

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

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**State-Level Complaint 2010: 515**  
**San Juan BOCES (Durango)**

**DECISION**

**INTRODUCTION**

This pro-se, state-level complaint (Complaint), dated 11/09/2010, was properly filed on 11/17/2010.

The Complainants are the mother and father of a child who is not currently identified as a child with a disability. In order to comply with the federal privacy laws (i.e., Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA))<sup>1</sup> and to protect the anonymity of the Complainants and their child, hereafter, the persons and locations identified in conjunction with the Complaint investigation and Decision will be abbreviated as follows and redacted prior to publication:

[Parents], Complainants [Parents];  
[Parent], Mother [Parent];  
[Student], Child of [Parents], [Student];  
[Student's] age of [Age] [Age];  
[School], [School];  
San Juan BOCES (Durango) [BOCES];  
[District] [District];  
[Superintendent], District Superintendent [Superintendent];  
[Special Education Director], BOCES Executive Director [Special Education Director];  
[Principal], [School] Principal [Principal];  
[OT], Occupational Therapist [OT];  
[School Psychologist], School Psychologist [School Psychologist];  
[SLP], Speech Language Pathologist [SLP];  
[Social Worker], [School] Social Worker [Social Worker];  
[General Education Teacher], Teacher [General Education Teacher];  
[Special Education Teacher], Special Education Teacher [Special Education Teacher];  
[IEE Evaluator], Independent Education Evaluation Evaluator [IEE Evaluator];  
[Private Evaluator], Private Evaluator [Private Evaluator];  
[Vision Center] [Vision Center];  
[Private School] [Private School]; and

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<sup>1</sup> FERPA, codified at 20 U.S.C. § 1232g, was enacted in 1974, to protect a parent's access to education records and to protect the privacy rights of students and their parents. The IDEA regulations are found at 34 CFR § 300.1, *et seq.*

[BOCES' Legal Counsel], [District] and BOCES' Legal Counsel [BOCES' Legal Counsel].

The Complaint consisted of 13 pages and Exhibits "A" through "J."

The State Complaints Officer (SCO)<sup>2</sup> determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaints process under the federal Individuals with Disabilities Education Act (IDEA) and its implementing regulations at 34 CFR §§ 300.151 through 300.153.<sup>3</sup> The SCO has jurisdiction to resolve the Complaint pursuant to those regulations.

The overriding issues and, therefore, the scope of the investigation identified by the SCO, between April 2010 and August 2010, are:

Whether the BOCES' committed procedural violations of the IDEA or Colorado's Exceptional Children's Educational Act<sup>4</sup> in conjunction with 1) the 2010 special education eligibility evaluation (2010 Evaluation) or 2) the 2010 independent educational evaluation (IEE) and, if so, whether the procedural violations denied [Student] a free appropriate public education (FAPE).

The BOCES' [Special Education Director] was notified of [Parents'] allegations in a letter dated 11/19/2010. The letter included a complete copy of the Complaint and all supporting documentation. In conjunction with the Response, the BOCES was specifically directed to supply the SCO with:

- A. A written response specifically admitting or denying each complaint allegation; and
- B. All documentation supporting the BOCES' Response, including, but not limited to:
  1. The BOCES' written policies, procedures and criteria used in determining whether a child has a specific learning disability;
  2. The name, contact information, occupation and licenses of each Eligibility Team member attending the 05/06/2010 eligibility meeting;
  3. Complete copies of all documentation and information (i.e., all evaluations; progress reports; grade reports; parent information; data; observations; testing results; etc.) considered by the team in making Student's 05/06/2010 eligibility determination;
  4. The identity of any person who took notes during the 05/06/2010 eligibility meeting and complete copies of all meeting notes;
  5. If the meeting was recorded, a complete copy of the audio recording of the meeting;

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<sup>2</sup> The Complaint investigation was conducted jointly by SCOs Jeanine Pow and Candace Hawkins.

<sup>3</sup> Final Regulations implementing the IDEA at 34 CFR Part 300.

<sup>4</sup> Hereafter, the IDEA, 20 U.S.C. § 1400, *et seq.* and its implementing regulations at 34 CFR Part 300 will be referred to by regulation number (i.e., § 300.000 or Section 300.000) and Colorado's Exceptional Children's Educational Act (ECEA), 1 CCR 301-8, 2220-R-1.00, *et seq.*, will be referred to by rule number (e.g., Rule 1.00(0)).

6. The BOCES' written policies and procedures concerning IEEs, including the BOCES' criteria, credentials and required licensure of any IEE evaluator;
7. The complete contact information and vita for [IEE Evaluator];
8. A written explanation concerning how [IEE Evaluator] was selected; and
9. The complete name, title and contact information for each BOCES and District staff member having knowledge of the facts underlying the Complaint allegations.

On 12/07/2010, the BOCES' 15 page Response and Exhibit #s "1" through "3" and "5" through "9" were timely received.

On 12/07/2010, the SCO mailed [Parents] a complete copy of the Response and exhibits by overnight mail.

On 12/08/2010, the SCO emailed the BOCES' Legal Counsel requesting a specific response and documentation, if any, to request #4, above. On 12/13/10 the SCO received a clarified response from [BOCES' Legal Counsel] and supporting documentation which was marked as Exhibit "4." On 12/13/2010, the SCO mailed [Parents] a copy of the BOCES' clarified response and Exhibit 4 by overnight mail.

On 12/16/2010, the SCO requested and received from [BOCES's Legal Counsel] a copy of the Consent to Evaluate signed by [Parent] on 4/7/2010. This document was marked Exhibit "10." On 12/16/2010, the SCO mailed [Parents] a copy of Exhibit 10 by overnight express mail.

On 12/17/2010, [Parents'] 14 page Reply and Exhibits "K" through "S" were timely received.

On 1/3/2010, the SCO requested [General Education Teacher's] Response to Intervention (RtI) progress notes. The requested information was received on 1/4/2010, marked Exhibit "11" and mailed to [Parents] by certified mail.

Between 12/17/2010 and 01/03/2011, the SCOs conducted telephone interviews with BOCES' and District staff.

On 12/23/2010, the SCOs interviewed [Parent] by telephone.

On 01/04/2011, the SCOs interviewed [IEE Evaluator] by telephone.

On 01/04/2011, the SCO closed the Record.

### **[PARENTS'] COMPLAINT ALLEGATIONS**

[Parents'] Complaint contains two allegations<sup>5</sup> that are summarized below:

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<sup>5</sup> The remainder of [Parents'] Complaint allegations were not accepted since they were either beyond the SCO's jurisdictional one-year statute of limitations or because the allegation did not articulate a violation of the IDEA.

**Allegation #1.** The BOCES' eligibility evaluation conducted between 04/07/2010 and 05/06/2010 (2010 Eligibility Evaluation) was improperly conducted in violation of the IDEA. Specifically:

- a. The evaluation failed to assess [Student] in all areas of suspected disabilities;
- b. The evaluation contained insufficient assessments and data to make a proper eligibility determination;
- c. In making its determination, the Eligibility Team failed to consider the private evaluation obtained by Parents on 01/19/2008; and
- d. In making its determination, the Eligibility Team failed to consider information provided by [Parents], classroom based assessments and observations.

**Allegation #2.** The 2010 IEE was not properly conducted in violation of the IDEA. Specifically:

- a. [IEE Evaluator] merely reviewed the existing data and did not conduct additional assessments; and
- b. [IEE Evaluator] was not independent since he conferred with [School Psychologist].

**Proposed Remedies.** [Parents] sought numerous remedies, including, but not limited to: The BOCES be ordered to pay for a second IEE using an evaluator of [Parents'] choice; an assistive technology (AT) evaluation be conducted; the Eligibility Team be reconvened to review the second IEE and data in order to determine [Student's] eligibility for special education and AT services; and, if [Student] was determined to be eligible, the BOCES be ordered to: reimburse [Parents] for tuition paid to [Private School] and supply [Student] with two years of compensatory education.

### **THE BOCES' RESPONSE**

The BOCES' Response denied each of the Complaint allegations. The Response is summarized as follows:

**Allegation #1.** The BOCES' complied with the IDEA in evaluating [Student's] eligibility for special education.

**Allegation #2.** The August 2010 IEE was properly conducted in accordance with the IDEA.

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

[Parents] filed a 14 page Reply and additional documentation, Exhibits "K" through "S" to the BOCES' Response. The Reply is summarized below:

**Allegation #1.** Reiterated the allegation that the 2010 Eligibility Evaluation was improperly conducted. Specifically, [Parents]:

- a. Reiterated claims that the evaluation failed to assess [Student] in all areas of suspected disabilities. Additionally, [Parents] claimed for the first time that the evaluation should have included assessments for attention deficit disorder (ADD) and dyspraxia. [Parents] also reiterated allegations that the SCO had previously notified [Parents] as being beyond the SCO's jurisdiction.
- b. Reiterated claims that the evaluation contained insufficient assessments and data to make a proper eligibility determination. Additionally, [Parents] raised for the first time the claim that the assessments were not sufficient to assess whether [Student] qualified for special education services as a student with physical impairments, such as ADD.
- c. Reiterated the claim that the Eligibility Team failed to consider the 2008 private evaluation.
- d. Reiterated the claim that the Eligibility Team failed to consider information provided by parents, classroom based assessments and observations.

**Allegation #2.** Reiterated the allegation that the 2010 IEE was improperly conducted. Specifically, [Parents]:

- a. Reiterated the claim that [IEE Evaluator] should have conducted additional assessments.
- b. Reiterated the claim that [IEE Evaluator] was not independent because he conferred with [School Psychologist] in conjunction with his IEE.
- c. Raised for the first time the claim that [Parents] selected [IEE Evaluator] from the list of three IEE evaluators supplied by the BOCES because [IEE Evaluator] was the only one of the three evaluators available at the time<sup>6</sup>

### **FINDINGS OF FACT**

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

#### **Factual Background.**

1. During the time period relevant to the Complaint, [Student] was enrolled in and attended [School] in the [District] which is a member of the BOCES.
2. Between January 2004 and March 2006, [Student] was identified with a speech-language impairment and received speech therapy services through an IEP while attending [School]. On 03/14/2006, the IEP Team determined that [Student] no longer qualified as a child with a

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<sup>6</sup> The SCO elected to investigate all of [Parent's] new claims although not raised in the original Complaint even though the BOCES did not have the opportunity to address these claims in its Response.

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

disability and, as a consequence, [Student] was exited from special education. Between March 2006 and February 2009, [Student] received general education services at [School].<sup>8</sup>

3. **Private Evaluation.**<sup>9</sup> On 12/21/2008, [Parents] arranged to have [Private Evaluator] conduct a private evaluation consisting of educational testing of [Student]. In conjunction with her evaluation, [Private Evaluator] conducted a file review of [Student's] extensive previous testing and screening information performed between January, 2004 and November, 2008. Additionally, [Private Evaluator] administered the following tests: Weschsler Intelligence Scale for Children (WISC-IV), Woodcock-Johnson III – Tests of Achievement (W-J III), Woodcock-Johnson II – Tests of Cognitive Abilities (W-J III Cog.), and Jordan Left-Right Reversal Test. [Private Evaluator] did not conduct any classroom observations of [Student].

4. In her report, [Private Evaluator] observed “Test results together with background information indicate that [Student] has significant educational deficits that will be considered by the Multi-Disciplinary Team (MDT) when determining possible eligibility for 504 accommodations or special education services.”<sup>10</sup> The SCO notes that [Private Evaluator] did not determine that [Student] was a child with a disability. Furthermore, [Private Evaluator's] evaluation did not utilize the BOCES' criteria for the identification of a specific learning disability (SLD) using mandatory state and federal Response to Intervention (RtI) regulations that went into effect on 08/15/2009.<sup>11</sup>

5. In February 2009, [Parents] disenrolled [Student] from [School] and enrolled [Student] at [Private School] which focuses on twice exceptional students.<sup>12</sup> While attending [Private School], [Student] received “intensive remediation to address [Student's] learning disability in written language expression, reading and math.”<sup>13</sup>

6. In November 2009, [Parents] reenrolled [Student] at [School] because [Student] had graduated from [Private School's] one-on-one tutoring program and [Private School] did not have a program that focused on writing.<sup>14</sup>

7. **RtI Plan.**<sup>15</sup> On 12/04/2009, a Tier 2 Response to Intervention (RtI) Plan was implemented due to [Student] demonstrating “visual-spacial difficulties that impact [Student's] penmanship and math.” [General Education Teacher] was responsible for implementing the RtI Plan.

8. Instructional accommodations consisted of “graph paper for math, extended time for writing, and the opportunity for inclusion in enrichment activities.” [General Education Teacher] had the discretion to provide accommodations as needed.<sup>16</sup> The interventions consisted of “math

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<sup>8</sup> Interview with [Parent] and Exhibit 3, pg. 3.

<sup>9</sup> Exhibit A, pgs. 1-13.

<sup>10</sup> Id., pg. 12.

<sup>11</sup> Exhibit #1, pg. 16.

<sup>12</sup> Interview with [Parent].

<sup>13</sup> Complaint, pg. 5.

<sup>14</sup> Id., pg. 4 and Interview with [Parent].

<sup>15</sup> Exhibit D.

<sup>16</sup> Interview with Special Education Director.

manipulates, extra support and as-needed time for writing.”<sup>17</sup> Typically, the use of interventions is not discretionary and the decision not to implement an intervention would require a change in the RtI Plan. However, when, as here, math manipulates did not comport with the level of math being taught, it was appropriate for [General Education Teacher] to not use this intervention.<sup>18</sup>

9. The RtI Plan had one goal: “[Student] will demonstrate improvement of writing [by] achievement of [a] score of 4.5 on all components of the 6 trait rubric.”<sup>19</sup> The rubric addressed three specific areas to be measured: i) ideas and content; ii) word choice; and iii) grammar, punctuation and spelling.<sup>20</sup> By 02/26/2010, [General Education Teacher’s] intervention progress monitoring notes demonstrate that [Student] had attained a score of 4.5 as to the first two specific areas and had maintained a score of 3.5 in the area of grammar, punctuation and spelling.<sup>21</sup> [General Education Teacher] communicated her progress monitoring information to [School Psychologist] who then communicated the information to [Parent].<sup>22</sup> In April 2010, [General Education Teacher] determined that [Student] had met the RtI goal and the plan was discontinued.<sup>23</sup> Given the credible information in the Record,<sup>24</sup> the SCO finds that the RtI Plan was implemented with fidelity.

### **The 2010 Eligibility Evaluation.**

10. On 4/06/2010, due to concerns expressed by [Parents] regarding [Student’s] progress on the RtI plan, the BOCES proposed to conduct an evaluation for special education eligibility.<sup>25</sup> The Prior Notice and Consent for Evaluation form notified [Parents] that the BOCES intended to evaluate [Student] for “learning, occupational therapy and [speech language pathology].” [Parent] consented to the evaluation on 04/07/2010.<sup>26</sup>

11. Between 04/07/2010 and 05/07/2010, the following assessments and reviews were conducted in conjunction with the 2010 Eligibility Evaluation:

- [SLP] administered the Clinical Evaluation of Language Fundamentals IV (CELF IV);
- [SLP] administered an informal speech/language sample (S/L Sample);
- [Special Education Teacher] administered the Woodcock Johnson Test of Achievement III (W-J III);<sup>27</sup>

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<sup>17</sup> Exhibit D.

<sup>18</sup> Interview with Special Education Director.

<sup>19</sup> Exhibit D.

<sup>20</sup> Exhibit #11.

<sup>21</sup> Id.

<sup>22</sup> Interviews with [General Education Teacher], [School Psychologist] and [Parent].

<sup>23</sup> Interviews with [Parent], [School Psychologist] and [General Education Teacher].

<sup>24</sup> Exhibits D and #11 and Interviews with [General Education Teacher] and [Special Education Director].

<sup>25</sup> Exhibit 10.

<sup>26</sup> Id.

<sup>27</sup> Some subparts of the W-J III had not been completed by [Special Education Teacher] when the Eligibility Team convened on 05/06/2010. The SCO specifically finds that, because the W-J III is used for determining IEP instruction rather than for determining whether a student qualifies for special education, although the entire W-J III was not completed until 05/07/2010, this did not impact the Team’s 05/06/2010 eligibility determination. Interview with [Special Education Teacher].

- [General Education Teacher] administered the Northwest Education Association Measure of Academic Progress (NWEA MAP) for reading and math;
- [Special Education Teacher] reviewed [Student's] 2008 Colorado Student Assessment Program (CSAP) results;<sup>28</sup>
- [School Psychologist] administered the Wechsler Intelligence Scale for Children (WISC IV);
- [School Psychologist] arranged for [Parent] to complete the Behavior Assessment System for Children (BASC);
- [School Psychologist] conducted a review of [Student's] file;
- [OT] conducted a Test of Visual-Perceptual Skills Non-Motor (TVPS Revised);
- [OT] conducted informal observations of [Student] performing motor tasks (Motor Task Observations);
- [OT] conferred with [General Education Teacher];
- [OT] conducted a review of [Student's] file;
- [Social Worker] conducted a review of [Student's] file;
- [Social Worker] conducted a developmental history assessment and interview of [Parent]; and
- [Social Worker] observed [Student] in classroom.

12. The SCO is not persuaded that the BOCES' had any credible information that would suggest the need to evaluate [Student] for dyspraxia, ADD or any other health impairments. [Parent] claims that [Private Evaluator's] report, coupled with [Student's] history of articulation difficulties were consistent with a diagnosis of dyspraxia.<sup>29</sup> Additionally, [Parent] alleged that "[I]t is irrefutable that [Student] has been diagnosed with a central processing disorder along with dysgraphia . . . [and] [School Psychologist], [Private Evaluator] and [Student's] teachers have all raised the possibility that [Student] suffers from ADD."<sup>30</sup> The SCO notes that in 04/12/2010 email exchanges, [School Psychologist] commented that the BOCES' file "seems to lack any cognitive data or medical diagnostics (I am particularly interested in any dyspraxia information)." [Parent] replied "I do not have a medical diagnosis of dyspraxia." [School Psychologist] replied noting "[Student] apparently reports having Dyspraxia – you may want to address [sic] this with [Student]."<sup>31</sup>

13. The SCO specifically finds that:

- At no time during the evaluation process did [Parents] request that the BOCES evaluate [Student] for ADD or dyspraxia;<sup>32</sup>

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<sup>28</sup> The 2009 CSAP results were not available because [Student] was enrolled at [Private School] when [School] administered the 2009 CSAP. The 2010 CSAP results were not yet available at the time of the 05/06/2010 Eligibility Meeting.

<sup>29</sup> Complaint, pg. 3.

<sup>30</sup> Reply, pg. 2.

<sup>31</sup> Exhibit G, pg. 1.

<sup>32</sup> Interviews with [Parent], [School Psychologist], [OT], [Social Worker] and [Special Education Teacher].

- Given [Parent's] training as a school psychologist,<sup>33</sup> when [Parent] executed the Prior Notice and Consent for Evaluation form on 04/07/2010, she knew or should have known that [Student] was not being evaluated for ADD or dyspraxia;
- Although [Student] was not specifically evaluated for dyspraxia, the individualized motor task observations did not suggest the need for specific dyspraxia testing.<sup>34</sup>
- During the developmental history assessment, [Parent] did mention to [Social Worker] a concern about [Student] having dysgraphia, a written expression disorder;<sup>35</sup>
- One appropriate method of assessing dysgraphia is to use individualized motor task observations, as was administered to [Student];<sup>36</sup>
- The individualized motor task observations did not indicate the need for further assessments in the areas of written language (i.e., dysgraphia);<sup>37</sup>
- Although [Student] was not specifically evaluated for ADD, the BASC results (e.g., hyperactivity, conduct problems, attention problems, etc.) were "not significant" and therefore did not suggest the need for further ADD assessment;<sup>38</sup> and
- As a result of the assessments administered, the BOCES had no credible information suggesting the need to evaluate [Student] for dyspraxia, ADD or other physical disabilities.<sup>39</sup>

14. The 05/06/2010 eligibility meeting was composed of the following Eligibility Team members: [Parents], [OT], [Principal], [School Psychologist], [General Education Teacher], [SLP], [Social Worker], and [Special Education Teacher]. [School Psychologist] chaired the meeting.

15. During the meeting, the Eligibility Team, including [Parent], discussed and considered:<sup>40</sup>

- [Student's] developmental history;
- The Confidential Student History questionnaire;
- [Student's] vision and hearing screening;
- [Student's] speech/language testing (i.e., CELF IV assessment);
- [Student's] academic testing (i.e., NWEA MAP assessments, 2008 CSAP results, W-J III testing (complete results still pending), grades and academic progress);
- [Student's] motor skills (i.e., TVPS Revised);
- [Student's] cognitive testing (i.e., WISC-IV);
- [Student's] social/emotional/behavioral functioning (i.e., BASC);

<sup>33</sup> Reply, pg. 4.

<sup>34</sup> Exhibit B, pg. 4 and Interviews with [OT] and [IEE Evaluator].

<sup>35</sup> Exhibit 9, pg. 32 and [Social Worker] Interview.

<sup>36</sup> Interview with [OT].

<sup>37</sup> Exhibit B, pg. 4 and Interviews with [OT] and [General Education Teacher].

<sup>38</sup> Exhibit 3, pgs. 32-41 and Interviews with [School Psychologist] and [Social Worker].

<sup>39</sup> Id.

<sup>40</sup> Exhibit B and Interviews with [Parent]; [OT]; [SLP]; [Special Education Teacher]; [General Education Teacher]; [School Psychologist] and [Social Worker].

- [Student's] RtI Plan;
- The observations of [Student] by [General Education Teacher], [Special Education Teacher] and [OT];
- [School Psychologist's] summary of his file review; and
- [Parent's] concerns and input.

16. [School Psychologist's] 'file review' during the meeting included a summary of information previously supplied by [Parents], [Private Evaluator's] 01/19/2009 evaluation; the 2006 Audiological/Central Auditory Processing Evaluation, and the 2006 Vision Center report.<sup>41</sup>

17. [Parents] fully participated in the eligibility meeting.

18. At the conclusion of the meeting, the Eligibility Team determined:

- [Student] did not have a specific learning disability; and
- [Student] did not qualify for an IEP.<sup>42</sup>

19. Given the credible information in the Record, the SCO finds:

- The evaluation assessed [Student] in all areas of suspected disabilities;
- The evaluation contained sufficient assessments and data to make a proper eligibility determination;
- The Eligibility Team considered [Private Evaluator's] 01/19/2008 evaluation; and
- In making its determination, the Eligibility Team considered information provided by [Parents], classroom based assessments and observations.

### **The IEE Evaluation.**

20. On 05/10/2010, [Parent] wrote [Superintendent] expressing dissatisfaction with the scope of the 2010 Eligibility Evaluation and the Eligibility Team's determination. [Parent] concluded her letter advising that [Parents] were not interested in beginning another RtI process and requested an IEE "for previously identified areas of need."<sup>43</sup>

21. On 05/13/2010 [Special Education Director] sent [Parents] a letter acknowledging their IEE request.<sup>44</sup> Enclosed with the letter were:

- A list of three evaluators who met the [BOCES'] criteria for conducting an IEE;
- A form letter (IEE form letter for SLD evaluations);<sup>45</sup> and

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<sup>41</sup> Exhibit B.

<sup>42</sup> Exhibit B and Interviews with [School Psychologist]; [OT]; [Social Worker]; [School Psychologist]; [General Education Teacher]; and [SLP].

<sup>43</sup> Exhibit J, pgs. 1-2. Notably, the letter mentions no concerns that [Student] had not been assessed for a physical impairment, ADD or Dyspraxia.

<sup>44</sup> Exhibit 7, pg. 3.

- A form detailing the BOCES’ “Criteria for Identification for [SLD].”<sup>46</sup>

In his letter, [Special Education Director] explained that when [Parents] notified the BOCES of their choice of evaluators, the BOCES would send the IEE form letter for SLD evaluations and the BOCES’ Criteria for Identification for Specific Learning Disability to the selected evaluator.<sup>47</sup>

22. Relevant portions of the IEE form letter for SLD evaluations provided:

*Re: Independent Educational Evaluation: STUDENT WITH OR SUSPECTED OF HAVING SPECIFIC LEARNING DISABILITY*

...

*In order for us to proceed with arrangements for the evaluation we must determine that the individual performing the IEE has credentials that meet the [BOCES’] requirements; and, that the evaluation itself will be performed in accordance with [BOCES’] requirements.*

...

*In determining whether a child meets the eligibility criteria for a Specific Learning Disability as defined in state and federal law, “Responsiveness to Intervention” (RtI) is the primary means of evaluation and eligibility determination for students suspected of having a specific learning disability. Accordingly, when the suspected disability is a specific learning disability as defined under federal and state law, the IEE must be based upon data demonstrating the student’s responsiveness and/or lack of responsiveness to scientific, research-based interventions in the instructional setting. Because it is not practical for the evaluator to replicate the RtI process independently of the school the IEE will necessarily consist in part of a review of the existing RtI data. The BOCES will ensure that the independent evaluator has access to all RtI records and data for the student subject to parent authorization.*

*Please provide a statement of what other elements the evaluation will include apart from the records review discussed . . . above. i.e., what types of observations will be performed, what other records will be reviewed, what interviews will be conducted, and what tests (not including the WJ or any other discrepancy criteria tests) will be administered.*<sup>48</sup>

23. The BOCES’ form listing Criteria for Identification for [SLD] contained a list of six eligibility criteria and noted:

*To receive special education or related services for a Specific Learning Disability in the academic area(s) of: Reading Fluency, Reading Comprehension, Math Calculation, Math*

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<sup>45</sup> Id., pgs. 5-6. At the top of the IEE form letter for SLD evaluations is a note indicating “(This is a letter sent to the [IEE] to confirm credentials and to inform them that they are required to use [BOCES’] procedures and criteria, and to request a plan of evaluation.)”

<sup>46</sup> Id., pg. 7.

<sup>47</sup> Id., pg. 3.

<sup>48</sup> Id., pgs. 5-6 (emphasis added).

Reasoning, and/or Written Language, *a student **must** meet all of the [BOCES'] adopted eligibility criteria below.* Each section must be verified and the box checked.<sup>49</sup>

24. On 07/05/2010, [Parents] emailed [Superintendent] noting that one evaluator had communicated that she was not interested in conducting the evaluation and the second evaluator could not be reached. [Parents] advised that they had spoken with [IEE Evaluator] and had selected him to do the evaluation.<sup>50</sup> The SCO specifically finds that [Parents] chose to have [IEE Evaluator] do the IEE evaluation.

25. [IEE Evaluator] is a certified school psychologist who has practiced as a school psychologist for 24 years. [IEE Evaluator] is not an employee of the BOCES and has been conducting special education assessments since 1989.<sup>51</sup>

26. On 07/07/2010, [Special Education Director] sent [IEE Evaluator] the IEE form letter for SLD evaluations and inquired as to [IEE Evaluator's] ability to conform with BOCES' requirements concerning SLD evaluations. The letter included a copy of the BOCES' Criteria for Identification for [SLD]. [Parents] were copied on this letter.<sup>52</sup>

27. On 07/09/2010, [IEE Evaluator] wrote [Special Education Director] replying to the BOCES' inquiries concerning an IEE for an SLD evaluation. In his letter, [IEE Evaluator] noted:

I foresee that the IEE will consist primarily of a file review based on current and past IEP information provided by [the BOCES] and current testing information that has been conducted independently by [Student's] [Parents]. Progress monitoring and gap analysis data will be part of this review. Other information may be utilized as necessary. I'm not anticipating the need for an observation or interview. This could change however based on the file review and parent request.

...

The evaluation could commence Thursday 7/15. A report would be issued a week following the end of the evaluation.<sup>53</sup>

28. Neither [Special Education Director] nor [IEE Evaluator] could recall whether either of them had sent [Parents] a copy of [IEE Evaluator's] 07/09/2010 letter. Based on [IEE Evaluator's] 07/09/2010 letter, the BOCES approved [IEE Evaluator].<sup>54</sup>

29. One of [Parents'] chief Complaint claims is that [IEE Evaluator] merely reviewed existing data and did not conduct additional assessments.<sup>55</sup> [Parent] could not recall whether she had requested that [IEE Evaluator] conduct specific additional tests but complained that he had not conducted additional assessments: "[IEE Evaluator's] entire evaluation consisted of a

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<sup>49</sup> Id., pg. 7 (emphasis added).

<sup>50</sup> Id., pg. 8.

<sup>51</sup> Exhibit 6 and Interview with [IEE Evaluator].

<sup>52</sup> Exhibit 7, pgs. 9-10

<sup>53</sup> Id., pg. 11.

<sup>54</sup> Interviews with [Special Education Director] and [IEE Evaluator].

<sup>55</sup> Complaint, Reply and Interview of [Parent].

reviewing [sic] the existing data provided to him by the [BOCES]. Consequently, this IEE did nothing to address our complaints that the [BOCES'] evaluations were incomplete – which was the reason the IEE was requested in the first place.”<sup>56</sup> Conversely, [IEE Evaluator] noted that he had several telephone conversations with [Parent]. During these conversations [IEE Evaluator] advised [Parent] that he had been in touch with [Special Education Director], advised her what the IEE process would look like and what needed to be done going forward with the evaluation. As to communications had with [Parent], [IEE Evaluator] specifically recalled:

- [Parent] made no mention of a concern that [Student] had ADD but mentioned that [Student] had been having difficulty focusing in the classroom and suffered from a central processing disorder;
- [Parent] never requested that [IEE Evaluator] perform additional assessments but did express dissatisfaction with the Eligibility Team’s evaluation (i.e., [OT] had not looked at [Student’s] handwriting, academic testing was completed after the eligibility meeting, VMI testing had not occurred and [General Education Teacher] had not followed the RtI Plan);
- [Parent] expressed concerns with the Eligibility Team’s determination (i.e., that [Student] was not identified as having a SLD or as being gifted and talented);
- [IEE Evaluator] advised [Parent] that he would be doing a file review format unless the file review indicated the need for a direct observation;
- His file review would be without additional assessments;
- [IEE Evaluator] advised [Parent] that he would be contacting [School Psychologist] to obtain additional information about the 2010 evaluation;
- At the conclusion of his file review, [IEE Evaluator] discussed with [Parent] his conclusions and recommendations (i.e., that [Student] did not have a SLD and therefore did not qualify for special education but that a 504 plan was appropriate);
- [Parent] communicated to [IEE Evaluator] that she understood why [Student] did not qualify for an SLD determination;
- On 08/02/2010 [IEE Evaluator] supplied [Parent] with a draft of his IEE Report and inquired if she had any ‘substantial corrections’; and
- [Parent] requested that [IEE Evaluator] add one or two additional classroom accommodations (unidentified) which [IEE Evaluator] did insert in the report prior to mailing the final IEE Report to [Parents] and the BOCES.<sup>57</sup>

The SCO finds [IEE Evaluator’s] recollections credible particularly since [IEE Evaluator] relied on his file notes during the interview.

30. In conjunction with his IEE, [IEE Evaluator]:

- Had telephone conversations with [Parent];
- Had a telephone conversation with [School Psychologist];
- Conducted a file review;
- Reviewed [Private Evaluator’s] 01/19/2009 Report;

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<sup>56</sup> Reply, pg. 11 and Interview of [Parent].

<sup>57</sup> Interview with [IEE Evaluator].

- Reviewed emails from [Parent] to the [School] [GT Coordinator];
- Reviewed the 5/6/2010 Eligibility Report and assessment scorings;
- Reviewed the 12/04/2009 RtI Plan and progress reporting;
- Reviewed [Student's] IEP's from 2003, 2004, 2005, and 2006;
- Reviewed [Student's] state assessments (i.e. CSAP and NWEA MAP);
- Reviewed summaries of the WISC and the completed W-J III data results; and
- Reviewed email correspondence between [Parent] and various teachers.<sup>58</sup>

31. The bulk of the information [IEE Evaluator] reviewed was supplied by [Parent]. However, in conjunction with his IEE, [IEE Evaluator] initiated a telephone call to [School Psychologist] to gather additional information concerning the eligibility evaluation. As a result, the BOCES supplied [IEE Evaluator] with 73 pages of additional information.<sup>59</sup>

32. [IEE Evaluator] did not conduct additional assessments because, in his professional opinion, [IEE Evaluator] had all the data necessary to evaluate whether [Student] qualified for special education services under the BOCES' SLD criteria.<sup>60</sup>

33. Given the credible information in the Record, the SCO finds that [Parent] knew:

- The IEE was to determine whether [Student] had a specific learning disability;
- [IEE Evaluator] would be conducting his IEE using the BOCES' SLD criteria;
- [IEE Evaluator] was conducting his IEE on the basis of information obtained from [Parent] and the BOCES' (including information supplied by [School Psychologist]);
- [IEE Evaluator] was conducting his IEE on the basis of previously generated reports and assessments;
- [IEE Evaluator] did not find it necessary to conduct additional assessments in conjunction with his IEE;
- Using BOCES' criteria for SLD identification, including evidenced based RtI, [IEE Evaluator] determined that [Student] did not have a SLD and did not qualify for an IEP; and
- [Student] did qualify for and would benefit from a § 504 Plan.

34. Given the credible information in the Record, the SCO specifically finds:

- [IEE Evaluator] had sufficient information and existing data to conduct the IEE;
- [IEE Evaluator] did not need to conduct additional assessments in order to reach an independent determination as to whether [Student] had a SLD or qualified for special education services;
- The fact that [IEE Evaluator] communicated with [School Psychologist] did not compromise [IEE Evaluator's] independence; and
- [IEE Evaluator's] evaluation and IEE Report<sup>61</sup> were indeed independent.

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<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> Interview with [IEE Evaluator].

35. As to Allegation #1, the SCO finds that in conducting the 2010 Eligibility Evaluation, the Eligibility Team complied with the BOCES' Criteria for Identification for SLD.

36. As to Allegation #2, the SCO finds that in conducting the 2010 IEE, [IEE Evaluator] complied with the BOCES' Criteria for Identification for SLD.

### **CONCLUSIONS OF LAW**

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

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

#### **Whether the 2010 Eligibility Evaluation was properly conducted.**

2. The IDEA regulations governing general evaluation procedures for special education are contained in §§ 300.304 and 300.305. In order for an evaluation to comply with the IDEA, the eligibility evaluation must:

- (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether the child is a child with a disability;
- (2) Not use any single measure or assessment as the sole criterion for determining whether the child is a child with a disability;
- (3) Use technically sound instruments that may assess the relative contributions of cognitive and behavioral factors, in addition to physical or developmental factors;
- (4) The public agency must ensure that:
  - (i) The assessments are not discriminatory on a racial or cultural basis;
  - (ii) Are provided and administered in the child's native language;
  - (iii) Are used for the purposes for which the assessments or measures are valid and reliable;
  - (iv) Are administered by trained and knowledgeable personnel; and
  - (v) Are administered according to the producer's directions;
- (5) Assessments must be tailored to assess specific areas of education need and not merely to provide an intelligence quotient;
- (6) Assessments must be selected and properly administered; and
- (7) The child must be assessed in all areas related to the suspected disability.

Section 300.304(b) and (c).

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<sup>61</sup> Exhibit 7, pgs. 12-16.

3. Additionally, in conducting an initial evaluation, the public agency must:
  - (1) Review existing evaluation data on the child, including:
    - (i) Evaluations and information provided by the parents;
    - (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
    - (iii) Observations by teachers; and
  - (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine –
    - (i) Whether the child is a child with a disability, as defined in 300.8, and the educational needs of the child;
    - (ii) The present levels of academic achievement and related developmental needs of the child; and
    - (iii) Whether the child needs special education and related services.

Section 300.305(a)(1) and (2).

4. When the child is suspected of having a SLD, the public agency must also adhere to very specific federal and state criteria in conducting the eligibility evaluation:

- (a) General. A State must adopt, consistent with § 300.309, criteria for determining whether a child has a SLD as defined in § 300.8(c)(10). In addition, *the criteria adopted by the State* –
  - (1) *Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a SLD . . .*
  - (2) *Must permit the use of a process based on the child's response to scientific, research-based intervention (i.e. response to RtI); and*
  - (3) *May permit the use of other alternative research-based procedures for determining whether a child has a SLD.*
- (b) Consistency with State criteria. *A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a SLD.*

Section 300.307 (a) through (b) (emphasis added). In determining the existence of a SLD for a child, the Eligibility Team must also apply Colorado's criteria for SLD as set forth in Rule 2.08(6)(b)(ii) as follows:

Criteria under the Response to Intervention Model. The child must meet the following criteria:

- (A) The child does not achieve adequately for the child's age or to meet state-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or state-approved grade-level standards:
  - (I) Oral expression;

- (II) Listening comprehension;
- (III) Written expression;
- (IV) Basic reading skill;
- (V) Reading fluency skills;
- (VI) Reading comprehension;
- (VII) Mathematical calculation;
- (VIII) Mathematics problem solving; and

(B) The child does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the areas identified in [Rule 2.08(6)(b)(ii)(A)] when using a process based on the child's response to scientific, research-based intervention as determined by a body of evidence demonstrating:

- (I) Academic skill deficit(s) and
- (II) Insufficient progress in response to scientific, research-based intervention.

Rule 2.08(6)(b)(ii). If the child meets the criteria for a SLD, the Eligibility Team must then make a determination that the child's lack of achievement or lack of progress is not primarily attributable to other disabling conditions. Section 300.309(a)(3).

5. Consistent with § 300.307, since 08/15/2009, Colorado administrative units have been required to use criteria under the RtI model in determining whether a child has a SLD. Rule 2.08(6)(b)(ii). In comparing the BOCES' Criteria for Identification for SLD with § 300.309 and Rule 2.08(6)(b)(ii), the SCO concludes that the BOCES' criteria is consistent with the IDEA regulations and the ECEA rules.

6. The evaluation assessed [Student] in all areas of suspected disabilities. (Findings of Fact (FF) #s 10, 12, and 13).

7. The evaluation contained sufficient assessments and data to make a proper eligibility determination. (FF # 11).

8. In making its determination, the Eligibility Team:

- Considered the 01/19/2008 Private Evaluation. (FF #s 3-4 & 16);
- Considered information provided by [Parents], classroom based assessments and observations. (FF #s 11, 15-17); and
- Properly applied the BOCES' Criteria for Identification for SLD. (FF # 7-9, 23 & 35).

9. The SCO concludes that the 2010 eligibility evaluation was properly conducted in compliance with the relevant IDEA regulations<sup>62</sup> and ECEA rules.<sup>63</sup>

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<sup>62</sup> Sections 300.304(b) & (c); 300.305(a)(1) & (2); 300.307(a) & (b); and 300.309(a)(1) through (3).

<sup>63</sup> Rule 2.08(6)(b)(ii).

## Whether the IEE was properly conducted.

10. The relevant portions of the IDEA regulation concerning IEEs provides:

- General. (1) The parents of a child with a disability have the right under this part to obtain an [IEE] of the child, *subject to paragraphs (b) through (e) of this section.*
- (2) Each [BOCES] *must provide to parents, upon request for an [IEE], information about where an [IEE] may be obtained, and the [BOCES'] criteria applicable for [IEEs] as set forth in paragraph (e), of this section.*
- (3) For purposes of this subpart –
- (i) *[IEE] means an evaluation conducted by a qualified examiner who is not employed by the [BOCES] responsible for the education of the child in question;*
- ...
- (b) Parent right to evaluation at public expense.
- (1) A parent has the right to an [IEE] at public expense if the parent disagrees with an evaluation obtained by the [BOCES], *subject to paragraphs (b)(2) through (4) of this section.*
- (2) *If a parent requests an [IEE] at public expense, the [BOCES] must, without unnecessary delay, either –*
- (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
- (ii) *Ensure that an [IEE] is provided at public expense. . .*
- ...
- (e) *Agency Criteria.*
- (1) *If an [IEE] is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the [BOCES] uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an [IEE].*
- (2) Except for the criteria described in paragraph (e)(1) of this section, a [BOCES] may not impose conditions or timelines related to obtaining an [IEE] at public expense.

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

11. Consistent with § 300.502, the BOCES supplied [Parents] with the BOCES' criteria for an evaluation and the names of three providers the BOCES determined were qualified to conduct an IEE. (FF #s 20-23). [Parents] selected [IEE Evaluator] from the list. (FF# 24).

12. [IEE Evaluator] was supplied with the Criteria for Identification for SLD. (FF # 26).

13. [IEE Evaluator] was not employed by the BOCES and notified the BOCES that he would conform with the BOCES' criteria. (FF #s 25 & 27). As a consequence, [IEE Evaluator] was approved by the BOCES to conduct the IEE. (FF # 28).

14. [Parent] and [IEE Evaluator] discussed in detail [Parent's] concerns, the data and the information that [IEE Evaluator] planned to review. [IEE Evaluator] conducted an SLD evaluation and had no reason to evaluate [Student] for other disabilities. (FF # 29).

Furthermore, [Parent] knew that [IEE Evaluator] was evaluating [Student] under the BOCES' SLD criteria. (FF #s 21-23 and 33). [IEE Evaluator] notified [Parent] that the IEE would be done without additional assessments because [IEE Evaluator] had sufficient information upon which to make a determination as to whether [Student] had an SLD. (FF #s 29 and 33).

15. [Parent] supplied no credible information or regulatory authority in support of the claim that [IEE Evaluator] should have conducted further assessments. (FF #s 29 & 32). In conducting the IEE, [IEE Evaluator] reviewed all of the assessments and data which were considered by the Eligibility Team. (FF # 30). In making his review, [IEE Evaluator] used the Criteria for Identification for SLD, the same criteria as was used by the Eligibility Team. (FF # 33).

16. In order to gather all of the information relevant to his IEE and with the knowledge of [Parent], [IEE Evaluator] conferred with [School Psychologist]. (FF # 31). [Parent] offered no evidence to suggest that, by conferring with [School Psychologist], [IEE Evaluator's] independence was compromised. The [IEE Evaluator's] evaluation and IEE Report were independent. (FF # 34).

17. The SCO concludes that the IEE was properly conducted in compliance with both the IDEA and the ECEA. (FF #36).

18. [Parents] have not met their burden in proving that a procedural violation was committed in conjunction with the 2010 Eligibility Evaluation or the IEE.

19. Finding no procedural violations, no remedy is ordered.

### **CONCLUSION**

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *See*, 34 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 13th day of January, 2011.

*Jeanine M. Pow*

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Jeanine M. Pow, Esq.  
State Complaints Officer

## **Appendix A**

### **2010:515 Record**

#### **Complaint, pgs. 1 through 13;**

- Exhibit A 01/19/2009 [Private Evaluator's] Report, pgs. 1-13
- Exhibit B 05/06/2010 Eligibility Report, pgs. 1-6
- Exhibit C [Private School] 08/2009 Individual Testing Report, 1 page
- Exhibit D 12/04/2009 RtI Plan, pgs. 1-3
- Exhibit E 05/17/2010 Letter from [School Psychologist] to [Parents], pg. 1-2
- Exhibit F Email exchanges between [Parent] and [Gifted Ed. Coordinator], dated 12/16/2009 to 4/6/2010, pgs.
- Exhibit G Email exchanges between [Parent] and [School Psychologist] dated 4/9/2010 to 4/12/2010, pgs. 1-2
- Exhibit H [IEE Evaluator's] IEE Report, pgs. 1-5
- Exhibit I 05/17/2010 Letter from [School Psychologist] to [Parents], pgs. 1-2
- Exhibit J 05/10/2010 Letter from [Parents] to [Superintendent], pgs. 1-2

#### **Reply, pgs. 1-14;**

- Exhibit K Not relevant and not considered
- Exhibit L Not relevant and not considered
- Exhibit M Not relevant and not considered
- Exhibit N Not relevant and not considered
- Exhibit O Not relevant and not considered
- Exhibit P Not relevant and not considered
- Exhibit Q Not relevant and not considered
- Exhibit R Not relevant and not considered
- Exhibit S Not relevant and not considered

#### **Response, pgs. 15;**

- Exhibit 1: [BOCES'] Special Education Procedural Manual, pgs. 1-18
- Exhibit 2: Blank
- Exhibit 3:
  - 05/06/2010 Eligibility Report, pgs. 1-7 (Duplicate of Exhibit B)
  - [Prior Written] Notice of Action, pg. 8
  - NWEA Student Longitudinal Report, pgs. 9-11
  - Official Transcript, pgs. 12-14
  - Response to Intervention Plan, pgs. 15-18
  - Confidential Educational Diagnostic Report, pgs. 19-31
  - Behavior Assessment System for Children Report, pgs. 32-45
  - Weschler Intelligence Scale of Children IV, pgs. 46-52
- Exhibit 4: [OT] Notes from 05/06/2010 Eligibility Determination Meeting, 1 page
- Exhibit 5:
  - Special Education Parent Handbook, pgs. 1-10
  - Parent and Child Rights in Special Education, Procedural Safeguards Notice—Independent Educational Evaluations, pgs. 11-28

Exhibit 6: [IEE Evaluator] Curriculum Vita

Exhibit 7:

- 05/10/2010 Letter from [Parents], pgs. 1-2
- 05/13/2010 Letter from [Special Education Director], pgs. 3-7
- 07/05/2010 Email from [Parent], pg. 8
- 07/08/2010 Letter from [Special Education Director], pgs. 9-10
- 07/08/2010 Letter from [IEE Evaluator], pg. 11
- IEE Report, pgs. 12-16

Exhibit 8: Blank

Exhibit 9:

- Not relevant and not considered
- Not relevant and not considered
- Not relevant and not considered.
- Historical Grade Report (SCO considered [Student's] grades only during the 2009-2010 school year, pgs. 15-17
- 4/9/2010-4/12/2010 Email Exchanges between [School Psychologist] and [Parents], pgs. 27-29
- 5/17/2010 Letter from [School Psychologist] to [Parents], pgs. 30-31(Duplicate of Exhibit E and I)
- 04/14/2010 Confidential Student History, pgs. 32-35

**BOCES' Supplement to Record:**

Exhibit 10: 04/06/2010 Prior Notice and Consent for Evaluation

Exhibit 11: [General Education Teacher's] RtI progress notes, pgs. 1-6

**Telephone Interviews:**

- School Psychologist on 12/17/2010
- OT on 12/20/2010
- Social Worker on 12/20/2010
- Special Education Teacher on 12/20/2010
- Parent on 12/23/2010
- SLP on 12/28/2010
- Executive Director on 1/3/2010
- General Education Teacher on 1/3/2010
- [IEE Evaluator] on 1/4/2010