

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 2010: 513**

**San Juan BOCES (Durango)**

**DECISION**

**INTRODUCTION**

This is a pro-se, state-level complaint (Complaint), dated 08/02/2010, which was filed on 08/05/2010.

The Complainants are the mother and father of a child with a disability. In order 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>1</sup> and to protect the anonymity of the Complainants and their child, hereafter, the persons and locations identified in conjunction with the Complaint investigation and Decision will be abbreviated as follows and redacted prior to publication:

[Parents], Complainants [Parents];  
[Parent], Mother [Parent];  
[Student], Child of [Parents], [Student];  
[Student's] age of [Age] [Age];  
[School], [School];  
San Juan BOCES (Durango) [BOCES];  
[District] [District];  
[Superintendent], District Superintendent [Superintendent];  
[Executive Director], BOCES Executive Director [Executive Director];  
[Former Special Education Director], Former Special Education Director [Former Special Education Director];  
[Assistant Principal], Assistant Principal [Assistant Principal];  
Zia Behavioral Team Builders, [Parents'] proposed IEE provider [ZIA Group];  
[ZIA Evaluator], [Parents'] proposed ZIA evaluator [ZIA Evaluator];  
[Case Manager], Special Education Teacher and Case Manager [Case Manager];  
[English Teacher], English Teacher [English Teacher];  
[School Counselor], School Counselor [School Counselor];  
[AT Coordinator], Assistive Technology Coordinator and Occupational Therapist [AT Coordinator];

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<sup>1</sup> FERPA, codified at 20 U.S.C. § 1232g, was enacted in 1974, 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.*

[Transition Coordinator], Transition Coordinator [Transition Coordinator];  
[School Psychologist], School Psychologist [School Psychologist];  
[Health Teacher], Health Teacher [Health Teacher];  
[Advocate], Advocate [Advocate];  
[Scheduling Coordinator], Scheduling Coordinator [Scheduling Coordinator]; and  
[BOCES' Legal Counsel], [District] and BOCES' Legal Counsel [BOCES' Legal  
Counsel].

The Complaint consisted of six pages and Exhibits A-E.

The State Complaints Officer (SCO) determined that the Complaint identified nine allegations subject to the jurisdiction of the state-level complaints process under the federal Individuals with Disabilities Education Act (IDEA) and its implementing regulations at 34 CFR §§ 300.151 through 300.153.<sup>2</sup> The SCO has jurisdiction to resolve the Complaint pursuant to those regulations.

The overriding issues and, therefore, the scope of the investigation identified by the SCO, between the dates of 08/05/2009 and 08/05/2010, are:

- I. Whether the BOCES committed procedural violations of the IDEA, and, if so, whether the procedural violations denied [Student] a free appropriate public education (FAPE) in violation of IDEA, 20 U.S.C. § 1400, *et seq.* and its implementing regulations at 34 CFR Part 300; and
- II. Whether the 04/06/2010 IEP was insufficient to provide [Student] with a FAPE in the least restrictive environment (LRE) in violation of § 300.101, *et seq.*

The BOCES [Special Education Director] was notified of [Parent's] allegations in a letter dated 08/09/2010. The letter included a complete copy of the Complaint and all supporting documentation. In conjunction with the Response, the BOCES was specifically directed to supply the SCO with all supporting documentation substantiating the BOCES' Response including:

- A. A written Response addressing each of the accepted allegations,<sup>3</sup> including the legal authorities supporting the BOCES' position as to each allegation.
- B. Complete copies of the following:
  - 1) The Student's 4/22/2009 and 4/06/2010 IEPs;
  - 2) All prior written notices, consistent with § 300.503, sent by the BOCES to [Parents] regarding the 4/06/2010 IEP;

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<sup>2</sup> Hereafter the IDEA regulations will be referred to by regulation number, e.g., § 300.000.

<sup>3</sup> Three of the allegations raised in [Parent's] Complaint were not accepted due to being beyond the SCO's jurisdictional one year statute of limitations or because the allegation was not a violation of either the IDEA or ECEA.

- 3) All prior written notices, consistent with § 300.503, regarding [Parents'] request for an IEE to be completed by [ZIA];
- 4) Any other written communications between the BOCES staff, BOCES staff and [Parents] or the BOCES and [ZIA] regarding [Parents'] request, made between 08/05/2009 and 08/05/2010, for an IEE to be completed by [ZIA];
- 5) All prior written notices, consistent with § 300.503, regarding the BOCES' refusal to convene an IEP Team meeting as requested by [Parents] on 08/12/2009;
- 6) Documentation regarding the development and implementation of the transition plan specified by the 04/22/2009 IEP, including: whether and when the transition plan was developed; a copy of the transition plan; and evidence of implementation of the transition plan during the 2009-2010 school year;
- 7) Any documentation evidencing that [Student's] teachers were informed of their responsibilities for implementing the assistive technology components of [Student's] 04/22/2010 IEP;
- 8) Any documentation regarding training provided to [Student] during the 2009-2010 school year to facilitate [Student's] use of the assistive technology during that school year;
- 9) Any documentation regarding the availability and functionality during the 2009-2010 school year of the assistive technology used by [Student];
- 10) Any written meeting notice(s), written meeting invitations or other documentation inviting [Parents] to the 04/06/2010 IEP team meeting;
- 11) All data and/or other documentation supporting the BOCES' refusal to include Extended School Year (ESY) Services in [Student's] 04/06/2010 IEP;
- 12) Complete copies of the BOCES' policies and procedures in effect between 08/05/2009 and 10/29/2009 regarding [Parent] requests for IEEs, including the BOCES' criteria for IEE evaluators, consistent with § 300.502;
- 13) Complete copies of the BOCES' policies and procedures in effect between 02/22/2010 and 04/06/2010 regarding parent notification of IEP team meetings consistent with §300.322 (a) –(b) (Prior notice of IEP meetings);
- 14) Complete copies of the BOCES' policies and procedures in effect between 08/05/2009 and 08/05/2010 that address §300.323 (d) (Accessibility of IEPs to teachers and others);
- 15) Complete copies of the BOCES' policies and procedures in effect on 04/06/2010 addressing the review and revision of IEPs, including consideration of [Parents'] concerns for enhancing the education of [Student], consistent with § 300.324(a)(ii);
- 16) Complete copies of the BOCES' policies and procedures in effect between 08/05/2009 and 08/05/2010 addressing how student eligibility for extended school year services are to be determined by IEP teams and how ESY decisions are to be documented consistent with § 300.106;
- 17) Complete copies of all progress reports, grade reports and supporting data regarding [Student's] progress on the 4/22/2009 and 04/06/2010 IEP goals; and

- 18) The complete name, title and contact information for each BOCES and BOCES staff member who has knowledge of the facts underlying the [Parent's] allegations.

On 08/19/2010, the BOCES' Legal Counsel filed a Motion for Extension of Time to File Response to State-Level Complaint.

On 08/20/2010, the SCO entered an Order Denying the Motion for Extension of Time.

On 08/25/2010, the BOCES' Response, consisting of pgs. 1-23 and Exhibits 1(a) through 19(f), was timely received.

On 08/26/2010, the SCO mailed [Parents] a complete copy of the Response.

On 08/30/2010, [Parents'] Reply was timely received.

On 09/09/2010, the BOCES' Legal Counsel filed a Supplemental Response and Exhibit 19g.

On 09/09/2010, the SCO emailed the BOCES' Legal Counsel and [Parent] to advise that Exhibit 19g had been accepted. However, the SCO advised that the Supplemental Response would not be considered since the Complaint Procedures make no provision for a Response to a Reply.

On 09/10/2010, [Parents'] renewed their request for voluntary mediation of the allegations raised in the Complaint.

On 09/10/2010, the BOCES' Legal Counsel advised the SCO that the BOCES declined to mediate the Complaint allegations. The SCO relayed this information to [Parents] by email the same date.

On 09/10/2010, the SCO closed the Record.

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

[Parent's] Complaint contains nine allegations that are summarized below:

1. The BOCES violated 34 CFR § 300.502(a) through (b), and (e)<sup>4</sup> and 1 CCR 301-8, 2220-R-6.02(2)<sup>5</sup> when it refused to pay for an Independent Educational Evaluation (IEE) proposed by [Parents] to be conducted at [ZIA Group] by [ZIA Evaluator].
2. The BOCES violated the IDEA when it refused to convene an IEP team meeting following [Parent's] 08/14/2009 request for an IEP Team meeting.

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<sup>4</sup> Final Regulations implementing the Individuals with Disabilities Education Act at 34 CFR Part 300. Hereafter, the IDEA regulations will be referred to by section number only (e.g., § 300.000).

<sup>5</sup> Rules for the Administration of the Exceptional Children's Educational Act (ECEA), 1 CCR-301-8, 2220-R-1.00 *et seq.* Hereafter, the ECEA Rules will be referred to by rule number only (e.g., ECEA Rule 1.00).

3. The BOCES violated § 300.116(a)(1)<sup>6</sup> and ECEA Rule 4.03(8)(a) when, on or about 08/26/2009, it changed [Student's] schedule to offer [Student] a co-taught English class.
4. The BOCES failed to consistently implement [Student's] 4/22/2009 IEP during the 2009-2010 school year as it related to [Student's] need for assistive technologies (AT), including ensuring that [Student's] teachers were aware that [Student] was to have access to and the use of AT and computer for all school work in class and homework.
5. The BOCES failed to implement the 04/22/2009 IEP during the 2009-2010 school year as it related to developing and implementing a Transition Plan for [Student].
6. The BOCES failed to provide the required IEP notice of meeting for the 04/06/2010 IEP Team meeting in violation of § 300.322(a)-(b).
7. The BOCES failed to consider [Parents'] concerns raised during the 04/06/2010 IEP team meeting in conjunction with the development of the 04/06/2010 IEP in violation of § 300.324(a)(1)(ii).
8. The BOCES violated § 300.106 (a)(3)(i) when it refused to include Extended School Year (ESY) services in [Student's] 04/06/2010 IEP based solely on [Student's] category of disability (i.e., Specific Learning Disability).
9. The BOCES violated § 300.101, *et seq.*, since [Student's] current IEP of 04/06/2010 is insufficient to provide a free appropriate public education (FAPE) in the least restrictive environment (LRE).

**Proposed Remedies:** a) [Student] receive two years of compensatory education for reading, writing and AT services; b) [Parents] be reimbursed \$3,500 for AT services (i.e., accessories, additional software, device maintenance and Kindle) that they have provided to [Student]; c) the BOCES be ordered to perform professional staff development and training as to all violations; d) the BOCES be ordered to pay for an IEE to be performed at [ZIA Group] and by [ZIA Evaluator] (including transportation and expenses); e) reimbursement of \$5,000 for [Parents'] advocacy services; f) reimbursement of \$47 for [Parents'] ACT expenditure; g) the BOCES be directed to hire or train an academic language therapist; and, h) the BOCES submit a Corrective Action Plan (CAP) as to all cited violations.

### **THE BOCES' RESPONSE**

The BOCES' Response denied each of the allegations.

### **THE [PARENTS'] REPLY**

The [Parents'] Reply is summarized below:

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<sup>6</sup> The Complaint refers to § 300.316(a)(1) which does not exist. It appears that this citation was a typographical error and should have referenced § 300.116 (a)(1).

1. [Parents'] Reply raised new allegations (i.e., [ZIA Evaluator] is uniquely qualified in the geographic to diagnose Dyslexia and the evaluators on the [BOCES'] list do not have these qualifications) which were not considered.
2. Reiterated the initial allegation. The remainder of the Reply (i.e., [Student] "had no direct specially designed instruction (SDI) for reading and writing") raised a new allegation outside the original Complaint which, therefore, was not considered.
3. Reiterated the initial allegation.
4. [Parents] had "consistently asked for a laptop to be provided by the [BOCES] across all environments since [Student] has nightly homework." [Parents'] Reply also raised a new allegation (i.e., "[AT Coordinator] was not in attendance at 04/22/2009 IEP [meeting]") which was not relevant to the initial Complaint allegation and therefore, was not considered.
5. Reiterated the initial allegation and also raised a new allegation (i.e., concerning agencies to be present at transition planning) which was not considered.
6. Reiterated the initial allegation.
7. Denied that the BOCES supplied prior written notice (PWN) as to [Parents'] concerns expressed in the 04/06/2010 IEP meeting.
8. Reiterated the initial allegation.
9. Reiterated the initial allegation.

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire Record,<sup>7</sup> the SCO makes the following FINDINGS:

1. At the time of the Complaint, [Student] was [Age] years of age and eligible for special education and related services on the basis of a Specific Learning Disability. [Student] is expected to graduate on [date].<sup>8</sup>
2. On 01/09/2009, due to concerns expressed by [Parents], an AT evaluation was conducted. The evaluation revealed that [Student] had a typing speed of 45 WPM with 91% accuracy and was familiar with and could use the following software: Dragon Naturally Speaking (Dragon);

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<sup>7</sup> Appendix A, attached and incorporated by reference, details the entire Record.

<sup>8</sup> CD A, Recording of 04/06/2010 IEP Meeting.

Kurzweil; Inspiration; and Microsoft Word. Additionally, [Case Manager] had received training in Dragon; Kurzweil and Inspiration.<sup>9</sup>

### **The Triennial Review and 04/22/2009 IEP.<sup>10</sup>**

3. The IEP Team conducted a Triennial Review during the course of two meetings (i.e., on 04/22/2009 and 05/04/2009). [Student] and at least one of [Student's] parents attended each of those meetings.

4. In conjunction with the 04/22/2009 Meeting, [Parents] supplied the Team with a list of 12 concerns and a Parental Statement.<sup>11</sup> After Team discussion, some, but not all, of [Parents'] requests were incorporated into the IEP.<sup>12</sup>

5. During the Triennial Review, the Team reviewed [Student's] progress on:

- The current IEP goals;
- Current grades and GPA;
- Work samples;
- Northwest Education Association Measure of Academic Progress (NWEA MAP) scores;
- Colorado Student Assessment Program (CSAP) scores;
- Gray Oral Reading Test (GORT 4) scores;
- Wide Range Achievement Test (WRAT) scores;
- Test of Written Language (TOWL 3) scores;
- Evaluation of [Student's] Written Work Sample, using CSAP writing rubric;
- AIMSweb, MAZE (Reading Comprehension) scores;
- Customtyping.com progress; and
- Teacher observations and feedback.<sup>13</sup>

6. **Relevant Sections of the 04/22/2009 IEP.** The Team determinations and 04/22/2009 IEP provisions relevant to the Complaint are as follows:<sup>14</sup>

Section 7: Consideration of Special Factors: The Team determined that [Student] needed Assistive Technologies (AT) and specified access in school to the following AT:

- Scan and read software;
- Voice to text software and scanner;
- Graphic organizing software; and
- The opportunity to use the AT across all academic areas.

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<sup>9</sup> Exhibit 8a.

<sup>10</sup> Exhibit 1a.

<sup>11</sup> Exhibit 1a.

<sup>12</sup> Id.

<sup>13</sup> Exhibits 1a and 5d.

<sup>14</sup> Exhibit 1a.

#### Section 8: Post-School Considerations:

- Post-Secondary Education/Training – Transition Services and Activities: Southwest Assessment Partners (SWAP) and [Transition Coordinator] conducted College in Colorado assessment with [Student] and a Holland personality inventory. Agricultural engineering is a likely area of study and [Student] showed strength in investigative and realistic domains. [School] counselors will continue to assess the alignment of [Student's] transcript with [Student's] college goals. The counseling office has financial aid workshops and has college counselors visit and [Student] should attend these next year. [Case Manager] will complete application for accommodations for ACT and College Board . . . periodically monitor [Student's] use of AT application in [Student's] classes and maintenance of skills. . . Team will meet prior to end of 2008-2009 school year to develop detailed transition plan.

#### Section 9: Annual [Measurable] Goals:

##### Goal #1 – Area of Need: Academics-Access Skills;

- [Student] will identify [Student's] anticipated area of study and three colleges of interest by the end of the second trimester of [Student's] Junior year.

##### Goal #2 – Area of Need: Academics – Written Language;

- [Student] will organize, write, and edit [Student's] written work using appropriate [AT] with less than five errors per page to be successful in all academic classes.

##### Goal #3 – Area of Need: Academics – Written Language;

- Using speech to text software in all academic areas, [Student] will use grade level vocabulary in [Student's] written expression.

#### Section 10: Accommodations and Modifications:

- Accommodations: 50% extra time; access to and use of [AT] and computer for all school work in class and homework; texts available on CD; multiple opportunities for editing work; alternate setting for tests/exams; tests and directions read orally via individual or scan/read software; copies of teacher notes provided; teacher will encourage student to use grade level vocabulary in [Student's] writing; development and use of word banks; and
- Modifications: 50% of required reading in English class; use of calculator when needed; foreign language requirement waived at [School].

#### Section 12: State/District Assessments:

- Assessment Accommodations: 50% extra time, reader or scan and read program for test material if allowed, word processor for written work to be transcribed by scribe. Calculator for ACT and SAT.
- Standard Accommodations to be used in the CSAP or ACT: 50% extra time, reader or scan and read program for test material if allowed, word processor for written work to be transcribed by scribe. Calculator for ACT and SAT.

#### Section 13: Related Services:

- Monitor support in all core areas to ensure that accommodations are applied and effective and that [AT] is available and being used in all areas;
- Co-taught English class with support from ESE staff;
- [Special Education Teacher] Direct: 3.50 hours p/wk. in Reading & Writing;
- Indirect: 1.0 hrs. p/wk.

7. On 05/13/2009, the BOCES sent [Parents] a lengthy PWN<sup>15</sup> concerning numerous requests the Team considered and rejected during the two IEP meetings, including [Parents'] request for:

- Use of Six Minute Solution program;
- Direct 1:1 tutoring services to improve [Student's] fluency;
- Extended School Year (ESY) services;
- Direct AT services;
- Inclusion of additional goals in the IEP; and
- Additional evaluations of [Student's] speech and language needs.

The 05/13/2009 PWN also addressed [Parents'] expressed concerns regarding the Transition Plan. The PWN explained in extensive detail why the [Parents'] requests were rejected (e.g., [Student's] present levels of performance; multiple tests previously administered and considered by the Team; and the appropriateness of [Student's] current placement). The PWN explained the reason for the Team's refusal: "Significantly, you have repeatedly expressed a desire 'to close the achievement gap between [Student] and [Student's] non-disabled peers.' That does not reflect any legally-required standard. Moreover, [Student's] success in school – out-performing most of [Student's] non-disabled peers – certainly demonstrates that any such gap has been closed."<sup>16</sup>

8. **Transition Action Plan (Plan) Implementation.** On 04/22/2009, the IEP Team developed a Plan predicated on [Student's] post-secondary goal of attending a four year college after high school graduation. Consistent with this goal, the Plan detailed numerous activities and timelines to be completed by [Student]; [Parents]; [Case Manager]; [School Counselor]; and [Transition Coordinator].<sup>17</sup> Additionally, the Team included a Measurable Goal (i.e., Goal #1, above) in the 04/22/2009 IEP which addressed [Student's] transition needs and complemented the Plan.

9. The other Measurable IEP Goals (i.e., Goals 2 and 3, above) addressed [Student's] writing needs, the post-secondary goal of attending college, and stressed AT usage to accomplish those goals.

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<sup>15</sup> Exhibits 1a, pg. 9, 5d, 17i and E, pg. 96.

<sup>16</sup> Exhibit 5d, pg. 1.

<sup>17</sup> Exhibit 6b.

10. Given the overwhelming evidence in the Record, the SCO finds that [Parents] fully participated in both of the IEP meetings and their concerns and suggestions were considered by the Team.<sup>18</sup>

11. The IEP made no provision for the supply of a laptop computer for home use. The SCO concludes that the IEP Team considered [Parents'] request but determined that a [Student] did not require a [School] laptop computer for home use in order to receive a FAPE.<sup>19</sup>

12. **[AT] Implementation.** In conjunction with implementation of the 04/22/2009 IEP, [Student] was supplied with or had access to the following AT software: Dragon (for voice to text software and scanner); Inspiration (for graphic organizing); Kurzweil (for scan and read software). Texts on compact disc (as well as Reading for the Blind and Dyslexia for said texts) and Microsoft Word were made available to [Student]. At [School], [Student] had access to fully functioning computers and laptops containing the software. Additionally, the following software had been downloaded on [Student's] personal laptop: Kurzweil; Dragon; Inspiration; and Microsoft Word.<sup>20</sup>

13. In conjunction with implementation of the IEP, the [Case Manager] distributed to [Student's] teachers a Confidential Information Sheet, which detailed [Student's] current accommodations, modifications and goals. Additionally, [Case Manager] made himself available to confer with [School] staff concerning the use of AT.<sup>21</sup>

14. In support of the allegation that the BOCES' failed to properly implement the AT services, [Parent] relies on a 09/14/2009 email where [Case Manager] made inquiry to [Health Teacher] concerning [Student's] progress and use of AT in the class. The [Health Teacher] replied stating "I don't know what 'assistive technology' is but [Student] is doing quite well in my class – current avg. 95%, no detectible problems with reading."<sup>22</sup> However, [Case Manager] and [English Teacher], two teachers who had extensive contact with [Student] during the preceding two years, noted that [Student] did not consistently take advantage of AT that was made available to [Student].<sup>23</sup>

15. The credible evidence in the Record<sup>24</sup> supports the finding that the BOCES consistently implemented [Student's] 04/22/2009 IEP during the 2009-2010 school year as it related to AT:

- [Student's] Teachers were familiar with the IEP and AT accommodations;
- [Student] was supplied, had access to and use of all of the AT software listed in [Student's] IEP;
- [Student] was proficient in using AT supplied to [Student]; and
- [Student] did not consistently take advantage of AT made available to [Student].

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<sup>18</sup> Exhibits 1a, 5d and 17i.

<sup>19</sup> Exhibit 1a and Reply, pg. 2.

<sup>20</sup> Response, pgs. 15-16 and Exhibit 8b.

<sup>21</sup> Exhibits 7a and b, 9d & e.

<sup>22</sup> Exhibit A, pg. 55.

<sup>23</sup> Exhibits 9 d & e.

<sup>24</sup> Exhibits 6l, D, pgs. 10-12, 7a & b, 8a & b, 9b through e.

16. Progress Reports:<sup>25</sup> Between 04/22/2009 and 04/06/2010, [Student] made progress on all three of the Measurable Goals and, by 04/06/2010, had met Goals one and two. The SCO notes that the [Case Manager] supplied detailed progress notes in conjunction with the 05/29/2009, 01/29/2010, and 03/05/2010 Progress Reports. In addition to documenting [Student's] progress, the progress notes also documented numerous activities done by [Case Manager] to support and implement [Student's] Transition Plan. Although [Student] made progress on Goal #3, the 04/06/2010 progress report and notes indicate: "[Student] had made insufficient progress on this goal . . . Vocabulary development was used through the writing/editing process in English class without using speech to text software."<sup>26</sup>

17. Transition Plan Progress.<sup>27</sup> By 04/06/2010, [Student] had:

- Completed the College in Colorado interest finder . . . [Student's] interests are in . . . agriculture, mechanical, chemical and nuclear engineering and business;
- Completed a College Readiness questionnaire;
- Had taken the ACT test;
- Researched six colleges;
- Identified schools that supported [Student's] areas of interest;
- Had expressed interest in completing the first two years school at a local college; and
- Was scheduled to take the SAT.

18. Grade Reports.<sup>28</sup> During the relevant IEP time period, [Student] received "As" and "Bs" in all of [Student's] college preparatory coursework.

19. The overwhelming evidence in the Record<sup>29</sup> supports the finding that during the 2009-2010 school year, the BOCES properly developed and consistently implemented [Student's] 04/22/2009 IEP as it related to the Transition Plan. Furthermore, given the evidence in the Record, the SCO concludes that the 04/22/2009 IEP was reasonably calculated to confer [Student] with educational benefits.

20. The 04/22/2009 IEP was in effect when [Student] started the 2009-2010 school year.

21. **[Parents'] Request to Convene IEP Meeting.** On 08/12/2009 [Parents] emailed the BOCES requesting an IEP Meeting since "our son . . . has not had an appropriate IEP since 05/08." [Parents] noted that "the Goals we are once again requesting are based on present level [sic] of performance in the areas of reading [sic] writing and assistive technology."<sup>30</sup>

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<sup>25</sup> Exhibits 6I and D, pgs. 10-12.

<sup>26</sup> Id.

<sup>27</sup> Exhibit 1b, pg. 4.

<sup>28</sup> Exhibit 11e.

<sup>29</sup> Exhibits 1a, 1b, 6b-c, f, h k through 6m, 11e and 19a.

<sup>30</sup> Exhibit A, pg. 80.

22. On 08/14/2009, the [Executive Director] sent [Parents] a PWN by U.S. mail and email, denying [Parents'] request for another IEP meeting.<sup>31</sup> In the PWN, the [Case Manager] explained that the request was refused because:

[Student's] IEP for the 2009-2010 school year was developed over the course of two IEP meetings, held on [04/22/2009] and [05/04/2009]. At the meetings, the parents were provided a full and complete opportunity to participate. Through these two meetings, the IEP Team developed an IEP that is appropriate and provides [Student] with a . . . FAPE in the least restrictive environment. Thus, no additional meeting is necessary.<sup>32</sup>

The PWN also referenced the reasons previously detailed in three PWNs issued on 05/12/2009 (concerning ESY) and 05/13/2009 (concerning AT and [Parents'] requests raised in the 04/22/2009 IEP meetings)<sup>33</sup> as well as the BOCES' 05/13/2009 Response to [Parents] Ten Day Notice of Intent to Provide Unilateral Placement.<sup>34</sup>

23. Given the credible evidence in the Record, the SCO finds that [Parents] 08/12/2009 IEP Meeting request did not offer any new information or changed circumstances which would impact the 04/22/2009 IEP.

24. **[Parent's] Request for an Independent Educational Evaluation (IEE).** On 08/12/2009, [Parents] emailed [Executive Director] to advise that "We will be requesting an [IEE] to determine [Student's] present level of performance in the areas of reading [sic] writing and assistive technology."<sup>35</sup>

25. On 08/14/2009, [Executive Director] sent [Parents] by email and U.S. mail, a letter acknowledging that they were entitled to an IEE. [Executive Director] requested that [Parents] "specify with which evaluation that you disagree so that we may send you the criteria for the evaluation, including the location of the evaluation and qualifications of the examiner."<sup>36</sup>

26. In a 09/21/2009 email, [Parents] clarified that "Just so all are aware we disagreed with the entire triennial evaluation" and noted "we will be sending this on to our lawyer. . ."<sup>37</sup>

27. In a letter transmitted on 09/23/2009,<sup>38</sup> [Parents] notified [Executive Director] and [Superintendent] that "we disagree with the entire [Multi Disciplinary Evaluation]. . . Since we have never received a physical document entitled MDE . . . with critical analysis for [Student] we can not [sic] tell you specifically what we disagree with but certainly want you to know we disagree with it in its entirety." [Parents] requested that the BOCES supply them with "criteria

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<sup>31</sup> Exhibits A, pg. 76 and 5a.

<sup>32</sup> Exhibit 5a.

<sup>33</sup> Exhibits 5b and c.

<sup>34</sup> Exhibit 5e.

<sup>35</sup> Exhibit A, pg. 80.

<sup>36</sup> Exhibits A, pg. 76 and 4b.

<sup>37</sup> Exhibits A, pg. 52 & 4d, pg. 2.

<sup>38</sup> Although the letter is dated 08/14/2009, in its Response at pg. 2, the BOCES notes that the letter was received by the BOCES on 09/23/2009. Given the documentation in the Record, (i.e., Exhibit A, pg. 70), the SCO concludes that [Parents'] [Advocate] sent the letter to the BOCES by facsimile on 09/23/2009.

. . . for IEE's and the date the boards approved these criteria and list [sic] of evaluators."<sup>39</sup>

28. On 09/23/2009 the [Executive Director] wrote [Parents] via email and U.S. mail acknowledging [Parents'] request for an IEE concerning the entire triennial evaluation rather than an evaluation of [Student's] social/emotional needs. [Executive Director] noted that the [ZIA Group] representative who contacted [Executive Director] had initially indicated that "[Student] was being referred for social and emotional problems as well as dyslexia." [Executive Director] requested that [Parents] confirm that [ZIA Group] was their preference for evaluating [Student] for a specific learning disability (SLD). "Once we receive confirmation (via email is fine), we will immediately email the attached letter to [ZIA Group]." A form letter was attached which detailed the BOCES' criteria for IEEs for an SLD evaluation and requested specific information concerning the qualifications of any proposed evaluator.<sup>40</sup>

29. On 09/24/2009, the [Executive Director] sent [ZIA Group] a letter acknowledging that [Parents] had designated [ZIA Group] as the agency they preferred to use for an IEE.<sup>41</sup> A copy of the BOCES' IEE form letter detailing the BOCES' criteria was enclosed. The IEE form letter specified that the IEE was for a "Student with or suspected of having specific learning disorder" and noted that the BOCES would need to determine that:

- *The individual performing the IEE has credentials that meet the . . . BOCES requirements; and*
- *That the evaluation will be performed in accordance with . . . BOCE'S requirements.*<sup>42</sup>

The letter noted that per state and federal law, "Responsiveness to Intervention (RTI) is the primary means of evaluation and eligibility determination for students suspected of having a specific learning disability. Accordingly . . . the IEE must be based upon data demonstrating the student's responsiveness and/or lack of responsiveness to scientific, research-based interventions in the instructional setting."<sup>43</sup> With parental authorization, [Executive Director] noted that the BOCES would ensure that the independent evaluator was provided access to all RTI records and data for [Student]. [ZIA Group] was asked to:

- Provide a statement of what other elements the evaluation would consist of including observations to be performed, other records to be reviewed, interviews to be conducted and tests that would be administered;
- *Identify each person who would be performing the IEE as well as the credentials (i.e., educational background, experience, current licensure and any other credentials) of each person performing the IEE;*
- Requested that the evaluator travel to Durango, Colorado to perform the evaluation in [Student's] home school setting; and

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<sup>39</sup> Exhibits A, pg. 71 and 4c.

<sup>40</sup> Exhibits A, pg. 51 & 4d.

<sup>41</sup> Exhibit 4e, pg. 1.

<sup>42</sup> Id. (emphasis added).

<sup>43</sup> Id.

- Noted that the travel to Durango might be waived “if the parents and the BOCES agree in writing that observation of the student in the instructional setting is not necessary for the IEE.”<sup>44</sup>

30. [ZIA Group] is located in Santa Fe, New Mexico. According to the website,<sup>45</sup> [ZIA Group] consists of a group of nine doctors who “reach those in need of behavioral health services throughout New Mexico” and, to that end, offers services in:

- Psychiatric Assessments;
- Medication Management;
- Telepsychiatry;
- Individual, group and family therapies;
- Psychological and neuropsychological testing;
- Education and training programs for families and professionals; [and]
- Psychiatry and clinical services available on a per-diem basis to public and private agencies statewide.<sup>46</sup>

31. On 10/26/2009, [Executive Director] wrote [Parents] by email and U.S. mail, notifying them that [ZIA Group] had contacted the BOCES and advised the BOCES that [ZIA Group] could not conform to the BOCES’ criteria and “specifically informed us that they do not have an examiner that is licensed in the State of Colorado.”<sup>47</sup> The letter referenced an attachment listing the credentials and addresses of three [Colorado] evaluators “which meet the [BOCES’] criteria. Please let us know as soon as possible if you will be proceeding with this IEE with one of the evaluators.”<sup>48</sup>

32. [Parents] never replied to the 10/26/2009 letter to inform the BOCES whether they would be proceeding with an IEE or to either identify an evaluator (from the BOCES’ list of three) or to identify an alternate evaluator (including credentials) that [Parents] intended to use.<sup>49</sup>

33. Having reviewed the entire Record, the SCO finds that:

- On 09/23/2009, the BOCES supplied [Parents] with the BOCES’ IEE criteria for an SLD evaluation and also requested that [Parents] confirm that they wished to use [ZIA Group];
- The criteria the BOCES supplied to [Parents’] and [ZIA Group] is the same criteria employed by the BOCES when it initiates an evaluation;<sup>50</sup>
- [ZIA Group] did not meet the BOCES’ criteria because:
  - (i) [ZIA Group] is located outside the geographical area of Colorado; and
  - (ii) [ZIA Group] advised the BOCES that it had no evaluators licensed in Colorado.

<sup>44</sup> Exhibit 4e, pgs. 2-3 (emphasis added).

<sup>45</sup> [www.ziabehavioralhealth.com/services/html](http://www.ziabehavioralhealth.com/services/html).

<sup>46</sup> Id.

<sup>47</sup> Exhibits A, pgs. 45-46 and 4f, pgs. 1-2.

<sup>48</sup> Id.

<sup>49</sup> Response, pg. 13.

<sup>50</sup> Exhibit 12b, pgs. 35-36 and 12c, pgs. 5-6.

- On 10/26/2009, the BOCES notified [Parents] that:
  - (i) [ZIA Group] did not meet the BOCES' criteria;
  - (ii) Supplied [Parents] with a list of three independent evaluators within Colorado who did meet the BOCES' criteria; and
  - (iii) Asked that [Parents] notify the BOCES whether they wished to proceed with an IEE using one of the evaluators from the BOCES' list.
- On 10/26/2009, the BOCES was ready, willing and able to proceed with and pay for an IEE using any of the three independent evaluators that met the BOCES' criteria;
- [Parents] never replied to the BOCES' letter of 10/26/2009 to either designate a [Colorado] evaluator meeting BOCES' criteria or to inform the BOCES of the unique circumstances supporting their selection of an alternate evaluator not meeting the BOCES' criteria;<sup>51</sup>
- The first time [Parents] notified the BOCES of their desire to use [ZIA Evaluator] and to supply the BOCES with any evaluator credentials was in conjunction with the Complaint; and
- The Record simply does not support [Parents'] claim that the BOCES refused to pay for an IEE or for an IEE conducted by [ZIA Evaluator].

34. **Co-taught English Class During 2009-2010 School Year.** As noted in Finding of Fact (FF) #4 Section 13, above, per the 04/22/2009 IEP, [Student] was to receive 'co-taught English class[es]' during the 2009-2010 school year.<sup>52</sup>

35. In August 2009, the BOCES learned that [District] was eliminating the co-taught Junior English class for the 2009-2010 school year.

36. [Student] was scheduled to take the co-taught English class in the second and third trimesters of the school year.

37. On 08/26/2009, [Parent] emailed [Case Manager] noting that the co-taught English class was not going to be offered by the [District] during the [first trimester] and therefore "the IEP is out of compliance."<sup>53</sup> The SCO notes that neither the [Parents'] Complaint nor Reply allege that [Student] was enrolled in but unable to take a co-taught English class during the first trimester of the 2009-2010 school year.

38. [Case Manager] replied by email the same day and assured [Parents] "We will get [Student] into a Co-taught English class or reconvene another IEP to make the appropriate changes."<sup>54</sup>

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<sup>51</sup> In fact, the only mention in the Record of an IEE after the 10/26/2009 letter and prior to filing of the Complaint was a 02/01/2010 email from [Parent] to [Caseworker] in which [Parent] noted "So, there is no scientific data to support the progress. Guess we will look into the IEE still." Exhibit A, pg. 38.

<sup>52</sup> Exhibit 1a, pg. 9.

<sup>53</sup> Exhibit 19c.

<sup>54</sup> Exhibit 19c.

39. On 09/18/2009, after the BOCES had conferred with the [District], [Case Manager] emailed [Parent] to advise “[W]e will be able to place [Student] in a co-taught Junior English class as agreed upon in our last IEP...”<sup>55</sup>

40. Consistent with the 04/22/2009 IEP, during the second and third trimesters of the school year, the [District] offered and [Student] took the co-taught Junior English class. [Student’s] grades for the co-taught Junior English classes were: an “A” for the second trimester and a “B” for the third trimester.

41. The SCO concludes that the decision to drop the co-taught English class from the [District’s] schedule was a [District] decision made without the BOCES’ knowledge; amounted to a harmless error which was timely corrected to conform with [Student’s] IEP and future class schedule; and, consequently, [Student] suffered no loss of educational opportunity. Furthermore, the SCO concludes that, contrary to [Parents’] Complaint, the harmless error did not constitute a change of placement by the BOCES.

#### **The 04/06/2010 IEP.**

42. **Notice of Meeting for the 04/06/2010 IEP Team Meeting.** On 02/22/2010, [Scheduling Coordinator] sent [Parent] an email advising that she was “scheduling [Student’s] *annual review IEP meeting, which was due by [04/22/2010].*” [Scheduling Coordinator] offered [Parents] four dates in April and inquired as to whether [Parents] would be able to meet on any of the offered dates.<sup>56</sup>

43. On the same date, [Parents] responded stating “[04/06/2010] would be good. Thanks, [Parent].”<sup>57</sup>

44. Although the [Scheduling Coordinator] was initially planning for the meeting to begin at 1:05 p.m. on 04/06/2010, anticipating that the meeting would be lengthy, [Case Manager] and [Parent] agreed that the meeting should begin earlier.<sup>58</sup>

45. Consequently, on 03/05/2010, [Scheduling Coordinator] sent out a Notice of Meeting (Notice)<sup>59</sup> which notified [Parents] of the purpose, time, location and identified the [School] and BOCES staff who would be present. Specifically, the Notice advised that the following staff would be present: [Former Special Education Director]; [Assistant Principal]; [School Psychologist]; [AT Coordinator]; [English Teacher] in the capacity of General Education Teacher; [Case Manager]; [School Counselor]; [Transition Coordinator]; and the [BOCES’ Legal Counsel]. The Notice also notified [Parents] that they could invite other people that they believed would be helpful.

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<sup>55</sup> Exhibit 19d.

<sup>56</sup> Exhibit 10a (emphasis added).

<sup>57</sup> Exhibit 10b and Complaint, pg. 4.

<sup>58</sup> Exhibits 10c and d.

<sup>59</sup> Exhibit 10e.

46. The BOCES had arranged for [BOCES' Legal Counsel] to attend the meeting since, in the past practice, [Parents'] brought their [Advocate] to IEP meetings.<sup>60</sup> The BOCES' explanation is consistent with the sign in sheet listing persons who attended the 04/22/2009 IEP meeting (i.e., [Advocate] and [BOCES' Legal Counsel]).<sup>61</sup>

47. In advance of the 04/06/2010 meeting, [Parents] communicated to [Case Manager] that their [Advocate] might not attend the meeting. Consequently, on 04/01/2010, [School Psychologist] emailed [Parents] noting that [BOCES' Legal Counsel] was planning on attending the meeting but if [Advocate] would not be in attendance, [BOCES Legal Counsel] "really does not need to attend."<sup>62</sup> [School Psychologist] requested that [Parents] notify the BOCES if they intended to bring [Advocate]: "[I]f you do happen to know by the close of the day tomorrow, please let me know and I can inform those who need to plan travel etc. on this end."<sup>63</sup>

48. [Parents] did not reply to [School Psychologist's] 04/01/2010 email. Consequently, [BOCES' Legal Counsel] traveled from Denver to [School] in advance of the meeting.

49. The SCO finds that given the credible evidence in the Record:

- The 04/06/2010 IEP meeting was attended by all the [School] and BOCES staff listed on the Notice except for [BOCES' Legal Counsel];<sup>64</sup>
- Neither [Advocate] nor [BOCES' Legal Counsel] attended the 04/06/2010 IEP meeting;<sup>65</sup>
- [Parents'] claim that they were intimidated by [BOCES' Legal Counsel's] presence in the [School] building during the meeting is not persuasive;<sup>66</sup>
- The initial Notice was proper;
- [Parents] received timely notice that the [BOCES' Legal Counsel] would not attend if [Advocate] did not attend;
- [Parents] chose not to reply to the [School Psychologist's] 04/01/2010 email inquiry;
- The BOCES' Legal Counsel was not a required member of the IEP Team; and
- The absence of the BOCES' Legal Counsel from the IEP Meeting did not interfere with [Parents'] right to participate in the meeting.

50. **[Parents'] Concerns.** An IEP Team meeting was held on 04/06/2010 and was recorded by [Parent].<sup>67</sup> In addition to the [School] and BOCES' staff (FF #s 42 and 46, above), the meeting was attended by [Parent], [Student] and a person who identified herself as a [Friend of Parent].<sup>68</sup>

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<sup>60</sup> Response, pg. 19.

<sup>61</sup> Exhibit 1a, pg. 3.

<sup>62</sup> Exhibit 19e.

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> Exhibit 1b, pg. 3.

<sup>66</sup> Complaint, pg. 4.

<sup>67</sup> CD A, Recording of 04/06/2010 IEP Meeting.

<sup>68</sup> Id., pg. 3.

51. In advance of the meeting, [Parents] submitted a list of 15 Parental Concerns (Concerns) as well as a Parental Statement (Statement).<sup>69</sup> [Parents'] specific Concerns were as follows:

- [AT] for written assignments;
- Training in Dragon Naturally Speaking;
- All text on CD or RFBD;
- All tests presented orally;
- Extra time on written assignments;
- Appeal for ACT accommodations;
- ACT scores without accommodations;
- Reading remediation;
- American Sign Language;
- Internship;
- Classes at Fort Lewis College;
- Community Service;
- Tutor younger students;
- GORT 4; and
- Computer classes.<sup>70</sup>

[Parents'] Statement noted:

We as a team have accomplished quiet a lot. [Student] has acquired many [AT] skills, such as Kurzweil and Inspiration. . . [Student] has twice been offered Linda Mood Bell at [School] for [Student's] reading and writing difficulties. [Student] was able to make great gains with this type of remediation, repetition and support. [Student] has had a study skills class in [Student's] schedule for [two] years and this proved to be very helpful. This class, at the end of the day, provided [Student] support for all of [Student's] homework and opportunities for technical assistance. [Student] has been provided much in the way of accommodations. Extra time on all written assignments (sic). Less Reading (sic) material required. All Textbooks (sic) available on CD or downloaded off of RFBD. All testing read out loud to [Student]. [AT] for Writing.<sup>71</sup>

The Statement then reiterated in greater detail many of [Parents'] Concerns. The SCO notes that, neither the Statement nor list of Concerns made mention of [Student] needing either an IEE or ESY programming.

52. During the meeting, while [Case Manager] was attempting to present [Student's] present levels of performance, including [Student's] most recent CSAP , NWEA and MAZE scores, [Parent] frequently interrupted and repeatedly expressed the opinion that all of the testing had been done with accommodations "so it's not a true indicator." [Parent] noted that, "college

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<sup>69</sup> Id., pgs. 12-13.

<sup>70</sup> Exhibit 1b, pg. 12.

<sup>71</sup> Id., pg. 13.

admissions needs a triennial evaluation within three years that proves what [Student's] areas of disability are." [Parent] also noted that all colleges require a psychological evaluation.<sup>72</sup>

53. During the meeting, [Parent] voiced numerous criticisms. [Parent] complained that [Student's] high grades "are subjective. My son has enormous potential. What is [Student's] potential without accommodations?"<sup>73</sup> [Parent] opined that the 2008-2009 CSAP scores were subjective and merely an indicator of what [Student] had done previously. [Parent] noted that the CSAP was done with accommodations:

[S]o it's not a true picture of where [Student's] weaknesses are. CSAP is not a nationally normed reference test that shows [Student's] area of weakness, where [Student] needs help. . . It, state criteria, has no bearing on a child with a [SLD]. It's got to be nationally normed. . . We should all be talking about [Student] reading and writing at grade level when [Student] graduates. . . *I think [Student] needs remediation in reading and writing until [Student] graduates so [Student] can read and write at grade level without accommodations.*<sup>74</sup>

[Former Special Education Director] attempted to explain that [Student] did not have any IEP reading goals since [Student] was reading at grade level [with accommodations] last year. [Former Special Education Director] noted that, based on the 04/14/2009 CSAPs, [Student] was reading at an eighth grade level and by 09/2009 had shown improvement. [Parent] replied "That's not good enough for a child who has potential." [Former Special Education Director] explained that accommodations are like reading glasses. [Parent] replied "I'd like [Student] reading without glasses."<sup>75</sup>

54. The recording of the meeting is over two hours in length. On two occasions during the meeting, [Parent] abruptly stated that she needed a break and left the meeting for several minutes during which time the meeting was suspended. Shortly after two hours, the recording ends abruptly.<sup>76</sup> The IEP meeting notes indicate that "[Parent] left the meeting before its conclusion. [Parent] was asked to stay in order to complete the IEP and she continued to leave. [Parent] was informed that the IEP meeting would continue [in her absence]."<sup>77</sup>

55. The SCO specifically finds:

- During the meeting, [Parent] raised and the Team discussed the vast majority of [Parents'] Concerns;<sup>78</sup>
- Although an agenda was presented at the onset of the meeting, [Parent] frequently interrupted presenters and dominated the Team discussions;

<sup>72</sup> CD A, Recording of 04/06/2010 Meeting.

<sup>73</sup> Id.

<sup>74</sup> Id. (emphasis added).

<sup>75</sup> Id. (emphasis added). The SCO notes that [Parents'] views persisted subsequent to the meeting. In a 04/08/2010 email to [Advocate], [Parent] noted "Help my son read at grade level by the time [Student] graduates, without accommodations. That would be FAPE and any thing (sic) less is a law suit." Exhibit A, pg. 18.

<sup>76</sup> CD A, 04/06/2010.

<sup>77</sup> Exhibit 1b, pg. 11.

<sup>78</sup> CD A, Recording of 04/06/2010 Meeting.

- There were lengthy discussions about [Parents'] concerns about [Student's] present levels of performance, [Parent's] belief that [Student] needed more goals (specifically a reading goal), the Transition Plan, [Student's] access to skills in and use of various [AT] programs, as well as [Student's] need for ESY;
- [Parent] abruptly walked out of the meeting a third and final time prior to its conclusion; and
- The remaining Team members completed the meeting and IEP in [Parent's] absence.

56. **Relevant Sections of the 04/06/2010 IEP.** The Team determinations and relevant portions of the 04/06/2010 IEP are as follows:<sup>79</sup>

Section 6: Present Levels of Academic Achievement and Functional Performance:

- CSAP:
  - 2008: Proficient in Reading, Writing and Math;
  - 2009: Proficient in Reading, Math and Science; Partially proficient in Writing.
- Colorado Growth Model:
  - 2009: Proficient in Reading and Math; Partially proficient in Writing.
- Present Levels of Educational Performance Summary - Current GPA after second trimester of [Student's] junior year is 3.675. . . NWEA scores from the end of last year show [Student] to be in the 72% in math; 73% in general science, 55% in concepts. [Student] has progressed in [Student's] academics and has passed all classes with A's and B's. Writing continues to be the primary area of disability. [Student] has worked in Junior English to develop stronger vocabulary in [Student's] writing. . . [03/03/2010] AIMS probe results were Gr. 6 153/2, grade 7 146/3, Gr. 8 153/0 compared to [09/15/2009] Grade 8 126/4. MAZE test [03/03/2010] 34/1 and 09/15/2009 26/0. Earlier this year [Student] took the ACT test without accommodations and scored a composite of 17.
- Transitional Assessment Process – [Student] has completed the College in Colorado interest finder and [Student's] interests are in the areas of agricultural, mechanical, chemical and nuclear engineering and business. [Student] did a College Readiness questionnaire, has taken the ACT test without accommodations . . . [Student] has researched [six] colleges and identified schools that supported [Student's] areas of interests with strong programs. [Student] has expressed that completing the first two years of school at [College] and then transferring might be the best option. [Student] is scheduled to take the SAT on [05/01/2010].
- Student Needs and Impact of Disability – [Student's] disability impacts [Student's] education primarily in reading and writing. [Student] has shown greater comprehension when [Student] hears the material read aloud. [Student's] silent comprehension has improved based on [Student's] MAZE scores. [Student's] writing continues to lack maturity in word choice, paragraph and sentence structure and conventions. [Student] has exhibited improved ability in writing when [Student] uses [AT]. [Student] is fluent when presenting in class.

Section 7: Consideration of Special Factors:

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<sup>79</sup> Exhibit 1b, pgs. 1-13.

- Does student need [AT]? Yes. [Student] has access to scan and read software and speech to text software for support in reading and writing. Two hours of specific training for [Case Manager] in voice recognition software will be completed. On-going support is available upon request from [Case Manager].

Section 8: Post-School Considerations:

- Graduation date – 5/27/2010.
- Goal (#1) – [Student] will attend a [four] year college after high school. Planned Course of Study – [Student] is taking college prep classes. Currently [Student] is in trigonometry, Junior English B, Chemistry B, and Ceramics. Next year as a senior [Student] will take statistics and Senior English A. [Student] has career interests in science and math, but has expressed interest in business. [Student] can do an internship in a career area during [Student’s] senior year. [Student] has had the foreign language requirement waived for graduation. [Student’s] parent has been informed about the policy of [four] Colorado colleges about acceptance without the language requirement.
- Transition Services and Activities: [Student] has considered careers in engineering and business. With [Transition Coordinator] and [Case Manager] [Student] has explored the college opportunities and majors with these careers. [Transition Coordinator] will invite [Student] on a tour of [College] before graduation, and arrange a visit with the disabilities office if desired. [Parent] has expressed desire to visit other colleges with [Student]. [School Counselor], [Case Manager], [Parent], and [Student] will meet to create a possible fast track or current enrollment plan.
- Goal (#2) – [Student] will work full time in competitive paid employment after college. Planned Course of Study – [Case Manager] will consult with [Student] and [Parent] to determine if [Student] wants to pursue an internship as a senior to explore career paths. Transition Class is available to explore careers and colleges.
- Transition Services and Activities: Transition Class teacher will meet with [Student] to explain curriculum. [Case Manager] will assist [Student] in completing the College in Colorado Pathways. [Transition Coordinator] will meet with [Student] to explore college catalogs. [Parent] will contact [Division of Vocational Rehabilitation] and [School] can support family appropriately if requested.

Section 9: Annual [Measurable] Goals:

Goal #1 – Area of Need: Academics-Access Skills;

- Because [Student] has not chosen a college major or determined which college to attend, [Student] will complete the College in Colorado pathways to define at least three areas of career interests and colleges of interest by the end of first trimester 2010-2011 school year.<sup>80</sup>

Goal #2 – Area of Need: Academics – Written Language;

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<sup>80</sup> [Case Manager] acknowledged during the 04/06/2010 IEP meeting that he had erroneously inserted the wrong data point and baseline target numbers in the goal and had corrected the numbers without reconvening a meeting Exhibits: CD A Recording of 04/06/2010 Meeting and 1b, pg. 11.

- In order to achieve continued success in high school and future success in college, [Student] will consistently use this writing process to achieve improvement in [Student's] writing products: 1) drafting [Student's] thoughts in an informal outline, 2) verbalizing [Student's] thoughts following [Student's] outline and using speech to text software to create [Student's] first draft, 3) editing text using scan and read software for clarity in expression, sentence structure, vocabulary and conventions 4) identifying key words and ideas 5) generating a list of synonyms for key words 6) using scan and read software, review again for clarity to reduce [Student's] errors on larger writing assignments with subject verb agreement, run on sentences, and lack of sentence structure variety.

Goal #3 – Area of Need: Academics – Written Language;

- [Student] will achieve a score of 5.0 (on three consecutive writing samples) on a final draft using the SAT Writing Rubric.

Section 10: Accommodations and Modifications:

- Accommodations: Reader for tests, opportunity to access and use scan and read software and speech to text software on [Student's] computer for all reading and writing assignments, extended time on writing assignments with multiple opportunities to edit for conventions and spelling without penalty. All text available to [Student] in an audio format; and
- Modifications: Based on the previous IEP team decision, [Student] will not be required to take Foreign Language requirement in order to meet graduation requirements.

Section 12: State/District Assessments:

- Not Assessed at this Grade Level.

Section 13: Related Services:

- [Student] will be included in general education classes with special education support provided as outlined below. [Student] and [Case Manager] will meet two times per week to work on IEP goals for direct service delivery and [Case Manager] will provide/coordinate case management services on [Student's] behalf indirectly one hour per week.
- [Teacher] and [Special Education Teacher] Direct: 2.00 hours p/wk;
- Indirect: 1.0 hrs. p/wk.

Section 14: Recommended Placement in Least Restrictive Environment:

- Placement Options Considered and Selected: Continued placement in general education classroom at least 80% of the time with support from special ed staff.
- Placement Options Considered but not Selected: Team considered more direct service delivery, which would possibly move [Student] into participating in regular education classes less (sic) percentage of [Student's] day.
- Summarize discussions: Team agreed that [Student's] [LRE] is with regular education peers and any special education support for IEP goals can be provided

by [Case Manager] at a separate time during the school day so as not to interfere with [Student] participating in the regular education environment.

- Primary Special Education Environment: General education class at least 80% of the time.

Section 15: Prior [Written] Notice of Special Education Action:

- This action is proposed/refused because: [Student] will continue to receive special education support as outlined in this most recent IEP.
- This action/refusal is based on the following evaluation procedures, tests, records, or reports: The action is based on review of previous IEP goals and progress on those goals, Triennial school evaluation completed last school year, state testing, current grades, school transcript, classroom performance, observations and input from [Case Manager] and school team, [Student] and [Parent].
- Other options considered: ESY; Additional, updated standardized tests; additional direct instruction using AT, mainly speech to text software; instruction in remediation of reading; parent concern regarding past NWEA testing; [Parent] would like [Student] to take additional computer classes.
- Why these options were rejected: The options of ESY, additional standardized testing, IEP goals around reading remediation, [are] addressed in separate [PWN]. [AT] training to [Case Manager] is noted in section 7 of this IEP. NWEA testing results were removed from Present Levels of Performance Section. [Student] has taken [all of] the computer related classes offered by [School].

57. In addition to the PWN contained in the IEP, on 04/14/2010, the BOCES sent [Parents] a lengthy PWN<sup>81</sup> concerning numerous parental concerns and requests the Team considered and rejected during the 04/06/2010 IEP meeting, including [Parents'] requests for:

- Additional evaluations, including additional standardized assessments and GORT;
- Direct instruction for reading remediation;
- Writing mentor;
- Inclusion of more goals in the IEP;
- ESY programming;
- Inclusion of Diane Jenkins on Transition page, as Agency/Community supports;
- Computer class;
- Lindamood-Bell (LMB) class;
- American Sign Language;
- Community Service; and
- Tutoring younger students in AT.

58. The PWN summarized:

[T]he IEP Team has considered your requests carefully. However, at this time, as a public school district, we must deny your requests as such services/evaluations/goals are

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<sup>81</sup> Exhibits 1b, pg. 11, 2, A, pg. 12 and E, pgs. 20 & 47-48.

not necessary for [Student] to receive FAPE; the attached IEP, completed on [04/06/2010], ensures that [Student] is able to receive some educational benefit.<sup>82</sup>

59. The PWN explained in extensive detail (e.g., [Student's]: grades in the 2009-2010 school year; numerous testing scores; progress monitoring on AIMSWeb and MAZE; and IEP progress reports) the basis for the Team's refusals. The PWN advised in extensive detail the specific reasons why the Team had rejected requests concerning additional evaluations and additional services (detailed in FF 55, above). Concerning [Parents'] requests for more computer classes or to take the LMB class again, the PWN noted that,:

[Student] has exhausted all available computer classes at [School] and has taken the LMB class twice. . . [Student] does not need more computer classes or to take the LMB class again. [Student] has completed [those] classes successfully and continues to benefit from the learning and skills [Student] gained in those classes.<sup>83</sup>

60. Finally, the PWN acknowledged that many of [Parents'] concerns and requests had been included in the 04/06/2010 IEP, including:

- Use of AT for writing assignments;
- Training by [Case Manager] in Dragon;
- All texts being available on CD or RFB&D;
- Extra time on written assignment;
- Appeal of ACT scores without accommodations; and
- Transition services will address internship opportunities and Fast-Tracking in order to take classes at [College].<sup>84</sup>

61. [Parents'] Reply alleges that the BOCES did not supply PWN explaining the Team's actions.<sup>85</sup> However, the SCO notes that the Complaint exhibits included copies of the 04/06/2010 IEP, (including Section 15, Prior [Written] Notice) and the 04/14/2010 PWN.<sup>86</sup> The SCO finds that [Parents'] claim is not supported by the Record.

62. The 04/06/2010 IEP was in effect when [Student] started the 2010-2011 school year.

63. **ESY Programming Request.** Prior to implementation of the 04/22/2009 IEP, [Student] had been trained extensively in the use of AT software but, ultimately, [Student] decided when and to what extent [Student] actually used the technologies.<sup>87</sup>

64. During the 04/06/2010 IEP meeting, [Parent] sought ESY services for [AT], specifically Dragon. [Special Education Director] attempted to explain the ESY criteria for regression/recoupment. [Parent] argued that, during the summer of 2009, [Student] had

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<sup>82</sup> Exhibit 2, pg. 1.

<sup>83</sup> Id., pg. 5.

<sup>84</sup> Id., pg. 5.

<sup>85</sup> Reply, pg. 3.

<sup>86</sup> Exhibit E, pgs. 20 and 47-48.

<sup>87</sup> Exhibits 8a, 9d & e and CD A, 04/06/2010 meeting.

regression in Dragon. [Parent] noted that [Student] was “at 90% proficiency last year and we all know [Student]’s not at that level now. [Student]’s regressed because [Student]’s stopped using [Dragon]. If [Student]’s totally off of it all summer [Student]’s regressed.”<sup>88</sup> [Special Education Director] explained that the regression criteria was based, per the law, on [Student]’s goals and observed that [Student] was receiving As and Bs even if [Student] was not using Dragon.<sup>89</sup>

65. The only mention in the 04/06/2010 IEP meeting of a SLD as it related to ESY programming was a comment made by [Parent]: “We’ve never been entitled to ESY over the years – they don’t offer it to people like [Student].”<sup>90</sup>

66. The BOCES’ Special Education Procedural Manual (BOCES’ Manual)<sup>91</sup> provides extensive guidance to IEP Teams concerning ESY programming, including: when circumstances dictate a student qualifies for ESY; measures of progress for students being educated primarily in the general curriculum; ESY criteria (including ‘significant jeopardy,’ regression/recoupment; and numerous additional factors).

67. The 04/14/2010 PWN notified [Parents]:  
[Student] does not qualify for ESY. [Student] met two of [Student]’s IEP goals and made progress on the third goal. The AIMSWeb and MAZE testing showed that [Student] was able to recoup and make gains after brief breaks. [Student] continues to achieve As and Bs, even after coming back from summer break. Further, [Student] does not require ESY services to receive FAPE as indicated by [Student]’s continued academic progress and success in [Student]’s general education classes.<sup>92</sup>

68. As to [Parents]’ ESY request, given the overwhelming evidence in the Record, the SCO specifically finds:

- [Student] was fully trained and proficient in Dragon and other AT programming;<sup>93</sup>
- One of [Student]’s 04/06/2010 IEP goals emphasized [Student]’s use of AT programming in writing assignments;
- The Team fully considered and discussed [Parents]’ ESY programming request;
- The Team rejected the request on the basis of proper ESY criteria; and
- There is no evidence in the Record to support [Parents]’ claim that the [Student] was refused ESY services on the basis of [Student]’s disability (i.e., SLD).

69. Two teachers who had extensive contact with [Student] (i.e., [Case Manager] and [English Teacher]) noted that [Student], by [Student]’s own choice, did not use the Dragon software consistently. [Student] acknowledged this during the 04/06/2010 IEP meeting.<sup>94</sup> [Student]’s inconsistent use of Dragon is further substantiated by a 04/19/2010 email from

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<sup>88</sup> CD A, 04/06/2010 meeting.

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> Exhibit 16b.

<sup>92</sup> Exhibit 2, pg. 4.

<sup>93</sup> Exhibits 8a and 2.

<sup>94</sup> Exhibits 9d & e and CD A, 04/06/2010 IEP Meeting.

[Parent] to her [Advocate]: “They committed in the IEP to [two] hours of this AT training a week. . . [Student] feels it will be a waste of time because then [Student] has to do it all over again in the Fall. [Student] knows [Student] won’t use it over the summer.”<sup>95</sup> The SCO concludes that, given [Student’s] age and post-secondary education ambitions, once [Student] received training in Dragon and all the other AT programming the BOCES had downloaded on to [Student’s] personal computer, *[Student] had a responsibility to consistently use the programming in order to ensure retention of [Student’s] learned AT skills. That responsibility extended to the 2010 summer break.*

70. Progress Reports. The notes indicate that, between 04/06/2010 and 05/27/2010, [Student] made progress on two of the three IEP goals:<sup>96</sup>

- Goal #1: Did not Work On. [Student] worked on this goal during 04/2010 but not during the 05/27/2010 reporting period. On 05/21/2010, [Student] and [Case Manager] met to review the 2010-2011 classes and informally discussed classes for the next year and the possibility of going to [College] for business and English classes. [Student] has decided not to go to [College] next year. [Student] will complete research with [Student’s] case manager during the first trimester of [Student’s] senior year.
- Goal #2: Progress. 05/27/2010 - [Student] has just begun to use and explore this process for writing. . . Based on [Student’s] final writing in Junior English, [Student] has used Step one consistently creating an outline. . . Step three using reading software improved editing, structure and conventions. Step four showed no evidence in [Student’s] draft writing on being used. Step five was not followed through on in this writing as it had been in previous ones. The final writing shows some lack of focus and smoothness of expression along with weak vocabulary choice. The final step six was followed and improved the final product. [Student] and . . . [Case Manager] will continue to work on refining this process during [Student’s] first trimester of [Student’s] senior year.
- Goal #3: Progress. 05/27/2010 – [Student’s] writing has not improved to the level of achieving a 5 on the SAT rubric. [Student’s] most recent writing at the end of the Junior English class was scored at a 3.5 on the rubric. Variety of structure, word choice and cohesive expression were the primary areas that brought down the score.

71. Grade Reports.<sup>97</sup> During the final trimester of the 2009-2010 school year, [Student] received “As” and “Bs” in all of [Student’s] college preparatory coursework and had a cumulative GPA of 3.636.

72. ACT Testing.<sup>98</sup> In 2010, [Student] sat twice for the ACT Test. [Student] initially took the test without accommodations. However, because of [Student’s] disability, [Student] was later permitted to retake the ACT with accommodations:

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<sup>95</sup> Exhibit A, pg. 5.

<sup>96</sup> Exhibit 19f, pgs. 1-3. The SCO notes that the Complaint was filed during the first week of the 2010-2011 school year.

<sup>97</sup> Exhibit 11e.

<sup>98</sup> Exhibit 19a.

- In February, 2010 – *Without Accommodations*. [Student] received a composite score of 17 which indicated a Colorado ranking of 32% and a national ranking of 26%.<sup>99</sup> The ACT report notes that [Student] had a combined English/writing score of 12% and a writing score of 33%. The report comments indicate “Your essay used some specific details, reasons, and examples, but it needed more of them.”<sup>100</sup>
- In April, 2010 – *With Accommodations*. [Student] received a composite score of 23, which indicated a Colorado ranking of 71% and a national ranking of 69%. The ACT report notes that [Student] had a combined English/writing score of 53% and a writing score of 81%. The report comments indicate “Your essay adequately supported general statements with specific reasons, examples, and details. Your essay maintained focus on the specific issue in the prompt. Using more sentence variety and precise word choice would make your essay clearer and more engaging.”<sup>101</sup>

73. SAT Testing. The College Board Services for Students with Disabilities approved [Student] for the following testing accommodations: 50% extended testing time; a Reader; and, with use of a reader, 50% extended testing time.<sup>102</sup> With [Parents’] concurrence, [Case Worker] appealed the accommodations ruling, requesting that [Student] be permitted use of a word processor for the writing portion of the SAT to be transcribed by [a] scribe.<sup>103</sup> As a result, [Student] was approved for a Reader and 50% more time on the PSAT/NMSQT; and approved for a Reader, Word Processor and 50% more time on the AP Exams.<sup>104</sup> The Record is silent as to [Student’s] SAT testing results.

74. **Sufficiency of the 04/06/2010 IEP.** Given the overwhelming evidence in the Record,<sup>105</sup> the SCO finds that:

- The 04/06/2010 IEP was developed by the IEP Team which included [Parent];
- The IEP provided for an educational placement and special education services that suited [Student’s] needs;
- [Student’s] special education and related services were consistently implemented;
- [Student] has made progress on two of the three IEP goals;
- [Student] has continued to receive above average grades (i.e., “As” and “Bs”) in all college prep classes; and
- [Student] has maintained a very high GPA.

### CONCLUSIONS OF LAW:

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

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<sup>99</sup> In other words, 32 % of Colorado students and 26% of student in U.S. received scores at or below [Student’s] score.

<sup>100</sup> Exhibit 19a, pg. 2.

<sup>101</sup> Id., pg. 1.

<sup>102</sup> Exhibit 19g, pg. 1.

<sup>103</sup> Id., pgs. 4-6.

<sup>104</sup> Exhibit E, pgs. 50-51.

<sup>105</sup> Exhibits 1b, 2, 9d & e, 11e, 19f & g and CD A, Meeting of 04/06/2010.

1. Under the IDEA and the corresponding Colorado law, the Exceptional Children’s Educational Act (ECEA), students with disabilities have the right to a FAPE. (20 U.S.C. 1400 *et seq.*; ECEA Rule 2220-R-1.00 *et seq.*)<sup>106</sup> The relevant IDEA regulation defines a FAPE to mean *special education and related services that*:

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the Colorado Department of Education;
- (c) Include an appropriate preschool, elementary school, or secondary school education; and
- (d) *Are provided in conformity with an IEP that meets the requirements of §§ 300.320 through 300.324.*

§ 300.17 (emphasis added). See also ECEA Rule 2.19

2. The standard for determining whether a student has received a FAPE is whether the student received “some educational benefits.” *Board of Education v. Rowley*, 458 U.S. 176, 207 (1982). The educational benefit required by the IDEA must be “more than *de minimis*.” *Urban ex re. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10<sup>th</sup> Cir. 1996).

3. In assessing whether a BOCES has provided a student with a FAPE, courts follow a two-step process as set forth by the U.S. Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176, 206-207 (1982). First, the court considers whether the BOCES complied with the procedures set forth in the IDEA, including the specific requirements of the IEP. *Garcia v. Board of Educ.*, 520 F.3d 1116, 1125 (10<sup>th</sup> Cir. 2008). Next, the court looks at whether the special education services provided to the student in the IEP are reasonably calculated to enable the child to receive educational benefits. *Id.*

4. In challenging an IEP, the burden of proof is properly placed on the party seeking relief. *Schaffer v. Weast*, 126 S.Ct. 528 (2005) (“The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.”) *Accord A.E. v. Indep. Sch. Dist. No. 25*, 936 F.2d 472 (10<sup>th</sup> Cir. 1991) (“The burden of proof rests upon the party attacking the child’s IEP.”)

### **Procedural Violations Allegedly Committed In Conjunction with 04/22/2009 IEP.**

5. **Failure to Consistently Implement AT Access and Use.** In reviewing and revising an IEP, the BOCES must ensure that the IEP Team:

- Reviews the child’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and
- Revises the IEP, as appropriate, to address –
  - (A) Any lack of expected progress toward the annual goals . . . and in the general education curriculum, if appropriate;

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<sup>106</sup> Hereafter, only the IDEA regulation and corresponding ECEA rule will be cited.

- (B) The results of any reevaluation;
- (C) Information about the child provided to, or by, the parents;
- (D) The child's anticipated needs; or
- (E) Other matters.

§ 300.324(b)(1). Additionally, in conducting a review of the child's IEP, the IDEA requires that the IEP Team consider special factors including "whether the child needs assistive technology devices and services." § 300.324(b)(2) and (a)(2)(v).

6. In order to conform with FAPE requirements, the BOCES must ensure that [AT] devices or [AT] services, or both, are made available to a child with a disability if required as a part of the child's special education, related services or supplementary aids and services. Furthermore, the IEP Team is to determine, on a case by case basis, whether the use of school-purchased [AT] devices for use in a child's home is necessary in order for the child to receive a FAPE. § 300.105.

7. Consistent with § 300.105, in conjunction with the 2008-2009 school year, the BOCES supplied [Student] with a variety of AT software (e.g., Dragon; Kurzweil; Inspiration; and Microsoft Word). [Student] was familiar with and could use all of the AT software. [Case Manager] had also received training on this AT software (FF #s 2 & 6).

8. The 04/22/2009 IEP Meeting was a Triennial Review which occurred over the course of two meetings. Those IEP meetings were attended by one or more [Parents] and [Student], the [Parents] fully participated in both of the IEP meetings and their concerns and suggestions were considered by the Team. (FF #s 3 & 10).

9. In developing the 04/22/2009 IEP, including those portions of the IEP related to [Student's] anticipated AT needs, the Team complied with the provisions of § 300.324(a) and (b). (FF #s 4 through 7 & 11). The 2009 IEP included two measurable goals specifically addressing [Student's] AT use. (FF #6). The IEP Team concluded that [Student] did not require a [School] laptop computer for home use in order to receive a FAPE. (FF #11).

10. After the 04/22/2009 IEP was finalized, consistent with § 300.105, the portion of the IEP concerning the availability of AT devices and services was consistently implemented by the BOCES. (FF #s 12 through 15). By 04/06/2010, [Student] had met one of the AT goals (i.e., goal # two) and had made progress on the other AT goal (i.e., goal # three). (FF #16). Although [Student] has access to the AT during school and had received the AT software programming on [Student's] personal computer, [Student], of [Student's] own volition, did not consistently use the AT software. (FFs 14 through 15, 64, and 68 through 69). The SCO concludes that the BOCES committed no procedural violations.

11. **Failure to Consistently Implement the Transition Plan.** Beginning with the first IEP developed when the child is age 15, but not later than the end of 9<sup>th</sup> grade, or earlier if deemed appropriate by the IEP Team, and updated annually, thereafter, the IEP must include: (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services . . . needed to assist the child in reaching those goals. ECEA Rule 4.03(6)(d).

12. Consistent with ECEA Rule 4.03(6)(d), the 04/06/2009 IEP provided appropriate measurable postsecondary goals and transition services. (FF #s 6 through 9). Furthermore, subsequent to development, the Transition Plan portions of the IEP were consistently implemented. (FF #s 16-19). The SCO concludes that the BOCES committed no procedural violation.

13. **[Parents’] Request to Convene IEP Meeting.** The review and revision of a child’s IEP must occur periodically, but not less than annually. § 300.324(b)(1)(i). See also ECEA Rule 4.03(3) (Meetings to review and revise each child’s IEP and to determine the child’s placement shall be initiated and conducted at least once every 365 days.)

14. Two IEP meetings occurred in conjunction with Triennial Review and development of the 04/22/2009 IEP. [Parents] attended both of those meetings. (FF #3). During the meetings, [Parents’] concerns, suggestions and input were fully considered. (FF #s 4, 7 and 10). In their 08/12/2009 request for an IEP meeting, [Parents] did not offer any new information or changed circumstances which would justify another IEP meeting. (FF #s 21 through 23). The SCO concludes that no procedural violation occurred.

15. **[Parents’] Request for an IEE.** The relevant sections of the IDEA regulation concerning IEEs provide as follows:

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an [IEE] of the child, *subject to paragraphs (b) through (e) of this section.*

(2) Each [BOCES] *must provide to parents, upon request for an [IEE], information about where an [IEE] may be obtained, and the [BOCES’] criteria* applicable for [IEEs] as set forth in paragraph (e), of this section.

(3) For purposes of this subpart –

(i) *[IEE] means an evaluation conducted by a qualified examiner who is not employed by the [BOCES] responsible for the education of the child in question; and*

(ii) *Public expense means that the [BOCES] either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent. . .*

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an [IEE] at public expense if the parent disagrees with an evaluation obtained by the [BOCES], *subject to (b)(2) through (4) of this section.*

(2) *If a parent requests an [IEE] at public expense, the [BOCES] 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 [IEE] is provided at public expense. . .*

. . .

(4) If a parent requests an [IEE], the [BOCES] may ask for the parent's reason why he or she objects to the public evaluation. However, the [BOCES] may not require the parent to provide an explanation and may not unreasonably delay either providing the [IEE] at public expense or filing a due process complaint to request a due process hearing to defend the [BOCES'] evaluation.

...

(e) *Agency Criteria.*

(1) *If an [IEE] is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the [BOCES] uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an [IEE].*

(2) Except for the criteria described in paragraph (e)(1) of this section, a [BOCES] may not impose conditions or timelines related to obtaining an [IEE] at public expense.

§ 300.502(a)(b) & (e) (emphasis added).

16. Consistent with the § 300.502, the BOCES supplied [Parents] with the BOCES' criteria for an evaluation. (FF 28). [ZIA Group], a behavioral health service group, did not meet the BOCES' criteria on the basis of either location or individual evaluator credentials. (FF 29-31).

17. On 10/26/2009, the BOCES notified [Parents] that [ZIA Group] had contacted the BOCES and advised that [ZIA Group] could not conform to the BOCES' criteria. Specifically, [ZIA Group] had no examiner licensed in the State of Colorado. The BOCES' 10/26/2009 letter included a list of three Colorado evaluators meeting the BOCES' criteria. *The BOCES requested that [Parents] advise the BOCES whether they would be proceeding with the IEE with one of the evaluators.* (FF 31).

18. [Parents] never replied to the BOCES' letter of 10/26/2009. Specifically, the [Parents] never advised the BOCES whether they would be proceeding with an IEE. Nor did the [Parents] either identify an evaluator from the BOCES' list of three qualified evaluators or identify an alternate evaluator or that evaluator's credentials. (FF #s 32 and 33). In fact, the first time [Parents] replied to the 10/26/2009 letter to notify the BOCES of their specific evaluator choice (i.e., [ZIA Evaluator]) and to supply any of that evaluator's credentials was over nine months later in conjunction with the instant Complaint. (FF # 33).

19. The SCO concludes that the BOCES complied with the relevant provisions of § 300.502(a)(2) and (e) when [Parents] were supplied with the BOCES' criteria and information about where an IEE could be obtained. By supplying [Parents] with a list of three Colorado evaluators who met the BOCES' criteria, [Parents] were notified of how and where they might obtain an IEE.

20. The Office of Special Education Programs (OSEP) has supplied guidance concerning § 300.502(e)(1). In *Letter to Young*, 39 IDELR 98 (03/20/2003), OSEP determined that a [BOCES] may establish qualifications required for BOCES evaluators, including a published list

of qualified IEE examiners from which a parent could choose. Additionally, under certain circumstances, the BOCES can restrict parents to selecting from the evaluators on the list. However, there is nothing in the Record to suggest that the BOCES required [Parents] to choose an evaluator from the list of three Colorado evaluators. SCO concludes that, contrary to [Parents'] Complaint, the BOCES has not refused to pay for an IEE or refused to approve [ZIA Evaluator]. Consequently, contrary to the Complaint allegation, there was no dispute between the parties and the BOCES committed no procedural violation.

21. **The Co-taught English Class.** Under the IDEA, in determining the educational placement of a child with a disability, the BOCES must ensure that the placement decision is made by a group of persons, including the parents, and that the child's placement is based on the child's IEP. § 300.116(a) and (b). See also ECEA Rule 4.03(8)(a) ("The determination of placement must be based on the child's IEP and made by the IEP Team.")

22. In 08/2009, the BOCES became aware that the [District] planned to eliminate the co-taught Junior English class. By 09/18/2009, the BOCES ensured that the class would be offered to [Student] during the 2009-2010 school year. (FF #s 35, and 37 through 39). Consistent with the 04/06/2009 IEP and [Student's] 2009-2010 schedule, [Student] took (and passed) both of the co-taught English classes for which [Student] had been scheduled. (FF #s 34, 36 & 40).

23. The scheduling incident amounted to a harmless error which was timely corrected by the BOCES. (FF # 41). [Parents'] allegation that the scheduling glitch constituted a change of placement in violation of the IDEA or ECEA is not supported by the Record. [Parents] have not met their burden in proving that a procedural violation occurred.

24. In summary, the 04/22/2009 IEP was properly developed and reasonably calculated to enable [Student] to receive educational benefits. (FF #s 15 through 19).

#### **Procedural Violations Allegedly Committed In Conjunction with 04/06/2010 IEP.**

25. **The Notice of Meeting for the 04/06/2010 IEP Meeting.** The relevant IDEA regulation provides that the BOCES must take steps to ensure that one or both parents are present at each IEP Team meeting. In order to ensure parental participation at the meeting *the BOCES must:* notify the parents of the meeting early enough to ensure that they will have an opportunity to attend and schedule the meeting at a mutually agreed on time and place. § 300.322(a)(1) and (2). The notice must: indicate the purpose, time and location of the meeting and who will be in attendance. Additionally, the notice must inform the parents of their option to invite others persons to participate in the meeting. § 300.322(b) (emphasis added).

26. In scheduling the meeting, the BOCES complied with all of the notice requirements of § 300.322 (a) and (b). (FF #s 42-45). However, after learning that [Parents'] were not planning on having their [Advocate] attend the meeting, five days prior to the meeting, the BOCES sought to verify whether [Parent] intended to have [Advocate] attend the meeting. If [Advocate] was not attending, the BOCES would not go to the expense of having BOCES' Legal Counsel travel to the meeting from Denver. (FF #s 46 and 47).

27. [Parents] had notice but did not respond to the BOCES' inquiry and, consequently, BOCES' Legal Counsel traveled to the meeting site from Denver. However, because [Advocate] did not attend the meeting, neither did the BOCES' Legal Counsel. (FF #48 and 49).

28. The IDEA details the required members of the IEP Team. § 300.321(a). Under the regulation, legal counsel for a BOCES is not one of the required members of the IEP Team. *Id.* Additionally, because legal counsel is not a required IEP Team member, it follows that the BOCES did not have to obtain [Parents'] written consent to excuse the BOCES' Legal Counsel from the meeting. § 300.321(a)(6). Furthermore, the SCO concludes that consistent with § 300.322(b), [Parents] received timely notice that BOCES' Legal Counsel would not attend if [Advocate] did not attend but [Parents] chose not to respond to the email. Consequently, the SCO concludes that the Meeting Notice complied with the relevant regulations and no procedural violation occurred.

29. **Parental Concerns.** One of the core purposes of the IDEA is to ensure parental participation. To that end, parents are to be supplied with timely notice of purpose, time and location of meetings and who will be in attendance. § 300.322(a) through (b). In reviewing or revising an IEP, the BOCES must ensure that the IEP Team revises the IEP, *as appropriate*, to address . . . information about the child provided to, or by, the parents. § 300.324(b)(1)(ii)(C) (emphasis added). In revising [Student's] IEP, the IEP Team addressed and fully considered the information provided by [Parents], even though [Parent] abruptly left the meeting prior to its conclusion. (FF #s 50 through 55). [Parent] fully participated in the 04/06/2010 meeting to the extent she chose to participate. (FF 54 and 55).

30. In reviewing and revising [Student's] IEP, the IEP Team considerations were appropriate and consistent with § 300.324(b)(1)(ii)(C). The SCO concludes that the BOCES committed no procedural violations.

31. **ESY Services.** The IDEA regulation relevant to ESY services provides:

(a) General.

(1) Each [BOCES] must ensure that *[ESY] services* are available *as necessary to provide FAPE*, consistent with (a)(2) of this section.

(2) *[ESY] services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.*

(3) In implementing the requirements of this section, a [BOCES] may not –

(i) Limit [ESY] services to particular categories of disability. . .

...

(b) Definition. As used in this section, the term [ESY] services means special education and related services that – . . .

...

(2) Meet the standards of the SEA.

§ 300.106(a) (emphasis added). The Colorado Department of Education (CDE) ESY standards are summarized in the Procedural Manual (CDE Procedural Manual) at pgs. 65-66. Having

compared the ESY provisions of the BOCES' Procedural Manual<sup>107</sup> to those listed in the CDE Procedural Manual,<sup>108</sup> the SCO concludes that the BOCES' ESY standards meet the CDE standards.

32. The IEP Team fully considered [Parents'] request for ESY services but rejected the request on the basis of proper ESY criteria. (FF #s 51, 55, 56 - Section 15, 57 and 63 through 68). Nor did the Team base its decision on the category of [Student's] disability. (FF #65). The SCO concludes that the Team's ESY determination complied with § 300.106(a)(1)-(3) and (b)(2).

**Whether the 04/06/2010 IEP was sufficient to provide [Student] a FAPE in the LRE.**

33. A BOCES must ensure that:

- (1) To the maximum extent appropriate, children with disabilities are educated with children who are nondisabled; and
- (2) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§ 300.114(a)(2)(i) through (ii). In conjunction with the 04/06/2010 IEP Meeting, the Team considered [Parents'] multiple concerns and, as a result, implemented some but not all of [Parent's] requests. (FF #s 50 through 61).

34. The IEP Team determined an educational placement and special education services that, given the Record, suited [Student's] individual needs. The Team properly considered appropriate information, including, but not limited to: [Student's] present levels of performance; progress on goals; grades; special [AT] factors; and how [Student's] disability impacted [Student's] education. (FF #s 56 through 60 and 68 and 74). The Team specifically determined that [Student's] LRE was with regular education peers at least 80% of the time. Any special education support could be provided by [Case Manager] at a separate time during the school day so as not to interfere with [Student's] participation in the regular education environment. (FF 56, Section 14).

35. [Student] did not consistently avail [him\herself] to AT programming that the BOCES made available to [Student]. (FF #69). Nevertheless, during the relevant time period, [Student] made progress on two of the measurable goals; received grades of "As" and "Bs" in [Student's] college preparatory coursework; had a cumulative GPA of 3.636; and, with accommodations, received a composite score of 23 on the ACT . (FF #s 70-72). Subsequent to development of the 04/06/2010 IEP, [Student's] special education and related services were supplied in conformity with the IEP. (FF #s 70 through 74).

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<sup>107</sup> Exhibit 12b, pgs. 30-33.

<sup>108</sup> Full citation to the CDE Procedural Manual is: Procedural Manual: The Colorado State Recommended IEP, published 05/22/2008.

36. The 04/06/2010 IEP was properly developed and implemented consistent with the relevant provisions of §§ 300.320 through 300.324 and § 300.114(a)(2)(i) through (ii). The SCO concludes that [Student] received educational benefits.

37. [Parents'] bare assertion that [Student's] 04/06/2010 IEP was insufficient to provide a FAPE in the LRE environment is not supported by the Record. The IEP Team finalized the IEP in [Parent's] absence only because [Parent] chose to leave the meeting prior to its conclusion. (FF #s 54 and 55).

38. Contrary to [Parents'] understandings (FF 53), the correct legal standard is whether [Student] has been supplied with a "basic floor of opportunity," not whether the [Student] has been supplied with a "potential-maximizing education." *Board of Education v. Rowley*, 458 U.S. 176, at 199 to 201 (1982). The BOCES complied with the relevant IDEA procedures. Furthermore, both the 04/22/2009 IEP and the 04/06/2010 IEP were properly developed and reasonably calculated to enable [Student] to receive educational benefits. *Garcia v. Board of Educ.*, 520 F.3d 1116, 1125 (10<sup>th</sup> Cir. 2008). Clearly, [Student's] educational benefits were more than *de minimis*. *Urban ex re. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10<sup>th</sup> Cir. 1996).

39. [Parents] have not met their burden in proving that the BOCES committed any procedural violations or in proving that [Student] was denied a FAPE. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). There being no violation, no remedy is ordered.

### 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 30th day of September, 2010.

*Jeanine M. Pow*

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Jeanine M. Pow, Esq.  
State Complaints Officer

## **Appendix A**

### **2010:513 Record**

#### **Complaint, pgs. 1 through 6;**

- Exhibit A Assorted Correspondence and Emails, pgs. 1-130
- Exhibit B Data, pgs. 1-30
- Exhibit C Receipts for Devices and Software Programs, pgs. 1-8
- Exhibit D Progress Reports, pgs. 1-30
- Exhibit E Supporting Evidence, pgs. 1-167 (Note: pgs. 98-167 were outside of the SCO's jurisdictional time limits and therefore were not considered.)
- Compact Disc (CD) A: Recording of IEP Meetings: 10/06/2008; 11/19/2008; 04/06/2009; 04/22/2010; and 01/13/2009.
- Compact Disc (CD) B: Recordings of IEP Meetings: 01/14/2009 and 05/04/2009;

#### **Reply, pgs. 1-4;**

- Exhibit F Duplicate copy of previously submitted exhibit.
- Exhibit G [School] District Educational Technology & Information Literacy Plan 2009-2012

#### **Response, pgs. 1-23;**

- Exhibit 1a: IEP, dated 04/22/ 2009, including List Parental Concerns and Parental Statement
- Exhibit 1b: IEP, dated 04/06/ 2010, Parental Concerns List of Concerns and Parental Statement
- Exhibit 2: Prior Written Notice, dated 04/14/2010
- Exhibit 3: Prior Written Notice, dated 09/18/2009
- Exhibit 4a: Email from Parent requesting IEE
- Exhibit 4b: Letter from [Executive Director], dated 08/14/ 2009
- Exhibit 4c: Letter from Parent, received 09/23/2009 (though dated 08/14/ 2009)
- Exhibit 4d: Email Exchange Between Parent and [Executive Director], dated 09/21/2009 – 09/23/2009
- Exhibit 4e: Letters from [Executive Director] to [Zia Group], dated 09/24/ 2009
- Exhibit 4f: Letter from [Executive Director], dated 10/26/2009
- Exhibit 5a: Prior Written Notice, dated 08/13/2009
- Exhibit 5b: Prior Written Notice (Extended School Year), dated 05/12/2009
- Exhibit 5c: Prior Written Notice (Assistive Technology), dated 05/13/2009
- Exhibit 5d: Prior Written Notice (Requests made at Spring 2009 IEP meetings), dated 05/13/2009
- Exhibit 5e: [Executive Director's] *Response to Ten Day Notice of Intent to Provide Unilateral Placement and Parent's Notice of Proposed Actions for IEP Dated 4/22/09, May 13, 2009*
- Exhibit 6a: IEP—§ 8: Post-School Considerations and § 9: Goal 1, dated 04/22/2009
- Exhibit 6b: Transition Action Plan, dated 04/22/2009
- Exhibit 6c: Memorandum from [Transition Coordinator], dated 04/28/2009
- Exhibit 6d: Career Research for the Student
- Exhibit 6e: Transition Assessment Record for the Student
- Exhibit 6f: Record of Contact by [Case Manager]

Exhibit 6g: Notes by [Case Manager]  
Exhibit 6h: College in Colorado Account for the Student  
Exhibit 6i: Transition Inventory Result  
Exhibit 6j: Holland Personality Types  
Exhibit 6k: Student-Questionnaire—Transition to Post Secondary Education or Training Readiness  
Exhibit 6l: Student Progress Reports for 2009-2010 for IEP dated 4/22/09  
Exhibit 6m: Knowing Yourself Worksheets, completed during 2009-10 school year, presented at 4/6/10 IEP meeting  
Exhibit 6n: Interest Profile Directions  
Exhibit 6o: High School Transition Readiness Checklist for [BOCES], dated 01/01/ 2009  
Exhibit 7a: Confidential Sheet regarding Behavior and Interactions with Others, Academics and Classroom Participation, and Accommodations and/or Modifications, dated 03/2010 - 3rd Trimester  
Exhibit 7b: Statement of [Case Manager], dated 08/23/2010  
Exhibit 7c: Confidential Sheet regarding Behavior and Interactions with Others, Academics and Classroom Participation, and Accommodations and/or Modifications, dated 08/2010  
Exhibit 8a: AT evaluation completed by the [BOCES'] Assistive Technology Team ("AT Team"), in 01/2009  
Exhibit 8b: Assistive Technology Implementation Plan, 02/2009 to 04/2009  
Exhibit 8c: Statement by [Case Manager], dated 08/23/2010  
Exhibit 8d: IEP—§ 8: Considerations of Special Factors, dated 04/22/ 2009  
Exhibit 8e: Organization Rubric, dated 01/21/ 2009  
Exhibit 9a: Email Exchange between [AT Coordinator], Parent, and [Case Manager], dated 11/05/2009  
Exhibit 9b: Email Exchange between [Former Special Education Director] and [AT Coordinator], dated 11/11/2009  
Exhibit 9c: Email Exchange between [AT Coordinator], Parent, and [Case Manager] dated 11/11/2009  
Exhibit 9d: Statement by [English Teacher], dated 08/20/2010  
Exhibit 9e: Statement by [Case Manager], dated 08/23/2010  
Exhibit 10a: Email from [Scheduling Coordinator], dated 02/22/2010  
Exhibit 10b: Email from Parent, dated 02/22/2010  
Exhibit 10c: Email Exchange between [Case Manager] and [Scheduling Coordinator], dated 02/24/2010  
Exhibit 10d: Email from [Case Manager], dated 02/26/2010  
Exhibit 10e: Notice of Meeting, dated 03/05/2010  
Exhibit 11a: IEP, § 6 Present Levels of Academic Achievement and Functional Performance, dated 4/6/10, including review of following CSAP scores, CO Growth Model scores, NWEA scores, and AIMSWeb and MAZE scores  
Exhibit 11b: Student Progress Reports for 2009-2010 for IEP dated 4/22/09  
Exhibit 11c: [School], T1, T2, T3 Progress Reports  
Exhibit 11d: Exceptional Student's Monitor Form—Trigonometry, Ceramics II, Chemistry  
Exhibit 11e: Official Transcript  
Exhibit 12a: Special Education Parent Handbook—Overview of Rights of Parents, p. 8

- (Complete copy of Handbook)
- Exhibit 12b: [BOCES'] Special Education Procedural Manual—Independent Educational Evaluations, p. 35 (Complete copy of Manual)
- Exhibit 12c: Parent and Child Rights in Special Education, Procedural Safeguard Notice—Independent Educational Evaluations, p. 5 (Complete copy of Notice)
- Exhibit 13a: Special Education Parent Handbook—Meeting Notification, p. 4 (excerpt only, *please see* Exhibit 12 for complete Handbook)
- Exhibit 13b: [BOCES'] Special Education Procedural Manual—Notice of Meeting, p. 21 (excerpt only, *please see* Exhibit 12 for complete Manual)
- Exhibit 14: BLANK
- Exhibit 15a: Special Education Parent Handbook—Helpful Hints for Parents, pp. 9-11 (excerpt only, *please see* Exhibit 12 for complete Handbook)
- Exhibit 15b: [BOCES'] Special Education Procedural Manual—Parental Involvement p. 14; Notice of Meeting, p. 21 (excerpt only, *please see* Exhibit 12 for complete Manual)
- Exhibit 16a: Special Education Parent Handbook—Extended School Year, pp. 6-7 (excerpt only, *please see* Exhibit 12 for complete Handbook)
- Exhibit 16b: [BOCES'] Special Education Procedural Manual— Guidance on Extended School Year (ESY) Programming, pp. 30-33 (excerpt only, *please see* Exhibit 12 for complete Manual)
- Exhibit 17a: IEP, § 6 Present Levels of Academic Achievement and Functional Performance, dated 4/22/09
- Exhibit 17b: 2009 NWEA Student Report
- Exhibit 17c: 2008 CSAP
- Exhibit 17d: Gray Oral Reading Test
- Exhibit 17e: Adapted CSAP Rubric for Extend Writing
- Exhibit 17f: Wide Range Achievement Test
- Exhibit 17g: AIMSweb
- Exhibit 17h: [Student's] Typing Session Average
- Exhibit 17i: Prior Written Notice, dated 05/13/2009
- Exhibit 17j: IEP, § 6 Present Levels of Academic Achievement and Functional Performance, dated 4/6/10
- Exhibit 17k: Student Progress Reports for 2009-2010 for IEP dated 4/22/09
- Exhibit 17l: [School] T1, T2, T3 Progress Reports
- Exhibit 17m: Exceptional Student's Monitor Form—Trigonometry, Ceramics II, Chemistry
- Exhibit 17n: Official Transcript
- Exhibit 18: BLANK
- Exhibit 19a: *ACT Plus Writing Student Report*—04/2010 Exam
- Exhibit 19b: [School] Test Record
- Exhibit 19c: Email Exchange between Parent and [Former Special Education Director], dated 08/26/2009
- Exhibit 19d: Email from [Case Manager], dated 09/18/2009
- Exhibit 19e: Email from [School Psychologist], dated 04/01/2010
- Exhibit 19f: Student Progress Reports for 2009-2010 for IEP dated 04/06/2010

### **BOCES' Supplement to Record**

- Exhibit 19g: Documentation re: SAT and ACT testing accommodations.