

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 2023:535**  
**San Luis Valley BOCES**

**DECISION**

**INTRODUCTION**

On April 12, 2023, the Parents (“Parents”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> filed a state-level complaint (“Complaint”) against a member district (“District”) of the San Luis Valley BOCES (“BOCES”). The State Complaints Officer (“SCO”) determined that the Complaint identified seven allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

On May 1, 2023, upon the agreement of the parties, the SCO extended the 60-day investigation timeline to allow the parties to participate in mediation. However, mediation resulted in an impasse, and, on June 1, 2023, the SCO resumed the investigation.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. § 300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from April 12, 2022 to the present for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

**SUMMARY OF COMPLAINT ALLEGATIONS**

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

1. Failed to conduct a comprehensive reevaluation of Student between August of 2022 and present, specifically by:

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 C.F.R. § 300.1, *et seq.* The Exceptional Children’s Education Act (“ECEA”) governs IDEA implementation in Colorado.

- a. Failing to evaluate Student in all areas of suspected disability, in violation of 34 C.F.R. § 300.304(c)(4); and
  - b. Failing to ensure the evaluation was sufficiently comprehensive to identify all of Student's special education and related service needs, in violation of 34 C.F.R. § 300.304(c)(6).
2. Failed to develop an IEP for Student after determining that she needed special education, in violation of 34 C.F.R. § 300.306(c)(2).
3. Failed to develop, review and revise an IEP that was tailored to meet Student's individualized needs from August of 2022 through present, specifically by:
  - a. Failing to include an accurate statement of how Student's disability impacted her involvement and progress in the general education curriculum, in violation of 34 C.F.R. § 300.320(a)(1)(a); and
  - b. Failing to include the special education and related services and supplementary aids and services the Student required, in violation of 34 C.F.R. § 300.320(a)(4).
4. Deprived Parents of meaningful participation in the development, review and revision of Student's IEP from August of 2022 through present, specifically by:
  - a. Failing to consider the concerns of the parents, in violation of 34 C.F.R. § 300.324(a)(1)(ii); and
  - b. Failing to provide proper notice of IEP team meetings, including the purpose of the meetings, after December 14, 2022, in violation of 34 C.F.R. § 300.322(a).
5. Failed to implement Student's IEP from August of 2022 to present, in violation of 34 C.F.R. § 300.323, specifically by:
  - a. Failing to ensure Student's teachers had access to her IEP and were informed of their responsibilities related to implementing the IEP;
  - b. Failing to provide Student with required accommodations; and
  - c. Failing to provide Student with required minutes with a mental health provider.
6. Failed to provide Parents with periodic reports on Student's progress between August of 2022 and present, in violation of 34 C.F.R. § 300.320(a)(3)(iii).

7. Failed to ensure that Student's special education teacher possessed required certifications and licenses from December of 2022 through present, in violation of 34 C.F.R. §§ 300.156 and 300.207 and ECEA Rule 3.04.

### **FINDINGS OF FACT**

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

#### **A. Background**

1. Student is 13 years old and, during the 2022-2023 school year, attended seventh grade at a District middle school ("School"). *Exhibit A*, p. 57. District is a member of BOCES. *Id.* BOCES is responsible for providing FAPE to all IDEA-eligible children with disabilities attending a school in its member districts. ECEA Rule 2.02.
2. Student is identified as a child with a specific learning disability ("SLD") and other health impairment ("OHI"). *Exhibit A*, p. 57.
3. Student is hard working and very motivated to do well in school. *Interview with Parents, counselor at School ("Counselor 1"), and Student's third special education teacher ("Special Education Teacher 3")*. She is creative and loves to build things. *Interview with Parents*.
4. Student struggles with peer relationships and had a hard time with the transition to middle school. *Interviews with Parents and Counselor 1*. She struggles to maintain focus and to follow multistep directions. *Interviews with Parents, Counselor 1 and Special Education Teacher 3*. Although she maintains good grades, she has difficulty keeping up with her homework and often spends hours on it after school and on the weekends. *Interview with Parents*. She has a very hard time with writing, especially spelling. *Interview with Special Education Teacher 3*.

#### **B. 2021 IEP**

5. At the start of the 2022-2023 school year, Student had a new special education teacher and case manager ("Special Education Teacher 2"). *Interview with Parents*. At the time, her operative IEP was from November 2021 ("2021 IEP"). *Exhibit A*, pp. 1-12. The IEP was developed by Parents, a school psychologist from BOCES and Student's former special education teacher ("Special Education Teacher 1") on November 18, 2021. *Id.* at p. 2.
6. According to the 2021 IEP, Student is outgoing and fun, knows when to get to work, is good at math, as well as other academics, and is a team player. *Id.* at p. 3. The present levels section reviews standardized test scores and progress on prior goals. *Id.* at pp. 3-5. According to the student needs and impact of disability statement, her disability affects her focus and stamina,

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<sup>2</sup> The appendix, attached and incorporated by reference, details the entire Record.

and she struggles with spelling. *Id.* at p. 6. Parents were concerned about her adjustment to School and wanted her to get counseling support to help with her related unhappiness. *Id.*

7. The 2021 IEP included two goals. *Id.* at pp. 6-8. Student's progress was to be measured by IEP team member ratings and provided to Parents quarterly. *Id.* From a baseline of 1, Student would "show independence in her ability to use executive functioning skills to continue her success in the classroom setting." *Id.* at p. 7. In addition, from a baseline of 1, Student "will show independence in her ability to regulate her emotions in order to be successful in the classroom setting and during unstructured periods." *Id.*
8. The 2021 IEP includes nine accommodations: breaks when needed, praise for self-advocacy, spelling support including access to a dictionary when appropriate, alternative seating to eliminate distractions, movement, fidget breaks out of the room as needed, shortened assignments when necessary and extended due dates if necessary. *Id.* at p. 8.
9. Under the 2021 IEP, Student was to receive the following services:
  - Special Education: 30 minutes per month ("MPM") of indirect consultation between the special education teacher and Student's classroom teachers "to assess her progress and ability to access the grade level curriculum."
  - Counseling: 60 MPM of direct support from the school counselor to support her in her "social emotional goal area."

*Id.* at p. 10.

10. Student's least restrictive environment ("LRE") was general education at least 80% of the time, where "she can access grade level content" with the accommodations. *Id.* at p. 11. The embedded prior written notice ("PWN") notes the IEP team determined Student no longer required academic goals but now required mental health services to support her transition to middle school. *Id.* at p. 11-12. Accommodations were also added to help when Student feels overwhelmed by the amount of work assigned. *Id.*

### **C. Planning a Triennial Reevaluation**

11. BOCES follows IDEA guidance around eligibility, making determinations of eligibility, or ineligibility, based on evaluations. *Interview with BOCES' director of special education ("Director")*. BOCES does not have written procedures or guidance in this area but covers it in the professional development training it offers throughout the year. *Id.* BOCES offers training once a month for BOCES' employees and interested district staff. *Id.* Staff from District do not participate in these trainings. *Id.* Someone from BOCES, either a school psychologist, Director, or a team lead, is present at all eligibility determinations. *Id.*

12. The 2022-2023 school year started out much better than the prior year because Student had a new group of friends and was engaged with sports. *Interview with Parents*. However, Student told Parents she was not getting support from Special Education Teacher 2 like she had from Special Education Teacher 1, contributing to challenges with reading and writing. *Id.* Student was spending hours at night and on the weekends, trying to keep up with schoolwork and study for tests. *Id.* Most teachers intend for students to be able to complete their assignments during class and not have homework. *Interview with Principal*.
13. During fall conferences, Special Education Teacher 2 reported that Student was happy and had great grades, and Parent tried to explain that Student was still struggling despite her grades. *Interview with Parents*. In early October, Special Education Teacher 2 told Parent Student would be “staffed out” of special education because her grades were “phenomenal,” and his caseload was too big. *Id.* Parent asked for documentation to support that decision and Special Education Teacher 2 again pointed to Student’s grades. *Id.*
14. After a conversation with someone from BOCES, Parents signed consent for an evaluation on November 14, 2022. *Exhibit B*, p. 3; *Exhibit J*, p. 150. That same day, Parents received notice of a meeting scheduled for December 14, 2022. *Exhibit D*, p. 1.
15. BOCES agreed to evaluate Student’s academic performance and social emotional status. *Exhibit B*, p. 1. Parents did not get a response about what testing would be done. *Id.* School staff did not know who would be conducting what testing at that point. *Exhibit J*, p. 150.
16. Parents and Advocate also discussed pursuing a private evaluation. *Interviews with Advocate and Parents*. In addition to concerns about BOCES ending Student’s eligibility, Parents were concerned about ADHD and dyslexia and wanted formal diagnoses if their concerns were founded. *Interview with Advocate*. Parents were able to get an early evaluation, before the scheduled eligibility meeting, because of a cancelation. *Id.*
17. On November 16, 2022, Parents notified staff at School that they had obtained a private evaluation and asked that BOCES not do any testing. *Exhibit J*, p. 152. Parents promised to share the private evaluation after the Thanksgiving break. *Id.* On November 22, Parents received a new notice for an evaluation meeting scheduled on December 1. *Exhibit D*, p. 3.

#### **D. Private Evaluation**

18. Student was privately evaluated on November 7, 2022 (“Private Evaluation”). *Exhibit B*, p. 20. The evaluators administered the Weschler Intelligence Scales for Children, the Woodcock Johnson Tests of Achievement, the Weschler Individual Achievement Test, the Comprehensive Test of Phonological Processing, the Clinical Evaluation of Language Fundamentals, the Brown Executive Function/Attention Scales and a Qb Check (a computer-based ADHD screening tool).

19. Student's cognitive abilities were in the average range, with verbal comprehension skills in the low average range and working memory deficits. *Exhibit B*, pp. 20-21, 29.
20. Student's reading abilities were in the below average range. *Id.* at pp. 23-25, 29. This included basic reading skills and reading comprehension. *Id.* at p. 29. Student had difficulty reading orally, saying words with sounds missing, blending sound parts into whole words, and identifying specific sounds in a word. *Id.* She also struggled to fluently retrieve numbers and letters from her memory at a rate comparable to peers her age. *Id.* Based on the preponderance of the evidence, including a family history of similar problems, Student was diagnosed with dyslexia. *Id.* at p. 31.
21. Her math calculation skills fall in the below average range, with difficulty completing "problems involving basic division, addition and subtraction with regrouping, addition with decimals, subtracting fractions with common denominators, division with decimals, long division, reducing fractions, order of operations, and multiplication with negative numbers." *Id.* at p. 29. She made many errors while trying to quickly solve basic addition, subtraction, and multiplication problems. *Id.* Her performance was consistent with a diagnosis of dyscalculia. *Id.* at p. 31.
22. Student's spelling skills were also below average. *Id.* at p. 30. She struggled with irregular spelling patterns and her writing was "very difficult to read." *Id.* Her spelling challenges interfered with the readability of her writing. *Id.*
23. In writing, Student expressed her thoughts clearly but used simple sentences. *Id.* She did not form her letters appropriately, mixed uppercase and lowercase letters in her writing, had inconsistent spacing and "ha[d] excessive erasures or write-overs to fix mistakes." *Id.* Student's writing was consistent with a diagnosis of dysgraphia, which can lead to difficulty with legibility and spelling and "[l]ow volume of written output." *Id.*
24. Parents' responses on the executive function scales indicated concerns with activation, focus, effort, memory, and action. *Id.* at pp. 27, 32. Student's movement during the Qb test was greater than 93% of her peers. *Id.* at p. 32. Her reaction time was greater than 94% of her peers and she made more omission errors than 88% of her peers. *Id.* Based on testing observations and results of the executive function scales and the Qb Check, Student was diagnosed with ADHD, predominately inattentive presentation. *Id.* at p. 34.

#### **E. Triennial Reevaluation**

25. Results of the private evaluation were copied and pasted into BOCES' evaluation report ("BOCES' Evaluation"). *Id.* at pp. 42-57.
26. The only information added by the BOCES was the results of a Parent and Student Behavior Assessment System for Children ("BASC") administered by a school psychologist for BOCES

("School Psychologist 1"). *Id.* at pp. 47-50; *Interview with Director*. Parent rated anxiety, attention problems and withdrawal as clinically significant. *Exhibit B*, p. 49. Student identified clinically significant concerns with atypicality, anxiety, depression, attention problems, and hyperactivity. *Id.* at p. 50. The BOCES' Evaluation concludes that "internalizing behaviors and emotionalities" are impacting her executive functioning and interpersonal relationships. *Id.*

27. BOCES' Evaluation does not include teacher rating scales or teacher updates. *Id.* at pp. 42-57. There are no observations of Student or updates on her goals or classroom performance. *Id.*

#### **F. 2022 Eligibility Determination**

28. Parents, Advocate, Principal, Special Education Teacher 2, School Psychologist 1 and Student, collectively, the multidisciplinary team ("MDT") met virtually on December 1, 2022 to review BOCES' Evaluation and determine Student's ongoing eligibility. *Interviews with Parents, Advocate and Special Education Teacher 2*.
29. School Psychologist 1 ran the meeting and started by quickly reviewing BOCES' Evaluation. *Interviews with Parents and Advocate and Special Education Teacher 2*. The MDT then went through the eligibility questionnaires. *Id.* Parents, Advocate and School Psychologist 1 agreed on answers to the eligibility questions. *Interviews with Parents and Advocate*.
30. Together, they determined that BOCES' Evaluation was sufficiently comprehensive to identify all of Student's needs. *Exhibit B*, p. 36. She was found eligible with a SLD in basic reading skills, reading fluency skills, reading comprehension, written expression, mathematical calculation, and mathematical problem solving. *Id.* at p. 39. She was also eligible as a child with an OHI which caused limited alertness. *Id.* Parents agreed with the ultimate determination and did not have concerns about the comprehensiveness of BOCES' Evaluation which relied on the Private Evaluation. *Interview with Parents*.
31. After the MDT finished going through the questions, Special Education Teacher 2 disagreed with Student's eligibility; he did not believe Student required an IEP. *Interview with Parents and Advocate*. He indicated other students needed his help more than Student. *Interview with Principal and Parents*. Special Education Teacher 2 disagreed with the results of the Private Evaluation because Student was getting As and Bs in her classes. *Interview with Special Education Teacher*. After the meeting, there would "be more conversations about eligibility with [him] to build consensus." *Exhibit B*, p. 40.
32. Due to technical difficulties, BOCES' Evaluation could not be shared on the screen, and not all participants had a copy of BOCES' Evaluation in front of them. *Interview with Advocate; Exhibit J*, p. 35. Without the ability to go over all the data, Principal neither agreed nor disagreed with the determination. *Interviews with Advocate and Principal*.

33. The MDT agreed to reconvene on December 14, 2022 to develop an IEP. *Exhibit A*, p. 77. BOCES did not issue a PWN after the eligibility meeting. *Response*, p. 9.

### **G. Student's New Case Manager**

34. Teachers with general education licenses can serve as special education teachers if they want to change positions. *Interview with Director*. They must be pursuing licensure as special education teachers and get authorization from the CDE. *Id.*
35. After the eligibility meeting, Advocate contacted Director with concerns about the meeting. *Exhibit J*, p. 34. Advocate was concerned that Special Education Teacher 2 had behaved unprofessionally, disagreeing after the determination was made and justifying his disagreement based on his caseload. *Id.* Parents were upset that Student heard what Special Education Teacher 2 said about her. *Interview with Parents*. School Psychologist 1 and Parents agreed that Student needed a new special education teacher. *Interview with Parents*.
36. Special Education Teacher 3 provided direct services to eight students in sixth grade with IEPs. *Interview with Special Education Teacher 3*. She is licensed to teach elementary education but not special education. *Response*, p. 8. She had plans to pursue licensure through a program at a local university but missed the deadline to enroll in the program. *Interview with Special Education Teacher 3*. She intended to start the program in the fall of 2023 before accepting a different role outside of District. *Id.* Special Education Teacher 3 is not currently, and has never been, licensed to teach special education in the state of Colorado. *CDE Exhibit 1*.
37. Because Special Education Teacher 3 was unlicensed, Special Education Teacher 1 was listed as the case manager for the sixth graders. *Interview with Special Education Teacher 3*. He also came in to support Special Education Teacher 3 for two hours a day and taught her about IDEA and IEP process requirements. *Id.* Special Education Teacher 1 also provided daily support in Special Education Teacher 3's classroom to add necessary structure for the sixth-grade students. *Interview with Principal*.
38. Special Education Teacher 1 was not part of Student's team and was not supporting Special Education Teacher 3 with her IEP. *Interview with Special Education Teacher 3; Exhibit J*, p. 238. As of February 22, 2023, there was still confusion as to who was Student's special education teacher of record. *Exhibit J*, pp. 238-240.
39. Parents were told they could not be part of personnel decisions like who would act as Student's special education teacher and case manager. *Interview with Parents*. Parents were not explicitly told Special Education Teacher 3 was not a licensed special education teacher. *Interviews with Principal and Parents*. Special Education Teacher 3 took over as Student's special education teacher on December 6, 2022. *Interview with Special Education Teacher 3*. School ended for the semester two and a half weeks later, on December 22, 2022. *Exhibit H*.



## H. First Draft IEP

40. On December 7, 2022, School Psychologist 1 sent proposed goals for Student: one for writing, two for executive functioning, and one for social skills. *Exhibit J*, p. 39. She then sent a draft of the IEP (“First Draft IEP”) a few hours before the meeting was scheduled to start on December 14. *Id.* at pp. 177-197.
41. The First Draft IEP included the student strengths statement from the 2021 IEP. *Compare, Exhibit J*, p. 180 and *Exhibit A*, p. 3. The present levels statement included summaries of Student’s standardized test scores as well as the test results from Private Evaluation, without the qualitative explanations. *Exhibit J*, pp. 180-189.
42. The student needs and impact of disability (“SNID”) statement is blank, and the parent input is copied from the 2021 IEP, focusing on Student’s difficulty adjusting to middle school. *Id.* at p. 190. The First Draft IEP also includes the goals proposed by School Psychologist 1. *Compare, Id.* at pp. 39, 190-193.
43. The First Draft IEP includes the nine accommodations from the 2021 IEP, with some clarifications, such as shortened assignments to be determined by teacher “not to overwhelm.” *Compare, Exhibit A*, p. 8 and *Exhibit J*, p. 193. There are 12 new accommodations to address difficulties with writing and executive functioning, including use of computer for longer writing assignments, not chastising Student for careless work, guided notes, 1.5 time for exams, break lengthy written assignments into several sections to help maintain attention to task, and graphic organizers for long writing assignments. *Exhibit J*, p. 193.
44. The First Draft IEP included the following special education and related services:
  - Special Education: 43 minutes per day (“MPD”) of direct instruction from a special education teacher outside the general education setting. There is no description of how those minutes will be allocated.
  - Counseling: 60 MPM of direct services from a school counselor to “support [Student] in her social emotional goal area.”

*Id.* at p. 196.
45. The First Draft IEP does not include any information about advantages or disadvantages of different potential placements. *Id.* The embedded PWN still contains the information from the 2021 IEP. *Compare Exhibit A*, pp. 11-12 and *Exhibit J*, p. 197.

## I. December 14, 2022 IEP Team Meeting

46. Parents, Advocate, School Psychologist 1, Special Education Teacher 3, Principal, the executive director of special education for BOCES, another counselor at School (“Counselor 2”), and a general education teacher (the “2022 IEP Team”) met December 14 to develop an IEP. *Interviews with Parents, Special Education Teacher 3; Exhibit A, p. 14; Exhibit J, p. 313.*
47. During the meeting, the IEP team went through each section of the IEP. *Interviews with Parents, Advocate, Special Education Teacher 3.* The 2022 IEP Team adjusted Student’s goals and accommodations during the meeting. *Id.*
48. The writing goal was adjusted to focus on writing an essay, rather than total words written, scored with a curricular based measure (“CBM”). *Interview with Special Education Teacher 3.* A Likert scale was also established to measure Student’s progress on executive functioning. *Id.* The 2022 IEP Team talked about ensuring the goals were measurable and establishing accurate baselines which were to be provided in an updated draft. *Interviews with Advocate and Parents.*
49. The 2022 IEP Team also adjusted and clarified the accommodations based on the Private Evaluation and things Student shared. *Interview with Parents.* Parents were particularly concerned about supporting the communication between Student and teachers around extended time and requesting breaks. *Interview with Advocate.* Parents wanted Student to always have shortened assignments, but they ultimately agreed on shortened assignments at teacher discretion. *Interview with Special Education Teacher 3.*
50. Parents wanted to make sure she would have direct special education services where she could get help without seeking it out. *Interview with Parents.* Special Education Teacher 3 described the executive functioning course she was designing to help Student and others, which would last for one period, or 43 MPD. *Interviews with Parents and Advocate.* The 2022 IEP Team agreed to 43 MPD of specialized instruction, and Parents emphasized the importance of using some of that time to allow her to complete work and stay on top of upcoming deadlines. *Interview with Advocate.* They wanted to ensure services would include helping her prioritize assignments and contact teachers about needed accommodations. *Id.*
51. Parents were also concerned Student had not been getting counseling services, so they requested a log of services. *Id.* The 2022 IEP Team agreed to increase Student’s counseling services to 30 MPW, but thought Parents were asking for more. *Interview with Special Education Teacher 3.* 30 MPW is the maximum amount Counselor 1 can provide. *Interviews with Counselor 1 and Special Education Teacher 3.*
52. Overall, it was a successful meeting, with no major disagreements. *Interviews with Parents and Advocate.* The biggest disagreement was over counseling, but they ultimately all agreed to 30 MPW. *Interview with Special Education Teacher 3.* There were lots of conversations

about how to phrase things or how to support Student, but no real disagreements. *Interview with Principal*. After the meeting, Parent asked Special Education Teacher 3 to correct Father's cell phone number on the first page of the IEP. *Interview with Parents*.

#### **J. Second Draft IEP**

53. On December 19, 2022, Special Education Teacher 3 sent out an updated draft of the IEP ("Second Draft IEP"). *Exhibit J*, pp. 205-226.
54. This IEP indicates her next eligibility meeting is due on or before December 12, 2023. *Id.* at p. 206. Parents are still listed as having the same cell phone number. *Id.* There is also no change to the student strengths section, so it continues to match the 2021 IEP. *Id.* at p. 208.
55. Graphics related to the standardized testing results are added to the present levels. *Id.* at pp. 208-217. The executive functioning testing is removed and replaced with a paragraph describing Student's counseling services. *Compare, Id.* at pp. 188-189 and 216-217.
56. The new SNID statement provides that according to a recent private evaluation, Student is "experiencing internalizing behaviors of clinically significant anxiety and depression. Including interpersonal relationships that are impacted due to her internalizing behaviors and her working memory impacts and Executive Functioning skills needing specially designed instruction." *Id.* at p. 218. In addition, internalizing behaviors also affect her academics related to "impacts with working memory and executive functioning skills." *Id.* The SNID also includes several impacts of impaired working memory, pulled from the Private Evaluation. *Id.*
57. The Parent Input section includes Parents' comments from the 2021 IEP. *Id.* However, several additional concerns have been added, including that Student does not get help when she asks, lack of services around social skills, concerns about implementation of the 2021 IEP (and what that means for implementation of the current IEP), and frustration that they felt they had to seek a private evaluation to avoid having her taken off an IEP without data. *Id.*
58. The Second Draft IEP includes one writing goal, for Student to write 100 total words, "correctly spelled and correct writing sequences responding to a grade level reading passage discussing the 5 W's with 90% accuracy in 3 out of 4 consecutive quarter probes." *Id.* at p. 219. The draft writing goal had been for Student to "demonstrate basic writing skills: Editing, spelling, sentence structure, paragraphs, and build fluency to write short essays." *Id.* at p. 190. The baselines for both draft goals was 50, although the Second Draft IEP clarifies that it is "50 total words written/ not corrected in 4 minutes." *Id.* at pp. 190 and 219. Both goals would be measured using an unspecified curriculum-based measurement in writing. *Id.*
59. The Second Draft IEP includes the self-determination goal from the First Draft IEP, "[Student will work with the special education teacher to learn strategies in self-monitoring, self-advocacy, and organization for all academic courses." *Id.* at pp. 191-192, 220. However, the

Second Draft IEP adds that this will be measured “by self-monitoring report Likert scale of 0, 1, 2 with 80% accuracy,” from a baseline of 0. *Id.* at p. 220.

60. A social emotional goal to allow Student to practice strengthening executive functioning skills is included in the First Draft IEP but not the Second Draft IEP. *Id.* at pp. 191, 219-221. A second social emotional goal, for Student to “receive direct instruction in learning prosocial skills and increase positive peer interactions,” is included in both. *Id.* at pp. 192, 220. The Second Draft IEP adds that this will be “measured by pre and post assessments in social emotional skills approach an average range of 22 or below,” from a baseline of 28. *Id.* at p. 220.
61. All accommodations from the First Draft IEP are included with no changes. *Id.* at pp. 193, 221. One additional accommodation is included: “[a]ccess to trusted adult.” *Id.* at p. 221. Extended time is added as an accommodation for several state and district assessments. *Id.* at p. 223.
62. The Second Draft IEP included the following special education and related services:
- Special Education: 43 MPD of direct instruction from a special education teacher outside the general education setting. The service delivery statement specifies that the “[e]xecutive function curriculum will include but not be limited to the following topics: motivation, self advocacy (sic), self monitoring (sic), flexibility, task initiation, working memory, planning and organization.”
  - Counseling: 30 MPW of direct services from a school counselor to “support [Student] in her social emotional goal area.”

*Id.* at p. 224.

63. The Second Draft IEP includes consideration of one possible LRE: general education at least 80% of the time, specifically 87.8% of the time. *Id.* at p. 225. This IEP still includes information from the 2021 IEP in the embedded PWN. *Id.* at pp. 225-226. BOCES did not issue a standalone PWN after this meeting. *Response*, p. 9. Upon review, Director concluded that the Second Draft IEP “was riddled with problems.” *Id.* at p. 52.
64. Based on the limited changes relative to the First Draft IEP, including the failure to remove 2021 information, focus on essay writing in the writing goal or modify the accommodations, the SCO finds that the Second Draft IEP did not reflect the agreement of the 2022 IEP Team.

#### **K. Parents’ Requested Revisions to Second Draft IEP**

65. Distracted by the end of the semester and the holidays, Parents initially forgot to review the Second Draft IEP. *Interview with Parents*. On January 31, 2023, Parents shared that Student had even more homework in the second semester, with assignments every night and “several hours on weekends.” *Exhibit J*, p. 232. They also asked for help supporting her with a new

planner and raised concerns about her ability to get help in class. *Id.* Neither District nor BOCES responded to this email. *Id.*

66. Later that morning, Advocate shared several questions and clarifications the Parents wanted addressed in the IEP, so that it would match their understanding of the December 2022 meeting. *Exhibit J*, pp. 47, 249-269. Advocate requested corrections on the first page. *Id.* at p. 249. He also asked that student strengths information from the 2021 IEP be removed and replaced with updated information from the meeting. *Id.* at p. 251. Parents similarly wanted old information removed from the parent input section, clarifying they were requesting counseling services logs, not more services. *Id.* at p. 261.
67. Parents also asked that the SNID statement be corrected as Student had not been diagnosed with anxiety or depression. *Id.* It was their perspective that her difficulties with working memory and executive functioning were related to her diagnoses of dyslexia, dysgraphia, dyscalculia and ADHD. *Id.* Parents understanding is that the internalizing behaviors are a symptom of the learning disabilities, not a cause of her difficulties. *Interview with Parents.*
68. The SCO finds that the Private Evaluation did not diagnose Student with anxiety or depression; however, Parents and Student indicated clinically significant levels of anxiety and depression in the BASC detailed in BOCES' Evaluation. *See, Exhibit B.*
69. Consistent with Special Education Teacher 3's memory of the December 2022 IEP team meeting, Advocate proposed changing the writing goal to focus on her ability to write an essay, with specific language. *Id.* at p. 262. He also asked for clarification around the baselines for the other two goals. *Id.* at p. 263.
70. Parents also requested adjustments to accommodations to determine when they would be necessary and requested additional accommodations. *Id.* at p. 264. Advocate requested information in the service delivery statement to explain what the special education minutes would be supporting. *Id.* at p. 267. Parents asked questions about references to "consultative basis" and Special Education Teacher 1 in the embedded PWN. *Id.* at p. 268.

#### **L. BOCES' Response to Parents' Revisions**

71. BOCES advises staff to finalize IEPs within a reasonable time after an IEP team meeting. *Interview with Director.* Although the IDEA does not define what is reasonable, BOCES generally expects IEPs to be finalized within a couple of weeks and tries to work with districts to get that done. *Id.* Signatures should be collected at the meeting, but a lack of signatures would not hold up finalization of an IEP. *Id.*
72. Practice in District is to input changes from the IEP meeting and then send it to parents for approval. *Interview with Special Education Teacher 3.* If everyone agrees, it is sent to BOCES

for review and approval. *Interview with Special Education Teacher 2*. In all, the review process should be finished in one to two weeks. *Interviews with Special Education Teachers 2 and 3*.

73. Special Education Teacher 3 responded to Advocate indicating she already finalized the IEP when she did not hear back from Parents and proposing that all changes be made in an amendment. *Exhibit J*, p. 49. Advocate was open to amendment but indicated all the changes were discussed at the December 14 meeting, so another meeting should not be required. *Id.* at p. 48. On February 1, Director said the IEP was not finalized and offered to help the team finish the IEP by the end of the week. *Id.* Special Education Teacher 3 later clarified that the IEP had not been finalized because the signature page had been lost. *Id.* at p. 234.
74. On February 13, while waiting for an updated IEP, Parents reiterated that Student may appear “calm and collected” at school, when she is very anxious. *Id.* at p. 235. The next day, February 14, 2023, Special Education Teacher 3 asked Parents for help identifying signs that Student is internalizing besides Student telling them. *Id.* She reiterated the question on February 20, 2023. *Id.* at p. 317. Parents did not respond to either email. *Id.*

#### **M. Third and Fourth Draft IEPs**

75. After three weeks and more email exchanges, on the evening of February 21, 2023, Director sent another draft of the IEP (“Third Draft IEP”), in which she had made corrections and changes. *Id.* at pp. 238, 270-291. On February 25, she noted they were “out of ‘reasonable’ time for this to be completed.” *Id.* at p. 240. On March 1, Director sent another draft of the IEP (“Fourth Draft IEP”) that incorporated further changes. *Id.* at pp. 241, 293-314.
76. This IEP included all requested corrections on the first page, except those that would autofill when the document was finalized. *Id.* at pp. 238, 270. Advocate’s proposed language was added to the student strength section, but information from 2021 was not removed. *Id.* at p. 272. The present levels are unchanged. *Compare, Id.* at pp. 208-217 and 272-282.
77. The SNID statement is updated to reflect Student’s recent diagnoses of dyslexia, dysgraphia, and dyscalculia which are impacting “her working memory and executive functioning skills, which leads to the need of specialized instruction in reading, writing and math.” *Id.* at p. 282. There is no mention of ADHD, but the Private Evaluation’s description of working memory challenges remains. *Id.* Parents indicate this updated statement accurately reflects the impact of Student’s disability. *Interview with Parents*.
78. Starting with the Fourth Draft IEP, consistent with the 2022 IEP Team’s decisions, the writing goal changed to Student “will be able to write a coherent essay appropriate for the purpose and audience that meets the following criteria: organized with the use of planning and peer/teacher guidance, appropriate grammar and conventions by going back and editing, demonstrating comprehension by including supporting details that address who, what,

where, when and why.” *Id.* at pp. 283, 307. The baseline is “50 total words written/ not corrected in 4 minutes.” *Id.* at p. 307.

79. The self-determination goal is unchanged, although the baseline is updated to “0 in the Likert Scale of 0, 1, 2.” *Compare, Id.* at pp. 284 and 308. The goal of achieving an average range of 22 or below was removed from the social emotional goal, so it just states what instruction she will receive. *Compare, Id.* The baseline is changed to “28 with goal of 22 (average range).” *Id.*
80. Two accommodations are adjusted in the Fourth Draft IEP: extra time would be “determined by classroom teacher,” and movement would be allowed “when asked for.” *Id.* at p. 309.
81. A statement about potential COVID-19 closures was removed from the service delivery statement and a sentence was added to clarify that the executive function curriculum would “be provided by resource room teacher.” *Compare, Id.* at pp. 289 and 312.
82. The first two options considered and rejected per the PWN, adding small group testing and academic goals, were from the 2021 IEP and contradict what was listed in the IEP. *Id.* at pp. 307, 309, 313. The third option is new in the Fourth Draft IEP: School Psychologist 1 left the BOCES and Director was now the “teacher of record and the case manager.” *Id.* at p. 313. A statement was added to the other factors considered, addressing the change in the special education teacher and summarizing goals, accommodations and services. *Id.* at pp. 313-314.

#### **N. Revision of the Fourth Draft IEP**

83. On March 3, 2023, Parents asked for a clear communication plan to help them know whether Student had extended time or a shortened assignment so that they could support her at home. *Id.* at p. 244. Parents requested weekly communication. *Id.* at p. 245. Parents were hoping for Student and Special Education Teacher 3 to review and prioritize outstanding assignments weekly and document conversations with teachers as well as accommodations offered. *Id.* Parents indicated this would allow Student to practice her executive functioning skills and allow them to have updated information so they could assist Student. *Id.* Parents were also confused by the statements in the PWN from the 2021 IEP. *Id.* at p. 245.
84. In response, on March 9, Principal determined email communication was no longer effective, and another IEP team meeting was required to efficiently communicate Student’s needs. *Id.* at p. 246. In his opinion “the desires of the IEP do not appear feasible to help [her] grow.” *Id.*
85. In the evening of March 14, Special Education Teacher 3 asked via email if Parents, Advocate and Principal were available for a meeting on the morning of March 16. *Id.* at p. 63. Parents and Advocate agreed to rearrange their schedules to meet the next day, on March 16. *Id.* They requested a link so Mother and Advocate could participate virtually and an agenda to ensure the meeting would respect their limited time. *Id.* Special Education Teacher 3 sent a

calendar invite with a link for the meeting, but no formal notice or list of participants was issued. *Id.* Parents were not informed of their right to invite others to the meeting. *Id.*

86. On March 10, BOCES assigned a new school psychologist (“School Psychologist 2”) to help finalize Student’s IEP. *Interview with School Psychologist 2.* Without a finalized IEP, School Psychologist 2 was very concerned about what, if any, services Student was receiving. *Id.* She wanted to remove the old information and complete the IEP as soon as possible. *Id.*

#### **O. March 16, 2023 IEP Team Meeting**

87. Parents, Director, a team lead from BOCES (“Team Lead”), Principal, Advocate, Special Education Teacher 3, and School Psychologist 2 (the “2023 IEP Team”) met on March 16, 2023 to review Student’s IEP. *Interviews with School Psychologist 2, Parents and Special Education Teacher 3.* Parents did not raise concerns about the meeting participants. *Interviews with Parents and Advocate.*
88. Parents were concerned about how much time Student was spending on homework. *Interviews with Parents and School Psychologist 2.* Special Education Teacher 3 was frustrated that Father would not sign the signature page when she brought it to him. *Id.* Principal did not say much but appeared to be angry throughout the meeting. *Id.* Principal suggested Student only had so much homework because she was not using her time in class well, but he could not provide any specific examples or classes to support that. *Interview with Parents.*
89. They spent a lot of time talking about accommodations. *Interviews with Advocate, Director, and Special Education Teacher 3.* With the review of the accommodations, it appeared like they were rehashing things that had already been decided. *Interview with Parents.*
90. They also talked about services, specifically how the time with a special education teacher would be spent. *Interviews with Advocate and Director.* Self-advocacy was a strength, but she needed to learn how to do it effectively. *Interview with School Psychologist 2.* She needed a special education teacher to help her communicate with teachers and make sure she was getting extended time and shortened assignments. *Interviews with Advocate and Parents.* Team Lead and School Psychologist 2 agreed with this being part of the special education teacher’s time, but a specific division of time was not agreed upon. *Interview with Advocate.*
91. The meeting was collaborative. *Interview with Parents.* Members of the 2023 IEP Team left feeling like they had reached agreement. *Exhibit J, p. 331-332.*

#### **P. Fifth Draft IEP**

92. On March 29, Advocate asked if the IEP had been updated and shared with the family. *Id.* at p. 334. He specifically reiterated the request to build time into Student’s day where she could



work on homework with Special Education Teacher 3 to practice her executive functioning skills and get help asking teachers for accommodations. *Id.* Team Lead and School Psychologist 2 agreed with Advocate’s description of her needs and the agreement around how Student’s time with a special education teacher would be split. *Id.* at pp. 335-336.

93. Special Education teacher 3 did not respond to the question about services, but said she sent a draft home with Student that day. *Id.* at p. 335. On March 31, Team Lead shared a PDF of the “final” IEP (“Fifth Draft IEP”) so that everyone could review it. *Id.* at pp. 336, 370-392.
94. The present levels, including student strengths, educational performance, SNID and parent input are the same as the Fourth Draft IEP. *Compare, Id.* at pp. 295-306 and 372-383. The goals and baselines are also unchanged. *Compare, Id.* at pp. 307-309 and 384-386.
95. Several accommodations were adjusted. *Compare, Id.* at pp. 309 and 386. As examples: 1) instead of fidget breaks out of the classroom she can have “[a]ccess to fidgets to increase attention” and “[s]elf selected or teacher directed movement breaks;” 2) “SPED” is to support her access to shortened assignments and extended due dates; 3) Guided notes was replaced with access to teacher or peer notes. *Id.*
96. A sentence is added to the service delivery statement, indicating that special education resource teacher will support the writing goal for 43 MPD. *Id.* at p. 389. No other changes were made in the Fifth Draft IEP or the embedded PWN. *Id.* at pp. 312-314, 366-369.

#### **Q. Sixth Draft IEP**

97. In response, on March 31, Advocate shared additional thoughts and School Psychologist 2 provided some edits to make the accommodations easier to understand. *Id.* at pp. 337 and 423. School Psychologist 2 also pointed out that the service delivery statement did not match what they had agreed to in the March 16 meeting, including that Student would have time to complete work at School to stay ahead on assignments. *Id.* at p. 337.
98. On April 3, Special Education Teacher 3 said Student could only have homework time if they doubled her daily special education minutes and replaced her elective. *Id.* at p. 338. Advocate asked to have the homework time built into the existing 43 MPD, as the 2023 IEP team had agreed. *Id.* Team Lead proposed splitting the existing time between writing services and the executive functioning skills, with an accurate service delivery statement, to which School Psychologist 2, Parents and Advocate all agreed. *Id.* at pp. 339-340.
99. On April 4, Special Education Teacher 3 sent another copy of Student’s IEP (“Sixth Draft IEP”), saying it would be finished as soon as she got signatures. *Id.* at pp. 341 and 347-369. The only change from the March 31 version of the IEP to the April 4 version is in the service delivery statement and grid. *Compare, Id.* at pp. 366 and 389. Services with a special education teacher were revised to read 172 MPW from 43 MPD, although this did not change the

amount of service. *Id.* Instead of the statement about services to support the writing goal, a special education teacher would provide services for 172 MPW to support executive functioning, assignment completion and writing assistance. *Id.*

100. Director responded that they were “extremely out of compliance” and the IEP needed to be completed. *Id.* at p. 342. Parents believed the updated draft did not include any changes or address any of the areas of concern. *Id.*
101. On April 10, School Psychologist 2 noted that the IEP from April 4 did not include much that had been agreed to during the March 16 IEP team meeting. *Id.* 344. In addition, her corrections to the accommodations had not been addressed. *Id.* The SCO finds that while School Psychologist 2’s suggested language for the accommodations might have been clearer, it did not substantively change the accommodations.

#### R. 2022 IEP

102. On April 11, 2023, Team Lead shared a final IEP for Student (“2022 IEP”). *Exhibit A*, p. 56. The only change was to the final accommodation. *Id.* Access to teacher or peer notes was clarified to state the notes had to be accurate. *Id.* at p. 73. This IEP is otherwise identical to the Sixth Draft IEP that was shared on April 4. *Compare, Exhibit J*, pp. 347-369 and *Exhibit A*, pp. 57-79.
103. The student strengths, parent input and PWN sections all contain information from the 2021 IEP that is inaccurate. *Exhibit A*, pp. 58, 70, 78. The SNID acknowledges Student’s dyslexia, dysgraphia, and dyscalculia diagnoses, but not her ADD, and focuses on the impact of her working memory and executive functioning. *Id.* at p. 70.
104. The baseline for the writing goal is 50 total words written in four minutes. *Id.* at p. 71. However, the goal is to write an essay and display multiple skills including planning and appropriate grammar. *Id.* The unit of measurement is “curriculum based measurement in writing.” *Id.* The SCO, in consultation with CDE Content Specialist, finds that this goal does not have a clear unit of measurement or baselines for the various skills to be measured. *Interview with CDE Content Specialist.*
105. The baseline of the self-determination goal is 0 on the Likert scale. *Exhibit A*, p. 72. The SCO finds that this is not consistent with Student’s self-reports throughout the semester. *See, FF # 133.* To be measurable, goals should not rely solely on self-report for determining progress; instead, they should rely on objective measures like percentage of assignments completed on time or include some other measure of Student progress such as teacher reports. *Interview with CDE Content Specialist.*
106. The social emotional wellness goal is for Student to receive direct instruction in prosocial skills. *Exhibit A*, at p. 72. The baseline is 27 on the “Pediatric Symptom Checklist.” *Id.* Her responses on a symptom checklist provide an overview of her general wellbeing and do not

clearly differentiate her progress on specific areas of need. *Interview with CDE Content Specialist*. Progress on all three goals will be shared with Parents quarterly. *Exhibit A*, p. 71.

107. There are 24 accommodations, including special education support to access shortened written assignments and extended due dates, access to a calculator and access to teacher or peer notes. *Id.* at p. 73.
108. The service delivery statement includes 172 MPW with a special education teacher for executive functioning, assignment completion and writing assistance, as well as 30 MPW with a counselor to address the social emotional goal area. *Id.* at p. 76. The PWN is not updated to reflect any further discussion after December. *Id.* at pp. 77-78.

### **S. Implementation of Student's Accommodations**

109. Case managers at School are responsible for sending general education teachers IEP "snapshots" for all students and explaining them. *Interview with Director*. At School, case managers are expected to send snapshots at the start of each semester and after any changes. *Interview with Principal*.
110. At the start of the school year, Special Education Teacher 2 creates folders with all the IEPs for each grade and then gives teachers the relevant folder. *Interview with Special Education Teacher 2*. He does this before the year starts and includes all students in the grade because schedules usually fluctuate at the start of the year. *Id.* He also contacts teachers and offers to answer any questions. *Id.* Special Education Teacher 2 provided Student's 2021 IEP to the seventh-grade teachers, along with all the other seventh grade IEPs. *Id.*
111. Special Education Teacher 1 told Special Education Teacher 2 that Student was on a "consult" IEP. *Id.* When students are on consult, School is testing to see if they are ready to move off an IEP. *Id.* Students on consult do not get direct services from a special education teacher and their accommodations decrease drastically. *Id.*
112. Special Education Teacher 2 tracked Student's grades but did not read her 2021 IEP. *Id.* He does not know if she was getting her accommodations, or even if she had any. *Id.* During fall conferences, at least three of Student's teachers were not aware that she had an IEP, let alone one that allowed for breaks. *Interview with Parents*.
113. Special Education Teacher 3 kept Student's teachers informed of her accommodations and any changes through regular conversations. *Interview with Special Education Teacher 3*. The only time Special Education Teacher 3 shared a copy of Student's IEP or any of its requirements with Student's teachers electronically was when she sent the snapshot of the IEP on April 5, 2023. *Exhibit J*, p. 434. The SCO finds that this was before the final change was made to clarify one accommodation on April 11, 2023.

114. Even after the 2022 IEP was finalized, Student continued to have substantial amounts of homework every night and weekend and was frequently frustrated or in tears at home. *Interview with Parents*. She was not getting help chunking longer assignments. *Id.* She would ask for more time and then get a lower grade for turning assignments in late. *Id.* She also struggled to turn assignments in in a reasonable amount of time. *Exhibit J*, p. 143.
115. On March 29, Student requested a fidget break in art class. *Interview with Parents; Exhibit 1*, p. 105. The teacher did not know what a fidget break was and would not allow Student to take a break. *Id.* In late April, when Student tried to talk to the art teacher about a missing assignment, she was chastised in front of the class for sending a “rude” email. *Exhibit 4*, p. 2.
116. On March 29, Student asked Counselor 2 to replace her art class with a study hall. *Exhibit J*, p. 420. After some internal discussions, Principal and Special Education Teacher 2 determined that they could not accommodate that; Student could only get a study hall if she gave up her elective.<sup>3</sup> *Id.* at p. 421. No one agreed to notify Student or ask why Student wanted out of her art class. *Id.* Almost a week later, on April 4, having received no response, Student stopped by Counselor 2’s office. *Reply*, p. 6. Counselor 2 said it was not up to her and chastised Student for knocking on her door if it was not an emergency. *Id.*
117. When accommodations need to be provided “as necessary” or “when appropriate,” it is the special education teacher’s responsibility to navigate access to them, including by ensuring general education teachers understand when they need to be provided or helping students effectively self-advocate. *Interview with CDE Content Specialist*. For instance, what is ample time for one student might not be enough for another. *Exhibit J*, p. 432. Because Special Education Teacher 2 did not know if Student had accommodations, the SCO finds he could not ensure teachers understood their responsibilities related to them, including determining when she requires breaks, extra time, shortened assignments or extended due dates.

#### **T. Implementation of Student’s Special Education Services**

118. Special Education Teacher 2 did not read Student’s 2021 IEP and thus does not know if Student had any goals. *Interview with Special Education Teacher 2*. Because Special Education Teacher 2 had not read Student’s 2021 IEP, the SCO finds that he did not provide any indirect, consultative services during the fall semester of the 2022-2023 school year.
119. The 2022-2023 School year started in the third week of August 2022. *Exhibit H*. School was closed for a week in November 2022 and a week in December 2022. *Id.* Therefore, the SCO finds that the fall semester consisted of four months. With four months in the semester and 30 MPM in the 2021 IEP, the SCO finds that Student was entitled to 120 total minutes of indirect support from a special education teacher. *Exhibit A*, p. 10.

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<sup>3</sup> The SCO finds the tone of these emails, and several others, suggest that District staff did not fully consider, or otherwise view as credible, the requests and concerns raised by Student and Parent.

120. According to the school calendar, there were 13 weeks or three- and one-half months between the start of second semester and April 11, 2023. *Exhibit H*. There were six weeks between April 11 and the end of the year. *Id.*
121. Special Education Teacher 3's executive functioning class, created for Student, started at the beginning of the second semester and continued through the end of the 2022-2023 school year. *Interview with Special Education Teacher 3*. After April 5, 2023, Student participated in the executive functioning class for two days per week and worked on assignment completion with a paraprofessional on the other two days. *Exhibit J*, p. 432. Special Education Teacher 3 did not work with Student on the writing goal because it was changing. *Exhibit G*, p. 16.

#### **U. Implementation of Student's Counseling Services**

122. If she sees a student at least once a month, Counselor 1 creates a brief record of what they talked about as well as any goals for the coming week. *Interview with Counselor 1*. She records these notes the same day as the session but does not include the length of the session. *Id.*
123. The beginning of the school year can be chaotic, so Counselor 1 initially kept her session notes on paper. *Id.* She transitioned to electronic notes in October 2022. *Id.* The initial service log provided by Counselor 1 came from her electronic records and she said sessions were 15 minutes each. *Id.*; *See Exhibit G*, pp. 7-8.
124. Later, she came across her handwritten notes and got records of when Student met with Counselor 2 while Counselor 1 was out. *Interview with Counselor 1*. She also determined that her initial sessions averaged closer to 20 minutes each, since they consistently ran over. *Id.* She used this information to create updated logs. *Id.*; *See Exhibit G*, pp. 11, 18.
125. After reviewing some social skills from the prior year, the sessions focused on Student's self-esteem and self-directed academic goals. *Interview with Counselor 1*. Student wanted help focusing in class and taking better notes. *Id.* She also worked on changing or reframing thought patterns to challenge negative thoughts and alleviate anxiety. *Id.*
126. Around November 2022, Counselor 1 offered a study skills group that Student participated in, on top of her individual services. *Id.* While she participated in the group, individual sessions built on the group sessions, including whether she needed help with any teachers. *Id.*
127. With four months in the semester and 60 MPM in the 2021 IEP, the SCO finds that Student was entitled to 240 total minutes of direct services from a counselor during the first semester. The IEP does not specify whether the services will be group or individual, so the SCO finds that either is appropriate. *Exhibit A*, p. 10. Even assuming the initial sessions were 15 minutes long, the SCO finds that Counselor 1 met with Student for 30 minutes in August, 45 minutes in September, 45 minutes in October, 100 minutes in November, and 125 minutes in December, for a total of 345 minutes in the first semester. *Exhibit G*, p. 11. If the sessions

were in fact 20 minutes long, the SCO finds that she met with Student for 40 minutes in August, 60 minutes in September, 60 minutes in October, 110 minutes in November and 125 minutes in December, for a total of 395 minutes in the first semester.

128. Counselor 1 continued to meet with Student weekly throughout the second semester for individual sessions. *Interview with Counselor 1*. Counselor 1 and Student worked on understanding anxiety and then learning coping skills. *Id.* BOCES provided a log of Counselor 1's sessions that stops on April 25, 2023. *Exhibit G*, p. 18. The SCO finds that this reflects when records were collected for this investigation and not a cessation of services.
129. They met for four 30-minute sessions each in January and February, three sessions in March because of spring break and one session in April before the 12th. *Exhibit G*, p. 18. Thus, the SCO finds that Student received 360 total minutes during that period. Based on the consistency of the log to that point, the SCO finds that Student continued to receive 30 MPW throughout the end of the year.

#### **V. Progress Monitoring of the 2022 IEP**

130. Student's progress report for the 2022 IEP is blank. *Exhibit G*, pp. 2-4. BOCES did not provide any other progress reports. *See, Exhibit G*.
131. Special Education Teacher 2 was not monitoring Student's progress on goals. *Interview with Special Education Teacher 2*. Counselor 1 received Student's IEP, but she did not read it or monitor Student's progress on goals. *Id.* Counselor 1 readministered the screener in February 2023 and found that Student's score dropped from 27 to 20. *Id.* at p. 12.
132. Special Education Teacher 3 was not working with Student on the writing goal while it was changing. *Id.* at p. 16. She tried to start monitoring the writing goal after the IEP was finished, but it was not focused on essay writing. *Interview with Special Education Teacher 3*. She tried to keep her work consistent with the baseline that had measured how many uncorrected words Student wrote in four minutes. *Id.*
133. Student's self-report for the self-determination goal was verbal until February. *Exhibit G*, p. 16. On February 9, Special Education Teacher 3 began recording her responses in a chart that was shared with Parents. *Id.* at pp. 5-6 and 16. Student generally rated herself as a 2. *Id.*

#### **CONCLUSIONS OF LAW**

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

**Conclusion to Allegation No. 1: BOCES evaluated Student in all areas of suspected disability and conducted an evaluation that was sufficiently comprehensive to identify all of Student's needs, consistent with 34 C.F.R. § 300.304(c)(4), (c)(6). No IDEA violation occurred.**

Parents' concern is that BOCES was not going to conduct a comprehensive evaluation before determining that Student was no longer eligible under the IDEA.

The IDEA requires an evaluation to assess students "in all areas related to the suspected disability." 34 C.F.R. § 300.304(c)(4). Evaluations must be sufficiently comprehensive to identify all of the child's special education needs, whether or not commonly linked to the disability category with which the child has been identified. *Id.* at § 300.304(c)(6). The evaluation must also gather all relevant information that may assist in determining "the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum." *Id.* at § 300.304(b)(1)(ii). The SCO, in consultation with CDE Content Specialist, notes that this generally requires gathering information about how the student's disability impacts them in the school environment, including but not limited to teacher reports, classroom observations and/or teacher rating scales. Evaluations are required before any change in eligibility, including determining that a student is no longer eligible. 34 C.F.R. § 300.305(e).

Here, based on statements made by Special Education Teacher 2, Parents were concerned that Student would be taken off an IEP based solely on her grades. (FF # 13.) Based in part on that concern, they obtained a Private Evaluation, which they also wanted to confirm Student's ADHD diagnosis. (FF # 16.) On November 14, 2022, BOCES sought and received consent to evaluate Student in the areas of academic performance and social emotional status. (FF #s 14-15.) Two days later, on November 16, 2022, Parents asked BOCES not to conduct any testing as they would be providing copies of a private evaluation. (FF # 17.)

The Private Evaluation was extensive, consisting of cognitive and academic testing, as well as assessments of Student's executive functioning. (FF # 18.) Based on the evaluation, Student was diagnosed with dyslexia, dysgraphia, dyscalculia, and ADHD. (FF #s 20-24.) Student also had working memory deficits. (FF # 19.) BOCES accepted the Private Evaluation and considered it as most of its evaluation. (FF # 25.) The only new information in BOCES' Evaluation was Parent and Student responses to the BASC, which identified concerns with anxiety, depression, and attention. (FF # 26.) The MDT determined that BOCES' Evaluation was sufficiently comprehensive and determined Student was eligible as a Student with a SLD and OHI. (FF # 30.) Parents agreed with the ultimate determination and did not have concerns about the comprehensiveness of BOCES' Evaluation, which relied on the Private Evaluation. (*Id.*)

Because the MDT determined that BOCES' Evaluation was sufficiently comprehensive, and Parents continue to agree, the SCO finds and concludes that BOCES evaluated Student in all areas of suspected disability and that its evaluation was sufficiently comprehensive to identify all of Student's special education and related service needs, consistent with 34 C.F.R. § 300.304(c).

**Conclusion to Allegation No. 2: BOCES failed to timely develop an IEP for Student after determining that she was IDEA-eligible on December 1, 2022, in violation of 34 C.F.R. §§ 300.306(c)(2) and 300.323(c)(2). These violations resulted in a denial of FAPE.**

Parents' concern is that after determining Student was eligible as a student with a disability in December 2022, BOCES did not develop an IEP until April 2023.

The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is "the centerpiece of the statute's education delivery system for disabled children . . . [and] the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). Once a student is found eligible, an IEP must be developed in accordance with 34 C.F.R. §§ 300.320-300.324. 34 C.F.R. § 300.306(c)(2). Each public agency must ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education services. *Id.* at § 300.323(c)(1). Once developed, the public agency must ensure special education and related services are made available to the student as soon as possible. *Id.* at § 300.323(c)(2). To that end, a final IEP must be issued in a timely manner after an eligibility determination. *Deleware Cnty. Intermediate Unite No. 25 v. Martin K.*, 831 F. Supp. 1206, 1215 (E.D. Pa. 1993) (holding that a district's failure to issue a final IEP for nearly four months after determining the student eligible was a procedural IDEA violation).

Here, the MDT determined that Student was IDEA-eligible as a child with a disability on December 1, 2022. (FF #s 28 and 30.) BOCES sent Parents a draft IEP and convened an IEP team meeting on December 14, 2022. (FF #s 40 and 46.) Thus, the SCO finds and concludes that BOCES convened an IEP team within 30 days of determining that Student was eligible on December 1, 2022, consistent with 34 C.F.R. § 300.323(c)(1).

However, BOCES did not issue a finalized IEP until April 11, 2023, more than four months after the eligibility determination. (FF # 102.) In the interim, there were multiple rounds of drafting and revision that included changes to goals, services, and accommodations. (FF #s 53-101.) The initial signature page may have been missing. (FF # 73.) Even so, while signature pages are useful evidence of meeting participation, once a parent consents to the initial provision of services, nothing in state or federal law requires parental signatures to finalize an IEP. Although the IDEA does not specify how quickly IEPs need to be finalized, Director was aware this delay was not reasonable. (FF #s 75 and 100.) The SCO agrees that four months without finalizing an IEP is not reasonable. *Martin K.*, 831 F. Supp. at 1215. Therefore, the SCO finds and concludes that BOCES failed to issue a final IEP for Student in a timely manner after determining that she was eligible, resulting in a violation of 34 C.F.R. §§ 300.306(c)(2) and 300.323(c)(2).

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 205-06 (1982). However, procedural violations of IDEA are only actionable to the extent that they impede the child's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making



process regarding the provision of a FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008).

Again, the IEP is central to ensuring the provision of a FAPE under the IDEA. *Rowley*, 458 U.S. at 181. As a result of the delays in finalizing Student’s IEP in this case, Special Education Teacher 3 did not work on the writing goal. (FF # 132.) Her process for monitoring the self-determination goal was also in flux. (FF # 133.) Parents did not get any progress reports for the semester. (FF # 130.) A snapshot of Student’s 2022 IEP, with its new goals and accommodations, was not shared with her teachers until April 5, 2023. (FF # 113.) For all these reasons, the SCO finds and concludes that BOCES’ failure to timely finalize an IEP for Student resulted in a denial of FAPE. All the violations found in this case and their impact are all closely related; therefore, the SCO will set out remedies to address all the violations at the conclusion of this Decision.

**Conclusion to Allegation No. 3: BOCES failed to develop goals and services in the 2022 IEP that were individually tailored to address Student’s needs, in violation of 34 C.F.R. § 300.320(a)(2), (a)(4). This violation resulted in a denial of FAPE.**

Parents’ concern is that the 2022 IEP was not appropriately tailored to meet Student’s individualized needs.

The IDEA requires a school to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). An analysis of the adequacy of an IEP begins with the two-prong standard established by the United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The first prong determines whether the IEP development process complied with the IDEA’s procedures; the second prong considers whether the IEP was reasonably calculated to enable the child to receive an educational benefit. *Id.* at 207. If the question under each prong can be answered affirmatively, then the IEP is appropriate under the law. *Id.* Taken together, these two prongs assess whether an IEP is procedurally and substantively sound.

#### **A. IEP Development Process**

In developing an IEP, the IEP Team must consider the strengths of the child, the parent’s concerns, evaluation results, and “the academic, developmental, and functional needs of the child.” 34 C.F.R. § 300.324(a)(1). An IEP must include a statement explaining how the child’s disability impacts the student’s involvement and progress in the general education curriculum. *Id.* § 300.320(a)(1)(i). An IEP must include the special education and related services and supplementary aids and services that will be provided to allow the child to (1) attain the annual goals, (2) be involved and make progress in the general education curriculum and (3) participate in nonacademic activities. *Id.* § 300.320(a)(4). The IEP must also contain measurable annual goals designed to: (1) meet the needs that result from the student’s disability to enable him or her to

be involved in and make progress in the general education curriculum, and (2) meet each of the student's other educational needs that result from his or her disability. *Id.* § 300.320(a)(2).

An IEP meeting itself “serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child.” *Letter to Richards*, 55 IDELR 107 (OSEP 2010). “The IEP Team should work towards a general agreement, but . . . [i]f the team cannot reach agreement, the public agency must determine the appropriate services . . . .” *Id.* Although an IEP may be amended by agreement obtained through email correspondence, developing, reviewing, and revising an annual IEP via email is inconsistent with the collaborative process contemplated by the IDEA. *Denver Public School District 1*, 77 IDELR 266 (SEA CO 2020).

Here, portions of the 2022 IEP were developed at properly convened IEP team meetings on December 14, 2022 and March 16, 2023. (FF #s 46 and 87.) The IEP includes a statement of the impact Student's disabilities have on her ability to access the general education curriculum. (FF # 103.) The IEP includes three goals to address Student's academic and social emotional needs. (FF #s 104-106.) The IEP also includes services and accommodations to support Student's progress on goals and in the general education curriculum. (FF #s 107-108.)

However, the IEP was not finalized for four months. Also, substantial revisions were made by extensive email correspondence. (FF #s 66-84 and 97-99.) Although amendments can be made via email, the IDEA intends IEP team meetings to be central to the collaborative process required to develop an IEP. 34 C.F.R. § 300.320(a); *Letter to Richards*, 55 IDELR 107 (OSEP 2010); *Denver Public School District 1*, 77 IDELR 266 (SEA CO 2020). While it may be appropriate to refine language over email when substantive agreement has been reached at the IEP team meeting, email should not be used to achieve substantive agreement. At the point BOCES realized there was substantial disagreement over the contents of the IEP here, to comply with IDEA's procedures, it could have (1) scheduled another IEP team meeting or (2) issued a final IEP along with PWN of its decisions and Parents' right to contest those decisions by exercising their procedural safeguards.

Because the 2022 IEP was not finalized for four months and was developed in large part over email, the SCO finds and concludes that the development process for the 2022 IEP did not comply with IDEA's procedures. *Rowley*, 458 U.S. at 206. Nevertheless, the SCO still turns next to the second question of whether the 2022 IEP is substantively appropriate. *Rowley*, 458 U.S. at 207.

## **B. Substantive Adequacy of the IEP**

### *i. Student Needs and Impact of Disability*

Parents' concern is that the SNID statement in the Second Draft IEP did not accurately reflect Student's disabilities or their impact on her ability to access the general education curriculum.

(FF #s 56 and 67.) An IEP must include a statement explaining how the child’s disability impacts the student’s involvement and progress in the general education curriculum. 34 C.F.R. § 300.320(a)(1)(i). The SNID statement in the Second Draft IEP appears to indicate internalizing behaviors related to clinically significant anxiety and depression are impacting her interpersonal relationships, working memory and executive functioning, requiring specially designed instruction. (FF # 56.) The SCO finds that the statement is difficult to understand and that it was BOCES, not the Private Evaluation, that identified anxiety and depression as concerns. (FF # 68.)

However, starting with the Third Draft IEP and continuing through the 2022 IEP, the SNID statement acknowledges Student’s dyslexia, dysgraphia, and dyscalculia as well as the impact of her working memory deficits and difficulties with executive functioning. (FF #s 77, 94, and 103.) Parents indicated this updated statement accurately describes how Student’s disabilities impact her involvement and progress in the general education curriculum. (FF # 77.) The SCO agrees. Thus, the SCO finds and concludes that the SNID statement in the 2022 IEP is reasonably calculated to enable Student to receive an educational benefit and does not violate the IDEA’s substantive requirements related to the development of an IEP at 34 C.F.R. § 300.320(a)(1)(i).

ii. Special Education and Related Services

Parents’ concern is that the 2022 IEP did not include a clear description of the special education and related services Student requires to make appropriate progress on her goals and in the general education curriculum.

An IEP must include the special education and related services and supplementary aids and services that will be provided to allow the child to (1) attain the annual goals, (2) be involved and make progress in the general education curriculum and (3) participate in nonacademic activities. 34 C.F.R. § 300.320(a)(4). It must “include information about the services that will be provided to the child, so that the level of the agency’s commitment of resources will be clear to parents and other IEP Team members.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46667 (August 14, 2006).

This statement, commonly known as a service delivery statement, must be sufficiently detailed for parents to understand what specific services and supports the school district is offering to provide. *Tamalpais Union Sch. Dist. v. D.W.*, 70 IDELR 230 (N.D. Cal. 2017) (noting that “Parents can’t make an informed decision on whether to accept a proposed IEP if the document includes only a vague description of the student’s services”); *see also Douglas Cnty. Sch. Dist.*, 118 LRP 35788 (SEA CO 7/6/18). The service delivery statement must clearly specify the amount and type of services that will be provided to a student. *Adams 12 Five Star Schs.*, 75 IDELR 86 (SEA CO 2019). This includes describing the setting in which a particular service will be provided. *See, e.g., S.H. v. Mount Diablo Unified Sch. Dist.*, 70 IDELR 98 (N.D. Cal. 2017) (finding that the district violated the IDEA when it failed to spell out whether the 40 minutes of speech and language services would be delivered to the student individually or in a group setting).

Here, the 2022 IEP states that Student will receive 30 MPW of direct services from a counselor to address her social-emotional goal area. (FF # 108.) In addition, Student is to receive 172 MPW of direct services from a special education teacher to address executive functioning, assignment completion, and writing assistance as needed. (*Id.*)

The 2022 IEP does not specify whether either service will be provided in an individual or small group setting. (*Id.*) Although this statement clearly specifies the amount of services Student will receive from each provider, it also does not clearly describe the type of services a special education teacher will be providing. (*Id.*) It is not clear how often or for what length of time Student will be receiving writing assistance versus support with executive functioning or assignment completion. These deficiencies prevent Parents from making an informed decision about whether the 2022 IEP is adequate to meet Student's needs. *Tamalpais Union Sch. Dist.*, 70 IDELR 230 (N.D. Cal. 2017). Similarly, new providers reading the IEP would not know what services the IEP team determined Student requires to progress in her goals and the general education curriculum. For example, while it would not be necessary to specify that Student would be working on writing for 15 minutes every Tuesday and Thursday, it would be necessary to specify that Student would receive direct services focused on writing for 30 MPW.

Because the 2022 IEP did not include a clear statement of the special education and related services Student was to receive, the SCO finds and concludes that it was not reasonably calculated to allow her to make progress on annual goals and to be involved and make progress in the general education curriculum, as required by 34 C.F.R. § 300.320(a)(4). This resulted in a denial of FAPE. *See D.S. v. Bayonne Bd. Of Ed.*, 602 F.3d 553, 565 (3d. Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA's procedural requirements).

### *iii. Accommodations*

Parents' concern is that the 2022 IEP does not contain all the accommodations Student requires to access and progress in the general education setting.

An IEP must include the supplementary aids and services, including accommodations, that will be provided to allow the child to (1) attain the annual goals, (2) be involved and make progress in the general education curriculum and (3) participate in nonacademic activities. 34 C.F.R. § 300.320(a)(4). "Accommodations allow different instructional designs to support students and to enable them to receive instruction based on the general education curriculum and other content focus areas needed by the students, such as social, self-determination, and independent living skills." *CDE IEP Procedural Guidance Manual*, p. 44 (July 2017), available at [https://www.cde.state.co.us/cdesped/iep\\_proceduralguidance](https://www.cde.state.co.us/cdesped/iep_proceduralguidance).

Whether an IEP is reasonably calculated to allow a student to make appropriate progress is determined prospectively, based on what was known when the IEP was drafted, and not determined by the student's actual progress. *Fuhrmann v. East Hanover Bd. of Educ.*, 19 IDELR 1065 (3d Cir. 1993), *reh'g denied*, 110 LRP 65930 (3d Cir. 06/08/93); and *Adams v. State of*

*Oregon*, 31 IDELR 130 (9th Cir. 1999). Instead of promising a particular educational or functional outcome for a student with a disability, the IDEA provides a process for reviewing an IEP to assess achievement and revising the program and services, as necessary, to address new information or a lack of expected progress. 34 C.F.R. § 300.324(b)(1).

Here, the 2022 IEP includes 24 accommodations, including special education support to access shortened written assignments and extended due dates and access to teacher notes, to support Student’s executive functioning and other academic needs. (FF # 107.) While School Psychologist 2’s edits might have made the accommodations easier to understand, the SCO finds that these edits would not have substantively changed the 2022 IEP. (FF # 101.) However, as discussed in the conclusion to Allegation No. 2, the 2022 IEP was not finalized until April 11, 2023. As discussed in the conclusions to Allegation Nos. 5 and No. 7, BOCES failed to ensure accommodations were implemented and Special Education Teacher 3 was not certified to teach special education.

Again, IEPs should be assessed based on what is known when they are written, not based on Student’s actual progress. *Adams v. State of Oregon*, 31 IDELR 130 (9th Cir. 1999). The SCO finds and concludes that, at the time written, the accommodations in the 2022 IEP were reasonably calculated to enable Student to make progress on her goals and in the general education curriculum, consistent with 34 C.F.R. § 300.320(a)(4). If Student does not make adequate progress with those accommodations in the future, the IEP can be reviewed and revised at that time. 34 C.F.R. § 300.324(b)(1).

#### iv. Goals

Parents did not raise concerns with the 2022 IEP’s goals, but the SCO identified problems with their ability to pass the stranger test and addresses them now since they are directly related to this allegation.

To allow for the evaluation of a student’s progress, IEP goals must be clear and objectively measurable. *Kuszewski v. Chippewa Valley Schs.*, 34 IDELR 59 (E.D. Mich. 2001), *aff’d*, 38 IDELR 63 (6<sup>th</sup> Cir. 2003, *unpublished*). Appropriate goals should be clear enough that a stranger, or person unfamiliar with the IEP, would be able to implement the goal, monitor student’s progress on the goal and determine whether that progress was satisfactory. *Mason City Cmty. Sch. Dist.*, 46 IDELR 148 (SEA IA 2006). This includes accurately identifying the skill areas in which the student requires specialized instruction, although specific words or the most expansive phrasing is not required. *See Benjamin A. v. Unionville-Chadds Ford School District*, 70 IDELR 150 (E.D. Pa. 2017) (holding that goals that addressed executive functioning skills was not deficient because it failed to use the term “executive functioning”).

Here, the writing goal does not have a clear unit of measurement or a baseline for all the identified skills. (FF # 104.) The SCO, in consultation with CDE Content Specialist, finds that a new special education professional attempting to implement this goal would be unable to effectively monitor Student’s progress, knowing neither where she started nor how to assess her progress.

(*Id.*) In fact, when Special Education Teacher 3 attempted to implement it, she could not actually focus on essay writing in her effort to stay consistent with the baseline. (FF # 132.)

The self-determination goal relies solely on Student's subjective self-report of her executive functioning abilities to determine progress. (FF # 105.) Thus, it is not objectively measurable. (*Id.*) In addition, it does not appear to have an accurate baseline or a baseline for each skill, further inhibiting efforts to measure Student's progress. (*Id.*)

The social emotional goal identifies an area for direct instruction, prosocial skills. (FF # 106.) However, neither the baseline nor the unit of measurement are specific to prosocial skills. (*Id.*) The SCO, in consultation with CDE Content Specialist, finds that even if they administered the same screener, there is no way for a stranger to know what Student's areas of need were or if she has progressed in those areas.

Overall, because the goals are not clear and objectively measurable, the SCO finds and concludes that the goals in the 2022 IEP were not reasonably calculated to enable Student to receive an educational benefit and violated the IDEA's substantive requirements related to the development of an IEP at 34 C.F.R. § 300.320(a)(2). This resulted in a denial of FAPE. *See D.S. v. Bayonne Bd. Of Ed.*, 602 F.3d 553, 565 (3d. Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA's procedural requirements).

**Conclusion to Allegation No. 4: Parents meaningfully participated in the development of Student's 2022 IEP, consistent with 34 C.F.R. § 300.324(a)(1)(ii). BOCES failed to provide adequate notice of the participants and Parents' ability to invite others before the March 16, 2023 IEP team meeting, in violation of 34 C.F.R. § 300.322(b)(1)(i)-(ii). This procedural violation did not result in a denial of FAPE.**

#### **A. Consideration of Parent Concerns**

Parents' concern is that BOCES deprived them of meaningful participation by failing to take their concerns into account.

The IDEA's procedural requirements for developing a child's IEP are designed to provide a collaborative process that "places special emphasis on parental involvement." *Systema v. Academy School District No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008). To that end, the IDEA requires that parental participation be meaningful, to include carefully considering a parent's concerns for enhancing the education of his or her child in the development of the child's IEP. 34 C.F.R. §§ 300.321(a)(1), 300.322, and 300.324(a)(1)(ii).

Meaningful parent participation occurs where the IEP team listens to parental concerns with an open mind, exemplified by answering questions, incorporating some requests into the IEP, and discussing privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of the student. *O'Toole v. Olathe District Schools Unified School*

*District No. 233*, 144 F.3d 692, 703 (10th Cir. 1998). Meaningful participation does not require that a district simply agree to whatever a parent has requested. *Jefferson County School District RE-1*, 118 LRP 28108 (SEA CO 3/22/18). However, parental participation must be more than “mere form.” *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014). “It is not enough that the parents are present and given an opportunity to speak at an IEP meeting.” *Id.* Evidence that a district “was receptive and responsive at all stages” to the parents’ position, even if it was ultimately rejected, is illustrative of parental participation. *Id.*

Parents do not have “veto power” over IEP team decisions. *Garden Grove Unified Sch. Dist.*, 115 LRP 20924 (SEA CA 05/05/15). An IEP meeting “serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child.” *Letter to Richards*, 55 IDELR 107 (OSEP 2010). “The IEP Team should work towards a general agreement, but . . . [i]f the team cannot reach agreement, the public agency must determine the appropriate services . . . .” *Id.*

Here, Parents and Advocate participated in an eligibility meeting and two IEP team meetings. (FF #s 28, 46, 87) BOCES agreed to many of the changes Parents requested, including changing the SNID statement, adjusting the services to include time to complete assignments, and modifying the goals and accommodations. (FF #s 76-78, 90, 95, 99.) BOCES did not initially make many of the changes agreed to in the IEP team meetings. (FF #s 64, 97 and 101.) However, as most of these changes were later made, the SCO finds that this reflects Special Education Teacher 3’s inexperience and not an effort to disregard Parents’ input. Although IEPs should not be substantially revised over email, at every stage of the process Parents were made aware of BOCES’ proposed changes and given an opportunity to provide further feedback. (FF #s 53, 65, 75, 83, 87, and 97.) For these reasons, the SCO finds and concludes that Parents had ample opportunity to participate in the IEP’s development, consistent with 34 C.F.R. § 300.324(a)(1)(ii).

## **B. Notice of Meeting**

Parents’ concern is that they were not provided with adequate notice of the March 16, 2023 IEP team meeting.

Under the IDEA, school districts must notify parents of IEP team meetings “early enough to ensure they have an opportunity to attend.” 34 C.F.R. § 300.322(a)(1). Notice of the meeting must indicate: (i) the purpose, time and location of the meeting, (ii) the attendees, and (iii) inform parents that they may invite other individuals. *Id.* § 300.322(b)(1)(i)-(ii).

Here, the March 16 IEP team meeting was scheduled less than 48 hours before it occurred. (FF # 85.) However, although it was short notice, Parents and Advocate agreed to the proposed time and location and participated. (FF #s 85 and 87.) Because Parents and Advocate were able to participate, and there is no indication the meeting would not have been rescheduled had they so

requested, the SCO finds and concludes that, in this case, notice was issued early enough to ensure they had an opportunity to attend, consistent with 34 C.F.R. § 300.322(a)(1).

Per Principal's email, the purpose of the meeting was to communicate more efficiently to revise and finalize Student's IEP. (FF # 84.) The email exchange also clearly communicated the time and location of the meeting, including the link for virtual participation. (FF # 85.) Thus, the SCO finds and concludes that the emails offered sufficient notice of the purpose, time, and location of the meeting, consistent with 34 C.F.R. § 300.322(b)(1)(i).

However, Parents were not told which professionals, including a new school psychologist, would attend the meeting. (FF #s 85-87.) They were not told they could invite others to attend. (*Id.*) Thus, the SCO finds and concludes that BOCES failed to provide notice of the attendees and the option to invite others, resulting in a procedural violation of 34 C.F.R. § 300.322(b)(1)(i)-(ii).

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 205-06 (1982). However, procedural violations of IDEA are only actionable to the extent that they impede the child's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008).

Here, the SCO finds that Advocate's presence at the meeting shows that Parents were aware of their right to invite others to attend meetings. (FF # 87.) Although they did not get a list of participants, Parents could see the other individuals who were copied on the scheduling emails and included on the calendar link. (FF # 85.) Further, Parents' and Advocate's questions about an agenda and a link suggest they could have (and would have) asked if they had questions about the participants in the meeting. (*Id.*) Parents did not raise concerns about the participants in the meeting, before, during or after. (FF # 87.) Thus, the SCO finds that this procedural violation did not impede Parents' opportunity to participate in the decision-making process for Student. The lack of formal notice also had no impact on Student's services, so it did not result in a denial of FAPE or a deprivation of educational benefit. Thus, the SCO finds and concludes that this procedural violation did not result in a denial of FAPE.

**Conclusion to Allegations No. 5 and 7: BOCES failed to properly implement Student's 2021 IEP during the 2022-2023 school year, in violation of 34 C.F.R. § 300.323. BOCES also failed to ensure Student's special education teacher was appropriately licensed from December 6, 2022 through the end of the school year, in violation of 34 C.F.R. § 300.207 and ECEA Rule 3.03 and 3.04. These violations resulted in a denial of FAPE.**

Parents' concern is that BOCES failed to ensure Student's teachers had access to her IEP and failed to provide her with the accommodations and mental health services required by her IEP.



The IDEA seeks to ensure that all children with disabilities receive a FAPE through individually designed special education and related services pursuant to an IEP. 34 C.F.R. § 300.17; ECEA Rule 2.19. The IEP is “the centerpiece of the statute's education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). A student’s IEP must be implemented in its entirety. 34 C.F.R. § 300.323(c)(2).

An IEP must identify the special education and related services and supplementary aids and services necessary to allow the student to advance appropriately towards annual goals, to be involved in the general education curriculum, and to be educated and participate with other nondisabled children. *Id.* at § 300.320(a)(4). A school district must ensure that “as soon as possible following the development of the IEP, special education and related services are made available to a child in accordance with the child’s IEP.” 34 C.F.R. § 300.323(c)(2). To satisfy this obligation, a school district must ensure that each teacher and related services provider is informed of “his or her specific responsibilities related to implementing the child’s IEP,” as well as the specific “accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.” *Id.* § 300.323(d).

#### **A. Applicable IEP**

As a preliminary matter, the SCO must first determine what IEP was in effect. Although an IEP meeting was held on December 14, 2022, BOCES did not issue a final IEP for Student until April 11, 2023. (FF #s 46 and 102.) The Second Draft IEP, sent after the December IEP team meeting, did not reflect the agreement of the 2022 IEP Team. (FF # 64.) It was not until April 2023 that BOCES produced a final IEP. (FF # 102.) As there was no consensus reached and BOCES did not make a determination and issue PWN of its decisions, the SCO finds that the 2021 IEP remained the operative IEP for Student until April 11, 2023. As this Complaint was filed April 12, 2023, this Decision analyzes implementation of the 2021 IEP through April 11, 2023.

#### **B. Knowledge of Student’s 2021 IEP**

The SCO starts by determining whether BOCES satisfied its obligation under 34 C.F.R. § 300.323(d) to ensure that Student’s teachers were aware of their responsibilities under the 2021 IEP.

Special Education Teacher 2’s practice is to provide teachers with all the IEPs for their grade at the start of the school year. (FF # 110.) The 2021 IEP was included in the packet of IEPs provided to seventh-grade teachers at the start of the 2022-2023 school year. (*Id.*) However, Special Education Teacher 2 did not read the 2021 IEP. (FF # 112.) He did not know if Student had goals or accommodations. (FF #s 112 and 118.) Thus, the SCO finds and concludes that Special Education Teacher 2 was not informed of his responsibilities under Student’s 2021 IEP, in violation of 34 C.F.R. § 300.323(d)(2).

Student's accommodations in the 2021 IEP included fidget breaks as needed and shortened assignments and extended due dates when necessary. (FF # 8.) Special education teachers are responsible for ensuring that general education teachers know how to determine when a student requires such accommodations, since the needs of students vary. (FF # 117.) As Special Education Teacher 2 had not read Student's IEP, the SCO, in consultation with CDE Content Specialist, finds and concludes that he could not have ensured that her teachers had a meaningful understanding of their responsibilities under the 2021 IEP, in violation of 34 C.F.R. § 300.323(d)(2).

Further confusing matters, while the 2022 IEP was being drafted, Special Education Teacher 3 kept Student's teachers updated about changes in the IEP through regular conversations. (FF # 113.) Thus, it is unclear what accommodations, if any, teachers were directed to provide. Additionally, throughout the revision process, the drafts of the IEP did not always match what the IEP team had agreed to, so it cannot be confirmed that teachers were instructed to provide either what the 2021 IEP required or what the 2022 IEP Team determined Student needed. (FF #s 64, 89 and 101.) Student's 2022 IEP was shared with her teachers on April 5, 2023, before the final change to the accommodations. (FF # 113.)

Because Special Education Teacher 2 could not meaningfully inform teachers of their responsibilities under the 2021 IEP and Special Education Teacher 3 did not try to inform teachers of their responsibilities under the 2021 IEP, the SCO finds and concludes that BOCES did not ensure Student's teachers were aware of their responsibilities under the 2021 IEP, in violation of 34 C.F.R. § 300.323(d)(2).

### **C. Implementation of Accommodations**

Parents' concern is that teachers were not implementing Student's accommodations because several were not aware she had an IEP and she continued to be overwhelmed by her assignments. (FF #s 12, 65, 83, 88, 112 and 114.) Student needed support from a special education teacher to advocate effectively for when she needed accommodations. (FF # 90.) However, neither Special Education Teacher 2 nor Special Education Teacher 3 ensured that Student's teachers meaningfully understood her accommodations, like when she needs extra time. For example, the 2021 IEP, as well as early drafts of the 2022 IEP, include fidget breaks out of the classroom as an accommodation. (FF # 8, 43 and 61.) When Student asked for a fidget break on March 29, 2023, her art teacher did not know what that was and did not allow it. (FF # 115.) For these reasons, the SCO finds and concludes that BOCES failed to implement the accommodations from Student's 2021 IEP, in violation of 34 C.F.R. § 300.323.

### **D. Implementation of Counseling Services**

Parents' concern is that Student was not receiving her counseling services. Under the 2021 IEP, she was entitled to 60 MPM of direct counseling services, or 240 minutes of direct counseling services during the first semester of the 2022-2023 school year. (FF # 127.) Even assuming the initial counseling sessions were 15 minutes each, as Counselor 1 initially reported, she received

345 minutes of counseling during that semester. (FF #s 123 and 127.) Thus, the SCO finds that BOCES implemented the counseling services in Student’s 2021 IEP throughout the first semester.

In December 2022, Counselor 1 started having 30-minute weekly sessions with Student. (FF # 129.) Between the start of the semester and April 12, she received 360 minutes of counseling services from Counselor 1. (*Id.*) During that time, there were 3.5 months of school. (FF # 120.) At 60 MPM, the SCO finds she was entitled to 210 minutes of counseling. Thus, the SCO finds that BOCES implemented the counseling services in the 2021 IEP throughout the second semester. Overall, the SCO finds and concludes that BOCES implemented the counseling services in Student’s 2021 IEP consistent with 34 C.F.R. § 300.323.

## **E. Implementation of Specialized Instruction**

### *i. Special Education Teacher 2*

The SCO is concerned that Special Education Teacher 2 did not read Student’s 2021 IEP. (FF # 112.) He did not know if Student had any goals (she had two), or if she had any accommodations. (FF #s 112 and 118.) According to the 2021 IEP, Student should have been receiving 30 MPM, or 120 total minutes, of indirect consultative services from a special education teacher during the first semester. (FF # 119.) Because he did not read Student’s 2021 IEP, the SCO finds that he did not provide any indirect consultative services to Student in the first half of the 2022-2023 school year. (FF # 118.) Thus, the SCO finds and concludes that BOCES failed to implement the special education services in Student’s 2021 IEP, in violation of 34 C.F.R. § 300.323.

### *ii. Special Education Teacher 3*

Under the IDEA, the CDE must establish qualifications to ensure that special education teachers are “appropriately and adequately prepared and trained . . . to serve children with disabilities.” 34 C.F.R. § 300.156(a). This includes ensuring that all special education teachers have obtained state certification as special education teachers. *Id.* at § 300.156(c). Administrative units must ensure that staff are “appropriately and adequately prepared, subject to the requirements of § 300.156.” *Id.* at § 300.207.

To that end, the CDE requires “[a]ll special education teachers [to] hold Colorado teacher’s certificates or licenses with appropriate endorsements in special education.” ECEA Rule 3.04(1)(a)(i). Administrative units bear responsibility for ensuring their staff comply with state licensing requirements. ECEA Rule 3.03.

The IDEA does not excuse a district’s failure to implement an IEP based on staff shortages. *E.g., El Paso County School District 20*, 122 LRP 39732 (SEA CO 6/5/22) (finding an ongoing obligation to provide FAPE pursuant to a student’s IEP during a staffing shortage); *See also In re: Student with a Disability*, 121 LRP 38674 (SEA KS 10/20/21) (finding an ongoing obligation to provide FAPE pursuant to a student’s IEP during a staffing shortage).

Here, Special Education Teacher 3 took over as Student’s special education teacher on December 6, 2022. (FF # 39.) BOCES practice is that those serving as special education teachers while pursuing licensure must get authorization from the CDE. (FF # 34.) Special Education Teacher 3 is not now, and has never been, licensed to teach special education in Colorado. (FF # 36.) Intent to enroll in a graduate program is not the same thing as getting an interim or alternative license. (*Id.*) See CDE Alternative Teacher Candidates, found at: <http://www.cde.state.co.us/cdeprof/altteacheroverview>.

BOCES contends that Special Education Teacher 3 could act as Student’s special education teacher because Parents agreed. Parents agreed Student needed a new special education teacher, but they were not given a say in the replacement. (FF #s 35 and 39.) Even if they had known, it is BOCES’ responsibility, and not the Parents’, to ensure Student’s special education teachers are appropriately licensed. 34 C.F.R. § 300.207. There is nothing in the law that gives parents the authority to waive that requirement, just as that requirement is not waived because of a teaching shortage. See *El Paso County School District 20*, 122 LRP 39732 (SEA CO 6/5/22).

Thus, the SCO finds and concludes that BOCES failed to ensure Student’s special education teacher possessed the required certifications and licenses from December 6, 2022 through the end of the school year, in violation of 34 C.F.R. §§ 300.156 and 300.207 and ECEA Rule 3.04. BOCES’ failure to ensure Special Education Teacher 3 was appropriately licensed and certified to provide special education instruction also resulted in violations of 34 C.F.R. § 300.207 and ECEA Rule 3.03 and 3.04.

BOCES’ failure to provide an appropriately licensed teacher for Student resulted in a failure to implement the 2021 IEP and deprived her of the specialized instruction required by her IEP throughout the second semester of the 2022-2023 school year, a period of 19 weeks or five months. (FF # 120.) Thus, at 30 MPM, the SCO finds and concludes that BOCES failed to provide 150 minutes of indirect consultative support during that time, in violation of 34 C.F.R. § 300.323.

#### **F. Materiality of Failure to Implement**

Where the definition of a FAPE specifically references delivery of special education and related services consistent with an IEP, the failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19. However, not every deviation from an IEP’s requirements results in a denial of a FAPE. See, e.g., *L.C. and K.C. v. Utah State Bd. of Educ.*, 125 Fed. App’x 252, 260 (10th Cir. 2005) (holding that minor deviations from the IEP’s requirements which did not impact the student’s ability to benefit from the special education program did not amount to a “clear failure” of the IEP); *T.M. v. Dist. of Columbia*, 64 IDELR 197 (D.D.C. 2014) (finding “short gaps” in a child’s services did not amount to a material failure to provide related services). Thus, a “finding that a school district has failed to implement a requirement of a child’s IEP does not end the inquiry.” *In re: Student with a Disability*, 118 LRP 28092 (SEA CO 5/4/18). Instead, “the SCO must also determine whether the failure was material.” *Id.* Courts will consider a case’s

individual circumstances to determine if it will “constitute a material failure of implementing the IEP.” *A.P. v. Woodstock Bd. of Educ.*, 370 Fed. App’x 202, 205 (2d Cir. 2010).

“A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). The materiality standard “does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” *Id.*

Here, BOCES failed to ensure that Student’s teachers were aware of Student’s 2021 IEP. In part, due to this failure, BOCES also failed to consistently provide Student with the accommodations in her IEP. As a result, Student continued to struggle with her workload throughout the year. (FF #s 65, 88, and 114.) Attempts to advocate for herself, without the support of a special education teacher, led to conflicts with a teacher and Counselor 2. (FF #s 115-116.) Even if Student appeared calm and ready to learn at School, she was anxious and struggling when she got home, as was identified in BOCES’ Evaluation. (FF #s 26, 74 and 114.)

Because Special Education Teacher 2 did not read the 2021 IEP and Special Education Teacher 3 was not appropriately licensed, BOCES also failed to provide Student with any indirect specialized instruction throughout the year. In total, BOCES failed to provide 270 minutes of indirect support.

These violations—even taken independently—amount to more than a minor discrepancy between the services Student received and those required by her IEPs. For this reason, the SCO finds BOCES’ failure to implement Student’ IEPs to be material. This failure denied Student a FAPE. Given the degree to which a FAPE was denied, Student is entitled to compensatory education. *Colo. Dep’t of Ed.*, 118 LRP 43765 (SEA CO 6/22/18).

**Conclusion to Allegation No. 6: BOCES failed to provide Parents with quarterly progress reports, in violation of 34 C.F.R. § 300.320(a)(3). This violation resulted in a denial of FAPE.**

Parents’ concern is that BOCES failed to provide them with periodic reports on Student’s progress on her IEP goals.

IEPs must include a description of how a child’s progress towards their annual goals will be measured and school districts must provide periodic reports on the progress a student is making toward the student’s annual goals. 34 C.F.R. § 300.320(a)(3).

Here, the 2021 IEP and the 2022 IEP required the provision of quarterly progress reports to Parents. (FF #s 7 and 106.) Special Education Teacher 2 did not monitor Student’s goals under the 2021 IEP or share any reports of her progress. (FF # 131.) Counselor 1 also did not monitor the social emotional goal in the 2021 IEP. (*Id.*)

The progress report for Student's 2022 IEP is blank. (FF # 130.) Special Education Teacher 3 did not work on the writing goal while it was changing and could not work on essay writing once it was finalized because of the baseline. (FF # 132.) She also did not track the self-determination goal for a month. (FF # 133.) After February 9, 2023, she started recording Student's self-reports through April 26, but there is no assessment of progress or lack thereof. (*Id.*) Finally, although she readministered the pediatric screener once, Counselor 1 also did not monitor the social emotional goal from the 2022 IEP. (FF # 131.) In addition, as previously discussed in this Decision, the SCO has concerns with the accuracy of the baselines and the measurability of all three goals.

Because Parents did not receive a progress report all year, and, in most cases, no one was monitoring Student's progress, the SCO finds and concludes that BOCES failed to provide periodic reports of Student's progress, resulting in a procedural violation of 34 C.F.R. § 300.320(a)(3).

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. Of Educ. V. Rowley*, 458 U.S. 176, 205-06 (1982). However, procedural violations of IDEA are only actionable to the extent that they impede the child's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008).

Here, since no one was monitoring the 2021 IEP goals, Parents were not provided with any reports on Student's progress before the eligibility determination. Then, as Parents were actively advocating for additional support and services in the 2022 IEP because they observed Student was struggling, they still were not provided with any reports of her progress throughout the second semester. Thus, the SCO finds and concludes that the failure to monitor Student's progress and provide Parents with quarterly progress reports significantly impeded Parents' opportunity to participate in the decision-making process regarding Student's eligibility and the development of the 2022 IEP, resulting in a denial of FAPE.

**Compensatory Education: This investigation demonstrates a need for compensatory services.**

Compensatory education is an equitable remedy intended to place a student in the same position he would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education need not be an "hour-for-hour calculation." *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child, and ensuring children receive the services to which they are entitled. *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010).

Here, on December 14, 2022, the 2022 IEP Team determined that Student required 43 MPD or 172 MPW of specialized instruction in executive functioning, including assignment completion, and writing, and 30 MPW of counseling services to develop prosocial skills. (FF #s 48 and 50-51.) The 2022 IEP Team also made several adjustments to Student's accommodations. (FF # 49.)

Nevertheless, BOCES did not finalize Student's 2022 IEP until April 11, 2023. (FF # 102.) Had BOCES appropriately finalized and implemented Student's 2022 IEP at or near the start of the semester, Student would have been entitled to 172 MPW of direct special education services for 19 weeks, or 3,268 total minutes. (FF #s 50 and 120.)

In addition, under the 2021 IEP, BOCES failed to implement the accommodations and 270 minutes of indirect support from a special education teacher. BOCES further failed to ensure Student had a licensed special education teacher for the entire second semester.

Here, in consideration of Student's strong grades, already busy schedule, and receipt of executive functioning services from a licensed general education teacher, the SCO, in consultation with CDE Content Specialist, finds an award of all the missed minutes to be overly burdensome. Instead, the SCO orders BOCES to provide Student with the following: (1) 570 minutes of direct instruction from a special education teacher in writing; (2) 570 minutes of direct instruction from a special education teacher in executive functioning, including generalization and application of those skills to her assignments; and (3) 120 minutes of indirect support from a special education teacher to support implementation of Student's accommodations and coordination between Student's providers and the provider of compensatory services.

In addition, because BOCES failed to develop an IEP that was appropriately tailored to Student's individualized needs, the SCO orders BOCES to convene an IEP team to review, and as necessary, revise Student's IEP to address the concerns identified by the SCO. However, because BOCES failed to monitor Student's progress or provide her with any specialized instruction from a special education teacher during the 2022-2023 school year, the SCO finds that BOCES currently lacks the necessary information to develop an appropriate IEP. Thus, the SCO also orders BOCES to conduct an updated evaluation to gather accurate information regarding Student's needs.

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

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

Here, the SCO has concerns that the failure to implement Student's 2021 IEP was systemic in nature and likely to impact the future provision of services to IDEA-eligible students in BOCES. Because he understood Student to be "on consult," Special Education Teacher 2 did not read her IEP, know if she had any goals or accommodations, or provide her with any services. (FF #s 111,

112 and 118.) While a student might have only indirect services in an IEP, it is still necessary to read the IEP to provide those services. The concern for the SCO is that Special Education Teacher 2 may continue to ignore the IEPs of other students he understands are ready to transition off an IEP, resulting in future denials of FAPE. (FF # 111.) Thus, the SCO will order remedies designed to promote future compliance with the requirements of 34 C.F.R. § 300.323. Although it is beyond the scope of this investigation, the SCO cautions BOCES that the practice of putting students on “consult” IEPs based on an understanding that they may no longer be eligible could be inconsistent with IDEA’s requirements regarding evaluations and eligibility determinations and might result in additional findings in a future investigation.

The SCO is also concerned that BOCES’ failure to ensure Student’s special education teacher possessed the required certifications is systemic. Special Education Teacher 3 has accepted a new role outside District, and there is nothing to suggest BOCES routinely hires unlicensed teachers, so this violation is not likely to impact the future provision of services to IDEA-eligible students in the BOCES. (FF # 36.) However, in addition to Student, Special Education Teacher 3 was providing direct, specialized instruction to eight sixth graders at School. (*Id.*) Special Education Teacher 1 provided Special Education Teacher 3 with daily support for those sixth graders, so the exact impact of this violation cannot be determined without additional information. (FF # 37.) Because eight other students received at least some direct instruction from an unlicensed special education teacher, the SCO will order BOCES to comply with a file review to assess the extent to which, if at all, these other students require compensatory services.

Finally, nothing in the Record suggests that the other violations—the failure to develop an IEP within a reasonable timeframe, the failure to develop an appropriate IEP that was individually tailored to Student’s needs, the failure to provide adequate notice of the March 16 IEP team meeting and the failure to provide progress reports—are systemic in nature. Instead, the SCO finds that these violations were likely the result of Special Education Teacher 3’s inexperience and lack of appropriate training and support. Since Special Education Teacher 3 will not be returning to that role, or even District, the SCO finds that these violations are not systemic as they are unlikely to impact the future provision of services to IDEA-eligible students in BOCES.

### **REMEDIES**

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

- a. Failing to timely develop an IEP for Student after determining that she was eligible, in violation of 34 C.F.R. §§ 300.306(c)(2) and 300.323(c)(2);
- b. Failing to develop an IEP that was appropriately tailored to Student’s needs, in violation of 34 C.F.R. §§ 300.320(a)(2), (a)(4);



- c. Failing to provide Parents with adequate notice of the participants at an IEP team meeting and of Parents' ability to invite others to the meeting, in violation of 34 C.F.R. § 300.322(b)(1)(i)-(ii);
- d. Failing to properly implement Student's IEP, in violation of 34 C.F.R. § 300.323;
- e. Failing to ensure staff were appropriately licensed, in violation of 34 C.F.R. § 300.207 and ECEA Rule 3.03 and 3.04; and
- f. Failing to provide Parents with progress reports, in violation of 34 C.F.R. § 300.320(a)(3).

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

**1. Corrective Action Plan**

- a. By **Friday, August 11, 2023**, BOCES shall submit to the CDE a corrective action plan ("CAP") that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom BOCES is responsible. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm BOCES' timely correction of the areas of noncompliance.

**2. Final Decision Review**

- a. Director, Team Lead and any other team leads for BOCES, all school psychologists for BOCES, Principal, Special Education Teacher 2 and Special Education Teacher 3 must review this decision, as well as the requirements of 34 C.F.R. §§ 300.207, 300.306(c)(2), 300.320(a), 300.322, and 300.323 and ECEA Rules 3.03 and 3.04. If these individuals are no longer employed by District or BOCES, BOCES may substitute individuals occupying identical roles to demonstrate compliance with this remedy. This review must occur no later than **Friday, September 1, 2023**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Friday, September 8, 2023**.

**3. Training**

- a. Director, Team Lead and any other team leads for BOCES, all school psychologists for BOCES, Principal, and all special education teachers at School must attend and complete training provided by CDE on IEP development and implementation. If these individuals are no longer employed by District or BOCES, BOCES may substitute individuals occupying identical roles to demonstrate compliance with

this remedy. This training will address, at a minimum, the requirements of 34 C.F.R. §§ 300.320 and 300.323 and the related concerns addressed in this Decision.

- b. Director and CDE Special Education Monitoring and Technical Assistance Consultant will determine the time, date, and format of the training. This training may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.
- c. Such training shall be completed no later than **Thursday, December 21, 2023**. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to CDE no later than **January 12, 2024**.

#### **4. Compensatory Services to Address Systemic IDEA Violations**

- a. By **Thursday, August 31, 2023**, BOCES shall submit a list of all other students (“Students”) who received special education services from Special Education Teacher 3 during the 2022-2023 school year. For each of the listed students, BOCES shall also provide the following:
  - i. Contact information for the parent(s) of each Student, including phone number, mailing address and, if applicable, email address;
  - ii. Any IEPs in effect for the 2022-2023 school year;
  - iii. Any progress reports and/or progress monitoring data from the 2022-2023 school year;
  - iv. All report cards for the 2022-2023 school year;
  - v. Any standardized test scores from the 2022-2023 school year, including but not limited to CMAS, NWEA, DIBELS, and i-Ready.
  - vi. Any PWNs issued during the 2022-2023 school year;
  - vii. Any other records requested by CDE.
- b. After a thorough review of the files to determine how much, if any, compensatory education services the Students require because BOCES failed to ensure their special education teacher was appropriately licensed, by **October 31, 2023**, CDE will issue compensatory education determinations for each Student, notifying BOCES and parent(s).
  - i. By **November 30, 2023**, BOCES shall schedule compensatory services in collaboration with the parent(s) of all Students. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based

format to arrange for compensatory services. These compensatory services shall begin as soon as possible and will be in addition to any services the Students currently receive, or will receive, that are designed to advance Students toward IEP goals and objectives. The parties shall cooperate in determining how compensatory services will be provided. If the parent(s) refuse to meet with BOCES within this time, BOCES will be excused from delivering compensatory services, provided that BOCES diligently attempts to meet with the parent(s) and documents such efforts. A determination that the BOCES diligently attempted to meet with a Student's parent(s), and should thus be excused from providing compensatory services, rests solely with CDE.

- ii. BOCES shall submit the schedule of all Students' compensatory services to CDE no later than **Tuesday, December 5, 2023**. If for any reason, including illness, Students are not available for any scheduled compensatory services, BOCES will be excused from providing the service scheduled for that session. If for any reason BOCES fails to provide a scheduled compensatory session, BOCES will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Student's parent(s) and notify CDE of the change in the appropriate service log.
- c. Monthly consultation between the provider(s) delivering compensatory services and Director must occur to evaluate Students' progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. BOCES must submit documentation that these consultations have occurred **by the second Monday of each month**, once services begin, until compensatory services have been completed. Consultation logs must contain the name of the Student, the name and title of the provider(s), and the date, the duration, and a brief description of the consultation.
- d. To verify that Students have received the services required by this Decision, BOCES must submit records of service logs to CDE by the **second Monday of each month** until all compensatory services have been completed. The name of the Student, the name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log.

## **5. Reevaluation and Review of IEP**

- a. BOCES must provide Parents with consent for a reevaluation of Student by **August 11, 2023**. The reevaluation may include a review of records but must include an

assessment of how Student's diagnosed disabilities are impacting her in the classroom setting.

- i. If Parents refuse to sign consent for evaluation within 30 days of receipt, BOCES will be excused from conducting the reevaluation, provided BOCES diligently attempts to resolve disagreements about the scope of the evaluation and secure signatures and documents such efforts. A determination that BOCES diligently attempted to secure consent for the reevaluation, and should thus be excused from evaluating Student, rests solely with CDE. Regardless, BOCES must still convene Student's IEP team in accordance with 5(b) below.
- b. BOCES must convene Student's IEP Team, at a mutually agreeable date and time, within 30 days of the eligibility determination and no later than **November 9, 2023**. In consideration of the reevaluation and Student's current academic performance, Student's IEP Team must review and, as necessary, revise Student's current IEP, in accordance with 34 C.F.R. § 300.320, to address Student's unique needs and the concerns identified in this Decision.
- c. By **November 30, 2023**, the BOCES must provide copies of the signed consent for reevaluation, evaluation report, notice of the IEP meeting, and finalized IEP to the CDE Special Education Monitoring and Technical Assistance Consultant.

## **6. Compensatory Education Services for Student**

- a. Student shall receive **570 minutes (9.5 hours) of specialized writing instruction**. This instruction must be provided by an appropriately licensed special education teacher. These services must target Student's deficits in writing. All 570 minutes must be completed by **Tuesday, April 30, 2024**.
- b. Student shall receive **570 minutes (9.5 hours) of specialized instruction in executive functioning, to include generalization and application of these skills to assignment completion**. This instruction must be provided by an appropriately licensed special education teacher. These services must target Student's deficits in executive functioning. All 570 minutes must be completed by **Tuesday, April 30, 2024**.
- c. Student shall receive **120 minutes (2 hours) of indirect support from a special education teacher**. This instruction must be provided by an appropriately licensed special education teacher working in Student's school of attendance for the 2023-2024 school year. These services shall be used to address Student's identified deficits and support implementation of Student's accommodations, including reviewing Student's needs with all classroom teachers and coordinating with any

other providers of compensatory services. All 120 minutes must be completed by **Tuesday, April 30, 2024.**

- d. **By Monday, September 18, 2023,** BOCES shall schedule compensatory services in collaboration with Parents. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. BOCES shall submit the schedule of compensatory services, to include the dates, times, and durations of planned sessions, to the CDE no later than **Wednesday, September 20, 2023.** If BOCES and Parent cannot agree to a schedule by September 18, 2023, the CDE will determine the schedule for compensatory services by **September 29, 2023.**
  - i. The parties shall cooperate in determining how the compensatory services will be provided. If Parents refuse to meet with BOCES within this time, BOCES will be excused from delivering compensatory services, provided that BOCES diligently attempts to meet with Parents and documents such efforts. A determination that BOCES diligently attempted to meet with Parents, and should thus be excused from providing compensatory services, rests solely with the CDE.
  - ii. Parents may opt out of some or all of the compensatory services if they wish.
- e. Monthly consultation between the provider(s) delivering compensatory services and Director shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. BOCES must submit documentation that these consultations have occurred **by the second Monday of each month,** once services begin, until compensatory services have been completed. Consultation logs must contain the name and title of the provider and the date, the duration, and a brief description of the consultation.
- f. To verify that Student has received the services required by this Decision, BOCES must submit records of service logs to the CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service must be included in the service log.
- g. These compensatory services will be in addition to any services Student currently receives, or will receive, that are designed to advance her toward IEP goals and objectives. If for any reason, including illness, Student is not available for any

scheduled compensatory services, BOCES will be excused from providing the service scheduled for that session. If for any reason BOCES fails to provide a scheduled compensatory session, BOCES will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parents and notify the CDE of the change in the appropriate service log.

## 7. Other Remedies

- a. Based on the outcomes of the other remedies, CDE may require additional training, technical assistance, or revision of policy, procedure, or practice to address identified areas of concern. CDE may also request additional records to ensure identified concerns have been addressed.
- b. Any additional findings of noncompliance identified through these remedies must be corrected consistent with 34 C.F.R. § 300.600(e).

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

Colorado Department of Education  
Exceptional Student Services Unit  
Attn.: CDE Special Education Monitoring and Technical Assistance Consultant  
1560 Broadway, Suite 1100  
Denver, CO 80202-5149

**NOTE:** Failure by the BOCES to meet any of the timelines set forth above may adversely affect the BOCES annual determination under the IDEA and subject the BOCES to enforcement action by the CDE.

## CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13. If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶13; *See also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 12 day of July, 2023.



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Rachel Dore  
State Complaints Officer

## APPENDIX

### Complaint, pages 1-5

- Exhibit 1: Correspondence
- Exhibit 2: Correspondence
- Exhibit 3: Rubric

### Response, pages 1-11

- Exhibit A: IEPs
- Exhibit B: Evaluations
- Exhibit C: None
- Exhibit D: Meeting Documentation
- Exhibit E: Service Logs
- Exhibit F: Attendance Records
- Exhibit G: Progress Monitoring
- Exhibit H: School Calendar
- Exhibit I: BOCES' Policies
- Exhibit J: Correspondence
- Exhibit K: None
- Exhibit L: Verification of Delivery to Parents

### Reply, pages 1-8

- Exhibit 4: Parent Notes
- Exhibit 5: Correspondence

### Telephone Interviews

- Advocate: June 15 and 21, 2023
- School Psychologist: June 15, 2023
- Parents: June 15 and 19, 2023
- Special Education Teacher 3: June 16, 2023
- Special Education Teacher 2: June 16, 2023
- Counselor: June 20, 2023
- Principal: June 20, 2023
- Director: June 21, 2023

### CDE Exhibits

- CDE Exhibit 1: Teacher Licensing