

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

State-Level Complaint 2021:506
San Luis Valley BOCES

DECISION

INTRODUCTION

On March 8, 2021, the parent (Parent) 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 San Luis Valley Board of Cooperative Educational Services (BOCES).

Pursuant to 34 C.F.R. § 300.152(c)(1), the Complaint was held in abeyance pending the resolution of a due process complaint, which raised issues identical to those in the Complaint. On April 30, 2021, the due process complaint was dismissed, and the Complaint investigation was reinstated on the same date.

The State Complaints Officer (SCO) determined that the Complaint identified one allegation subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from March 8, 2020 through March 8, 2021 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

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.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to provide an independent educational evaluation (IEE) at public expense without unnecessary delay, or file a due process complaint to show the BOCES' evaluation was appropriate, following Parent's request for an IEE on or about October 2020, in violation of 34 C.F.R. § 300.502(b)(1)-(2).

FINDINGS OF FACT

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

A. Background

1. Student is a sixteen-year-old who was eligible for special education and related services from January 16, 2020 to October 15, 2020 under the disability category traumatic brain injury (TBI). *Exhibit A*, p. 1; *Exhibit B*, pp. 1-3. Student attends a high school (School) in [(District)], a member district of BOCES. *Interviews with Parent and Principal*. He is described as hard-working and polite, and he has many friends. *Id.*
2. Student was found ineligible for special education and related services on October 15, 2020. *Interview with Parent; Complaint*. Parent alleges that BOCES failed to provide an IEE without unnecessary delay after her request on October 15, 2020. *Id.*

B. Student's Reevaluation and Eligibility Determination

3. On August 19, 2020, Parent provided signed consent for a reevaluation (Evaluation 1) of Student in the areas of academic performance and motor abilities. *Interview with Parent; Exhibit D*, pp. 1-3; *Exhibit P*, pp. 1-2. BOCES requested consent for Evaluation 1 due to Student's improvement and progress, including progress in physical therapy. *Interview with Director of Special Education; Exhibit D*, p. 1.
4. Evaluation 1 included an academic performance assessment, the Woodcock-Johnson Tests of Achievement; a physical therapy assessment and evaluation; and health assessments. *Exhibit C*, pp. 1-2.
5. On October 15, 2020, BOCES convened a properly constituted multidisciplinary team (MDT) to discuss the results of Evaluation 1 and determine whether Student continued

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

to be eligible for special education and related services. *Interviews with Parent, Principal, and Director of Special Education; Exhibit B*, pp. 1-3; *Exhibit F*, pp. 4-5.

6. The MDT reviewed the results of Evaluation 1 and found that, based on the available data, Student did not meet the eligibility criteria for TBI. *Exhibit B*, pp. 1-3.

C. Parent's Request for an IEE

7. During the October 15, 2020 meeting, Parent disagreed with Evaluation 1 and requested an IEE. *Interviews with Parent and Principal*. BOCES staff discussed Parent's request but did not provide approval for the IEE at the meeting. *Id.*
8. On October 16, 2020 and October 19, 2020, Parent emailed Principal and Special Education Teacher requesting information on how to obtain an IEE. *Id.*; *Exhibit I*, pp. 1-3.
9. Principal replied on October 20, 2020 that he would coordinate with BOCES regarding Parent's request, but he did not provide information about the IEE process, such as IEE criteria or information about where Parent could obtain an IEE. *Exhibit I*, pp. 3-4. Principal requested that Parent identify the areas of Evaluation 1 with which she disagreed. *Id.*
10. Parent responded the same day, "Please let us know...what BOCES says in regards to the IEE." *Id.* at p. 4. She did not identify areas of disagreement with Evaluation 1. *Id.* Because Parent was unfamiliar with the IEE process, she did not know how to answer Principal's question, and thus, she requested information about the process. *Interview with Parent*.
11. After Principal received Parent's emails, he notified District superintendent (Superintendent) and began forwarding the emails to him. *Exhibit I*, pp. 2-3, 8-9; *Interview with Principal*. Based on discussions with Superintendent, Principal understood that Superintendent was coordinating with BOCES regarding the request. *Id.* However, Superintendent never contacted Director of Special Education regarding Parent's IEE request. *Interview with Director of Special Education*.
12. On November 2, 2020, Parent emailed Principal, Guidance Counselor, and School Nurse once again requesting information regarding the IEE process and the status of her IEE request. *Exhibit I*, p. 7.
13. On the same date, Principal responded to Parent that he was working with BOCES on the request and asked Parent to identify the areas of disagreement with Evaluation 1. *Id.* at pp. 8, 10. Parent replied that it was not necessary for her to identify the areas of disagreement, and she requested information regarding the IEE process. *Id.* at p. 11.

14. On November 11, 2020, Principal emailed Parent, “Regarding the IEE, the BOCES is prepared to move forward with an IEE for [Student] but it would be helpful to know [the] aspects of the prior evaluation with which you disagree. If I don’t hear from you on this before the end of the day Thursday, we will assume that you disagree with the entire evaluation and we will proceed accordingly.” *Id.* at p. 12.
15. Parent responded the same day and requested more information about why it was necessary to identify the areas of disagreement. *Id.* Principal responded on November 12, 2020 explaining that his request was “an effort to be as efficient as possible with the independent evaluator’s time” in completing the IEE. *Id.* at p. 13. He added that if Parent disagreed with all of Evaluation 1, “then we will have the independent [evaluator] conduct each of the assessments done before without limitation. Just let us know what you prefer.” *Id.*
16. Parent did not reply to Principal’s email because she was still uncertain about the IEE process and how to respond to Principal’s request. *Interview with Parent.* Parent waited for BOCES to provide additional information about the IEE process. *Id.* However, no action was taken by the BOCES regarding Parent’s request for an IEE. *Interviews with Parent, Director of Special Education, and Principal.*
17. Parent did not receive any further information or communications from BOCES regarding her IEE request, and thus on December 22, 2020, she emailed Principal to check on the status of the IEE. *Interview with Parent; Exhibit I*, p. 14. Parent shared that she found a private provider (Private Provider) to complete the IEE, and she asked how to proceed with scheduling the evaluation and funding the IEE. *Id.*
18. On December 30, 2020, Principal requested the name of the provider. *Exhibit I*, pp. 15-16. He shared that BOCES would need to work directly with the provider regarding qualifications, coordinating the evaluation, and billing. *Id.*
19. On January 15, 2021, Parent emailed Principal with Private Provider’s contact information, but she received no response from Principal. *Id.* at p. 16. On January 20, 2021, Parent emailed Principal to ask if she had approval to complete the IEE with Private Provider. *Id.* at p. 17.
20. On January 20, 2021, Principal forwarded Private Provider’s contact information to Executive Director of BOCES, who shared it with Director of Special Education. *Id.* at p. 18. This was the first notice Director of Special Education received of Parent’s IEE request. *Interview with Director of Special Education.*
21. Director of Special Education and Principal met on January 25, 2021 to discuss the request and concerns that Private Provider may not be “neutral.” *Interviews with*

Director of Special Education and Principal; Exhibit I, pp. 20-22. Per Director of Special Education, BOCES was willing to fund the evaluation but had no written procedures to guide its response. *Interview with Director of Special Education*.

22. On February 2, 2021, Principal asked Director of Special Education for a list of independent providers to send Parent, and Director of Special Education emailed a list to Principal on February 10, 2021. *Exhibit I*, pp. 24-25.
23. On February 23, 2021, Principal sent Parent the list of evaluators and asked if she would agree to use one of them. *Id.* at p. 30. He stated, “We have not worked with [Private Provider] before, and thus, are not sure that she meets our qualifications and cost criteria...We are proceeding with the IEE process given your request, and as soon as we find a suitable evaluator, we will pay for the evaluation.” *Id.*
24. On February 24, 2021, Parent replied that Private Provider was qualified to complete the IEE. *Id.* at pp 30-31. On February 26, 2021, Principal and Director of Special Education notified Parent that BOCES approved Private Provider to complete the IEE. *Id.* at p. 32. Principal requested that Parent schedule the evaluation and explained that BOCES would work with Private Provider on logistics and billing. *Id.*
25. The SCO finds that BOCES agreed to provide the IEE on February 26, 2021, 135 calendar days after Parent made a request on October 15, 2020. *Id.*; *Interviews with Parent, Director of Special Education, and Principal*.
26. Director of Special Education and Principal acknowledged that BOCES did not timely respond to Parent’s request. *Interview with Director of Special Education and Principal*. The 2020-2021 academic year was the first year that Director of Special Education and Principal served in their respective positions, and Parent’s IEE request was the first that either of them had ever received. *Id.*
27. Director of Special Education and Principal never received any training on how to respond to an IEE request, and BOCES had no written procedures in place regarding the IEE process. *Id.* For example, BOCES did not have any written criteria for the IEE, such as criteria for the evaluation, the provider, or the billing process. *Id.* The only written documentation that Director of Special Education located was the list of IEE providers that was sent to Parent on February 23, 2021. *Id.*
28. Director of Special Education and Principal attribute the delay in BOCES’ provision of the IEE to the lack of procedures. *Id.* Director of Special Education reports that BOCES is currently developing procedures on the IEE process and that BOCES plans to train all relevant BOCES staff prior to the 2021-2022 academic year. *Interview with Director of Special Education*.

D. The IEE and Eligibility Determination

29. The IEE was completed on April 2, 2021, and BOCES received the IEE report on April 6, 2021. *Interviews with Director of Special Education and Principal; Exhibit C*, p. 3. Given the delay in the completion of the IEE and her disagreement with Evaluation 1, Parent also requested a special education evaluation (Evaluation 2) in the areas of academic performance, social emotional status, and health. *Interview with Parent; Exhibit O*, pp. 7-9. Parent provided signed consent for Evaluation 2 on April 26, 2021. *Id.*
30. On May 25, 2021, BOCES convened a properly constituted MDT to review the results of the IEE and Evaluation 2. *Interviews with Parent, Director of Special Education, and Principal; Exhibit O*, pp. 1-2.
31. The MDT reviewed the results of the IEE and Evaluation 2 and found that, based on the available data, Student did not meet the eligibility criteria for Other Health Impairment. *Interviews with Parent and Director of Special Education; Exhibit O*, pp. 1-2.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: The BOCES failed to provide an IEE at public expense without unnecessary delay, or file a due process complaint to show the BOCES' evaluation was appropriate, in violation of 34 C.F.R. § 300.502(b)(1)-(2). The BOCES also failed to provide information about where an IEE may be obtained and the criteria applicable for IEEs, in violation of 34 C.F.R. § 300.502(a)(2).

Parents have a right to seek an IEE at public expense if they disagree with an evaluation conducted by the school district. 34 C.F.R. § 300.502(b)(1). An IEE is an "evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i). After a parent requests an IEE at public expense, the district "must without unnecessary delay, either –(i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria." 34 C.F.R. § 300.502(b)(2).

Additionally, the district "must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations" as set forth in 34 C.F.R. § 300.502(e). 34 C.F.R. § 300.502(a)(2).

A district may ask for a parent's reasons for disagreeing with an assessment, but it may not require, and may not wait for, the statement of reason by parents. 34 C.F.R. § 300.502(b)(4). A district may not impose conditions or timelines on an IEE request. 34 C.F.R. § 300.502(e)(2).

In this case, the SCO finds and concludes that BOCES failed to either provide an IEE without unnecessary delay or file for due process. BOCES reviewed Evaluation 1 at an eligibility meeting on October 15, 2020, and Student was found ineligible for special education and related services. (FF #3-6). Parent timely requested an IEE on October 15, 2020, and she also requested information about the IEE process the following day. (FF #5-8). Principal acknowledged Parent's request via email on October 20, 2020. (FF #9).

In emails from October 2020 through January 2021, Parent repeatedly requested information about the IEE process, but BOCES failed to provide any information or approval to proceed with the IEE. (FF #7-19, 23-25). Instead, BOCES repeatedly asked Parent to identify the areas of Evaluation 1 with which she disagreed, delaying provision of the IEE. While BOCES may ask for the reasons for disagreement with an evaluation, BOCES may not require a parent to provide an explanation and may not unreasonably delay providing the IEE or filing for due process.

BOCES did not provide Parent with IEE criteria or information about where she could obtain an IEE until Principal sent her a list of providers on February 23, 2021, 131 calendar days after she first requested information about the process. (FF #8, 23). BOCES did not agree to provide the IEE until February 26, 2020—135 calendar days after Parent first requested an IEE. (FF #7-25).

Accordingly, the SCO finds and concludes that BOCES' failure to fund an IEE at public expense without unnecessary delay, as well as its failure to provide Parent with IEE criteria and information about where an IEE could be obtained, resulted in procedural IDEA violations. 34 C.F.R. §§ 300.502(b)(2) and 300.502(e); *see also Fullerton Sch. Dist.*, 112 LRP 8549 (SEA CA 1/30/12) (concluding that a district's offer to reevaluate a child was not appropriate and that the only two options were to fund the IEE or file for due process).

A procedural violation results in a denial of FAPE if it "(1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefit." 34 C.F.R. § 300.513(a)(2).

A parent's ability to request an IEE is a powerful procedural safeguard provided by the IDEA. 34 C.F.R. § 300.502. When a parent disagrees with an evaluation conducted by a school district, the ability to request an IEE helps ensure that parents "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 61 (2005)(citing *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)).

Here, Parent requested an IEE on October 15, 2020 because she disagreed with Evaluation 1, and she requested information about the IEE process the following day. (FF #5-8). BOCES did not provide Parent with information about the IEE process until February 23, 2021, and BOCES did not approve the IEE until February 26, 2021—135 calendar days after Parent’s IEE request. (FF #5-8, 23-25). The BOCES’ delay in providing the IEE impeded Parent’s participation in the decision-making process. This is particularly true where a child who had previously been identified as IDEA-eligible is found ineligible for services, and where the parent disagreed with the evaluation upon which the eligibility determination was based. Accordingly, the SCO finds and concludes that this procedural violation resulted in a denial of FAPE because it significantly impeded Parent’s opportunity to participate in the decision-making process.

The SCO also finds and concludes, however, that this procedural violation did not impede Student’s right to a FAPE or cause a deprivation of educational benefit. After the IEE and Evaluation 2 were completed, BOCES convened an MDT to discuss the results. (FF #29-31). Student was found ineligible by the MDT at an eligibility meeting held on May 25, 2021. Accordingly, the SCO finds and concludes that BOCES’ delay in providing an IEE did not impede Student’s right to a FAPE or cause a deprivation of educational benefit, and thus Student is not entitled to compensatory education or other individualized remedies.

Systemic IDEA Violations: This investigation demonstrates violations that are systemic and will likely impact the future provision of services for all children with disabilities in the BOCES if not corrected. 34 C.F.R. § 300.151(b)(2).

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

Here, the SCO finds and concludes that BOCES’ violations are systemic in nature. The BOCES’ delay in providing an IEE and its failure to provide any IEE criteria or information about where an IEE may be obtained stem from a lack of written procedures regarding the IEE process, as well as a lack of training for BOCES staff. (FF #21, 26-28). BOCES had no procedures in place regarding the IEE process, and thus, staff lacked guidance on how to proceed when a request was made. These facts suggest this violation might not be unique to Student. For that reason, the SCO finds and concludes that this violation is systemic.

REMEDIES

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

- a. Failing to provide an IEE at public expense without unnecessary delay, or file a due process complaint to show the BOCES' evaluation was appropriate, in violation of 34 C.F.R. § 300.502(b)(1)-(2);
- b. Failing to provide to parents, upon request for an IEE, information about where an IEE may be obtained, and the agency criteria applicable for IEEs, in violation of 34 C.F.R. § 300.502(a)(2).

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

1. By **August 9, 2021**, BOCES must submit to CDE a proposed corrective action plan (CAP) that effectively addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to reoccur as to Student and all other students with disabilities for whom the BOCES is responsible. The CAP must, at a minimum, provide for the following:
 - a. Director of Special Education, Principal, District Superintendent, and any other BOCES staff responsible for responding to IEE requests must review this Decision in its entirety and the requirements of 34 C.F.R. § 300.502 with BOCES' legal counsel, no later than **August 31, 2021**. In the event that these individuals are no longer employed, the BOCES may substitute individuals in the same roles. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **September 7, 2021**.
 - b. Attendance and completion of a training provided by CDE on responding to IEE requests. This training will address, at a minimum, the concerns noted in this Decision and the requirements of 34 C.F.R. § 300.502. Director of Special Education and CDE Consultant will determine the date, time, and format for this training (i.e., video conference, web conference, webinar, or webcast). The training must be completed by **August 31, 2021**.
 - i. This training is mandatory for Director of Special Education, Principal, District Superintendent, and any other BOCES staff responsible for responding to IEE requests.
 - ii. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to CDE no later than **September 7, 2021**.

- c. By **October 29, 2021**, BOCES must submit written procedures establishing a process for responding to requests for IEEs. Such procedures should detail the BOCES process for responding to IEE requests consistent with 34 C.F.R. § 300.502.

The Department will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the BOCES' timely correction of the areas of noncompliance.

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

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Rebecca O'Malley
1560 Broadway, Suite 1100
Denver, CO 80202-5149

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

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *See*, 34 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Dated this 28th day of June, 2021.



Lindsey Watson
State Complaints Officer

Appendix

Complaint, pages 1-11

- Exhibit 1: Correspondence
- Exhibit 2: Additional correspondence
- Exhibit 3: Letter from speech language pathologist
- Exhibit 4: Recording of May 21, 2021 IEP meeting

Response, pages 1-6

- Exhibit A: IEPs and notes
- Exhibit B: Eligibility determination
- Exhibit C: Evaluations
- Exhibit D: Requests for consent
- Exhibit E: Prior written notices
- Exhibit F: Notices of meeting
- Exhibit G: Grades and progress documents
- Exhibit H: Documentation from Parent
- Exhibit I: Correspondence
- Exhibit M: Verification of delivery
- Exhibit N: List of IEE providers
- Exhibit O: Miscellaneous documentation
- Exhibit P: Signed consent for Evaluation 1

Telephonic Interviews with:

- Principal: June 3, 2021
- Director of Special Education: June 3, 2021 and June 9, 2021
- Parent: June 3, 2021