

Colorado Department of Education
Decision of the State Complaints Officer
Under the Individuals with Disabilities Education Act (IDEA) and
the Protection of Individuals from Restraint and Seclusion Act (PPRA)

**State-Level Complaint 2023:573
Pikes Peak BOCES**

DECISION

INTRODUCTION

On September 6, 2023, the Parent (“Parent”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against a member district (“District”) of the Pikes Peak BOCES (“BOCES”). The State Complaints Officer (“SCO”) determined that the Complaint identified nine allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153, as well as the Protection of Individuals from Restraint and Seclusion Act (“PPRA”)² and its implementing regulations, the Rules for the Administration of the Protection of Persons from Restraint Act (the “Rules”).³ Therefore, the SCO has jurisdiction to resolve the Complaint.

Due to the unavailability of BOCES’ Director of Special Education (“Director”), BOCES required a two-week extension to submit its Response. BOCES’ Response contained voluminous records and extensive recordings, some of which were not delivered to the SCO for an additional three weeks, due to technical errors. In order to fulfill the Colorado Department of Education’s (“CDE”) duty to conduct a thorough investigation, the SCO extended the 60-day investigation due to exceptional circumstances, consistent with 34 C.F.R. § 300.152(b)(1).⁴

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

² The Protection of Individuals from Restraint and Seclusion Act, C.R.S. § 26-20-101, *et seq.*, was previously titled the Protection of Persons from Restraint Act and referred to as the “PPRA.” This acronym lives on despite amendment of the Act’s title.

³ The Rules are codified at 1 C.C.R. 301-45. The Rules were amended in June 2023; however, because the alleged conduct occurred prior to that date, the previous version of the Rules is cited herein.

⁴ *See, Letter to Reilly, 64 IDELR 219* (OSEP 2014) (noting that it is the state’s responsibility to gather evidence and make a determination in the State Complaint process).

RELEVANT TIME PERIOD

The CDE has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. 34 C.F.R. § 300.153(c); Rule 2620-R-2.07(2)(f). Accordingly, this investigation will be limited to the period of time from September 6, 2022 to the present for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATIONS

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

1. Deprived Parent of meaningful participation in the development, review and revision of Student’s IEP at meetings in May and August of 2023, specifically by:
 - a. Failing to schedule the meeting at a mutually agreed on time and place, in violation of 34 C.F.R. § 300.322(a); and
 - b. Failing to consider the concerns of Parent, in violation of 34 C.F.R. § 300.324(a)(1)(ii).
2. Failed to develop an IEP that was tailored to meet Student’s individualized needs from May 2023 to present, specifically by:
 - a. Failing to convene an appropriate IEP team, including Parent, in violation of 34 C.F.R. § 300.321(a);
 - b. Failing to include measurable annual goals designed to enable Student to be involved in and make progress in the general education curriculum and meet her educational needs, in violation of 34 C.F.R. § 300.320(a)(2);
 - c. Failing to include the special education and related services Student required to meet her mental health and academic needs, in violation of 34 C.F.R. § 300.320(a)(4);
 - d. Failing to include behavioral strategies and supports that adequately addressed Student’s behavioral needs, in violation of 34 C.F.R. § 300.324(a)(2)(i);
 - e. Determining Student’s placement without considering any potential harmful effects of the current placement, in violation of 34 C.F.R. § 300.116(d); and

- f. Failing to determine that Student qualified for extended school year (“ESY”) services when such services were necessary to the provision of FAPE, in violation of 34 C.F.R. §§ 300.106, 300.320, and 300.324.
3. Failed to review and revise an IEP that was tailored to meet Student’s individualized needs from August 2023 to present, in violation of 34 C.F.R. § 300.324(b) specifically by:
 - a. Failing to consider information, including an independent educational evaluation (“IEE”), provided by Parent;
 - b. Failing to address Student’s attendance concerns; and
 - c. Failing to revise Student’s BIP.
4. Failing to implement Student’s IEP, in violation of 34 C.F.R. § 300.323, specifically by:
 - a. Failing to make Student’s IEP accessible to teachers or service providers responsible for its implementation, from May 16, 2023 to present;
 - b. Failing to implement the behavior supports and strategies indicated in Student’s IEP and BIP, from May 16, 2023 to present; and
 - c. Failing to provide Student with the special education and related services required by her IEP, from August 2023 to present.
5. Failed to provide Parent with periodic reports on Student’s progress between January 2023 and present, in violation of 34 C.F.R. § 300.320(a)(3)(iii).
6. Failed to conduct a reevaluation of Student at Parent’s request on or about August 29, 2023, in violation of 34 C.F.R. § 300.303.
7. Failed to issue prior written notice (“PWN”) containing the required information regarding BOCES’ decisions about the provision of FAPE to Student from August 29, 2023 to present, in violation of 34 C.F.R. § 300.503.

And whether BOCES violated the PPRA because BOCES:

8. Improperly restrained Student on or around May 16, 2023, specifically by:
 - a. Restraining Student in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a);

- b. Restraining Student without first using less restrictive alternatives or determining that less restrictive alternatives would be inappropriate or ineffective under the circumstances, in violation of Rule 2620-R-2.01(1)(b);
 - c. Failing to provide Student with opportunities to have the restraint removed, in violation of Rule 2620-R-2.02(1)(a)(iv);
 - d. Failing to end the restraint when it was no longer necessary to protect the Student or others, in violation of Rule 2620-R-2.02(1)(a)(v);
 - e. Failing to ensure restraint was administered by staff who have received required training, in violation of Rule 2620-R-2.03;
 - f. Failing to comply with the documentation and notification requirements for restraint, in violation of Rule 2620-R-2.04 and C.R.S. 22-32-147(3)(b)-(c); and
 - g. Failing to review the use of restraint and convene a meeting with Parent, in violation of Rule 2620-R-2.05(1).
9. Improperly secluded Student on or around May 16, 2023, specifically by:
- a. Secluding Student in a non-emergency situation, in violation of Rule 2620-R-2.01(1)(a);
 - b. Secluding Student without first using less restrictive alternatives or determining that less restrictive alternatives would be inappropriate or ineffective under the circumstances, in violation of Rule 2620-R-2.01(1)(b);
 - c. Failing to provide Student with opportunities to have the seclusion removed, in violation of Rule 2620-R-2.02(1)(a)(iv);
 - d. Failing to end the seclusion when it was no longer necessary to protect the Student or others, to reintegrate the Student or clearly communicate that the Student is free to leave the seclusion area, in violation of Rule 2620-R-2.02(1)(a)(v);
 - e. Failing to ensure seclusion was administered by staff who have received required training, in violation of Rule 2620-R-2.03;
 - f. Failing to comply with the documentation and notification requirements for seclusion, in violation of Rule 2620-R-2.04 and C.R.S. 22-32-147(3)(b)-(c); and
 - g. Failing to review the use of restraint and convene a meeting with the Parent, in violation of Rule 2620-R-2.05(1).

FINDINGS OF FACT

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

A. Background

1. Student is six years old and, during the 2023-2024 school year, is in first grade at a school (“School”) in District. *Exhibit R*, p. 1. District is a member of BOCES. *Response*, p. 3. BOCES is responsible for providing FAPE to all IDEA-eligible children with disabilities attending a school in its member districts. ECEA Rule 2.02. BOCES is also responsible for complying with the PPRA and the Rules. 1 C.C.R. 301-45 R. 2.00(7)(a)(iv).
2. Student is identified as a child with a developmental delay (“DD”). *Exhibit R*, p. 1.
3. Student is an energetic and loving child who is close with her family. *Interviews with Parent and special education teacher at School (“Special Education Teacher”)*. She enjoys her friends at School and loves dinosaurs. *Id.*
4. She has trouble identifying and expressing her emotions, which sometimes causes her to act out. *Interview with Parent*. She also struggles academically, particularly with reading and writing. *Interviews with Parent and Special Education Teacher*. She struggles to transition away from preferred activities and sometimes exhibits behaviors when asked to engage in academic tasks that are hard for her. *Interview with Special Education Teacher*.

B. First Reevaluation of Student

5. During the start of the 2022-2023 school year, Student did well in kindergarten and her behavior challenges were typical for a kindergarten student. *Interviews with principal at School (“Principal”) and Special Education Teacher*. In January and February 2023, her behavior challenges really started to increase. *Id.*
6. On February 7, 2023, BOCES sought and received consent for a reevaluation (“March Evaluation”). *Exhibit D*, p. 2.
7. The March Evaluation included a review of records and Student’s recent behavior. *Exhibit C*, pp. 2-8. Over the course of nine days, District staff observed 24 instances of work refusal, 36 instances requiring redirection and 10 incidents of aggression. *Id.* at p. 8.
8. Among other formal evaluations, BOCES’ occupational therapist (“OT”) formally evaluated Student’s sensory profile. *Id.* at p. 9. Student was noted to exhibit both sensory seeking and

⁵ The appendix, attached and incorporated by reference, details the entire Record.

sensory avoiding tendencies. *Id.* at p. 18. In particular, Student tends to avoid touch and sound while seeking out movement and oral sensation. *Id.* at p. 19.

9. BOCES initially convened a meeting on March 8, 2023 to review the March Evaluation and determine Student's eligibility, but agreed to reconvene March 10, 2023 because BOCES speech and language pathologist ("SLP") was unavailable. *Interview with Director.*
10. On March 10, 2023, a multi-disciplinary team ("MDT") including OT, SLP, Parent, Student's kindergarten teacher ("Teacher"), BOCES' school psychologist ("School Psychologist"), Special Education Teacher, Student's grandparent ("Grandparent"), School's nurse ("Nurse"), Director, Parent's advocate ("Advocate") and Principal determined that Student qualified as a student with a DD. *Exhibit E*, p. 7.

C. Second Reevaluation of Student

11. During the March 10, 2023 meeting, Parent requested additional evaluations to consider Autism Spectrum Disorder ("ASD") and the team agreed on the need for a functional behavior assessment ("FBA") to develop a behavior intervention plan ("BIP"). *Exhibit D*, p. 5. Thus, BOCES sought and received consent to evaluate Student in the areas of communicative status, academic performance, social and emotional status, and motor abilities. *Id.*
12. Formal observations of Student's behavior were collected over three hours in a two-week period. *Id.* BOCES also gathered information through informal observations over nine days. *Id.* at p. 30. Overall, Student exhibited 90 problem behaviors in that time, including boundary violations, refusal, verbal aggression and physical aggression. *Id.* Student was off task 78% of the time she was observed, exhibiting refusal in 27% of opportunities, elopement in 16% of opportunities and aggression in 34% of opportunities. *Id.* The FBA concludes the primary functions of Student's behavior are attention and avoiding non-preferred tasks. *Id.* at p. 31.
13. Both Parent and Teacher completed the Adaptive Behavior Assessment System to assess Student's adaptive skills and the Social Responsiveness Scale to assess social impairment associated with ASD. *Id.* at pp. 31-33, 37. In both cases, Parent reported higher levels of concern while Teacher primarily reported scores that were normal or close to normal. *Id.* at pp. 31-33, 37-38.
14. School Psychologist completed the Childhood Autism Rating Scale based on "direct observations of and interactions with [Student] within the school setting, as well as feedback" from Parent and Teacher. *Id.* at pp. 33-37. School Psychologist concluded that Student demonstrates "no symptoms commonly associated with an autism spectrum disorder" within the school setting. *Id.* at pp. 36-37.
15. A MDT initially met on April 6, 2023 to review the new evaluation ("April Evaluation"), but were unable to finish in the time allotted. *Interview with Director; Exhibit S*, p. 6. OT, SLP,

Director, Parent, Teacher, School Psychologist, Special Education Teacher, Principal, Grandparent, and Advocate reconvened on April 13, 2023. *Exhibit E*, p. 22. The MDT, over the objection of Parent and Advocate, found that Student was not eligible as a student with an ASD but remained eligible as student with a DD. *Id.* at pp. 19-21; *Exhibit S*, p. 10.

D. Scheduling the May 4, 2023 IEP Team Meeting

16. BOCES provides back-to-school trainings for all the special education teachers in its districts. *Interview with Director*. During that training, it reminds staff that parents must attend IEP team meetings. *Id.* Staff members are encouraged to use multiple methods to contact parents, including sending certified mail as a last resort. *Id.* It suggests making at least three contacts before proceeding without a parent and continuing to try when it knows parents are hard to reach. *Id.*
17. When scheduling IEP team meetings, parents are typically offered numerous dates. *Interview with School Psychologist*. Staff should make at least three attempts to contact parents to schedule, and best practice is to send a certified letter if they cannot reach parents. *Id.*
18. On April 28, 2023 an IEP team, including Principal, OT, Director, Special Education Teacher, Teacher, Parent, Advocate, Grandparent, School Psychologist and Nurse, met to develop an IEP for Student. *Exhibit S*, p. 12. During the meeting they reviewed the present levels, including student needs and impact of disability and parent input. *Id.* at pp. 12-13. They also reviewed and discussed the BIP, which involved heated discussions between Advocate and other members of the IEP team. *Id.* at p. 13; *Exhibit E.y.*
19. Although running out of time, the IEP team started to review goals and tried to rush through Advocate's questions. *Exhibit E.y.* After reviewing three of four goals, the IEP team agreed to reconvene, and Parent agreed to send possible dates by the end of the day. *Exhibit S*, p. 14.
20. Parent did not send any dates on April 28, 2023. *Interview with Special Education Teacher*. On the morning of May 1, 2023, Special Education Teacher emailed Parent with an updated draft of the IEP and suggested potential meeting times on May 4 and May 5. *Exhibit O*, p. 147.
21. She noted that they needed to discuss accommodations, extended school year services ("ESY") and least restrictive environment ("LRE"). *Id.* However, based on the recording of the April 28 meeting, the SCO finds that they also needed to discuss goal 4 and special education and related services, including Parent's request for a 1-1 paraprofessional. *Exhibit E.y.*
22. Director followed up the following morning asking Parent to provide a time to complete the IEP meeting. *Exhibit O*, p. 148. After comparing internal availability, School and BOCES staff agreed that 8:00 a.m. on Thursday, May 4, 2023, would work for all of them. *Id.* at pp. 148-150. Not having heard from Parent, Special Education Teacher sent Parent a notice of meeting for that time on the morning of May 2, 2023. *Id.* at p. 179.

23. Parent responded right away that she was not available at that time and would look for times the following week. *Id.* She did not share with the team that she was unavailable due to a conflicting appointment. *Interview with Parent.*
24. Special Education Teacher immediately asked Parent to reconsider the proposed time because BOCES wanted to get a plan in place for Student. *Exhibit O*, p. 178. Five minutes later, Director followed up, explaining that staff was “adjusting their schedules to make [that] time work,” and it would be difficult to find another time so close to the end of the year. *Id.* at pp. 177-178. She asked if Parent could have any flexibility to meet at that time and offered for her to attend virtually or by phone. *Id.*
25. Parent responded that evening, May 2, 2023, with information from an IEE and asked that the meeting be postponed until the report was finalized and could be considered by the team. *Id.* at p. 177. The letter from the outside evaluator indicated that diagnostic testing and interview supported a diagnosis of ASD and attention deficit hyperactivity disorder (“ADHD”). *Exhibit 3.*
26. Director responded the following morning and agreed to hold another meeting once the report was finalized. *Id.* However, she explained that they needed to move forward now to finalize an IEP and get a plan in place for Student based on the current evaluations. *Id.* She said the team would still meet the next morning, May 4, 2023, at 8:00 a.m. and hoped Parent would “attend either in person, virtually or over the phone.” *Id.*

E. May 4, 2023 IEP Team Meeting

27. An IEP team (“May IEP Team”), including Director, School Psychologist, OT, Teacher, Principal, Special Education Teacher and Nurse met on May 4, 2023 to finish Student’s IEP (“May IEP”). *Exhibit E.x.* Parent was not present. *Id.*
28. They also went over the accommodations, with additional feedback and suggestions from Teacher and OT. *Id.*
29. The May IEP Team then went through a severity rating scale to determine if Student required a one-to-one paraprofessional, which Parent had requested. *Id.* Although some concerns were noted, they determined that Student’s score of 21 out of 80 indicated a need for added support but not a dedicated paraprofessional. *Id.*
30. When they reached the ESY section, Director concluded that there was no data to support a need for ESY but said they could reconsider in the future if they saw such data. *Id.* No other team members spoke during this section. *Id.*

31. OT noted that she had increased her services from 60 minutes per month (“MPM”) to 90 MPM after Parent requested more services at a prior meeting. *Id.* After determining that she would need to provide writing services in addition to math and reading, Special Education Teacher adjusted her service minutes, increasing the “other” category that reflected academic services and decreasing the amount of services she was recommending for social emotional learning (“SEL”), specifically noting that this would serve as a minimum. *Id.*
32. The team then considered the advantages and disadvantages of placement in general education more than 80% of the time versus placement in general education 40-79% of the time. *Id.* The May IEP team referenced Parent’s concerns from prior meetings several times throughout the meeting and added some to both present levels and parent input. *Id.*

F. May 4, 2023 IEP

33. The present levels section of the May IEP included summaries of both the March Evaluation and the April Evaluation. *Exhibit A*, pp. 24-27. It also includes Student’s grades and scores on math and reading assessments given periodically to all students. *Id.* at pp. 28-30. It also includes updates on Student’s prior goals through second quarter. *Id.* at pp. 31-32.
34. Student’s disability impacts her ability to sustain attention, adapt to changes and transitions and demonstrate her academic knowledge. *Id.* at p. 34. Her fine motor delays impact her “willingness to participate in regard to pencil and paper tasks,” potentially leading to behavioral challenges. *Id.* Student’s sensory differences might also be impacting her regulation during the school day. *Id.*
35. A lengthy parent input section lists several parent concerns including a desire for a one-to-one paraprofessional, Student’s difficulty with the way some adults talk to her and a desire for more information about how Student is being supported at school. *Id.* It is also noted that Parent was pursuing an IEE for Student and included preliminary diagnoses *Id.* at pp. 34-35.
36. The only applicable special factor is that Student required a BIP. *Id.* at p. 35.
37. The May IEP included one SEL goal for Student to demonstrate mastery of four objectives:
 - Student “will decrease her escape from the classroom or task by 80%.”
 - Student “will decrease her instances of refusal by 80%.”
 - Student “will decrease her off task behaviors by 80%.” And
 - Student “will decrease her instances of aggression by 80%.”

Id. at pp. 35-36. The baselines for each objective was 12, 20, 56 and 25 respectively. *Id.*
38. Best practice is for goals to focus on skills the Student will develop instead of things the team hopes to eliminate. *Interview with CDE Content Specialist 1.* As with academic goals, behavior

goals should be written from the mindset that the student has a skill deficit the IEP team hopes to address. *Id.* This also helps support the development of appropriate accommodations, services and BIPs to address those deficits. *Id.*

39. The May IEP includes one math goal for Student to be able to add up to 10 “using objects, fingers or traditionally in 100% of given opportunities” from a baseline of 0. *Exhibit A*, p. 36.
40. The reading goal was for Student to demonstrate 43 correct letter sounds and read 8 whole words from baselines of 0. *Id.* at pp. 36-37.
41. Parent’s concern is that this goal was overly ambitious because Student could not recognize letters. *Interview with Parent*. However, Special Education Teacher indicated that Student could identify letters when they were working together. *Interview with Special Education Teacher*. Teacher was confident that this was an attainable goal for Student based on her performance at that time. *Id.*
42. Finally, the writing goal also had two objectives for legible writing with the same baseline, 20%. *Exhibit A*, p. 37.
43. The May IEP had 16 accommodations including:
 - “Repeat directions with processing times between repetitions;”
 - Use of First-Then approach;
 - Support for transitions;
 - Supportive redirection;
 - Positive reinforcement for positive behaviors;
 - Access to sensory tools and strategies;
 - A safe spot in the room to take breaks; and
 - “Co-regulation strategies across school environments.”

Id. at pp. 37-38.

44. Student did not qualify for ESY. *Id.* at p. 38. She was not eligible due to “continued progress on the IEP goals.” *Id.* at p. 40. This analysis is copied verbatim from Student’s prior IEP, which also determined that Student did not require ESY. *Id.* at p. 15.
45. Student was to receive the following services:
 - Special Education Services: “inside the classroom in large group, small group or one to one setting” from a special education teacher or paraprofessional under the direct supervision of a special education teacher. *Id.* This included 60 minutes per week (“MPW”) for SEL and 360 MPW for academics. *Id.* at p. 41.

- Mental Health Services: 60 MPM of direct support from a mental health provider inside the general education setting. *Id.* These services were intended to support Student’s SEL goal. *Interview with Special Education Teacher.*
 - Occupational Therapy: 90 MPM of direct support from an OT to support sensory needs for self-regulation and fine motor skills impacting writing. *Exhibit A*, pp. 40-41. Direct OT services were to be provided outside of the general education setting but might “happen inside general education classroom based on task planned, behavior and safety.” *Id.* at p. 40. OT would also provide 15 MPM of indirect services. *Id.* at p. 41.
 - A summary of the severity rating scale the May IEP team used to determine that Student did not require a one-to-one paraprofessional is also included in the service delivery section. *Id.* at p. 40.
46. Although not reflected in the May IEP, Special Education Teacher pulled several students, including Student, for two-hour rotations every Tuesday afternoon, starting around February 2023. *Interview with Special Education Teacher; Exhibit O*, pp. 128-132. During this time, students would rotate through a combination of academic and leisure activities. *Id.* This gave Special Education Teacher an opportunity to work on and monitor their IEP goals. *Interview with Special Education Teacher.* These services were provided to supplement the services in their IEPs. *Id.*
47. The May IEP considers the advantages and disadvantages of placement in general education more than 80% of the time or 40-79% of the time. *Exhibit A*, p. 42. It ultimately concludes that Student’s LRE is general education at least 80% of the time, specifically 98.9% of the time. *Id.*
48. The embedded PWN indicates that Student was sleeping at School for an hour or more once or twice per week. *Id.* at p. 43. The May IEP does not address that concern which could “be something to look and have discussion on in the future.” *Id.*

G. May 5, 2023 BIP

49. During the IEP team meeting on April 28, the team reviewed a BIP (“May BIP”) for Student. *Exhibit S*, p. 13. The May BIP, dated May 5, 2023, reviews the FBA data and concludes that the primary functions of Student’s behaviors are avoidance and attention. *Exhibit B*, pp. 9-10.
50. The May BIP includes several setting event strategies including clear expectations, front loading transitions to non-preferred tasks, use of social stories and first/then statements and use of “kind, upbeat language.” *Id.* at pp. 11-12. It also includes several antecedent strategies including visual schedules, reinforcement for appropriate and expected behaviors,

noncontingent attention, scheduled breaks, offering a break before the behavior occurs and set consequences for undesired behaviors. *Id.*

51. The behavior teaching strategies in the May BIP are:

- Direct instruction on expected behaviors;
- Teaching coping skills;
- Differential reinforcement, or reinforcing appropriate behaviors while placing inappropriate behaviors on extinction by no longer providing reinforcement like breaks or attention;
- Visual/physical redirection to the task.

Id.

52. Finally, the reinforcement strategies include access to attention and breaks for appropriate/replacement behavior while ignoring inappropriate behavior. *Id.* Dense levels of reinforcement would be provided with reinforcers individualized to Student. *Id.* The final reinforcement strategy was opportunities for positive peer attention. *Id.*

53. The May BIP includes a short crisis intervention plan. *Id.* at p. 13. “When appropriate and only as a last resort, CPI, Crisis Prevention Intervention, training will be implemented.” *Id.*

54. A BIP should include proactive behavior supports. *Interview with CDE Content Specialist 1.* It should also specify the alternative behaviors being taught. *Id.* For students with sensory difficulties, setting event strategies should include steps to minimize those challenges. *Id.* The SCO finds that the May BIP for Student lacks both of these things. *Id.*

55. Behavior interventions must be implemented with fidelity for about six weeks to know whether they are effective. *Id.*

56. Overall, the SCO finds that the services and supports in the May IEP and BIP are not commensurate with the frequency and intensity of behaviors described in the FBA. *Interview with CDE Content Specialist 2.*

H. Implementation of the May IEP and BIP

57. Principal is responsible for ensuring that the necessary staff are assigned to cover any responsibilities in a student’s IEP or BIP. *Interview with Special Education Teacher.* Special Education Teacher is responsible for ensuring staff understand their responsibilities and have the necessary training. *Interviews with Special Education Teacher and Director.*

58. Special Education Teacher provides teachers with “snap shots” of students’ IEPs containing a summary of each student’s IEP. *Interview with Special Education Teacher.* She sends teachers

and paraprofessionals an “accommodation of the week” talking about what that looks like and which students require that support. *Id.* She is available for support as needed. *Id.*

59. Special Education Teacher supported paraprofessionals by modeling various accommodations and interventions when she was in the classroom working with Student. *Id.* She also held monthly meetings with the elementary school paraprofessionals to provide ongoing training and answer questions. *Id.; Interviews with Paraprofessional 1 and 2.*
60. Teacher and Special Education Teacher attended the April 28 and May 4 IEP team meetings where the May IEP and BIP were developed. *Exhibit S*, p. 12; *Exhibit E.x.* Paraprofessional 1 does not recall getting a copy of Student’s IEP or BIP. *Interview with Paraprofessional 1.* However, after the May IEP and BIP were finalized, she talked with Teacher about what she needed to do to follow the IEP and BIP. *Id.*
61. Paraprofessional 2 reviewed summaries of all the IEPs she might be implementing before the start of the 2022-2023 school year. *Interview with Paraprofessional 2.* In April of 2023, Paraprofessional 2 was assigned to Student’s classroom to support her with academics and behaviors. *Id.* She does not remember getting any updates in the spring or seeing any BIP for Student. *Id.* She just kept notes of Student’s behavior, both good and bad, in a notebook. *Id.*
62. Special Education Teacher created a binder for Student that went with whoever was supporting her. *Interview with Special Education Teacher; Exhibit G*, pp. 138-156. The binder includes information from a training she did for paraprofessionals on work refusal and several visual aids. *Id.* at p. 40. It also includes a summary of the May BIP on the second page in a form she believed would be easier to read and understand. *Id.* at p. 41.
63. Student had cards with coping strategies she could choose like taking a walk or playing with playdoh, and she also had checkboxes for completing work to earn rewards and social stories. *Interview with Paraprofessional 2.* She also responded well to first, then statements. *Id.*
64. Student had a safe space in the room, on a bench against the wall where Student could go to regulate and sometimes sleep. *Interviews with Paraprofessional 2, Special Education Teacher, and Principal.* That is where she went most often when dysregulated. *Id.*

I. Progress Reports

65. Parent’s concern is that she did not receive any progress monitoring reports during the spring 2023 semester. *Complaint*, p. 3.
66. The service provider implementing the goal is responsible for monitoring the student’s progress. *Interview with Director.* Data should be added to BOCES’ system and progress reports issued to parents as frequently report cards go out. *Id.* Since District issues report cards quarterly, progress reports must be issued as frequently. *Id.*

67. Special Education Teacher issues progress reports quarterly. *Interview with Special Education Teacher*. She usually shares them via email. *Id.*
68. During the quarter that an IEP team meeting occurs, no progress report is issued because progress is reported in the IEP instead. *Interview with Director*. Special Education Teacher issued progress reports for first and second quarter, but not third quarter because progress was included in the evaluations and IEP. *Interview with Special Education Teacher*.
69. Special Education Teacher emailed Parent a progress report on December 16, 2023. *Exhibit O*, pp. 96-102. Before the May IEP was completed, District was implementing an IEP from April 13, 2022 (“April IEP”), developed while Student was in preschool. *Exhibit A*, p. 2.
70. The April IEP had six goals and progress reports were to be sent out “in accordance with the school calendar.” *Id.* at pp. 8-12. Goals one and two were based on preschool standards. *Id.* at pp. 8-10. Goals three through six were based on kindergarten standards, for implementation after Student transitioned to kindergarten. *Id.* at pp. 10-12.
71. Goal three was a social emotional wellness goal focused on Student’s ability to manage her emotions using “auditory and visual cues of reminders to calming skills” she was practicing. *Exhibit I*, p. 18. From a baseline of 0/5, the goal was for her to be able to do so in 5/5 scenarios over nine weeks. *Id.*
72. According to the included graph, Student could do so 2/5 times in October and December. *Id.* However, the narrative update for this goal comes from the SLP. *Id.* at p. 19. SLP entered the same sentence verbatim in October 2022, December 2022 and February 2023, saying Student received consultative SLP services and “[n]o concerns have been brought to the SLP’s attention at this point.” *Id.* The SCO finds that this is not relevant to the goal in question, which also makes it unclear where the 2/5 data was coming from.
73. Goal four was a self-determination goal about Student’s ability to attend to non-preferred tasks for 15 minutes with 80% accuracy, from a baseline of zero. *Exhibit I*, p. 19.
74. According to the graph in the progress report, Student reached 80/100 in April of 2022. *Id.* In September and December 2022 she was at 2/5. *Id.* The narrative information for this goal comes from OT who comments on Student’s inconsistent self-regulation and unwillingness to learn new skills to “facilitate handwriting and task completion” in October. *Id.* In December, OT notes that Student’s self-regulation remains inconsistent and that Student “continues to be willful” but her participation is “somewhat improving.” *Id.* The SCO finds that this is inconsistent with the measurement required by the goal and the narrative information is also largely irrelevant to the goal.

75. Goal five was a math goal for Student to count to 20 with 80% accuracy. *Exhibit I*, p. 20. According to the graph, in September 2022 Student was at 0/5 while the narrative information from October 2022 indicates that Student could count with 80% accuracy to 15. *Id.* In December of 2022 both the chart and the narrative information indicate Student can count to 15. *Id.*
76. Goal six was a reading goal for Student to demonstrate 30 “first sounds” in words with 80% accuracy from a baseline of zero. *Id.* at p. 20. In September 2022 Student was at a 5/26 and in October 2022 she could identify 12 first letter sounds with 80% accuracy. *Id.* in December 2022 she was at a 15/26 and could identify 15 first letter sounds. *Id.* at pp. 20-21.
77. The March Evaluation includes progress monitoring data that includes the same information from the December 2022 progress report, with no additional data from third quarter. *Exhibit C*, pp. 20-22. The May IEP also includes the same data, with no additional information from third or fourth quarter. *Exhibit A*, pp. 31-32.
78. The progress report from May 2023 contains no data, with narrative comments indicating that progress monitoring and reporting for the new goals will occur in the 2023-2024 school year. *Exhibit I*, pp. 10-16.

J. May 16, 2023 Incident

79. Around February or March 2023, School created a calm down room in what used to be a counselor’s office. *Interviews with Principal and Special Education Teacher*. Some students use the room to work or take a break from noisy classrooms. *Id.*
80. Once they started using the room for this purpose, they removed the door. *Id.* The room has bean bags and pillows for students to use. *Id.*
81. Student used the room frequently. *Interviews with Special Education Teacher and second paraprofessional in Student’s classroom (“Paraprofessional 2”)*. Sometimes she asked to go there, other times she was guided or directed by staff. *Id.*
82. As of May 16, 2023, School Psychologist had yet to start providing direct services to Student. *Interview with School Psychologist*.
83. Around noon on May 16, 2023, Student became upset because she not allowed to choose a prize from the prize box because she had not completed an assignment. *Exhibit G*, p. 264. Student started screaming and a classmate stepped on her fingers. *Id.* at p. 260. Teacher tried explaining why Student was not getting a prize. *Id.* at p. 264.

84. Paraprofessional 2 tried to “talk [Student] out from the table” and told her she could not scream in class. *Id.* at p. 268. She offered Student her comfort item and the option to take a break or go for a walk. *Interview with Paraprofessional 2.*
85. Another staff member heard screaming and entered the classroom at 12:04:46 to see if she could help. *Exhibit G*, p. 264; *Exhibit G.I.i.* Having been told they had it under control, she left at 12:05:02. *Id.*

K. Hold 1

86. Student was under Teacher’s table and kicked one of the nearby stools, which landed near a classmate. *Id.* at p. 266, 268. Paraprofessional 2 and the kindergarten paraprofessional (“Paraprofessional 1”) made a “quick” decision to use a two-person hold to move Student (“Hold 1”). *Exhibit G*, p. 268. The inside of Student’s classroom is not visible on surveillance video. *Exhibit G.*
87. Surveillance video shows Student exiting the classroom with Paraprofessionals 1 and 2 at 12:05:49. *Exhibit G.I.i.* The paraprofessionals are attempting to execute a two-person hold. *Id.* However, Student is dragging her feet and then drops to the ground, at which point she is carried with her knees and feet dragging on the ground. *Id.* They reach the corner of the hallway at 12:05:59, exiting the area visible on the first camera. *Id.*
88. At the same time, they become visible on a camera in the next hallway. *Exhibit G.I.* The paraprofessionals continue to carry Student with her knees and feet dragging until they reach the calm down room at 12:06:14. *Id.* Another student is visible in the calm down room, and by 12:06:20 they have released Student outside the room. *Id.*
89. The entire hold lasted about 40 seconds. *Interview with Paraprofessional 2.* The hold was over in less than a minute. *Interview with Paraprofessional 1.*
90. Student initially appears to take off out of site and then can be seen running down the hallway towards the camera. *Id.* She goes off camera at 12:06:26. *Id.*

L. Hold 2

91. At 12:07:49 Student reappears on camera holding hands with a third paraprofessional (“Paraprofessional 3”) and willingly walking forwards. *Id.* As they walk toward the calm down room, she begins pulling away from Paraprofessional 3 at 12:07:53. *Id.* He does not release her hand. *Id.*
92. At 12:08:15 Student’s sibling appears and gives her a hug. *Id.* Paraprofessional 3 then pulls Student towards the calm down room as she resists and then sits down at 12:08:26. *Id.*

Paraprofessional 2 then picks up Student's other arm and together the paraprofessionals propel Student into the calm down room. *Id.*

93. Only a sliver of the doorway to the calm down room is visible on the surveillance camera. *Id.* However, by 12:08:33 Student has been released and Paraprofessional 2 is removing furniture from the calm down room. *Id.*
94. This day was the first time staff used holds to get Student to the calm down room. *Interviews with Special Education Teacher and Paraprofessionals 1 and 2.*

M. Student in Calm Down Room

95. Students and staff on the video begin covering their ears, suggesting that Student was screaming. *Exhibit G.I.* Paraprofessional 3 sat in the doorway of the calm down room. *Id.*
96. Student remains in the calm down room with at least one adult in the doorway until the video cuts off at 12:24:38. *Id.* At some point after entering the room, Student fell asleep. *Exhibit G*, pp. 261, 270.
97. Between 12:10 and 12:21 Parent received text messages from Student's sibling indicating that Student was "pulled" into her "secret room" by paraprofessionals. *Reply*, p. 12. Just before 1:00 p.m., Parent arrived to pick up Student, who was sleeping. *Complaint*, pp. 5-6; *Exhibit G*, p. 265. Parent reported that Student developed bruises. *Interview with Parent.*

N. School Review of the Incident

98. School Psychologist is a certified CPI instructor. *Exhibit L*, pp. 2-3; *Interview with School Psychologist.* Paraprofessionals 1 and 2 are both CPI trained. *Exhibit L*, pp. 5-6.
99. Later in the afternoon on May 16, 2023, Principal, School Psychologist and Paraprofessionals 1 and 2 reviewed the security footage of the incident with Student. *Interviews with School Psychologist, Principal and Paraprofessional 1.* At that time, School Psychologist suggested that in a similar situation in the future, a one-person hold walking backwards with the student might be more appropriate. *Interviews with School Psychologist and Paraprofessional 1.* He also explained that in the future they should release a student who drops to the ground instead of carrying them. *Interview with Principal.*
100. Although Paraprofessionals 1 and 2 appear to be using a CPI-approved two-person hold, they should have been standing closer to Student, with their hips closer to her shoulders. *Interview with CDE Content Specialist 2.* At no point should a student in a CPI hold be dragged or lifted. *Id.* If the student drops to the ground or stops supporting their weight, they should be released. *Id.*

101. Principal sent Parent a copy of the incident report for the May 16, 2023, incident around 3:00 p.m. on May 17. *Exhibit O*, p. 294.

O. Independent Educational Evaluation

102. Parent provided BOCES with a copy of an IEE on August 9, 2023, the week before the new school year started. *Exhibit O*, p. 138; *Exhibit E*, pp. 29-45.

103. The outside evaluator interviewed Student and Parent, observed Student, and had Parent complete rating scales. *Exhibit E*, p. 29. Three of the four formal assessments were completed by having Parent answer questions or complete interviews. *Id.* at pp. 36-39.

104. The outside evaluator diagnosed Student with an ASD, unspecified communication disorder and ADHD. *Id.* at p. 41. The report included several recommendations to support Student. *Id.* at pp. 41-44. This included specific “education-based interventions.” *Id.* at pp. 43-44.

P. August 29, 2023 IEP Team Meeting

105. BOCES and Parent agreed to convene an IEP team meeting on August 29, 2023, to review and consider the IEE. *Exhibit O*, pp. 138-142. BOCES staff reviewed the IEE in advance of the proposed meeting. *Interviews with School Psychologist, Special Education Teacher, Principal and Director.*

106. In advance of the meeting, Special Education Teacher went through the IEE and highlighted interventions that were already included in the IEP and/or BIP. *Interviews with Principal and Director; Exhibit S*, pp. 32-35. The plan was to review what was already in the IEP and consider if any additional suggestions should be added. *Interviews with Principal and Director.*

107. Although they were prepared to discuss some revisions in light of the IEE, for the most part staff felt that the May IEP was still appropriate to meet Student’s needs. *Interviews with School Psychologist and Director.*

108. Director, School Psychologist, Special Education Teacher, Principal, Advocate, Parent, Grandparent and Student’s new classroom teacher (“New Teacher”) (the “August IEP team”) met on August 29, 2023. *Exhibit E*, p. 52. OT was not present but completed an excusal form which Director and Parent both signed, agreeing that she could be excused. *Id.* at pp. 66-67.

109. The meeting started with a discussion of what would be included in the agenda. *Id.* at p. 52; *Exhibit E.s.* There was also a heated exchange between Advocate and staff. *Exhibit E.s.*

110. Parent requested homebound instruction because Student is terrified of coming to School. *Exhibit E*, p. 52; *Exhibit E.s.* Parent did not want the paraprofessionals involved in the May 16 incident anywhere near Student, but Principal confirmed they all still worked at School. *Id.*

111. In advance of the meeting, Parent submitted several agenda items, including a request for social-emotional assessments and a new ASD evaluation. *Exhibit 1*, p. 4. During the meeting, she also asked for a mental health provider from School to come assess Student in her home to understand her current functioning. *Exhibit E*, p. 52; *Exhibit E.s*.
112. Director said they could discuss homebound services as an IEP team, but the purpose of the current meeting was to review the IEE. *Id.* The August IEP Team rejected the request for homebound services because they did not have medical documentation to support that need. *Interviews with Director and Special Education Teacher*.
113. Director indicated that no staff would come to her home, but they would meet Parent and Student at the public library. *Exhibit E*, p. 52; *Exhibit E.s*. Parent declined any meetings at the library as she specifically wanted the assessment to occur in her home. *Id.*
114. Parent continued to ask that Student's eligibility be changed to ASD. *Id.* BOCES' staff explained the difference between a medical diagnosis of autism and an educational identification and declined to change Student's eligibility. *Id.* Director explained that DD is the most appropriate classification for students under age nine. *Id.* In addition, at that time Student did not exhibit behaviors in the three areas required for eligibility under ASD. *Id.*
115. The majority of the meeting was spent discussing ways to get Student back to School, including starting with a shortened day, helping get her out of the car in the parking lot or having Grandparent attend with her as a volunteer. *Id.*
116. Parent asked to add more positive behavior interventions ("PBIS") to Student's plan going forward. *Exhibit E.s*. Director responded that PBIS was a general education intervention and not a special education matter. *Id.*
117. The August IEP team did not review the IEE because it focused on addressing Parent concerns. *Exhibit E*, p. 53. At the end of the meeting, Parent agreed to work with Special Education Teacher to set up a session at the public library where they could work on helping Student feel comfortable returning to School. *Id.* BOCES agreed to complete a PWN and they agreed to reconvene at a later date to consider Student's eligibility and LRE. *Id.*

Q. August 29, 2023 Prior Written Notice

118. After the August meeting, BOCES issued a PWN dated August 29, 2023 ("August PWN"). *Exhibit D*, p. 11. According to the notice, the August IEP team rejected additional assessments in the home and rejected the request for homebound services. *Id.* However, the IEP team was waiting to hear from Parent about a date to have a more in-depth discussion about homebound services or additional assessments. *Id.*

119. BOCES refused to change Student's placement to homebound because it lacked the necessary documentation to support such a change. *Id.* The members of the IEP team did not determine that homebound is Student's LRE based on the data they have at this time. *Interviews with School Psychologist, Special Education Teacher and Director.* However, they were willing to have further discussions at a future IEP team meeting. *Interview with Director.*
120. They rejected the request for additional assessments because "sufficient data exists from the previous evaluation[s]." *Exhibit D, p. 11; Interview with School Psychologist.*
121. The August IEP Team also refused to consider changing Student's eligibility category. *Exhibit D, p. 11.* This decision was based on the fact that changing the category would not change the services because Student's IEP was "designed to meet all of [her] educationally identified needs" and they had already considered ASD and determined she was not eligible. *Id.*
122. These decisions were based on the evaluations considered on April 13, 2023, and the IEE considered at the August IEP team meeting. *Id.*
123. According to the August PWN, the school team considered addressing Parent's requests at the August 29, 2023 meeting but opted to create a meeting dedicated to those concerns. *Id.*
124. They also considered adding other Parent requests to the agenda but determined that they were not special education matters. *Id.* Finally, the August IEP team considered a plan to "support [Student] in attending school." *Id.*
125. The August PWN indicates that parents have protections under the procedural safeguards. *Id.* Parent could contact Special Education Teacher for a copy of her procedural safeguards or help understanding the PWN. *Id.*

R. Fall 2023 Services

126. Student has a history of expressing fear or concern about coming to school which predates May 16, 2023. *Interview with Special Education Teacher.* In April 2023, Special Education Teacher created a social story for Student about being brave and coming to school when it feels hard. *Id; Exhibit G, p. 155.* School had a copy of the story in class and sent a copy home to Parent to review with Student before school. *Interview with Special Education Teacher.*
127. In April of 2022 the prior IEP team "discussed ways to help [Student] feel more comfortable when school starts." *Exhibit A, p. 19.* Student would visit School over the summer and visit the kindergarten classrooms before the year ended. *Id.* Parent was also going to "spend the summer talking about all of the exciting things that [Student would] get to do once she starts kindergarten." *Id.*

128. Student has not returned to School for any educational purposes since Parent picked her up on May 16, 2023. *Interviews with Parent, Special Education Teacher and Principal*. Student did attend kindergarten graduation and two practices in May of 2023. *Interview with Principal*. Paraprofessionals 1 and 2 were both present at those events and Student did not exhibit any perceptible fear. *Id.* Student also came to the School, outside of school hours, for a concert and a volleyball game and was not visibly distressed or fearful. *Interview with Special Education Teacher*.
129. The 2023-2024 school year started August 15, 2023. *Exhibit M*, p. 2. On August 16, Parent emailed that Student was very distressed at the thought of going to School. *Exhibit O*. p. 216. She asked for “at-home mental health service and interventions” to get Student to where she would not be “terrified of going to school.” *Id.*
130. Special Education Teacher responded on August 17 with five suggestions to help Student feel comfortable returning. *Id.* at p. 217. Suggestions included a video introduction from New Teacher, introducing herself and the classroom. *Id.*; *See, Exhibit O.e*. Another included talking with Parent and Student’s sibling about all the fun and exciting parts of school, like seeing friends, along with another social story that could be read daily. *Exhibit O*, p. 217. Special Education Teacher also suggested incentive charts where Student could earn stickers every day when she comes home from school in order to earn a larger reward. *Id.* They could also discuss shortened schedules to help get Student back into the school schedule. *Id.* She also suggested having Student come to School each day and trying to go to class, even if she only makes it in the building or down a hallway at first. *Id.*
131. Parent thought these were all great ideas but indicated that she needed in-home support first because she could not “even get her to the school.” *Id.* On August 21, Parent explained she wanted someone skilled in social emotional interventions to come to her home once to try and help her with Student. *Id.* at p. 219.
132. Director reiterated the suggestions from Special Education Teacher, clarifying that if Parent could get Student to School, staff would help to get her inside, giving them a chance to see how she is responding to interventions. *Id.* at p. 220.
133. Parent repeated her requests for help at home on August 24. *Id.* at pp. 221. Special Education Teacher promised to have the teacher video, sticker charts and social story ready for Parent the next day. *Id.* at pp. 221-222. On August 25, as an alternative to meeting at their home, Director also asked to schedule a meeting at the public library to meet with Parent and Student and go over the strategies. *Id.* at p. 222. Parent was concerned about privacy and uninterested in meeting at a public location. *Id.* at p. 223.
134. BOCES determined Student continues to require placement in a general education environment. *Interviews with Director, School Psychologist, Principal and Special Education Teacher*. Placement at home, without access to peers, would be detrimental to Student’s

development. *Interview with School Psychologist*. Placing Student at home without more data would be doing her a disservice. *Interview with Special Education Teacher*. Student's goals can be best addressed in a school environment. *Interview with Principal*.

135. Special Education Teacher and a School counselor met with Parent and Student at the library on September 6 and the park on September 21. *Exhibit F*, p. 28; *Interview with Special Education Teacher*. Student engaged with staff and did not want to leave at the end of these sessions. *Id.*; *Exhibit F*, p. 28.
136. Starting October 17, 2023, Special Education Teacher and the counselor agreed to meet with Student at the library once a week. *Interview with Special Education Teacher*. The purpose of these sessions is to help keep Student connected to School and show her that school can be a positive place with people who like her. *Interview with School Psychologist*. BOCES remains ready and willing to implement Student's IEP and BIP at School. *Interviews with School Psychologist, Special Education Teacher and Director*.

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: BOCES failed to schedule the May 4, 2023 IEP Team Meeting at a mutually agreeable time and place, in violation of 34 C.F.R. § 300.322(a). This violation resulted in a denial of FAPE.

A. Scheduling the May 4, 2023 IEP Team Meeting

Parent's concern is the May 4 IEP team meeting was not scheduled at a mutually agreeable time.

"Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate – including (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed on time and place." 34 C.F.R. § 300.322(a). "Parental participation in the creation of a student's IEP is widely considered to be one of the most critical procedural safeguards in the IDEA." *Oskowis v. Sedona-Oak Creek Unified Sch. Dist.*, 73 IDELR 257 (U.S. Dist. AZ 2019).

A request to reschedule or postpone an IEP team meeting is not an affirmative refusal to attend. *Douglas County School District*, 119 LRP 37635 (SEA CO 7/3/19) (holding that parent's request to postpone the IEP team meeting until after a private evaluation was completed was not an affirmative refusal to attend the IEP team meeting.)

Two essential IDEA requirements, parental participation and annual review, can sometimes conflict and create tension for BOCES. In *Doug C. v. Hawaii Department of Education*, the school

district faced the problem of confronting an impending annual IEP review date and parent's unavailability to participate in the scheduled meeting. 720 F.3d 1038, 1046 (9th Cir. 2013). The district chose to convene an IEP team meeting without parent in order to comply with the annual review deadline, which the court held resulted in a denial of FAPE. The 9th Circuit issued the following guidance:

When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. In reviewing an agency's action in such a scenario, we will allow the agency reasonable latitude in making that determination.

Id. The court also pointed to the central purposes of IDEA: "to provide disabled students a free appropriate public education and to protect the educational rights of those students." *Id.*

Here, BOCES contends that the May 4 meeting was the continuation of an IEP meeting that lasted 12 hours across five meetings. However, the meetings on March 8, March 10, April 6 and April 13 all concerned review of the March and April Evaluations and a determination of Student's eligibility. (FF #s 9, 10, 15.) An IEP team first discussed Student's IEP on April 28, 2023, at which time it reviewed present levels, Student's BIP and three of four goals. (FF #s 18, 19.)

The May 4 meeting would have been Parent's first opportunity to provide input on accommodations, services, ESY and LRE. (FF # 21.) BOCES provided Parent with less than 48 hours notice and only one possible date and time to reconvene the IEP team, 8:00 a.m. on May 4, 2023. (FF # 22.) When Parent indicated that she was not available at that time, BOCES did not propose any other times. (FF #s 23-26.) Instead, both Special Education Teacher and Director emailed Parent asking her to reconsider and make herself available at their preferred time. (FF # 24.) Offering to have Parent participate virtually or by phone is not the same as offering another date or time. (*Id.*) In this case, Parent had another appointment at that time and could not participate through any means. (FF # 23.)

Student's April IEP was from April 13, 2022, so Student's annual review was overdue by the time BOCES was scheduling the May 4, 2023 IEP team meeting. (FF # 69.) BOCES was appropriately concerned about getting a plan in place for Student as soon as possible. (FF #s 24, 26.) However, BOCES also had an obligation to ensure Parent could participate in the development of Student's IEP. 34 C.F.R. § 300.322(a). The SCO recognizes that Parent never followed through on sending possible dates. (FF #s 20, 23.) However, BOCES' pressure to have Parent participate at its identified time did not invite suggestions of other times. (FF # 24.)

The fact that Parent asked BOCES to postpone the meeting until after the IEE was complete is not the same as refusing to participate. (FF # 25.) Instead, BOCES was obligated to try and convince

Parent of the importance of participating. *Douglas County School District*, 119 LRP 37635. While BOCES did tell Parent they needed to meet and would meet again once the IEE was complete, BOCES still made no efforts to schedule the meeting at a time Parent was available. (FF # 26.)

Because BOCES provided Parent with less than 48-hours notice of the May 4 meeting and did not offer any other dates or times when Parent indicated she was unavailable, the SCO finds and concludes that BOCES failed to schedule the IEP team meeting at a mutually agreeable time and place, in violation of 34 C.F.R. § 300.322(a).

However, it is important to note that the SCO is not saying BOCES is obligated to hold numerous meetings to satisfy the requirements of parental participation. *See, e.g. San Luis Valley BOCES*, 123 LRP 33004 (SEA CO 7/12/2023) (finding that where BOCES and parents could not reach agreement in IEP meetings, BOCES could either 1) schedule another meeting or 2) issue a final IEP and PWN of its decisions.) The concern for the SCO in this case is that an IEP team including Parent had yet to review much of Student's proposed IEP.

i. Procedural Violations

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

Here, because BOCES did not schedule the meeting at a mutually agreeable date and time, Parent was unable to attend the May 4 IEP team meeting. (FF # 27.) As a result, Parent did not have the opportunity to participate in decision making around Student's fourth goal, her accommodations, her services, ESY or her LRE. (FF # 21.) Thus, the SCO finds and concludes that this violation significantly impeded Parent's opportunity to participate in the decision-making process around Student's IEP, resulting in a denial of FAPE.

B. Considering Parent's Concerns at the August 29, 2023 IEP Team Meeting

Parent's concern is that the August IEP team did not adequately consider her concerns at the IEP team meeting on August 29, 2023.

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

Meaningful parent participation occurs where the IEP team listens to parental concerns with an open mind, exemplified by answering questions, incorporating some requests into the IEP, and discussing privately obtained evaluations, preferred methodologies, and placement options, based on the individual needs of the student. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 703 (10th Cir. 1998). Meaningful participation does not require that a district simply agree to whatever a parent has requested. *Jefferson County School District RE-1*, 118 LRP 28108 (SEA CO 3/22/18). However, parental participation must be more than “mere form.” *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014). “It is not enough that the parents are present and given an opportunity to speak at an IEP meeting.” *Id.* Evidence that a district “was receptive and responsive at all stages” to the parents’ position, even if it was ultimately rejected, is illustrative of parental participation. *Id.*

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

Here, Parent participated in the meeting on August 29, 2023. (FF # 108.) During and before this meeting, Parent requested additional evaluations of Student, a change in her eligibility category, and homebound services because Student was too afraid to come to School. (FF # 110, 111, 114.) BOCES did not agree to conduct additional evaluations of Student but did agree to have someone from School meet Parent and Student at the library. (FF # 113.) They explained the difference between a medical diagnosis of ASD and an educational evaluation. (FF # 114.) BOCES’ staff determined a change in eligibility would not change Student’s services, and they had already found Student ineligible under the ASD category. (FF # 121.)

The August IEP Team also considered Parent’s concern that Student was too afraid to come to School. (FF # 110.) In fact, discussion of how to get Student back to school consumed much of the meeting. (FF # 115.) District did not agree to Parent’s request for homebound services as BOCES staff did not believe they had data to support such a change in Student’s LRE. (FF # 119.)

Although they did not agree to the specific things Parent was requesting, BOCES carefully considered her concerns and offered various suggestions to help Student feel comfortable returning to School. Thus, the SCO finds and concludes that BOCES considered Parent’s concerns at the August 29 IEP team meeting and no violation of 34 C.F.R. § 300.324(a)(1)(ii) occurred.

Conclusion to Allegation No. 2: BOCES developed measurable annual goals and appropriately determined Student’s placement and that she did not qualify for ESY. BOCES failed to convene an appropriate IEP team which included Parent on May 4, 2023, in violation of 34 C.F.R. §

300.321(a). BOCES also failed to develop special education and related services in the May IEP that were reasonably calculated to enable Student to make appropriate progress, in violation of 34 C.F.R. § 300.320(a)(4). Finally, BOCES failed to include appropriate behavior supports and services in the May IEP and BIP, in violation of 34 C.F.R. § 300.324(a)(2)(i). These violations resulted in a denial of FAPE.

Parent’s concern is that District failed to develop, review or revise an IEP that was appropriately tailored to meet Student’s individualized needs in the spring of 2023.

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

A. 2022 IEP Development Process

As an initial matter, Parent is concerned that BOCES developed the May IEP over two IEP team meetings, one of which did not include Parent.

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

“Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate – including (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed on time and place.” 34 C.F.R. § 300.322(a). “If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls.” 34 C.F.R. §§ 300.322(c), 300.328.

A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as (1) detailed records of telephone calls made or attempted and

the results of those calls; (2) copies of correspondence sent to parents and any responses received; and (3) detailed records of visits made to the parent's home or place of employment and the results of those visits.

34 C.F.R. § 300.322(d).

Here, as discussed in the conclusion to Allegation No. 1(A), the May 4 IEP team meeting was not scheduled at a mutually agreeable time and place. In fact, when Parent indicated that she was not available at the time selected by BOCES, BOCES merely offered her the opportunity to participate via phone or video conference. (FF #s 24-26.) The May 4 meeting was the first time the IEP team discussed one goal, accommodations, ESY, special education and related services and LRE. (FF # 21, 28-32.) All without Parent. (FF # 27.) Suggesting that they postpone the meeting until after the IEE was complete was not the same as refusing to participate, so the exception in 34 C.F.R. § 300.322(d) did not apply.

Because Parent was not present at the IEP team meeting where much of the May IEP was developed, the SCO finds and concludes that the development process for the May IEP did not comply with IDEA's procedures. *Rowley*, 458 U.S. at 206. Nevertheless, the SCO still turns to the second question of whether the May IEP is substantively appropriate. *Rowley*, 458 U.S. at 207.

B. Substantive Adequacy of the May IEP

i. Annual Goals

Parent has concerns with the SEL goal and the reading goal in the May IEP.

An IEP must include measurable goals designed to “[m]eet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum” and any other educational needs that result from the child’s disability. 34 C.F.R. at § 300.320(a)(2). To allow for the evaluation of a student’s progress, IEP goals must be clear and objectively measurable. *Kuszewski v. Chippewa Valley Schs.*, 34 IDELR 59 (E.D. Mich. 2001), *aff’d*, 38 IDELR 63 (6th Cir. 2003, *unpublished*). Appropriate goals should be clear enough that a stranger, or person unfamiliar with the IEP, would be able to implement the goal, monitor student’s progress on the goal and determine whether that progress was satisfactory. *Mason City Cmty. Sch. Dist.*, 46 IDELR 148 (SEA IA 2006). This includes accurately identifying the skill areas in which the student requires specialized instruction, although specific words or the most expansive phrasing is not required. See *Benjamin A. v. Unionville-Chadds Ford School District*, 70 IDELR 150 (E.D. Pa. 2017) (holding that goals that addressed executive functioning skills was not deficient because it failed to use the term “executive functioning”).

IEPs, and by extension IEP goals, must be reasonably calculated to enable Students to make appropriate progress in light of their circumstances. *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017). Whether an IEP is reasonably calculated to allow a student to make appropriate progress is determined prospectively, based on what was known when the IEP was

drafted, and not determined by the student's actual progress. *Fuhrmann v. East Hanover Bd. of Educ.*, 19 IDELR 1065 (3d Cir. 1993), *reh'g denied*, 110 LRP 65930 (3d Cir. 06/08/93); and *Adams v. State of Oregon*, 31 IDELR 130 (9th Cir. 1999). Instead of promising a particular educational or functional outcome for a student with a disability, the IDEA provides a process for reviewing an IEP to assess achievement and revising the program and services, as necessary, to address new information or a lack of expected progress. 34 C.F.R. § 300.324(b)(1).

SEL Goal

Parent's concern is that the SEL goal does not appropriately address Student's needs in that area. The SEL goal in the May IEP is for Student to decrease several disruptive behaviors, including escape and aggression, by 80% each. (FF # 37.) While best practice is to write goals from the perspective that a student has a skill deficit, so that the goal focuses on what they will be learning, that is not a legal requirement. (FF # 38.) This SEL goal identifies baselines and a way to clearly measure Student's progress, a reduction in the frequency of each behavior, measured as a percentage of the baseline. (FF # 37.) It also clearly identifies the areas in which Student needs instruction, addressing escape, refusal, off task behaviors and aggression. (*Id.*) Thus, the SCO finds and concludes that the SEL goal in the May IEP was appropriate to meet Student's needs.

Reading Goal

Parent's concern is that the reading goal was overly ambitious. (FF #s 40, 41.) However, Teacher and Special Education Teacher found it appropriate for Student's then-current levels. (*Id.*) Whether an IEP is appropriate is based on what is known at the time, not on Student's actual progress. *Fuhrmann*, 19 IDELR 1065. The SCO finds that the reading goal is clear and measurable, with baselines and units of measure, such that a stranger could implement it. *Mason City Cmty. Sch. Dist.*, 46 IDELR 148. Further, if Student is unable to make adequate progress on the goal, IDEA requires BOCES to review and, as appropriate, revise her IEP, but that does not make the goal inappropriate. For these reasons, the SCO finds and concludes that the reading goal in the May IEP was appropriate to meet Student's needs.

Overall, the SCO finds and concludes that goals in the May IEP are appropriate to meet Student's needs and no violation of 34 C.F.R. § 300.320(a)(2) occurred.

ii. Special Education and Related Services

Parent's concern is that the May IEP did not include appropriate special education and related services because the OT services were not provided one-on-one in the classroom and the special education services were being provided by paraprofessionals.

An IEP must include the special education and related services and supplementary aids and services that will be provided to allow the child to (1) attain the annual goals, (2) be involved and make progress in the general education curriculum and (3) participate in nonacademic activities.

34 C.F.R. § 300.320(a)(4). It must “include information about the services that will be provided to the child, so that the level of the agency’s commitment of resources will be clear to parents and other IEP Team members.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46667 (August 14, 2006).

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

Here, according to the May IEP, special education services could be delivered in a large group, a small group or a one-on-one setting. (FF # 45.) Similarly, the OT services were intended to be provided outside of general education but might occur inside the classroom for various reasons. (*Id.*) While the SCO recognizes that special education providers must be flexible to respond to the needs of students and different services might require different settings, the sheer breadth of possibilities encapsulated in this service delivery statement prevents Parent from understanding what specific services BOCES was offering. *Tamalpais Union Sch. Dist. v. D.W.*, 70 IDELR 230.

In addition, at the time the May IEP was written, Special Education Teacher was pulling Student for two hours of special education instruction every week, in addition to the services in her IEP. (FF # 46.) Special Education Teacher did not include these “supplemental” services when she was drafting Student’s May IEP. (FF # 45.) As such, there was no way for Parent to know the full amount of services BOCES intended to provide to Student. *Adams 12 Five Star Schs.*, 75 IDELR 86.

When permitted by an IEP, as it was here, paraprofessionals can provide direct services under the supervision and support of a special education teacher. (FF # 45.) Here, Special Education Teacher supported paraprofessionals regularly and was also supporting Student in the classroom and modeling how to help her for the paraprofessionals. (FF #s 58, 59.) As such, the SCO finds that the partial reliance on paraprofessionals to deliver services was reasonable in this case.

However, because the service delivery statement is vague and does not include some of the services BOCES was providing to Student, the SCO finds and concludes that the service delivery statement in the May IEP did not include all the necessary special education and related services, violating the IDEA’s substantive requirements related to the development of an IEP at 34 C.F.R. § 300.320(a)(4). This resulted in a denial of FAPE. *See D.S. v. Bayonne Bd. Of Ed.*, 602 F.3d 553,

565 (3d. Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA's procedural requirements).

iii. Appropriate Behavioral Strategies and Supports

Parent's concern is that the IEP did not include adequate behavior supports—especially positive behavior intervention services—to address Student's behavior needs.

For a student whose behavior impedes their learning, the IEP must, among other things, also "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.324(a)(2). As contemplated by 34 C.F.R. § 300.324(a)(2), this includes where the consequences of a child's behavior, including "violations of a school's code of student conduct, classroom disruptions, disciplinary removals, and other exclusionary disciplinary measures," impede the child's learning. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, 122 LRP 24161 (OSERS 07/19/22). IEPs must address any behaviors that are impeding learning, including by causing student to miss instruction or avoid work. 34 C.F.R. § 300.324(a)(2)

A student's behavior plan should not rely on restraint or seclusion:

Restraint and seclusion must never be used:

- (a) As a punishment or disciplinary sanction;
- (b) As part of a treatment plan or behavior modification plan;
- (c) For the purpose of retaliation by staff; or
- (d) For the purpose of protection, unless:
 - (I) The restraint or seclusion is ordered by the court;
 - or
 - (II) In an emergency, as provided for in subsection (1) of this section.

C.R.S. § 26-20-103(1.5) (emphasis added). The U.S. Department of Education has explained that the use of restraints and seclusion signal the need for a new behavioral plan, and should not be part of the plan itself:

As many reports have documented, the use of restraint and seclusion can have very serious consequences, including, most tragically, death. Furthermore, there continues to be no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques. . . . [S]chools must make every effort to structure safe environments and provide a behavioral framework,

such as the use of positive behavior interventions and supports, that applies to all children, all staff, and all places in the school so that restraint and seclusion techniques are unnecessary.

...

When restraint or seclusion is repeatedly used with a child . . . a review of the student’s BIP should occur, the prescribed behavioral strategies should be modified, if needed, and staff training and skills should be re-evaluated. The need for the review is based on the individual needs of the child and the determination should include input from the family; a review could be necessitated by a single application of restraint or seclusion.

Department of Education, *Restraint and Seclusion: Resource Document*, pp. iii, 17 (May 15, 2012). (Available at <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.)

Here, the SCO has several concerns with the behavior supports included in the May IEP and BIP. First, BOCES’ March Evaluation found that Student was engaging in work refusal, requiring redirection and exhibiting aggression more than once a day. (FF # 7.) The formal FBA in the April Evaluation found that Student exhibited 90 problem behaviors in nine days and was off task 78% of the time. (FF # 12.) Overall, the supports and services in the May IEP and BIP were not commensurate with the frequency and intensity of behavior BOCES was describing. (FF # 56.) Second, the May BIP is lacking in proactive strategies to address Student’s sensory concerns through the setting event or antecedent strategies. (FF # 54.) Third, the May BIP does not specify the alternative behaviors BOCES was going to teach Student. (*Id.*)

Fourth, the May IEP notes that Student was regularly sleeping at school. (FF # 48.) Even though sleeping allowed Student to miss hours of instruction, the May IEP does not address that behavior concern at all. (*Id.*)

Finally, the only step in the crisis intervention plan is the use of CPI training “when appropriate.” (FF # 53.) Colorado law and federal guidance prohibits the reliance on restraint or seclusion in a student’s behavior plan. C.R.S. § 26-20-103(1.5); *Restraint and Seclusion: Resource Document*. The concern for the SCO is that BOCES has identified a potential need to use CPI procedures without considering any other strategies to use in a crisis to avoid reaching that point. (FF # 53.) By choosing to rely solely on restraint training in a crisis situation, BOCES is effectively planning to restrain Student.

For these reasons, and in consultation with CDE Content Specialists 1 and 2, the SCO finds and concludes that the May IEP and BIP do not include adequate behavior strategies and supports to address Student’s needs, in violation of 34 C.F.R. § 300.324(a)(2)(i). This resulted in a denial of

FAPE. See *D.S. v. Bayonne Bd. Of Ed.*, 602 F.3d 553, 565 (3d. Cir. 2010) (finding that the content of an IEP relates to its substance, not to the IDEA’s procedural requirements).

iv. LRE

Parent’s concern is that in refusing to provide Student with homebound services starting in August 2023, BOCES failed to consider the potential harmful effects of Student’s placement in general education at least 80% of the time.

“Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA’s most important substantive requirements.” *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004). This means that children with disabilities receive their education in the general education setting with typical peers to the maximum extent appropriate, and that they attend the school they would if not disabled. 34 C.F.R. §§ 300.114 and 300.116. Children with disabilities should only be placed in separate schooling, or otherwise removed from the regular educational environment, “if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii).

Accordingly, an IEP must include “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.” 34 C.F.R. § 300.320(a)(5). This statement describes a student’s recommended placement in the LRE. *Id.* Students with disabilities must be educated consistent with the LRE described in the IEP. *Id.*

Placement must be determined annually, be based on the child’s IEP and be as close as possible to the child’s home. 34 C.F.R. § 300.116(b). Decisions about a student’s LRE must give consideration to any potential harmful effects the placement will have on the student or the quality of services. *Id.* at § 300.116(d). Any significant change in placement, such as a move to a one-on-one setting or a shortened day, must be made by the IEP team—including the parents of the child—and in consideration of a reevaluation. ECEA Rule 4.03(8)(b)(ii)(B); See *Weld RE-5J School District*, 77 IDELR 148 (SEA CO 07/14/2020) (holding that a move to a placement where Student was completely removed from the general education environment and taught one-on-one by a special education teacher constituted a significant change in placement.).

Here, the May IEP determined that Student’s LRE was general education more than 80% of the time. (FF # 47.) In August 2023, because Student was afraid to come to School, Parent asked the IEP team to change her placement to homebound. (FF #s 110, 129.) As this would completely remove Student from the general education environment and result in the provision of one-on-one services, it would constitute a significant change of placement and require consideration of a reevaluation. ECEA Rule 4.03(8)(b)(ii)(B); See *Weld RE-5J School District*, 77 IDELR 148. BOCES refused to change Student’s placement to homebound because the IEP team did not have data to support such a change. (FF # 119.) Members of the IEP team did not determine that

homebound is Student's LRE. (*Id.*) In fact, they determined that such a placement would be detrimental to Student. (FF # 134.)

The SCO agrees. Homebound is among the most restrictive settings, offering students no access to peers, nondisabled or otherwise. The May IEP and BIP were developed based on two reevaluations of Student and implemented for fewer than two weeks last spring. (FF #s 33, 49, 128.) Behavior interventions need to be implemented for six weeks before a team can determine if they are effective or not. (FF # 55.) As such, the SCO finds that it would be premature to determine that Student cannot be educated in the regular environment with special education supports and services. Even if the May IEP and BIP are not appropriate for Student, there are many interventions that could be tried between general education 98% of the time and homebound. (FF # 47.)

Thus, the SCO finds and concludes that BOCES considered the potential harmful effects of any placement in determining that the May IEP continued to describe her LRE. No violation of 34 C.F.R. § 300.116(d) occurred.

v. ESY

Parent's concern is that BOCES inappropriately determined that Student did not qualify for ESY.

A school district must provide ESY services when a child's IEP team determines on an individual basis that the services are necessary for the provision of FAPE to the child. 34 C.F.R. § 300.106(a)(2). ESY services cannot be limited to a particular category of disability or unilaterally limited in the type, amount, or duration of those services. 34 C.F.R. §300.106(a)(3). ESY services are not intended or required to maximize a student's educational benefit. *Cordrey v. Euckert*, 17 IDELR 104 (6th Cir. 1990), cert denied, 499 U.S. 938 (1991). Instead, ESY services are appropriate when the body of evidence demonstrates that the student will experience a severe loss of skills or knowledge that will significantly jeopardize the educational benefit gained during the regular school year. *Johnson v. Indep. Sch. Distr. No. 4 of Bixby, Tulsa Cty.*, 921 F.2d 1022 (10th Cir. 1990); *Colorado Springs Dist. 11*, 110 LRP 22639 (SEA CO 2010).

There are factors, other than regression and recoupment, that may be analyzed to determine whether ESY is a necessary component of FAPE. *Johnson v. Indep. Sch. Distr. No. 4 of Bixby, Tulsa Cty.*, 921 F.2d 1022 (10th Cir. 1990). These include: a child's degree of regression suffered in the past, the exact time of past regression, the ability of parents to provide educational structure at home, a child's rate of progress, a child's behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with nondisabled children, the areas of a child's curriculum that need continuous attention, a child's vocational needs, and whether the requested services are extraordinary for the child's condition as opposed to an integral part of a program for populations of students with the same disabling condition. *Id.*

Here, during the May IEP team meeting, the IEP team considered ESY, and Director concluded that it was unnecessary because there was no data supporting a need for ESY. (FF # 30.) The SCO recognizes that BOCES did not appear to have any data from after December 2022. (FF # 77.) However, Student's prior IEP team had also determined Student did not require ESY. (FF # 44.) The purpose of ESY is not to maximize a student's benefit but rather to prevent a severe loss of skills over the summer vacation. *Johnson v. Indep. Sch. Distr. No. 4 of Bixby, Tulsa Cty.*, 921 F.2d 1022. In addition, Student has not returned to a school setting since May 16, 2023. As such, even if the May IEP had included ESY services, the SCO finds that Student would not have attended. (FF # 128.) Overall, there is nothing in the Record which suggests that Student experienced severe regression which would prevent her from making progress without the provision of ESY services.

As a result, the SCO finds and concludes that District appropriately determined that Student did not require ESY services, and no violation of 34 C.F.R. §§ 300.106, 300.320, and 300.324 occurred.

Conclusion to Allegation No. 3: BOCES' decision not to revise Student's IEP or BIP in August 2023 was appropriate, and no violation of 34 C.F.R. § 300.324(b) occurred.

The IDEA requires school districts to offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). The IDEA does not promise a particular educational or functional outcome for a student with a disability, but it does provide a process for reviewing an IEP to assess achievement and revising the program and services, as necessary, to address a lack of expected progress or changed needs. *Id.* To that end, school districts have an affirmative duty to review and revise a student's IEP at least annually. 34 C.F.R. § 300.324(b).

However, the IDEA's procedures contemplate that a student's IEP may need to be reviewed and revised more frequently to address, among other things, the results of an evaluation, information provided by the parent or the student's anticipated needs *See id.* §§ 300.324(a)(4)-(6), (b); *Andrew*, 137 S. Ct. at 994.

A. Consideration of the IEE

Parent's concern is that BOCES did not consider the IEE because they did not revise Student's IEP on August 29, 2023.

Parent presented BOCES with a copy of an IEE on August 9, 2023. (FF # 102.) BOCES convened an IEP team meeting on August 29, 2023 to review and consider that IEE. (FF # 108.) In preparation for that meeting, members of the IEP team reviewed the IEE. (FF # 105.) Special Education Teacher went through the recommendations in the IEE and highlighted those that were already included in the May IEP or BIP. (FF # 106.) The plan was then to discuss adding other recommendations. (*Id.*)

However, when the IEP team met, Student had not been at School since the year started two weeks prior on August 15, 2023. (FF #s 128, 129.) While they were prepared to discuss the IEE at that meeting, the majority of the meeting was spent addressing Parent’s concerns and discussing ways to get Student back to School. (FF #s 115, 117.) Had BOCES revised the IEP in consideration of the IEE without addressing Student’s fear of returning to School, it would not have had an opportunity to implement the newly revised IEP. Further, even after reviewing the IEE, BOCES staff determined the May IEP was still appropriate to address Student’s needs. (FF # 107.)

Because BOCES considered the IEE, but reasonably focused on getting Student to school at the August 29 IEP team meeting, the SCO finds and concludes that no violation of 34 C.F.R. § 300.324(b)(ii)(B) occurred.

B. Addressing Student’s Attendance Concerns

Parent’s concern is that BOCES did not revise Student’s IEP on August 29, 2023 to address her fear of coming to School.

Coming into the August 29 IEP team meeting, Student had already missed two weeks of school. (FF #s 128, 129.) Parent reported that Student was terrified and distressed at the thought of going to School. (FF # 110.) Student has a history of expressing fear of going to school. (FF #s 126, 127.) In April 2022 Student’s IEP team made specific plans to help ease Student back into school at the end of summer. (FF # 127.) Prior to and during the August 29 IEP team meeting, BOCES offered several suggestions to help get Student back to school. (FF #s 115, 117, 130, 132, 133.) None of BOCES’ suggestions—like having Grandparent accompany Student, meeting at the library to help Student feel comfortable or helping get Student out of the car—would have required an amendment of the IEP. (FF #s 115, 130.) Members of the IEP team from BOCES did not determine that homebound is Student’s LRE, and they did not determine they have any data to support such a significant change in placement. (FF #s 118, 119.)

Although BOCES did not revise Student’s IEP to address her attendance concerns, the SCO finds and concludes that it did appropriately consider and respond to those concerns and no violation of 34 C.F.R. § 300.324(b)(ii) occurred.

C. Revising the BIP

Parent’s concern is that BOCES did not update Student’s BIP at her request after the incident on May 16, 2023.

The May BIP was finalized on May 5, 2023. (FF # 49.) Student has not returned to School since May 16, 2023. (FF # 128.) Thus, the SCO finds that the May BIP was implemented for fewer than two weeks. Providers cannot tell whether behavior interventions are effective until they have been implemented with fidelity for about six weeks. (FF # 55.) Because BOCES had not yet had

an opportunity to implement the May BIP consistently for several weeks, the SCO finds that not updating it in August 2023 was reasonable and did not violate 34 C.F.R. § 300.324(b)(ii).

Conclusion to Allegation No. 4: BOCES failed to implement Student’s IEP and BIP on May 16, 2023, in violation of 34 C.F.R. § 300.323. This violation did not result in a denial of FAPE.

Parent’s concern is that BOCES failed to implement the behavioral supports and strategies in Student’s IEP and BIP on May 16, 2023 and that BOCES has not implemented the special education and related services in her IEP since August of 2023.

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

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

A. Knowledge of Student’s May IEP and BIP

The SCO first determines whether BOCES satisfied its obligation under 34 C.F.R. § 300.323(d). Special Education Teacher is responsible for ensuring that teachers and other providers understand their responsibilities under students’ IEPs and BIPs. (FF # 57.) In addition to providing them with summary documents, she sends weekly emails, holds monthly trainings for paraprofessionals, and models interventions in the classroom. (FF #s 58, 59.) Teacher and Special Education Teacher attended the meetings where Student’s May IEP and BIP were written. (FF # 60.) Those working with Student also had a binder with visual supports for Student and a summary of her BIP. (FF # 62.) Teacher and Special Education Teacher talked with Paraprofessional 1 about how to support Student. (FF #s 59, 60.) Although Paraprofessional 2 does not remember seeing Student’s IEP or BIP, she was aware of several of her accommodations and would have had Student’s binder with more information. (FF #s 61-64.) Thus, the SCO finds

and concludes that BOCES ensured Student's teachers and providers were aware of their responsibilities under the May IEP and BIP and no violation of 34 C.F.R. § 300.323(d) occurred.

B. Implementation on May 16, 2023

Parent's concern is that BOCES did not implement the strategies in Student's May IEP and BIP before placing her in a hold on May 16, 2023. The SCO agrees.

Student's May IEP requires several accommodations including processing time between directions and co-regulation strategies. (FF # 43.) It also includes an SEL goal for Student to decrease target behaviors, including refusal and aggression. (FF # 37.) This goal was to be supported with 60 MPM from a mental health provider. (FF # 45.) However, School Psychologist had yet to start providing Student with direct services before this incident. (FF # 82.) Based on the FBA, Student's May BIP concluded that the primary functions of her behavior were avoidance and attention. (FF # 49.) As such, the May BIP required ignoring inappropriate behavior and not reinforcing it with attention. (FF #s 51, 52.) To help avoid behaviors, the May BIP required clear expectations and offering breaks before a behavior occurs. (FF # 50.)

On May 16, Student was upset, and Teacher tried to explain why she was not getting a prize. (FF # 83.) She was screaming and went under Teacher's table. (FF # 83-85.) With clear expectations, Student should have already understood what she needed to do to get a prize. (FF # 50.) Once Student escalated, the BIP required that staff ignore the behavior. (FF #s 51, 52.) Instead of ignoring the behavior, Paraprofessional 2 rewarded Student with attention, asking her to come out from under the table. (FF # 84.) Then, once Student started kicking, instead of removing other stools from her reach, Paraprofessionals 1 and 2 immediately implemented a hold. (FF # 86.)

For these reasons, the SCO finds and concludes that BOCES failed to implement Student's IEP and BIP on May 16, 2023, in violation of 34 C.F.R. § 300.323.

C. Implementation since August 2023

Parent's concern is that BOCES has not provided Student with the special education and related services in her IEP since August 2023.

The 2023-2023 school year started on August 15, 2023, but Student has yet to return. (FF # 128, 129.) BOCES remains ready and willing to implement her IEP and BIP at School. (FF # 136.) They have also offered various suggestions and supports to help get Student to School, including meetings in a public place, having Grandparent accompany Student, social stories, using incentive charts and a slow reintroduction. (FF #s 115, 130.) Student has a fear of going to School which predates the May 16 incident. (FF # 126.) She has also been back in the School building and around various staff members since that time. (FF # 128.) She has not exhibited any distress or fear upon seeing staff. (*Id.*)

The SCO has no doubt that Student has expressed fear about returning to School, as she has before. (FF # 126.) The SCO also recognizes that Student likely had bruising and that watching videos of May 16 may have been traumatizing for Parent. (FF # 97.) However, other than meeting at the public library, Parent has been unwilling to work with BOCES on any other steps to get Student back in school until BOCES sends someone to her home. (FF # 136.)

Because Parent is choosing to keep Student home from School while BOCES is ready and able to implement her IEP, the SCO finds that BOCES has not failed to implement Student's IEP in this respect and no violation of 34 C.F.R. § 300.323 occurred.

D. Materiality of Failure to Implement

Where the definition of a FAPE specifically references delivery of special education and related services consistent with an IEP, the failure to implement an IEP can result in a denial of a FAPE. 34 C.F.R. § 300.17; ECEA Rule 2.19. However, not every deviation from an IEP's requirements results in a denial of a FAPE. *See, e.g., L.C. and K.C. v. Utah State Bd. of Educ.*, 125 Fed. App'x 252, 260 (10th Cir. 2005) (holding that minor deviations from the IEP's requirements which did not impact the student's ability to benefit from the special education program did not amount to a "clear failure" of the IEP); *T.M. v. Dist. of Columbia*, 64 IDELR 197 (D.D.C. 2014) (finding "short gaps" in a child's services did not amount to a material failure to provide related services). Thus, a "finding that a school district has failed to implement a requirement of a child's IEP does not end the inquiry." *In re: Student with a Disability*, 118 LRP 28092 (SEA CO 5/4/18). Instead, "the SCO must also determine whether the failure was material." *Id.* Courts will consider a case's individual circumstances to determine if it will "constitute a material failure of implementing the IEP." *A.P. v. Woodstock Bd. of Educ.*, 370 Fed. App'x 202, 205 (2d Cir. 2010).

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

Here, BOCES failed to implement Student's IEP and BIP for a single day on May 16, 2023. Both the IEP and BIP had just been finalized earlier that month. (FF #s 27, 49.) Although Student's providers were made aware of their responsibilities, it is likely they were still getting used to the new supports and strategies. (FF #s 60, 62-64.) There is no evidence to suggest they were routinely failing to implement the May IEP and BIP, and they have not had a chance to implement either since. (FF # 128.) Thus, the SCO finds and concludes that a failure to implement Student's supports during one incident on one day is not a material failure, and that it did not result in a denial of FAPE.

Conclusion to Allegation No. 5: BOCES failed to provide Parent with periodic reports of Student's progress on her IEP goals, in violation of 34 C.F.R. § 300.320(a)(3). This violation resulted in a denial of FAPE.

Parent's concern is that District has not provided her with periodic reports on Student's progress since December of 2022.

IEPs must include a description of how a child's progress towards their annual goals will be measured and when parents will be provided with periodic reports on the progress a student is making toward the student's annual goals. 34 C.F.R. § 300.320(a)(3). Appropriate goals should be clear enough that a stranger, or person unfamiliar with the IEP, would be able to implement the goal, monitor student's progress on the goal and determine whether that progress was satisfactory. *Mason City Cmty. Sch. Dist.*, 46 IDELR 148 (SEA IA 2006).

Here, BOCES expects providers to send out progress reports with every report card. (FF # 66.) Since District issues report cards every quarter, Parent should have received progress reports quarterly. (*Id.*) Parent received a second quarter update on Student's progress in December 2022. (FF # 69.) However, no meaningful update was provided as to Student's progress on the social emotional wellness goal as the information provided was not relevant to the goal. (FF #s 71, 72.) Similarly, the update on the self-determination goal also did not match that goal. (FF #s 73, 74.) Parent did get updates on Student's academic goals in December of 2022. (FF #s 75, 76.)

For BOCES, in quarters when an IEP team meeting occurs, the IEP stands as the progress report. (FF # 68.) IEPs must include clear and measurable goals so that a student's progress can be monitored to determine if it was satisfactory. *Mason City Cmty. Sch. Dist.*, 46 IDELR 148. General evaluation data or results from universal assessments does not answer the question of whether a student has made adequate progress on their *individualized* goals. Thus, the SCO finds and concludes that for an IEP or evaluation to stand as progress report, it must include specific information about the student's progress on their unique goals.

In this case, both the March Evaluation and the May IEP include progress data for Student's prior goals, but neither contained information beyond what was provided to Parent in December 2022. (FF # 77.) Thus, the SCO finds that Parent did not receive a progress report for the third quarter.

Because Parent did not receive a progress report in third quarter and the prior progress reports did not contain information about Student's progress on two of her goals, the SCO finds and concludes that BOCES failed to provide periodic reports of Student's progress, resulting in a procedural violation of 34 C.F.R. § 300.320(a)(3).

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

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

Here, throughout the spring of 2023, Parent and BOCES were engaged in a lengthy discussion about Student's needs and services. (FF #s 5-32.) At the same time, Parent did not have any data on how Student had progressed on her social emotional or self-determination goal. (FF #s 71-74, 77, 78.) She was also missing any data on how Student was progressing on her academic goals in the second semester. (FF #s 77, 78.) Thus, the SCO finds and concludes that the failure to provide Parent with quarterly progress reports significantly impeded her opportunity to participate in the decision-making process regarding Student's eligibility and the development of the May IEP, resulting in a denial of FAPE.

Conclusion to Allegation No. 6: BOCES provided Parent with PWN of its decision not to conduct the additional evaluations she requested and no violation of 34 C.F.R. § 300.303(a)(2) occurred.

Parent's concern is that BOCES did not respond to her request for a reevaluation of Student in August 2023.

Districts must ensure that a reevaluation of a child with a disability is conducted if "the child's parent or teacher requests a reevaluation." 34 C.F.R. § 300.303(a)(2). Reevaluations cannot occur more than once a year, unless the parent and district agree otherwise, and reevaluations must occur at least once every three years, unless the parent and district agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b). "Once a parent requests evaluation, the school district has two choices: agree to evaluate the child and obtain parental consent to conduct the evaluation or deny the request to evaluate and provide parent with written notice explaining its decision." *Poudre School District*, 118 LRP 28104 (SEA CO 02/5/2018).

Here, in preparation for, and during, the August 29 IEP team meeting, Parent requested additional social emotional and ASD assessments of Student. (FF # 111.) After the August IEP meeting, BOCES issued a PWN declining to conduct additional assessments of Student. (FF # 118.) BOCES did not determine additional assessments were warranted because they already had sufficient information from the two prior BOCES' evaluations and the IEE. (FF # 120.) BOCES also declined to reconsider whether Student was eligible under the ASD category because the May IEP was already designed to meet all of Student's "educationally identified needs." (FF # 121.)

Because BOCES provided Parent with PWN explaining its decision not to conduct the requested evaluations, the SCO finds and concludes that no violation of 34 C.F.R. § 300.303(a)(2) occurred.

Conclusion to Allegation No. 7: The August PWN contained the required information and was sufficiently clear. No violation of 34 C.F.R. § 300.503 occurred.

Parent's concern is that BOCES did not issue appropriate PWN of its decisions on August 29, 2023.

The IDEA requires PWN to be provided to the parents of a child with a disability within a reasonable time before the public agency:

- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

34 C.F.R. § 300.503(a).

PWN must include: (1) a description of the action proposed or refused by the district; (2) an explanation of why the district proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report used by the district as a basis for the action; (4) a statement that the parents of a child with a disability have protections under the procedural safeguards, and the means by which a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the information; (6) a description of other options the IEP team considered and the reasons why those options were rejected; and (7) a description of any other factors relevant to the district's proposal or refusal. 34 C.F.R. § 300.503(b)(1-7). The notice must be "written in language understandable to the general public." *Id.* at § 300.503(c).

Adequately identifying the specific action being proposed or refused is essential because the primary purpose of PWN is to help parents understand the basis for disagreement and whether to seek resolution of the dispute through the available procedural safeguards. *See Letter to Boswell*, 49 IDELR 196 (OSEP 2007); *Douglas Cnty. Sch. Dist.*, 118 LRP 35788 (SEA CO 7/6/18).

Here, at the August IEP meeting, Parent requested additional evaluations, a change in Student's eligibility and a change in Student's educational placement. (FF #s 110, 111, 114.) BOCES refused to change Student's eligibility because DD was the most appropriate and they were not seeing behaviors in all three areas required for eligibility under ASD. (FF # 114.) BOCES also refused to conduct additional assessments or to change Student's placement to homebound because they did not have data to support such a significant change in Student's placement. (FF #s 118-120.)

After the meeting, District issued a PWN which included BOCES' refusal to make all three changes. (FF #s 118, 120.) They also explained why BOCES refused to make those changes, including the records and assessments used as a basis for those decisions. (FF #s 119-122.) The August PWN notifies Parent that she has protections and can contact Special Education Teacher for a copy of the procedural safeguards or help understanding the information. (FF #125.)

According to the August PWN, the August IEP team also considered addressing these concerns at that meeting but chose to schedule another meeting instead. (FF # 123.) Finally, the other factors

considered by the August IEP team were (1) addressing other Parent concerns that were not related to special education and (2) a plan to help Student get to school. (FF # 124.)

The SCO recognizes that the PWN could have been clearer, instead of simultaneously refusing some requests and offering to consider them at a future meeting. (FF # 118.) However, the fact that BOCES was willing to reconsider some decisions at a future meeting does not change the fact that BOCES was refusing to make those changes at that time. The SCO finds and concludes that the August PWN was sufficiently clear for the general public to understand that BOCES was not making any of Parent’s requested changes at that time.

Thus, the SCO finds and concludes that the August PWN included all seven required components and was written in clear enough language, and no violation of 34 C.F.R. § 300.503 occurred.

Conclusion to Allegation No. 8: Because both holds lasted less than one minute, Student was not restrained within the meaning of the PPRA. No violation of the PPRA occurred.

Parent’s concern is that BOCES inappropriately restrained Student on May 16, 2023.

A. The PPRA’s Definition of “Restraint”

The SCO must first determine whether Student was “restrained” within the meaning of the PPRA.

The PPRA defines restraint, in relevant part, as follows:

“Restraint” means any method or device used to involuntarily limit freedom of movement, including bodily physical force, mechanical devices, or chemicals. . . .

C.R.S. § 26-20-102(6). “Physical restraint” is defined:

“Physical restraint” means the use of bodily, physical force to involuntarily limit an individual’s freedom of movement *for more than one minute*; except that “physical restraint” does not include the holding of a child by one adult for the purposes of calming or comforting the child.

C.R.S. § 26-20-102(5) (emphasis added).

B. Hold 1

Here, the first time Paraprofessionals 1 and 2 made physical contact with Student was when they used a two-person hold to move Student from Teacher’s desk to the area outside the calm down room. (FF #s 86-88.)

Hold 1 started inside the classroom, which cannot be seen on video. (FF # 86.) Paraprofessionals 1 and 2 can be seen on surveillance cameras carrying Student down the hallways to the calm down room. (FF #s 87, 88.) In the hallway, the hold lasts from 12:05:49 until 12:06:20, or 31 seconds. (*Id.*) Paraprofessionals 1 and 2 both recall Hold 1 lasting less than one minute. (FF # 89.) Additional staff left the classroom 45 seconds before Student can be seen on video, or one minute and sixteen seconds before Hold 1 ended, because staff had things under control in the classroom. (FF # 85.) Because of this, and considering the size of the classroom, the SCO finds that the portion of the hold inside the classroom was shorter than the portion in the hallway. In total, the SCO finds and concludes that the entirety of Hold 1 lasted less than one minute. As such, the SCO finds and concludes that Hold 1 was not a “restraint” within the meaning of the PPRA.

Although this was not a “restraint,” the SCO, in consultation with CDE Content Specialist 2, has concerns about the implementation of Hold 1, including how Paraprofessionals 1 and 2 chose to transport Student and the fact that Student was carried when she was not supporting her own weight. (FF # 87.) The SCO recognizes that BOCES provided Paraprofessionals 1 and 2 with additional training after the fact. (FF # 99.) However, the SCO cautions BOCES about the importance of appropriately training staff *before* implementing any restraints. Rule 2620-R-2.03.

C. Hold 2

The second potential restraint on May 16, 2023 occurred when Paraprofessionals 2 and 3 moved Student into the calm down room. (FF #s 91-93.)

Student reappears on the camera at 12:07:49 holding hands with Paraprofessional 3. (FF # 91.) At that point Student appears to be walking willingly. Because Student is walking while Paraprofessional 3 holds her hand, the SCO finds and concludes that the hold constituted minimal physical contact during an escort and not a physical restraint. *See Boulder Valley RE-2 Sch. Dist.*, 120 LRP 14036 (SEA CO 3/16/20).

However, at 12:07:53 she begins pulling away from Paraprofessional 3 as they approach the calm down room, and he does not release her. (FF 91.) This is the earliest point at which he could be said to be involuntarily limiting her freedom of movement, or the start of Hold 2. As they get closer to the calm down room, Student sits down at 12:08:26, and Paraprofessional 2 picks up her other arm to help Paraprofessional 3 propel Student inside. (FF # 92.) By 12:08:33 Paraprofessionals 2 and 3 have released Student. (FF # 93.)

Even if the SCO assumes Student was in a hold from the moment she began pulling away from Paraprofessional 3, the entire potential restraint lasted 40 seconds from that point. (FF #s 91-93.) Because Hold 2 lasted less than one minute, the SCO finds and concludes that Hold 2 was not a “restraint” within the meaning of the PPRA.

Allegation No. 8, subparts a through g, concern PPRA requirements that apply only when a student has been restrained. Because the SCO does not find that the BOCES “restrained” Student within the meaning of the PPRA, BOCES did not need to meet these requirements. For these reasons, the SCO finds and concludes that BOCES did not violate the PPRA by improperly restraining Student on May 16, 2023.

Conclusion to Allegation No. 9: BOCES’ placement of Student in the calm down room on May 16, 2023 did not constitute seclusion because Student was not alone. As a result, no violation of the PPRA occurred.

Parent’s concern is that BOCES inappropriately secluded Student on May 16, 2023.

A. The PPRA’s Definition of “Seclusion”

“Seclusion”, within the scope of the PPRA, means “the placement of a student *alone* in a room from which egress is involuntarily prevented.” Rule 2620-R-2.00(9) (emphasis added). Seclusion explicitly excludes: (a) placement of a student in residential services in his room for the night; and (b) time-out, where a student is removed from “potentially rewarding people or situations.” *Id.* Any space used for seclusion “must have adequate lighting, ventilation, and size.” *Id.* 2620-R-2.02(2)(e)(ii). “To the extent possible under the specific circumstances, the space should be free of injurious items.” *Id.*

Here, Student was placed in the calm down room on May 16, 2023. (FF # 92.) The calm down room does not have a door. (FF # 80.) Instead, throughout Student’s time in that room, a staff member is in the doorway. (FF #s 95, 96.) As such, the SCO finds and concludes that Student was never alone in the calm down room on May 16, 2023.

Again, for seclusion to occur, 1) a student must be placed *alone* in a room and 2) egress must be involuntarily prevented. Rule 2620-R-2.00(9) (emphasis added). Because Student was never alone, the SCO finds that Student was not “secluded” within the meaning of the PPRA on May 16, 2023. Allegation No. 9, subparts a through g, concern PPRA requirements that apply only when a student has been secluded. Because the SCO does not find that BOCES “secluded” Student within the meaning of the PPRA, BOCES did not need to meet these requirements.

For these reasons, the SCO finds and concludes that the BOCES did not violate the PPRA by improperly secluding Student on May 16, 2023.

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

Pursuant to its general supervisory authority, CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in District. 34 C.F.R. § 300.151(b)(2).

Indeed, the U.S. Department of Education has emphasized that the state complaint procedures are “critical” to the SEA’s “exercise of its general supervision responsibilities” and serve as a “powerful tool to identify and correct noncompliance with Part B.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46,601 (Aug. 14, 2006).

Here, the SCO is concerned that BOCES’ failure to develop and implement an IEP with appropriate behavior interventions and supports is systemic in nature and likely to impact the future provision of services to IDEA-eligible students in BOCES. Specifically, BOCES failed to develop an IEP or BIP that appropriately addressed Student’s needs and the plan it developed lacked proactive behavior supports. (FF # 54.) It then struggled to implement the plan it did have on May 16, 2023. When asked to add additional PBIS to Student’s plans, Director responded that PBIS is only a general education intervention. (FF # 116.) For students whose behavior impedes their learning or the learning of others, IDEA requires the use of PBIS and other strategies to address that behavior. 34 C.F.R. § 300.324(a)(2). The concern for the SCO is that BOCES’ lack of understanding around the importance of PBIS may impact other students whose behavior is impeding learning. As such, the SCO will order remedies designed to ensure this does not impact the future provision of services to students in BOCES.

The SCO is also concerned that BOCES’ failure to report Student’s progress is systemic in nature. In this case, BOCES failed to report progress on some of Student’s goals for the entire year and failed to report progress on any goals for the third quarter. (FF #s 72-78.) The concern for the SCO is that District may be routinely issuing progress reports that bear no relationship to the goal in question or failing to track and report progress in quarters in which an IEP team meets. As such, the SCO will order remedies intended to address this systemic issue.

Finally, nothing in the Record suggests that the other violations—failure to schedule the May 4 IEP team meeting at a mutually agreeable time and place, convening an IEP team meeting without Parent present and failing to develop an IEP with all the special education and related services Student required—are systemic in nature. Instead, the SCO finds that these violations were likely the result of BOCES’ contentious relationship with Parent, the frequency with which the IEP team met and BOCES efforts to design services that were appropriate for Student’s recently changing/increasing behavior needs. The SCO thus finds that these violations are unlikely to impact the future provision of services in District.

REMEDIES

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

- a. Failing to schedule an IEP team meeting at a mutually agreeable time and place, in violation of 34 C.F.R. § 300.322(a);

- b. Failing to convene an appropriate IEP team, including Parent, in violation of 34 C.F.R. § 300.321(a);
- c. Failing to develop an IEP that was appropriately tailored to Student’s needs, in violation of 34 C.F.R. § 300.320(a)(4);
- d. Failing to develop an IEP that adequately addressed Student’s behavior needs, in violation of 34 C.F.R. § 300.324(a)(2)(i);
- e. Failing to implement Student’s IEP and BIP, in violation of 34 C.F.R. § 300.323; and
- f. Failing to provide Parent with progress reports, in violation of 34 C.F.R. § 300.320(a)(3).

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

1. Corrective Action Plan

- a. By **Friday, January 5, 2024**, BOCES shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom BOCES is responsible. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm BOCES’ timely correction of the areas of noncompliance.

2. Final Decision Review

- a. Director, School Psychologist, Principal and Special Education Teacher must review this decision, as well as the requirements of 34 C.F.R. §§ 300.320(a), 300.321, 300.322, 300.323, and 300.324(a)(2). If these individuals are no longer employed by District or BOCES, BOCES may substitute individuals occupying identical roles to demonstrate compliance with this remedy. This review must occur no later than **Friday, February 2, 2024**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Friday, February 9, 2024**.

3. Training

- a. Director, School Psychologist, OT, Special Education Teacher and all special education teachers at School must attend and complete training provided by CDE on progress monitoring and reporting. If these individuals are no longer employed by District or BOCES, BOCES may substitute individuals occupying identical roles

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

- b. Director, School Psychologist, Principal, Special Education Teacher and all special education teachers and all paraprofessionals at School must attend and complete training provided by CDE on PBIS for IDEA-eligible students. If these individuals are no longer employed by District or BOCES, BOCES may substitute individuals occupying identical roles to demonstrate compliance with this remedy. This training will address, at a minimum, the requirements of 34 C.F.R. § 300.324 and the related concerns addressed in this Decision.
- c. Director and CDE Special Education Monitoring and Technical Assistance Consultant will determine the time, date, and format of the trainings. This training may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast.
- d. Such training shall be completed no later than **Friday, February 9, 2024**. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to CDE no later than **February 16, 2024**.

4. IEP Meeting

- a. District must convene Student's IEP team, at a mutually agreeable date and time, by **Thursday, February 29, 2024**. In consideration of the above training as well as all recent evaluations and IEEs of Student, Student's IEP team should review and, as necessary, revise (a) Student's special education and related services, and (b) the behavior supports and services in Student's IEP and BIP, with the requirements of 34 C.F.R. §§ 300.320(a), 300.324(a), to address Student's unique needs and the concerns identified in this Decision.
 - i. If Parent refuses to participate in the IEP meeting, BOCES may convene a meeting without her, provided BOCES diligently attempts to secure her participation at a mutually agreeable time and place and documents such efforts. A determination that BOCES diligently attempted to secure her participation rests solely with CDE. Regardless, unless Student is withdrawn from District, BOCES must still convene Student's IEP team.
- b. By Friday, March 14, 2024, BOCES must provide notice of the IEP meeting, proof of IEP team members such as a signature page, and a finalized IEP and BIP to the CDE Special Education Monitoring and Technical Assistance Consultant.

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

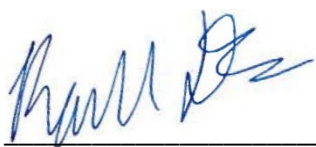
Colorado Department of Education
Exceptional Student Services Unit
Attn.: CDE Special Education Monitoring and Technical Assistance Consultant
1560 Broadway, Suite 1100
Denver, CO 80202-5149

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

CONCLUSION

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

Dated this 28th day of November, 2023.



Rachel Dore
State Complaints Officer

APPENDIX

Complaint, pages 1-11

- Exhibit 1: Correspondence
- Exhibit 2: IEPs
- Exhibit 3: Diagnosis
- Exhibit 4: Health Care Plan
- Exhibit 5: Paraprofessional Assessment

Response, pages 1-36

- Exhibit A: IEPs
- Exhibit B: BIPs
- Exhibit C: Evaluations
- Exhibit D: PWN
- Exhibit E: IEP Documentation
- Exhibit E.s.: Recording
- Exhibit E.t.: Recording
- Exhibit E.u.: Recording
- Exhibit E.v.: Recording
- Exhibit E.w.: Recording
- Exhibit E.x.: Recording
- Exhibit E.y.: Recording
- Exhibit F: Service Logs
- Exhibit G: Behavior Records
- Exhibit G.l.: Video
- Exhibit G.l.i.: Video
- Exhibit H: Attendance
- Exhibit I: Progress Reports
- Exhibit J: Restraint Documentation
- Exhibit K: Restraint Review
- Exhibit L: CPI Training
- Exhibit M: School Calendars
- Exhibit N: BOCES' Policies
- Exhibit O: Correspondence
- Exhibit O.e.: Video
- Exhibit P: Staff Contacts
- Exhibit Q: Verification of Delivery
- Exhibit R: Recent Records

Reply, pages 1-18

- Exhibit 6: Reintegration Plan
- Exhibit 7: Video
- Exhibit 8: Video
- Exhibit 9: Video
- Exhibit 10: Video
- Exhibit 11: Video
- Exhibit 12: Video
- Exhibit 13: Verification of Delivery

Telephone Interviews

- Parent: October 23, 2023
- School Psychologist: October 30, 2023
- Paraprofessional 2: October 30, 2023
- Special Education Teacher: October 30, 2023
- Principal: October 30 and 31, 2023
- Director: October 31 and November 6, 2023
- Paraprofessional 1: November 7, 2023