

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

State-Level Complaint 2022:512
Pikes Peak BOCES

DECISION

INTRODUCTION

On March 22, 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 the Pikes Peak BOCES (“BOCES”). The State Complaints Officer (“SCO”) determined that the Complaint identified two (2) allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), the Colorado Department of Education (“CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from March 22, 2021 through March 22, 2022 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Failed to provide Parent with adequate prior written notice (“PWN”) of the action proposed by BOCES regarding Student’s functional behavioral assessment on or about February 16, 2022, in violation of 34 C.F.R. § 300.503;
2. Evaluated Student without parental consent in or about February 2022, in violation of 34 C.F.R. § 300.300.

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.

FINDINGS OF FACT

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

A. Background

1. Student qualifies for special education and related services under the multiple disabilities category, to include qualifying for an intellectual disability, a speech language impairment, and a visual impairment (blindness). *Exhibit A*, p. 36, 45. Student also has a medical diagnosis of autism spectrum disorder. *Id.* at p. 45.
2. Although Student lives within District boundaries, he attends Separate School, which is operated directly by BOCES. *Id.* at p. 32; *Interview with Director of Special Education*. District is a member of BOCES. *See Exhibit O*, p. 5. BOCES is responsible for providing FAPE to all IDEA-eligible children with disabilities attending a school in its member districts. ECEA Rule 2.02.
3. This investigation concerns the 2021-2022 academic year, when Student was in 10th grade at Separate School. *Exhibit O*, p. 5. During the 2021-2022 academic year, Student received special education services under a May 7, 2021 IEP (“2021 IEP”), which was developed in conjunction with Student’s triannual reevaluation. *Exhibit A*, pp. 3, 32-33.

B. The 2021 IEP

4. The 2021 IEP documented Student’s strengths, preferences, and interests, including that he typically follows direction to transition easily with minimal prompting, and he enjoys being outside if it is not windy or cold. *Id.* at p. 35.
5. The 2021 IEP reviewed Student’s present levels of performance, documenting the results of the reevaluation, as well as detailed observations from teachers and service providers and Student’s progress toward his annual goals. *Id.* at pp. 35-45.
6. Student is non-verbal, and he requires support of a one-to-one paraprofessional throughout the school day for personal safety, to access his school environment, and to support communication, behavioral needs, and completion of self-care and academic needs. *Id.* at pp. 36-37, 45.
7. The Parent/Student Input section reported that his independent skills have “increased somewhat at home, but he continues to need a lot of support.” *Id.* at pp. 45-46.
8. Student’s post-school education/training goal was to attend social skills and work skills training through the local community centered board, and his career employment goal was

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

to volunteer in the community with support from a job coach. *Id.* at p. 46. His independent living skills goal was to live at home and independently participate to the maximum extent possible in daily routines, such as feeding, dressing, hygiene, and selecting leisure activities. *Id.*

9. The 2021 IEP provided that Student qualified for several related services including assistive technology, a health plan, a learning media plan, and special transportation. *Id.* Relevant to this investigation, the special transportation section indicated Student requires curb to curb transportation to Separate School provided by District. *Id.*
10. The 2021 IEP contained annual goals in independent living skills, communication, and vision. *Id.* at pp. 49-52.
11. The 2021 IEP contained accommodations to help Student access the general education curriculum. *Id.* at pp. 52-53. These included monitoring him for safety during ambulation, familiarizing him with new environments/rooms, and access to a quiet environment. *Id.*
12. The 2021 IEP contained modifications to the general education curriculum, including instructing Student consistent with the Extended Evidence Outcomes to the Colorado State Standards. *Id.* at p. 53.
13. The Service Delivery provided for:
 - a. 30 minutes of monthly indirect orientation and mobility services;
 - b. 60 minutes of monthly direct vision services;
 - c. 60 minutes of monthly indirect vision services;
 - d. 120 minutes of monthly direct speech language services;
 - e. 15 minutes of direct monthly indirect speech/language therapy;
 - f. 1,800 minutes of weekly direct specialized instruction;
 - g. 90 minutes of monthly direct occupational therapy; and
 - h. 720 additional minutes of weekly direct specialized instruction (that was only provided until July of 2021).

Id. at p. 56.

14. The IEP Team determined it was appropriate for Student to be placed at a separate school, and in the general education environment three percent of the time. *Id.* at p. 57.

C. The 2021 BIP

15. The 2021 IEP included a Behavior Intervention Plan (“2021 BIP”). *Id.* at pp. 64-67. The 2021 BIP was developed in May of 2021 after a functional behavioral assessment (“FBA”), which

was conducted using formal observations, teacher interviews, data review, and previous school documentation. *Id.* at p. 64.

16. The strength-based profile section documented Student's interests and protective factors, including that he is interested and motivated by audiobooks, being read a story, music, dried fruit, and seeds. *Id.*
17. The 2021 BIP identified target behaviors as self-injurious behavior (hitting and slapping the head and biting), aggression toward others (hitting, kicking, and biting), as well as persistent screaming. *Id.* The 2021 BIP indicated, however, that his behaviors had been significantly reduced, which the IEP Team indicated was due to the environment at Separate School being less overwhelming than his previous learning environment. *Id.*
18. The 2021 BIP identified setting event strategies, such as providing an environment with minimal visual/auditory distractions, establishment of consistent routines, and maintaining close proximity during transitions in the hallway. *Id.* at pp. 64-65.
19. Antecedent strategies included modifying instruction to decrease errors (errorless learning strategy), allowing frequent breaks during difficult/new acquisition target work, and following a predictable schedule (where possible) and reviewing the scheduling with Student. *Id.*
20. The 2021 BIP included behavior teaching strategies such as teaching appropriate ways to make requests (such as for breaks) using a variety of modalities, reducing opportunities to error during the acquisition stage of a skill, and providing access to a reinforcer for using alternate or replacement behavior. *Id.* Reinforcement strategies included that "appropriate" requests be honored with access to the requested item/activity, and a dense schedule of reinforcement for use of replacement behavior to be "thinned as appropriate." *Id.*
21. The 2021 BIP includes a Crisis Intervention Plan. *Id.* at pp. 65-66.
22. The 2021 IEP and 2021 BIP were in effect when classes started for the 2021-2022 academic year in August of 2021. *Interviews with Parent, School Psychologist, and Special Education Teacher.*

D. The 2021-2022 Academic Year (August – January)

23. During the 2021-2022 academic year, Parent reports that Student's "outbursts" and target behaviors increased in frequency compared to the previous year. *Interview with Parent; Exhibit M*, p. 13. Specifically, Parent references Student's daily communication log, and reports that the log details more frequent behavioral incidents requiring an intervention than last year. *Interview with Parent; see Exhibit K*, pp. 1-106.

24. Special Education Teacher, Student's primary instructor, reports that over the course of the 2021-2022 academic year, Student has shown growth behaviorally in his desire to be part of activities and interact with peers, although there are frequent behaviors that require a behavioral intervention. *Interview with Special Education Teacher*. Special Education Teacher attributes Parent's concerns about Student's behavioral incidents increasing to the implementation of the daily communication log. *Id.*

The Daily Communication Log

25. During the 2021-2022 academic year, Student's behavior was tracked using a daily communication log, which is shared with Parent daily. *Interviews with Special Education Teacher and Parent; see Exhibit K*, pp. 1-106. Although behavior was also tracked the previous year, the daily communication log used during the 2021-2022 academic year was "upgraded" from the previous year to include more detailed information. *Interview with Special Education Teacher*. This year, Parent was also informed of Student's behavior through standing weekly phone calls with BOCES staff. *Interview with Parent*.

26. Throughout the day, Student's support paraprofessionals log behavioral observations on a clipboard which contains data sheets designed to track behavior. *Interview with Special Education Teacher*. These data sheets break the day at Separate School into ten blocks, starting with "Breakfast" from 8:00 – 9:00 a.m., and ending with "Pack Up" from 3:00 - 3:30 p.m. *See, e.g., Exhibit K*, p. 3. At the end of each day, Special Education Teacher reviews the data sheets and sends them to Parent. *Interview with Special Education Teacher*.

27. During each of the ten blocks throughout the day, staff detail the activity Student participated in, his behavior during the activity, and any comments. *Id.; see, e.g., Exhibit K*, p. 3. Staff are expected to record target behaviors (to include ear folding, which while not self-injurious, can sometimes be a sign that Student is becoming dysregulated), the duration of the behavior, the staff involved, and the outcome of the activity. *Interviews with Special Education Teacher and Parent*.

28. Special Education Teacher reports that the daily communication log is much more detailed than the communication log used the previous year and that the increased detail may have given Parent the impression that this year was much worse for Student in terms of behavior. *Interview with Special Education Teacher*. Although there have been more observations of self-injurious behavior over the course of the year, there have otherwise been no observations of new behaviors and/or concerning behavior trends, and Special Education Teacher indicates he has been making progress behaviorally over the year. *Id.*

Transportation Concerns

29. Parent, concerned at the number of behavioral incidents detailed in the daily communication log, indicated that Student's behavior might be caused by environmental concerns on the bus

because of disruptions by other riders (the “Bus Environment”). *Interviews with Special Education Teacher, School Psychologist, and Parent.*

30. Last year, Student rode the bus alone to and from Separate School, but during the 2021-2022 academic year, he no longer rode the bus alone. *Interview with Parent.* Parent would sometimes observe loud noises when Parent helped get Student on and off the bus. *Id.* Student is sensitive to loud noises, so Parent became concerned that Student’s behavior at Separate School might be related to the Bus Environment. *Id.*
31. In February of 2022, Parent expressed concerns about transportation to BOCES, and asked to have Student’s annual IEP review, which was scheduled for May of 2022, moved up. *Interviews with Parent, Director of Special Education, School Psychologist, and Special Education Teacher; Exhibit E, p. 2.* BOCES scheduled an IEP meeting for February 16, 2022 to discuss Parent’s concerns, and agreed to move Student’s annual IEP review meeting to March of 2022. *Exhibit E, pp. 2, 4; Exhibit M, pp. 13-17; Interviews with Director of Special Education and School Psychologist.*

E. The February 16, 2022 IEP Meeting

32. At the IEP meeting, Parent expressed concerns that the Bus Environment was negatively affecting Student, and that this might be carrying over into the classroom and causing behavioral issues. *Interviews with Parent, School Psychologist, and Special Education Teacher; Exhibit M, p. 13.* Parent asked if Student could ride the bus without any other students, indicating Student was happy in previous years when he could ride the bus alone. *Interview with Parent; Exhibit M, p. 13.*
33. BOCES had access to District transportation logs, and on review, discovered no behavioral concerns documented aside from Student “fussing” when being buckled. *Exhibit M, p. 13.* The BOCES members of the IEP Team, to include Special Education Teacher, disagreed that there was evidence to suggest the Bus Environment negatively impacted Student or otherwise show a connection between Student’s behavior during the day at Separate School and the Bus Environment. *Interviews with Special Education Teacher and School Psychologist.*
34. Although the BOCES members of the IEP Team did not agree that there was evidence to suggest Bus Environment presented an issue for Student, the IEP Team discussed several ways to address Parent’s concerns, such as providing Student with headphones, playing music on the bus, and reimbursing Parent to transport Student in a separate vehicle. *Exhibit M, p. 13.* These options were rejected, however, because Student does not tolerate headphones, playing music on the bus could cause a disturbance, and Parent was unable to transport Student. *Id.*
35. Parent asked if the IEP Team could reconsider if there was more information about Student’s bus ride to support her concerns, so the IEP Team agreed to have a staff member ride the bus

with Student to observe. *Interviews with School Psychologist and Special Education Teacher; Exhibit M*, pp. 13, 15.

36. Parent's educational advocate suggested a variety of staff people be used to observe rather than a single staff member, so the IEP Team determined that four different staff members would each sit with Student during a bus ride and observe Student and the Bus Environment. *Exhibit M*, pp. 13, 15. Results of the observations were to be discussed at the upcoming annual IEP review meeting. *Exhibit E*, p. 4.

F. The Bus Observations

37. The bus ride from Student's home to Separate School is approximately ten to fifteen minutes long. *Interviews with Parent, School Psychologist, and Special Education Teacher*. Staff rode the bus with Student on three days – March 1, 2022 (morning and afternoon), March 2, 2022 (morning), and March 3, 2022 (morning and afternoon). *Exhibit N*, pp. 3, 11.

38. During each ride, the staff person would observe Student and the Bus Environment and document hits (i.e., hitting the window or ceiling of the bus), vocalizations, self-injurious behavior, and ear folds. *See Exhibit N*, pp. 2-20. The staff person also noted other noises or events that might impact Student on the bus, and there was a space in the log to describe other behaviors of concern. *Id.* Parent was also asked to observe Student for thirty minutes prior to the bus ride and note his mood and any self-injurious behavior or vocalizations, as well as whether anything was off with Student's usual morning routine. *See, e.g., Id.* at p. 9.

39. The results of the observations were as follows:

- a. March 1, 2022 (morning): The observer did not note anything of significance about the Bus Environment in the morning. *Id.* at p. 3. A total of five vocalizations and one instance of ear folding were observed from Student. *Id.* Two of the vocalizations occurred when Student was getting on to the bus with Parent's assistance. *Id.* The other three occurred between 8:05 a.m. and 8:10 a.m. *Id.* Parent observed one vocalization before Student got on the bus, but his mood was good, and there was nothing out of his usual routine. *Id.* at p. 9.
- b. March 1, 2022 (afternoon): The observer did not note anything of significance about the Bus Environment in the afternoon, although the observer noted there was a continuous squeak on the bus while it was in motion. *Id.* A total of seventeen vocalizations and one ear fold were observed for Student. *Id.* at p. 3. A cluster of vocalizations occurred around 3:40 p.m. and most (fourteen) of the vocalizations occurred between 3:55 p.m. and 4:00 p.m. *Id.*
- c. March 2, 2022 (morning): Two instances of giggling were observed from a student as the bus approached Separate School. *Id.* There was also one instance of that student

- tapping the bus seat in front of him. *Id.* Student was folding his ear before and after this tap. *Id.* One vocalization was observed from Student as he walked onto the bus. *Id.* The observer noted Student appeared to be asleep during the drive, as he rested his head against the window for most of the ride. *Id.* The observer noted an increase in road noise as the bus accelerated onto the highway. *Id.* Parent observed one vocalization before Student got on the bus, but his mood was good, and there was nothing out of his usual routine. *Id.* at p. 13.
- d. March 3, 2022 (morning): The observer did not note anything of significance about the Bus Environment in the morning. *Id.* at p. 3. There were three vocalizations and three ear folds observed for Student. *Id.* at p. 5. The vocalizations were described as having a “low tone” and being “soft” in nature. *Id.* These occurred at the beginning of the ride (7:50 a.m.) and two of each between 8:00 a.m. and 8:05 a.m. *Id.* Parent did not observe anything concerning before the bus ride to include anything out of Student’s usual routine and indicated his mood was good prior to getting on the bus. *Id.* at p. 17.
- e. March 3, 2022 (afternoon): The observer did not anything of significance about the Bus Environment in the afternoon. *Id.* at p. 5. There was one vocalization observed for Student in the afternoon around 3:45 p.m. *Id.* Student was also observed to do some swaying during the bus ride. *Id.*

G. The March 8, 2022 IEP Meeting

40. On March 8, 2022, a properly constituted IEP Team met to discuss the results of the bus observations, review the 2021 IEP, and develop a new IEP (“2022 IEP”). *Exhibit E*, pp. 4-5.
41. During discussions about Student’s present levels of functioning, the IEP Team reviewed the bus observations and determined they did not demonstrate concerns. *Response*, p. 3; *Interviews with Special Education Teacher and School Psychologist*. Parent, however, remained concerned about transportation, and renewed her request for Student to be transported alone. *Interview with Parent; Response*, p. 3. Parent expressed doubt that the results of the observations were valid because it was apparent there was someone on the bus observing. *Interview with Parent*.
42. The IEP Team suggested putting a paraprofessional on the bus with Student to address Parent’s concerns. *Exhibit O*, p. 31; *Interviews with School Psychologist and Special Education Teacher*. Parent, however, did not want a paraprofessional on the bus because Student does not like to be around a lot of people, and she thought the addition of more people and noise would not be helpful. *Interview with Parent; Exhibit O*, p. 31.
43. Parent’s educational advocate suggested putting a paraprofessional on the bus temporarily to gather more data about the bus ride. *Exhibit O*, p. 31. The IEP Team agreed to put a

paraprofessional on the bus to obtain more observations of Student, and continued the IEP meeting to March 17, 2022. *Id.* at pp. 31-32.

44. On March 17, 2022, the IEP Team met again, however the meeting had to be rescheduled for April 7, 2022, because Parent's educational advocate was not present. *Id.* at p. 32.

H. The April 7, 2022 IEP Meeting

45. On April 7, 2022, a properly constituted IEP Team met to continue discussions regarding Parent's transportation concerns and complete development of the 2022 IEP. *Id.*
46. Between March 8, 2022 and the April 7, 2022 IEP meeting, a paraprofessional rode the bus to observe Student, tracking the same type of information as was collected during the March bus observations. *Exhibit O*, pp. 32-33, 37-45.
47. At the April 7, 2022 IEP meeting, during discussions about Student's present levels, the IEP Team reviewed the bus observations and determined they did not demonstrate that the Bus Environment impacted Student. *Id.* at p. 33. Parent requested that the paraprofessional not ride the bus with Student going forward, and the BOCES members of the IEP Team agreed to her request. *Id.* Details of the bus observations were recorded in the 2022 IEP's Present Levels of Functional Performance section, along with other observations from teacher and service providers and information on Student's progress toward annual goals. *Id.* at p. 13.
48. The IEP Team finished developing the 2022 IEP, determining no behavioral support changes were necessary to the 2021 BIP, although Student's classroom support was changed so he would have 2:1 support from paraprofessionals throughout the day to ensure safety and address his unique combination of needs. *Exhibit O*, pp. 33, 57.
49. On April 8, 2022, BOCES issued PWN to Parent. *Id.* at p. 57. The PWN indicated there was a discussion at the April 7, 2022 IEP meeting about conducting an FBA to analyze Student's behavior on the bus, but the IEP Team, including Parent, agreed this was not necessary as there was no new perceived function of behavior and no discipline incidents that would indicate a need for further assessment. *Id.*
50. The PWN indicated the IEP Team suggested adding a paraprofessional to the bus ride, but that this was rejected because Parent voiced "significant concerns" about the presence of an additional person on the route. *Id.* The PWN further reflected Parent's request for private transportation but indicated that the request was rejected because the data did not demonstrate that the Bus Environment impacted Student during the day. *Id.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: BOCES was not required to provide Parent with PWN because it did not propose or refuse to initiate or change the provision of FAPE to Student on or about February 16, 2022, consistent with 34 C.F.R. § 300.503.

In her Complaint, Parent alleges that BOCES failed to provide adequate PWN regarding the IEP Team's decision to conduct the March 1, 2, and 3 bus observations following the IEP meeting on February 16, 2022.

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

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

34 C.F.R. § 300.503(a).

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

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

At the February 16, 2022 IEP meeting, the IEP Team discussed Parent's transportation concerns, but did not otherwise amend the 2021 IEP or change the provision of FAPE for Student. (FF #s 32-36). The BOCES members of the IEP Team disagreed that there was data to demonstrate that Bus Environment was impacting Student or to suggest a need for a formal assessment, such as an

FBA. (FF #s 33-34). Nevertheless, to address Parent's concerns, the IEP Team agreed to conduct observations to obtain more data about Student during the bus ride, and postponed final discussions regarding transportation to Student's annual IEP review meeting, which was moved up from May to March of 2022 at Parent's request. (FF #s 31, 35-36).

At the April 7, 2022 annual IEP review meeting, the IEP Team reviewed the data obtained through the March bus observations, and ultimately decided the data did not demonstrate that Bus Environment impacted Student. (FF # 47). For this reason, the IEP Team determined an FBA was not necessary to determine if there was a need for alternate transportation. (FF #s 47, 49).

Again, the IDEA requires BOCES to issue PWN a reasonable time before the IEP Team proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a).

At the February 16 IEP meeting, BOCES did not propose or refuse to evaluate Student or change the provision of FAPE to Student. (FF #s 32-36). Indeed, no changes were made to the 2021 IEP at the February 16, 2022 IEP meeting, and no formal assessments were ordered. *See id.* Instead, discussions regarding the possibility of an FBA to determine if private transportation was necessary were postponed to Student's annual IEP review meeting, to provide time for BOCES to collect more data through the bus observations at Parent's request. (FF #s 35-36). For these reasons, the SCO finds and concludes that BOCES was not required to provide Parent with PWN following the February 16, 2022 IEP meeting, consistent with 34 C.F.R. § 300.503.

At the April 7, 2022 IEP meeting, the IEP Team reviewed the results of the bus observations, and determined the data did not demonstrate a need for an FBA. (FF # 47). The IEP Team proposed to have a paraprofessional ride the bus with Student but agreed not to do so upon Parent's request. *Id.* In doing so, the IEP Team refused to initiate an evaluation of Student, and proposed a change to the provision of FAPE to Student through the addition of the paraprofessional on the bus, triggering BOCES' responsibility to provide Parent with PWN. *See id.*

On April 8, 2022, BOCES provided Parent with PWN, explaining the IEP Team's refusal to conduct an FBA, and addressing BOCES' proposal to have a paraprofessional ride the bus with Student. (FF #s 49-50). The PWN contained the content required under IDEA. *See id.* BOCES also timely provided Parent with the PWN on April 8, 2022. (FF # 49). For these reasons, the SCO finds and concludes that BOCES properly provided Parent with adequate PWN of its refusal to reevaluate Student or provide alternate transportation on April 8, 2022, consistent with 34 C.F.R. § 300.503.

Conclusion to Allegation No. 2: BOCES was not required to obtain parent consent in or about February 2022 because BOCES did not evaluate or reevaluate Student, consistent with 34 C.F.R. § 300.300.

In her Complaint, Parent alleges that BOCES failed to request parental consent prior to conducting the March 1, 2, and 3 bus observations, in violation of 34 C.F.R. § 300.300.

The IDEA requires parents to provide informed consent before a school district performs evaluations or reevaluations pursuant to developing an IEP. 34 C.F.R. § 300.300(c)(1)(i). “Evaluation” refers to the procedures used to determine whether a child has a disability and the nature and extent of the special education and related services the child needs. 34 C.F.R. § 300.15. A school district must ensure that a reevaluation of each child with a disability is conducted if the school district determines that the educational or related services needs, including improved academic achievement and functional performance of the child, warrant reevaluation; or the child’s parent or teacher requests a reevaluation. 34 C.F.R. § 300.303. Reevaluations must occur at least once every three years and not more than once a year unless the school district and parent agree otherwise. *Id.*

However, parental consent is not required before a school district reviews existing data as part of an evaluation or a reevaluation or administers a test or other evaluation that is given to all children unless, before administration of that test or evaluation, consent is required of all children. 34 C.F.R. § 300.300(d)(1).

In February of 2022, Parent expressed concern that the Bus Environment negatively impacted Student, and in response BOCES quickly scheduled an IEP meeting for February 16, 2022. (FF # 31). At the meeting, the BOCES members of the IEP Team disagreed that there was reason to suggest Student was being impacted by the Bus Environment but agreed to conduct bus observations to see if there was any data to support Parent’s concerns and demonstrate a need for a formal assessment. (FF #s 33-36).

On March 1, 2, and 3, BOCES staff rode the bus with Student to track behavior. (FF #s 38-40). Staff also documented other events that might impact Student, such as noise on the bus. (FF # 39). The observations were documented on a data sheet like those used for Student’s daily communication log, for later review by the IEP Team. *See* (FF #s 25-27, 36-39).

On March 8, 2022, when the IEP Team reviewed the bus observations and determined they did not show the Bus Environment impacted Student, BOCES agreed to conduct additional bus observations in late March and early April at Parent’s request. (FF # 43). These additional observations were the same in form as those March 1, 2, and 3, and were likewise for the purpose of determining if there was data to support Parent’s concerns and a need for an FBA. (FF # 46).

On April 7, 2022, at Student’s annual IEP review meeting, the results of the observations were discussed and documented in the 2021 IEP during a review of Student’s present levels along with other observations from Student’s teachers and service providers. (FF # 47). The IEP Team determined the data from the bus observations did not demonstrate a need for a formal assessment because the data did not suggest the Bus Environment was impacting Student. *Id.* The IEP Team, including Parent, agreed that an FBA was not necessary, and no changes were made to the 2021 BIP (although Student’s classroom support increased from 1:1 to 2:1 to assist with safety and address his unique combination of needs). (FF # 48).

Student's most recent reevaluation had occurred in May of 2021 in conjunction with the development of the 2021 IEP. (FF # 3). Student was accordingly not due for a triannual reevaluation until May of 2024. *See id.* Nevertheless, BOCES agreed to collect the bus observations to explore Parent's concerns and determine if additional data was needed in advance of Student's annual IEP review, which was moved up at Parent's request. (FF #s 31, 35-36). These bus observations supplemented the information that was already being tracked about Student's behavior through the daily communication logs. *See* (FF #s 25-27, 38-39).

For these reasons, the SCO finds and concludes that the March 1, 2, and 3 bus observations (and the additional bus observations in March and April) were not an IDEA evaluation or reevaluation because they were not conducted for the purpose of determining whether Student continued to qualify for special education and related services and the extent of the special education and related services Student needs. *See Letter to Gallo*, 61 IDELR 173 (OSEP 2013) (ruling that a teacher must obtain parental consent before gathering academic functional assessment data during RTI if the data is being collected to determine whether a specific student has, or continues to have a disability, and to determine the student's special education needs), *Letter to Olex*, 74 IDELR 22 (OSEP 2019) (ruling that school districts do not need to obtain parental consent before conducting postsecondary transition assessments), *Letter to Anonymous*, 48 IDELR 136, 107 LRP 45732 (OSEP 2007) (ruling that a district does not need to obtain parental consent before reviewing existing data to determine if additional data about a student is necessary); *Cf. Timothy O. v. Paso Robles Unified Sch. Dist.*, 116 LRP 21676 (9th Cir., 2016) (holding causal observation of a student to determine eligibility was insufficient to qualify as an evaluation under IDEA).

For these reasons, the SCO finds and concludes that BOCES was not required to obtain parental consent prior to conducting the March and April bus observations, consistent with 34 C.F.R. § 300.300.

REMEDIES

The SCO concludes that BOCES did not violate the requirements of IDEA as alleged in the Complaint. Accordingly, no remedies are ordered.

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 21st day of May, 2022.



Ross Meyers
State Complaints Officer

APPENDIX

Complaint, pages 1-8

- Exhibit 1: Correspondence, BIP, and Selected Communication Logs
- Exhibit 2: Correspondence, Health Plan, NOMs, IEP

Response, pages 1-7

- Exhibit A: 2021 IEP/BIP
- Exhibit B: none
- Exhibit C: none
- Exhibit D: Parental Consent
- Exhibit E: NOMs
- Exhibit F: Policies and Procedures
- Exhibit G: Correspondence
- Exhibit H: Contact List
- Exhibit I: District Calendar
- Exhibit J: Consent for Electronic Communication
- Exhibit K: Daily Communication Logs
- Exhibit L: Class Dojo Messages
- Exhibit M: Meeting Notes
- Exhibit N: Bus Observation Records
- Exhibit O: 2022 IEP/BIP

Telephone Interviews

- Director of Special Education: April 25, 2022
- Parent: May 3, 2022
- School Psychologist: April 25, 2022
- Special Education Teacher: April 27, 2022