

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

State-Level Complaint 2022:507
Centennial BOCES & East Central BOCES

DECISION

INTRODUCTION

On February 23, 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 (“Complaint”) against a member district (“District 1”) of the Centennial Board of Cooperative Educational Services (“BOCES 1”) and a member district (“District 2”) of the East Central BOCES (“BOCES 2”). The State Complaints Officer (“SCO”) determined that the Complaint identified three 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 (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from February 23, 2021 through February 23, 2022 for the purpose of determining if a violation of IDEA occurred. Additional information 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 1 denied Student a Free Appropriate Public Education (“FAPE”) because BOCES 1:

1. Failed to make an offer of FAPE and provide special education and related services in accordance with an IEP from September 29, 2021 until January of 2022, in violation of 34 C.F.R. § 300.323.

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.

Whether BOCES 2 denied Student a FAPE because BOCES 2:

2. Failed to conduct a reevaluation and convene an IEP Team meeting in September or October of 2021, to ensure that Online School was an appropriate placement for Student, in violation of ECEA Rule 4.03(8)(b).
3. Failed to make an offer of FAPE and provide special education and related services in accordance with an IEP from September 29, 2021 until January of 2022, in violation of 34 C.F.R. § 300.323.

FINDINGS OF FACT

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

A. Background

1. Student is ten years old and currently attends fourth grade at an elementary school (“School”) in District 1. *Interview with Parent; Exhibit J*, p. 9. Student and her family currently reside within the boundaries of District 1. *Exhibit L*, p. 3. District 1 is a member of BOCES 1. *Exhibit 1*, p. 1. BOCES 1 is responsible for providing FAPE to all IDEA-eligible children with disabilities attending a school in its member districts. ECEA Rule 2.02.
2. Student is described as sweet, lovable, and polite when well rested. *Interviews with Parent and Special Education Teacher 1*. Student is a strong reader with good comprehension, and she loves to draw and play outside. *Id.* However, Student struggles to regulate her emotions and is easily frustrated when tired. *Id.* She has been diagnosed with Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, Anxiety and insomnia. *Interview with Parent*.
3. Student first enrolled at School, in District 1, during spring of 2021. *Exhibit 1*, p. 16. At the time of her enrollment, Student was eligible for special education and related services as a child with a specific learning disability. *Exhibit 1*, pp. 1 and 16. Shortly after enrolling at School, the family opted to participate in remote instruction for the remainder of the year, due to concerns related to COVID-19. *Id.* at p. 22; *Exhibit G*, p. 9.
4. District 1 conducted a reevaluation and, on May 6, 2021, found Student eligible for special education and related services as a child with Other Health Impairment. *Exhibit 1*, p. 34. As a result of her disabilities, Student struggles with attention and emotional regulation and requires targeted instruction in math. *Id.* at pp. 7 and 34.
5. To address these needs, Student’s May 6, 2021 IEP (“May IEP”) contained two math goals, a self-determination goal and a self-regulation goal. *Exhibit 1*, pp. 7-9. To meet these

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

goals, the May IEP included several accommodations and 40 minutes per day (“MPD”) with a special education teacher, to be split evenly between math and social skills, and 20 minutes of weekly consultation between the general education and special education teachers. *Id.* at p. 13. The May IEP also included contingency learning plans for short quarantines or full school closures caused by COVID-19. *Id.* at p. 12. During school closures, when all students would be learning virtually, Student was to receive 20 MPD with a special education teacher. *Id.*

6. Student’s May IEP did not contain a Behavior Intervention Plan (“BIP”). *Id.* at p. 7. However, District 1 had an evacuation protocol in place for Student after an incident that occurred in the special education classroom the prior year. *Exhibit G*, pp. 14-16.
7. Student transferred from School, in District 1, to an online charter school (“Online School”) in District 2 for most of the month of October of 2021. *Interviews with Parent and Special Education Director 2; Exhibit F*, p. 10. District 2 is a member of BOCES 2. *Interview with Special Education Director 2*. BOCES 2 is responsible for providing FAPE to all IDEA-eligible children with disabilities attending a school in its member districts. ECEA Rule 2.02.

B. Transfer out of District 1

8. It is BOCES 1’s practice not to send records to a new school until after a student is withdrawn, as it is its understanding that schools will not request records from them until after a student is already enrolled. *Interviews with Special Education Director 1 and Special Education Teacher 1*.
9. It is District 1’s practice to keep a disenrolled student on its attendance rolls until it receives confirmation that the student is enrolled elsewhere, usually in the form of a records request. *Interview with Principal*.
10. At the beginning of the 2021-2022 school year, Parent started looking for alternative school options because she was concerned about the behavioral supports Student was getting at School. *Complaint*, p. 2; *Interview with Parent*. Teachers were struggling to get Student to complete work and Parent did not want her “to be failing at school.” *Exhibit G*, pp. 2, 9-10; *Interviews with Parent and Special Education Teacher 1*. Although Parent referred alternatively to homeschooling and online schooling, she ultimately settled on Online School, where she told a special education teacher at School (“Special Education Teacher 1”) that Student would have classes and a teacher. *Exhibit G*, pp. 2 and 4.
11. On September 27, 2021, BOCES 1 received a records request from Online School and asked Special Education Teacher 1 to send the withdrawal form and remove Student in Enrich, the data management system used by BOCES 1. *Exhibit G*, p. 5. That same day,

Special Education Teacher 1 told Parent she was being asked to remove Student from the system. *Id.* at p. 4. Parent then called and unenrolled Student from District 1 that day. *Id.*

12. Student enrolled in Online School on September 30, 2021. *Response*, p. 2; *Interview with Special Education Director 2*. On October 1, 2021, a special education teacher with Online School (“Special Education Teacher 3”) reached out to Student and Parent to introduce herself and begin setting up special education and related services. *Exhibit F*, pp. 5-8.

C. Revocation of Consent

13. When a student with an IEP enrolls at Online School, Online School’s Director of Special Education is notified and assigns the review to a special education teacher after confirming Online School has all the necessary records on file. *Interview with Special Education Teacher 2*. Because its setting is different, Online School does not accept IEPs from brick-and-mortar schools. *Exhibit F*, p. 10. When the review is assigned to Special Education Teacher 2 at Online School, she considers the records and makes notes of the services she determines are appropriate for the new setting. *Interview with Special Education Teacher 2*. She assigns goals and services based upon what is included in the most recent IEP. *Id.* She then calls the parents, ideally that day, to review her proposed interim services. *Id.* If she cannot reach the parent, she leaves a voicemail detailing what services will be offered and then sends an email. *Id.*
14. On October 5, 2021, Special Education Teacher 2 reviewed Student’s records and determined that Online School would not adopt the May IEP and instead would provide interim services until it could develop a new IEP. *Interview with Special Education Teacher 2*. That same day, Special Education Teacher 2 attempted to call Parent about the transfer IEP process. *Id.* When she could not reach Parent by phone, she followed up by email. *Exhibit F*, p. 10; *Interview with Special Education Teacher 2*. Attached to the email was an IEP Transfer Form, which Parent was asked to sign and return, that specified the services that would be provided to Student until a new IEP could be developed. *Exhibit F*, pp. 10-11; *Exhibit J*, pp. 2-3.
15. Interim services were to consist of 60 minutes per week (“MPW”) with a special education teacher, to be split evenly between math and social/emotional wellness and 30 minutes of monthly consultation between the special education and general education teachers. *Exhibit J*, p. 2. Under goals, the transfer form concluded “[t]he incoming goals are not adopted, new goals will be developed at the IEP meeting.” *Exhibit J*, p. 1-2.
16. In response to this email, Parent indicated that she did not want to go through “the hassle” of another IEP since she thought Student’s needs were mostly behavioral. *Exhibit F*, p. 12. Student did not like doing math, particularly with certain teachers, but worked better at home with her parents and was completing work. *Id.* Special Education Teacher 2 asked if Parent was indicating she wanted to revoke services and advised her that

Student would have to go through another reevaluation process to get special education services again if she returned to a brick-and-mortar school. *Id.* Parent confirmed her desire to revoke services in writing on October 5, 2021. *Id.*

17. Special Education Teacher 2 attempted to call Parent once on October 5, 2021 but never talked with her or asked about Student's significant academic needs, particularly in math. *Exhibit J*, pp. 4-7; *Interview with Special Education Teacher 2*. Based on Parent's email, Special Education Teacher 2 sent Parent a Prior Written Notice ("PWN") and revocation of consent form that same day. *Id.* Both forms notified Parent that District 2 would no longer be required to provide Student with a FAPE and could not continue to provide special education services to Student. *Exhibit J*, pp. 4-7. The PWN informed Parent that she could refer Student for another evaluation in the future. *Id.* at p. 6. Parent received and signed the revocation of consent form that day, October 5, 2021. *Id.* at p. 4.
18. Although she acknowledges receiving the PWN and the revocation of consent form from Online School, Parent says she did not understand what she was signing. *Reply*, p. 1; *Interview with Parent*. She thought she was agreeing to cancel the May IEP but that they would be reviewing a new one and that only the social emotional services would stop. *Interview with Parent*. She did not tell her attorney about signing the forms. *Reply*, p. 1.
19. Apparently unaware that Parent had revoked consent the day before, Special Education Teacher 3 emailed Parent, at an email address assigned to Student, on October 6, 2021 about setting up Student's math services. *Exhibit F*, p. 9. After that, no one else from District 2 contacted Parent to support Student, even when the family asked for help accessing Student's lessons. *Interview with Parent*. Student and Parent struggled to figure out what Student should be working on (Student's workbooks did not arrive for a month) or where to go for which classes. *Id.* Worried that Student would fall irreparably behind, Parent decided to return Student to a brick-and-mortar school. *Id.* Parent called Online School to withdraw Student on October 27, 2021 and Online School completed the withdrawal on November 1, 2021. *Response*, p. 3; *Exhibit K*.

D. Denial of Admission to District 1

20. District 1 has a policy ("Board Policy JF") which states that resident students who are choice enrolled outside of the district after the pupil count date (October 1) cannot enroll in the district until the following school year, unless the superintendent grants an exception for unusual circumstances. *Exhibit E*.
21. At least three other districts in Colorado have this same policy, including two others in BOCES 1 and one in BOCES 2. *CDE Exhibit 1*. Special Education Director 1 is aware of another instance where a district in BOCES 1 relied on Board Policy JF to deny admission to an IDEA-eligible student. *Interview with Special Education Director 1*. In that instance, the student was later admitted when district staff sought her advice. *Id.* BOCES 1 does not

offer any formal training or guidance to districts on the application of Board Policy JF to special education students. *Id.* She denies that any other eligible students have been denied enrollment based on Board Policy JF. *Id.* However, in this case, District 1's Superintendent ("Superintendent") did not contact her about the decision to deny enrollment to Student. *Id.*

22. According to Superintendent, about three students each year seek permission to return, despite Board Policy JF. *Interview with Superintendent.* He stated the number stays low because parents are informed about the policy before they withdraw their student. *Id.* District 1 practice is to allow students with IEPs to return because it is District 1's responsibility to ensure that their educational needs are met. *Id.*
23. School's Principal ("Principal") did not speak with Parent before Student was withdrawn. *Interview with Principal.* No one told Parent about Board Policy JF when she withdrew Student from District 1. *Interview with Parent.*
24. On October 27, 2021, Parent called School and left a message for Principal about reenrolling Student. *Interview with Principal.* Principal emailed Superintendent that day, asking if Board Policy JF applied to special education students, as she was concerned about reenrolling a student that she deemed a "behavior concern." *Exhibit L, p. 23.* Superintendent told Principal that the family had "forfeited the right to enrollment for the 21-22 school year" and Student did not have to be allowed to enroll, even as a student with an IEP. *Id.* Principal called Parent on October 29, 2021 and informed her that Student could not return to School that year. *Id.*
25. Parent then contacted Superintendent to seek admission. *Interview with Parent.* Parent and Superintendent agreed to meet on November 2, 2022, regarding Student's ability to reenroll. *Interviews with Parent and Superintendent.* Parent did not show up for the meeting and did not answer Superintendent's follow up calls that week. *Id.*
26. Parent reports that Superintendent told her Student could not return but that she could appeal the decision by meeting with him. *Interview with Parent.* Superintendent did not offer any explanation of why an appeal of his decision to him would be effective and told her he would not meet with her if her attorney was present. *Id.* If she wanted her attorney to attend the meeting, he would have to check his attorney's schedule. *Id.* She asked him what she was supposed to do, as Student was not enrolled anywhere else and had nowhere to go. *Id.*
27. Superintendent says he told Parent that Principal could not allow Student to return, but he could. *Interview with Superintendent.* He asked Parent to let him know if her attorney would be present so he would have the opportunity to have his attorney present as well. *Id.* Superintendent denied telling Parent that Student could not return, calling it an appeal, being asked the purpose of appealing his decision to him or suggesting that having

his attorney present would cause a significant scheduling delay. *Id.* When Parent did not show up, Superintendent called her twice that afternoon and again two days later before deciding she must have changed her mind about having student return to District 1. *Id.*

28. No other witnesses to this conversation exist and neither party took contemporaneous notes. However, Superintendent's emails with Principal directly contradict his description of how Board Policy JF is applied to students with disabilities. Further, Principal contradicted his report that she notified Parent about the policy before Student was withdrawn. As a result, the SCO finds Parent's recollection of the conversation to be more credible.
29. On December 6, 2021, Parent and Superintendent met, with their respective lawyers present by phone, and agreed Student could return in January. *Interviews with Parent and Superintendent.* However, School staff preferred to have her start before winter break. *Id.*
30. From October 27, 2021 through December 13, 2021, Student was not enrolled in any school. *Interviews with Parent, Superintendent, and Principal.* Staff from District 1 and BOCES 1 made no effort to provide her with special education and related services. *Id.*
31. Student was registered in District 1 on December 13, 2021. *Exhibit G*, p. 17. Parent told Special Education Teacher 1 that Online School did not have an IEP and "nothing had changed." *Id.* An IEP team meeting was scheduled for December 16, 2021 to review the May IEP and revise it as necessary. *Exhibit L*, p. 1.

E. Return to District 1

32. After a parent indicates that an enrolling student has an IEP, front office staff notify Special Education Teacher 1 so that she can submit a form to BOCES 1 to request the student's records. *Interview with Special Education Teacher 1.* BOCES 1 Data Specialists then contact the prior school for records and upload them to its data management system, Enrich. *Interview with Special Education Director 1.* Principal reports that anytime a student registers, her administrative assistant requests records. *Interview with Principal.*
33. In preparation for Student's return, Special Education Teacher 1 asked BOCES 1 staff to request records from the school that had requested records from BOCES 1 in the fall. *Exhibit G*, p. 12. After Student was registered on December 13, 2021, Special Education Teacher 1 completed a new student data sheet and submitted it to BOCES 1. *Exhibit G*, p. 17; *Exhibit J*, p. 9. When asked where Student was transferring from, Special Education Teacher 1 wrote "online-homeschool." *Exhibit J*, p. 9. Because the form indicated "homeschool" and did not name a prior school, BOCES 1 staff did not submit a request to Online School or BOCES 2 for Student's records. *Interview with Special Education Director*

1. Principal does not know if her staff requested Student's records in this case. *Interview with Principal.*
34. Neither District 1 nor BOCES 1 was aware that Parent had revoked consent for special education while Student was attending Online School, until they were responding to this Complaint. *Interviews with Special Education Director 1, Principal and Special Education Teacher 1.* As such, no one requested Student's records from District 2 or BOCES 2.
35. At the reentry meeting on December 16, 2021, the IEP team, including Parent, agreed to tweak Student's goals and accommodations and remove her social skills minutes with a special education teacher because Student was being referred to a counselor in District 1. *Exhibit L, p. 2; Interviews with Principal and Special Education Teacher 1.*
36. The IEP team also agreed to conduct a functional behavior assessment ("FBA") to develop a BIP. *Interviews with Principal and Special Education Teacher 1.* Parent signed consent for the FBA in January. *Exhibit J, pp. 15-16.* The IEP team was set to meet about the FBA and a proposed BIP on March 25, 2022. *Interviews with Parent and Special Education Teacher 1.* The meeting was cancelled after BOCES 1 found out that Parent had revoked consent for services. *Id.* District 1 is currently conducting an initial evaluation for Student. *Interviews with Parent, Special Education Director 1 and Special Education Teacher 1.*
37. Student did not work on any goals throughout the first semester. *Exhibit L, pp. 20-22.* She continued to struggle when she returned to School, frequently becoming escalated and struggling to initiate tasks. *Id.* She did not make any progress on her self-determination or her social emotional goals. *Id.* BOCES 1 reports that she made progress on her math goals, although "not enough data has been able to be collected." *Id.*
38. However, in late February, Special Education Teacher 1 changed her approach and started pulling Student for one-on-one services in the morning. *Interview with Special Education Teacher 1.* The IEP team also implemented some new strategies, like checking in with staff at the start and end of the day and earning drawing time. *Id.* Since making these changes, Student is completing more work, missing less school and generally appears to be making more progress. *Interviews with Parent, Special Education Teacher 1 and Special Education Director 1.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: BOCES 1 did not fail to make an offer of FAPE and provide special education and related services in accordance with an IEP.

The first allegation accepted for investigation concerns whether BOCES 1 failed to make an offer of FAPE and provide special education and related services for Student after she sought to reenroll on October 27, 2021.

i. Responsibility for Providing a FAPE

The State must ensure that all eligible students between the ages of 3 and 21, inclusive, have access to a FAPE. 34 C.F.R. § 300.101(a). This means the provision of special education and related services, provided in conformity with an IEP that is individually tailored to meet the student's unique needs and that meets the IDEA's requirements. 34 C.F.R. § 300.17; ECEA Rule 2.19. These services must be made available to a child as soon as possible following the development of an IEP. 34 C.F.R. § 300.323(c)(2). In Colorado, administrative units ("AUs"), including BOCES, are responsible for implementing the rules governing the provision of educational services to exceptional students. ECEA Rule 2.02.

Nothing in the law or regulations relieves an AU of its responsibility to offer a FAPE when a student is parentally placed outside the AU. Although an AU is not required to provide a FAPE if the child is privately placed, it must be prepared to make an offer of FAPE if the parent requests an evaluation or IEP. *District of Columbia v. Oliver*, 62 IDELR 293 (D.D.C. 2014); *District of Columbia v. Wolfire*, 62 IDELR 198 (D.D.C. 2014); and *Regional Sch. Unit 51 v. Doe*, 60 IDELR 197 (D. Me. 2013). In addition, the AU of residence must be prepared to make a FAPE available to the child if the parent seeks to reenroll them. *Letter to Wayne*, 73 IDELR 263 (OSEP 2019).

In general, the responsibility to provide a FAPE falls to the AU of residence, meaning where the child resides. ECEA Rule 2.02(1). The AU of residence does not change when a student is enrolled in a charter school or an online school in another AU. *Id.* For certain enumerated disabilities, the AU of residence remains responsible for paying tuition costs to the AU of attendance when a student is choice enrolled outside of their AU of residence. See ECEA Rule 9.03. The AU of residence is also responsible for the identification of eligible students who are not currently enrolled in school. ECEA Rule 8.02(2). Although the regulations are silent as to which AU is responsible for providing a FAPE when a student is not enrolled in a school or seeks to return to his or her AU of residence, these regulations suggest that the intent is that the AU of residence remains responsible for the provision of FAPE in such a situation.

Student resides in District 1, making BOCES 1 her AU of residence. (FF # 1.) As such, as soon as Parent sought to enroll Student in District 1 on October 27, 2021, BOCES 1 was responsible for providing her with an offer of a FAPE, regardless of where she was enrolled at that point.

Therefore, the SCO finds and concludes that from October 27, 2021, the date Parent sought to reenroll Student, onward, to the extent that Student was entitled to a FAPE, BOCES 1 was responsible for providing those services.

ii. Revocation of Consent

Parents are free to revoke consent for the provision of special education and related services at any time by notifying the district in writing. 34 C.F.R. §§ 300.9 and 300.300(b)(4). Once consent is revoked, the district “must provide prior written notice in accordance with § 300.503” before terminating services, but “will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services.” 34 C.F.R. § 300.300(b)(4).

On October 5, 2021, in response to an email from Special Education Teacher 2 about interim services, Parent indicated she did not want to go through “the hassle” of another IEP because she thought Student’s needs were mostly behavioral. (FF # 16.) Special Education Teacher 2 asked if she wanted to revoke consent for services and notified Parent, in writing, that, if consent was revoked, Student would have to undergo a new evaluation in order to get special education services if she returned to a brick-and-mortar school. (FF # 16.) When Parent confirmed in writing that she wanted to revoke consent, Special Education Teacher 2 sent a PWN and a revocation of consent form which notified Parent that District 2 would no longer be able to provide Student with special education and related services if Parent revoked consent. (FF # 17.) Parent confirmed her intent to revoke consent in writing, both in her email and by signing the revocation of consent form. (FF #s 16-17.) The SCO thus finds and concludes that Parent revoked consent for services on October 5, 2021.

Parent maintains that she did not understand that what she was signing meant Student would no longer have an IEP. (FF # 18.) From conversations with her attorney and with Special Education Teacher 1, Parent did not understand that Student no longer had an IEP. (FF #s 18 and 31.) Additionally, had she understood that Student no longer had an IEP, she could have requested a new evaluation. However, the SCO must consider whether Parent’s misunderstanding means she did not actually revoke consent for special education and related services.

Informed consent requires that the parent has been given all the relevant information to make a decision, the consent form describes the activity they are agreeing to, and the parent understands and agrees in writing. 34 C.F.R. §300.9. In general, the IDEA contains specific procedural requirements because legislators believed that compliance with those procedures was the best way to ensure the education of students with disabilities. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 205-06, (1982) (finding that Congress intended for compliance with IDEA procedures to assure much, if not all, of what they desired in terms of substance.)

While the SCO might wish Special Education Teacher 2 would have had a conversation with Parent about the consequences of revoking consent, BOCES 2 complied with IDEA’s procedural requirements. There is nothing in the law or regulations that requires a conversation as part of informed consent. The regulations actually require that the parent’s request be made in writing, as it was here (FF # 16.). Special Education Teacher 2’s written communications with Parent were

also clear. Nothing in the notices or communications provided by Special Education Teacher 2 indicated that only the social emotional services would be terminated, and Parent never expressed a desire for ongoing academic support. (FF #s 16-17.)

Thus, the SCO finds and concludes that BOCES 2 complied with all procedural requirements in 34 C.F.R. § 300.300(b)(4) in responding to Parent’s revocation of consent and provided Parent with all the information relevant to the decision. As such, the SCO finds and concludes that Parent revoked consent on October 5, 2021, regardless of any confusion on her part.

iii. Reliance on Board Policy JF

While a school district is free to write its own policies and procedures, there is no legal authority that permits a school district to use such policies as a basis to avoid responsibilities under the IDEA. Each school district, in providing for the education of children with disabilities within its jurisdiction, “must have in effect policies, procedures, and programs that are consistent with the State policies and procedures established under §§ 300.101 through 300.163 and §§ 300.165 through 300.174”. 34 C.F.R. § 300.201. To the extent that a school district’s policies and procedures create artificial barriers that prevent students with disabilities from accessing special education and related services guaranteed by the IDEA, those policies are inconsistent with the spirit of the Act.

At the time Parent sought to reenroll Student in District 1, BOCES 1 understood Student to be an eligible student with a disability. (FF #34.) Despite the fact that Superintendent told the SCO he does not use Board Policy JF to deny enrollment to eligible students, he clearly told Principal that the policy allowed them to deny enrollment to special education students. (FF #s 22 and 24.) In this case, District 1 relied on Board Policy JF to prevent Student from reenrolling and provided her with no services for approximately six weeks. (FF #s 24-30.)

However, once a parent revokes consent for services, a school district “will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services.” 34 C.F.R. § 300.300(b)(4)(iii). As discussed above, Parent effectively revoked consent for special education and related services on October 5, 2021. Because Parent had revoked consent, the SCO finds and concludes that BOCES 1 was not obligated to provide Student with special education and related services when she sought to reenroll on October 27, 2021 and there was no denial of FAPE. The SCO cautions BOCES 1 that the outcome of this Decision likely would have been different, had Parent not terminated consent.

iv. Failure to Request Records

When a student transfers to a new school district, the enrolling school district “must take reasonable steps to promptly obtain the child’s records . . . from the previous public agency.” 34 C.F.R. §300.323(g)(1).

Student reenrolled in District 1 on December 13, 2021. (FF # 31.) At that time, Special Education Teacher 1 submitted a new student form to BOCES 1 that incorrectly stated that Student was transferring from homeschooling. (FF # 33.) In reality, Student had attended Online School, in BOCES 2, from September 30, 2021 through October 27, 2021. (FF #s 12 and 19.) While Student was enrolled at Online School, Parent revoked consent for special education and related services. (FF # 17.)

Despite the fact that District 1 has two separate processes for requesting records for transfer students, no one in District 1 or BOCES 1 requested Student's records when she returned. (FF #s 32-34.) In this case, Principal's administrative assistant did not get Student's records. (FF # 34.) Although Special Education Teacher 1 submitted the new student form, BOCES 1 did not request Student's records because the form stated that she had been homeschooled. (FF # 33.) Although Special Education Teacher 1 and BOCES 1 staff followed procedure for requesting records, they did not obtain Student's records, so the SCO must consider whether the actions they took were reasonable. Parent and teachers referred both to online school and homeschooling when discussing Parent's plan to transfer Student, but Parent ultimately told Special Education Teacher 1 that Student would be attending an online school with a teacher, and BOCES 1 staff informed Special Education Teacher 1 that they had received a request for Student's records from Online School. (FF #s 10-11.) Special Education Teacher 1 initially asked BOCES 1 to request Student's records from the school that had just requested them from BOCES 1. (FF # 33.) Given this, the SCO finds that Special Education Teacher 1 and BOCES 1 did not take reasonable steps to obtain Student's records from BOCES 2.

For these reasons, the SCO finds and concludes that BOCES 1's failure to promptly obtain Student's records from BOCES 2 resulted in a procedural violation of 34 C.F.R. § 300.323(g)(1).

Additionally, if a parent revokes consent, a school district "may not continue to provide special education and related services to the child." 34 C.F.R. § 300.300(b)(4)(i). Because BOCES 1 failed to take reasonable steps to obtain Student's records from BOCES 2, it was unaware that Parent had revoked consent for services on October 5, 2021. (FF # 17.) This resulted in BOCES 1 providing Student with special education and related services after Parent revoked consent for services, in violation of 34 C.F.R. § 300.300(b)(4).

Procedural violations of IDEA are only actionable to the extent that they impede the child's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a 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). Additionally, once a parent revokes consent for services, a school district "will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services." 34 C.F.R. § 300.300(b)(4)(iii).

The October 5, 2021 revocation of consent ended Student’s right to a FAPE. As a result, these two procedural violations did not impede her right to a FAPE. Further, Parent’s ability to participate in the decision-making process was not impeded, as BOCES 1 involved her throughout the process, beginning with the IEP team meeting on December 16, 2021. (FF #s 35-36.) Finally, the procedural violations resulted in Student continuing to receive special education and related services despite Parent revoking consent. Because BOCES 1 was providing services over and above what it was required to provide (nothing), there was no deprivation of educational benefit.

For these reasons, the SCO finds and concludes that these procedural violations did not result in a denial of a FAPE.

Conclusion to Allegation No. 2: BOCES 2 did not fail to conduct a reevaluation and convene an IEP team meeting to ensure that Online School was an appropriate placement for Student.

The second allegation accepted for investigation concerns whether BOCES 2 failed to conduct a reevaluation and convene an IEP team to ensure that Online School was an appropriate placement when Student transferred to BOCES 2 from BOCES 1 on September 30, 2021.

When a student transfers from a brick-and-mortar school to an online program, it constitutes a significant change in placement. ECEA Rule 4.03(8)(b)(ii)(A)(III). A significant change in placement must be made by agreement or by an IEP team, upon consideration of a reevaluation. ECEA Rule 4.03(8)(b)(ii)(B). The district responsible for the online program “is responsible for conducting the reevaluation and convening the IEP team to determine whether the on-line program is an appropriate placement for the child.” ECEA Rule 4.03(8)(b)(ii)(A)(III), *See also* ECEA Rule 8.07(1).

In this case, based on an email Special Education Teacher 2 sent to Parent, BOCES 2 intended to conduct a reevaluation and convene an IEP team meeting for Student. (FF # 14.) However, Parent revoked consent for services on October 5, 2021, less than a week after Student enrolled at Online School. (FF # 16-17.) Once a parent revokes consent for services, a district “will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services.” 34 C.F.R. § 300.300(b)(4)(iii).

When Parent revoked consent for services, it terminated BOCES 2’s obligation to consider whether Online School was appropriate for Student. Therefore, the SCO finds and concludes that BOCES 2 did not violate ECEA Rule 4.03(8)(b)(ii)(A)(III).

Conclusion to Allegation No. 3: BOCES 2 failed to make an offer of a FAPE and provide special education and related services in accordance with an IEP on October 5, 2021, resulting in a procedural violation of 34 C.F.R. § 300.323. This procedural violation did not result in denial of a FAPE.

The third allegation accepted for investigation concerns whether BOCES 2 failed to make an offer of FAPE and provide special education and related services for Student from September 29, 2021 until October 27, 2021.

i. September 29, 2021 through October 5, 2021

When a student with an IEP transfers to a new school district in the same state within the same school year, the new school district (in consultation with the parents) must provide comparable services until the new district: (1) adopts the IEP developed by the old district or (2) develops, adopts and implements a new IEP. 34 C.F.R. § 300.323(e). Federal regulation does not set out a specific timeframe for completing this process. However, the new district must act “within a reasonable period of time to avoid any undue interruption in the provision of required special education and related services.” *Questions and Answers on Individualized Educ. Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11).

On October 1, 2021, one day after Student enrolled in Online School, Special Education Teacher 3 reached out to Student and Parent to begin setting up special education and related services. (FF # 11.) On October 5, 2021, within one week of Student’s enrollment in Online School, Special Education Teacher 2 reviewed Student’s records, including the May IEP, and determined that BOCES 2 would be offering interim services while conducting a reevaluation and developing a new IEP. (FF #14.) Special Education Teacher 2 called parent on October 5, 2021 and then communicated her decision via email when Parent did not answer. (FF # 14.) However, at no point in the process of determining comparable services did BOCES 2 consult with Parent. Making one attempt to call Parent before completing the transfer form does not constitute due diligence to invite parent participation in the process. Neither Special Education Teacher 2’s description of her usual voicemail nor the contents of the email she sent to Parent includes a request for Parent to weigh in on the comparable services. (FF #s 13-14.)

Comparable services are “similar” or “equivalent” to those services described in the child’s IEP from the old school district, as determined by the IEP Team at the new school district. *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46681 (Aug. 14, 2006). Providing comparable services requires the provision of goals that align with the annual goals in the student’s last IEP. *Letter to Finch*, 56 IDELR 174 (OSEP Aug. 5, 2010).

The transfer form used by Special Education Teacher 2 includes a space for goals. (FF # 15.) However, in this case, Special Education Teacher 2 declined to include any goals aligned with the May IEP, stating only that the “incoming goals are not adopted.” (FF # 15.) The SCO is concerned that Special Education Teacher 2 appears unaware of the obligation to develop any temporary goals for transfer students. The transfer form drafted by Special Education Teacher 2 did not include any goals, let alone any goals aligned with the May IEP. (FF # 15.) For these reasons, the SCO finds and concludes that although BOCES 2 moved to provide services quickly, it failed to

offer comparable services or to consult with Parent in developing the offer, resulting in a procedural violation of 34 C.F.R. § 300.323(e).

Procedural violations of IDEA are only actionable to the extent that they impede the child's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a 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). Once a parent revokes consent for services, a school district "will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services." 34 C.F.R. § 300.300(b)(4)(iii).

As discussed above, Parent revoked consent for special education the same day BOCES 2 proposed comparable services. (FF #s 14-17.) As such, the SCO finds and concludes that this procedural error could not result in a substantive denial of a FAPE.

ii. October 6, 2021 through October 27, 2021

Parents are free to revoke consent for the provision of special education and related services at any time by notifying the district in writing. 34 C.F.R. §§ 300.9 and 300.300(b)(4). Once consent is revoked, the school district "must provide prior written notice in accordance with § 300.503" before terminating services, but "will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services." 34 C.F.R. §§ 300.300(b)(4).

Here, as discussed above, Parent revoked consent for special education and related services on October 5, 2021, ending Student's entitlement to a FAPE. (FF # 17.) Therefore, the SCO finds and concludes that from October 6, 2021 until Parent withdrew Student from Online School in BOCES 2 on October 27, 2021, BOCES 2 was not obligated to make an offer of a FAPE and provide special education and related services in accordance with an IEP.

Systemic IDEA Violations: This investigation demonstrates violations that are systemic and will likely impact the future provision of services for all children with disabilities if not corrected.

Pursuant to its general supervisory authority, CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in BOCES 1 and BOCES 2. 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. BOCES 1

The SCO finds and concludes that the violations of 34 C.F.R. §§ 300.323(g)(1) and 300.300(b)(4) are not systemic in nature. Both Special Education Director 1 and Special Education Teacher 1 demonstrated an understanding of IDEA's transfer rules, including the record request requirements, in interviews with the SCO. (FF # 31.) The failure to request Student's records from BOCES 2 appeared to stem from Special Education Teacher 1's misunderstanding about where Student had been attending school. This misunderstanding then led BOCES 2 to provide Student with services after Parent had revoked consent. There is nothing in the Record to suggest that BOCES 1 knowingly provided services after Parent revoked consent. There is also nothing in the Record to indicate that these issues exist throughout BOCES 1, or even District 1.

However, written procedures are essential to ensuring school staff understand their responsibilities and provide special education services consistent with ECEA Rules, the IDEA, and school district policy. At least three districts in BOCES 1 have language in Board Policy JF that prohibits students from enrolling for the rest of the school year if they are choice enrolled outside of the district on the pupil count date. (FF #s 20-21.) This investigation shows that this is at least the second time a district in BOCES 1 has relied on Board Policy JF to deny enrollment to an IDEA-eligible student. (FF # 21.) BOCES 1 does not have any written policies or procedures on the application of Board Policy JF to special education students and it does not offer districts any guidance on this issue. (FF # 21.) The lack of written practices means BOCES 1 does not have a system to ensure BOCES 1 is made aware anytime a student with an IEP seeks to enroll, despite Board Policy JF.

In this instance, BOCES 1 was unaware that District 1 was relying on Board Policy JF to deny enrollment to Student. (FF # 21.) Because of the unique circumstances in this case (Parent had revoked consent, unbeknownst to District 1), there was not a failure to make an offer of a FAPE to Student, meaning there was no violation of 34 C.F.R. § 300.323. The concern for the SCO is that districts in BOCES 1 may continue to rely on Board Policy JF to prevent known children with disabilities from enrolling and BOCES 1 would never know, unless a parent contacts them. As the lack of written guidance on this issue in BOCES 1 contributed to the decision to exclude Student, this investigation raises concerns about the appropriate future provision of services for all IDEA-eligible students in BOCES 1. Accordingly, the SCO will set forth specific remedies consistent with IDEA to ensure procedures are in place and designed for the appropriate provision of services for all IDEA-eligible students in BOCES 1.

ii. BOCES 2

This investigation demonstrated a procedural violation at Online School that is systemic and likely to impact the future provision of services for children with disabilities. In particular, the SCO is concerned with the process at Online School for implementing IEPs for students who transfer from another district in the state. In this case, Special Education Teacher 2 did not consult Parent in determining comparable services for Student and she did not include any interim goals that

aligned with Student's May IEP. Special Education Teacher 2 actions in this case were not based on any written processes provided by District 2 or BOCES 2 regarding the process of determining comparable services for students who transfer from another district during the same school year. However, Special Education Teacher 2's actions were consistent with the general process she described at Online School. (FF # 13.)

Due to the nature of its setting, Online School never accepts transfer IEPs from brick-and-mortar schools. (FF # 13.) This means it must always provide a FAPE, in consultation with the parents, while developing a new IEP. 34 C.F.R. § 300.323(e). When a new student is assigned to her, Special Education Teacher 2 reviews the student's records to determine what comparable services will be offered while Online School evaluates the student and develops a new IEP. (FF # 13.) Before completing the transfer form, memorializing the offer of comparable services, she makes one attempt to call the parents. *Id.* If parents do not answer, Special Education Teacher 2 documents Online School's interim services offer in a transfer form and electronically sends the form to parents to sign. (FF # 13.) If parents do not answer Special Education Teacher 2's one unscheduled phone call, they are not consulted in the process of determining comparable services. As noted above, the SCO is also concerned that temporary goals are not developed for transfer students.

Accordingly, the SCO finds and concludes that this violation is systemic, but only with respect to students who transfer into Online School during the school year. The SCO will set forth specific remedies consistent with the IDEA to ensure that appropriate procedures are in place to ensure the provision of a FAPE to IDEA-eligible students who transfer into Online School.

REMEDIES

The SCO concludes that BOCES 1 has violated the following IDEA requirements:

- a. Failing to promptly obtain Student's records from BOCES 2, in violation of 34 C.F.R. §300.323(g)(1);
- b. Providing Student with special education and related services after Parent revoked consent, in violation of 34 C.F.R. §300.300(b)(4).

To remedy these violations, BOCES 1 is ORDERED to take the following actions:

1. Corrective Action Plan

- a. By **Monday, May 23, 2022**, BOCES 1 shall submit to the CDE a corrective action plan ("CAP") that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom BOCES 1 is responsible. The CAP must, at a minimum, provide for the following:

- i. Special Education Director 1, Special Education Teacher 1 and Data Specialists must review this Decision, as well as the requirements of 34 C.F.R. § 300.300(b) and 34 C.F.R. § 300.323(g). This review must occur no later **than Monday, June 27, 2022**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Tuesday, July 5, 2022**.
- ii. Additionally, Superintendent, Principal and all District 1 enrollment/registration staff must review this Decision, as well as the requirements of 34 C.F.R. § 300.323. This review must occur no later **than Monday, June 27, 2022**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Tuesday, July 5, 2022**.
- iii. By **Monday, August 16, 2022**, BOCES 1 must submit written procedures to ensure compliance with 34 C.F.R. § 300.323 by:
 - a. Clarifying that board policies and admission/enrollment practices do not permit the exclusion of IDEA-eligible students and students suspected of being IDEA-eligible, no matter what point in the year they seek to enroll;
 - b. Describing a plan to identify and communicate procedures to any current or future districts relying on a policy like Board Policy JF; and
 - c. Monitoring to ensure special education and related services is always available to eligible students in their AU of residence.
- b. 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 1's timely correction of the areas of noncompliance.

The SCO concludes that BOCES 2 has violated the following IDEA requirement:

- a. Failing to offer Student comparable services, in consultation with Parent, when Student transferred from BOCES 1, in violation of 34 C.F.R. § 300.323(e).

To remedy this violation, BOCES 2 is ORDERED to take the following actions:

1. Corrective Action Plan

- a. By **Monday, May 23, 2022**, BOCES 2 shall submit to the 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 2 is responsible. The CAP must, at a minimum, provide for the following:

- i. Special Education Director 2, Online School's Special Education Director and Special Education Teacher 2 must review this Decision, as well as the requirements of 34 C.F.R. §300.323(e). This review must occur no later than **than Monday, June 27, 2022**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Tuesday, July 5, 2022**.
 - ii. Attendance and completion of training provided by CDE on IEP transfer provisions. This training will address, at a minimum, the requirements of 34 C.F.R. § 300.323 and the related concerns noted in this decision. Special Education Director 2 and CDE Special Education Monitoring and Technical Assistance Consultant will determine the time, date, and format of the training. This training may be conducted in person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast. This training is mandatory for Special Education Teacher 2, Online School's Director of Special Education, Special Education Director 2 and any other special education staff at Online School who are involved in the review of IEPs for transfer students. Such training shall be completed no later than **Monday, August 29, 2022**.
 - iii. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to CDE no later than **Friday, September 9, 2022**.
- b. 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 2's timely correction of the areas of noncompliance.

2. File Review

- a. Following the required training, Online School and BOCES 2 will cooperate with a student file review by CDE to evaluate whether this area of noncompliance has been addressed and to inform further corrective action and available technical assistance and support from CDE. By **Friday, December 30, 2022**, BOCES 2 shall provide CDE with a complete list of all inter- and intra-state transfer students with IEPs, in all grades (K-12), who enroll in Online School during the first semester of the 2022-2023 school year. For each student, the list must include, at a minimum, a) the student's name, b) the student's grade, c) the student's area(s) of eligibility

at time of enrollment, d) when the parent(s) were consulted regarding the provision of comparable services, and e) the student's area(s) of eligibility, if any, after reevaluation. The list should include students whose reevaluations are still underway.

- b. From this list, by Friday, January 20, 2023, CDE Special Education Monitoring and Technical Assistance Consultant shall randomly select not more than 10 students for a file review. For the selected students, BOCES 2 shall provide CDE with a) the student's incoming IEP, b) documentation of consultation with parents regarding comparable services, for example, phone logs, email correspondence or meeting notes, c) the offer of comparable services and d) the student's IEP, if any, after reevaluation. BOCES 2 will provide requested documentation and access to records and staff as necessary for CDE to complete a thorough and complete review of Online School's transfer process, at CDE direction and request. This review will be completed **no later than February 28, 2023**. CDE will then conduct follow-up and verification activities as necessary.
- c. Based on the results of the review, the CDE will collaborate with BOCES 2 to revise relevant policy, procedure, and practice and to provide technical assistance, professional development, and resources to ensure compliance with IDEA's transfer provisions. Findings of noncompliance identified through the CDE file review must be corrected consistent with 34 C.F.R. § 300.600(e).

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
1560 Broadway, Suite 1100
Denver, CO 80202-5149

NOTE: Failure by BOCES 1 or BOCES 2 to meet any of the timelines set forth above may adversely affect their annual determination under the IDEA and subject BOCES 1 or BOCES 2 to enforcement action by the CDE. **Given the current circumstances surrounding the COVID-19 pandemic, the CDE will work with BOCES 1 and BOCES 2 to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *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 24th day of April, 2022.



Rachel Dore
State Complaints Officer

APPENDIX

Complaint, pages 1-8

- Exhibit 1: IEP, Evaluation Report and Eligibility Determination

Response, pages 1-9

- Exhibit A: IEP
- Exhibit B: Progress Report
- Exhibit C: None
- Exhibit D: Evaluations
- Exhibit E: Board Policy JF
- Exhibit F: Correspondence
- Exhibit G: Correspondence
- Exhibit H: List of Involved Staff
- Exhibit I: Verification of Delivery to Parent
- Exhibit J: Educational Records
- Exhibit K: Recording of Withdrawal from Online School
- Exhibit L: Educational Records

Reply, pages 1-3

Telephone Interviews

- Special Education Teacher 1: March 30, 2022
- Special Education Director 1: March 30, 2022
- Superintendent: March 30, 2022
- Special Education Director 2: March 30, 2022
- Parent: March 31, 2022
- Principal: April 5, 2022
- Special Education Teacher 2: April 6, 2022

CDE Exhibits

- CDE Exhibit 1: Board Policies