

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

State-Level Complaint 2024:605
Santa Fe Trail BOCES

DECISION

INTRODUCTION

On October 21, 2024, the Parents (“Parents”) of a student (“Student”) not currently identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against the Santa Fe Trail BOCES (“BOCES”) and concerning one of its member school districts (“District”). The Colorado Department of Education (“CDE”) determined that the Complaint identified two allegations subject to its jurisdiction for the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.

The CDE’s goal in state complaint investigations is to improve outcomes for students with disabilities and promote positive parent-school partnerships. A written final decision serves to identify areas for professional growth, provide guidance for implementing IDEA requirements, and draw on all available resources to enhance the quality and effectiveness of special education services.

RELEVANT TIME PERIOD

The CDE has the authority to investigate alleged noncompliance that occurred no earlier than one year before the date the Complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, findings of noncompliance shall be limited to events occurring after October 21, 2023. Information prior to October 21, 2023 may be considered to fully investigate all allegations.

SUMMARY OF COMPLAINT ALLEGATIONS

The Complaint raises the following allegations subject to the CDE’s jurisdiction under 34 C.F.R. § 300.153(b)² of the IDEA:

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 The CDE’s state complaint investigation will determine if BOCES complied with the IDEA, and if not, whether the noncompliance resulted in a denial of a FAPE. 34 C.F.R. §§ 300.17, 300.101, 300.151-300.153.

1. BOCES did not identify and evaluate Student—from October 21, 2023 to present—when it was on notice that Student may have a disability and need special education and related services, as required by 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).
2. BOCES did not afford Parents an opportunity to inspect and review Student’s education records—including specifically records from third grade to present and minutes from individualized service and support team meetings concerning Student—after Parent’s request on July 16, 2024, as required by 34 C.F.R. §§ 300.501 and 300.613.

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,³ the CDE makes the following findings of fact (“FF”):

A. Background

1. Student is 12 years old and is not eligible for special education services. *Response*, p. 9. During the 2023-2024 school year, Student was in fifth grade at a program run by BOCES that is an extension of its member school districts (“Program”). *Exhibit B*, p. 1; *Interview with Director*.
2. Student’s neighborhood school (“District School”) is in District, which is a member of BOCES. *Response*, p. 4. BOCES is responsible for child identification and providing a free appropriate public education (“FAPE”) to all IDEA-eligible children with disabilities attending a school in its member school districts. ECEA Rule 2.02.
3. Student is smart and athletic. *Interviews with Parents, principal of District School (“District Principal”) and principal of Program (“BOCES Principal”)*. However, he struggles with attention, impulsivity, and emotional regulation. *Interview with Parents; Exhibit K*, p. 2. Student also struggles with social skills and maintaining positive relationships with peers, which often caused him to get in trouble in school. *Interviews with former counselor at Program (“Counselor”), BOCES Principal and District Principal*.

B. Program

4. Program does not meet the CDE’s criteria for a school. *Interview with Director*. Instead, while attending Program, the students remain enrolled in their neighborhood school districts, which continue to be responsible for their education. *Id.* District staff and policies remain responsible for discipline decisions, and districts issues grades and report cards based on the scores students earn at Program. *Interviews with Director and BOCES Principal*.
5. Program serves students who are having difficulty maintaining in a regular school environment due to behavior or mental health challenges. *Interview with Director*. When

³ The appendix, attached and incorporated by reference, details the entire Record.

district schools believe they have run out of options, they refer a student to Program. *Interviews with Director and District Principal*. BOCES then reviews the student's file to determine if they meet criteria to attend Program. *Id.*

6. With onsite counseling services and a low student to teacher ratio, the goal is to get the student back to their district school. *Interview with Director*. All students at Program participate in affective education, including learning social and coping skills. *Id.*
7. Program generally enrolls 25-30 students and maintains a ratio of one teacher and one paraprofessional for every 10 students. *Id.* Not all students are IDEA-eligible. *Id.* For instance, in October 2023, eight of the 20 enrolled students were not eligible for IEPs. *Exhibit L*.

C. Child Find Procedures and Student's Enrollment at Program

8. BOCES' Comprehensive Plan for the Provision of Special Education ("BOCES Plan") indicates that BOCES has child find processes consistent with the requirements of the IDEA, including plans for identifying students who are advancing grade to grade. *Exhibit H*, pp. 17-19. However, BOCES Plan does not outline any specific procedures or offer any guidance to staff on how to comply with the IDEA. *Id.* BOCES did not provide any policies or procedures which guide staff on how or when to refer students for evaluation. *Id.* at pp. 1-86.
9. BOCES generally relies on district staff or parents to refer school-age students for special education evaluations. *Interview with Director*. However, BOCES has recently developed a detailed, more consistent process for monitoring students involved in response to intervention ("RTI") so that they are treated consistently across all seven districts. *Id.*
10. District monitors academic data, including benchmark testing, closely to identify students in need of special education evaluations. *Interview with District Principal*. They also rely on teachers and parents to refer students for speech, physical, or occupational therapy concerns. *Id.*
11. District School uses positive behavioral interventions and supports throughout the building. *Id.* When students struggle with behavior, District implements a variety of interventions like check-in/check-out, mentoring and counseling. *Id.* In her 13 years in the role, District Principal has never participated in referring a student for a special education evaluation because of behavior concerns. *Id.*
12. District sometimes partners with local agencies to collaborate and identify services to support students and families through voluntary participation in individualized student support team meetings ("ISST"). *Id.* ISSTs are voluntary but facilitated through the local courts. *Id.* District has been part of an ISST with Student for several years. *Id.* The Department of Human Services ("DHS") took notes at these meetings. *Response*, p. 9; *Exhibit D*, pp. 1-3. Neither District nor BOCES maintained any records from these meetings. *Id.*

13. Student attended kindergarten through second grade at District School. *Id.* During that time, he performed well academically but would go through periods of refusing to complete work or comply with any directions. *Id.* He needed a lot of extra support with behavior, including aggression towards and bullying of peers, and was not improving with the available interventions. *Id.*
14. Ultimately, District and the ISST determined that Student needed more support than District School could provide. *Id.* For third grade, in fall 2021, Student was enrolled in Program. *Interviews with Parents and District Principal.*

D. Student's First Private Evaluation

15. At Program, Student continued to get into trouble and struggle with peer interactions. *Exhibit K*, p. 3. In May 2023, as part of the ISST, BOCES Principal and someone from District referred Student for a psychological evaluation ("2023 Evaluation") for "diagnostic clarification and treatment recommendations due to [Student] presenting with ongoing negative and disruptive behavior at school." *Id.* at p. 1; *Interview with BOCES Principal.* District has an arrangement with the psychologist ("Evaluator 1"), allowing them to help facilitate appointments. *Interview with District Principal.*
16. Rating forms completed by BOCES Principal and two of Student's teachers at Program indicated "major problems with self-control and attention problems" as well as difficulties with internalizing behaviors and interpersonal relationships. *Exhibit K*, pp. 6-7. School staff also noted significant concerns around externalizing behaviors including disruptive and aggressive behaviors. *Id.*
17. Evaluator 1 observed Student as "having poor impulse control, getting frustrated within seconds, creating his own rules, and sacrificing accuracy for speed." *Id.* at p. 9. He had a "short attention span" and constantly moved around the room "looking to keep occupied." *Id.* at p. 10. Student also struggled with "low self-esteem, irritability, and 'black and white' thinking," consistent with concerns of depression. *Id.* at p. 12.
18. Student exhibited symptoms of attention deficit hyperactivity disorder ("ADHD"), including difficulty with shifting attention, sustaining mental effort, behavioral inhibition and organization. *Id.* at p. 13. Ultimately, Evaluator 1 diagnosed Student with an unspecified depressive disorder, ADHD and oppositional defiant disorder ("ODD"). *Id.* The 2023 Evaluation was shared with District Principal and BOCES Principal. *Id.* at p. 9; *Interviews with District Principal and BOCES Principal.*
19. BOCES Principal never considered referring Student for a special education evaluation, before or after the 2023 Evaluation, because he was satisfied with the strategies that came out of the ISST meetings. *Interview with BOCES Principal.* Director was not aware of this evaluation until after this Complaint was filed. *Interview with Director.* Had she known about the 2023 Evaluation, she would have initiated a special education evaluation for Student. *Id.*

E. 2023-2024 School Year

20. BOCES maintains that the ISST and Program staff did not decide to refer Student for an evaluation because he was doing so well academically. *Response*, p. 5. During the 2023-2024 school year, Student was receiving several RTI supports, including weekly meetings with Counselor, morning meetings to review behavior goals, preferential seating near teachers and line of sight supervision at recess. *Id.* at p. 4. However, Student continued to struggle with peer interactions and display aggression towards others. *Id.* at pp. 4-5. He also did not comply with teacher directives. *Id.*
21. Student earned three Bs, one D and one F in the first quarter. *Response*, p. 14; *Exhibit M*. After verbal and physical aggression towards multiple peers on October 5, 2023, Student was suspended out of school for three days. *Id.* at p. 5. Student hit a peer the day he returned and was suspended out of school for three more days and in school for another two. *Id.* Student's continued denial of his behavior and perceived lack of remorse "caused District and BOCES staff, and ISST members, great concern." *Response*, p. 5.
22. In November 2023, after several behavioral incidents in class, Student requested to attend online classes from a classroom at Program, instead of attending classes with his peers. *Id.* at p. 15; *Interview with BOCES Principal*. Student continued to engage in aggressive behavior towards classmates for the next several months. *Response*, p. 5; *Interviews with Counselor and BOCES Principal*. As a result, the ISST started discussing having Student complete online classes from home, where he could continue accessing academics without putting peers at risk. *Id.*
23. Standardized testing from January 2024 indicated that Student was reading at a second-grade level and performing at a third-grade level in math. *Exhibit B*, p. 5.
24. In February 2024, Student was removed from Program and continued with his online classes from home. *Response*, p. 15. During this time, the care manager associated with his private therapist ("Care Manager") worked with him at the library for two hours per day. *Id.*
25. Because his grades were declining, Student was allowed to return to Program in March 2024. *Id.* Behavior reports from teachers, Counselor and a paraprofessional consistently indicated significant concerns with conduct, social skills and academic functioning, from January through March 2024. *Exhibit B*, pp. 5-17. *Id.* Program started collecting bimonthly reports of Student behavior from various staff members in January 2024. *Interview with Counselor*. In these reports, academic functioning was a measure of academic behaviors like attention and engagement in lessons, not content mastery. *Id.*
26. Upon his return, Student continued to be aggressive and struggle with peer interactions, until he was ultimately suspended on March 14 for threatening a classmate. *Response*, pp. 5-6. At that point, BOCES Principal and District expelled Student "because he was habitually

disruptive at [Program], threatened, and sometimes harmed, other students.” *Id.* at p. 6. Student was expelled from April 17, 2024 through April 17, 2025. *Id.*

27. Student participated in online classes from November 2023 until his expulsion in April 2024. *Response*, p. 15. During that time, he completed two social studies classes, earning Cs, and about half of a math class, where he was earning a D. *Exhibit O.*

F. Student’s Second Private Evaluation

28. In late March 2024, before Student was officially expelled, the ISST met and considered whether Student might require additional supports, such as a residential setting. *Id.* The ISST referred Student for another private evaluation (“2024 Evaluation”). *Id.*
29. The 2024 Evaluation was performed by a licensed clinical social worker (“Evaluator 2”) to consider placement in a residential facility. *Exhibit A*, pp. 1-4. As part of her evaluation, she spoke with Student, Parents, BOCES Principal, District Principal, Student’s individual therapist, a family therapist, Care Manager and Student’s caseworker. *Id.* at p. 4.
30. In the six months leading up to the 2024 Evaluation, Student’s behavior escalated to the point of “daily infractions of not listening to authority.” *Id.* at p. 10. Student’s behaviors were not generally thought to be deliberate, but rather the result of impulsivity and a lack of emotional regulation. *Id.* at p. 8. Everyone Evaluator 2 spoke to endorsed Student’s ADHD diagnosis and reported impulsive decision making. *Id.* at p. 10.
31. Student’s behavior at school, mostly towards peers, “ha[d] resulted in a recent expulsion, an inability to visit the recreational center and [an] ongoing loss of privileges at home.” *Id.* at pp. 7-8. BOCES Principal, Parents, and his individual therapist noted that Student struggled to “get along with other children” and to make and keep friends. *Id.* at pp. 7, 11.
32. District Principal reported that Student’s “behavior ha[d] been so intrusive to his education pursuits” that expulsion was the “least of [their] problems.” *Id.* at p. 9. Based on his time spent working with Student at the library, Care Manager observed that Student could only do academics with constant adult support. *Id.*

G. Referral for Special Education Evaluation

33. On April 2, 2024, Evaluator 2 concluded that Student required a residential level of care. *Id.* at pp. 19-20. On April 10, 2024, District Principal contacted BOCES to enquire about getting Student a 504 plan. *Exhibit C*, p. 1.
34. In response, Director noted that Student’s placement at Program was “data proving his behavior or emotional functioning [was] impacting him academically,” so there was “a good chance” he would qualify for an IEP. *Id.* Director asked if there would be any advantage to an IEP, including if that could help get him a residential placement more quickly. *Id.*

35. On April 17, 2024, District Principal told Director she thought an IEP “would be better,” and asked about next steps. *Id.* Director was waiting for further direction from the ISST and never started an evaluation for Student. *Interview with Director.*
36. Student is currently enrolled in a residential treatment program out of state, but Parents anticipate he could be returned to their home as soon as January 2025. *Interview with Parents.* To date, BOCES has not started an evaluation for Student. *Interview with Director.*

H. Parents’ Request for Records

37. BOCES strives to respond to records requests as quickly as possible. *Interview.* The records BOCES maintains and releases are part of the student’s “official special education record.” *Id.* Records from Program are not part of BOCES’ record system. *Id.* Requests for those records would need to go through BOCES Principal or the student’s district since districts continue to issue report cards for those students. *Id.*
38. In summer 2024, Parents were introduced to an educational advocate (“Advocate”) through the DHS. *Interview with Advocate.* The DHS was concerned about Student’s lack of access to education but was not sure what options were available. *Id.*
39. On July 16, 2024, Advocate requested “copies of any and all of [Student’s] educational records from date of initial registration through present, July 2024.” *Exhibit 1*, p. 1. Her request included Student’s cumulative file, including disciplinary records. *Id.* She attached a release, signed by Parents, granting her permission to access Student’s records. *Id.* at p. 3. She requested records because she suspected Student had a disability and wanted to know if BOCES had evaluated Student for special education or implemented any RTI supports. *Interview with Advocate.*
40. In response, on July 25, 2024, BOCES shared Student’s inactive special education records from 2015. *Exhibit F*, pp. 1-17. BOCES did not share a spreadsheet from Program. *Id.* at pp. 2-3. On August 6, 2024, District Principal shared Student’s records from kindergarten through second grade. *Complaint*, p. 3.
41. Director’s understanding was that BOCES Principal contacted Advocate, but she does not know what, if any, records he shared. *Interview with Director.* BOCES Principal’s understanding is that requests for records from Program should come through a student’s district, since districts maintain grades. *Interview with BOCES Principal.* Upon request from a district, BOCES Principal would then provide any records. *Id.*
42. BOCES Principal remembers getting permission from District and Director to send Advocate some records for Student. *Id.* He says he answered some of her questions over the phone and then scanned some documents to her. *Id.* He could not remember exactly what records he sent or when he sent them. *Id.* He did not confirm that Advocate received the records. *Id.*

43. After sending several unanswered emails and making several efforts to connect, Advocate spoke with BOCES Principal on September 6, 2024. *Interview with Advocate; Exhibit 2*, pp. 1-4. During the call, BOCES Principal could not tell Advocate who to contact to get Student's records from Program. *Interview with Advocate*. He did not indicate a plan to send her any records. *Id*. She has checked her junk mail folder, and, to date, Advocate has not received any records from Program. *Id; Exhibit 2*, p. 1.
44. Program uses an online school management system to track grades and attendance. *Interview with BOCES Principal*. Due to how the 2023-2024 school year was entered into that system, BOCES was unable to produce accurate attendance or grade reports from the grading system for Student, or any other students at Program, from the 2023-2024 school year. *Response*, p. 14; *Interview with Director and BOCES Principal*. Based on records kept elsewhere, after 40 days, BOCES ultimately submitted Student's grades for the of the 2023-2024 school year. *Response*, pp. 14-15; *Exhibit M*.
45. BOCES Principal kept discipline records for all students at Program in an online document that "inexplicably" disappeared. *Interview with BOCES Principal*. He was unable to produce any records of Student's behavior incidents during the 2023-2024 school year, including suspensions or expulsion. *Id; Response*, p. 5.
46. In addition, contemporaneous communication between Advocate and BOCES Principal do not indicate any transmission of records. *Exhibit 2*, pp. 1-4. In addition, BOCES does not have any procedures or consistent practices to ensure that records from Program are provided to parents in response to a records request. *Interview with Director*. For these reasons, the state complaints officer ("SCO") finds that BOCES Principal did not provide Advocate with any records of Student's time at Program.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: BOCES did not evaluate Student from October 2023 to present, as required by 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3). This noncompliance did not result in a denial of FAPE.

Parents' concern is that BOCES has never identified and evaluated Student for special education despite being on notice that Student might have a disability and need special education services.

A. The Child Identification Process under the IDEA

The IDEA mandates that states develop and implement adequate procedures to identify, locate, and evaluate children with disabilities who may need special education and related services. 34 C.F.R. § 300.111(a). In Colorado, the child identification process "shall include child find, special

education referral, initial evaluation, and determination of disability and eligibility for special education.” ECEA Rule 4.02(1)(a)(ii).

Under the “special education referral” component of the identification process, school districts have an affirmative obligation to evaluate a child where the district has reason to suspect a qualifying IDEA disability and a need for special education and related services. 34 C.F.R. § 300.111(c); ECEA Rule 4.02(1)(a). This obligation exists even where the child advances from grade to grade. 34 C.F.R. § 300.111(c).

The threshold for suspecting a disability is relatively low. *Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001). The appropriate inquiry by a school district is “whether the child should be referred for an evaluation, not whether the child actually qualifies for the services.” *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). Suspicion “may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation.” *Cheyenne Mtn. Sch. Dist. 12*, 117 LRP 25901 (D. Colo. 2017) (quoting *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)).

The actions of a school district in terms of whether it had knowledge of, or reason to suspect, a disability must be evaluated in light of the information the district knew, or had reason to know, at the relevant time. *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). It should not be based on hindsight. *Id.*; see also *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). School districts must systematically seek out IDEA-eligible students and may not take a passive approach and wait for others to refer students for special education. *Compton Unified Sch. Dist. v. Addison*, 54 IDELR 71 (9th Cir. 2010). Remaining vigilant for red flags and referring students who may have a disability and need special education is part of this ongoing obligation. *Arapahoe County Sch. Dist. 5*, 117 LRP 2988 (SEA CO 12/21/16) (citing *Cincinnati City Sch.*, 115 LRP 26069 (SEA OH 5/07/15)).

A school district may attempt pre-referral interventions before initiating an IDEA evaluation. See, e.g., *M.G. v. Williamson County Schs.*, 71 IDELR 102 (6th Cir. 2018, unpublished). However, an RTI process cannot be used to delay or deny an evaluation. *Letter to Ferrara*, 60 IDELR 46 (OSEP 2012). RTI is a “schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors.” *Memo to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011). RTI cannot be used to delay or deny a timely initial evaluation. *Id.*

To decide whether BOCES fulfilled its child find obligations here, the CDE considers the individual circumstances of this case to determine whether BOCES had a reason to suspect that Student needed to be evaluated for special education. *Cherry Creek Sch. Dist.*, 119 LRP 30204 (SEA CO 5/17/19); *Weld RE-4 School District*, 119 LRP 5662 (SEA CO 1/2/19) (citing *Clark County Sch. Dist.*, 114 LRP 45477 (SEA NV 8/28/14)).

B. BOCES' Reasons to Suspect a Disability

Here, the Record includes numerous factors that provided BOCES with knowledge of a disability and a need for a special education evaluation.

First, in May 2023, BOCES referred Student for a private evaluation for treatment recommendations due to his “ongoing negative and disruptive behavior at school.” (FF # 15.) This 2023 Evaluation diagnosed Student with ADHD, depression and ODD. (FF # 18.) The 2023 Evaluation also noted consistent difficulties with attention, impulsivity and interpersonal relationships. (FF #s 16-18.) The 2023 Evaluation was shared with both District Principal and BOCES Principal. (FF # 18.) These events are more than one year before this Complaint was filed; however, they are instructive as to what BOCES knew in October 2023. 34 C.F.R. § 300.153(c); *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). Thus, by October 2023, BOCES was already aware of Student’s diagnoses as well as his difficulties with impulsivity and peer relationships.

Indeed, Director would have initiated a special education evaluation for Student based on the 2023 Evaluation had she known about it. (FF # 19.) Regardless, BOCES has an affirmative obligation to seek out and identify students who they suspect may need special education, and it cannot wait for parents or members of an ISST to refer a student to for evaluation. Thus, it is important that BOCES ensures building staff know how and when to refer a student for evaluation. BOCES did not have any policies or procedures to guide staff on when to refer students for evaluation, other than their new RTI procedures. (FF #s 8-10.) In the absence of such policies, District Principal has never referred a student for a special education evaluation based on behavior, and BOCES Principal did not refer Student because he was relying on the strategies recommended by the ISST. (FF #s 11, 19.)

Second, BOCES was aware of an escalating pattern of behavior which was impacting his access to education. These behaviors were unusual, causing staff “great concern” and registering as significant on standardized rating forms. (FF #s 16, 21.) Student was referred to Program in 2021 because of ongoing behavior challenges at District School, including work refusal and difficulties with peers. (FF #s 13, 14.) District School first exhausted the behavior interventions available in the building. (FF # 11, 13.) BOCES admitted that enrollment at Program suggested that “his behavior or emotional functioning [was] impacting him academically. (FF # 34.) Once at Program, from 2021 through 2024, Student’s behavior continued to impact his ability to make and keep friends and had resulted in repeated suspensions. (FF #s 15, 16, 20-26.) During the 2023-2024 school year, Program was implementing a variety of RTI supports to address Student’s behaviors. (FF # 20.) Nevertheless, in the six months leading up to the 2024 Evaluation, Student’s behavior had escalated to daily infractions that resulted in a one-month period of removal from Program to online classes at the library, followed by expulsion. (FF #s 22-26, 30.)

Third, Student’s behavior was impacting his academics. In January 2024, when Student was in fifth grade, he was reading at a second-grade level and performing at a third-grade level in math. (FF # 23.) During the first quarter of the 2023-2024 school year, he failed one class and earned a

D in another. (FF # 21.) Then, during five months of online schooling, he completed only two social studies classes and half of a math class. (FF # 27.) Throughout spring 2024, staff also reported consistent concerns with conduct, social skills and academic functioning skills. (FF # 25.) BOCES maintains that Student was not referred for evaluation because staff had no academic concerns. (FF # 20.) Even if true, students who are advancing from grade to grade can still be eligible for special education so long as they have a disability requiring specialized instruction. 34 C.F.R. § 300.111(c)(1).

Taken together, the SCO finds that BOCES' mounting knowledge of Student's diagnoses and behavior challenges by October 2023 raised a reasonable suspicion that Student should have been referred for an initial evaluation. Accordingly, the SCO finds and concludes that District did not comply with its child find obligations at 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).

In reaching the conclusion that BOCES should have initiated a special education evaluation, the SCO recognizes this does not necessarily mean Student would have qualified for special education. See *Oxnard Sch. Dist.* It may be that after a comprehensive evaluation and a properly conducted eligibility meeting, Student is determined not to be a student with a disability. Without the benefit of such an evaluation, though, it is impossible to make that determination.

C. Procedural Noncompliance

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, noncompliance with a procedural requirement resulting in a denial of FAPE only if the noncompliance: (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 procedural noncompliance can cause substantive harm where it seriously infringes upon a parent's opportunity to participate in the IEP process). For a district to be liable for a denial of FAPE, the student must be a student with a disability. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 59 IDELR 2 (5th Cir. 2012, *unpublished*) (holding that a district cannot be liable for child find noncompliance unless the student has a need for special education).

Here, BOCES has still not evaluated Student. (FF #36). As discussed above, it cannot be known until after an evaluation whether Student will qualify for special education. Without the ability to determine at this time whether Student is a child with a disability, the CDE cannot determine that the noncompliance impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process or caused a deprivation of educational benefit. See *D.G.; Pueblo Sch. Dist. 60*, 124 LRP 36441 (SEA CO 05/31/24); *Douglas Cty. Sch. Dist.*, 119 LRP 30196 (SEA CO 04/15/19). For this reason, the SCO finds and concludes that the procedural noncompliance did not result in a denial of FAPE.

This conclusion, however, does not mean that BOCES' noncompliance has not negatively impacted Student, whose behavioral challenges have increased to the point that he has been expelled from District and placed in a residential setting. (FF #s 26, 30, 31, 36.) Thus, the CDE has ordered a remedy described below to address the noncompliance.

Conclusion to Allegation No. 2: BOCES did not afford Parents an opportunity to inspect and review Student's records from Program after a request on July 16, 2024, as required by 34 C.F.R. § 300.613. This noncompliance did not result in a denial of FAPE.

A. The Right to Inspect and Review 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). Thus, 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.* Parents also have the right to have "a representative of the parent inspect and review the records." *Id.* at 300.613(b)(3).

This right extends to parents "who suspect their child may have a disability," and who may wish to review records such as assessments and evaluation reports. *Letter to Kashyap*, 116 LRP 44694 (OSEP 2016); *See also, Jefferson County School District RE-1*, 118 LRP 28108 (SEA CO 3/22/18) (finding that the right to review education records under the IDEA extends to parents who suspect their child may have a disability and wish to review their child's records to participate in meetings about eligibility or consider whether to pursue IDEA's dispute resolution options).

Here, because Parents suspected that Student had a disability, the SCO finds that the right to inspect and review education records, as requested by Advocate, extends to them. (FF # 39.)

B. What Constitutes an Education Record

The IDEA borrows the definition of "education records" from the Federal Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 300.611(b). Under FERPA, "education records" are "those records, files, documents, and other materials which: (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a party acting for the agency or institution." *Id.* § 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.*

Here, Parents, through Advocate, requested Student's complete educational records on July 16, 2024. (FF # 39.) Parents' concern is that BOCES has not provided them with Student's records from the ISST meetings or Program since Advocate's request on July 16, 2024.

i. ISST Records

If the ISST records are education records, BOCES was required to permit Parents to inspect and review them without unnecessary delay, before any meeting regarding Student's IEP or, in any case, by August 30, 2024. See 34 C.F.R. § 300.613(a).

In this case, ISST meetings are organized and facilitated through the local courts, not BOCES. (FF # 12.) Notes from those meetings are kept by the DHS. (*Id.*) Neither District nor BOCES maintain any records from the ISST meetings. (*Id.*) Because BOCES did not maintain records of the ISST meetings, the SCO finds and concludes that ISST meeting notes are not education records. Thus, BOCES was not required to share records of the ISST meetings under 34 C.F.R. § 300.613.

ii. Program Records

Under the IDEA, parents are entitled to inspect and review student's education records, as defined under FERPA. 34 C.F.R. §§ 300.611(b), 300.613. This right to inspect and review records is not limited to special education records. *Id.* It is undisputed that Student's records from Program, including, but not limited to, grades, attendance, and discipline, are education records. Therefore, BOCES was required to permit Parents to inspect and review Student's education records from Program without unnecessary delay, before any meeting regarding Student's IEP or, in any case, by August 30, 2024. See 34 C.F.R. § 300.613(a).

In response to Advocate's July 16 request for Student's complete educational records, BOCES provided only his historical special education records from BOCES. (FF # 40.) BOCES Principal did not provide Advocate with any records from Student's time at Program. (FF # 46.) BOCES has not provided Advocate with access to any of Student's records from Program. (FF #s 40-46.) Thus, the SCO finds and concludes that BOCES did not permit Parents to inspect and review Student's educational records from his time at Program, as required by 34 C.F.R. § 300.613.

D. Procedural Noncompliance

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, noncompliance with a procedural requirement resulting in a denial of FAPE only if the noncompliance: (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 procedural noncompliance can cause substantive harm where it seriously infringes upon a parent's opportunity to participate in the IEP process).

As discussed above, it cannot be known until after an evaluation whether Student will qualify for special education. Without the ability to determine at this time whether Student is a child with a disability, the CDE cannot determine that the noncompliance impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process or

caused a deprivation of educational benefit. *See D.G.; Pueblo Sch. Dist. 60*, 124 LRP 36441 (SEA CO 05/31/24); *Douglas Cty. Sch. Dist.*, 119 LRP 30196 (SEA CO 04/15/19). For this reason, the SCO finds and concludes that the procedural noncompliance did not result in a denial of FAPE.

However, Parents requested Student's records to understand his school performance and the steps that had been taken by BOCES because they suspected he had a disability. (FF # 39.) Thus, the CDE has ordered a remedy described below to address the noncompliance.

Systemic IDEA Noncompliance: This investigation demonstrates noncompliance that is systemic and likely to impact the future provision of services for other children with disabilities in BOCES if not corrected.

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

i. Child Find

Here, BOCES' Plan does not include any specifics about the child find process or guidance for staff. (FF # 8.) BOCES did not provide the SCO with any other policies or procedures which guide staff on how or when to refer students for evaluation. (*Id.*) BOCES has a new process for identifying students in the RTI process who should be referred for evaluation, but this process relies on monitoring academic data and does not address children, like Student, whose primary concerns are not academic. (FF #s 9, 10.)

In the absence of such guidance, in 13 years, District Principal has never referred a student for evaluation based on behavior concerns. (FF # 11.) Instead, she referred Student to Program without considering special education. (FF # 13, 14.) There, BOCES Principal never considered referring Student, instead relying on the support of the ISST process. (FF # 19.) Written procedures or a checklist might have helped District and BOCES staff understand and fulfill their child find responsibilities with respect to Student, and other students whose behavior is impacting their academic functioning. For these reasons, the SCO finds and concludes that BOCES' noncompliance in this respect is systemic.

ii. Records Requests

Here, BOCES does not generally include records from Program in response to records requests. (FF # 37.) Director indicates that requests for such records must go through either BOCES Principal or the student's home district. (*Id.*) Director does not keep track of what records from

Program are shared with parents. (FF # 41.) BOCES Principal waits for direction from districts or Director to share records in response to a request. (FF # 41, 42.) IDEA entitles parents to inspect and review their child's education records, not just their special education records. 34 C.F.R. § 300.613. BOCES does not have any policies or procedures to ensure that parents are provided with education records other than special education records. For these reasons, the SCO finds and concludes that BOCES noncompliance in this respect is systemic.

REMEDIES

The CDE concludes that BOCES did not comply with the following IDEA requirements:

1. Identifying and evaluating Student once the BOCES was on notice that Student might have a disability and need special education, as required by 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).
2. Affording Parents the opportunity to inspect and review Student's education records upon request, as required by 34 C.F.R. § 300.613.

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

1. Corrective Action Plan

- a. By **Friday, January 24, 2025**, BOCES shall submit to the CDE a corrective action plan ("CAP") that adequately addresses the noncompliance noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom BOCES is responsible. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm BOCES timely correction of the areas of noncompliance.

2. Final Decision Review

- a. Director, BOCES' Executive Director, BOCES Principal, and District Principal must each read this Decision in its entirety, as well as review the requirements of 34 C.F.R. §§ 300.111, 300.613, and ECEA Rule 4.02 by **Friday, February 21, 2025**. If these individuals are no longer employed by the BOCES or District, the BOCES or District may substitute individuals occupying identical roles to demonstrate compliance with this remedy. A signed assurance that this information has been read and reviewed must be provided to the CDE no later than **Friday, February 28, 2025**.

3. Written Procedures – Evaluation

- a. By **Friday, February 28, 2025**, BOCES must submit a written procedure outlining how BOCES ensures compliance with 34 C.F.R. §§ 300.111 and ECEA Rule 4.02(1)-(3).
- b. At a minimum, the procedure must offer clear guidance on:
 - i. BOCES’ affirmative child find obligations; and
 - ii. How and when staff should refer students for initial evaluations, including students who are advancing from grade to grade.⁴
- c. Any proposed procedure must be submitted to CDE Special Education Monitoring and Technical Assistance for review and approval prior to being finalized.
- d. Upon approval, BOCES must ensure that all principals, assistant principals, counselors, social workers, and school psychologists in BOCES and all member districts receive a copy of the approved written procedures no later than **Friday, March 28, 2025**.
- e. Evidence that the procedure was shared with staff, such as a copy of the email notice sent, must be provided to the CDE no later than **Friday, April 4, 2025**.

4. Written Procedures – Records Requests

- a. By **Friday, February 28, 2025**, BOCES must submit a written procedure outlining how BOCES ensures compliance with 34 C.F.R. §§ 300.501 and 300.613.
- b. At a minimum, the procedure must offer clear guidance on:
 - i. How BOCES ensures parents can access education records maintained by member districts; and
 - ii. How BOCES ensures parents can access education records maintained by Program.
- c. Any proposed procedure must be submitted to CDE Special Education Monitoring and Technical Assistance for review and approval prior to being finalized.

⁴ Additional guidance on evaluating students suspected of having a serious emotional disability can be found on CDE’s website. https://www.cde.state.co.us/cdesped/sd-emotional_sed_trainings

- d. Upon approval, BOCES must ensure that all BOCES staff responsible for responding to records requests receive a copy of the approved written procedures no later than **Friday, March 28, 2025**.
- e. Evidence that the procedure was shared with staff, such as a copy of the email notice sent, must be provided to the CDE no later than **Friday, April 4, 2025**.

5. Evaluation of Student and Determination of Eligibility

- a. BOCES must provide Parents with consent for an evaluation of Student by **Friday, January 10, 2025**.
 - i. If Parents refuse to sign consent for evaluation within 30 days of receipt, BOCES will be excused from conducting the evaluation, provided BOCES diligently attempts to resolve disagreements about the scope of the evaluation and secure signatures and documents such efforts. A determination that BOCES diligently attempted to secure consent for the evaluation, and should thus be excused from evaluating Student, rests solely with CDE.
 - ii. BOCES cannot condition Student's evaluation on his enrollment at a school in BOCES.
 - iii. If Parents condition consent for evaluation inconsistent with the scope of the evaluation ordered in this Decision, this may be construed as a refusal to provide consent. A determination that Parents refused consent by adding conditions rests solely with the CDE.
- b. Upon receipt of Parents' signed consent for evaluation, BOCES must conduct a comprehensive evaluation of Student in all areas of suspected disability.
 - i. BOCES may determine the appropriate evaluations and evaluators. The evaluator(s) must be appropriately licensed, trained, and knowledgeable to conduct the assessments. Assessments may be conducted virtually, if appropriate.
 - ii. The evaluation must be conducted in all areas of suspected disability and be consistent with the IDEA's evaluation procedures at 34 C.F.R. § 300.304. The evaluation must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, consistent with §§ 300.304-300.305.
 - iii. BOCES may, at its discretion, rely on existing data and the 2023 Evaluation and 2024 Evaluation, and conduct only those additional assessments deemed necessary to ensure the evaluation is comprehensive. A

determination that the evaluation is comprehensive rests solely with the CDE.

- iv. If Parents or the private residential facility do not cooperate or make Student available for evaluation, the BOCES will be excused from conducting the evaluation. A determination that BOCES shall be excused rests solely with the CDE.
- c. Within 60 days of BOCES' receipt of Parents' signed consent for evaluation, District shall convene a multidisciplinary team meeting in conformity with the requirements of 34 C.F.R. §§ 300.301-306. That multidisciplinary team shall determine whether Student is eligible for special education and related services. BOCES shall issue a prior written notice ("PWN 1") in conformity with 34 C.F.R. § 300.503 describing the multidisciplinary team's determination.
- d. Should the multidisciplinary team determine that Student is eligible for special education and related services, BOCES shall, within 30 days of that determination, convene an IEP team in conformity with the requirements of 34 C.F.R. §§ 300.320-328, and develop an appropriate IEP for Student.
 - i. If Student is found eligible but remains privately placed outside of BOCES, BOCES must confer with Parents about their interest in having Student return to a public school. If Parents are not currently interested in the possibility of returning Student to BOCES, then BOCES need not convene an IEP team at this time. Instead, BOCES shall issue to Parents a PWN ("PWN 2"), in conformity with 34 C.F.R. § 300.503 describing (1) the date and manner of their conference with Parents (e.g. in person or via phone); and (2) their willingness to convene an IEP team at such time as Parents request it or seek to enroll Student in a BOCES school.
- e. By **Monday, May 12, 2025**, BOCES must provide copies of the signed consent for reevaluation, evaluation report, PWN 1, notice of the IEP meeting (if applicable), and finalized IEP (if applicable) or PWN 2 (if applicable) to the CDE Special Education Monitoring and Technical Assistance Consultant.

6. Student's Records

- a. By **Friday, January 10, 2025**, BOCES shall provide Parents and Advocate with Student's complete educational record, including grades, attendance, standardized testing results, discipline records and any other records maintained by District or BOCES.

- b. To the extent that any records cannot be produced due to technical malfunctions, BOCES must provide Parents and Advocate with a list of the records that are unavailable due to the malfunction.
- c. Evidence that these records were provided to Parents and Advocate must be submitted to CDE no later than **Tuesday, January 14, 2025**.

Please submit the documentation detailed above to the CDE as follows:

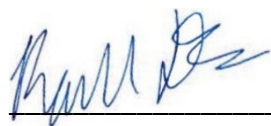
Colorado Department of Education
Exceptional Student Services Unit
Attn.: CDE Special Education Monitoring and Technical Assistance Consultant
201 E. Colfax Avenue
Denver, CO 80203

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

CONCLUSION

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

Dated this 20th day of December, 2024.



Rachel Dore
Senior State Complaints Officer

APPENDIX

Complaint, pages 1-9

- Exhibit 1: Records Request

Response, pages 1-15

- Exhibit A: Evaluation
- Exhibit B: Monthly Progress
- Exhibit C: Correspondence
- Exhibit D: Correspondence
- Exhibit E: Student Detail
- Exhibit F: Records Request
- Exhibit G: Calendars
- Exhibit H: Policies
- Exhibit I: Discipline Records
- Exhibit J: Grades
- Exhibit K: Evaluation
- Exhibit L: Enrollment Data
- Exhibit M: Grades
- Exhibit N: Online Progress
- Exhibit O: Grades
- Exhibit P: Online Progress
- Exhibit Q: Online Progress
- Exhibit R: Online Summary

Reply, pages 1-2

- Exhibit 2: Correspondence

Telephone Interviews

- Parents: November 20, 2024
- Director: November 21, 2024
- Counselor: November 21, 2024
- District Principal: November 22, 2024
- BOCES Principal: November 22, 2024
- Advocate: November 26, 2024