

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, CO 80203	▲ COURT USE ONLY ▲
[Parent], Complainant, vs. BOULDER VALLEY SCHOOL DISTRICT, Respondent.	
DECISION	

Complainant filed this due process complaint after Complainant’s son ([Student]) was administratively withdrawn from [High School #5] ([High School #5]) in the Boulder Valley School District (the District). This proceeding is subject to the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, as implemented by federal regulation 34 CFR § 300.510 and state regulation 1 CCR 301-8, § 2220-R-6.02. Hearing was held May 3 and 4, 2017, before Administrative Law Judge Hollyce Farrell (ALJ). The hearing was held at the Office of Administrative Courts at 1525 Sherman Street, Courtroom 2, in Denver, Colorado. Derry Dale Sadler, Esq. represented the Complainant. Kathleen Sullivan, Esq., represented the District. At hearing, Complainant’s Exhibits A-2 through A-5, C-4, C-5, D-8 through D-10, F-2 through F-4, F-9, F-19 through F-21, G, H-7, K, L-1 through L-14 and O were admitted into evidence. Complainant’s Exhibit M-1 was offered but not admitted into evidence. Respondent’s Exhibits 2, 3, 4, 5 (page 0033 only), 6, 7, 8 9, 10 (pages 0057(a) – (m), 12, 13, 17, 18 and 19 were admitted into evidence. Respondent’s Exhibits 11 and 15 were offered but not admitted into evidence. The hearing was digitally recorded.

Case Summary

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Key to a school district’s ability to provide FAPE is its obligation to identify, locate, and evaluate disabled children who are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 CFR § 300.111. This obligation, known as Child Find, extends to any child age 3 to 21 suspected of being a child with a disability, and regardless of the severity of the disability is in need of special education, even though the child may be advancing from grade to grade. *Id.* Complainant alleges that the District violated its Child Find obligation to [Student]. For the reasons set forth in this Initial Decision, the ALJ finds that the District did not violate its Child Find obligation, and no remedy is owed to Complainant or [Student].

Findings of Fact

Complainant

1. [Student] is a [age] year-old male.
2. For purposes of confidentiality, [Student]'s mother will be referred to herein as [Parent].
3. [Student] and [Parent] live with [Student]'s stepfather and some of [Student]'s siblings in [City #1], Colorado. [Student]'s half-brother lives with his and [Student]'s uncle, [Uncle], in [City #2], Colorado, and attends [High School #5] ([High School #5]). While attending [High School #5], [Student] lived with [Uncle]. [Uncle] has never assumed guardianship of [Student] or [Student]'s brother. [Uncle] testified that [Student] is no longer living with him.

Educational History in Colorado

4. When [Student] was in 9th grade, he and his family moved from [Former State] to Denver. There was no evidence provided that [Student] was ever determined to have a disability or received special education services while living in [Former State].
5. The first school [Student] attended in Colorado was [High School #1] ([High School #1]) in Denver. [Student] attended only the spring semester at [High School #1]; he had at 58 unexcused absences from classes and was tardy to classes on numerous occasions. While [Student] had attendance problems at [High School #1], he did not have behavioral problems.
6. While [Student] was attending [High School #1], he was not assessed for special education services, nor did he receive such services, and his family did not request that he be evaluated to determine if he had a disability or the need for special education.
7. [Student] and his sister began attending [High School #2] ([High School #2]) in Denver. At some point during [Student]'s time at [High School #2], his family became homeless and lived in a hotel for a period of time.
8. While at [High School #2], [Student] had problems with grades and attendance. During the first semester, he had 37 absences from class; during the second semester, had 53 absences. He was frequently tardy to classes. In addition, [Student] had behavioral issues at [High School #2]. [High School #2] had two meetings with [Parent] regarding [Student]'s attendance. [Parent] also had meetings at [High School #2] to discuss [Student]'s academics and his attention span.
9. Understandably, [Parent] was concerned about [Student]'s attendance, grades and behavior. She noticed that [Student] seemed depressed and had not been communicative since the family had moved from [Former State]. Both [Student] and his sister were unhappy because things were taught differently than they were in [Former State] and they were having to learn material they had already learned.
10. Around December of 2013, [Parent] asked [High School #2] staff what

could be done to determine the cause of [Student]'s problems. Specifically, [Parent] wanted [Student] tested for Attention Deficit Hyper Activity Disorder (ADHD). [High School #2] told her that there were a series of assessments which could be done to pinpoint any problematic areas.

11. [School Psychologist], an expert in school psychology, who is the school psychologist at [High School #2], had three of [Student]'s core teachers complete the Vanderbilt ADHD Diagnostic Teacher Rating Scale (the Vanderbilt) on [Student]. When trying to determine if a student has ADHD, the standard procedure is to start with the Vanderbilt. The Vanderbilt is based on teacher observations and conclusions regarding a student.

12. With respect to inattention, all three teachers indicated that [Student] had behaviors that happened at a significant frequency. With respect to impulsivity, one of the three teacher indicated that [Student]'s behaviors were significant. In the "oppositional" category, all three of the teachers indicated that [Student] had two of the nine symptoms listed.

13. All three of the teachers reported that [Student] failed to comply with an adult's request on a "very often" basis because he consistently refused to do seat work in class. With respect to classroom behavior, all three of the teachers characterized [Student]'s behavior as "disruptive." One of the teachers noted that [Student] was rarely in class, and two of the teachers did not fully complete the assessment.

14. All three teachers noted that losing things was a problem for [Student]. In [School Psychologist]'s opinion, losing things could be a symptom of ADHD. He stated, however, that most children with ADHD do not have attendance issues, and that rule violations had more to do with conduct than ADHD.

15. [School Psychologist] did not diagnose [Student] with ADHD; instead, he provided the Vanderbilt scores to [Parent] to have her follow up with [Student]'s medical provider. There was no evidence presented that [Student] followed up with a medical provider. Usually, a family takes the Vanderbilt scores to their medical provider to discuss possible medications and behavioral interventions if ADHD is diagnosed. There was also no evidence that [Student] was ever diagnosed with ADHD.

16. [School Psychologist] did not refer [Student] for a Response to Intervention (RTI), and he did not place [Student] on a 504 plan, nor did he refer him for an Individualized Education Program (IEP) assessment. [Student] never received special education services at [High School #2].

17. Following a behavioral incident, one of the deans at [High School #2] felt that it was best if [Student] disenrolled from [High School #2]. [Student] left [High School #2] and began attending another Denver Public High School known as [High School #3]. [Student] had no problems at [High School #3]. He did not receive special education services at [High School #3], nor was he referred for an assessment to see if he qualified for such services.

18. [Student] was a student at [High School #3] for approximately 9 weeks to

a semester. During that time frame, [Student]'s family became homeless and his family moved to [City #3].

19. [Student] and his brother began attending [High School #4] ([High School #4]) in the Adams 12 5-Star School District in the fall of the 2014-2015 school year. While at [High School #4], [Student] had problems with attendance, academics and behavior.

20. According to [Student]'s testimony at hearing, his behavioral issues at [High School #4] were a result of him and his brother being the only two black students at [High School #4], and the school watched them.

21. While at [High School #4], [Student] was never assessed for special education services, never placed on a 504 and never placed on a learning plan. His family did not request that he receive any assessments or that he receive any special education services. [Parent] had meetings with [High School #4] staff regarding credit recovery for [Student]. During those meetings, [Parent] never mentioned the Vanderbilt assessment [School Psychologist] had done at [High School #2] or her concerns that [Student] may have ADHD.

McKinney-Vento Program

22. In late March of 2016, [Student] and his family moved in with [Parent]'s brother and his son in Boulder because they were homeless.

23. Under a United States statute known as McKinney-Vento Homeless Assistance Act (McKinney-Vento), [Student] was considered homeless because he was "doubled up" or sharing housing.

24. When the registrar at [High School #5], [Registrar], learned that [Student] and his brother were homeless and enrolling at [High School #5], she contacted the District's McKinney-Vento specialist, [McKinney-Vento Specialist]. Because a student's address is not a consideration for the McKinney-Vento program, [Student]'s address was not verified. Once [McKinney-Vento Specialist] determined that [Student] and his brother qualified under McKinney-Vento, she emailed [Registrar].

25. Students who qualify for McKinney-Vento receive free lunch and all of their school fees are waived.

26. McKinney-Vento follows the school year, and qualification for the program ends on July 31 of each year, and the process starts over on August 1 for the following school year. A McKinney-Vento student must be evaluated again each school year to determine if he or she still qualifies for the program.

27. At the end of the school year, [McKinney-Vento Specialist] sends out a letter to each McKinney-Vento family to let them know that their students need to qualify for the program again; the family must give [McKinney-Vento Specialist] notification that they wish to qualify again. If such notification is not made, the students are not evaluated again for the program, and are no longer McKinney-Vento qualified.

28. [McKinney-Vento Specialist] sent out such a letter to [Student]'s family at

the end of the 2015-2016 school year, but heard nothing back from them. Thus, [Student] and his siblings were McKinney-Vento students only for the 2015-2016 school year; their qualification as McKinney-Vento students ended on July 31, 2016.

[Student]’s Enrollment and Attendance at [High School #5]

29. [Parent] enrolled [Student] online to attend [High School #5] on or about March 29, 2016. The online application contained boxes to check if a student is in special programming. The boxes are: “Special Education,” “Talented and Gifted,” “ESL” and “§ 504 Plan.” None of those boxes was checked on [Student]’s online application. [Parent] assumed that the Vanderbilt assessment from [High School #2] would be in [Student]’s school records.

30. When [Student] enrolled at [High School #5], he was almost 18 years-old and was in his fourth year of high school. He had 106 credits, and needed 220 credits to graduate. Accordingly, [Student], his family and the staff at [High School #5] were all concerned about [Student] getting as many credits as possible so he could graduate.

31. Once [Student] was enrolled at [High School #5], [Registrar] requested information such as transcripts, attendance, behavior, test scores and learning plans from all of [Student]’s former high schools, including the high school he attended in [Former State] and [High School #2].

32. [Registrar] specifically asked for any special education documents, IEPs, 504 plans and learning plans from each of [Student]’s former high schools. She sent emails to both [High School #4] and [High School #2] inquiring as to whether [Student] was on an IEP, 504 or had a learning plan. None of the high schools provided any information that would have alerted [High School #5] that [Student] was a child in need of special education services or that [Student] was a child with a disability. [School Psychologist]’s Vanderbilt assessment was not included in the records that [High School #2] sent to [High School #5]. The District was unaware of the assessment until documents were exchanged in preparation for this hearing.

33. After [Student] was enrolled at [High School #5], he and his mother met with [Counselor], [Student]’s assigned counselor, on April 1, 2016. Assistant Principal [Assistant Principal] and two other counselors were also present at the meeting. Prior to the meeting, [Counselor] reviewed [Student]’s transcripts from his previous schools. It was [Counselor]’s role to enroll [Student] in the classes he needed for graduation.

34. The purpose of the April 1, 2016 meeting was for [Counselor] and the other staff members present to get to know [Student] and his family, and get [Student] set up for success at [High School #5]. They went over [Student]’s transcripts and [Student]’s discipline and attendance issues at his previous high schools. Prior to the meeting, [Parent] and [Student]’s stepfather were made aware that the discipline and attendance issues would be discussed.

35. The [High School #5] staff present at the meeting asked [Student]’s mother if there were any systems [Student] needed for support for attendance, academics and behavior. During the meeting, neither [Student] nor [Parent] referenced

any concerns about [Student] having a disability, ADHD, or the Vanderbilt assessment at [High School #2].

36. Because [Student] had so many failing grades at [High School #4], [Counselor] contacted [High School #4] to see if there was anything she should know. Nothing that she learned indicated that [Student] had a disability, had a 504 plan, an IEP, a learning plan or was receiving special education services.

37. [Counselor] got [Student] and his brother set up with bus passes through McKinney-Vento and got each of them a laptop to use at home.

38. At the end of the 2015-2016 school year, [Counselor] arranged for [Student] to take summer school classes, paid for by McKinney-Vento. [Student] and his family were very focused on [Student] graduating the next school year.

39. Within the first week of [Student]'s enrollment at [High School #5], [Student] began having attendance issues. On April 7, 2016, [Counselor] and [Assistant Principal] held a meeting with [Student] and [Parent] in order to nip the attendance issues in the bud. During that meeting, neither [Parent] nor [Student] mentioned anything about ADHD, the [High School #2] Vanderbilt assessment, or anything else that would indicate that [Student] had a disability or needed to be evaluated for a disability.

40. During April and May of 2016, [Student] was coming to school pretty regularly and his attendance issues were manageable. [Student] was showing promising progress as he got some credits, was engaging the curriculum and was engaging with staff and students.

41. [Assistant Principal] had another meeting with [Student] and [Parent] on May 10, 2016 to discuss a behavioral issue [Student] was having. Again, neither [Student] nor [Parent] said anything about [Student] having ADHD, the [High School #2] Vanderbilt assessment, or anything else that would indicate that [Student] had a disability or needed to be evaluated for a disability.

42. When [Student] began attending school in the fall for the 2016-2017 school year, his attendance began to decline significantly. From August 22, 2016 through the end of September 2016, [Student] missed 76 classes. [Assistant Principal] spoke to [Student] but because he over the age of 18, truancy was not an available remedy. [Assistant Principal] gave [Student] detention, but he didn't attend the detention.

43. In August of 2016, [Assistant Principal] contacted an engagement specialist with the District regarding [Student]'s attendance. The engagement specialist was not concerned with [Student]'s grades; his only concern was [Student]'s attendance.

44. The engagement specialist attended a meeting with [Student], [Parent] and [Assistant Principal] to discuss [Student]'s attendance and to consider options other than [High School #5] if attendance did not improve so that [Student] could reach his goal of graduation. During the meeting, [Parent] nor [Student] raised the issue of a

[Student] having a potential diagnosis of a disability. They did not say anything about [Student] having ADHD or the Vanderbilt assessment at [High School #2].

45. [High School #5] placed [Student] in its math and literacy lab for credit recovery and so he could finish work he had done over the summer. [High School #5] also adjusted [Student]'s schedule so he wouldn't be tardy and made him an office aide in an effort to lighten his class load.

46. [High School #5] has a Student Support Team (SST team) which consists of all of the school counselors, psychologists, a special education teacher, a general education teacher, and all of the administrators with the exception of the school's principal.

47. The SST team meets weekly to discuss concerns regarding [High School #5] students. The concerns can arise internally from school personnel or externally from a parent. All of the staff at [High School #5] are trained every year on the SST process. [High School #5] keeps track of its students by checking attendance daily, having teacher supervision, and the counselors are accessible to students all day, every day. One of the purposes of the SST team is to identify students who should be referred for an RTI to determine if they have a disability and in need of special education services.

48. No teachers or other staff members at [High School #5] ever reported concerns to the SST team that they were concerned that [Student] had the need for and IEP or a 504 plan. The primary concern regarding [Student] amongst administrators, teachers and counselors at [High School #5] was [Student]'s attendance.

49. At hearing, [Student], himself, testified that at one point, staff at [High School #5] told him that they were going to change his placement from [High School #5] if his grades did not improve. He further testified that he got his grades up because he wanted to be able to stay at [High School #5].

50. On September 27, 2017, [High School #5] was advised that [Student] had been involved in an off-campus incident with another [High School #5] student. [High School #5] did not allow [Student] to attend school while it investigated the incident.

51. [High School #5] first conducted a threat assessment screening to determine if it needed to a full threat assessment regarding [Student].

52. Following the threat assessment screening, [High School #5] determined that it was necessary to do a full threat assessment. Both the threat assessment screening and the full threat assessment are general education procedures.

53. After the full threat assessment, it was determined that [Student] posed a high level of threat if he remained at [High School #5].

54. Initially, a safety plan was created which would allow [Student] to remain at [High School #5], but it was subsequently decided that it was necessary for the safety of everyone, including [Student], for [Student] to be removed from [High School #5].

55. After the decision was made that [Student] could not return to [High

School #5], the principal, [Principal], and other staff from [High School #5] and the District had a meeting on or about October 10, 2016 with [Student]’s family regarding [Student]’s options. During the meeting, the District offered [Student] placement at [High School #6] or pursuing his GED through the Boulder County Workforce or the District’s Engage program.

56. Because [Student] said he wanted to get his GED, [Director of Student Services], the District’s Director of Student Services, connected [Student] with [District Liaison], a District liaison for both Engage and [High School #6], who could assist [Student] in pursuing his GED through one of the listed programs.

57. [Student] and his family were not happy with the options, but stated that [Student] would pursue his GED. After the meeting, [Principal] contacted [Registrar] to have her administratively separate [Student] from [High School #5], and informed her that [Student] stated that he wanted to get his GED.

58. During the first week of November 2016, [Parent] asked [Director of Student Services] to provide [Student]’s options in writing. [Director of Student Services] did provide [Student]’s options in a November 8, 2016 email.

59 [Student] and [Parent] toured [High School #6] and [Student] shadowed there the following day. Both [Student] and [Parent] decided that [High School #6] was not appropriate for [Student], and [Student] did not attend there, and did not pursue his GED through the Boulder Workforce Center or Engage.

60. On December 5, 2016, [Parent] filed a Due Process Complaint, which included, amongst other things, a request for an IEP, assessments to determine his need for services. Prior to this date, [Parent], nor anyone else, had suggested to the District that [Student] had a potential need for special education services or that he had a disability.

61. The District’s failure to assess [Student] for a disability or provide him with special education services is reasonable based on the information contained in these findings of fact.

62. As early as October of 2016, Appellant’s mother and stepfather and his younger siblings moved to [City #1] which is not in the Boulder Valley School District. Because [Parent] is [Student]’s guardian, he is also considered to reside in [City #1].

63. [Student] is no longer a McKinney-Vento student and his legal residence is in [City #1]. Thus, he no longer lives in the Boulder Valley School District.

Discussion and Conclusions of Law

Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion “where it usually falls, upon the party seeking relief.” *See also Thompson R2-J Sch. Dist.*, 540 F.3d at 148 (“The burden of proof . . . rests with the party claiming a deficiency in the school district’s efforts.”) Parents therefore bear the burden of proving that the District violated

its child find obligations under IDEA and failed to provide [Student] with a free appropriate public education.

Child Find

The School District's Child Find obligation extends beyond simply responding to a parent's request for a SPED evaluation. Per IDEA § 1412(a)(3), school districts have the affirmative obligation to ensure that any child with a disability, regardless of severity, who needs special education and related services is "identified, located, and evaluated." According to 34 CFR § 300.111(c)(1), this obligation extends to all children who are suspected of being a child with a disability and in need of special education, "even though they are advancing from grade to grade."

The threshold for suspicion of a disability is relatively low, and is not whether the child actually qualifies for special education services, but rather whether the child should be referred for evaluation. *Dep't of Educ. v. Cari Rae S.*, 158 F.Supp.2d at 1195. Knowledge of the disability may be inferred from written parental concern, the behavior of performance of the child, teacher concern, or a parental request for evaluation. *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F.Supp.2d 1307, 1310-11 (D. Utah 2002). A school district need not "rush to judgment or immediately evaluate every student exhibiting below-average capabilities," *D.K. v. Abington*, 696 F.3d at 252; however, Child Find requires a school district to identify and evaluate a child "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." *W.B. v. Matula*, 67 F.3d 484, 501 (3rd Cir. 1995).

A school district's failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE. *N.G. v. Dist. of Columbia*, 556 F.Supp.2d 11, 16 (D.D.C. 2008); *Long v. Dist. of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C. 2011). Even though a SPED-eligible student may have received some educational benefit from general education, if the student was not properly identified and evaluated and placed on an IEP, there has necessarily been a denial of FAPE. *Cari Rae S.*, 158 F.Supp.2d at 1196 ("No IEP, no FAPE"); see also *Knable v. Bexley City Sch. Dist.*, 238 F.3d at 766 (6th Cir. 2001) (failure to develop an IEP necessarily resulted in loss of educational opportunity).

The ALJ concludes that the School District did not violate its Child Find obligation to [Student]. When [Student] enrolled at [High School #5] at the end of March of 2016, [High School #5] took immediate and thorough steps to determine if [Student] had been on an IEP, a 504 plan or a learning plan at his previous high schools. [Registrar], the registrar, contacted all of [Student]'s former schools to not only find out if he was receiving special education services, but also to get copies of his transcripts, attendance records and behavioral records. Nothing [High School #5] received in response to [Registrar]'s requests would have reasonably put the District on notice that it needed to evaluate [Student] for special education services. In addition to her requests for document requests, [Registrar] emailed both [High School #4] and [High School #2] to determine if [Student] had been receiving any type of special services; neither school indicated that he had. [Counselor] also contacted [High School #4]

teachers to learn more about [Student] when he became one of her counseling students. None of the teachers with whom she spoke indicated that [Student] was receiving any special services or had the need for those services.

Once [Student] became a student at [High School #5], none of his teachers ever contacted [Assistant Principal], [Counselor] or the SST team to report concerns that [Student] may need to be assessed to determine if he had a disability. All of the teachers at [High School #5] are trained annually on SST procedures. The only concern [Student]’s teachers reported was his attendance. [School Psychologist], Complainant’s expert witness, testified that attendance issues are not usually associated with ADHD. Moreover, during April and May of 2016 when [Student] was attending school, he made progress and earned credits. Thus, [Student]’s attendance issues did not reasonably put the District on notice that [Student] may have been a child with a disability who needed to be evaluated.

[High School #5] did not receive [School Psychologist]’s Vanderbilt assessment regarding [Student] until documents were exchanged in preparation for the due process hearing. [Parent] was aware of the assessment, but in the meetings she had with [High School #5] and the District regarding [Student], she never raised her concern that [Student] had ADHD or mentioned the assessment. The District had no information or suspicion that [Student] had ADHD or any other disability. [School Psychologist], who performed the Vanderbilt assessment, did not refer [Student] for RTI or any other type of special education services. While [Student] was attending [High School #5], [Parent] never requested that [Student] be evaluated to determine if he was IDEA eligible. The ALJ concludes that the District did not violate its Child Find obligation to [Student] while he was a student at [High School #5].

[Student]’s Residence

During the 2015-2016 school year, [Student] was a homeless student who qualified for the McKinney-Vento program. While he was qualified under that program, his residence was not a factor in determining whether he could attend [High School #5]. [Student] and his family took no action to qualify [Student] for the McKinney-Vento program for the 2016-2017 school year; thus he was no longer a McKinney-Vento student. Section 22-1-102, C.R.S. governs the residence of a child for education purposes. Subsection (2)(a) of that statute provides that a child is deemed to reside in a school district if one or both of his parents reside in the District. [Parent], Respondent’s parent, lives in [City #1] which is not in the Boulder Valley School District, and has lived there since at least October of 2016. Thus, [Student] is no longer deemed to reside in the District, and has not been since October of 2016. Because [Student] no longer resides in the Boulder Valley School District, the District has no further obligations to him. This was true in December of 2016 when Complainant filed her due process complaint which requested an assessment of [Student]. As such, the District did not violate its Child Find obligation to [Student] failing to do an assessment of [Student] when the due process complaint was filed. At no time, did the District violate its Child Find obligation to [Student].

Decision

The School District did not violate its Child Find obligation to [Student]. Accordingly, [Student] is entitled to no remedy.

This decision is considered a final decision and subject to appeal pursuant to 34 C.F.R. §§ 300.514(b) and 300.516.

Done and Signed

May 18, 2017

HOLLYCE FARRELL
Administrative Law Judge