

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

**State-Level Complaint 2022:559
South Central BOCES**

DECISION

INTRODUCTION

On November 11, 2022, 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 (the “Complaint”) against a member district (“District”) of the South Central BOCES (“BOCES”). The State Complaints Officer (the “SCO”) determined that the Complaint identified four (4) allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), the Colorado Department of Education (“CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from November 11, 2021 through November 11, 2022 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 BOCES denied Student a Free Appropriate Public Education (“FAPE”) because BOCES:

1. Failed to provide Parent with access to Student’s education records, specifically evaluation data, within 45 days of Parent’s request on or about October 19, 2021, in violation of 34 C.F.R. §§ 300.501(a) and 300.613.

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 provide Parent with adequate prior written notice of the action taken by BOCES at Student’s IEP Team meeting held on or about December 15, 2021, in violation of 34 C.F.R. § 300.503.
3. Failed to develop, review, and revise an IEP, on or about September 8, 2022, that was tailored to meet Student’s individualized needs, in violation of 34 C.F.R. §§ 300.34, 300.320, and 300.324, specifically by failing to provide Student with adequate services and supports to address his health-related needs.
4. Failed to properly implement Student’s IEP from September 8, 2022 to present, in violation of 34 C.F.R. § 300.323, specifically by:
 - a. Failing to provide Student the special education and related services required by his IEP; and
 - b. Failing to provide Student the accommodations, including breaks, required by his IEP.

FINDINGS OF FACT

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

A. Background

1. Student is a friendly, respectful, and fun-loving sixteen-year-old, with interests in sports, music, and horror movies. *Exhibit A*, p. 5; *Interviews with Lead Paraprofessional, General Education Teacher, Former Case Manager, and Parent*. Student qualifies for special education and related services under the Other Health Impaired disability category. *Exhibit A*, p. 3.
2. This investigation concerns the 2022-2023 academic year, during which Student attended 10th grade at a District School (“School”). *Id.* District is a member of BOCES. *Id.* at p. 1. BOCES is responsible for providing FAPE to all IDEA-eligible children with disabilities attending a school in its members districts. ECEA Rule 2.02.
3. When classes started at School in August of 2022, Student’s December 15, 2021 IEP was in effect (the “2021 IEP”). *Exhibit A*, pp. 3-18.

B. The 2021 IEP

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

4. The 2021 IEP was developed by a properly constituted IEP Team in conjunction with Student's triannual reevaluation for eligibility. *Exhibit H*, pp. 1-8; *Exhibit A*, p. 4; *Exhibit C*, p. 6.
5. The 2021 IEP documented Student's strengths, preferences, and interests, including that he is social, caring, and respectful, and that he enjoys sharing information about his interests (such as horror movies). *Exhibit A*, p. 5.
6. The 2021 IEP reviewed Student's present levels of performance, documenting the results of the reevaluation, grades, observations, and an interview with Student. *Id.* at pp. 5-8.
7. The Student Needs and Impact of Disability section documented that Student qualifies for special education and related services due to a "brain bleed" he experienced when he was younger. *Id.* at p. 9. Student experiences severe fatigue and weakness on his right side, and when fatigue "sets in" he is prone to anxiety attacks which can make him physically ill. *Id.* Student experiences headaches and dizziness, as well as short term memory loss. *Id.* Student is "very good" about asking for help and becomes "very pleased" when he remembers something that is not routine, but he requires reminders in "all areas." *Id.*
8. The Parent/Student Input section contained input from Parent that Student is "happy with how things are going" and he has significantly improved since the previous year, but he needs to improve his comprehension and "coming up with the correct word." *Id.* Student reports that he needs help in writing, spelling, and math, but he has done well in reading. *Id.*
9. The 2021 IEP contained a Post-School Education/Training goal for Student to become a pastor. *Id.* According to a December 9, 2021 transition interview, Student wants to gain employment which allows for more independence. *Id.* Student has good communication skills, but he needs to work on developing more independent living skills, which is why he was enrolled in a "Life Skills" class at School. *Id.*
10. The 2021 IEP documented that, due to medical needs, Student requires a Health Care Plan. *Id.* at p. 10; *Exhibit J*, pp. 91, 181. The Health Care Plan contained information and instructions for medications that Student takes to address medical issues related to his disability, such as asthma, migraines, and seizures. *Exhibit J*, pp. 91, 181. The 2021 IEP indicated the Health Care Plan could be accessed in the nurse's office at School. *Exhibit A*, p. 10.
11. The 2021 IEP contained annual goals in writing, mathematics, and reading. *Id.* at pp. 11-13.
12. The 2021 IEP contained accommodations to help Student access the general education environment, including preferential seating, extra time for work/testing, checks for

understanding, and allowing for alternative ways to determine Student's knowledge. *Id.* at p. 13.

13. The Service Delivery of the 2021 IEP provided for 640 minutes per week of direct specialized instruction and/or support inside the general education classroom, 480 minutes per week of direct specialized instruction and/or support outside the general education classroom, and 15 minutes per quarter of indirect occupational therapy services. *Id.* at p. 16.
14. The IEP Team determined it was appropriate for Student to be in the general education classroom 40 to 79 percent of the time. *Id.* at p. 17.
15. The Prior Written Notice (the "PWN") section of the 2021 IEP indicated that the IEP Team considered additional accommodations, but that option was rejected. *Id.* The embedded PWN did not, however, explain what led the IEP Team to reject additional accommodations, or discuss other options that were considered by the IEP Team. *See id.*
16. During the December 15, 2021 IEP meeting, School Psychologist drafted a supplementary, standalone PWN regarding the IEP Team's actions at the meeting. *Exhibit B*, p. 9; *Interview with Former Case Manager*. The supplementary PWN indicated the IEP Team developed the 2021 IEP through a review of "district data"; reports from teachers, service providers, and Parent; and a discussion of the data from the reevaluation. *Exhibit B*, p. 9. The IEP Team considered not finding Student eligible for special education but rejected that option because the data demonstrated that Student continued to require special education and related services. *Id.*

C. PWN and Parent's Receipt of the 2021 IEP

17. In August of 2022, on or about the start of classes at School for the 2022-2023 academic year, Parent requested, and was provided with, a copy of the 2021 IEP. *Interview with Parent; Reply*, p. 1; *see Exhibit L*, p. 18. Parent indicates she was never previously provided with a copy of the 2021 IEP following the December 2021 IEP meeting (and thus, did not receive PWN of the IEP Team's actions taken during the meeting until August of 2022). *Complaint*, p. 8; *Interview with Parent*.
18. BOCES' position is that Former Case Manager provided Parent with a copy of the 2021 IEP (which contained the embedded PWN) following the December 2021 IEP meeting, and that Parent was provided the supplemental PWN that School Psychologist drafted at the December 2021 IEP meeting. *Response*, pp. 6-8.
19. BOCES policies and procedures require PWN to be provided to a parent whenever BOCES proposes to initiate or change the provision of free, appropriate public education (FAPE) to a student (such as through the development of an IEP). *Exhibit K*, pp. 102-105. These policies and procedures indicate that, following an IEP meeting, the case manager will copy

and distribute the IEP documents as appropriate, ensuring that the special education teacher and parents receive a full copy at the end of the meeting or within ten calendar days (the policies and procedures do not specify a method of delivery for IEP documents, such as through mail, email, or hand delivery). *Id.* at pp. 99, 118.

20. Former Case Manager told the SCO during interviews that the typical practice during the 2021-2022 academic year was for Former Case Manager or School Psychologist to finish typing an IEP following an IEP meeting, and then for Former Case Manager to obtain a copy from Enrich and provide it to the parent. *Interview with Former Case Manager*. Former Case Manager conceded, however, that she cannot remember whether the 2021 IEP was provided to Parent. *Id.* The SCO requested but was not provided with verification from BOCES that the supplemental PWN that School Psychologist drafted at the December 15, 2021 IEP meeting was provided to Parent at or following the meeting. *See Exhibit B*, p. 9.
21. Parent signed PWN and consent for the 2021 reevaluation on October 27, 2021, and her signature likewise appears on the signature page of the 2021 IEP, documenting her attendance and participation at the December 15, 2021 IEP meeting. *Id.* at p. 4; *Exhibit A*, p. 4; *Exhibit C*, p. 6. However, there is no evidence in the Record to establish when or whether Parent received the 2021 IEP (with the embedded PWN) and/or supplemental PWN following the December 15, 2021 IEP meeting and prior to August 2022. *See Exhibit L*.
22. Since there is no evidence in the Record to contradict Parent's claims and show Parent was provided with the 2021 IEP or PWN following the December 15, 2021 IEP meeting, and because BOCES staff cannot remember when or if Parent was provided with the IEP, the SCO finds that BOCES failed to provide Parent with the 2021 IEP and the PWN of the IEP Team's decision at the December 15, 2021 IEP meeting until August of 2022.
23. Notwithstanding, Parent indicates she was in regular and frequent communication with staff about Student for the remainder of the 2021-2022 academic year. *Interview with Parent*. Parent worked at School during the 2021-2022 academic year and thus, had regular in-person contact with members of Student's support team, and was kept apprised of progress and needs. *Id.* Parent did not report any concerns regarding IEP implementation or Student's special education services for the remainder of the 2021-2022 academic year, to include his health-related services. *Id.* Student also passed all his classes with a 3.167 GPA and made progress toward the annual goals contained in the 2021 IEP. *Exhibit G*, p. 2; *Exhibit E*, pp. 1-2.

D. Parent's Concerns Regarding Student's Seizures (August 2022)

24. Upon receiving the 2021 IEP in August 2022, and through conversations with School staff, Parent became concerned that there were times throughout the day, such as shop class, when Student would be unsupported by a paraprofessional. *Interviews with Parent, Lead*

Paraprofessional, and Case Manager. As a result, Parent became concerned that there were times when staff were not monitoring Student for seizures. *Interview with Parent.*

25. Due to his disability, Student sometimes experiences “focal” and “absence” seizures. *See Exhibit J, p. 201; Interviews with School Nurse and Parent.* “Focal” seizures impact a specific area of the brain, and “absence” seizures involve sudden, brief lapses in consciousness. *Interview with School Nurse; Consultation with CDE Content Specialist 1.*
26. Student’s “focal” seizures sometimes begin with an aura (a feeling prior to the onset of a seizure – Student sometimes feels “off”) and may be accompanied by behaviors such as lip smacking, chewing, eye blinking, or picking at clothes. *Exhibit J, p. 201; Interviews with School Nurse, Parent, and Lead Paraprofessional.* These usually last 1-2 minutes. *Exhibit J, p. 201.* Student’s “absence” seizures are accompanied by a quick change in alertness, and usually last less than 10 seconds. *Id.* Student’s seizures—particularly the absence seizures—can be difficult to detect, even for Student. *Interviews with Parent and School Nurse.*
27. Student’s Health Care Plan contained instructions for medications that Student takes to address his seizures. *Exhibit J, pp. 91, 181.* Student is administered a daily medication at School, and staff are authorized to administer an additional medication if he either (1) experiences a seizure that lasts more than five minutes, or (2) experiences a cluster of six or more seizures in one hour. *Id.* The medication Student receives for (1) and/or (2) above is designed to stop the seizure activity. *Interviews with School Nurse and Parent; Consultation with CDE Content Specialist 1.*
28. If Student experiences seizures at School, it can negatively impact him by leaving him feeling “extremely” fatigued. *Interviews with School Nurse and Parent.* Parent’s concern is that Student must always be monitored for seizures so staff know if he has experienced a cluster of six or more seizures which would require medication administration. *Interview with Parent.*
29. Classes began at School on August 15, 2022. *Exhibit I, p. 2.* Due to outside medical appointments and procedures, Student missed the first several weeks of classes. *See Exhibit L, p. 18.*
30. On August 25, 2022, Parent emailed Case Manager to ask for an IEP meeting and requested that BOCES: (1) allow the meeting be recorded, (2) provide a copy of a consent form showing Parent consented to implementation of the 2021 IEP³, (3) provide a copy of the training materials used to train staff on seizures, (4) provide a list of staff who received seizure training, (5) provide information about which staff would be authorized to provide medication to Student if School Nurse is unavailable, (6) designate a dark and quiet place for Student to go if he experiences a seizure at School, and (6) provide a copy of “the plan”

³ Colorado does not have an annual consent requirement for the continued provision of special education services and thus school districts are only required to obtain written consent from parents for the initial implementation of special education services. *See* 34 C.F.R. § 300.300.

developed to address seizures. *Id.* Parent hoped Student would be recovered enough from his outside medical procedures to start attending School following the IEP meeting. *Id.*

E. The September 8, 2022 IEP Meeting

31. On September 8, 2022, a properly constituted IEP Team met to discuss Parent's concerns and possible amendments to the 2021 IEP. *Exhibit C*, p. 10; *Exhibit D*, p. 1. Parent, Parent's advocate, Student, School Nurse, Case Manager, School Psychologist, the superintendent of District, and the principal of School attended the meeting. *Exhibit D*, p. 1.
32. To address Parent's concerns about Student's seizures, School Nurse reviewed Student's Health Care Plan and discussed steps that BOCES took to address safety and seizures at School. *Exhibit D*, p. 1; *Exhibit 1*.

The "Action Plan" and Staff Training for Student's Seizures

33. Prior to the start of classes at School, School Nurse met with the school nurse from the previous year (this nurse retired following the end of the 2021-2022 academic year) to discuss Student's medical needs and his Health Care Plan. *Interview with School Nurse*. School Nurse also met with Parent and Student during orientation on August 8, 2022 to review medical orders for Student with Parent and ensure Parent and School Nurse were "on the same page" about Student's medical needs. *Id.*
34. Following discussions with Parent at orientation, School Nurse completed the "Epilepsy Foundation: Seizure Training for School Nurses: Caring for Students" online training course, a CDE-approved training designed to teach school nurses about seizure detection and seizure first aid. *Interview with School Nurse; CDE Exhibit 1; Consultation with CDE Content Specialist 1*. Using materials from the course, School Nurse developed a "seizure report book" which she distributed to all classrooms at School, the cafeteria, and gymnasium in purple folders marked "Seizure Training" (the "Action Plan"). *Interview with School Nurse*.
35. The Action Plan contained step by step directions for staff to follow if Student experienced a seizure at School. *Id.*; see e.g., *Exhibit J*, p. 35. The Action Plan's step-by-step directions for staff began with instructions to contact School Nurse (the plan detailed School Nurse's contact information) and contained space for staff to document seizure activity. *Id.* School Nurse had a copy of Student's academic schedule and was always aware of his location while attending School (to include the location of his classroom within the building), so she could quickly respond in the event of a seizure. *Interview with School Nurse*.
36. Prior to the September 8 IEP meeting, School Nurse reviewed the Action Plan with all staff who would work with Student during the 2022-2023 academic year, and staff in the front office and cafeteria were provided with a copy of the Action Plan and Student's Health Care

Plan (Student's Health Care Plan was not posted in classrooms to protect confidentiality). *Interviews with School Nurse, General Education Teacher, and Lead Paraprofessional.*

37. School Nurse provided all staff at School with links to the "Epilepsy Foundation: Seizure Training for School Personnel", which is another online, CDE-approved seizure training designed for school personnel, and required staff working directly with Student to complete the training and provide School Nurse with a certificate of completion prior to August 20, 2022. *Interviews with School Nurse, General Education Teacher, Lead Paraprofessional, and Director of Special Education.*

Parent's Request for a 1:1 Paraprofessional

38. Parent expressed concern that even if Student's teachers received seizure training and were instructed to monitor him for seizures, they would not always be able to monitor him in a class with multiple students. *Exhibit 1.* Parent indicated Student's seizures had been increasing in frequency, and he had been experiencing seizures approximately every other day for the month leading up to the September 8 meeting (a significant increase compared seizure activity during the previous year). *Id.*; see *Exhibit J*, pp. 31-32. Parent requested a dedicated 1:1 paraprofessional for Student for the entirety of his time at School to monitor him for seizures. *Exhibit D*, p. 1.; *Interviews with School Nurse and Parent; Exhibit 1.*

39. The IEP Team discussed Parent's observations of Student's seizures and School Psychologist proposed to continue the discussions to another date so Director of Special Education could be included in the conversation. *Exhibit D*, p. 1; *Interviews with Parent, School Nurse, and Case Manager.* Parent agreed. *Exhibit 1; Interview with Parent.* Following the meeting, Parent emailed School staff and requested an agenda for the next IEP meeting and requested that Occupational Therapist also attend the meeting. *Exhibit L*, p. 36.

40. On September 14, 2022, Parent emailed the BOCES members of the IEP Team and further requested that all members of Student's support team attend the next meeting. *Id.* at p. 61. In this email, Parent made an extensive list of requests for the meeting, to include: (1) "proof" that staff working with Student took and passed epilepsy/seizure training, (2) "proof" that additional staff were authorized to administer medication on Student in the event that School Nurse was unavailable, (3) a written copy of the Action Plan to be attached to the 2021 IEP, (4) a "trained" 1:1 paraprofessional for Student (along with a backup substitute 1:1 paraprofessional trained on Student's needs), (5) multiple changes to the 2021 IEP (to include annual goals, post/secondary goals, eligibility category, accommodations, and service minutes), (6) development/implementation of a daily communication log, and (7) consideration of additional related services for Student. *Id.*

41. On September 20, 2022, School Nurse sent Parent a formal letter in response to some of these requests. *Exhibit L*, p. 266. School Nurse assured Parent that all "appropriate staff have been educated and have completed CDE Training for School Personnel via the Epilepsy

Foundation.” *Id.* School Nurse further indicated that if School Nurse was unavailable to administer Student’s seizure medication, the previous year’s staff would be used (since those employees were previously trained to administer medication and were familiar with Student’s medical needs), and two additional staff members were in the process of training so they could also be authorized to administer medication. *Id.*; *Interview with School Nurse.*

42. An IEP meeting was scheduled for September 22, 2022, but had to be rescheduled to September 26, 2022 due to a “snow day.” *Exhibit L*, pp. 138, 145-146. Student did not attend School leading up to the rescheduled meeting because of outside medical appointments and procedures, though Parent also indicated she would not have Student attend regardless until her concerns were addressed. *Interviews with Parent, Lead Paraprofessional, School Nurse, General Education Teacher, and Case Manager.* BOCES staff encouraged Parent to send Student to School and indicated there was a comprehensive plan in place to support Student’s safe return to School, to include the Health Care Plan and seizure training for all of Student’s teachers. *Exhibit L*, p. 65.

F. The September 26, 2022 IEP Meeting

43. On September 26, 2022, a properly constituted IEP Team met to continue discussing Parent’s concerns and possible amendments to the 2021 IEP. *Exhibit D*, pp. 2-4. Parent, Parent’s advocate, Student, the assistant director of special education for BOCES, Director of Special Education, School Nurse, Case Manager, General Education Teacher, the superintendent of District, the principal of School, School Psychologist, and Occupational Therapist attended the meeting. *Id.* at p. 2.
44. Parent renewed her request for a list of specific staff who completed seizure training and a list of those who were authorized to administer medication when School Nurse was unavailable. *Id.* Parent also renewed her request for a 1:1 paraprofessional for Student. *Id.*
45. BOCES assured Parent that all staff working directly with Student, to include teachers and service providers, completed seizure training but was unwilling to provide Parent with the training materials or a list of the staff who completed training. *Interviews with Director of Special Education, School Nurse, and Parent.* BOCES was unwilling to disclose this information due to BOCES/District policy and because Parent was sending numerous communications to staff about her concerns, to include texts and telephone calls on personal lines and at night and/or over weekends. *Interviews with Director of Special Education and School Nurse.* There was concern about boundary lines being crossed, and several staff contacted the superintendent of District and School Nurse to specifically ask that their information not be shared with Parent. *Id.*
46. The IEP Team agreed to several new accommodations to address Student’s seizures, including: providing Student alternatives to physical education activities or activities outside in the sun/“extreme” heat (because exertion and overheating can lead to seizure activity);

watching for seizure triggers such as fatigue, illness, and stress (and provide Student with a break if those triggers are present); creation of a communication log to share information about seizure activity with Parent; access to “brain breaks” throughout the day (letting Student rest with his eyes shut); and letting Student take breaks in a quiet, dark place when he experiences migraines (which can lead to seizures). *Exhibit A*, p. 26.

47. Parent also requested additional changes to the 2021 IEP, such as to the annual goals and eligibility category. *Id.* The BOCES members of the IEP Team disagreed that there was data to demonstrate the 2021 IEP needed to be revised, so the BOCES members of the IEP Team proposed a reevaluation of Student since Student had not yet attended School during the 2022-2023 academic year and thus there was no current data on Student’s needs. *Id.*
48. To determine if a 1:1 paraprofessional was necessary, the IEP Team agreed to monitor Student’s seizure activity for a two-week period, starting on October 3, 2022 (the “Observation Period”). *Exhibit D*, pp. 2-4. To alleviate Parent’s concerns about Student’s safety during this time, BOCES agreed to put him on a modified schedule so he could have a 1:1 paraprofessional during the Observation Period. *Id.*; *Interviews with Director of Special Education, Case Manager, School Nurse, Lead Paraprofessional, and Parent.*

G. The Observation Period (October 2022)

49. From October 3 through 14, 2022, Student attended School on a modified schedule with a 1:1 paraprofessional. *Interviews with Parent, Director of Special Education, Case Manager, Lead Paraprofessional, School Nurse, and General Education Teacher.* During this time, the paraprofessional working with Student monitored Student for seizures, and documented whether seizure activity occurred every fifteen minutes using a Seizure Data Log which was shared daily with Parent. *See, e.g., Exhibit J*, p. 63; *Interviews with Lead Paraprofessional, Case Manager, School Nurse, and Parent.*
50. When Student exhibited a seizure, the paraprofessional working with Student filled out a Seizure Report Form from the Action Plan folder, and documented information such as the time and length of the seizure, the observed symptoms, when and whether School Nurse was called to administer medication, post event notes, descriptive notes, information about what may have triggered the seizure, and whether Parent and/or emergency personnel were contacted. *Exhibit J*, pp. 35-60; *Interviews with School Nurse, Lead Paraprofessional, Case Manager, and Parent.* These forms were also shared with Parent daily. *See Exhibit L*, pp. 324-337, 344-358; *Interviews with Lead Paraprofessional, School Nurse, and Parent.*
51. The Seizure Data Logs and Seizure Report Forms documented that Student exhibited seizure activity on October 3, 6, 10, 12, and 13, 2022. *See Exhibit J*, pp. 35-75.

H. Implementation of the 2021 IEP

Accessibility of the 2021 IEP

52. Case Manager was Student's case manager during the 2022-2023 academic year, and thus, was responsible for ensuring that Student's teachers and service providers were aware of their responsibilities under the 2021 IEP. *Interviews with Case Manager and Lead Paraprofessional; Response, p. 4.*
53. Prior to the start of classes at School, Case Manager met with Parent to discuss Student's needs and the plan for the 2022-2023 academic year. *Interview with Case Manager.* Case Manager provided a snapshot of the 2021 IEP to Student's teachers and service providers and met with the paraprofessionals working with Student to review Student's goals and accommodations. *Interviews with Case Manager, General Education Teacher, and Lead Paraprofessional.* Case Manager also informed staff of the process to access the "full" 2021 IEP from the School resource room. *Interview with Case Manager.*
54. Following the beginning of the year, Case Manager engaged in regular collaboration with staff, to include formal meetings every other week. *Interviews with Case Manager and Lead Paraprofessional.* Case Manager also set up a shared google document to be used by staff to track observations and progress monitoring for Student. *Id.* Lead Paraprofessional, who worked with Student and oversaw his paraprofessional support during the 2022-2023 academic year, confirms that she communicated with Case Manager every day, and Case Manager held weekly trainings with paraprofessionals. *Interview with Lead Paraprofessional.*

Implementation – Special Education and Related Services (August and September 2022)

55. Parent's first implementation concern is that BOCES failed to implement the 2021 IEP by failing to provide Student with the required direct specialized instruction/support during times when Student was absent due to outside medical appointments and procedures (as well as because of Parent's concerns regarding Student's seizures) in August and September of 2022. *Interview with Parent; see Exhibit L, p. 280.* Parent indicates BOCES told her at the September 8, 2022 IEP meeting that BOCES would make alternative arrangements for Student to receive his service minutes when he was absent, either by arranging homebound services or arranging for after school services. *Interview with Parent.*
56. The SCO reviewed a recording of the September 8, 2022 IEP meeting, and based upon this review, finds that BOCES did not promise that Student would receive special education and related services when he did not attend School during August and September of 2022. *Exhibit 1.* Rather, the SCO finds that BOCES merely informed Parent that the 2021 IEP would remain in effect even if Student did not attend School. *Id.* Indeed, BOCES made no promises

to provide Student with special education and related services through alternative means, such as homebound services or after-hours make-up services. *Id.*

57. Given the plain language of the 2021 IEP, and since Parent opted to not allow Student to attend School during August and September of 2022, the SCO finds that BOCES did not fail to implement the 2021 IEP in this respect.

Implementation – Accommodations (October 2022)

58. Parent’s second implementation concern is that BOCES failed to implement the 2021 IEP by failing to provide Student with required accommodations during the days he attended School in October of 2022. *Interview with Parent.* Parent indicates BOCES failed to provide a quiet and dark space to take breaks because Student had to go to the nurse’s office for breaks (which is by the band room and noisy). *Id.* Parent also indicates he was not provided with notes for class, shortened assignments as needed, a math vocabulary list, graphic organizers, or “steps in math assignments and tests” to help him “remember how to do problems so he can complete them more independently.” *Complaint, p. 5; Exhibit A, p. 13.*
59. Student attended School on a modified schedule for a total of seven days during the Observation Period from October 3 through 14, 2022 (School has four days of class each week), and he attended School for partial days the following week from October 17 through 20, 2022 before he stopped attending entirely. *Interviews with Parent, Case manager, and Lead Paraprofessional; Exhibit G, p. 3.* During this time, Student was supported 1:1 by Lead Paraprofessional or another paraprofessional under the management of Lead Paraprofessional. *Interview with Lead Paraprofessional; Response, p. 4.*
60. Lead Paraprofessional confirmed that Student was accompanied by a 1:1 paraprofessional from the time he arrived at School to when he left each day. *Interview with Lead Paraprofessional.* Lead Paraprofessional described examples of accommodations he received during this time, to include opportunities to use a computer for writing, shortened assignments, printed assignments (so Student could highlight instead of write), choice of partner for activities, and re-explaining assignments/directions. *Id.* Lead Paraprofessional described several locations designated as places Student could go for breaks, to include the special education room and the nurse’s office. *Id.* Although the nurse’s office is by the band room and is sometimes noisy, the room is typically quiet, and the special education room was also available as an alternative if the nurse’s office was loud. *Id.* Student was frequently offered breaks; however, he declined breaks when they were offered. *Id.*
61. School Nurse confirmed that several areas within School were designated as areas Student could go for breaks. *Interview with School Nurse.* These locations included the special education room and nurse’s office, as well as additional areas designated throughout the building so Student would not have to travel far if he was experiencing seizure activity or a migraine. *Id.*

62. Case Manager confirmed that Student was supported 1:1 by a paraprofessional throughout the time he attended School in October of 2022, and all of Student’s teachers and service providers were aware of required accommodations. *Interview with Case Manager*. Case Manager likewise confirmed that Student was offered breaks throughout the two-week observation period, but to her knowledge, he did not elect to take them when offered. *Id.*
63. General Education Teacher conceded that he had limited opportunities to work with Student during the 2022-2023 academic year but confirmed that Student was always accompanied 1:1 by a paraprofessional during the time he attended General Education Teacher’s math class. *Interview with General Education Teacher*. General Education Teacher confirmed that he was familiar with the required accommodations, and described detailed examples, to include modifications of assignments, additional explanations of directions, allowance of aids, and giving Student assignments “piece by piece.” *Id.* General Education Teacher further confirmed that Student was offered frequent breaks, however, to his knowledge Student declined to take breaks when they were offered. *Id.*
64. The SCO finds—based on the level of detail and similarities between accounts described by Lead Paraprofessional, School Nurse, Case Manager, and General Education Teacher—that Student was provided with accommodations as required by the 2021 IEP.

I. 1:1 Paraprofessional and Student’s Withdrawal from School

65. On October 14, 2022, Case Manager emailed Parent and requested availability for an IEP meeting to discuss the results of the Observation Period. *Exhibit L*, p. 205. Case Manager also indicated that BOCES had not yet received signed consent from Parent for Student’s reevaluation. *Id.* The next day, the principal of School emailed Parent with a proposed modified schedule for Student for the week of October 17 so Student would continue to have 1:1 paraprofessional support until the IEP meeting. *Id.* at p. 204.
66. Parent responded on October 16, 2022 to ask if it was “really necessary to meet and go over the ‘data’ collected” and if BOCES could “send [Parent] the decision in an email.” *Id.*
67. On October 17, 2022, Case Manager emailed Parent and indicated that the BOCES members of the IEP Team did not feel the data demonstrated a need for a 1:1 paraprofessional, but that the data did support a need for increased paraprofessional support. *Id.* at p. 209. Student’s class sizes were small, and the BOCES members of the IEP Team indicated a 2:1 paraprofessional would be sufficient to monitor Student’s seizures. *Id.*
68. As an attachment to the October 17 email, Case Manager provided Parent with a PWN of a proposed amendment to the 2021 IEP. *Exhibit A*, p. 28. The PWN indicated that the IEP Team considered increasing Student’s paraprofessional support, due to an increase in seizure activity and Parent’s concerns about his safety. *Id.* The PWN further indicated that

the IEP Team considered a 1:1 paraprofessional for the entirety of the day at School but rejected that option because Student would have significant adult support throughout the day (through the 2:1 paraprofessional), and Student's class sizes were small. *Id.*

69. On October 18, 2022, Parent requested by e-mail⁴: (1) specifics on how the increased paraprofessional support would work; (2) "data" that the IEP Team used to determine that a 1:1 paraprofessional was not necessary; (3) an explanation as to why the IEP Team had not discussed "specific forms of assessment and data collection" with a "timeline of completion and analysis" (with regards to the reevaluation); (4) whether the "data" from the Observation Period had been "disaggregated and synthesized in any way in order to determine a baselines for the health related concerns exhibited by [Student] while attending [School]"; (5) that the "threshold qualifying for a 1:1 health based paraprofessional be shared"; (6) additional information on any other factors the IEP Team considered; and (7) information about the size and duration of each of Student's classes. *Id.* at pp. 227-229. Parent also indicated she would not sign the consent for reevaluation unless BOCES removed stock language from the form indicating the reevaluation was being administered to determine if Student still qualified for special education services. *Id.* at p. 228.
70. On October 23, 2022, Case Manager responded and explained that if Parent agreed to the amendment to the 2021 IEP, Student would have a 2:1 paraprofessional for the entirety of his day, which meant the paraprofessional would be assigned to support Student and one other student. *Id.* at p. 225. Case Manager explained that Student's class sizes varied from 3-15 students, and the BOCES members of the IEP Team indicated the data showed that 2-3 adults in a class size of 3-15 students would be sufficient to monitor Student for seizures. *Id.*
71. Case Manager further reported to Parent that Student's seizure activity was monitored over an eight-day period on a modified schedule. *Id.* On five of those days, Student exhibited seizure activity at School, which means he exhibited seizure activity approximately 63 percent of these days he attended School. *Id.* Case Manager also indicated that the language in the consent form could not be changed because the stock language is set by the State of Colorado. *Id.* Case Manager indicated that BOCES would be happy to convene an IEP meeting to discuss Parent's concerns further and answer any questions. *Id.*
72. Parent responded on the same date and indicated that she would "get back" to BOCES about an IEP meeting. *Id.* at 231. Parent indicated she disagreed with the decision regarding the 1:1 paraprofessional and requested data documenting the process that was used to come to the decision. *Id.* Parent again requested that the consent form be revised to not indicate it was an evaluation to determine if Student continued to qualify for special education services. *Id.* Parent also renewed her requests for "proof" that staff working with

⁴ In the Complaint, Parent raised concerns that BOCES failed to respond to a records request for evaluation data made on or about October 19, 2021 (Allegation No. 1). *Complaint*, p. 4. During interviews, Parent clarified that she was referring to the request made by her October 18, 2022 email. *Interview with Parent*.

Student received seizure training and “proof” that additional staff were authorized to provide Student with medication if School Nurse was unavailable. *Id.* at p. 232.

73. Between October 23 and November 10, 2022, Parent sent BOCES numerous additional emails requesting “data” about the BOCES’ process/procedures for determining whether a 1:1 paraprofessional was necessary for Student, “proof” of staff training, and “proof” of authorization to provide medication. *Id.* at pp. 249-251, 254, 255, 263, 274, 280-281. During this time, BOCES made multiple attempts to arrange an IEP meeting with Parent, but Parent declined to meet until BOCES agreed to Parent’s requests. *Id.* at pp. 252, 262-263, 275; *Interview with Director of Special Education.*
74. On November 10, 2022, Parent provided BOCES with a formal letter of withdrawal, and withdrew Student from School. *Interviews with Parent and Director of Special Education; Exhibit J*, p. 2.

J. Parent’s Request for Educational Records

75. On November 10, 2022, when Parent withdrew Student from School, Parent made a written records request for “ALL records. . . .pertaining to Student”. *Exhibit J*, p. 1. Parent indicates BOCES failed to adequately respond to this request and her October 18, 2022 email request for records because BOCES never provided “proof” of staff training, “proof” that staff were authorized to administer medication on Student, and information about the “processes/guidelines/procedures” that BOCES used to determine a 1:1 paraprofessional was not necessary. *Interview with Parent.* Parent also indicates that she was never provided with a consent form showing that she consented to the implementation of the 2021 IEP, despite numerous requests. *Complaint*, p. 8; *Interview with Parent; Reply*, p. 1.
76. On November 10, 2022, upon receiving Parent’s request for educational records, BOCES hand-delivered Parent with educational records for Student, to include Student’s School medical records and medical plans (e.g., the Health Care Plan) starting from when Student enrolled within BOCES. *Exhibit J*, pp. 1-306; *Interview with Parent.* These records included data from the Observation Period, such as the Seizure Report Forms and Seizure Data Logs. *Exhibit J*, pp. 35-89.
77. On November 29, 2022, after Parent filed the Complaint, BOCES provided Parent with additional educational records, to include the 2021 IEP, PWN/consent forms, notice of meeting documents, meeting notes, progress reports, service logs, grades and attendance reports, evaluation data, correspondence, and information about BOCES policies and procedures. *See Response*, pp. 1-4. Parent was not provided with a consent form showing she consented to the 2021 IEP because Colorado law does not require annual consent for the provision of special education services and thus this form does not exist. *See Exhibit A*, pp. 1-29; *Exhibit B*, pp. 1-14; *see supra* Note 3.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: BOCES did not fail to provide Parent with access to Student's education records, specifically evaluation data, within 45 days of Parent's request, consistent with 34 C.F.R. §§ 300.501(a) and 300.613.

Parent's concern is that BOCES failed to provide access to Student's education records.

One of the procedural safeguards afforded to parents under the IDEA is the right to inspect and review their child's education records. 34 C.F.R. § 300.613(a). Accordingly, a school district "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency." *Id.* A district must comply with a request from a parent to review his or her child's education records "without unnecessary delay and before any meeting regarding an IEP," and in no case more than 45 days after the request. *Id.*

The right to inspect and review "education records" includes a "right to a response from the participating agency to reasonable requests for explanations and interpretations of the records." 34 C.F.R. § 300.613(b). IDEA borrows the definition of "education records" from the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 300.611(b). FERPA defines education records as those records that are "directly related to a student" and "maintained by an educational agency or institution or by a party acting for the agency or institution." 34 C.F.R. § 99.3. A record means "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." *Id.*

In this case, Parent made a formal request for all of Student's educational records on November 10, 2022. (FF # 75). Parent also previously made requests, starting on September 14, 2022, for (1) "proof" of staff training, and (2) "proof" that staff were authorized to administer medication in the event School Nurse was unavailable. (FF #s 40, 44, 69, 73). On October 18, 2022, Parent also requested information about the "processes/guidelines/procedures" that BOCES used to determine a 1:1 paraprofessional was not necessary. (FF # 73). The SCO finds and concludes that the information and documentation requested by Parent prior to November 10 are not educational records as defined by 34 C.F.R. § 99.3.

First, "proof" of staff training and "proof" that staff were authorized to administer medication in the event School Nurse was unavailable do not qualify as educational records because this information is not directly related to Student. Nevertheless, although BOCES was under no legal obligation to provide Parent with this information, BOCES provided Parent with a formal September 20, 2022 letter as assurance that appropriate staff had been trained. (FF # 41).

Second, information about the "processes/guidelines/procedures" that BOCES used to determine a 1:1 paraprofessional was not necessary does not qualify as an education record

because this information is not directly related to Student. Nevertheless, BOCES provided Parent with the Seizure Data Logs and Seizure Report Forms that were used to collect Student-specific data during the Observation Period determine if a 1:1 paraprofessional was needed. (FF # 49-50, 76). When Parent declined an offer for IEP meeting to review the data BOCES used to come to the determination, BOCES explained the data and offered several more times to meet with Parent to review the data and answer questions (an offer that Parent declined). (FF #s 65-73). BOCES contemporaneously provided Parent with the data from the Observation Period which was directly related to Student. (FF # 49-50).

On November 10, 2022, Parent submitted a formal request for “all” of Student’s educational records. (FF # 75). The SCO finds that this request, unlike the others, concerned educational records and thus triggered BOCES legal obligation to respond under 34 C.F.R. § 300.613(a). BOCES provided Parent with some educational records on November 10, 2022 and supplied the remainder of the educational records on November 29, 2022. (FF #s 75-77), all within 45 days of Parent’s request on November 10. *See* (FF # 75-77).

For these reasons, the SCO finds and concludes that BOCES provided Parent with access to Student’s educational records, consistent with 34 C.F.R. § 300.613(a).

Conclusion to Allegation No. 2: BOCES failed to provide Parent with adequate PWN of the action taken at Student’s IEP Team meeting held on or about December 15, 2021, in violation of 34 C.F.R. § 300.503. BOCES also failed to provide Parent with a copy of the 2021 IEP, in violation of 34 C.F.R. § 300.322(f). These violations did not result in a denial of FAPE.

Parent’s concern is that BOCES failed to provide adequate documentation regarding the IEP Team’s actions at the December 15, 2021 IEP meeting because Parent did not receive the 2021 IEP (or the embedded PWN and the standalone, supplemental PWN) until August of 2022.

IDEA requires school districts to provide parents a copy of their child’s IEP at no cost. 34 C.F.R. § 300.322(f). While IDEA does not specify the timeframe for a school district to provide parents with a copy of an IEP, previous CDE decisions have found that a delay of two months was too long. *See e.g., St. Vrain Valley Sch. Dist. RE-1J*, 122 LRP 13570 (SEA CO 02/15/22). Providing a copy of the IEP is essential to a parent’s ability to participate in the development and enforcement of their child’s IEP. *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1198 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 556 (2017). IDEA does not, however, specify that the IEP be provided within a certain timeframe. *See id.*

IDEA requires PWN to be provided to the parents of a child with a disability within a reasonable time before the public agency:

- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

- (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

34 C.F.R. § 300.503(a).

Failure to provide prior written notice within a reasonable time before refusing to initiate or change a student's identification constitutes a procedural violation that may result in a denial of FAPE. See *El Paso County Sch. Dist. 2*, 113 LRP 44602 (SEA CO 08/15/13). The notice must be provided so that parents have enough time to fully consider and respond to the action before it is implemented. *Letter to Chandler*, 59 IDELR 110 (OSEP 2012). But, for changes made at an IEP Team meeting, the PWN must be sent after the meeting, not before. *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46691 (2006). Providing PWN before the meeting would suggest that the decisions were made before the meeting and without parental input. *Id.*

PWN must include a description of the action proposed or refused by the district; an explanation of why the district proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report used by the district as a basis for the action; a description of other options the IEP team considered and the reasons why those options were rejected; and a description of any other factors relevant to the district's proposal or refusal. 34 C.F.R. § 300.503(b)(1)-(3) and (6)-(7). It must also include a statement that the parents of a child with a disability have protections under the procedural safeguards and the means of obtaining a copy if the notice is not for an initial evaluation, and sources for parents to contact to obtain assistance in understanding the procedural safeguards. *Id.* § 300.503(b)(4)-(5).

In this case, on December 15, 2021, the IEP Team developed the 2021 IEP using the results of the 2021 reevaluation. (FF # 4). Although this changed the provision of FAPE to Student, and triggered BOCES' obligation to provide PWN, BOCES failed to do so. (FF # 22). The BOCES also failed to provide Parent with a copy of the 2021 IEP until August of 2022. *Id.*

For these reasons, the SCO accordingly finds and concludes that BOCES procedurally violated 34 C.F.R. § 300.503 by failing to provide Parent with adequate PWN of the actions taken at the December 15 meeting and 34 C.F.R. § 300.322(f) by failing to provide Parent with a copy of the 2021 IEP until eight months after its development.

Procedural violations of IDEA are only actionable to the extent that they impede the child's right to FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

In this case, although Parent was not provided with a copy of the 2021 IEP or PWN following the December 15, 2021 IEP meeting, Parent was nevertheless included in both the reevaluation

process and the development of the 2021 IEP. (FF # 21). Following development of the 2021 IEP, Parent was in regular and frequent communication with members of Student's support team, due in part to her presence as an employee at School. (FF # 23). Parent also reported no concerns with the implementation of the 2021 IEP or Student's special education and related services for the remainder of the 2021-2022 academic year. *Id.* For these reasons, the SCO finds and concludes that these violations neither significantly impeded Parent's opportunity to participate in the decision-making progress regarding the provision of FAPE nor impeded Student's right to FAPE or caused a deprivation of educational benefit.

Conclusion to Allegation No. 3: BOCES reviewed and revised the 2021 IEP, on or about September 26, 2022, to address Parent's concerns and Student's individualized needs, consistent with 34 C.F.R. §§ 300.34, 300.320, and 300.324.

Parent's concern is that BOCES failed to review and revise the 2021 IEP, on or about September 8, 2022, to meet Student's changed health-related needs. Specifically, Parent is concerned that BOCES failed to provide Student with a dedicated 1:1 paraprofessional to address his increased seizure activity. *See* (FF # 38).

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*, 137 S. Ct. 988, 999 (2017). 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, 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.

While reviewing and revising an IEP, the IEP team is required to consider information provided by the parents, the child's anticipated needs, and other matters. 34 C.F.R. § 300.324(b)(1)(ii). A change in a student's medical needs does not necessarily trigger the need to revise the student's IEP. *Montgomery County Pub. Schs.*, 115 LRP 24190 (SEA MD 01/16/15) (finding that a district did not violate IDEA when it failed to revise the student's IEP after she sustained a concussion because it developed an individual health care plan) *But see San Marino Unified Sch. Dist.*, 71 IDELR 138 (SEA CA 2017) (finding that a student's clear-cut deterioration after major brain surgery undermined a district's claim that it was not required to conduct a reevaluation before developing the student's IEP).

A. IEP Review and Revision

In this case, the 2021 IEP was developed in December of 2021, and was in effect, along with the Health Care Plan, for the remainder of the 2021-2022 academic year. *See* (FF # 3, 23). During

this time, Parent did not report concerns with Student's special education and related services (to include his health-related services), whether related to substance or implementation. (FF # 23). Indeed, Student achieved passing grades in his classes and made progress toward his annual IEP goals. *Id.*

Parent contacted BOCES on August 25, 2022 to request an IEP meeting to discuss Student's seizures. (FF # 30). At the September 8, 2022 IEP meeting, School Nurse reviewed the Health Care Plan and discussed the steps that BOCES had taken to address Student's seizures at School. (FF #s 33-37). For instance, School Nurse completed seizure training before the start of class in August 2022, and similarly required that all teachers and service providers working directly with Student complete seizure training. (FF #s 34, 37). School Nurse used materials from the seizure training to develop the Action Plan, which was shared with staff and distributed in Student's classes, as well as the gym and cafeteria at School. (FF #s 35-36). Additional staff members were selected by School Nurse to be trained to administer medication to him in the event he experienced a seizure at School which required medication. (FF # 41).

Although Parent expressed no concerns with the 2021 IEP or Student's Health Care Plan during the 2021-2022 academic year, Parent informed BOCES that Student's seizures had been increasing in frequency and expressed concern that Student's teachers would not be able to monitor him for seizure activity in a class full of students. (FF #s 23, 38). Because of this, Parent requested a 1:1 paraprofessional to monitor Student for seizures. (FF # 38). Prior to the meeting, there was no indication that the 2021 IEP was failing to meet Student's academic- or health-related needs, so the IEP Team tabled discussions so additional staff, such as Director of Special Education, could participate in the IEP process. (FF #s 23, 39).

At a September 26, 2022 IEP meeting, the IEP Team agreed to several new accommodations to address Parent's concerns about Student's seizures, including the implementation of a communication log to track seizure activity. (FF # 46). The IEP Team also agreed to monitor Student during the Observation Period to determine if a 1:1 paraprofessional was necessary to address Student's health-related needs. (FF # 48). During this time, BOCES agreed to place Student on a modified schedule, so he could have a 1:1 paraprofessional throughout the Observation Period and to address Parent's concerns about Student's safety. *Id.*

During the September 26 IEP meeting, Parent also requested additional significant changes to the 2021 IEP, to include the annual goals and eligibility determination. (FF # 47). Student as reevaluated in 2021, so he was not due for a reevaluation until 2024. (FF # 4). Nevertheless, the IEP Team agreed to reevaluate Student since he had not attended School during the 2022-2023 academic year and the IEP Team did not have current data about his needs. (FF # 47).

Student attended School for approximately seven days during the Observation Period, and a paraprofessional tracked his seizure activity using the Seizure Data Log and Seizure Report Forms, which were shared with Parent. (FF #s 49-51). During this time, Student exhibited seizure activity on five of the days that he attended. (FF # 51).

Following the Observation Period, BOCES attempted to convene an IEP Team meeting to discuss the results of the Observation Period; however, Parent declined a meeting and requested a yes or no answer regarding the paraprofessional support. (FF #s 65-66). BOCES proposed an IEP amendment on October 17, 2022, and informed Parent that the BOCES members of the IEP Team indicated the data supported a 2:1 paraprofessional but not a 1:1 paraprofessional. (FF #s 67-68). Upon Parent's request, BOCES also provided Parent with an explanation of how BOCES came to the determination. (FF #s 69-71).

Although BOCES made multiple attempts to secure an IEP meeting with Parent to discuss the Observation Period, Parent refused to meet unless BOCES agreed to all of Parent's requests. (FF #s 65-73). Parent also refused to sign consent for the reevaluation unless BOCES agreed to change the stock language contained in the consent form. *Id.* When BOCES did not comply with Parent's requests, Parent ultimately withdrew Student from School. (FF # 74).

The SCO finds—in consultation with CDE Content Specialists 1 and 2—that BOCES took appropriate action to address Parent's concerns about changing medical needs as the IEP Team reviewed and revised the 2021 IEP to address Student's health-related needs. Prior to the start of the 2022-2023 academic year, BOCES had no information to suggest Student's seizures were increasing in frequency, and Student was making progress under the 2021 IEP. (FF # 23). When Parent expressed concern about Student's increased seizures, BOCES promptly took steps to review and revise the 2021 IEP. (FF #s 30-31, 43-48). For these reasons, the SCO finds and concludes that the BOCES reviewed and revised the 2021 IEP to address Parent's concerns and Student's health-related needs, consistent with 34 C.F.R. § 300.324(b).

Conclusion to Allegation No. 4: BOCES properly implemented Student's IEP from September 8, 2022 to present, consistent with 34 C.F.R. § 300.323.

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

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

Where the definition of a FAPE specifically references delivery of special education and related services consistent with an IEP, the failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19.

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

A. Implementation of the 2021 IEP (August through October 2022)

Parent's Concerns

The 2021 IEP was in effect when classes started at School in August of 2022. (FF # 3). Parent's concerns are: (1) Student did not receive special education and related services when he did not attend School in August and September of 2022 and (2) Student did not receive accommodations when he attended School in October of 2022. (FF #s 55, 58).

Accessibility to Student's Teachers

The SCO must first determine whether BOCES satisfied its obligation under 34 C.F.R. § 300.323(d). Here, Case Manager was Student's case manager, and thus, was responsible for ensuring staff were aware of their responsibilities under the 2021 IEP. (FF # 52). In August of 2022, prior to the start of classes at School, Case Manager met with Parent to discuss Student's needs and the plan for the 2022-2023 academic year. (FF # 53). Following conversations with Parent, Case Manager provided all of Student's teachers and service providers a snapshot of the 2021 IEP and information on the process to access the "full" IEP. *Id.*

Case Manager engaged in regular communication and collaboration with staff, to include formal staff meetings every other week. (FF # 54). Case Manager also created a google document to be used by staff for progress monitoring, met regularly with Lead Paraprofessional, and held regular trainings with the paraprofessionals who would be working with Student. *Id.*

For these reasons, the SCO finds and concludes that BOCES ensured teachers and service providers working with Student over the summer were informed of their responsibilities under the 2021 IEP, consistent with 34 C.F.R. § 300.323(d).

Special Education and Related Services (August and September 2022)

The 2021 IEP provided for 640 minutes per week of direct specialized instruction and/or support inside the general education classroom, 480 minutes per week of direct specialized instruction and/or support outside the general education classroom, and 15 minutes per quarter of indirect occupational therapy services. (FF # 13). During August and September of 2022, Student did not receive any of these services because Parent opted to not allow Student to attend School. (FF #s 29, 42).

Parent indicates that BOCES agreed to provide Student with services during times when Student was absent from School, but this is not supported by evidence in the Record. (FF # 56). At the September 8, 2022 IEP meeting, BOCES simply assured Parent that the 2021 IEP would remain in effect if Student was absent (i.e., that BOCES was prepared to implement the 2021 IEP while Student attended School). *Id.*

The SCO accordingly finds and concludes—given the plain language of the 2021 IEP and where BOCES’ made a full offer of FAPE but Parent withheld Student from School—that BOCES implemented the 2021 IEP in this respect, consistent with 34 C.F.R. § 300.323(c).

Accommodations (October 2022)

The 2021 IEP contained accommodations designed to enable Student to make progress in the general education curriculum. (FF # 12). On September 26, 2022, the 2021 IEP was amended to include additional accommodations, such as offering Student breaks in quiet, dark places for migraines/seizures. (FF # 46).

During the 2022-2023 academic year, Student only attended School for approximately 11 days (seven days during the Observation Period and four partial days the following week). (FF # 59). During this time at School, Student was always supported 1:1 by a paraprofessional. *Id.*

Lead Paraprofessional, who worked directly with Student and oversaw his paraprofessional support during the 2022-2023 academic year, provided detailed examples of the accommodations Student was afforded during this time, to include frequent offers of breaks in quiet, dark places (although Student declined to take breaks when offered). (FF # 60). School Nurse confirmed that there were multiple areas throughout School designated as locations for breaks. (FF # 61).

Case Manager confirmed that all of Student’s teachers and service providers were made aware of Student’s accommodations, and both Lead Paraprofessional and General Education Teacher

confirmed that Student received those accommodations while he attended School in October of 2022. (FF #s 62-63). Like Lead Paraprofessional, General Education Teacher provided numerous examples of accommodations which were provided to Student in his class. (FF # 63).

The SCO accordingly finds and concludes that BOCES implemented the 2021 IEP in this respect, consistent with 34 C.F.R. § 300.323(c).

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 District if not corrected. 34 C.F.R. § 300.151(b)(2).

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 SCO finds and concludes, in consultation with CDE Content Specialist 2, that BOCES’ IDEA violations are not systemic in nature and likely to impact other students if not addressed.

Indeed, although not followed in this Student-specific instance, BOCES policies and procedures require PWN to be provided following a change to the provision of FAPE to a student, such as the development of an IEP. (FF # 19). BOCES failed to provide Parent with the 2021 IEP and PWN of the IEP Team’s actions at the December 15, 2021 IEP meeting. (FF # 22). Although Parent was not provided with the 2021 IEP or PWN following the meeting, Parent was included in both the reevaluation and IEP development process. (FF # 21).

Following the development of the 2021 IEP, BOCES staff maintained regular communication with Parent about Student’s needs for the remainder of the 2021-2022 academic year. (FF # 23). When Parent requested a copy of the 2021 IEP in August of 2022 and expressed concerns about the contents, BOCES promptly scheduled an IEP meeting to consider Parent’s concerns and possible revisions to the 2021 IEP and took appropriate action to investigate those concerns and revise the 2021 IEP to meet Student’s changing needs. (FF #s 30-31, 43-48).

Nothing in the Record indicates BOCES regularly fails to provide parents with IEPs or PWNs. For these reasons, and in consultation with CDE Content Specialist 2, the SCO finds and concludes that the violations noted in the Decision were not systemic.

REMEDIES

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

1. Failing to provide Parent with a copy of Student's IEP, in violation of 34 C.F.R. § 300.322(f).
2. Failing to provide Parent with adequate PWN, in violation of 34 C.F.R. § 300.503.

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

1. Corrective Action Plan
 - a. By **Monday, February 13, 2023**, BOCES shall submit to CDE a corrective action plan ("CAP") that adequately addresses the violation 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. Director of Special Education, Case Manager, and School Psychologist must review this Decision, as well as the requirements of 34 C.F.R. §§ 300.322 and 300.503. This review must occur no later than **Monday, March 6, 2023**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Monday, March 20, 2023**.
 - 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.

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 Assistant 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.

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13. If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶13; *See also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 10th day of January, 2023.



Ross Meyers
State Complaints Officer

APPENDIX

Complaint, pages 1-10

Response, pages 1-13

- Exhibit A: IEP(s)
- Exhibit B: PWN and Consent
- Exhibit C: NOM and Eligibility Determination
- Exhibit D: Meeting Notes
- Exhibit E: Progress Report
- Exhibit F: Service Logs
- Exhibit G: Grades and Attendance
- Exhibit H: Evaluation Report
- Exhibit I: Academic Calendar
- Exhibit J: Response to Records Request
- Exhibit K: Policies and Procedures
- Exhibit L: Correspondence
- Exhibit M: none
- Exhibit N: none
- Exhibit O: Verification of Delivery

Reply, pages 1-9

- Exhibit 1: Audio Recording of September 8, 2022 IEP Meeting
- Exhibit 2: Audio Recording of September 26, 2022 IEP Meeting
- Exhibit 3: Correspondence (combined)

Telephone Interviews

- Case Manager: December 13, 2022
- Director of Special Education: December 12, 2022
- Former Case Manager: December 12, 2022
- General Education Teacher: December 12, 2022
- Lead Paraprofessional: December 12, 2022
- Parent: December 14, 2022
- School Nurse: December 12, 2022