

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

**State-Level Complaint 2016:505
East Central BOCES
DECISION**

INTRODUCTION

This state-level complaint (Complaint) was filed on March 14, 2016, by the parent of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

Based on the written Complaint, the State Complaints Officer (SCO) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaint process under the IDEA's implementing regulations at 34 CFR §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

COMPLAINT ALLEGATIONS

The Complaint allegations are summarized as follows:

1. Since the beginning of the 2015-16 school year, the BOCES has denied Student a free appropriate public education (FAPE) by failing to properly implement Student's IEP. Specifically, the BOCES has:
 - a. Failed to provide an educational interpreter from February 9, 2016, to present;
 - b. Failed to properly implement the Health Plan from the beginning of the 2015-16 school year to present, i.e., training staff on feeding protocol and performing health scans (ears and temperature) as identified in the IEP;
 - c. Failed to provide access to accommodations and communication plan in the general education classroom and on the bus, i.e., visual schedule and

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

² Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

American Sign Language (ASL), from the beginning of the 2015-16 school year to present; and

- d. Provided modifications, rather than accommodations, inconsistent with the IEP from the beginning of the 2015-16 school year to present.
2. During the 2015-16 school year, the BOCES conducted an occupational therapy assessment without parental consent.

FINDINGS OF FACT

After thorough and careful analysis of the entire record,³ the SCO makes the following FINDINGS:

Background:

1. At all times relevant to the Complaint, Student was [age] years old and resided with her Parents within the boundaries of the BOCES, the administrative unit responsible for compliance with IDEA and ECEA. Student has been determined eligible for special education and related services since preschool.
2. The relationship between Parent and the BOCES has become increasingly adversarial, a dynamic that significantly impacts their ability to collaborate in the development of Student's educational program. Since June of 2014, the Parties have been engaged in one or another of IDEA's formal dispute resolution processes, i.e., mediation, state complaint, and due process complaint.
3. At this time, Parent has appealed a 2015 due process decision to federal district court. As a result of this appeal, Student's educational program is in stay-put and services are being provided in accordance with the IEP dated October 2013.⁴ Although the Parties have met multiple times to discuss changes to the IEP, very few changes have been agreed upon.
4. Pursuant to stay-put, Student's 2013 IEP will govern the specific allegations raised in this Complaint regarding IEP implementation during the 2015-16 school year. The only change agreed upon by the Parties that is relevant to the Complaint allegations concerns the substitution of American Sign Language (ASL) for Conceptually Accurate Signed English (CASE). Consequently, any IEP service or accommodation requiring the use of CASE will be read to require the use of ASL, as agreed upon by the Parties in August of 2015.⁵

³ The appendix, attached and incorporated by reference, details the entire record.

⁴ Response. P. 4; Exhibit 1A, p. 1.

⁵ Exhibit 1A, pp. 4, 14-16, 39-41. During her interview, Parent asserted that the changes she agreed to were different than those captured by Assistant Special Education Director. Parent provided the SCO with hand-written

IEP Implementation during the 2015-16 School Year:

5. Parent alleges that the BOCES has denied Student a FAPE by failing to implement Student's IEP for the 2015-16 school year in various ways. First, Parent alleges that the BOCES has failed to provide Student with access to an interpreter, beginning on or around February 9, 2016. For the reasons explained more fully below, the SCO finds that the BOCES did not have an interpreter available between February 9 and March 4 of 2016, as required by Student's IEP. The SCO further finds that Parent cannot demonstrate educational harm resulting from the failure to provide an interpreter because Parent refused to send Student to School during this time.

6. Student "has a severe to profound hearing loss for her left ear and normal hearing thresholds for her right ear." To communicate with adults and peers, Student is able to use both conceptual signs and spoken language and understands both receptively.⁶ "Student is very eager to learn and picks up on new activities or vocabulary quickly."⁷ Professionals who work with Student in the education setting credibly reported that Student uses spoken language almost exclusively to communicate with adults and peers. During the school day, Student rarely signs spontaneously. Paraprofessional One reported that Student will sometimes respond to the question "what did you say" with a sign and will sometimes use signs for counting/numbers. Consistent with reports from Student's educators, the SCO observed Student actively and effectively communicating through spoken language to peers and adults during classroom instruction and social activities as part of an on-site investigation.⁸

7. Although Student primarily uses spoken language to communicate, her communication plan requires access to an interpreter fluent in American Sign Language (ASL) in all school settings, including transportation on the bus.⁹ According to the IEP, Student's language development and access to the general education curriculum is to be supported by using ASL.¹⁰ In addition, Student "needs someone with her who can acknowledge the signs she demonstrates spontaneously as well as encourage her to use additional signs and words."¹¹ In summary, access to an interpreter is provided to support language development, access to the general education curriculum, and to encourage Student to use sign language.

notes reflecting changes she requested. Parent's notes offer additional detail but are not substantively different than what was recorded by the Assistant Special Education Director. Regardless, there is no dispute regarding the only change relevant to this investigation, i.e., the change from CASE to ASL.

⁶ Exhibit 1A, p. 6.

⁷ Exhibit 1A, p. 8.

⁸ Classroom Observation; Interviews with Special Education Teacher, Paraprofessional One, Paraprofessional Two, Assistant Special Education Director, and Educational Audiologist.

⁹ Exhibit 1A, pp. 4, 14-16, 39-41. Parent and BOCES agreed to change Student's communication mode from Conceptually Accurate Signed English (CASE) to ASL in August of 2015. Consequently, the SCO will substitute ASL for CASE when describing Student's current IEP.

¹⁰ Exhibit 1A, pp. 4, 14-16, 39-41.

¹¹ Exhibit 1A, p. 8.

8. From February 9 through March 4, 2016, the BOCES did not have an interpreter available to serve Student.¹² On the evening of February 8, 2016, the Interpreter who had been working with Student since the beginning of the 2015-16 school year resigned without notice. Further compounding the unexpected vacancy, the Agency who had provided the Interpreter notified the BOCES that it “would no longer be providing interpreting services for this family.”¹³ Because of the immediate resignation and the Agency’s refusal to provide a substitute, the BOCES did not have an interpreter available on February 9, 2016.

9. On February 9, 2016, Parent discovered that the Interpreter was not on the morning bus and consequently informed the BOCES that she would be picking Student up from School. Parent further informed the BOCES that Student would not be coming to School until “the appropriate ASL support is in place.”¹⁴ In response, Superintendent and Assistant Special Education Director assured Parent that they would work as quickly as possible to fill the position. Most importantly, they assured Parent that the Teacher of the Deaf and Hard of Hearing (TDHH) would work with Student and Paraprofessional One to teach basic signs, including safety signs, as well as the new vocabulary Student was learning while they searched for another interpreter.¹⁵ Assistant Special Education Director assured Parent that this support, combined with Student’s ability to hear with assistive technology and communicate verbally, would ensure that Student would continue to “benefit from her current educational program while the search for a new interpreter [was] underway.”¹⁶ Based on the credible evidence regarding Student’s educational needs, the SCO finds that this proposed plan would likely have been sufficient to allow Student to benefit from her educational program.

10. In response to the BOCES’s temporary plan, Parent raised concerns about Student’s safety and continued to refuse to return her to School.¹⁷ Superintendent and Assistant Special Education Director diligently attempted to clarify and directly respond to Parent’s concerns through multiple email exchanges between February 12 and March 1, 2016. Throughout these exchanges, the BOCES and School assured Parent that Student had the paraprofessional support to safely ride the bus and was never alone during the school day. Further, they assured Parent that the staff assisting Student with eating had been trained in how to monitor her during meal and snack times, a training referred to by the Parties as the “feeding protocol.” Finally, they continued to assert that Student would be able to access and benefit from her

¹² Response; Exhibits 8 and 11; Interviews with Special Education Director and Assistant Special Education Director.

¹³ Exhibit 11, p. 1.

¹⁴ Exhibit 11, p. 2.

¹⁵ Exhibit 11, p. 4.

¹⁶ Exhibit 11, p. 4.

¹⁷ Parent’s safety concerns primarily stem from her belief that Student’s interpreter had abused Student by snatching her arm and calling her names. The interpreter resigned immediately as a result of the allegation. Investigations by School Administration and local law enforcement resulted in no findings. Response; Exhibit 11. Parent indicated that the County Sheriff’s Department is still looking into the matter. Interview with Parent.

educational program with the supports in place until a new interpreter could be found.¹⁸ Despite these assurances, Parent refused to send Student to School.

11. On March 4, 2016, the BOCES informed Parent that they had hired a qualified interpreter and services would begin on March 7, 2016. Notably, the BOCES diligently conducted the search for a new interpreter by immediately and thoroughly advertising the position and by reaching out to professional agencies, other school districts, and the Department for assistance. As a result of this effort, the BOCES had hired a new interpreter less than one month from the unexpected vacancy.

12. In response to the notice that a new interpreter had been hired, Parent informed Superintendent and Assistant Special Education Director that she had not received a picture or resume for the newly hired interpreter, as had been previously provided, and would not send Student to School until her safety had been addressed “in detail.” Parent’s email did not include any specific safety concerns.¹⁹ Superintendent responded by informing Parent that they had requested a resume from the new interpreting agency. In addition, Superintendent requested that Parent be more specific regarding her continuing safety concerns.²⁰

13. On March 9, 2016, Superintendent and Assistant Special Education Director offered Parent (and Student) the opportunity to meet the new Interpreter and also assured Parent that two adults would be with Student at all times to address safety concerns. Parent did not agree to meet or detail specific and substantive concerns until March 31, 2016, more than three weeks following after the initial offer.²¹

14. As a result of the meeting on March 31 with Superintendent, Special Education Director, Assistant Special Education Director, and New Interpreter, Parent agreed that Student would return to School under a “safety-plan.” This plan provided that Student would have two adults with her at all times, would continue to receive instruction in the general education classroom, and that Student would be assured of her safety.²² Notably, the items agreed to during the meeting on March 31, 2016, are not substantively different from the assurances offered by Superintendent and Assistant Special Education Director in February and early March of 2016.²³

15. Although a qualified interpreter had been hired and was available on March 7, Parent did not allow Student to return to School until April 4, 2016.²⁴ Had Student returned to School on March 7, the date the BOCES was able to provide an interpreter, Student would have been without an interpreter for a total of 17 school days. During this time, however, Student would

¹⁸ Exhibit 11, pp. 4-20; Interviews with Superintendent and Assistant Special Education Director.

¹⁹ Exhibit 11, p. 21.

²⁰ Exhibit 11, p. 21.

²¹ Exhibit 11, pp. 22-25.

²² Exhibit 11, pp. 40-41.

²³ Compare Exhibit 11, pp. 8, 16, and 19-20 with Exhibit 11, p. 41.

²⁴ The BOCES paid for interpreter services from March 7 to April 1, 2016, even though Student did not attend school during this time. Exhibit 8.

likely have been able to benefit from her educational program through the services and supports detailed in finding 9 above. Notably, the number of school days that Student would not have had access to an interpreter, i.e., 17 school days, is less than the total number of school days that Student had already missed between the beginning of the school year and February 9, 2016, i.e., 23 school days.²⁵

16. Although access to an interpreter is required by the 2013 IEP, the SCO does not agree that the unavailability of an interpreter from February 9 through March 4, 2016 resulted in educational harm. First, the BOCES plan to address Student's educational needs while an interpreter was found was likely sufficient to allow Student to continue to make progress in her educational program. Moreover, Parent cannot reasonably complain about the impact the temporary loss of an interpreter may have had on Student when she refused to send Student to School even after an interpreter was available.

Accommodations Related to Hearing Impairment:

17. Similarly, Parent alleges that Student has not been provided with accommodations related to her hearing impairment. Specifically, Parent alleges that Student has not been provided with a visual schedule and access to ASL in accordance with the IEP.²⁶ During her interview, Parent also alleged that Student's "Nova Chat," an augmentative/alternative communication device, has not been updated since Kindergarten and the touch screen was not sufficiently responsive.²⁷

18. Relevant to Parent's allegation, Student's Communication Plan states that she "learns best with a multi-modal approach" and that "new information is to be presented with visuals, through [ASL] and aurally."²⁸ Further, the Accommodation and Modification Section of Student's IEP specifies that a visual schedule is to be used to communicate about routines and choices. The purpose of the visual schedule is to help Student prepare for changes in her routine and schedule.²⁹ The use of visuals, identified as third level communication for Student, is especially important in noisy environments.³⁰ Finally, Student's IEP requires that she be provided with direction and support in ASL through an interpreter in all education settings, including the time when she is riding the bus.³¹

19. Contrary to Parent's assertion, Student has been provided with a visual schedule in the in the classroom and on the bus, and has access to ASL through an interpreter in accordance with her IEP. Professionals who work with Student in the education setting credibly reported

²⁵ Exhibit 6, pp. 1-3.

²⁶ Complaint.

²⁷ Interview with Parent. Parent brought the device to the interview and demonstrated difficulties in touch and outdated personnel and outdated subjects.

²⁸ Exhibit 1A at page 15.

²⁹ Exhibit 1A at page 33.

³⁰ Exhibit 1A at page 15.

³¹ Exhibit 1A, pp. 33 and 36-37.

that they had access to Student's IEP and were able to demonstrate familiarity with the accommodations identified on the IEP.³²

20. On the bus, Student has been provided with both an interpreter and a visual schedule to help her learn and adjust to changes in bus routine. Paraprofessional One credibly reported that Student initially used the visual schedule provided but quickly learned the new routine. Although the BOCES did not use the visual schedule prepared by Parent, Student was provided with a visual schedule that effectively supported her needs. Paraprofessional One stated that Student has learned her routine so well that she will now respond with "I know, I know," if presented with the visual schedule.³³

21. In addition, Student has had access to ASL on the bus through an interpreter at all times, with the exception of February 9 through March 4, 2016. As discussed above, however, Student did not ride the bus during this time because Parent refused to send Student to School. Moreover, Student was riding the bus without incident and had access to a visual schedule and Paraprofessional who knows basic safety signs. Consequently, the SCO finds no support for the allegation that Student was harmed by the BOCES inability to provide an interpreter on the bus between February 9 and March 4, 2016.

22. In the classroom, Student has access to picture cards, visual task strips, and a visual notebook used to prepare Student for changes in her schedule, remind her of upcoming activities, and assist her in making choices. Student has access to these visuals throughout the school day. Special Education Teacher and Paraprofessional credibly described the use of the visuals in the classroom. In addition, the SCO observed Student's access to and use of visuals in her classroom as part of an on-site investigation. Finally, Student has had access to ASL through an interpreter in the classroom at all times during the 2015-16 school year, with the exception of February 9 through March 16, 2016. As discussed above, Parent cannot demonstrate that the temporary lack of an interpreter resulted in any educational harm because she refused to allow Student to attend School during this time. Based on the credible evidence, the SCO finds that Student has been provided with visuals and access to ASL in the classroom in accordance with her IEP.

23. Finally, Parent alleges that Student's Nova Chat has not been updated since Kindergarten, despite her requests. During the 2015-16 school year, Parent has requested that Student's books and music be placed on the Nova Chat, and that pictures of school staff be updated.³⁴

³² Interviews with Special Education Director, Assistant Special Education Director, Special Education Teacher, Paraprofessional One, and Paraprofessional Two.

³³ Exhibit 9; Interview with Paraprofessional One.

³⁴ Interview with Parent; Exhibit C.

24. Access to an augmentative/alternative communication device (AAC), specifically the Nova Chat 10, is referenced in several sections of Student's IEP.³⁵ First, access to an AAC device is listed in the IEP section describing assistive technology devices and services to support Student's oral and [ASL] modes of communication.³⁶ In addition, the Nova Chat is one of 29 identified accommodations. The accommodation specifically referencing the AAC device requires that all items on Student's visual schedule also be included on the Nova Chat.³⁷ Finally, Student has an IEP goal in the area of speech language that specifically requires the use of an AAC device. This goal requires Student to locate and express 125 words in 13 different categories by appropriately navigating her AAC device.³⁸ There is no requirement on the IEP that books and music be available on the Nova Chat. Consequently, the BOCES did not violate the IEP by failing to accommodate Parent's request that books and music be placed on the device.

25. The SCO agrees that school staff pictures have not been updated since Kindergarten.³⁹ However, the failure to update these pictures has not resulted in any educational harm. Because Student is consistently provided with access to multimodal communication through her visual notebook, ASL interpreter, and spoken language, the failure to update the Nova Chat, one of 29 accommodations, has not demonstrably impeded Student's access to language and communication. For example, Student has a visual schedule that includes photos of current School staff that she has access to in the classroom.

26. In addition, the vocabulary available on her Nova Chat is consistent with Student's annual goal in speech language, even if it hasn't been updated since Kindergarten.⁴⁰ As discussed above, Student's IEP is in stay-put and has not been revised since the goal was developed. Although the Parties have met several times during the 2015-16 school year to review the IEP, they have been unable to reach agreement concerning changes to annual IEP goals. If the 2013 IEP was not in stay-put as a result of pending litigation, the failure to review and revise Student's IEP goal would raise questions. In this case, however, the SCO cannot find that the BOCES has failed to appropriately review and revise Student's IEP to address lack of progress on this goal or that the failure to update the Nova Chat with new vocabulary has resulted in substantive harm when changes to the IEP cannot be made without agreement of the Parties.

27. Similar to Parent's concerns about the accommodations related to Student's hearing needs, Parent also alleges that Student has been inappropriately provided with modifications rather than accommodations, in violation of the IEP. During her interview, Parent stated that Student should be provided with grade-level curriculum without any modification because

³⁵ Student's IEP team selected the Nova Chat 10 as Student's AAC device. Exhibit 1A, p. 8.

³⁶ Exhibit 1A, p. 11.

³⁷ Exhibit 1A, p. 31.

³⁸ Exhibit 1A, p. 21.

³⁹ Interview with Parent, Educational Advocate, and Assistant Special Education Director.

⁴⁰ Follow-up correspondence with Assistant Special Education Director.

Student only needed accommodations to access the curriculum.⁴¹ Contrary to Parent's assertion, the modification section of the 2013 IEP states that Student "needs to have presentations of lessons and materials at her level" and "needs academic curriculum modified to her level."⁴² Special Education Teacher consistently and routinely monitors Student's progress and modifies curriculum appropriately, in accordance with Student's IEP.⁴³ Based on the credible evidence, the SCO finds that Student has been receiving modifications and accommodations in accordance with her IEP for the 2015-16 school year.

28. Determining the education impact of any alleged failure to implement the IEP would be exceedingly difficult in this case because Student has missed a significant amount of school. Between the beginning of school and February 9, 2016, Student had missed approximately 23 school days.⁴⁴ Because Parent refused to send Student to School from February 9 through April 1, 2016, Student missed an additional 31 days of school.⁴⁵ Altogether, Student has missed a total of 54 days of instruction during the 2015-16 school year. Although Student had met or made progress in the majority of her IEP goals and objectives, she made insufficient progress in five out of seventeen goals/objectives. In reporting Student's progress on IEP goals, Special Education Teacher opined that she expected Student's progress would have been greater with consistent attendance.⁴⁶

29. In addition to attendance concerns, Student has demonstrated behavior during the 2015-16 school year that impedes her ability to access the general education curriculum. Between August 28 and October 26, 2015, Student was suspended for a total of four days.⁴⁷ The behavior for which Student was suspended included slapping a peer in the face; throwing rocks at a teacher; biting a paraprofessional; hitting several peers in the face during the course of one day; and kicking and pushing peers. In one incident, Student hit a peer hard enough to leave a red mark on her face.⁴⁸ During the week of April 18, 2016, Student again demonstrated behavior that interfered with instruction and disrupted the classroom learning environment. This behavior included spitting on adults and peers; hitting and kicking peers; throwing rocks at adults; throwing her shoes and socks; and telling her teacher to shut up and calling her stupid.⁴⁹ On April 28, 2016, Student was suspended for two school days for demonstrating aggressive behavior. This behavior involved slipping under a locked bathroom stall to slap a peer in a

⁴¹ Interview with Parent and Educational Advocate.

⁴² Exhibit 1A, p. 34.

⁴³ Interview with Superintendent, Special Education Director, Assistant Special Education Director, and Special Education Teacher. During her interview, Special Education Teacher reviewed work samples and provided examples of appropriately modified curriculum.

⁴⁴ Exhibit 6, pp. 1-3.

⁴⁵ Exhibit 6, pp. 1-3.

⁴⁶ Exhibit 7, pp. 4-11; Interview with Special Education Teacher.

⁴⁷ Exhibit 6, pp. 4-7. Because the half-day of in-school suspension (ISS) imposed on September 3, 2015, was to be provided in a separate classroom and inconsistent with the educational environment identified on her IEP, the SCO would likely consider this ISS a removal for purpose of IDEA's disciplinary provisions.

⁴⁸ Exhibit 6, pp. 4-7.

⁴⁹ Interview with Special Education Teacher.

neighboring stall, spitting on a preschool peer, and using foul language. Once again, Student slapped her peer hard enough to leave a “very red mark” on the student’s cheek.⁵⁰ This behavior disrupts the educational environment for Student and her peers, and impedes Student’s ability to access her educational program.

30. Despite multiple requests, Parent has refused to provide consent for the BOCES to conduct a functional behavioral assessment (FBA), a critical tool for developing appropriate behavioral interventions and supports to address the concerning behavior Student has been demonstrating at school. Moreover, Parent has refused to provide consent for an FBA even after being directed to do so by the SCO in a 2014 state complaint decision, and after being ordered to provide consent for a reevaluation by the ALJ in a 2015 due process decision. In both cases, Parent appealed the decisions and has continued to deny consent. During her interview, Parent explained that she will not provide consent for an FBA because she believes that Student’s behavior is the result of the failure to properly implement her IEP and the failure of educators to provide her with the necessary environmental supports.

Individualized Health Care Plan

31. Finally, Parent alleges that the BOCES has not properly implemented Student’s Individualized Health Care Plan (IHCP). Specifically, Parent alleges that the BOCES and School staff have not been appropriately trained in Student’s feeding protocol and are not performing temperature and ear scans in accordance with the IEP. For the reasons explained more fully below, the SCO finds that the BOCES has appropriately implemented Student’s IHCP.

32. Incorporated in the IEP, Student has an IHCP that addresses how she must be monitored while eating. Student has low tone peristalsis, a condition that makes it more difficult to swallow and digest food. In addition, Student has been known to “put too much food in her mouth.”⁵¹ Together, these conditions place Student at risk of choking and silent aspiration.

33. To help prevent choking and aspiration, Student’s meals and snacks are “monitored with 1-1 supervision by an adult trained to support [Student’s] specific feeding needs.”⁵² Student’s feeding needs are specifically identified in the IHCP as a set of recommendations from Children’s Hospital.⁵³ School staff and Parent commonly refer to these recommendations as the “feeding protocol.”

34. Parent specifically alleges that the school staff who have been feeding Student during the 2015-16 school year have not been properly trained in the feeding protocol. Relevant to this allegation, the 2013 IEP recommends that the School “identify at least 3 adults (such as

⁵⁰ Interview with Parent and documentation from School Principal.

⁵¹ Exhibit 1B, p. 20.

⁵² Exhibit 1B, p. 22.

⁵³ Exhibit 1B, pp. 22-24.

paraprofessional, interpreter, nurse, principal, and/or teacher) to be trained through Children's." ⁵⁴ The IEP further requires that a trained adult sit next to Student during all mealtimes. ⁵⁵

35. The credible evidence does not support Parent's allegation that School staff feeding Student have not been trained in accordance with the IEP. First, the SCO does not agree with Parent's assertion that the IEP requires that all staff be trained by Parent. Certainly, Parent knows Student best and can offer valuable coaching and modeling based on her intimate experience. Recognizing Parent's expertise in this area, the BOCES has repeatedly requested that Parent conduct such trainings, and Parent has done so on multiple occasions.

36. Although Parent is qualified to conduct training in the feeding protocol, the IHCP does not require that all such training be conducted exclusively by her. The initial 2013 IHCP recommended that the training be conducted by Children's Hospital. In 2014, Children's Hospital declined an invitation to train School staff because they had not recently seen Student and suggested that the School ask Parent to conduct the training. Because Children's would not provide further training, the IHCP dated August 2015 and January 2016 both recommended that staff be trained by a qualified individual or Parent, instead of Children's Hospital. ⁵⁶ Consequently, a training provided by a qualified person *or* Parent would satisfy the recommendations in the IEP.

37. As detailed below, the SCO finds that all staff assigned to monitor Student during mealtimes were trained by a both a qualified individual and Parent. On August 17, 2016, before the first day of school, Assistant Special Education Director scheduled training in Student's feeding protocol for relevant staff, including Special Education Teacher, Paraprofessional One, and Paraprofessional Two. ⁵⁷ Assistant Special Education Director had been initially trained by both Children's Hospital and Parent and provided training materials consistent with Student's IEP. ⁵⁸ Consequently, the SCO finds that Assistant Special Education Director was qualified to train staff in the feeding protocol and in accordance with Student's IEP. The SCO further finds that Assistant Special Education Director, Special Education Teacher, Paraprofessional One, and Paraprofessional Two were all trained in accordance with Student's IHCP, and therefore would be qualified to monitor Student at mealtimes during the 2015-16 school year.

38. Notably, the staff assigned to monitor Student at meal times for the 2015-16 school year, i.e., Special Education Teacher, Paraprofessional One, and Paraprofessional Two, have all been trained by Parent. Although Parent did not attend the training on August 17, 2016, she did meet with Assistant Special Education Director, Special Education Teacher, and General

⁵⁴ Exhibit 1A, p. 18.

⁵⁵ Exhibit 1A, p. 18.

⁵⁶ Exhibit 1B, pp. 13 and 23; Exhibit 10, p. 13.

⁵⁷ Exhibit 10, p. 33; Exhibit 1B, p.

⁵⁸ Exhibit 10, pp. 7-8 and 15-22; Exhibit 1B, pp. 10-15, 19-25; Interviews with Assistant Special Education Director, Special Education Teacher, Paraprofessional One and Paraprofessional Two.

Education Teacher to further review the feeding protocol and offer her expertise to School staff.⁵⁹ Moreover, Parent conducted additional training in the feeding protocol for Special Education Teacher, Paraprofessional One and Paraprofessional Two on or around September 8, 2015.⁶⁰ Although Parent did not conduct this training until the week of September 8, 2015, Student was monitored by Paraprofessional Two, an individual who had been trained by Parent in December of 2014 and December of 2015, during this time.⁶¹ Based on the credible evidence described above, the SCO finds that staff assigned to monitor Student at meal times have been trained in accordance with Student's IEP.

39. Parent also alleges that the BOCES has failed to implement Student's IEP by not performing temperature scans in accordance with the IHCP. Specifically, Parent alleges that the BOCES failed to follow the IHCP regarding a fever Student had on December 16, 2015.⁶² The SCO does not agree.

40. Upon review of IHCPs dated 2013, 2015, and 2016, the SCO finds that that routine monitoring of Student's temperature is not required by the IEP.⁶³ Instead, the only reference to temperature monitoring is related to the administration of ibuprofen pursuant to a "student medication form" signed by Student's pediatrician. At the beginning of the 2015-16 school year, Parent submitted a letter from Student's pediatrician that recommended Student be given ibuprofen or acetaminophen for a temperature of 101 degrees. The letter further recommended that Student's temperature be rechecked in one hour following administration of medication and that Student be sent home if her temperature remained 101 degrees or higher.⁶⁴ The letter supporting the student medication form was not incorporated into the IHCP, and therefore, it is not part of the IEP. Moreover, there is no credible evidence that the BOCES has not followed the recommendations for administering ibuprofen.

41. Finally, Parent alleges that the BOCES has failed to check Student's ears as required by the IEP. Upon review of IHCPs dated 2013, 2015, and 2016, the SCO finds that a weekly scan of Student's ears is not required by the IEP.⁶⁵ On or around the beginning of the school year, Parent submitted a copy of Student's IHCP with handwritten notes indicating that Student's "ears are to be checked weekly with report to Parent."⁶⁶ On November 19, 2015, Student's pediatrician wrote a letter suggesting that Student have weekly ear checks by school nurse or audiologist "with documentation sent to mother via email."⁶⁷ The recommendation did not

⁵⁹ Exhibit 10, pp. 23-28; Interviews with Assistant Special Education Director and Special Education Teacher.

⁶⁰ Exhibit 10, p. 33; Interviews with Assistant Special Education Director, Special Education Teacher, Paraprofessional One, and Paraprofessional Two.

⁶¹ Exhibit 10, pp. 15-17, 28-29, and 33; Interview with Assistant Special Education Director and Paraprofessional Two.

⁶² Complaint, p. 15.

⁶³ Exhibit 1A, pp. 17-19; Exhibit 1B, pp. 1-15, and 20-15.

⁶⁴ Exhibit 1B, p. 27.

⁶⁵ Exhibit 1A, pp. 17-19; Exhibit 1B, pp. 1-15, and 20-15.

⁶⁶ Exhibit 1B, p. 6.

⁶⁷ Exhibit C, p. 11.

provide any detail regarding how or why Student's ears needed to be checked. Moreover, Parent has not provided consent for the BOCES to discuss Student's health needs with healthcare providers, including Student's audiologist at Children's Hospital.

Occupational Therapy Assessment:

42. Parent alleges that Student was evaluated in the area of occupational therapy without consent. In its Response, the BOCES admitted that Occupational Therapist "attempted to administer a few of the subtests from the Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI)" on February 3, 2016 without parental consent.⁶⁸ At the time, the Occupational Therapist mistakenly believed that Student was being evaluated in preparation for an upcoming annual review. The Beery VMI subtests attempted by Occupational Therapist involved requesting that Student draw particular shapes, an exercise not unlike those routinely performed in class.⁶⁹ There is no evidence that this evaluation was intrusive or caused Student any educational harm. Consequently, the SCO finds that there was no substantive violation of IDEA.

43. Notably, the BOCES has taken appropriate steps to remedy the procedural violation as to Student, as well as other students in the BOCES. As to Student, the BOCES did not score the few subtests of the Berry VMI that were attempted and immediately assured Parent that the results would not be used. In addition, the Occupational Therapist and the BOCES immediately apologized for the error. As to other students, the BOCES sent a notice to all of its service providers reminding them that they must have a signed copy of written consent from a student's parent *in-hand* before conducting any assessments or other tools used as part of a special education evaluation.⁷⁰ The notice also outlined the process for completing evaluations and highlighted the necessity of having a signed copy of consent before initiating any evaluation. In addition, the BOCES will be providing this guidance again to all service providers during fall in-service before the start of the 2016-17 school year.⁷¹ The SCO finds that the action taken by the BOCES sufficient to remedy this violation as to Student and other students in the BOCES. Consequently, no further corrective action is required.

⁶⁸ Response at page 7; Exhibit 4, pp. 2-3.

⁶⁹ Interview with Special Education Director.

⁷⁰ Exhibit 4, p. 2; Exhibit 12.

⁷¹ Interview with Special Education Director and Assistant Special Education Director.

CONCLUSIONS OF LAW

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

Allegations One: The BOCES has not failed to implement Student's IEP during the 2015-16 school year, as alleged by Parent.

1. Parent alleges that Student was denied a FAPE because the BOCES failed to properly implement Student's IEP during the 2015-16 school year. Specifically, Parent alleges that the BOCES did not provide an interpreter, visual aids and accommodations, or follow Student's IHCP. For the reasons explained below, the SCO concludes that the BOCES appropriately implemented Student's IEP.

2. Under IDEA, local education agencies are required to provide eligible students with disabilities a free appropriate public education (FAPE) by providing special education and related services individually tailored to meet the student's unique needs and provided in conformity with an individualized education program developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19.

3. A public agency, here the BOCES, must implement a student's IEP in its entirety. 34 CFR § 300.323(c). To satisfy this obligation, the BOCES must ensure that each teacher and service provider responsible for implementing a student's IEP is informed of "his or her specific responsibilities related to implementing the child's IEP" and "the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP." 34 CFR § 300.323(d)(2). In this case, the education staff working with Student, i.e., general education teacher, special education teacher, paraprofessional, and related service providers had access to Student's IEP and were familiar with its requirements.

4. In addition to informing teachers of their responsibilities regarding a student's IEP, the BOCES must ensure that the IEP is being implemented. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to implement an IEP can result in a denial of FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19. Not every deviation from an IEP's requirements, however, results in a denial of FAPE. *E.g., L.C. and K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005)(minor deviations from IEP's requirements which did not impact student's ability to benefit from special education program did not amount to a "clear failure" of the IEP); *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. 2007). To incur liability under IDEA, the failure to implement IEP must be material as minor discrepancies between the services provided and the services called for do not give rise to an IDEA violation. *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. 2007). This means that a finding that a school district has failed to implement a requirement of a child's IEP does not end the inquiry. Rather, the SCO must also determine whether the failure was material.

5. In this case, the BOCES did not have an interpreter available between February 9 and March 7, 2016, due to the unexpected resignation of Student's interpreter. Although the BOCES did not provide a required service on Student's IEP for this brief time, the SCO concludes that Parent cannot reasonably complain that Student was denied services when she refused to cooperate in the provision of Student's educational program by not making Student available to receive them.

6. Courts have refused to award compensatory relief when parents refuse to cooperate or act unreasonably in the development of their child's educational program. *Rockwall Indep. Sch. Dist. v. M.C. ex. rel. M.C.*, 116 LRP 9727 (5th Cir. 2016)(Court denied tuition reimbursement based on Parents' refusal to cooperate in the development of their child's educational program.) In reaching the conclusion that Parent refused to cooperate in the provision of Student's educational program, the SCO relies on several key findings. First, the BOCES diligently worked to immediately fill the unexpected vacancy and, most importantly, had developed a temporary plan that likely would have allowed Student to make progress in her educational program until an interpreter could be hired. Second, the BOCES addressed Parent's safety concerns with a detailed plan in early March that included assurances that Student would never be alone. When the BOCES notified Parent that an interpreter had been hired and would begin March 7, 2016, Parent again refused to send Student based on safety concerns. Between March 7 and March 30, 2016, Parent refused to clarify her concerns or respond to the BOCES in any substantive way. When the Parties met on March 31, the "safety plan" agreed to was not substantively different than the plan proposed in early March. Considering all of these facts, the SCO concludes that Parent's refusal to send Student to School--even after an interpreter had been hired-- was not reasonable and precludes Parent from seeking relief for the lack of interpreter services.

7. Similarly, and perhaps most importantly, the SCO notes that Parent's refusal to consent to an FBA in light of significant behavioral incidents further complicates any claim she may make that Student has not received FAPE. Federal courts have consistently and unequivocally held that when the parents of a child with a disability refuse to allow a school district to conduct comprehensive evaluations by evaluators of its choosing, the parents lose any right to demand special education services or to complain about a denial of FAPE. *See M.T.V. v. DeKalb County School District*, 446 F.3d 1153 (11th Cir. 2006)(where parents refuse to allow school district to conduct evaluations by evaluators of its choosing, parents/student lose entitlement to special education services); *Shelby S. v. Conroe Indep. Sch. Dist.*, 454 F.3d 450 (5th Cir. 2006)(student who desires special education services under IDEA must consent to evaluations); *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176, 178-79 (5th Cir. 1995)("if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation"); *Johnson by Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir. 1996); *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1315 (9th Cir. 1987); *M.S. v. Mullica Township Bd. Of Educ.*, 485 F. Supp. 2d 555 (D.N.J. 2007).

8. Here, Student has demonstrated physical and verbal aggression towards peers and educators, resulting in multiple suspensions from School during the 2015-16 school year. In several instances, Student has left red marks on the peers she has hit. This behavior disrupts the classroom environment and interferes with Student's ability to access her educational program.

9. To appropriately address Student's behavior, the BOCES has requested consent to conduct a reevaluation, including an FBA. In addition, an FBA was ordered as a remedy in a 2014 state complaint decision. Upon appeal of that decision, a reevaluation was ordered in the 2015 due process decision. Despite these requests and orders, Parent has refused to consent to an FBA or reevaluation.

10. By refusing to provide consent for an FBA, Parent has constructively waived her right to complain that the BOCES has failed to provide appropriate support or is otherwise denying Student a FAPE in light of the significant behavioral challenges Student is currently exhibiting at School. This means that even if this investigation had found that the BOCES had failed to properly implement Student's IEP, Parent would not have been able to complain that Student had been denied FAPE when she refused to cooperate with the BOCES in evaluating Student and in developing Student's educational program.

11. Although Parent has constructively waived her right to complain that Student has been denied FAPE, the SCO addresses the remaining allegations concerning implementation of Student's IEP. In addition to the failure to provide an interpreter, Parent alleges that Student has not received other accommodations related to hearing, including a visual schedule, visual notebook, and Nova Chat.

12. Parent's primary concern with the visual schedule involved its use on the bus. Parent wanted the BOCES to use a visual schedule that she had prepared specifically for the bus. The BOCES, however, prepared and used its own visual schedule. The law is clear that as long as the educational methodology selected allows the student to receive educational benefit, educational agencies have the professional discretion to select the methodology suitable to the student's needs. *O'Toole v. Olathe District School District No. 233*, 144 F.3d 692 (10th Cir. 1998). The methodology selected by the school district does not have to be the best, or even better than that preferred by the parents, so long as it is appropriate to implement the IEP. *M.M. v. School Bd. of Miami-Dade Cty*, 437 F.3d 1085 (11th Cir. 2006). In this case, the methodology, i.e., visual schedule, used by the BOCES was sufficient to teach Student the bus routine. Consequently, the BOCES did not violate IDEA by refusing to use the schedule prepared by Parent.

13. During her interview, Parent also alleged that Student's Nova Chat has not been updated since Kindergarten. The SCO agrees that the school pictures on Student's Nova Chat are not current. This failure is not material, however, because Student has access to picture of current staff on her visual schedule. In addition, the BOCES was not required to put books and

music on the Nova Chat, as requested by Parent, because Student's current IEP does not require this. Most importantly, the Nova Chat contains the vocabulary required for Student to work on the one IEP goal that requires access to the Nova Chat. As noted, Student's IEP has not been updated since Kindergarten because the Parties are in stay-put as the result of pending litigation.

14. Next, Parent alleges that Student was provided with modifications, instead of accommodations, in violation of her IEP. According to Parent, Student's IEP does not allow for modification of the general education curriculum. Contrary to Parent's assertion, Student's IEP specifically provides that curriculum will be modified to Student's level. In accordance with the IEP, Special Education Teacher monitors Student's progress and modifies assignments accordingly. Consequently, the SCO concludes that the BOCES has not violated Student's IEP by modifying curriculum, as alleged.

15. The remaining allegations concern the implementation of Student's IHCP, as incorporated into her IEP. Specifically, Parent alleges that the BOCES has not followed the requirements of Student's IHCP related to the feeding protocol, and temperature and ear checks. According to Parent, the IHCP requires that all staff monitoring Student during mealtimes must be trained by her or Children's Hospital. The SCO does not agree. Instead, the IHCP requires that staff be trained by a qualified individual or Parent. Because Assistant Special Education Director has received training from Children's Hospital and Parent and prepared a training based on the recommendations identified in Student's IEP, the SCO found that she was qualified to train staff. Moreover, the SCO found that all staff assigned to monitor Student for the 2015-16 school year had also been trained by Parent. Consequently, the BOCES has provided training in the feeding protocol consistent with the IEP.

16. Parent also alleges that the IHCP required routine temperature scans and weekly ear checks pursuant to Student's IHCP. The requirement for monitoring Student's temperature is related to a student medication form authorizing the administration of ibuprofen for a temperature of 101 degrees or higher. This authorization is not part of Student's IHCP or IEP. Similarly, the recommendation that Student's ears be checked weekly by a school nurse or audiologist is related to a letter from Student's pediatrician. The letter does not describe how or why Student's ears should be checked and is not part of Student's IHCP or IEP. Consequently, the BOCES has not failed to implement Student's IEP by not providing routine temperature or ear checks, as alleged by Parent.

Allegation Two: Although the BOCES attempted to evaluate Student without parental consent, the violation did not result in educational harm and has been sufficiently remedied.

17. A public agency, here the BOCES, must obtain parental consent "prior to conducting any reevaluation of a child with a disability." 34 CFR § 300.300 (c). In this case, the BOCES admitted that it failed to obtain parental consent prior to attempting an evaluation of Student in the area of occupational therapy. The occupational therapist mistakenly believed that he needed to

evaluate Student and attempted to do so. Only a few subtests were completed and the BOCES immediately apologized for the mistake. Moreover, the BOCES immediately assured Parent that it would not score or use the results from the assessment. There is no evidence that Student was harmed by this mistake. Following this incident, the BOCES reminded relevant staff and related services providers that they must have a signed parental consent in-hand before they initiate any evaluations. Finally, the BOCES will include this reminder during the fall in-service at the start of the 2016-17 school year. Consequently, this violation has been remedied.

CONCLUSION

The BOCES has remedied the one violation founded through this investigation regarding parental consent for evaluation. Consequently, no further remedies are ordered.

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

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

Dated this 12th day of May, 2016.

Candace Hawkins, Esq.
State Complaints Officer

Appendix

Complaint, pages 1-31.

Exhibit A: Email correspondence and attachments.

Exhibit B: Documentation requested by SCO during interview related to agreed changes to IEP in August 2015.

Exhibit C: Documentation requested by SCO during interview related to IHCP.

Parent submitted additional documentation not requested and deemed not relevant to the specific allegations accepted for investigation. This documentation was not admitted as an Exhibit.

Response, pages 1-9.

Exhibit 1: IEP in effect for the 2015-16 school year, including amendments.

Exhibit 2: No documents responsive to SCO's initial request.

Exhibit 3: Notices of meeting and related correspondence.

Exhibit 4: Documentation relevant to allegation regarding occupational evaluation without parental consent.

Exhibit 5: Student schedule.

Exhibit 6: Attendance records.

Exhibit 7: Grades and IEP progress reports for the 2015-16 school year.

Exhibit 8: Invoices for ASL interpreter, as requested by SCO.

Exhibit 9: Documentation regarding provision of accommodations and modifications.

Exhibit 10: Documentation regarding Individualized Health Care Plan and requisite training.

Exhibit 11: Email correspondence.

Exhibit 12: Documentation provided by BOCES during interviews related to parental consent for evaluation.

Parent did not submit a written Reply.

Prior Administrative Decisions involving the Parties

- 2014 State Complaint Decision
- 2015 State Complaint Decision
- 2015 Due Process Decision

In-person interviews with:

- Parent
- Educational Advocate
- Superintendent
- Special Education Director

- Assistant Special Education Director
- Special Education Teacher
- Educational Audiologist
- Paraprofessional 1
- Paraprofessional 2

This investigation also included in-class observation of Student.