

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

Federal Complaint 2006:505

Northeast Colorado Board of Cooperative Educational Services

Decision

INTRODUCTION

This Complaint was dated 4/30/06 and postmarked 5/24/06. The Complaint was received in the office of the Federal Complaints Officer on 6/1/06.¹ The Northeast Colorado Board of Cooperative Educational Services (BOCES) received the Complaint on 6/5/06. The BOCES response to the Complaint was due on 6/20/06. The BOCES' special education director requested additional time until 6/27/06 to submit the BOCES' response (Response) because key BOCES and District staff were unavailable due to summer vacation. The Federal Complaints Officer agreed to the requested extension of time. The BOCES' Response was received on 6/27/06. The BOCES' Response was delivered to Complainant on 6/29/06. Complainant's reply was received on 7/11/06. Between 7/10/06 and 8/25/06, the Federal Complaints Officer received additional written documentation from the BOCES. The Federal Complaints Officer also conducted the following telephone interviews: with the BOCES' special education director on 7/28/06; with Complainant on 8/17/06; with the BOCES' special education director and [Student's] speech/language specialist on 8/18/06; and with the BOCES' special education director on 8/25/06. The Federal Complaints Officer closed the record on 8/25/06.

Complainant is the parent of child who has been identified as being a preschooler with a disability.

FINDING OF EXCEPTIONAL CIRCUMSTANCES

Under normal circumstances, this Decision would have been issued no later than 7/31/06. However, 34 C.F.R. §300.661 (b) (1)² permits an extension of time for processing a state-level complaint if "exceptional circumstances" are found.

¹ The Complaint was mailed in a box addressed to the "Compliance Unit, Special Education Division, Department of Education." It was received by the Exceptional Student Services Unit on 05/30/06. However, the box was not addressed to the "Federal Complaints Officer" as is required by the federal complaints procedure. The resulting confusion about whom the intended recipient was caused additional delay in delivery to the office of the Federal Complaints Officer. The Complaint was received by the Federal Complaints Officer on 06/01/06.

² Hereafter, the 1999 regulations implementing the Individuals with Disabilities Education Act of 1997 will be referred to by section number only (i.e., §300.661).

The Federal Complaints Officer has found that that exceptional circumstances existed requiring the Federal Complaints Officer to extend the time period for resolving this Complaint. The exceptional circumstance are: the number and complexity of the issues to be resolved; the large volume of written documentation submitted by the parties requiring careful review; the need to obtain additional information from [Student's] service providers; and the need to conduct interviews with Complainant and BOCES staff, many of whom were unavailable during the summer. On 7/31/06, the Federal Complaints Officer extended the timeline for resolving the Complaint to 8/30/06 and notified both parties of the extension of time by letter, a copy of which is attached hereto as Attachment A.

ALLEGATION I

A. Allegation

“[Student’s IEPs dated 8/30/04 and 08/24/05 do] not address [Student’s] current level of academic achievement or how [Student] is functioning within the general curriculum. It does not address age appropriate standards for each level of educational performance and needs. The comments are general, vague and do not begin to represent [Student]. The same exact statements under the (Strength) and (Needs) section are in the 2003, 2004 and 2005 IEP (sic). (as if cut and pasted) (sic)...”

B. The BOCES’ Response

The BOCES denies this allegation. “[All] IEPs indicate present levels of educational performance and, in listing needs as derived from the disability, address how [Student’s] disability affects his participation in appropriate preschool activities.”

C. Findings of Fact and Conclusions of Law

Based on the initial Complaint and Complainant’s reply to the BOCES’ Response, it is the Federal Complaints Officer’s understanding that this allegation concerns the “Educational” domain of the IEP at page 3 of the 8/30/04 IEP and at page 3 of the 8/24/05 IEP.

1. The 8/30/04 IEP

With regard to the 08/30/04 IEP, the Federal Complaints Officer is required to apply 34 C.F.R. §300.347 (a) (1), which provides as follows:

The IEP for each child with a disability must include – (1) A statement of the child’s present levels of educational performance, including...(ii) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities...

The Federal Complaints Officer makes the following findings of fact and conclusions of law:

- a. At all times pertinent to this allegation, [Student] was identified as a preschool child with a disability.
- b. Complainant attended the 8/30/04 annual IEP review meeting.
- c. The 8/30/04 IEP contained a statement listing six strengths of [Student].³ This list identified then current strengths, was cumulative in nature, and included strengths acquired between 9/2/03 and 8/30/04.⁴
- d. The 8/30/04 IEP contained a statement listing four needs⁵ of [Student] that affected his ability to participate in appropriate preschool activities. The list identified [Student's] then current needs. It was nearly identical to the needs identified on the 9/2/03 IEP.⁶ The identified needs reflected how [Student's] disability affected his participation in appropriate activities at the preschool level.

The Federal Complaints Officer concludes that the 8/30/04 IEP met the minimal content requirements of §300.347 (a) (1). To the extent that Complainant has alleged that the identification of strengths and needs listed on the 8/30/04 IEP was inaccurate and/or incomplete, then her dispute involves an IEP team decision. Complainant was present at the 8/30/04 IEP team meeting. If Complainant disagreed with strengths and needs listed on the 8/30/04 IEP, she was entitled to request a due process hearing to resolve the disagreement.

2) 8/24/05 IEP

With regard to the 8/24/05 IEP, the Federal Complaints Officer is required to apply the relevant standard set forth in the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) and also §300.347 (a) (1) to the extent that the regulation is consistent with IDEA 2004.⁷ IDEA 2004 requires the IEP to contain:

...a statement of the child's present levels of academic achievement and functional performance, including...(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities...⁸

³ The strengths listed were: "likes to take toys and line them up; is playing peek-a-boo with a blanket; will start to listen to a page or two of a story; beginning to match colors; starting to match the letter of his name to a sample; will use a peg handled puzzle placing animals in correct place; will check his schedule with help."

⁴ The added strengths were "beginning to match colors, starting to match the letters of his name to sample; will use a peg handled puzzle placing animals in correct place; will check his schedule with help"

⁵ The needs listed were: "develop eye contact; develop turn taking; develop being able to take and follow commands; continue to develop some pre-readiness skills."

⁶ The last need listed on the 9/2/03 IEP was "start to develop some pre-readiness skills".

⁷ See Attachment B

⁸ 20 USC §1414 (d) (1) (A) (i) (I)

As set forth, above, §300.347 (a) (1) provides as follows:

The IEP for each child with a disability must include – (1) A statement of the child’s present levels of educational performance, including...(ii) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities...

The Federal Complaints Officer makes the following findings of fact and conclusions of law:

- a. [Student] was a preschool child who was not yet involved in academic activities.
- b. Complainant attended the 8/24/05 annual IEP review meeting.
- c. The 8/24/05 IEP contained a statement listing twelve strengths of [Student]. This list identified then current strengths, was cumulative in nature, and included five additional skills acquired between 8/30/04 and 8/24/05.⁹
- d. The 8/24/05 IEP contained a statement listing four needs of [Student] that affected his ability to participate in appropriate activities at the preschool level. This list identified then current needs and was identical to the needs identified on the 08/30/04 IEP. The identified needs reflected how student’s disability affected his participation in appropriate preschool level activities.

The Federal Complaints Officer concludes that the 8/24/05 IEP met the minimal content requirements of IDEA 2004 and §300.347 (a) (1). As is indicated, above, if Complainant believed that the strengths and needs contained in the 8/24/05 IEP were inaccurate or incomplete, she was entitled to request a due process hearing to resolve her disagreement with the IEP.

ALLEGATION II

A. Allegation

“[Annual Goals 1 and 2 contained in the 9/2/03 IEP and 08/30/04 IEP and some objectives] are not measurable...[Annual Goal 2 and its benchmarks set forth in the 8/24/05 IEP] are very general and vague.”

⁹ The added strengths were: “He is using the ‘all done’ box for many other activities; Is beginning to use words at radom (sic) times; Is playing with puzzles with knobs; Is playing with finger paints/pudding; Is playing with this toy (sic) with a car that will go down a ramp; This summer, Adams Camp was very successful and the entire family enjoyed it.”

B. The BOCES' Response

The BOCES denies this allegation. "Each of these IEPs also include (sic) measurable annual goals with baseline information, and benchmarks and short term objectives."

C. Findings of Fact and Conclusions of Law

Based on the initial Complaint and Complainant's reply to the BOCES' Response, it is the Federal Complaints Officer's understanding that this allegation concerns the 9/2/03 IEP, the 8/30/04 IEP and the 8/24/05 IEP. The general allegation is that the goals and objectives are not measurable and/or are so vague and general as to preclude measurability.

For the IEPs in effect before 7/1/05, §300.347 (a) (2) establishes the IEP content requirements relevant to this allegation:

The IEP for each child with a disability shall include...[a] statement of measurable annual goals, including benchmarks and or short term objectives, related to -

- (i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum (i.e., the same curriculum as for nondisabled children), or for preschool children, as appropriate, to participate in appropriate activities; and
- (ii) Meeting each of the child's other educational needs that result from the child's disability...

For IEPs in effect on or after 7/1/05, §1414 (d) (1) (A) (i) (II) of IDEA 2004 requires the IEP to include:

a statement of measurable annual goals, including academic and functional goals, designed to—

- (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
- (bb) meet each of the child's other educational needs that result from the child's disability.

With regard to this allegation, the Federal Complaints Officer makes the following findings of fact and conclusions of law:

1. 9/2/03 and 8/30/04 IEPs

- a. The 9/2/03 and 8/30/04 IEPs contained the same three annual goals and nearly all of the same objectives for each goal.¹⁰
- b. Annual Goal 1 (“To increase pre-readiness skills”) contained five objectives. Objectives 2, 3 and 4 were measurable because the skills to be achieved, the baselines of current performance and the criteria for measuring progress were described with sufficient specificity. However, Objective 1 (“The learner will interact with peers and adults”) and Objective 5 (“The learner will develop eye contact with others”) were not measurable because the skills to be achieved were too general and vague. Specifically, Objective 1 fails to adequately describe the kinds of interactions necessary for [Student] to engage in for purposes of achieving the objective. Objective 2 fails to describe any criteria for determining whether [Student] has met the objective—e.g., would eye contact maintained for 5 seconds indicate achievement? Would eye contact maintained for 2 seconds be sufficient?
- c. Annual Goal 2 (“Student will continue to develop fine motor skills”) contained four objectives. The goal and its objectives were measurable because the skills to be achieved, the baselines of current performance and the criteria for measuring progress were described with sufficient specificity.
- d. Annual Goal 3 (“The student will improve functional communication skills by 80% of the following short term objectives”) contained six objectives. The goal and its objectives were measurable because the skills to be achieved, the baselines of current performance and the criteria for measuring progress were described with sufficient specificity.

With respect to Annual Goal 1 of the 9/2/03 and 8/30/04 IEPs, the Federal Complaints Officer concludes that the BOCES violated §300.347 (a) (2). The Federal Complaints Officer further concludes that this violation is procedural in nature and that there is no factual basis in the record to conclude that this procedural violation denied [Student] a free appropriate public education. With respect to Annual Goal 2 and Annual Goal 3, the Federal Complaints Office concludes that the BOCES did not violate §300.347 (a) (2).

2. The 8/24/05 IEP

- a. The 8/24/05 IEP contained four annual goals and multiple objectives for each goal. The measurability of each annual goal depended on whether the goal’s individual objectives were measurable.

¹⁰ During the 2003-04 school year, the student achieved Objective 1 of Annual Goal 3. For that reason, Objective 1 was not continued over to the 8/30/04 IEP.

- b. The objectives for each of the annual goals were measurable. The skills to be achieved, the baselines of current performance and the criteria for measuring progress are described with sufficient specificity.

The Federal Complaints Officer therefore concludes that the annual goals contained in the 8/24/05 IEP met the minimal requirements of §1414 (d) (1) (A) (i) (II) of IDEA 2004.

ALLEGATION III

A. Allegation

[With regard to the 9/2/03 IEP goals and objectives], “No progress reports [were] received for 11/04.” [With regard to the 8/30/04 IEP goals and objectives], “No progress reports [were] received for 1/05, 3/05 or 4/05. I finally received these in **March of 2006 after an attorney contacted them.** I then requested [Student’s] entire school file so I ended up with two to three copies of some progress reports. The progress reports are a mess. Dates are incorrect and there are discrepancies between copies.” In her reply to the BOCES’ Response, Complainant clarified that she is primarily concerned with the progress reports for the 2003-04 school year and the 2004-05 school year.

B. The BOCES’ Response

The BOCES denies this allegation. “In accordance with all IEPs outlining specialized services for [Student], regular reports on...progress towards...annual goals and objectives are to be provided in writing in November and March of each year...This is consistent with the reporting requirements of the [School District] for non-disabled preschool-age pupils. From August 2003 to the present, regular written reports of [Student’s] progress have been provided...In conjunction with [the progress] reports, [Student’s] parents were also provided regular verbal reports on [Student’s] progress at IEP team meetings held intermittently through each school year.”

C. Findings of Fact and Conclusions of Law

§ 300.350 establishes the following accountability requirements regarding implementation of the IEP for a child with a disability:

(a) **Provision of services.** Subject to paragraph (b) of this section, each public agency must-

(1) Provide special education and related services to a child with a disability in accordance with the child's IEP; and

(2) Make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

(b) **Accountability.** Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual

goals and benchmarks or objectives. However, the Act does not prohibit a State or public agency from establishing its own accountability systems regarding teacher, school, or agency performance.

(c) **Construction-parent rights.** Nothing in this section limits a parent's right to ask for revisions of the child's IEP or to invoke due process procedures if the parent feels that the efforts required in paragraph (a) of this section are not being made.

§300.347 (a) (7) requires that the IEP contain a statement explaining how the parents will be informed of their child's progress towards achieving the IEP annual goals and objectives. The Office of Special Education and Rehabilitative Services of the U.S. Department of Education (OSERS) has made clear that the required progress reports need not be a detailed written narrative nor do they need to be in writing:

Requiring a "detailed written narrative" of how a child is progressing toward meeting the IEP objectives...could add unnecessary burden...The statute and regulations make clear that a written report is sufficient, although in some instances, an agency may decide that a meeting with the parents (which does not have to be an IEP meeting) would be a more effective means of communication.

The agency must ensure that whatever method, or combination of methods, is adopted provides sufficient information to enable parents to be informed of (1) their child's progress toward annual goals, and (2) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

Generally, the reports to parents are not expected to be lengthy or burdensome. The statement of the annual goals and short term objectives or benchmarks in the child's current IEP could serve as the base document for briefly describing the child's progress.¹¹

The cited 1999 regulations are consistent with IDEA 2004 and are, therefore, applicable to progress reporting between 05/31/03 and 05/31/06.

With regard to this allegation, the Federal Complaints Officer makes the following findings of fact and conclusions of law:

1. All IEPs in effect during the relevant time period (i.e., the IEPs dated 9/2/03, 8/30/04, 8/24/05 and 1/31/06) state that the parents would be informed of [Student's] progress toward annual goals in writing in November and March. Because the IEPs specified that *written* progress were to be provided in November and March, the burden is on the BOCES to submit to the Federal Complaints Officer copies of required progress reports.

¹¹ Federal Register: March 12, 1999 (Volume 64, Number 48) at page 12594.

2. The 9/2/03 IEP

- a. Goal 1: The BOCES submitted a copy of the November 2003 progress report. A copy of a March 2004 progress report was not submitted for this goal.
- b. Goal 2: The BOCES submitted a copy of the November 2003 progress report. It also submitted a copy of a cumulative progress report showing multiple reporting dates (i.e., 8/30/03, 11/1/03, 1/14/04 and 3/23/04). This progress report is the required March 2004 progress report.
- c. Goal 3: The BOCES did not submit a copy of the November 2003 progress report for this goal, but did submit a copy of the March 2004 progress report.

3. The 8/24/04 IEP

- a. Goal 1: The BOCES submitted copies of the November 2004 and March 2005 progress reports for this goal.
 - b. Goal 2: The BOCES submitted a copy of the November 2005 progress report for this goal. A copy of the March 2005 progress report was not submitted. The BOCES did submit a cumulative progress report with a meeting date of 04/18/05, which is an April 2005 progress report.
 - c. Goal 3: The BOCES submitted a progress report with dates of progress as of October 26th or October 27th. The Federal Complaints Officer finds that this was effectively the November 2004 progress report. A March 2005 progress report was not submitted.
4. The Federal Complaints Officer concludes that the BOCES violated §300.350 (a) (1) because it intermittently failed to provide written progress reports on some of [Student's] IEP goals during the 2003-2004 school year and the 2004-2005 school year as required by [Student's] IEPs.
5. The written progress reports submitted by the BOCES met the minimal content requirements of the IDEA because they clearly indicated those objectives on which [Student] was making progress and those objectives for which progress was minimal or not evident.
6. The parties disagree about whether the parents actually *received* any written progress reports in November 2003, March 2004, November 2004 and March 2005. The findings of fact set forth in this section, above, do not resolve this factual dispute.

In most legal settings, when facts are in dispute, the usual method for resolving the dispute is to place witnesses under oath and subject them to examination and cross-

examination to assist the fact finder in determining which of the witnesses is the more credible. However, the federal complaints process is not well-suited for resolving factual disputes. The Federal Complaints Officer has no authority to place individuals under oath for purposes of examination and cross-examination to determine their credibility.

Another way of attempting to resolve a factual dispute is through an examination of the documentation submitted by the parties. The Federal Complaints Officer has carefully reviewed the documentation provided by Complainant and the BOCES and finds that the documentation does not resolve the factual dispute about whether or not the BOCES provided Complainant with the relevant written progress reports. Complainant was entitled to request a due process hearing to resolve this factual dispute.

7. Although the Federal Complaints Officer has concluded that the BOCES violated §300.350 (a) (1), this conclusion may not be construed to mean that the BOCES failed to *otherwise* inform the parents of [Student's] progress. The BOCES states that, in addition to written progress reports, Complainant was consistently informed of [Student's] progress during formal and informal IEP team meetings held intermittently throughout each of the school years in question.

The Federal Complaints Officer has carefully reviewed the documentation submitted by the parties. The documentation shows that, during the relevant time period, there were many formal and informal IEP team meetings attended by [Student's] providers and Complainant. However, the Federal Complaints Officer was not present at those meetings and, therefore, does not know what occurred. The Federal Complaints Officer is unable to resolve this factual dispute and is, therefore, unable to conclude that the BOCES' intermittent failure to prepare written progress reports on some goals deprived [Student] of a free appropriate public education (FAPE). Complainant was entitled to request a due process hearing to resolve the factual disputes involving the reporting of [Student's] progress on goals and objectives.

ALLEGATION IV

A. Allegation

“There is no documentation of any speech therapy from March 30, 2005 to August 29, 2005. In reply to the BOCES' Response, Complainant states that, based on the BOCES' documentation, [Student] did not receive the specified speech/language (S/L) services on multiple dates between 9/1/05 and 12/19/05 for a variety of reasons, including “[Student] having a “bad day” (behavior), [Student] was “resting,” and the provider was absent due to scheduled in-service training or other reasons.

B. The BOCES' Response

The BOCES states that, although there is no documentation of S/L services between 03/30/05 and 05/19/05, S/L services were provided. "On 03/30/05, [Student's] direct speech provider....went on medical leave for six weeks. At this time, the District's Speech/Language Supervisor delegated the speech/language services outlined in the 08/30/04 IEP, to the full-time Early Childhood Special Education Assistant...Accordingly, the speech/language services were provided by the Assistant to [Student]; however, data indicating frequency and duration was not maintained from 03/30/05 to 05/19/06. During the summer of 2005, [Student] was eligible for Extended School Year Services ("ESY"). Such services included 6-8 sessions for 20-30 minutes of speech/language services..."

It is the BOCES' policy that that services are to be made up if a [Student] missed services due to the provider's absence (e.g., illness) or when classroom activities (such as class parties or "picture day") prevent the delivery of services.¹² It is also the BOCES' policy not to make up services for district holidays, in-service training or snow days because the IEPs within the BOCES provide that services will be provided per the district calendar. If [Student] was unavailable for services because of his behavior or because he was sleeping at a particular time during the day, the provider would try to provide the services at another time during the same day.¹³

C. Findings of Fact and Conclusions of Law

As set forth in Section III.C., above, § 300.350 (a) (1), above, requires the public agency to provide the special education services specified by the IEP.

The Federal Complaints Officer makes the following findings of fact and conclusions:

1. 8/30/04 and 1/10/05 IEPs

- a. The 8/30/04 IEP and the revised 1/10/05 IEP specified that [Student] was to receive 20 minutes per week of direct S/L services in the general classroom and 60 minutes per week of direct S/L services outside the general classroom. No other speech language services, such as PECS training for the parents, were specified.
- b. Goal 3 of the 08/30/04 IEP was [Student's] functional communication goal. Goal 3 anticipated that data would be collected to determine whether [Student] was making progress toward achieving functional communication skills.

¹² This information was obtained during the 8/18/05 telephone interview with the BOCES' special education director and [Student's] speech language therapist.

¹³ See footnote 12, above.

- c. The BOCES has no documentation demonstrating that S/L services were provided during the period between 03/30/05 and 05/19/05.¹⁴
- d. No March 2005 progress report for Goal 3 has been produced by the BOCES.

The Federal Complaint Officer concludes that the BOCES violated §300.350 (a) (1) because it has failed to demonstrate that [Student] received S/L services between the dates of 3/30/05 and 5/19/05. The Federal Complaints Officer concludes that this violation deprived [Student] of a free appropriate public education.

2. Summer 2005 Extended School Year Services (ESY)

- a. The 5/17/05 ESY IEP specified that student was to receive 20 to 30 minutes of S/L services for six to eight sessions. The specific schedule for the services was to be jointly decided by the parents and the S/L provider.
- b. The [Student] received 30 minutes of S/L services on seven different dates: 6/9/05, 6/30/05, 7/7/05, 7/14/05, 7/21/05, 7/28/05 and 8/24/05.¹⁵

The Federal Complaints Officer therefore concludes that, with regard to ESY services for the summer of 2005, [Student] received the S/L services to which he was entitled.

3. 8/24/05 IEP

- a. The 8/24/05 IEP specified that [Student] was to receive the following S/L services: 20 minutes per week of indirect (consultation) services; 20 minutes per week of direct services in the general classroom; and 60 minutes per week of direct services outside the general classroom.
- b. The documentation submitted by the BOCES is [Student's] S/L services log for Fall 2005. This log is "child focused" in that it reflects the direct S/L services provided by both the S/L specialist and the paraprofessional delegated by the speech S/L specialist to provide direct services. The BOCES has also submitted documentation of discrete trial data collected during November 2005.
- c. The BOCES has produced documentation demonstrating that [Student] consistently received direct S/L services between 8/29/05 and 12/19/05. The

¹⁴ Sometime in late October or early November 2004, Complainant and [Student's] service providers agreed to discontinue using the picture exchange communication system (PECS) and, instead, begin using sign language as [Student's] functional communication system. However, the IEP team was not reconvened to revise Goal 3, which was a specific goal linked to PECS. As a result, no revised functional communication goal was developed for [Student]. This informal agreement became a source of confusion and, ultimately, disagreement between the BOCES and Complainant.

¹⁵ The BOCES originally submitted documentation showing that [Student] received 8 sessions of S/L services during the summer of 2005. Each session was 30 minutes in duration. The BOCES subsequently reported that 7, and not 8, sessions of S/L were provided to [Student] during the summer of 2005.

documentation, however, does not resolve the factual question of whether [Student] received all of the speech language services to which he was entitled. Over the course of time between 8/29/05 and 12/19/05, there were four weeks when [Student] received 80 minutes of direct services per week; there were six weeks when [Student] received more than 80 minutes of direct S/L cumulating to 185 excess minutes; there was one week when [Student] received less than 80 minutes of direct services per week (i.e., a minus 50 minutes); and there were five weeks when services were clearly provided but actual minutes of service were not recorded.

- d. The BOCES has also submitted documentation showing that the IEP team, including [Student's] S/L providers and Complainant, attended informal team meetings throughout the fall of 2005. The BOCES states that indirect S/L (consultative) services were provided during these meetings. However, this documentation does not resolve the factual question about how much time within each meeting was devoted to S/L consultative services.

With regard to the time period between 08/29/05 and 12/19/05, the Federal Complaints Officer finds that the documentation submitted by the BOCES does not resolve the question of whether [Student] received all of the direct speech/language services specified by the 8/24/05 IEP. Because the Federal Complaint Officer is unable to resolve this factual dispute, the Federal Complaints Officer concludes that there is insufficient evidence to determine whether the BOCES violated §300.350 (a) (1). Complainant was entitled to request a due process hearing to resolve this dispute.

ALLEGATION V

A. Allegation

“[Student] was having terrible behavior problems at school and home...[With regard to the 05/11/04 ESY IEP], “[the] FACTS was completed and states a multitude of behavior problems. The BEST team addressed none of these behavior problems...[the] BEST Team did not address any behavior problems in the time frame the IEP states...By December of '04 [Student's] behavior was so bad the school was calling me and telling me to come and pick [Student] up from school. When asked why [Student] was not making better progress at school I was told behavior problems which is in the schools (sic) documentation but no behavioral intervention was done as the **5/11/04 ESY IEP stated.**”

By letter dated 6/2/06,¹⁶ the Federal Complaints Officer has clarified that the investigation of this allegation would focus on whether, between 05/31/03 and 05/31/06, the IEP team considered the use of positive behavior interventions and supports, and other strategies, to address [Student's] challenging behaviors. Complainant has further clarified that the 2003-2004 school year is not at issue because the 2003-2004 school year went well for [Student].

¹⁶ See Attachment C at page 2.

B. The BOCES' Response

The BOCES denies this allegation. “Beginning in October 2004, the Behavior, Evaluation and Support Team (“BEST Team”), in conjunction with the IEP team, initiated a Functional Behavior Assessment (“FBA”) of [Student], which was completed in January of 2005...Upon completion of the FBA, the BEST Team facilitated a meeting on 01/24/05 with the IEP team, including [Student’s] parents, to review the results and discuss the recommendations...At this meeting, various interventions were discussed and a list of interventions to use with [Student] was compiled...Also, as a result of this meeting, a crisis intervention plan was developed and implemented...On 02/18/05, the BEST team organized a meeting with all providers to discuss specific positive behavioral interventions and supports, as well as other strategies to address [Student’s] behavior...[Mother] attended and participated in this meeting. As a result of this meeting, the IEP team decided to implement a multitude of positive behavioral interventions and supports...To review data and determine fidelity of the recommended interventions, the BEST team facilitated follow-up meetings with the IEP team on 04/05/05 and 11/11/05...[Mother] attended and participated in both of these meetings...In addition to the crisis intervention plan and the positive behavior supports and strategies developed in conjunction with the BEST Team, the IEP team added a behavior intervention plan (“BIP”) to the IEP to address emerging concerns with spitting behavior...The BIP includes a specific behavioral goal, a plan for providing positive instruction and support, and a description of success...As indicated in the 05/15/06 Triennial IEP, the BIP has been reviewed and modified periodically.”

C. Findings of Fact and Conclusions of Law

In the case of a child whose behavior impedes his or her learning or that of others, the IEP team, when developing the child’s IEP, is required to consider, if appropriate, strategies, including positive behavioral interventions, strategies and supports to address that behavior. See, §300.346 (a) (2) (i). This 1999 regulatory requirement is consistent with IDEA 2004.

With regard to this allegation, the Federal Complaints Officer makes the following findings of fact and conclusions:

1. The documentation submitted by the parties demonstrates that, beginning with the initial 9/2/03 IEP, [Student’s] behavior was of ongoing concern to the IEP team, including the parents, throughout the time frame relevant to this allegation.
2. The 5/11/04 ESY IEP documents the following: (a) [Student] was exhibiting tantrums and other escalating behaviors; (b) behavioral assessments would be initiated upon receipt of parental consent; (c) staff would be completing the *Functional Assessment Checklist for Teachers and Staff* (FACTS) in May 2004; and (d) a functional behavioral assessment would commence “next fall on each behavioral episode.” The IEP did not specify when the functional behavioral assessment was to be completed. The BOCES has submitted documentation showing that the FACTS was completed by staff in May 2004. By 12/15/05 (and most likely earlier), the functional behavioral assessment had been initiated per the 5/11/04 IEP; a list of prior

interventions previously used with [Student] was compiled during a 1/24/05 team meeting which was attended by the IEP team, including Complainant, and the Behavior, Evaluation and Support Team (BEST Team) members.¹⁷ The interventions compiled included home interventions. A crisis intervention plan for [Student] was developed at that meeting to address self-injurious behavior by {Student}.

3. The 08/30/04 IEP specifies that the Family Support Specialist was to provide assistance in behavioral issues in the classroom and home for 30 minutes per month. Accommodations specified by the IEP included “monthly informal meeting with team (progress).”
4. BOCES documentation shows that team meetings with the parents to discuss issues, behaviors and strategies to implement in the school and home settings were held on 9/21/04, 10/25/04, 1/10/05 (an IEP team meeting), 1/24/05, 2/7/05, 2/28/05 and 4/13/05. Documentation from the 1/24/05 and 2/18/05 meetings included information about prior interventions used, including positive behavioral interventions, and recommendations for implementation of additional positive behavioral supports and other strategies for the school and home settings. *Consistency* across the school and home settings was emphasized. The 4/13/05 meeting was a follow-up meeting with the BEST Team to review the implemented interventions and to recommend additional interventions. The BEST Team continued to collect data until August 2005.
5. The 8/24/05 IEP provides that the Family Support Specialist was to provide assistance in behavioral issues in the classroom and home for 30 minutes per month. Informal monthly team meetings were specified. A behavior goal (around spitting behavior) was included in the IEP. The BEST Team continued to observe [Student] and collect data through September and October 2005 and provided additional training to [Student’s] teachers and service providers around implementation of positive behavioral interventions.¹⁸
6. The 1/31/06 IEP added two hours per month of services to be provided by a school psychologist. The meeting notes accompanying the IEP include an extensive discussion regarding [Student’s] behaviors and the use of positive behavioral supports. The BEST Team consulted with [Student’s] providers regarding [Student’s] spitting behavior on 2/10/06.
7. Since October 2004, the BOCES has contracted with the University of Colorado for a variety of services involving children with autism, including consulting services specific to [Student] as well as staff and parent training around children with autism.

¹⁷ See document entitled “General Results of Functional Behavioral Assessment”

¹⁸ See document entitled “Behavior Intervention Consultations with Parent and Staff”

8. The Federal Complaints Officer finds that, between 9/2/03 and 5/31/06, the IEP team consistently considered [Student's] challenging behaviors and considered behavioral interventions for [Student], including positive behavioral interventions. The Federal Complaints Officer therefore concludes that the BOCES did not violate §300.346 (a) (2) (i).

ALLEGATION VI

A. Allegation

“[Student] was having terrible behavior problems at school and home. We never received any behavioral interventions to help in the home setting. As the 01/10/05 IEP states (sic).”

The Federal Complaints Officer has clarified that the investigation of this allegation would focus on whether [Student] and/or his family received all the behavioral services specified by the relevant IEPs between 01/10/05 and 05/31/06, including timely conducting any functional behavioral assessment(s) and timely developing and implementing a behavior intervention plan.¹⁹

B. The BOCES' Response

The BOCES denies this allegation. “...[The] combination of behavioral services provided by both the Family Support Specialist and the School Psychologist...with the additional behavioral services provided through the IEP team's work with the BEST Team...not to mention implementation of the BIP first added to [Student's IEP on 01/31/06, [Student] has received all behavior services outlined in his IEP.”

C. Findings of Fact and Conclusions of Law

As set in Section III.C., above, the public agency is required to provide special education and related services to a child with a disability in accordance with the child's IEP and to make good faith efforts to assist the child to achieve the goals and objectives or benchmarks listed in the IEP. § 300.350 (a) (1).

1. The Findings of Fact set forth in Section V.C., above, are incorporated herein by reference.
2. The Federal Complaint Officer finds that the BOCES has submitted sufficient documentation demonstrating that between 01/10/05 and 05/31/06, [Student] received all of the services that he was entitled to receive himself or on his behalf. With regard to this allegation, the Federal Complaints Officer concludes that the BOCES did not violate §300.350 (a) (1).

¹⁹ See Attachment C, page 2

ALLEGATION VII

A. Allegation

“[Student] spends the majority of his school day in a separate room off of the main classroom. [Student] does all of [Student’s] ‘workbaskets’ and some of [Student’s] sensory play there with [Student’s] Para....”

The Federal Complaints Officer has clarified that the investigation of this allegation would focus on whether [Student] was placed in the least restrictive environment specified by the relevant IEPs between 05/31/03 and 05/31/06.²⁰

B. The BOCES’ Response

The BOCES denies this allegation. “Since 05/31/03, [Student] has been educated at his home school and in an inclusive preschool classroom where he received specialized and highly individualized services...[Student’s] IEP team considers such placement to be appropriate, in part, because it encourages [Student’s] socialization with typically developing peers. Also, as indicated on [Student’s] IEPs, the chosen placement is considered to be the least restrictive.”

C. Findings of Fact and Conclusions of Law

§ 300.550 provides as follows:

(b) Each public agency shall ensure-

- (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs 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.

With regard to this allegation, the Federal Complaints Officer makes the following findings of fact and conclusions:

1. All IEPs in effect between 9/2/03 and 5/31/06 required [Student] to be placed in an early childhood (preschool) integrated setting designed primarily for children without disabilities. The IEPs required [Student] to receive specialized instruction and related services individualized to his unique needs.
2. At all times relevant to this allegation, [Preschool], met the criteria of an early childhood integrated setting.

²⁰ See Attachment C, page 2

3. [Student's] classroom schedules anticipated that [Student] would receive most, but not all, of his individualized instruction and other services in the main classroom with his nondisabled peers while some instruction and services were to be provided in an adjoining room.
4. [Student] was removed to the adjoining room when in a "rage" stage.
5. The parties disagree about how much time [Student] actually spent in the preschool's main classroom as opposed to the adjoining room.

The Federal Complaint Officer has carefully reviewed the documentation submitted by the parties. The Federal Complaint Officer finds that the documentation supplied by the parties does not resolve the factual dispute about whether, during the relevant time period, [Student] spent most of his time in the therapy room instead of in the preschool's main classroom with his nondisabled peers.

With regard to this allegation, the Federal Complaints Officer is unable to conclude that the BOCES violated § 300.550. Complainant was entitled to request a due process hearing to resolve this factual dispute.

ALLEGATION VIII

A. Allegation

"The ABLLS assessment [was] used to determine the IEP goals in 2005....Some of the previous goals were **then removed** even though [Student] had not met them. **This was done without discussion with us.**"

B. The BOCES' Response

The BOCES denies this allegation. "During the Spring of 2005, members of [Student's] IEP team were trained on the Assessment of Basic Language and Learning Skills ("ABLLS")...Upon implementation of ABLLS, the team decided that [Student's] former IEP goals needed to be redrafted to align with ABLLS. As indicated in [Student's] 08/24/05 IEP, the unmet goals contained in [the] 08/30/04 IEP were changed...As a member of [Student's] IEP team, [Mother] attended and participated in the 08/24/05 staffing in which the new goals/objectives were discussed, and did not object to the proposed changes...[Mother] was provided a copy of the new IEP containing the new goals and objectives and was informed of her right to request an additional meeting to further discuss the goals/objectives."

C. Findings of Fact and Conclusions of Law

The Federal Complaint Officer has clarified that the investigation of this allegation would focus on whether the IEP team, without the parent's participation and knowledge, removed unmet annual goals contained in Garrett's 08/30/04 IEP from his 08/24/05 IEP.²¹

The IEP team includes the parents. See, §300.344 (a) (1). The public agency must take steps to ensure that at least one parent of the child is present at each IEP team meeting or is afforded the opportunity to participate by alternate means. See §§ 300.345 (a) and 300.501(a)(2). The IEP team is required to review the child's IEP periodically, but not less than annually (a) to determine whether the annual goals for the child are being achieved; and (b) to revise the IEP, as appropriate, to address the child's anticipated needs and other matters. See, § 300.343.

In reviewing and revising the child's IEP, the IEP team is required to consider the strengths of the child and the concerns of the parents for enhancing the education of their child. See, §300.346 (b). The requirement that the IEP team consider the concerns of the parents does not mean that the IEP team must accept the parent's recommendations flowing from those concerns. Rather, the IEP team must give the concerns of the parent due weight and careful evaluation. A contradictory result does not necessarily indicate a lack of consideration. If the parent disagrees with an IEP team decision, the parent has the right to request a due process hearing to resolve the disagreement. The above cited 1999 federal regulations are consistent with IDEA 2004.

With regard to this allegation, the Federal Complaints Officer makes the following findings of fact and conclusions of law:

1. The parties agree that Complainant attended the 8/24/05 IEP team meeting. The parties also agree that IEP team listened to Complainant's input.
2. The parties disagree about whether the IEP team carefully considered Complainant's concerns. The parties also disagree about whether the goals and objectives contained in [Student's] 08/24/05 IEP accurately reflect the decisions made by the IEP team, including the parent.
3. The Federal Complaints Officer was not present at the 8/24/05 IEP team meetings and does not know what occurred at that meeting. The Federal Complaints Officer has carefully reviewed the documentation provided by the parties and finds that the documentation does not resolve the factual disputes about whether the IEP team gave due weight to Complainant's concerns about the goals and objectives contained in the final 8/24/05 IEP or whether the final goals and objectives were in fact the goals and objectives agreed to by the IEP team, including the parent.

²¹ See Attachment C , page 2

The Federal Complaints Officer finds that there is insufficient evidence to conclude that the BOCES violated §300.346 (b). Complainant was entitled to request a due process hearing to resolve these factual disputes.

ALLEGATION IX

A. Allegation

“The ABLLS assessment used to determine the IEP goals in 2005. The assessment was not fully completed by the IEP team. I was asked to fill out a portion of the ABLLS but was not given the assessment until after the IEP meeting my input was not used to set any of the goals...”

The Federal Complaints Officer has clarified that the investigation of this allegation would focus on whether the IEP team considered the Complainant’s input from the ABLLS when it developed the annual goals for [Student’s] 08/24/05 IEP.²²

B. The BOCES’ Response

The BOCES agrees that Complainant’s information from the ABLLS was not available during the 08/24/05 annual IEP team meeting. “Prior to the 08/24/05 IEP meeting, the ABLLS was administered to [Student] and other members of the IEP team. [Mother] was provided a portion of the ABLLS assessment to complete which elicited information pertaining to eating, dressing, grooming, and toileting skills...Such information was not available on 08/24/05 for the team to consider when new goals were developed; however, upon availability in mid-September, [Mother’s] input from the ABLLS was used to plan workbaskets, and other learning activities in the classroom. Furthermore, [Mother’s] input from the ABLLS was considered in developing goals and objectives that were added to [Student’s] IEP at the 1/31/06 IEP meeting.”

C. Findings of Fact and Conclusions of Law

As is set forth in Section VIII.C., above, the parent is a member of the IEP team. The public agency is required to ensure that the parent participates in IEP team meetings and to give due weight to the concerns of the parent.

The Federal Complaints Officer makes the following findings of fact and conclusions of law:

1. *The Assessment of Basic Language and Learning Skills (ABLLS)* is an assessment, curriculum guide and skills tracking system for children with autism or other developmental disabilities. It is typically an assessment that is completed by the student’s teacher and/or other providers. There is no “parent” portion of the ABLLS, although a parent could be given part of the ABLLS to complete. Consequently, an

²² See Attachment C, page 3

ABLIS assessment is not incomplete merely because the parent has not filled out part of it.

2. The goals and objectives contained in [Student's] 8/24/05 IEP were based on the ABLIS data provided by school staff.
3. Complainant was not given a portion of the ABLIS to complete until after the 8/24/05 IEP team meeting.
4. Complainant's input from the ABLIS was not available for use in developing the goals and objectives for the 8/24/05 IEP team meeting, but this fact does not mean that the ABLIS was invalid or incomplete. If Complainant disagreed with the goals and objectives contained in final 8/24/05 IEP, Complainant was entitled to request a due process hearing to resolve the disagreement.
5. To the extent that Complainant is alleging that her concerns were not considered at the 8/24/05 IEP team meeting, the findings of fact and conclusions of law set forth in Section VII.C., above, are incorporated herein by reference.

The Federal Complaints Officer concludes that, with regard to this allegation, the BOCES did not violate §300.346 (b).

X. REMEDY

1. The Federal Complaints Officer has determined that the BOCES violated the IDEA in the following respects:
 - a. Some of [Student's] goals and objectives were not measurable in violation of §300.347 (a) (2). The Federal Complaints Officer has determined that this violation was procedural in nature and did not deprive [Student] of a free appropriate public education.
 - b. Some written progress reports on annual goals were not prepared as required by [Student's] IEPs in violation of §300.350(a)(1). For the reasons set forth in Section III.C.5, above, the Federal Complaints Officer is unable to determine whether this violation deprived [Student] of a free appropriate public education.
 - c. The BOCES has failed to demonstrate that [Student] received required S/L services between 03/30/05 and 05/19/05 in violation of §300.350 (a) (1). The Federal Complaints Officer has determined that this violation deprived [Student] of a free appropriate public education.
2. Within thirty (30) days of the date of the BOCES' certified receipt of this Decision, the BOCES' special education director shall submit to the Federal Complaints Officer a written statement that the BOCES recognizes and accepts as valid the violations found by the Federal Complaints Officer.
3. This statement shall be accompanied by a corrective action plan developed to effectively address the violations found so as to prevent their recurrence not only as to [Student] but as

to all students with disabilities for whom the BOCES is responsible. The Federal Complaints Officer reserves the right to request revision of the corrective action plan should she find it to be insufficient. The BOCES' written statement shall further assure that any corrective action to be taken by the BOCES will be completed as soon as practicable but not later than 12/31/06. Upon timely completion of its corrective actions, the BOCES shall notify the Federal Complaints Officer in writing describing the corrective actions taken and the dates of their completion. This written notification shall be provided to the Federal Complaints Officer not later than 1/15/07.

4. The Federal Complaints Officer orders the BOCES to provide [Student] with ten (10) hours of direct S/L compensatory services for the 7.5 weeks between 3/30/05 and 5/19/05 for which no S/L services are documented. Per the 1/31/05 IEP, which was in effect during that time period, [Student] was entitled to 80 minutes of direct S/L services per week. In determining this award of compensatory services, the Federal Complaints Officer has carefully considered the nature and severity of [Student's] disability, the information contained in [Student's] IEPs between 1/31/05 and 5/15/06 and the other information supplied by the parties on this specific issue. The delivery of the compensatory S/L services shall be completed no later than 12/31/06. The BOCES shall document in writing the dates when the ordered compensatory services were provided as well as the name and title of the individuals who provided such services. The BOCES shall simultaneously submit said documentation to the Federal Complaints Officer and to the parents within twenty (20) days following the date when all compensatory services have been provided but not later than 01/20/07.

CONCLUSION

This Decision shall become final as dated by the signature of the Federal Complaints Officer. A copy of the appeal procedure is attached.

Dated this 28th day of August, 2006.

Laura L. Freppel, Esq.
Federal Complaints Officer