

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

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**State-Level Complaint 2023:505**  
**San Luis Valley BOCES**

**DECISION**

**INTRODUCTION**

On January 30, 2023, the parents (“Parents”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> filed a state-level complaint (“Complaint”) against a member district (“District”) of the San Luis Valley BOCES (“BOCES”). On February 1, 2023, Parents requested an amendment to the Complaint solely to expand the timeframe of the original allegations. Because the requested amendment involved the same legal issues and required no expansion of the SCO’s request for documentation from the BOCES, the SCO allowed the amendment.<sup>2</sup> The State Complaints Officer (“SCO”) determined that the Complaint, as amended, identified four allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. § 300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year before the date the complaint was filed. Accordingly, this investigation will be limited to the period of time from January 30, 2022 through February 1, 2023 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 the BOCES denied Student a Free Appropriate Public Education (“FAPE”) because the BOCES:

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

<sup>2</sup> See United States Department of Education, Office of Special Education and Rehabilitative Services (“OSERS”), *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46603 (Aug. 14, 2006) (providing guidance on amended complaints).

1. Failed to properly implement Student’s IEP from November 2, 2022 to February 1, 2023 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; and
  - b. Failing to provide the accommodations required by Student’s IEP.
2. Determined Student’s educational placement outside of a properly convened IEP meeting, from November 9, 2022 to February 1, 2023, in violation of 34 C.F.R. § 300.116 and ECEA Rule 4.03(8).
3. Failed to educate Student in the least restrictive environment as required by Student’s IEP from mid-November 2022 to February 1, 2023, in violation of 34 C.F.R. §§ 300.314, 300.317, and 300.323.
4. Failed to conduct a manifestation determination review (“MDR”) within ten school days of the BOCES’s decision to change Student’s placement on November 9, 2022, in violation of 34 C.F.R. § 300.530(e).

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire record<sup>3</sup> and investigation, the SCO makes the following FINDINGS OF FACT (“FF”):

#### **A. Background**

1. Student is ten years old and currently attends fourth grade at a District elementary school (“School”). *Exhibit A*, p. 2. District is a member of the BOCES. *Exhibit H*, p. 87. The BOCES is responsible for providing FAPE to all IDEA-eligible children with disabilities attending a school in its member districts. *Id.* at pp. 87-88; ECEA Rule 2.02.
2. Student is eligible for special education and related services under the disability categories of Serious Emotional Disability (“SED”) and Other Health Impairment (“OHI”). *Exhibit A*, p. 2.
3. Student is a kind young man who enjoys playing sports. *Interviews with Parent, Stepparent, and Special Education Teacher*. He is competitive and especially loves baseball. *Id.* He is smart and works hard to complete his assignments in class. *Exhibit A*, p. 3. When he becomes upset, however, he responds with physical aggression toward himself and others, and by shutting down. *Id.* at p. 20. During both the 2021-2022 and 2022-2023 school years, Student was involved in behavioral incidents including physically attacking other students, throwing objects, hitting himself, hiding, and shutting down. *Id.* at pp. 20, 23-24.

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<sup>3</sup> The appendix, attached and incorporated by reference, details the entire Record.

4. In third grade, Student began seeing a private therapist and was diagnosed with ADHD, severe anxiety, and autism. *Id.* at p. 43; *Interview with Parent*. At this time, his parents asked School to evaluate him for special education services. *Interviews with Parent and Stepparent*. An IEP was finalized on May 18, 2022 (“May 2022 IEP”). *Exhibit A*, p. 37. This IEP was in effect until its revision on January 25, 2023. *Id.* at p. 2.

#### **B. Student’s May 2022 IEP**

5. The May 2022 IEP reviewed Student’s present levels of performance. *Id.* at pp. 39-42. Student’s general education teacher reported that he was doing well in reading, writing, and math. *Id.* at p. 41. Parents voiced concerns regarding Student’s “elevating behaviors and aggression at school,” and the IEP Team agreed that “some self-regulation needs are present.” *Id.* at p. 42.
6. The May 2022 IEP stated that Student, due to his disability, needed social-emotional and self-regulation supports and education. *Id.* at p. 43. It provided that he would receive support in the general education setting following the “push-in” model, stating that “[t]his setting will help [Student] thrive because [Student] will be learning right alongside [his] same leveled peers.” *Id.* It also stated that he would benefit from occupational therapy and social emotional support outside of the classroom following the “pull-out” model. *Id.*
7. The two annual goals in Student’s May 2022 IEP targeted his abilities to regulate his emotions and to interact socially. *Id.* at pp. 44-45. Goal 1 was “to increase his independence and success within the classroom environment” and “demonstrate improved self and emotional regulation skills.” *Id.* at p. 44. Goal 2 was “to improve interpersonal effectiveness” by identifying strategies that would allow him to “avoid and/or resolve interpersonal conflicts . . . across school settings.” *Id.* at p. 45.
8. The May 2022 IEP required that Student receive direct occupational therapy outside of the general education classroom for 270 minutes per semester. *Id.* at p. 48. These services would “address gross/fine motor, visual motor/perceptual, sensory integrative, attention, executive function, self-regulation, life skills, and technology access as needed.” *Id.* He was also to receive direct psychological services inside the classroom for 60 minutes per month. *Id.* These services would “address emotional self-regulation skills.” *Id.*
9. The May IEP provided a number of accommodations including small groups for testing, the use of social groups, frequent breaks, and “[a]ccess to a Cozy corner” (the “Cozy Corner”). *Id.* at p. 46. The May IEP did not provide details or direction for teachers regarding Student’s use of the Cozy Corner. *See id.*

10. Student's Least Restrictive Environment ("LRE") was determined to be in the general education setting at least 80 percent of the time, with a specific calculation of 99.3 percent of time in that setting. *Id.* at 49.

11. The IEP Team expressly considered and rejected the option of pulling Student out of the general education setting:

Other options considered and the reasons each option was rejected:

Using the full pull-out model, students will miss grade level content widening the student achievement gap. Professionals at [School] are trained to differentiate their instruction for ALL students. The team feels that the full pull-out model will hinder grade level academic, social, and emotional growth of our Special Education students.

*Id.* at p. 49.

12. Although the IEP Team considered conducting a Functional Behavior Assessment ("FBA") and developing a Behavioral Intervention Plan ("BIP"), this idea was rejected because Student had recently started new medication and therapy. *Id.* at p. 50. Development of a BIP was postponed until the next school year. *Id.*

### **C. The October 2022 FBA and BIP**

13. At the beginning of Student's fourth grade year, School conducted an FBA and began developing a BIP, which was completed on October 14, 2022. *Exhibit A*, p. 14; *Interview with Special Education Teacher*.

14. The FBA documented Student's behavioral incidents including self-harm, physical aggression toward other students, throwing objects, and hiding. *Id.* at pp. 22, 24. In one incident, Student screamed and threw things in the classroom until all other students were evacuated from the classroom. *Id.* at p. 25. In October 2022, Student received four days of in-school suspension for behavioral incidents. *Response Section 4*, p. 2.

15. A BIP was developed from the FBA and its strength-based profile section stated that Student advocated for himself by asking for help, had the ability to do grade-level or higher math, scored in the average range for academic testing, and prioritized receiving approval from adults and his peers. *Exhibit A*, pp. 28-29.

16. The BIP identified Student's target behavior as aggression. *Id.* at p. 29. It described this aggression as "disruptive behaviors such as pushing desk away or throwing objects from his

desk while continuing to yell” motivated by a goal to get “stimulation from peers and adults which results in him not doing the task, likely serving the purpose of escape/avoidance and attention.” *Id.*

17. The BIP’s strategies/outcomes worksheet provided strategies for managing behavior based on Student’s individual needs, including allowing his use of the Cozy Corner. *Id.* at p. 30. The BIP specifically provided strategies tailored to Student’s needs in peer interaction:

- “Provide [Student] with direct instruction on using his de-escalation space.”
- “Staff needs to address [Student’s] non-compliance in a private manner, not in front of peers.”
- “Encourage [Student’s] involvement in clubs and enjoyable activities to increase positive connections with the school.”
- “[Student] needs to develop peer-conflict resolution practices.”
- “Rewards should include positive attention with adults and/or peers, positive phone calls home, and access to preferred activities; [Student] thrives on both adult and peer attention/approval. He wants to please.”

*Id.*

18. The BIP contained a crisis intervention plan. *Id.* at p. 32. Its purpose was to stop Student from committing self-harm or threatening the safety of other students. *Id.* It described three levels of increasingly disruptive behavior with escalating staff responses. *Id.* at pp. 32-33. The Cozy Corner accommodation was provided as a staff response for the first and third levels. *Id.* For level one behavior, a teacher would use a non-verbal gesture or calm tone to guide Student to go to the Cozy Corner. *Id.* at p. 32. For level three behavior, a teacher would guide Student to the Cozy Corner to calm down. *Id.* at p. 33.

19. The BIP provided a “criterion for success”: “[Student] needs access to general education classroom. The amount of time [Student] spends in the general education classroom is being limited by behaviors and the time it takes [Student] to be able to return to the general education classroom, after becoming frustrated.” *Id.*

20. The BIP indicated that Student’s behavior would be monitored by Special Education Teacher, who also kept Student’s teachers and other providers informed of the requirements of Student’s IEP and BIP. *Id.* at p. 34; *Interview with Special Education Teacher.*

#### **D. The Turn It Around Program**

21. At the beginning of the 2022-2023 school year, District first implemented the Turn It Around Program (“TIA”) throughout the District. *Interview with Principal*. This program occurs in a classroom that is separate from the general education classroom. *Response Section 3 (“Section 3”), p. 4*. The program and classroom are referred to interchangeably by School staff as the “Turn It Around Room” or, simply, “TIA.” *Interview with Principal*.
22. School’s TIA classroom is in a modular building behind the main school building. *Id.* Of this building’s two rooms, one is used for TIA and the other for elementary school art class. *Id.* The TIA room has doors, windows, an electronic whiteboard, and the other standard amenities and equipment found in the regular classrooms. *Id.*
23. District’s intended goal for TIA is “supporting students and helping them manage their behaviors so that they can successfully participate in the regular education setting.” *Section 3, p. 4*. District’s TIA policy states that, “[w]ithin this program we support students with behavioral needs, no matter their identification.” *Id.*
24. School’s leadership similarly intended that TIA would provide extra behavioral interventions for an extended period of time without the punitive aspects of in-school suspension. *Interview with Principal*. The goal was to provide necessary behavioral supports while ensuring the safety of the students both in and out of TIA. *Id.*
25. TIA is a form of discipline within School’s Progressive Discipline Guideline Matrix alongside measures such as contacting parents, in-school suspension, out-of-school suspension, and recommendation for expulsion. *CDE Exhibit 1, p. 19*. It is “a last resort” for situations where other measures, such as suspensions, have failed to result in corrected behavior. *Interviews with Principal and Behavioral Specialist*.
26. Placing a student in TIA is a disciplinary decision made by the Principal and Assistant Principal. *Interviews with Principal and Behavioral Specialist*.
27. A student’s schedule within TIA, any revision to that schedule, and the transition from TIA back to a regular classroom are determined by the student’s Response to Intervention Team (“RTI Team”). *Interview with Principal*. An RTI Team is formed when a student is exhibiting a recurring problem with academics, attendance, or behavior. *Id.* The RTI Team works on a plan to address the problem. *Id.* The RTI Team does not include the student’s parents. *Id.*
28. TIA has four “levels,” and the “leveled system is a way of increasing privileges as the behavior becomes more consistent and school-appropriate.” *Section 3, p. 5*.

29. Although the policy states that “[t]ime in the general education classroom is not treated as a privilege,” students’ time in the general education classroom increases as the students are approved to move up the levels. *Id.* at p. 5.
30. For example, students in Level 1 receive instruction through Zoom (a brand of video-conferencing software) or an online curriculum for a minimum of three weeks. *Id.* The policy states:

When students are assigned to the classroom [the “TIA room”], they will begin with a three-week minimum time assigned. Lessons, curriculum will be delivered remotely or online—depending on the availability of the teacher. If it’s possible for students to Zoom into lessons at specific times, that will be an option. If not, students will receive instruction through our standards based online— Odyssey ware curriculum. At the end of week three, teacher, admin. and the RTI team, will determine if student is ready to move to level 2 or if student will stay at level 1 for at least another 2 weeks.

*Id.* (*sic* throughout). At Level 2, students gain “flexibility with their schedule,” and “[p]ossible options include participation in lunch, recess, PE, core classes, with fading supervision, depending on student needs and desires.” *Id.* “Instruction and the schedule will stay the same as level 1 while the student is in the class.” *Id.* Beginning at Level 3, students may spend up to half a day outside the TIA room. *Id.* At Level 4, students attend regular classes for the entire day. *Id.* If a student has three negative behaviors in one day, the student is placed back in Level 1. *Id.*

31. School staff state that students in TIA have access to the general education setting via participation in regular classes via Zoom and interaction with other students whose behaviors also led them to be moved to the TIA room. *Section 3*, pp. 4-5; *Exhibit I*, p. 87; *Interviews with Principal, Fourth Grade Teacher, and Special Education Teacher*.
32. The TIA policy does not distinguish between students who have IEPs and those who do not, and School likewise implemented the TIA policy without distinguishing between such students. *Interview with Principal*.
33. Under BOCES policy, moving a student to TIA is not a change of placement. *Interview with BOCES Special Education Director*. The BOCES’s written policy for disciplining students with disabilities does not provide any guidance to determine whether an informal removal, such as moving a student to TIA, constitutes a disciplinary change of placement. *CDE Exhibit 4*.

### **E. The November 2, 2022 Incident**

34. The actions by School that motivated this Complaint were prompted by a behavioral incident on November 2, 2022. *See Complaint.*
35. On that day, Student's usual fourth grade general education teacher was out, and a substitute teacher ("Substitute Teacher") filled in. *Exhibit I*, pp. 220-21, 226-27; *Interviews with Principal, Fourth Grade Teacher, Special Education Teacher, Parent, and Stepparent.*
36. About five minutes before the end of classes that day, Student exchanged insults with another student—one who had been involved in some of Student's previous behavioral incidents. *Id.*
37. Student asked to use his Cozy Corner accommodation, but Substitute Teacher would not allow it. *Exhibit I*, pp. 226-27; *Interviews with Parent and Stepparent.*
38. Substitute Teacher had allowed Student to use the Cozy Corner multiple times earlier that day, as witnessed by Behavioral Specialist who visited the classroom frequently to check on Student. *Exhibit I*, p. 229; *Interviews with Behavioral Specialist and Special Education Teacher.*
39. Fourth Grade Teacher had provided notes for Substitute Teacher informing the substitute that Student had an IEP and BIP (although without providing the actual IEP or BIP), and Special Education Teacher told Substitute Teacher about Student's accommodations. *CDE Exhibit 2*, p. 493; *Interviews with Fourth Grade Teacher and Special Education Teacher.*
40. When the students exited to the hallway, Student ran up behind the other student, punched the other student several times, and then ran off. *Interviews with Principal and Fourth Grade Teacher.* This incident was recorded by School's hallway security cameras. *Id.*

### **F. Student's Removal to TIA in November-December 2022**

#### **Decision to Move Student to TIA**

41. The morning after the incident, Assistant Principal, Special Education Teacher, and Parents had a meeting. *CDE Exhibit 2*, p. 721. School informed Parents that Student would be suspended out of school for three school days. *Id.*
42. Separately, within two days of the incident, Principal, Assistant Principal, Fourth Grade Teacher, and Special Education Teacher informally determined, without input from Parents, that Student would be placed in TIA once he returned from out of school suspension. *Interviews with Principal, Fourth Grade Teacher, Parent, and Stepparent.*



43. Sometime between November 3, 2022 and November 8, 2022, Student's schedule for TIA was created by Student's RTI Team without input from Parents. *CDE Exhibit 2*, p. 685; *Interviews with Principal, Special Education Teacher, Parent, and Stepparent*.
44. On November 9, 2022, School held a "reintegration meeting" with the same RTI Team as well as BOCES Special Education Director, District Superintendent, Parents' Advocate, and Parents. *Section 3*, p. 7; *Exhibit I*, p. 228.
45. At this meeting, School officially notified Parents that Student would be placed in TIA and presented the TIA schedule to Parents. *Id.*
46. School explained that Student would be in TIA for three weeks and transition from TIA back to the regular classroom in the fourth week. *Id.* Because of the Thanksgiving holiday, this meant that Student would be in TIA for five calendar weeks from November 9, 2022 through December 16, 2022. *See Exhibit G*. Per Assistant Principal, School intended for Student to be fully integrated back into class "by the time we come back from Christmas break," which was January 9, 2023. *Section 3*, p. 7; *Exhibit G*.
47. Parents expressed concerns about Student's access to peer interaction while in TIA, his difficulty adjusting to schedule changes, and handling his anxiety with the change. *Section 3*, p. 7.
48. After the meeting, Special Education Teacher emailed Principal to express her concern that moving Student to TIA would be harmful in light of Student's social skill needs:

I do not agree with [Student] going to the TIA room every time [Fourth Grade Teacher] has a sub. Even though [Student's father] mentioned/requested it, it's not a good idea because [Student] will not have access to grade level content and will not be zooming with a sub in the room, that changes his LRE which we cannot do. Also, it goes against everything we are trying to do with [Student]. His parents . . . will argue that [it] takes him away from his peers and socialization which he already has a difficult time with.

*CDE Exhibit 2*, p. 544.

49. Nonetheless, Student was moved to TIA and returned full-time to the regular classroom only for the three school days just before Christmas break, which were the final exams period, from December 19, 2022 through December 21, 2022. *See CDE Exhibit 2*, p. 301 (Special Education Teacher writing, "[Student] will begin transitioning back into the classroom the week of December 12th. The goal is for him to be back into the classroom full time starting Monday, December 19th."); *Exhibit G*.

Student's Education in TIA in November-December 2022

50. Student's schedule in TIA, within the District's standard four-day school week, was as follows:

7:50 – 8:00	Circle
8:00 – 10:00	ELA [English Language Arts] Zoom
10:00 – 11:00	Motivational Video/High Intensity Break
11:00 – 11:35	SEL [Social and Emotional Learning] (Wednesday [with BOCES Mental Health Specialist]), (Monday, Tuesday, Thursday [with School's SEL Support staff])
11:35 – 12:05	Lunch ([with Behavioral Specialist] or Office)
12:10 – 1:30	Math Zoom
1:30 – 2:00	PE/High Intensity Break
2:00 – 2:45	Colorado History/Science with [Behavioral Specialist]
2:45 – 3:00	Check-in/walk with [School Counselor]
3:00 – 3:45	Book Study with [School staff]
3:45 – 3:55	Journal

*Section 3, p. 8.*

51. TIA was primarily staffed by Behavioral Specialist, who was properly credentialed as a substitute teacher. *Interviews with Principal and Behavioral Specialist.*
52. For part of Student's time in TIA, two other students—one third-grader and one fifth-grader—were also in TIA. *Interview with Behavioral Specialist.* Their stints in TIA did not fully overlap with Student's, and Student spent an unknown portion of his time in TIA as the only student. *Interviews with Behavioral Specialist, Parent, and Stepparent.*
53. When other students were not in TIA, the day's opening circle—a time in which the participants reflect on their emotional state and talk about their reactions to a discussion prompt—would include teachers. *Interview with Behavioral Specialist.*
54. For ELA and Math, Student and Behavioral Specialist would use Zoom, which displayed Fourth Grade Teacher's camera as well as the content that Fourth Grade Teacher shared to both her own classroom's electronic white board as well as Student's Zoom. *Interview with Behavioral Specialist.*
55. Student was the only fourth grade student joining the classroom in this manner, and students in that classroom would say "hey [Student]" when he joined. *Interviews with Behavioral Specialist and Fourth Grade Teacher.*

56. Although Student had the ability to ask questions audibly during class, he generally chose not to. *Id.* He and Behavioral Specialist would sometimes use Zoom’s “chat” function to ask questions through text. *Id.*
57. Fourth Grade Teacher would periodically talk to Student via Zoom during class. *Interview with Fourth Grade Teacher.* She would do some of his homework problems on her electronic whiteboard, which he could see. *Id.* She would provide in-person help to Student either at the very beginning or very end of the day, if he had questions. *Id.* Student would pick up his worksheets in the morning with Behavioral Specialist and drop them off for grading at the end of the day. *Interviews with Behavioral Specialist and Fourth Grade Teacher.* He could not participate in group work. *Interview with Fourth Grade Teacher.*
58. When one of the other students in TIA also needed to Zoom to class, Behavioral Specialist would use the other room in the modular building so they could Zoom in to their respective classes separately using iPads. *Interview with Behavioral Specialist.*
59. Technological difficulties occurred about once a week. *Interviews with Fourth Grade Teacher and Behavioral Specialist.* Student would occasionally intentionally disconnect from Zoom to avoid joining class. *CDE Exhibit 2, p. 732.*
60. While Student was in TIA, School continued to provide the occupational therapy and psychological services required by Student’s May 2022 IEP through the providers identified by his IEP. *Exhibit D, pp. 4-5, 8, 10.*
61. School increased Student’s psychological services in social-emotional learning (“SEL”) instruction during his time in TIA. *Section 3, p. 8.* The May 2022 IEP required 60 minutes of psychological services—specifically, SEL instruction—per month, and in TIA he received 35 minutes of SEL instruction per day. *Compare Exhibit A, p. 48 with Section 3, p. 8.*
62. At lunch time, the students in TIA would sit at a separate table in the cafeteria with Behavioral Specialist. *Id.* When one of the students in TIA had demonstrated no behavior issues, the student could invite a friend from the general student population to join them at the TIA table. *Id.*
63. For recess, physical education, and high intensity breaks, Student could play only with the other students in TIA, or, when he was the only student in TIA, with Behavioral Specialist. *Id.* He and Behavioral Specialist would also play chess, with Student often winning. *Id.*
64. For music class, Student would do his homework with Behavioral Specialist and record it to submit to the music teacher for grading. *Id.*

65. School had a Christmas concert in December 2022. *Id.* Student was not forbidden from participating, but he did not want to because he was not confident in his ability to play the music. *Interviews with Principal and Behavioral Specialist.*
66. In Student’s fourth “transition” week, he began joining the regular classroom for part of the time. *Interviews with Principal and Behavioral Specialist.* For example, he would join the regular classroom for general instruction for some time and then return to the TIA classroom to join again by Zoom. *Id.*
67. The degree to which Student was permitted to rejoin the regular academic setting was determined by Principal, Assistant Principal, Special Education Teacher, Fourth Grade Teacher, and Behavioral Specialist based on Student’s behavior. *Id.*
68. Student participated in the after-school latchkey program. *Id.*
69. During the time that Student was in TIA, his private therapist provided an opinion to School’s staff, including Student’s RTI Team, that “[Student] may more benefit from practicing and accessing his social/coping skills in real time” rather than learning such skills in TIA without an opportunity to practice them. *CDE Exhibit 2*, p. 382. He opined that, from Student’s view, “the TIA room is considered more of a reward” because “he has less distractions.” *Id.* Similarly, Behavioral Specialist observed that Student sometimes seemed “relieved to be out of the classroom” because, in TIA, he could have “peace and quiet.” *Interview with Behavioral Specialist.*
70. As Student began transitioning from TIA to regular classes the week of December 12, 2022, Special Education Teacher reported that “this week of integrating [Student] back into the classroom is not going as well as we hoped.” *CDE Exhibit 2*, p. 726. Student refused to do work, including in classes that had not previously been a trigger for his behaviors. *Id.* Special Education Teacher stated that, as a result, he would be returned to TIA. *Id.*
71. In response, several individuals familiar with Student opined that TIA was not a good match for his needs. *Id.* at pp. 460-61, 472. One of Student’s private therapists cautioned the RTI Team that his anxiety combined with his ADHD made it advisable to avoid “bouncing him back and forth” between a TIA schedule and regular schedule. *Id.* at p. 460. Another private therapist recommended against placing him back in TIA because “[w]ith his ADHD—to change his schedule and his ‘daily’ routine is going to be rocky” and that the change in routine was likely the cause of his refusal to work. *Id.* at p. 472. Stepparent told the RTI Team that Student, who was complaining about having a stomachache, likely was having difficulty “due to anxiety of transitioning” from TIA to regular classes. *Id.* at p. 461. She also suggested that his refusals to attend classes and do work during the transition week were the result of having lagged behind during his time in TIA so that he could not follow along with the class. *Id.*

72. Ultimately, Student spent eighteen school days in TIA, from November 9, 2022 through December 16, 2022. *Exhibit G; CDE Exhibit 2*, pp. 213, 301, 686.
73. Student's grade in Reading dropped from a 93 in the first quarter to an 80 at the end of the semester, and his grade in Math dropped from a 96 in the first quarter to an 83 at the end of the semester. *Exhibit 1*, p. 4. An end-of-semester progress report stated that Student had met his IEP's Goal 1 objective (occupational therapy for self-regulation) and made progress on his Goal 2 objective (SEL instruction for social skills). *Exhibit F*, pp. 2, 5.
74. Parent reports that Student has "lost his confidence" since his initial placement in TIA, has become shyer, more closed off, and reluctant to make eye contact when talking. *Interview with Parent*.

### **G. The January 2023 IEP**

75. On January 25, 2023, Student's IEP Team met and revised his May 2022 IEP ("January 2023 IEP"). *Exhibit A*, p. 1.
76. The January 2023 IEP noted, in comparison to the May 2022 IEP, improved assessment scores in Math, Reading, and Language Usage. *Exhibit A*, pp. 4-5. Fourth Grade Teacher reported that Student was doing well in class following Christmas break. *Id.* at p. 7. He was participating in an extracurricular boys group that met every two weeks for lunch. *Id.*
77. The IEP stated—as did the May 2022 IEP—that Student, due to his disability, would benefit from learning alongside his peers and receiving services for his social-emotional and self-regulation needs. *Id.* at p. 8. Unlike the May 2022 IEP, the January 2023 IEP statement of needs and disabilities did not mention the "pull-out" model, and it did not say that Student would benefit from supports outside the general education setting. *See id.*
78. The three annual goals targeted Student's abilities to regulate his emotions and interact socially. *Id.* at 8-10. Goals 1 and 2 both aimed at improving Student's self-regulation skills, and Goal 3 was to improve his self-esteem. *Id.* The IEP documented that Student had met his original Goal 1, and a new objective was added. *Id.* at pp. 8-9.
79. The January 2023 IEP's requirements for services were only slightly changed: whereas Student received 270 minutes of occupational therapy per semester under the May 2022 IEP, he received 250 minutes under the January 2023 IEP. *Id.* at p. 12.
80. Student's LRE remained at greater than 80 percent of his time in the general education environment with a specific calculation of 98.7 percent of time in that setting. *Id.* at p. 13.
81. The IEP Team again expressly rejected the idea of pulling Student out of the general education setting. *Id.* at p. 13. The IEP stated that removing him from that setting would be harmful:

Other options considered and the reasons each option was rejected:

Using the full pull-out model, students will miss grade level content widening the student achievement gap. Professionals at [School] are trained to differentiate their instructions for ALL students. The team feels that the full pull-out model will hinder grade level academics, social, and emotional growth of our Special Education students.

*Id.*

82. This IEP formally incorporated Student's October 2022 BIP. *Id.* at p. 14. Per Special Education Teacher, however, the BIP had been distributed to and followed by staff since its creation in October 2022. *Interview with Special Education Teacher.*

#### **H. School's Decision to Move Student to TIA in January 2023**

83. On January 31, 2023, Student had a behavioral incident in art class, which followed an incident earlier in the week. *Interviews with Parent and Stepparent.*

84. School, with involvement from District Superintendent, again decided to place Student in TIA for three weeks beginning February 1, 2023. *CDE Exhibit 2*, pp. 290, 716.

85. School's decision to place Student in TIA was made outside of an IEP Team meeting and without parental input. *See id.; Interviews with Parent and Stepparent.* School simply informed Parents that Student would be placed in TIA for another three weeks. *Interview with Stepparent.*

86. Student's schedule for TIA was again adopted without parental involvement by a team composed of District Superintendent, Principal, Assistant Principal, SEL Support Staff, School Counselor, Special Education Teacher, and Behavioral Specialist. *CDE Exhibit 2*, pp. 708-709.

87. The schedule provided that Student would attend Grammar, Literacy Skills, and Colorado History/Science via Zoom; attend Independent Reading and Independent Math through Zoom with teacher support "if needed"; but attend in-person whole group direct instruction in Reading and Math as well as his special classes with a trusted adult. *CDE Exhibit 3*, pp. 1-2. He was to eat his lunch in the administrative office. *Id.* at p. 1; *Interview with Parent.* He was to attend recess only with Behavioral Specialist. *CDE Exhibit 3*, p. 2. It also, as in November 2022, increased Student's SEL instruction to 35 minutes per day. *Id.*

## CONCLUSIONS OF LAW

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

**Conclusion to Allegation No. 1: BOCES failed to properly implement Student’s IEP on November 2, 2022, and from November 9, 2022 through December 16, 2022, in violation of 34 C.F.R. § 300.323. This violation resulted in a denial of FAPE.**

Parents’ concern is that the BOCES failed to fully implement Student’s May 2022 IEP on November 2, 2022, by failing to provide the accommodations in the IEP. *Complaint*, p. 2. Specifically, Parents allege that Substitute Teacher refused to allow Student to use the Cozy Corner accommodation at the end of class just prior to the November 2 incident. *Id.* Parents allege that the BOCES failed to inform Substitute Teacher of Student’s accommodations. *Id.*

### **A. Legal Requirements for Implementation**

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*, 580 U.S. 386, 391 (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).

The BOCES 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.” *Id.* § 300.323(c)(2). To satisfy this obligation, the BOCES 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).

### **B. Implementation of Student’s May 2022 IEP**

#### *Accessibility to Student’s Teachers*

The SCO must first determine whether District satisfied its obligation under 34 C.F.R. § 300.323(d).

Special Education Teacher kept School’s regularly employed staff informed of their responsibilities under Student’s May 2022 IEP and October 2022 BIP. (FF # 20.) Parents’ only

concern in this respect is that Substitute Teacher on November 2, 2022 was not informed of the Cozy Corner accommodation required by Student’s IEP. *See Complaint*, p. 2.

On November 2, 2022, however, Substitute Teacher was informed of her obligation to provide that accommodation by Special Education Teacher. (FF # 39.) Indeed, Substitute Teacher provided that accommodation multiple times that day, as observed by Behavioral Specialist. (FF # 38.)

Accordingly, the SCO finds and concludes that the BOCES teachers and service providers working with Student were informed of their responsibilities under the May 2022 IEP, consistent with 34 C.F.R. § 300.323(d).

#### *Implementation of the May 2022 IEP on November 2*

Student’s May 2022 IEP, which was in effect on November 2, 2022, required that he be given access to a Cozy Corner. (FF ## 4, 9.) The SCO finds and concludes that the BOCES failed to implement Student’s IEP accommodations on November 2, 2022, the day of the incident that ultimately led to Student’s placement in TIA.

Again, Student’s IEP required that he be given “access to” the Cozy Corner. (FF # 9.) The IEP provides no details or limitations to govern this access. (*Id.*) In context—particularly the IEP’s statement of Student’s needs and the BIP’s use of the Cozy Corner as a strategy and crisis response—the accommodation was intended to give Student a tool to self-regulate his emotions in the Cozy Corner rather than engage in disruptive behavior among the other students. (*See* FF ## 6, 8-9, 17-19.) When Student exchanged insults with the other student shortly before the end of class, Student became, as anticipated by his IEP and BIP, dysregulated. (*See* FF ## 5, 8-9, 17-19.) He again sought to use the Cozy Corner, as he had done throughout the day. (FF # 36-38.) However, Substitute Teacher did not allow him to do so even though he was dysregulated at this point. (*Id.*)

Although a single denial of the Cozy Corner in a different situation may not have been a denial of “access to” the Cozy Corner, Student’s situation at the end of class on November 2, 2022 was exactly the scenario for which the accommodation was designed. (*See* FF ## 5-9, 17-19.) Student was dysregulated by a negative interaction with his peers and sought to use the Cozy Corner to self-regulate, as intended by his BIP. (FF ## 5-9, 17-19, 36-38.) Accordingly, the SCO finds and concludes that Substitute Teacher’s refusal to allow Student to use the Cozy Corner to self-regulate at a time when he was dysregulated was a failure to implement Student’s IEP, in violation of 34 C.F.R. § 300.323(c)(2).

#### *Implementation of the May 2022 IEP from November 9 through December 16*

Student’s May 2022 IEP, which was in effect from November 9 through December 16, required multiple accommodations. (FF ## 4, 9). Indeed, the IEP provided accommodations with the



assumption that Student would be in the general education classroom. (See FF ## 9-11.) Specifically, the IEP required that Student be allowed the use of social groups and expressly rejected the “full pull-out model” of taking him from the regular classroom. (*Id.*) The IEP stated that pulling Student out of the general education classroom would “hinder grade level academics, social, and emotional growth.” (*Id.*)

The SCO finds and concludes that the BOCES failed to implement the May 2022 IEP while Student was in TIA, including LRE and several accommodations. For instance, in TIA, Student had no access to grade-level peers. (FF ## 50, 52, 54-55.) He did not have access to social groups because he was pulled from the general education entirely, with only an occasional chance to eat lunch with one of his peers. (FF ## 50-64.) Finally, moving student to TIA contradicted his IEP’s requirement that he not be pulled from the regular classroom. (FF # 11.) Specifically, the IEP’s LRE statement required that Student spend 99.3 percent of his school day in general education. (FF # 10.)

Accordingly, the SCO finds and concludes that the BOCES’s move of Student to TIA resulted in a failure to implement the May 2022 IEP, in violation of 34 C.F.R. § 300.323(c)(2).

### **C. 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 FAPE. Only the failure to implement a “material,” “essential,” or “significant” provision of a student’s IEP amounts to a denial of a FAPE. *See, e.g., Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (concluding consistent with “sister courts . . . that a material failure to implement an IEP violates the IDEA”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (holding that failure to implement an “essential element of the IEP” denies a FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that failure to implement the “significant provisions of the IEP” denies a FAPE). “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*, 502 F.3d at 822.

In this case, the SCO finds and concludes that each of these failures to implement was more than a “minor discrepancy between the services a school provides . . . and the services required by the child’s IEP.” *Van Duyn*, 502 F.3d at 822. Student’s IEP required the use of the Cozy Corner for self-regulation, and importantly, so did Student’s BIP which was drafted on October 14, 2022. (FF ## 9, 17-18.) The BOCES allowed only two and a half weeks to see how the BIP worked before Substitute Teacher denied Student a key accommodation, cascading into the complete removal of Student from the general education classroom into TIA and further violation of his IEP. (FF ## 13, 34-40, 82.) The IDEA’s process for behavioral intervention—addressing behavior that impedes a child’s learning through positive behavioral interventions and supports—was quickly

abandoned in favor of a removal to TIA. For these reasons, the SCO finds and concludes that these failures to implement the IEP were material and constituted a denial of FAPE.

**Conclusion to Allegation No. 2: The BOCES determined Student’s educational placement outside of a properly convened IEP meeting in violation of 34 C.F.R. § 300.116 and ECEA Rule 4.03(8). This violation resulted in a denial of FAPE.**

Parents’ concern is that the BOCES changed Student’s placement without their involvement. See *Complaint*.

#### **A. Legal Requirements for Changing Placement**

Placement—a term used to denote the provision of special education and related services—is determined by the IEP Team, including parents, and must be individualized, as well as based on the IEP. 34 C.F.R. § 300.116; ECEA Rule 4.03(8)(a); *Questions and Answers on Endrew F. v. Douglas County School Dist. Re-1*, 71 IDELR 68 (EDU 12/7/17). Specifically, school districts must ensure that the placement decision is made by a group of persons, including parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a); see also 34 C.F.R. §§ 300.321(a)(1), 300.327 and 300.501(c)(1).

The IDEA and federal guidance provide a means of determining whether a move constitutes a “change in placement.” The BOCES must consider three factors to determine whether an action constitutes a “change of placement”: (1) “whether the educational program set out in the child’s IEP has been revised”; (2) “whether the child will be able to be educated with nondisabled children to the same extent”; and (3) “whether the child will have the same opportunities to participate in nonacademic and extracurricular services.” *Letter to Fisher*, 21 IDELR 992 (OSEP 1994).

Any significant change in placement, such as a move to a one-on-one setting or from in-person learning to online learning, must be made by the IEP Team 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 7/14/2020) (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). A significant change in placement also means a student having different opportunities to participate in nonacademic and extracurricular services. ECEA Rule 4.03(8)(b)(ii)(B).

Finally, whenever the BOCES proposes to change a student’s educational placement it must issue a prior written notice (“PWN”) to the student’s parents. 34 C.F.R. § 300.503(a). The PWN must include: (1) a description of the action proposed or refused by the BOCES; (2) an explanation of why the BOCES proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report used by the BOCES as a basis for the action; (4) a statement that the parents of a child with a disability have protection under the procedural

safeguards, and the means by which a copy of a description of the procedural safeguards can be obtained; (5) resource individuals or groups 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 BOCES'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).

## **B. Student's Removal to TIA in November 2022**

Parents' concern is that Student's placement was changed outside of an IEP Team meeting when Student was removed from the general education classroom to TIA due to his behaviors. See *Complaint*.

### *Change of Placement Under the IDEA*

The SCO finds and concludes that Student's removal to TIA was a "change of placement" under the three-factor test provided by the IDEA regulations and federal guidance. See *Letter to Fisher*, 21 IDELR 992 (OSEP 1994).

First, the BOCES ignored the educational program set out in Student's IEP and BIP. As discussed in the analysis for Allegation 1, above, when Student was moved to TIA he lost his accommodation to participate in social groups and was pulled from the general education classroom despite the IEP's requirement that he be kept in that setting. (FF ## 10-11, 34-40, 82.) The increase in SEL services also constituted a change in his educational program that could be made only through the IEP process consistent with the IDEA. (FF # 61.)

Second, he was not educated with nondisabled children to the same extent as outside of TIA. His only companions in TIA were Behavioral Specialist or an occasional backup, a third-grade student with behavioral problems, and a fifth-grade student with behavioral problems. (FF ## 50-64.) Even when the third- and fifth-grade students were in TIA, they were in different grades and so could not be educated together. (FF # 52.) For some portion of Student's time in TIA, he was the only student. (*Id.*) He could not perform groupwork. (FF # 57.) He was understandably reluctant to verbally participate in class as the only student "participating" remotely via a speaker and camera from a modular building behind the school. (FF ## 55-56.) Unlike the other students in the regular classroom, Student could vanish from class instantly by disconnecting his iPad or by experiencing a real or simulated technological issue. (FF # 59.)

Finally, he did not have the same opportunities to participate in nonacademic and extracurricular services because he was excluded from recess, physical education, and lunch. (FF ## 62-63.)

The BOCES did not follow the IDEA's requirements for making a change of placement. See 34 C.F.R. § 300.116. The move to TIA was made without Parents' involvement. (FF ## 41-49.) It was not based on the IEP and, indeed, contradicted the IEP: The IEP stated that Student would "thrive

... learning right alongside [his] same leveled peers”; it set a goal of becoming more independent and successful “within the classroom environment”; it stated that he would be socially, emotionally, and academically harmed by pulling him out of the general education classroom; and, finally, it provided that he would stay in the general education setting 99.3 percent of the time. (FF ## 5-11.) Each of these IEP requirements was ignored when Student was moved to TIA.

Accordingly, the SCO finds and concludes that the BOCES unilaterally changed Student’s placement without following the IDEA’s requirements, in violation of 34 C.F.R. § 300.116.

#### *Significant Change of Placement under the ECEA*

The SCO also finds and concludes that Student’s removal to TIA was a significant change of placement under the ECEA. In TIA, Student accessed his classes through Zoom from a building behind the school, at least in part, rather than alongside his peers. (FF ## 50-64.) This shift from in-person learning to remote learning constituted a transfer “from a brick and mortar school to an online school or program.” ECEA Rule 4.03(8)(b)(ii)(A)(III). Further, he had “different opportunities to participate in nonacademic and extracurricular services” in TIA compared to the regular classroom. ECEA Rule 4.03(8)(b)(ii)(A)(I). He was unable to participate in physical education, recess, and lunch to the same extent as when he was in the regular classroom. (FF ## 50-64.) Although School made attempts to provide some inclusion through the involvement of the two other students in TIA and, occasionally, a peer invited to the TIA table at lunch, it cannot be said that Student had the same opportunities as when he was not in TIA. (*Id.*)

The BOCES did not follow the ECEA’s requirements for making a significant change in placement. Nothing in the record or the BOCES’s Response shows that the BOCES considered reevaluating Student. The BOCES’s decision to move Student to TIA and online learning was made unilaterally by School and District staff. (FF ## 41-49.) The IEP Team, which would have included Parents, was not convened. (*Id.*) The changes to Student’s opportunities to participate in nonacademic services could be made only by his IEP Team. ECEA Rule 4.03(8)(b)(ii)(B). Instead, the BOCES moved Student according to its disciplinary process and not through the IEP Team meeting procedures. (FF ## 25-27, 32-33.)

Accordingly, the SCO finds and concludes that the BOCES unilaterally made a significant change to Student’s placement without following the processes in the ECEA Rules, in violation of Rule 4.03(8)(b)(ii).

#### *Failure to Issue a PWN*

Additionally, the BOCES did not issue a PWN prior to changing Student’s educational placement from the general education classroom to TIA. (*See* FF # 41-49.) Accordingly, the SCO finds and concludes that the BOCES ignored the PWN requirement, in violation of 34 C.F.R. § 300.503.

### Denial of FAPE

Procedural violations of IDEA are actionable only to the extent that they impede a student's right to a FAPE. The BOCES has the duty to offer a FAPE "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 580 U.S. at 399. A denial of FAPE occurs if the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306, 1314 (10th Cir. 2008).

The SCO finds and concludes that the BOCES's procedural violations resulted in a denial of FAPE.

First, Student's IEP was designed to provide a FAPE, but it was not designed to be implemented in TIA. (FF # 11.) The move to TIA was not individualized or reasonably calculated to allow him to make progress. Most notably, it ignored Student's LRE. (FF # 10.) Indeed, "[e]ducating 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). In TIA, Student lost the peer interaction and access to his teachers that his IEP described as crucial to his success. (FF ## 6, 9-11.) Further, the move resulted in a drop to Student's grades, a setback to his social skills, and a lack of improvement in his behavior. (FF # 69-74, 83.)

Second, the move to TIA impeded Parents' opportunity to participate in the decision-making process because Student was moved without Parents' input, without providing prior written notice to Parents, and outside of the IEP process. (FF ## 25-27, 32-33, 41-49.)

Finally, Student's educational benefit from schooling was diminished. In TIA, he had a reduced ability to participate in class, ask questions, receive help, receive instruction from his normal instructors (specifically in Science and Music), and to work alongside his peers. (FF ## 50-64.)

For these reasons, the SCO finds and concludes that the BOCES's placement of Student in TIA in November 2022 resulted in a denial of FAPE.

### **C. Student's Removal to TIA in January 2023**

Parents' concern is that, in January 2023, BOCES again changed Student's placement outside of an IEP Team meeting by removing Student from the general education classroom to TIA due to his behaviors. (FF ## 83-87.)

### Change of Placement Under the IDEA

The SCO finds and concludes that the January 2023 decision to move Student was, like the November 2022 move, a change in placement according to the IDEA's three-factor test. First, the

BOCES ignored the educational program set out in Student's IEP by pulling him from the general education classroom despite the IEP's requirement that he be kept in that setting. (FF ## 80-81, 86-87.) It also changed his program by adding extra SEL instruction. (FF # 87.) Second, although Student had increased participation with his peers compared to November 2022, he was still not educated with nondisabled children to the same extent as outside of TIA. (FF # 87.) And finally, he did not have the same opportunities to participate in nonacademic services because he was excluded from recess and lunch. (*Id.*)

In January 2023, as in November 2022, the BOCES did not follow the IDEA's procedural requirements for determining a change of placement. The decision was made without Parents' involvement. (FF # 85.) It was not based on the IEP and, again, contradicted the IEP's requirement that he be educated within the classroom alongside his peers with an LRE of 98.7 percent of time in the general education environment. (FF # 80.)

Accordingly, the SCO finds and concludes that the BOCES's January 2023 decision to unilaterally move Student constituted a change of placement without following the requirements of the IDEA, in violation of 34 C.F.R. § 300.116.

#### *Significant Change of Placement Under the ECEA*

The SCO also finds and concludes that the January 2023 decision to move Student to TIA was a significant change in placement under the ECEA for the same reasons as the November 2022 move. Student was again shifted from in-person to online instruction for at least part of the day. (FF # 87.) He again had reduced opportunities to participate in nonacademic services, because he was unable to participate in physical education, recess, and lunch to the same extent as when he was in the regular classroom. (*Id.*)

In January 2023, as in November 2022, the BOCES did not follow ECEA's procedural requirements for making a significant change in placement. Nothing in the record or the BOCES's Response shows that the BOCES considered reevaluating Student. Further, the decision to move him to TIA was again made unilaterally by School and District staff rather than Student's IEP Team with Parents' involvement. (FF ## 84-85.)

Accordingly, the SCO finds and concludes that the BOCES's January 2023 decision to unilaterally move Student to TIA was a significant change of placement made without following the requirements of the ECEA Rules, in violation of Rule 4.03(8)(b)(ii).

#### *Failure to Issue a PWN*

Additionally, in January 2023 just as in November 2022, the BOCES changed Student's placement without issuing a PWN. (FF # 85.) Accordingly, the SCO finds and concludes that the BOCES ignored the PWN requirement, in violation of 34 C.F.R. § 300.503.

### Denial of FAPE

A denial of FAPE occurs if the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Sytsema*, 538 F.3d at 1314.

The SCO finds and concludes that the BOCES's procedural violations resulted in a denial of FAPE for the same reasons as the November 2022 change. The decision impeded Student's right to a FAPE because TIA was not reasonably calculated to allow Student to make progress. Student's IEP reflected Student's path to progress, and the decision to move him to TIA ignored the IEP's LRE requirement. (FF ## 80-81.) Further, Parents' opportunity to participate in the decision-making process was again impeded because Parents were wholly excluded from the decision to move Student and change his schedule. (FF ## 85.)

For these reasons, the SCO finds and concludes that the BOCES's January 2023 decision to move Student resulted in a denial of FAPE.

**Conclusion to Allegation No. 3: BOCES failed to educate Student in his LRE from November 9, 2022 through December 16, 2022, in violation of 34 C.F.R. §§ 300.114, 300.116-17, and 300.323. This violation resulted in a denial of FAPE.**

Parents' concern is that the BOCES's placement of Student in TIA violated the IDEA by putting him in a more restrictive environment than required by his IEP. *See Complaint*.

#### **A. Legal Requirements for LRE**

"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.*, 379 F.3d at 976. This means that children with disabilities receive their education in the general education setting with nondisabled peers to the maximum extent appropriate and that they attend the school they would if not disabled. 34 C.F.R. §§ 300.114, 300.116. Children with disabilities should be placed in separate schooling, or otherwise removed from the regular educational environment, only "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* § 300.114(a)(2)(ii). For instance, if a more restrictive program is likely to provide a child with a meaningful benefit while a less restrictive program does not, the child is entitled to be placed in the more restrictive setting. *P. v. Newington Bd. of Educ.*, 51 IDELR 2 (2d Cir. 2008).

An IEP must describe a student's LRE, which is the maximum appropriate participation, for that student, in the regular educational environment. 34 C.F.R. §§ 300.114(a), 300.117. The IEP must explain "the extent, if any, to which the child will not participate with nondisabled children in the

regular class.” *Id.* § 300.320(a)(5). Students with disabilities must be educated in the LRE specified by their IEP. *Id.* §§ 300.320(a)(5), 300.323(c)(2).

A student’s LRE must be individually tailored to that student and cannot be determined by a uniform standard, such as a level system. This is because the purpose of the IDEA is to provide children with disabilities an education “designed to meet their unique needs.” 34 C.F.R. § 300.1. Individualized instruction is the heart of the law. *See generally Andrew F.*, 580 U.S. at 390-91. Accordingly, an individual student’s LRE cannot be determined by a process that applies uniformly to all students without regard for the student’s individual disabilities and needs. *See id.* In particular, a “level system” wherein a student’s placement is contingent on his or her advancement through different “levels” of restriction may be permissible where it is developed by an IEP Team and individualized to a student’s unique needs. *See Denver Pub. Schs.*, 122 LRP 34367 (SEA CO 9/07/22); *Douglas County School District RE-1*, 123 LRP 5321 (SEA CO 11/25/22). However, one-size-fits-all level systems are not compatible with the IDEA. *See id.*

### **B. Student’s LRE**

Here, Student’s May 2022 IEP required that he be educated in the general education setting at least 80 percent of the time, with a specific calculation of 99.3 percent of time in that setting. (FF # 10.) It explained that the general education setting would help Student “thrive because [he] will be learning right alongside his same-leveled peers.” (FF # 6.) Moreover, one of his annual goals was to “increase his independence and success *within* the classroom environment.” (FF # 7) (emphasis added). The IEP Team expressly determined that pulling him out of the general education setting would be detrimental to his academic, social, and emotional growth. (FF # 11.)

### **C. TIA’s Level System**

District’s TIA policy treats all students, whether IDEA-eligible or not, alike in many respects. All students moved to TIA (primarily as a way to address behavior) stay in there for at least three weeks, followed by at least one week of transition back to the regular classroom. (FF # 30.) During the initial three weeks, all students receive their classes through Zoom or an online curriculum. (*Id.*) All students are placed within “levels,” where higher levels allow students more time in the general education classroom. (FF ## 28-30.) All students begin at Level 1 and remain there for a minimum of three weeks. (FF # 30.) All students who have three negative behaviors in one day are placed back in Level 1. (*Id.*) These rules apply whether or not a student has an IEP. (FF ## 32-33.)

Accordingly, TIA is not individualized for a child’s needs. Although the policy ties advancement through the levels to an individual student’s behavior, the standards for keeping students in TIA and evaluating students’ advancement through the levels are predetermined for all students, i.e., exhibiting fewer than three negative behaviors in a day. (FF # 30.)



#### **D. Student's Removal to TIA**

Here, the BOCES unilaterally placed Student in TIA on November 9, 2022 to address behavior, and he remained in TIA through December 16, 2022. (FF # 46.) He was fully pulled out from the general education program for at least the first three weeks he spent in TIA, i.e., through December 9, 2022. (FF ## 46, 49.) Neither Student's IEP Team nor Parents were involved in the decision to move Student to TIA. (FF # 42.) Student's placement and schedule in TIA were determined unilaterally by District and School staff rather than by Student's IEP Team including Parents. (FF ## 42-45.) The TIA program was not tailored to Student's needs as set forth in his IEP. (FF # 30.) His IEP defined his LRE as the general education setting for 99.3 percent of the time. (FF # 10.) His IEP Team expressly rejected the option of pulling him out of the general education setting. (FF # 11.)

While in TIA, however, the LRE statement in Student's IEP was ignored and instead replaced by a one-size-fits-all policy: Student was required to spend at least three weeks in the TIA classroom followed by increasing reintegration based on his ability to meet the uniform standard of fewer than three negative behaviors. (FF ## 29-30, 32-33.) While in TIA, he had minimal interaction with his nondisabled peers. (FF # 52.) Once out of TIA, he quickly was returned to TIA by Special Education Teacher rather than by a placement decision from Student's IEP Team. (FF # 70.) As a side effect, Student's BIP was not followed. None of the strategies provided by the BIP included a move to TIA, meaning BOCES failed to address Student's behavior through the use of positive behavioral interventions and supports consistent with the BIP. (FF ## 13-20.) Indeed, the BIP stated that its "criterion for success" was that "[Student] needs access to [the] general education classroom." (FF # 19.) The BIP's strategies and standards, tailored to Student, were superseded by TIA's policies, which applied to all students placed in TIA. (FF ## 30, 32-33.)

Accordingly, the SCO finds and concludes that the BOCES's placement of Student in TIA resulted in violations of 34 C.F.R. §§ 300.114, 300.116, 300.117, and 300.323.

#### **E. Denial of FAPE**

Procedural violations of IDEA are actionable only to the extent that they impede the child's right to FAPE. A denial of FAPE occurs if the procedural violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Sytsema*, 538 F.3d at 1314. A failure to implement an IEP results in a denial of FAPE only if the neglected provision is "material," "essential," or "significant." *Van Duyn*, 502 F.3d at 822.

The SCO finds and concludes that placing Student in TIA was a denial of FAPE for the same reasons described in the analysis for Allegation 2. First, it impeded Student's right to a FAPE because it was not reasonably calculated to allow him to make progress. It ignored the requirements of Student's IEP, particularly his LRE, which is "one of the IDEA's most important substantive requirements." *L.B. ex rel K.B.*, 379 F.3d at 976. The failure to implement the LRE requirement of

his IEP was material, essential, and significant. *See id.* Second, because the placement was made without Parents’ input, it impeded Parents’ opportunity to participate in the decision-making process. (FF ## 25-27, 32-33, 41-49.) Finally, placing Student in TIA diminished his educational benefit because he had a reduced ability to participate in class, learn alongside his peers, ask questions, and receive instruction from his teachers. (FF ## 50-64.)

For these reasons, the SCO finds and concludes that the BOCES’s placement of Student in TIA resulted in a denial of FAPE.

**Conclusion to Allegation No. 4: The BOCES failed to conduct an MDR within ten days of the decision to change Student’s placement on November 9, 2022, in violation of 34 C.F.R. § 300.530(e). This violation resulted in a denial of FAPE.**

Parents’ concern is that Student’s removal to TIA was disciplinary in nature and thus the BOCES was required to conduct an MDR. *Reply*, p. 1.

#### **A. Legal Requirements for an MDR**

Discipline of a student with a disability may result in a change to the student’s placement and trigger the IDEA’s procedural protections. *See* 34 C.F.R. §§ 300.530, 300.536. Within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, a BOCES must perform an MDR to determine whether the behavior at issue was a manifestation of the student’s disability. *Id.* § 300.530(e)(1).

#### **B. Disciplinary Change of Placement**

Because an MDR must be conducted within ten school days of any decision to change a student’s placement for disciplinary reasons, the first step is to determine whether a school’s action constitutes a disciplinary change of placement. This analysis is similar, though not identical, to determining—as in the analysis for Allegations 2 and 3—whether a school’s action has changed a student’s placement or LRE so as to trigger the requirements for parental involvement, an IEP Team meeting, or a PWN.<sup>4</sup>

A disciplinary change of placement occurs if: (1) a student has been removed from his current educational placement for more than 10 consecutive school days, or (2) a student has been subjected to a series of short-term removals that total more than 10 school days and constitute a pattern. 34 C.F.R. § 300.536(a).

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<sup>4</sup> *See* OSERS, *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions*, Question C-1 (July 19, 2022) available at <https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf> (noting that this is the same test as for determining whether in-school suspension counts against the ten-day MDR requirement). *See also* 34 C.F.R. §§ 300.536 (a disciplinary change of placement occurs upon a “removal” of more than 10 consecutive school days) and 300.114(a)(2) (“removal” includes “[s]pecial classes” and “separate schooling.”); *Adams-Arapahoe School District 28J*, 65 IDELR 89 (Dec. 9, 2014) (Colorado administrative decision defining “separate schooling” under the IDEA as “removal of a child from the regular education environment”).

In the discipline context, “administratively shortened school days occur when a child’s school day is reduced solely by school personnel, rather than the child’s IEP Team or placement team, in response to the child’s behavior.” *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions*, 81 IDELR 138 (OSERS 2022). An in-school suspension, though not defined by IDEA, “means an instance in which a child is temporarily removed from their regularly assigned classroom(s) for disciplinary purposes but remains under the direct supervision of school personnel.” *Id.*

Thus, the use of informal removals or in-school suspension to address a child’s behavior may constitute a disciplinary removal from the current placement. *Id.* IDEA’s disciplinary procedures apply to a removal unless all three of the following factors are met: (1) The child is afforded the opportunity to continue to appropriately participate in the general curriculum; (2) the child continues to receive the services specified on the child’s IEP; and (3) the child continues to participate with nondisabled children to the extent the student would have in the student’s current placement. *Id.* OSERS has also restated the first of these requirements as affording the student “the opportunity to continue to be involved in and make progress in the general education curriculum.” *Dear Colleague Letter*, 68 IDELR 76 (OSERS 2016).

Here, the SCO finds and concludes that the BOCES made the decision to change Student’s placement—i.e., to remove him from his educational placement for more than ten consecutive school days for disciplinary reasons—on November 9, 2022. On that date, it informed Parents that Student would be moved to TIA for at least three weeks, which was twelve consecutive school days. (FF # 45.)

Under the three-factor test provided by OSERS’s *Dear Colleague Letter*, each day of placement in TIA counted as one day of removal no different than one day of suspension: For the first factor, Student’s involvement in the general curriculum was severely curtailed. Zoom was not a substitute for learning alongside his peers because it made it difficult for him—especially in light of his particular disabilities and needs—to ask questions, stay on task, and participate in groupwork. (FF ## 4-11, 19, 50-64.) He had only Behavioral Specialist for his Music and Science classes, and these classes were taught one-on-one. (FF ## 50, 64.) As for the second factor, School increased the amount of SEL instruction while Student was in TIA, which modified the services specified in Student’s IEP. (FF # 61.) As for the third factor, Student did not participate with nondisabled children to the same extent as when he was not in TIA. He received classes through Zoom or one-on-one with Behavioral Specialist, could not attend recess with his peers, and could not fully attend lunch with his peers. (FF ## 50-64.)

Because the BOCES decided on November 9, 2022, to change Student’s placement for disciplinary reasons for more than ten consecutive school days, it was obligated to conduct an MDR within ten school days of that decision. 34 C.F.R. § 300.530(e)(1). Ten school days after November 9, 2022 was December 5, 2022. *See Exhibit G* (District calendar). Accordingly, the SCO finds and concludes that the BOCES failed to conduct an MDR by December 5, 2022, in violation of 34 C.F.R. § 300.530.

### C. Denial of FAPE

Procedural violations of the IDEA are actionable only to the extent that they impede the student's right to a FAPE. A denial of FAPE occurs if the procedural violation: (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Sytsema*, 538 F.3d at 1314. A student's parents must be included in the MDR, which is part of the overall disciplinary process for students who are eligible for the protections of the IDEA. 34 C.F.R. § 300.530(f).

Here, the BOCES sidestepped the IDEA's preference for using the IEP Team rather than school discipline (such as informal removals or in-school suspension) to address behavior. (FF ## 41-49.) The BOCES allowed Principal, Assistant Principal, Fourth Grade Teacher, and Special Education Teacher to unilaterally dictate the consequences of Student's behavior, precluding Parents' participation. (*Id.*) The BOCES demonstrated a consequential misunderstanding of the IDEA's disapproval of disciplining a child for behavior that results from his or her disability. *See* CDE, *Guidance Memorandum: Discipline of Children with Disabilities* (March 19, 2012) available at [www.cde.state.co.us/sites/default/files/documents/cdesped/download/pdf/guidance\\_disciplin\\_eofchildren.pdf](http://www.cde.state.co.us/sites/default/files/documents/cdesped/download/pdf/guidance_disciplin_eofchildren.pdf) (“[C]hildren should not be penalized for conduct that is the result of a disability.”); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities* (“*Assistance*”), 71 Fed. Reg. 46720 (Aug. 14, 2006) (providing that “a child with a disability may display disruptive behaviors characteristic of the child's disability and . . . should not be punished for behaviors that are a result of the child's disability”).

Importantly, Student spent most of November and December in TIA when his IEP required that he spend that time in the general education setting. (FF ## 10-11.) As a result, his grades dropped, his social-emotional progress was hindered, and he was deprived of a lengthy period of development alongside his peers. (FF ## 73-74.) This did not allow Student “the opportunity to continue to be involved in and make progress in the general education curriculum.” *Dear Colleague Letter*, 68 IDELR 76 (OSERS 2016). It is for these reasons the SCO finds and concludes that the procedural violation resulted in a denial of FAPE.

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

Pursuant to its general supervisory authority, CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the BOCES. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the State Complaint Procedures are “critical” to the State Educational Agency's “exercise of its general supervision responsibilities” and serve as a “powerful tool to identify and correct noncompliance with Part B.” *Assistance*, 71 Fed. Reg. 46601.

Here, the SCO finds and concludes that the violations of 34 C.F.R. §§ 300.114, 300.116, 300.117, 300.530, and ECEA Rule 4.03(8) are systemic and likely to impact other students if not addressed.

The IDEA's process for addressing behavioral concerns has been ignored. Implicit in IDEA's disciplinary provisions is a "principle that disfavors [using] discipline to make changes in the educational placement of a child with a disability. Rather, where a child with a disability has issues with behavior or self-control, [IDEA] shows a preference for dealing with those issues via the IEP process rather than via the disciplinary process." *Assistance*, 71 Fed. Reg. 46601. Accordingly, for a student with a disability, the IDEA requires school districts to "take a careful look at any possible relationship between the misconduct in question and the child's disability (or disabilities), and to proceed cautiously with disciplinary action." *Id.*

The SCO concludes that the BOCES's and District's use of TIA to address behavior for IDEA-eligible students is a systemic violation for the following reasons:

First, as a matter of policy, the BOCES does not view Student's move to TIA as either a change of placement or disciplinary of change of placement. (FF # 33.) Although the BOCES has a written policy concerning the discipline of IDEA-eligible students, that policy does not provide any guidance regarding informal removals, i.e., actions that constitute a disciplinary removal even if they are not labeled a "suspension." (*Id.*)

Second, Student was removed to TIA a second time even though his first stint resulted in reduced grades, social-emotional regress, and continuation of behavioral issues. The second placement was made even after this Complaint was accepted by CDE and received the active attention of the BOCES. (FF # 69.) The BOCES's Response does not meaningfully respond to the allegations, and this failure to respond may be construed as an admission. *See* CDE, *State-Level Complaint Procedures*, ¶ 7 (May 4, 2010). These actions confirm that the BOCES's, District's, and School's policies are being applied without regard for the policies' compliance with the IDEA.

Finally, the TIA policy is applied to all students within District as part of the disciplinary process without differentiating between students eligible for the protections of the IDEA and those who are not. (FF # 32.) District's Superintendent was involved in both the November 2022 and February 2023 decisions to place Student in TIA without following the IDEA's disciplinary process despite constant questioning by Parents, input from Student's private therapist, and the involvement of Student's special education caseworker. (FF ## 44, 69-71, 84.) This confirms that District is consciously applying the TIA policy throughout the District without regard for students' status under the IDEA.

The SCO addresses this systemic violation by ordering policy changes and training as part of the ordered remedies.

## REMEDIES

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

- a. Failing to implement Student's IEP, in violation of 34 C.F.R. § 300.323.
- b. Failing to include Parents in determining Student's educational placement in accordance with 34 C.F.R. §§ 300.116, 300.503, and ECEA Rule 4.03(8).
- c. Failing to educate Student consistent with the LRE required by his IEP, in violation of 34 C.F.R. §§ 300.114, 300.116-17, and 300.323.
- d. Failing to conduct an MDR within 10 school days of a disciplinary change of placement, in violation of 34 C.F.R. § 300.530(e).

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

### **1. Corrective Action Plan**

- a. By **Tuesday, April 18, 2023**, the 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 the BOCES is responsible. The CAP must, at a minimum, provide for the following:
  - i. BOCES Executive Director, BOCES Special Education Director, District Superintendent, School Principal, School Assistant Principal, School Special Education Teacher, School Fourth Grade Teacher, School Behavioral Specialist, School MTSS Coordinator, as well as the principal, assistant principal, and case managers for each school within District must review this Decision, as well as the requirements of 34 C.F.R. §§ 300.114, 300.116, 300.117, 300.323, and 300.530. This review must occur no later than **Friday, May 5, 2023**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Friday, May 12, 2023**.
  - ii. Attendance and completion of training provided by CDE on LRE, MDRs, and addressing behavioral issues of IDEA-eligible students. This training will address, at a minimum, the requirements of 34 C.F.R. §§ 300.114, 300.116, 300.117, and 300.530 and the related concerns noted in this Decision. BOCES Special Education Director and CDE Special Education Monitoring and Technical Assistance Consultant will determine the time, date, and format of the training. This training may be conducted in person or through

an alternative technology-based format, such as a video conference, web conference, webinar, or webcast. This training is mandatory for BOCES Executive Director, BOCES Special Education Director, District Superintendent, School Principal, School Assistant Principal, School Special Education Teacher, School Fourth Grade Teacher, School Behavioral Specialist, School MTSS Coordinator, as well as the principal, assistant principal, and case managers for each school within District. Such training shall be completed no later than **Friday, May 26, 2023**.

- a. 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 **Friday, June 2, 2023**.
- b. 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 the BOCES's timely correction of the areas of noncompliance.

## **2. BOCES Procedures**

- a. By **Friday, July 16, 2023**, BOCES shall submit to CDE Special Education Monitoring and Technical Assistance Consultant proposed written policies and procedures to address all systemic concerns noted in this Decision, to specifically include procedures regarding ensuring placement decisions and changes are made consistent with 34 C.F.R. §§ 300.114, 300.116, 300.117 and to ensure manifestation determination reviews are held consistent with 34 C.F.R. § 300.530. At a minimum, these policies and procedures will include:
  - i. An amendment to District's TIA policy to acknowledge the different treatment of students eligible for the protections of the IDEA.
  - ii. Definitions for "change of placement" and "disciplinary change of placement" in accordance with the ECEA and IDEA, as explained by this Decision and with specific procedures for use by staff within the BOCES.
- b. By **Friday, August 18, 2023**, BOCES Director of Special Education will distribute the finalized policies and procedures to each district superintendent and school principal throughout the BOCES, and by **Friday, August 25, 2023**, BOCES Director of Special Education will provide written assurance to CDE Special Education Monitoring and Technical Assistance Consultant that the policies and procedures were so distributed.

### **3. Completion of new FBA and Review of IEP and BIP**

- a. BOCES must complete a functional behavioral assessment (“FBA”) by **Friday, May 26, 2023**. If, for any reason, Student refuses or is otherwise unable to participate in the FBA, BOCES shall be excused from completing the FBA but must still convene Student’s IEP Team in accordance with (3)(b) below. The FBA must include:
  - i. Consultation with a behavioral specialist who has demonstrated experience in this area;
  - ii. Detailed identification of Student’s negative behaviors, including intensity, duration, and a detailed assessment of antecedents and consequences;
  - iii. A detailed summary statement concerning the function of Student’s behavior;
  - iv. Confirmation of the summary statement through formal observation of behavior, antecedents, and consequences; and
  - v. Development of competing behavior summary to identify desired behavior, common reinforcing consequences, and alternative behaviors.
- b. BOCES must convene Student’s IEP Team, at a mutually agreeable date and time, by **Friday, June 16, 2023**. In consideration of the FBA and Student’s current academic performance, Student’s IEP Team should review and revise Student’s current IEP and BIP. The IEP Team must ensure Student’s IEP and BIP address Student’s academic and behavioral needs in accordance with 34 C.F.R. § 300.324(a)(1)-(2).
- c. By **June 30, 2023**, the BOCES must provide copies of the FBA, BIP, notice of the IEP meeting, and finalized IEP to the CDE Special Education Monitoring and Technical Assistance Consultant.

### **4. Enrichment Program for Failure to Educate in the LRE**

- a. Student shall be enrolled in a **mutually agreed upon enrichment program** with nondisabled peers after school or over the summer. Enrollment in such a program shall support Student’s progress on IEP goals. If the BOCES does not have an appropriate program, the BOCES shall **pay up to \$600** to enroll Student in an appropriate program or activity in the community. This program must be completed by **Thursday, August 31, 2023**, though Parent and Student may opt out if they wish.



- b. By **Friday, May 19, 2023**, the BOCES and Parents shall agree upon an appropriate program or activity. A meeting is not required to arrange this program, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for this program. The BOCES shall submit the plan for this program to the CDE no later than **Friday, June 2, 2023**. If the BOCES and Parents cannot agree to a program by May 19, 2023, the CDE will determine the program by **Friday, June 2, 2023**.
  - i. The parties shall cooperate in selecting the program. If Parents refuse to meet with the BOCES within this time, the BOCES will be excused from paying for the program, provided that the BOCES diligently attempts to meet with Parents and documents such efforts. A determination that BOCES diligently attempted to meet with Parents, and should thus be excused from paying for the program, rests solely with the CDE.
- c. To verify that Student has participated in the program required by this Decision, the BOCES must submit proof of enrollment to CDE by **Tuesday, August 1, 2023** and proof of completion no later than **Friday, September 15, 2023**. Proof of completion must include date and duration of any services.
- d. The BOCES must, if Parents give their consent, inform the program's administrators of Student's positive behavioral support strategies and the contents of his BIP prior to Student's first day participating in the program to help Student succeed in this program. The BOCES shall submit meeting notes documenting this consultation to the CDE by **August 1, 2023**. If Parents refuse to consent to sharing this information, then the BOCES will be excused from this requirement.
- e. Services received through this program will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. If for any reason, including illness, Student is not available for the scheduled program or portion thereof, the BOCES will be excused from providing the service scheduled for that session. If for any reason the BOCES fails to provide the program or funding or the program is cancelled and the BOCES is reimbursed, the BOCES and Parent must work together to identify another mutually agreed upon alternative. The BOCES must immediately notify the CDE of the change.
- f. The services through the program must be provided to Student outside of the regular school day (such as before and/or after school, on weekends, or during school breaks) to ensure Student is not deprived of the instruction Student is entitled to (including time in general education).

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. 46607 (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 24th day of March, 2023.



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Nicholaus Podsiadlik  
State Complaints Officer

## **APPENDIX**

### **Complaint, pages 1-5**

- Exhibit 1: Supporting Documents

### **Response, pages 1-70**

- Section 1: Documents Related to Allegation 1
- Section 2: Documents Related to Allegation 2
- Section 3: Documents Related to Allegation 3
- Section 4: Documents Related to Allegation 4
- Exhibit A: IEPs
- Exhibit B: PWNs
- Exhibit C: IEP meeting notices and meeting notes
- Exhibit D: Service logs
- Exhibit E: Attendance records
- Exhibit F: Report cards and progress reports
- Exhibit G: District calendar
- Exhibit H: Policies and procedures
- Exhibit I: Correspondence
- Exhibit J: Names, titles, and contact information of relevant staff
- Exhibit K: Verification of delivery of the Response to Parents
- Video: Video of a meeting on October 18, 2022

### **Reply, pages 1-2**

- Exhibit 1: Supporting Documents
- Exhibit 2: Supporting Documents
- Exhibit 3: Supporting Documents
- Exhibit 4: Screenshots of emails
- Exhibit 5: Videos of two meetings between School and Parents

### **Telephone Interviews**

- BOCES Special Education Director: February 28, 2023
- School Principal: February 28, 2023
- Special Education Teacher: February 28, 2023
- Fourth Grade Teacher: March 2, 2023
- Behavioral Specialist: March 2, 2023
- Stepparent: March 3, 2023
- Parent: March 3, 2023
- CDE Content Specialist: March 6, 2023

## **CDE Exhibits**

- Exhibit 1: School Handbook
- Exhibit 2: Emails
- Exhibit 3: Student's February 2023 TIA schedule
- Exhibit 4: BOCES disciplinary policy