

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

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**State-Level Complaint 2012: 511**  
**South Central BOCES**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was properly filed on November 5, 2012, by the parent of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup>

To comply with the federal privacy laws (i.e., Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA))<sup>2</sup> and to protect the anonymity of the complainants and their child, the persons and locations identified in this complaint investigation and decision will be redacted prior to publication and labeled as follows:

[Parent] (Parent);  
[Student] (Student);  
Student's age of [Age] (Age);  
[School District] (School District);  
[School] (School);  
South Central BOCES (BOCES);  
[BOCES Special Education Director] (BOCES Special Education Director);  
[General Education Teacher] (General Education Teacher);  
[Special Education Teacher One] (Special Education Teacher One);  
[Special Education Teacher Two] (Special Education Teacher Two);  
[Paraprofessional One] (Paraprofessional One);  
[Paraprofessional Two] (Paraprofessional Two);  
[Former Paraprofessional] (Former Paraprofessional);  
[Speech Language Pathologist] (Speech Language Pathologist); and  
[School Psychologist] (School Psychologist).

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

<sup>2</sup> FERPA, codified at 20 U.S.C. § 1232g, was enacted to protect a parent's access to education records and to protect the privacy rights of students and their parents. The IDEA regulations are found at 34 CFR § 300.1, *et seq.*

Based on the written Complaint, the State Complaints Officer (SCO)<sup>3</sup> determined that the Complaint identified two 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.<sup>4</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

### **PARENT'S COMPLAINT ALLEGATIONS**

Parent's Complaint contained two allegations, summarized as follows:

1. Contrary to the IEP and Student's educational needs, since September 24, 2012, the BOCES has:
  - a. Failed to ensure that Student is supplied with a dedicated one-to-one paraprofessional at all times (i.e., the assigned paraprofessionals are working with other students during the time they are supposed to be working exclusively with Student); and
  - b. Assigned different paraprofessionals on various dates and times which is contrary to Student's need for consistency.
2. Since April 2012, the BOCES has failed to conduct a functional behavioral assessment (FBA) in order to identify triggers to behaviors which interfere with Student's learning (i.e., slapping [him/herself] on both ears and rocking excessively in [Student's] chair).

**Summary of Proposed Remedies.** Parent proposed that the BOCES resolve this dispute by reassigning Student's original one-to-one paraprofessional to work with [Student] or hire a new permanent paraprofessional, and conduct a functional behavioral assessment.

### **SUMMARY OF BOCES' RESPONSE**

Denying allegation one, the BOCES asserted that Student has been provided services in accordance with [Student's] current IEP, including a one-to-one paraprofessional for 4.6 hours per day for integrated support in the general education classroom. As evidence that it has complied with Student's IEP, the BOCES submitted service logs and attendance records for the relevant dates. Concerning Parent's allegation that Student requires a specific or dedicated paraprofessional, the BOCES asserted that Student's IEP does not require that a specific individual or a dedicated paraprofessional be assigned to Student to provide paraprofessional

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<sup>3</sup> This Complaint was initially assigned to Jeanine Pow. On November 28, 2012, Candace Hawkins was assigned to complete the investigation.

<sup>4</sup> Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

services. Further, the BOCES argued that Student's special education teachers may provide the paraprofessional services identified on Student's IEP, and have done so.

Denying allegation two, the BOCES asserted that Parent did not request a functional behavior assessment at any time during the 2011-2012 school year, and that it responded to Parent's September 4, 2012 request for a functional behavior assessment by convening an IEP meeting on October 8, 2012, to discuss her concerns about Student's behavior. According to the BOCES, Student's IEP team discussed whether a functional behavioral assessment was necessary and determined that a new assessment was not necessary based on the applicability of Student's prior behavioral intervention plan. As evidence that it has addressed Student's behavior, the BOCES submitted Student's October 2012 IEP Amendment, including the behavioral intervention plan.

### **SUMMARY OF PARENT'S REPLY**

Regarding allegation one, Parent asserted that special education teachers are not providing one-to-one paraprofessional services because they have simultaneous responsibilities to other students.

Regarding allegation two, Parent conceded that she did not pursue a functional behavioral assessment in April of 2012 because she believed Student's behaviors may be related to medication [Student] was taking and wanted to give Student more time to adjust. She denied, however, that she was in agreement at Student's October 8, 2012 IEP meeting that a new functional behavioral assessment was not needed. In support of her assertion, Parent argued that she would not have filed this Complaint if she had agreed that Student did not need a functional behavior assessment.

### **FINDINGS OF FACT (FF)**

After thorough and careful analysis of the entire Record,<sup>5</sup> the SCO makes the following FINDINGS:

#### **Factual Background.**

1. Student is [age] years old and lives with Parent within the boundaries of the School District, a member district of the BOCES. At all times relevant to the Complaint, Student attended School. Student is eligible for special education and related services as a child with autism.

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<sup>5</sup> Appendix A, attached and incorporated by reference, details the entire Record.

## Paraprofessional Services.

2. For the last four school years, Student's IEP teams have consistently determined that [Student] requires one-to-one paraprofessional support to receive a free appropriate public education.<sup>6</sup> During the 2010-2011 and 2011-2012 school years, Student's IEP required one-to-one paraprofessional support during all classes and at lunch. Although not required by the IEP, the same paraprofessional, Former Paraprofessional, was assigned to work with Student throughout these two previous school years.<sup>7</sup> Former Paraprofessional's employment with the School District ended unexpectedly on September 24, 2012.<sup>8</sup>

3. Parent has alleged that Student has not received one-to-one paraprofessional services since September 24, 2012, because the individuals now assigned to work with Student are simultaneously assigned to work with other students. For the reasons explained below, the SCO finds it more likely than not that Student has been provided one-to-one paraprofessional services in accordance with [Student's] IEP.

4. Student's IEP provides that [Student] is to receive 18.4 hours per week of one-to-one paraprofessional services to support integrated services in the general education classroom.<sup>9</sup> Since September 24, 2012, Student has had a one-to-one paraprofessional assigned to [Student] during all four of [Student's] general education classes and lunch, for a total of four hours and 42 minutes of one-to-one paraprofessional support per day, or twenty-three hours and thirty minutes per week.<sup>10</sup>

5. On November 15, 2012, Paraprofessional One was permanently assigned to work as Student's dedicated one-to-one paraprofessional for the entire school day, including Student's special education classes, even though one-to-one support is not required by the current IEP.

6. Further, the staff assigned to work one-to-one with Student in [Student's] general education classes did not have simultaneous responsibilities to other students. In making this finding, the SCO compared service logs, attendance records, Student's class schedule, and conducted interviews with various School and BOCES staff, including Special Education Teacher One, Special Education Teacher Two, General Education Teacher, Paraprofessional One, Paraprofessional Two, and Speech Language Pathologist. Although there were a few minor inconsistencies between the interviews and the records provided, all individuals interviewed consistently and credibly stated that Student has been provided with one-to-one support during general education classes because [Student] could not possibly participate or remain in

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<sup>6</sup> Interviews with Parent, Speech Language Pathologist, and Special Education Director.

<sup>7</sup> Exhibit 1; Interview with Special Education Director.

<sup>8</sup> Response, p. 1.

<sup>9</sup> Exhibit 2, p. 3.

<sup>10</sup> Exhibit 2, p 3; Exhibit 11, p.1; Exhibit 3b; Interviews with Special Education Director, General Education Teacher; Paraprofessional One, Paraprofessional Two, Special Education Teacher One, and Special Education Teacher Two. Student's general education classes are world geography, physical education, wood design, and computers and are each 61 or 62 minutes in length. Exhibit 11; Exhibit 3b; Interview with Special Education Director.

these classes without such support.<sup>11</sup> Since Student's IEP does not require one-to-one paraprofessional support in [Student's] special education classes, the SCO need not address whether Student received one-to-one paraprofessional support during [Student's] special education classes. Consequently, the SCO finds that Student has been provided the one-to-one paraprofessional services required by [Student's] IEP.

7. Parent has also alleged that the assignment of different paraprofessionals, rather than the assignment of one paraprofessional dedicated to working with Student throughout the school day, is contrary to Student's need for consistency. For the reasons explained below, the SCO finds that the assignment of different individuals to provide paraprofessional services does not violate Student's IEP or [Student's] educational needs.

8. Although Student's IEP states that Student has progressed because of the "consistent determination and caring" of the one-to-one paraprofessional who had been assigned for the previous two school years, the IEP does not require that Student have a specific paraprofessional or that [Student] be assigned the same paraprofessional throughout the entire day for consistency or any other purpose. And while Student did not have the same paraprofessional assigned each day, the different individuals who were regularly assigned to work with [Student] were small in number and familiar to [Student].<sup>12</sup> For example, Special Education Teacher One regularly provided paraprofessional support during two of Student's general education classes and also had Student in one of his special education classes.<sup>13</sup> In addition, Paraprofessional One and Paraprofessional Two were the two staff primarily assigned to work with Student during this time.<sup>14</sup> Importantly, Student's teachers, paraprofessionals, and Speech Language Pathologist all reported that Student typically responded positively to direction and redirection from a variety of individuals.<sup>15</sup>

9. Finally, best practices for a student with autism would include the incorporation of different paraprofessionals and teachers into a student's schedule to promote independence and generalization of skills across people and settings. It is consistency in programming, schedule, routine, and classroom structure that is critical for a student with autism. In other words, as long as the student's program is consistent, the people can and should change because a student working with the same paraprofessional all day, every day, may become dependent on that individual. Because Student is at the age where [Student] is preparing to

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<sup>11</sup> Exhibit 2; Exhibit 11, p.1; Exhibit 3b; Interviews with Special Education Director, General Education Teacher; Paraprofessional One, Paraprofessional Two, Special Education Teacher One, and Special Education Teacher Two.

<sup>12</sup> Exhibit 3b; Interviews with Special Education Director, Special Education Teacher One, Paraprofessional One, and Paraprofessional Two.

<sup>13</sup> Exhibit 3b; Exhibit 11; Interview with Special Education Teacher One.

<sup>14</sup> Exhibit 3b; Exhibit 11; Interviews with Paraprofessional One, Paraprofessional Two, and Special Education Director.

<sup>15</sup> Interviews with Special Education Teacher One, Special Education Teacher Two, General Education Teacher, Speech Language Pathologist, Paraprofessional One, Paraprofessional Two, and Special Education Director.

transition from the school setting, independence and the ability to generalize skills across settings and people are critical.<sup>16</sup>

### **Parental Request for Functional Behavioral Assessment and October 2012 IEP Meeting.**

10. On September 4, 2012, Parent requested a behavior assessment because she was concerned that Student's self-stimulatory behavior was increasing and [Student] was becoming more aggressive.<sup>17</sup> Because Student had been expelled for an incident of physical aggression in elementary school, Parent wanted the BOCES to conduct a functional behavioral assessment and develop a behavioral intervention plan to address these behaviors before something happened that might require disciplinary action.<sup>18</sup> Student's last evaluation to determine eligibility was conducted in April of 2011.<sup>19</sup> Although Parent initially alleged that she requested a functional behavior assessment as early as April of 2012, she later conceded that she did not discuss her concerns about Student's behavior with Student's IEP team or request a functional behavior assessment until September 4, 2012.<sup>20</sup>

11. In response to Parent's request for a behavioral assessment, School Psychologist and Speech Language called Parent to discuss her concerns.<sup>21</sup> Approximately two weeks later, on or around September 18, 2012, Special Education Director informed Parent that BOCES and School staff would review information about Student's behavior and convene a special request IEP team meeting to determine whether to conduct a functional behavioral assessment and/or develop a behavioral intervention plan.<sup>22</sup>

12. On September 21, 2012, Parent contacted Special Education Director to express concerns that Student's behavior was not improving.<sup>23</sup> In support of her concerns, she provided Special Education Director with two notes from Former Paraprofessional describing changes in Student's behavior, including self-stimulatory behavior Former Paraprofessional had not observed in the previous two years and aggressive conduct towards her and other students.<sup>24</sup> In the past, Student had exhibited self-stimulatory behaviors described as spitting and inappropriate self-touching.<sup>25</sup> The observations recorded by Former Paraprofessional in these notes dated September 17 and September 20, 2012, indicated that Student was exhibiting new self-stimulatory behaviors described as excessive and hard rocking, spinning, throwing [Student's] head back, finger flicking, and laughing uncontrollably. In addition,

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<sup>16</sup> Consultation with Melinda Graham, CDE Consultant on Autism.

<sup>17</sup> Exhibit 4, p. 11.

<sup>18</sup> Interview with Parent.

<sup>19</sup> Exhibit 1, p. 1.

<sup>20</sup> Reply; Interview with Parent.

<sup>21</sup> Response, p. 3; Interviews with Speech Language Pathologist and Parent.

<sup>22</sup> Response, p.3; Interview with Special Education Director and Parent.

<sup>23</sup> Response; Interviews with Special Education Director and Parent.

<sup>24</sup> Response; Exhibit C; Exhibit 6.

<sup>25</sup> Exhibit 13; Exhibit 6; Interview with Parent.

Former Paraprofessional reported that Student had pushed her and two other students, twisted her arm behind her back, and pinched her.<sup>26</sup>

13. On September 24, 2012, Parent again expressed concerns to Special Education Director that Student's behavior had not improved and that a functional behavioral assessment had not yet been conducted.<sup>27</sup> On September 27, 2012, an IEP meeting was scheduled for October 8, 2012, to review existing data, determine the need for a functional behavioral assessment and behavioral intervention plan, and discuss parental concerns.<sup>28</sup>

14. In preparation for this IEP meeting, School Psychologist interviewed Student's teachers, service providers, and paraprofessionals, and conducted a one-hour informal observation of Student during one of [Student's] general education classes.<sup>29</sup> In addition, Special Education Director reviewed the functional behavioral assessment of Student conducted in 2009. No other behavioral assessments, formal or informal, were conducted.

15. On October 8, 2012, a properly constituted IEP team convened to address parental concerns about Student's behavior and Parent's request for a new functional behavioral assessment.<sup>30</sup> During this meeting, Special Education Director discussed and reviewed the behavioral intervention plan that was in place during the 2009-2010 school year to address physical aggression and self-stimulatory behaviors, such as spitting and inappropriate self-touching.<sup>31</sup> In 2009, Student's IEP team had determined that Student exhibited these behaviors when frustrated or to gain positive attention from adults.<sup>32</sup> Because this 2009 plan was successful in addressing these behaviors, Student did not have a behavioral intervention plan in place during the 2010-2011 and 2011-2012 school years.<sup>33</sup>

16. Based primarily on the review of Student's 2009 functional behavioral assessment and behavioral intervention plan, the IEP team determined that a new functional behavioral assessment was not necessary because Student was exhibiting self-stimulatory and aggressive behaviors for the same reasons now as [Student] was in 2009, i.e., to gain the attention of adults or when frustrated. The basis for this assumption is unclear, however, because as noted above, no new behavioral assessments were conducted. In any event, based on this conclusion, Student's IEP team decided to re-implement the 2009 behavioral intervention plan, with modifications to reflect Student's current needs and behaviors, as well as the high school setting, because the previous plan had been successful.<sup>34</sup> In comparing the 2009 and 2012

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<sup>26</sup> Exhibit 6, pp. 6 and 9-10.

<sup>27</sup> Exhibit 4, p. 5-6.

<sup>28</sup> Response, p. 4; Exhibit 7, p. 11.

<sup>29</sup> Response; Interviews with School Psychologist and Special Education Director.

<sup>30</sup> Exhibit 7.

<sup>31</sup> Exhibit 13; Interviews with Special Education Director, Parent, and School Psychologist.

<sup>32</sup> Exhibit 13.

<sup>33</sup> Interviews with Special Education Director, Speech Language Pathologist, and Parent.

<sup>34</sup> Response; Interviews with Special Education Director, Speech Language Pathologist, School Psychologist, and Parent.

behavioral intervention plans, the SCO finds that the changes made involved replacing references to the self-stimulatory behaviors that would be targeted by the plan, i.e., references and strategies related to spitting and inappropriate self-touching were replaced with references to rocking, clapping, loud sound, and fluttering fingers.<sup>35</sup>

17. The 2012 behavioral intervention plan lacks a specific description and hypothesis regarding the physical aggression that Student has exhibited since the beginning of the 2012-2013 school year, as described in FF 24 and 25 below. For example, the 2012 behavioral intervention plan's states that Student "can become physically aggressive when [Student] is frustrated or to gain positive attention from adults."<sup>36</sup> What constitutes physical aggression is not defined or described. Further, the hypothesis that Student may become aggressive when frustrated or to gain attention is vague and does not identify settings or antecedents that are known to frustrate Student. For example, does Student become frustrated during transitions from one class to the next, when given a verbal prompt, when working on a non-preferred task, or when working in a loud environment? The hypothesis or functional behavioral assessment summary statement is too vague to answer these questions and inform meaningful teaching and reinforcement strategies.

18. Further, the behavioral log developed for purposes of monitoring Student's progress following implementation of the behavioral intervention plan is too vague and subjective to accurately document Student's progress and provide insight into the function that the targeted behavior is serving.<sup>37</sup> In its Response, the BOCES' asserted that the communication log would, among other things, provide an "accurate representation and documentation" of Student's self-stimulatory behaviors and "allow for the team to examine any patterns noted with [Student's] behavior in order to more specifically target the interventions that were outlined in the BIP."<sup>38</sup> The behavior log, as written, lacks the specificity to accomplish its stated purpose.

19. First, the behavior log lacks the specificity to accurately and comprehensively document Student's behavior and monitor [Student's] progress. For example, the log asks staff to rate Student's behavior as excellent, average, or overanxious. The first two terms are merely subjective labels that are not objectively defined. And while the term overanxious is partially defined as "more than 50% of the time exhibiting self-stimulating behavior," the specific behavior that constitutes self-stimulatory behavior is itself not described or defined and self-stimulatory behavior that is not occurring at this threshold is not recorded at all.<sup>39</sup> This lack of specificity undermines the reliability and consistency of the data being collected and used to monitor progress or regression in Student's self-stimulatory behavior.

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<sup>35</sup> Exhibit 7; Exhibit 13.

<sup>36</sup> Exhibit 7, p. 5.

<sup>37</sup> Exhibit 8; Interviews with Special Education Director and Parent.

<sup>38</sup> Response, p. 4.

<sup>39</sup> Exhibit 8.



20. Second, the behavior log does not provide reliable or consistent data concerning physical aggression. Physical aggression is listed as a targeted behavior on Student's behavioral intervention plan, but the behavior log does not define or request documentation concerning aggressive or disruptive behavior directed at others. Because staff has documented aggressive conduct toward other students by writing in the notes section or at the bottom of the log, there is evidence that Student is exhibiting aggressive conduct towards others.

21. Most importantly, the behavior log is not designed to collect the kind of information that could reasonably be used to examine and identify the function of Student's behavior. For example, the log does not document the duration of the behavior, the intensity of the behavior, or what happened immediately before and after the behavior.<sup>40</sup> Consequently, the SCO finds that the behavioral logs are not designed to collect the kind of data that would reasonably lend itself to functional understanding of Student's behavior; without such an understanding, behavioral interventions are not likely to be effective in replacing or eliminating the problem behavior. As described directly below, the behavioral intervention plan in place since October 15, 2012, has not decreased the aggressive conduct Student has exhibited towards others.

22. The BOCES has asserted that Parent agreed with the IEP team's decision not to conduct a new functional behavioral assessment. The SCO finds, however, that Parent did not express disagreement at the IEP meeting or shortly thereafter because she expected that the daily behavior logs would be used to collect further behavioral data and that the team would meet again in the next couple of weeks to discuss the results and determine the need for a functional behavioral assessment. When this did not happen, Parent decided to include this allegation in her Complaint, along with the allegations concerning Student's paraprofessional services.<sup>41</sup>

### **Student's behavior for the 2012-2013 school year.**

23. Student has exhibited self-stimulatory behavior that interferes with [Student's] learning and the learning of others. According to the information on the behavior log, Student was overanxious, i.e., exhibiting self-stimulatory behavior for more than 50% of class time, for 36 out of 112 class periods, or for 32% of the time [Student] was in the classroom environment.<sup>42</sup> Although not specifically identified on the behavioral log, the self-stimulatory behaviors expressed by Student are described on [Student's] behavioral intervention plan as excessive rocking, throwing head back, flickering fingers, clapping, and making loud sounds.<sup>43</sup> This is the kind of behavior that would necessarily interfere with Student's learning and with the learning of other students, particularly when it is often exhibited for over half of the class period.<sup>44</sup> Because the behavior log does not document self-stimulatory behavior that occurs for less than

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<sup>40</sup> Exhibit 8.

<sup>41</sup> Interviews with Special Education Director and Parent.

<sup>42</sup> Exhibit 8.

<sup>43</sup> Exhibit 7.

<sup>44</sup> Although BOCES and School staff denied that Student's self-stimulatory behaviors were disruptive in the classroom environment, the SCO finds the documentation and descriptions provided in the record more credible.

50% of the class period, the degree to which Student's behaviors interfere with the learning environment may be significantly under-estimated.

24. In addition to exhibiting self-stimulatory behavior that is disruptive in the classroom setting, Student has exhibited aggressive conduct towards other students and staff. Between August 28, 2012, and September 20, 2012, there were approximately six separate recorded incidents of aggressive conduct directed at others. The following observations and concerns about Student's aggressive behavior were recorded in the communication log that traveled between School and Parent.<sup>45</sup> Most of the entries during this time were recorded by Former Paraprofessional who had worked with Student on a daily basis for two years.

- September 5, 2012: Student grabbed Former Paraprofessional's arm, twisted it back, and pulled her with it. (One incident.)
- September 17, 2012: Student pushed two other students, grabbed Former Paraprofessional's arm and twisted it back, and grabbed and pinched Former Paraprofessional's arm. (Four separate incidents.)
- September 19, 2012: Student pushed and pinched Former Paraprofessional. (One incident.)

25. Between October 15, 2012, the date the behavioral intervention plan was implemented, and November 12, 2012, Student exhibited aggressive conduct directed at others on seven different dates.<sup>46</sup> In contrast to the separate and isolated incidents documented prior to the implementation of the behavioral intervention plan, the aggressive conduct Student exhibited during this period is more continual in nature, as indicated by the following observations:<sup>47</sup>

- October 29, 2012: Student continually bothered another student and would not respond to redirection.
- November 1, 2012: Throughout the day, Student tried to touch other students sitting near [Student] and had to be continually reminded to keep [Student's] hands to [him/herself].
- November 5, 2012: Student kept hitting another Student on the head during one class period and would not leave a student alone in another class period.
- November 6, 2012: During one class period, Student kept getting up to hit a student in the head. During another class period, Student hit a student in the head. Student also hit and tried to pull Paraprofessional One's hair.

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<sup>45</sup> Exhibit 6.

<sup>46</sup> Exhibit 8.

<sup>47</sup> Exhibit 8.

- November 7, 2012: Student kept trying to touch a student's hair.
- November 8, 2012: Student kept trying to hit other students in the head with [Student's] hands.
- November 12, 2012: Student trying to hit other students in the head, touching other students, and screaming.

26. On November 13, 2012, Parent again requested a functional behavioral assessment.<sup>48</sup> The BOCES rejected this request based on a review 2009 behavior assessment, the October 2012 behavior plan, and the behavioral log, which it concluded showed that Student was making progress since implementation of the behavioral plan on October 15, 2012.

27. The SCO disagrees with the BOCES' assertion on this point. As detailed in FF 17-21 above, the behavioral summary lacked the specificity to accurately document whether or not Student made progress. Further, the behavioral summary and the conclusion that Student had made behavioral progress were inconsistent with the information that was documented on the behavioral logs concerning aggressive conduct towards others.<sup>49</sup> The evidence does not support a finding that this is a systemic issue. Rather, the matter is more likely related to the contentious relationship between Parent and the BOCES.

### **CONCLUSIONS OF LAW**

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

**Allegation One: Student has been provided with the one-to-one paraprofessional services required by [Student's] IEP and educational needs.**

1. The definition of a free appropriate public education means special education and related services that "are provided in accordance with an [IEP]." 34 CFR §§ 300.17 and 300.101. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to implement an IEP can result in a denial of FAPE. In this case, Student's IEP provided Student with one-to-one paraprofessional support during all of [Student's] general education courses and lunch. (FF 2-4). Since the unexpected departure of Former Paraprofessional on September 24, 2012, the BOCES has provided Student with one-to-one paraprofessional services in accordance with [Student's] IEP. (FF 2-9). The evidence does not support a conclusion that the individuals assigned to Student as a one-to-one paraprofessional were assigned simultaneous responsibilities to other students. (FF 6). Consequently, the SCO concludes that the BOCES has provided the required one-to-one paraprofessional services.

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<sup>48</sup> Exhibit 9, p. 2.

<sup>49</sup> Comparing Exhibit 6, Exhibit 7, Exhibit 8, and Exhibit 9.

2. Parent has also alleged that the assignment of different paraprofessionals was contrary to Student's IEP and [Student's] educational need for consistency. Although Student received paraprofessional services from Former Paraprofessional for the previous two school years, Student's IEP does not require that paraprofessional services be provided by the same individual for consistency or for any other purpose. (FF 7-8). In fact, Student has typically responded well to direction and redirection from a variety of staff. (FF 8). Further, best practices for a student with autism would include the assignment of various paraprofessionals to promote generalization, across people and settings, and independence. (FF 9). Consequently, the SCO concludes that the assignment of various paraprofessionals was not contrary to Student's IEP or educational needs. Even if the failure to provide Student with the same one-to-one paraprofessional throughout the school day was contrary to Student's educational needs, this allegation was fully remedied on November 15, 2012, when the BOCES permanently assigned Paraprofessional One to provide one-to-one paraprofessional services to Student for all classes, including special education classes. (FF 5).

**Allegation Two: The BOCES failed to conduct a functional behavioral assessment.**

3. Any analysis of the appropriateness of an IEP must begin with the standard established by the United States Supreme Court in *Rowley v. Board of Education*, 458 U.S. 176 (1982), in which the Court set out a two-pronged analysis for determining whether an IEP has offered a FAPE. The first part of the analysis looks to whether the IEP development process complied with the IDEA's procedures; the second looks to whether the resulting IEP was reasonably calculated to confer some educational benefit upon the child. *Id.* at 207; *see also Thompson R2-J School Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008). If those two questions are satisfied in the affirmative, then the IEP is appropriate under the law.

4. Under the first "prong" of *Rowley*, the analysis looks to whether the IEP was developed according to the IDEA's procedures. When a student's IEP is developed in compliance with the IDEA's procedural requirements, *Rowley* holds that a certain degree of deference is to be given to the resulting IEP. "We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206.

5. In this case, the first question is whether the BOCES violated the procedural requirements of the IDEA when it refused to conduct a functional behavioral assessment at parental request. Although not defined by the IDEA, a functional behavioral assessment is generally understood as a tool for examining and identifying the reasons behind inappropriate or disruptive behavior for the purpose of developing an IEP that is tailored to the specific needs of the student. *Harris v. District of Columbia*, 561 F. Supp.2d, 63, 68 (D. D.C. 2008)(concluding that a functional behavioral assessment is an educational evaluation for purposes of 34 CFR § 300.502 because it is essential to evaluating a student's behavioral difficulties and developing

an appropriate IEP.) A functional behavioral assessment typically involves the identification of the target behavior and its antecedents and consequences; the development of a hypothesis about the cause or function of the behavior; the development of interventions to test the hypothesis; and the collection of data concerning the effectiveness of the interventions. *Independent Sch. Dist. No 2310*, 29 IDELR 330 (SEA MN 1998).

6. Under the IDEA and its implementing regulations, an IEP team is only required to conduct or order a functional behavioral assessment in relation to the disciplinary actions specified in 34 CFR § 300.530. That said, an IEP team must evaluate a student in all areas related to the suspected disability, including social and emotional status, if appropriate. 34 CFR § 300.304(b)(4). Consistent with the IDEA's various provisions for the continual review and revision of a student's IEP, the regulations provide that reevaluation shall occur at parental request, provided reevaluation has not occurred more than once a year. 34 CFR § 300.303. Further, in developing and reviewing a student's IEP, the IEP team must also consider the use of "positive behavioral interventions and supports, and other strategies," to address behavior that impedes the learning of the student [him/herself] or the learning of others. 34 CFR § 300.324 (a)(2)(i). While the regulations do not require an IEP team to use a particular tool or assessment, including a functional behavioral assessment, when considering positive behavioral supports, "conducting a functional behavioral assessment typically precedes developing positive behavioral intervention strategies." 71 Fed. Reg. 46683 (Comments to the 2006 federal IDEA regulations).

7. Because the IDEA requires an IEP team to use a variety of assessment tools and does not specifically require the use of a functional behavioral assessment when considering positive behavioral supports, courts have been reluctant to conclude that the failure to conduct a functional behavioral assessment constitutes a procedural violation. See *J.W. v. Unified Sch. Dist. No. 231*, 2012 U.S. Dist. LEXIS 24564 (D. Kans. 2012)(holding that the failure to conduct an FBA as part of a reevaluation did not violate the IDEA because parents did not seek an FBA at the time and the IDEA does not require the use of a single and specific assessment when considering the use of positive behavioral interventions.; *M.N. v. New York City Dept. of Educ.*, 700 F. Supp. 2d 356 (S.D.N.Y 2010)(holding that a failure to conduct an FBA is not necessarily a procedural violation when the IEP provides strategies to address the student's behavior).

8. The facts underlying the cases cited above are distinguishable from those presented here. First, unlike the parents in *J.W.*, Parent has repeatedly requested a functional behavioral assessment based on her concerns that Student's self-stimulatory and aggressive behaviors have increased and are different from the behaviors [Student] has previously exhibited. (FF 10, 12-13, and 26). Student has not had a functional behavioral assessment since 2009 and [Student's] last evaluation for purposes of eligibility was in April of 2011. (FF 10 and 16). Accordingly, Parent's request for a functional behavioral assessment can reasonably be characterized as a request for reevaluation pursuant to 34 CFR § 300.303.

9. Regardless of whether the assessment is called a functional behavioral assessment or a behavioral assessment or a reevaluation, the BOCES was obligated to conduct an appropriate and comprehensive evaluation to assist in determining whether Student's behavior was impeding [Student's] learning and what revisions, if any, should be made to Student's IEP to address this. 34 CFR §§ 300.303-304 and 300.324 (a)(2)(i). In response to Parent's September 2012 request to conduct a behavioral assessment, the BOCES convened an IEP team meeting to discuss Parent's concerns and determine whether a functional behavioral assessment (or other assessment that could yield similar information) was needed. (FF 15). During this meeting, the IEP team reviewed a functional behavioral assessment and behavioral intervention plan from 2009, and heard from School Psychologist, who had interviewed Student's teachers and conducted a one-hour informal observation. (FF 14-15). Based primarily on the review of Student's prior functional behavioral assessment and intervention plan, the BOCES refused to conduct a new functional behavioral assessment. (FF 16). Instead, it re-implemented Student's prior behavioral intervention plan, with very little modification, and started a behavior log that would be used to document and assess Student's progress for the purpose of tailoring appropriate behavioral intervention strategies. (FF 16-17).

10. When Parent again requested a functional behavioral assessment on November 13, 2012, the BOCES denied her request based on documentation from the behavioral log that showed Student was making progress. (FF 26-27). Because the behavioral log lacked the specificity to accurately document Student's behavior, the BOCES did not have reliable documentation to show that Student was making progress. (FF 17-21). Rather, the documentation provided on the behavioral log showed that Student was exhibiting behavior that impeded [Student's] learning and the learning of others. (FF 25). It is hard to imagine that Student's learning was not impeded when [Student] engaged in self-stimulatory behaviors, including excessive rocking, throwing [Student's] head back, and clapping, for over half of a class period during 36 of 112 classes. (FF 23). In addition, the aggressive conduct that Student has exhibited towards others, including hitting, touching hair, and pinching—which appears to be increasing in frequency —necessarily interferes with the learning of others. (FF 24-26).

11. The behavioral log also lacked the specificity and content that would provide the kind of information necessary for developing behavioral interventions targeted to address Student's unique problem behavior. (FF 21). In *M.N.*, the court concluded that the failure to conduct an FBA did not "render the IEP procedurally inadequate" where the school program utilized the ABA methodology, a methodology specifically designed to teach adaptive behavior through positive reinforcement, and parents had not argued that student's behavior impeded [Student's] learning. 700 F. Supp. 2d at 366-67. Here, the 2009 behavioral intervention plan and behavioral log lack the specificity and content necessary to accurately document and address Student's behavior. First, the behavioral intervention plan does not present a specific hypothesis concerning the cause of Student's behavior. Instead, it vaguely states that Student engages in self-stimulatory and aggressive behavior to get the attention of others or when frustrated. The behavioral log does not define the targeted behavior, including physical aggression, document the intensity and duration of the behavior, or identify the antecedents

and consequences of the behavior. (FF 18-20). Without consistent and reliable data concerning the nature of the targeted behaviors, their intensity and duration, antecedents and consequences, and accurate progress monitoring, the development of positive behavioral interventions to effectively address Student's behavior is not likely. *See Harris*, 561 F. Supp.2d at 68.

12. Reading 34 CFR §§ 300.303-304 and 300.324 (a)(2)(i) together with the cases cited above, the SCO concludes that the failure to conduct a behavioral assessment at parental request following the October 2012 IEP meeting violated the procedural requirements of the IDEA. Had the behavioral intervention plan and behavioral log developed at Student's October 2012 IEP meeting provided the specificity and content required to evaluate and address Student's behavioral problems, the BOCES may have avoided liability for the failure to conduct a functional behavioral assessment.

13. Although the failure to conduct a behavioral assessment violated the procedural requirements of the IDEA, it is well-settled that procedural violations are only actionable to the extent that they impede the child's right to FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). In this case, the SCO concludes that the failure to conduct a behavioral assessment resulted in a concomitant lack of specific information about the causes and functions of Student's behavior. That lack of information, in turn, resulted in the failure to develop behavioral strategies and interventions that would be individually tailored to address Student's specific behavioral needs. The failure to appropriately address behavior that interfered with Student's ability to attend to instruction resulted in educational harm and caused a denial of FAPE.

14. To remedy the denial of FAPE, the BOCES must promptly conduct a functional behavioral assessment and develop a behavioral intervention plan consistent with the results of the evaluation.

### **REMEDIES**

The SCO has concluded that the District violated the following IDEA requirements:

- a) Development, review, and revision of IEP at 34 CFR § 300.324 (a)(2)(i);
- b) Reevaluation at 34 CFR § 300.303; and
- c) Evaluation procedures at 34 CFR § 300.304.

To remedy this violation, the District is ordered to take the following actions:

- 1) **Conduct a functional behavioral assessment as soon as possible, but no later than February 15, 2013.** The FBA must include the following:

- a) Consultation with a behavioral specialist who has demonstrated experience in treating behavioral challenges associated with autism. The specialist shall be chosen by the BOCES, but may not be an employee of the BOCES or the School District.
- b) Detailed identification of Student's self-stimulatory and aggressive behaviors, including intensity, duration, and a detailed assessment of antecedents and consequences;
- c) A detailed hypothesis (summary statement) concerning the function of Student's behavior;
- d) Confirmation of the summary statement through formal observation of behavior, antecedents, and consequences; and
- e) Development of competing behavior summary to identify desired behavior, common reinforcing consequences, and alternative behaviors.

The District shall provide the Department with documentation that it has complied with these requirements no later than February 20, 2013. Documentation must include the resume and contract for the behavioral specialist, and signed consent for evaluation.

**2) Conduct an IEP meeting to review the results of the FBA and amend Student's IEP and behavioral intervention plan, as soon as possible, but no later than February 27, 2013.**

The District shall provide the Department with documentation that it has complied with this requirement no later than March 6, 2013. Documentation must include notice of meeting and prior written notice.

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

Colorado Department of Education  
Exceptional Student Services Unit  
Attn.: Joyce Thiessen-Barrett, Senior Consultant  
1560 Broadway, Suite 1175  
Denver, CO 80202-5149

**NOTE:** Failure by the District to meet any of the timelines set forth above will adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the Department.

**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



CFR § 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 26<sup>th</sup> day of December, 2012.

*Candace Hawkins*

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Candace Hawkins, Esq.  
State Complaints Officer

## **Appendix A**

### **Complaint, pages 1-3.**

#### **Reply, pages 1-2.**

Exhibit A: Select pages from Student's April 2012 IEP.

Exhibit B: Irrelevant and not considered.

Exhibit C: Notes from Former Paraprofessional.

#### **Response, pages 1-5.**

Exhibit 1: Student's IEP dated 4/23/12.

Exhibit 2: Student's IEP amendment dated 5/7/12.

Exhibit 3a-d: Service logs.

Exhibit 4: Correspondence between Parent and BOCES/School District.

Exhibit 5: Statements from Middle School Staff.

Exhibit 6: Parent Communication log.

Exhibit 7: Student's IEP amendment dated 10/8/12.

Exhibit 8: Behavior log implemented on October 15, 2012.

Exhibit 9: Prior written notice and summary of behavior logs.

Exhibit 10: Contact information for BOCES and School District staff.

Exhibit 11: Student's attendance records for the 2012-2013 school year.

Exhibit 12: BOCES and School District calendar for the 2012-2013 school year.

Exhibit 13: Behavior intervention plan dated August of 2009.

Exhibit 14: Progress Reports.

#### **Interviews with:**

- Parent on 12/11/12.
- Special Education Director on 12/10/12.
- Special Education Teacher One on 12/10/12.
- Special Education Teacher Two on 12/10/12.
- General Education Teacher on 12/10/12.
- Paraprofessional One on 12/10/12.
- Paraprofessional Two on 12/10/12.
- Speech Language Pathologist on 12/11/12.