);
- 2) Failing to conduct an MDR with all required team members, in violation of 34 C.F.R. § 300.530(e);
- 3) Failing to provide Student educational services after this tenth day of removal during the 2021-2022 school year, in violation of 34 C.F.R. §§ 300.530(b)(2) and 300.530(d);
- 4) Failing to provide notice of an MDR, in violation of 34 C.F.R. §§ 300.322(a)(1) and 300.530(e)(1); and
- 5) Failing to provide notice that a removal became a disciplinary change of placement and failing to provide a procedural safeguards notice, in violation of 34 C.F.R. § 300.530(h).

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

1. By **Tuesday, February 1, 2022**, the 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 the BOCES is responsible. The CAP must, at a minimum, provide for the following:
 - a. Attendance and completion of training provided by CDE on IEP and BIP development. This training will address, at a minimum, the requirements of 34 C.F.R. § 300.324 and the related concerns noted in this decision. Director 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 Director, Assistant Principal #1, School Psychologist #1, and Case Manager. Such training shall be completed no later than **Tuesday, March 1, 2022**.
 - i. 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 **Tuesday, March 8, 2022**.
 - b. Attendance and completion of training provided by CDE on required MDR team members and provision of educational services for students after the tenth day of removal. This training will address, at a minimum, the requirements of 34 C.F.R. § 300.530(b)-(e) and the related concerns noted in this decision. Director 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 Director, all BOCES school psychologists, Principal, Assistant Principal #1, Assistant Principal #2, and Case Manager. Such training shall be completed no later than **Tuesday, March 1, 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 **Tuesday, March 8, 2022**.

- c. 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. BOCES Policies and Procedures

- a. The BOCES must revise its written procedures regarding manifestation determinations to provide clarity regarding when manifestation determination should be held and the required composition of an MDR team. Current BOCES procedures incorrectly state that the "MDR meeting must be conducted within ten calendar days from the date the decision was made to expel or suspend for more than ten school days." This statement incorrectly states the trigger for the 10-day period and uses "calendar days" instead of "school days." The BOCES must revise these procedures and submit them to CDE for approval by **Tuesday, March 1, 2022**.
- b. The BOCES must develop written procedures regarding the provision of services to a student following the tenth day of removal in a school year, in accordance with 34 C.F.R. § 300.530(b)-(d). Such procedures should outline when the BOCES is required to provide services and who determines the services needed. The BOCES must develop these procedures and submit them to CDE for approval by **Tuesday, March 1, 2022**.

3. Completion of FBA and Review of IEP and BIP

- a. The BOCES must complete a functional behavior assessment ("FBA") by **Tuesday, February 15, 2022**. If, for any reason, Student refuses or is otherwise unable to participate in the FBA, the BOCES shall be excused from completing the FBA but must still convene Student's IEP Team in accordance with (3)(b) below. The FBA must include:
 - i. Consultation with a behavioral specialist who has demonstrated experience in this area;
 - ii. Detailed identification of Student's negative behaviors, including intensity, duration, and a detailed assessment of antecedents and consequences;
 - iii. A detailed summary statement concerning the function of Student's behavior;
 - iv. Confirmation of the summary statement through formal observation of behavior, antecedents, and consequences; and
 - v. Development of competing behavior summary to identify desired behavior, common reinforcing consequences, and alternative behaviors.

- b. The BOCES must convene Student's IEP Team, at a mutually agreeable date and time, by **Tuesday, March 1, 2022**. In consideration of the FBA and Student's current academic performance, Student's IEP Team should review and revise Student's current IEP and BIP. The IEP Team should ensure Student's IEP and BIP address Student's academic and behavioral needs in accordance with 34 C.F.R. § 300.324(a)(1)-(2).
4. **Compensatory Education Services for Denial of a FAPE**
- a. Student shall receive **180 minutes of direct specialized social-emotional instruction outside the general education classroom**. This instruction must be provided by a special education teacher. All 180 minutes must be completed by **Thursday, May 26, 2022**.
- b. Student shall receive **180 minutes of direct specialized math instruction outside the general education classroom**. This instruction must be provided by a special education teacher. All 180 minutes must be completed by **Thursday, May 26, 2022**.
- c. Student shall receive **180 minutes of direct specialized reading/writing instruction outside the general education classroom**. This instruction must be provided by a special education teacher. All 180 minutes must be completed by **Thursday, May 26, 2022**.
- d. To verify that Student has received the services required by this Decision, the BOCES must submit records of service logs to CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log. The BOCES shall communicate with the District as necessary to obtain this information.
- e. By **Tuesday, February 1, 2022**, the BOCES shall schedule compensatory services in collaboration with Parent. A meeting is required to arrange this schedule. Such a meeting may be held in-person, via phone, or video conference. The BOCES shall schedule the meeting with Parent at a mutually agreed upon time and place. If necessary, the BOCES shall work with Advocate #1 or Advocate #2 to schedule the meeting and ensure Parent's attendance. 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.

- i. If Parent does not attend the scheduled meeting, the BOCES shall be excused from delivering compensatory services. The BOCES shall document its efforts to schedule and host the meeting at a mutually agreed upon time and place. A determination that the BOCES diligently attempted to meet with Parent, and should thus be excused from providing compensatory services, rests solely with CDE.
- f. The BOCES shall submit the schedule of compensatory services to CDE no later than **Tuesday, February 15, 2022**. If for any reason, including illness, Student is not available for any scheduled compensatory services, the BOCES will be excused from providing the service scheduled for that session. If for any reason the BOCES fails to provide a scheduled compensatory session, the 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.: Rebecca O'Malley
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 the BOCES' annual determination under the IDEA and subject the BOCES to enforcement action by CDE. **Given the current circumstances surrounding the COVID-19 pandemic, the Department will work with the 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 28th day of December, 2021.

Ashley Schubert

Ashley E. Schubert
State Complaints Officer

Appendix

Complaint, pages 1-2

- Exhibit 1: Supporting Documents

Response, pages 1-2

- Exhibit A: IEPs
- Exhibit B: BIPs
- Exhibit C: FBA
- Exhibit D: Service Logs
- Exhibit E: Discipline Records
- Exhibit F: Blank
- Exhibit G: MDRs
- Exhibit H: DRH Records
- Exhibit I: Attendance Records
- Exhibit J: BOCES Policies & Procedures
- Exhibit K: Correspondence
- Exhibit L: District and School Staff List

Reply, page 1

Telephonic Interviews with:

- BOCES Special Education Director: December 1, 2021
- Assistant Superintendent: December 1, 2021
- Assistant Principal: December 1, 2021
- Case Manager: December 1, 2021
- School Psychologist #1: December 2, 2021

- Parent did not respond to requests to be interviewed.