

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 2017:504  
Douglas County School District  
DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on March 2, 2017, by the mother (Mother) of a student (Student) who attends school in the Douglas County School District (School District). Student is not currently identified as an eligible child with a disability under the Individuals with Disabilities Education Act.<sup>1</sup>

Based on the written Complaint, the State Complaints Officer (SCO) determined that the Complaint identified six 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.<sup>2</sup> .

**COMPLAINT ALLEGATIONS**

1. Whether, from the beginning of the 2016/2017 school year through October 19, 2016 (when the School District agreed to evaluate Student after he had been expelled from school), the School District should have suspected that Student may be a child with a disability who is eligible for special education and related services, but yet failed to refer Student for an evaluation to determine Student's eligibility;
2. Whether, from the beginning of the 2016/2017 school year to September 30, 2016, the School district's failure to identify Student as eligible for special education and related services resulted in Student being denied a free appropriate public education;
3. Whether, on September 30, 2016, Student was inappropriately expelled from school without a manifestation determination;

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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.*

<sup>2</sup> Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

4. Whether, in evaluating Student to determine if he is eligible for special education and related services, the School District violated the IDEA by failing to conduct an appropriate evaluation that included reviewing Student's medical and mental health records, interviewing Student's mental health provider, and conducting assessments in all areas of suspected disability;
5. Whether the School District violated the IDEA's timelines relating to initial evaluations;
6. Whether the School District has "predetermined" that Student is not an eligible child with a disability.

### **FINDINGS OF FACT**

After a thorough and careful analysis of the entire record,<sup>3</sup> the SCO makes the following FINDINGS:

1. At all times relevant to the Complaint, Student resided with Parents within the School District's boundaries. Student is in the 9<sup>th</sup> grade and attends High School. Student is not currently identified or served as an eligible child with a disability under the IDEA.
2. From second grade through fourth grade, Student was identified as a child with a disability under the "serious emotional disability" (SED) category. Based upon improvement in behaviors and performance in school, Student was reevaluated at the beginning of fifth grade (the 2012/2013 school year), and was found to no longer be eligible as a child with a disability.<sup>4</sup> Student has been served in general education since then.

### **Seventh and Eight Grades**

3. In January 2015, during his seventh grade year, Mother reported to Seventh Grade Counselor that Student was experiencing suicidal thoughts or ideations.<sup>5</sup> Neither Mother nor Student reported any actual attempts at suicide during that time. Student was not exhibiting any mental health or behavioral problems at school during this period; rather, Mother reported her concerns to Middle School Counselor and indicated that Student would be hospitalized for a brief period.<sup>6</sup> Following hospitalization of about one week, when Student returned to school he was provided with support from Middle School Counselor, who checked in with him weekly to see how Student was doing. Student was also

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

<sup>4</sup> Ex. F.

<sup>5</sup> Interview with Middle School Counselor; Interview with Mother and Student.

<sup>6</sup> Interview with Middle School Counselor.

provided with a special pass that allowed him to leave class to see the counselor as needed.<sup>7</sup>

4. Middle School Counselor described her check-ins with Student as focused on helping Student to make good social choices, including avoiding other students who were frequently in trouble.<sup>8</sup> Student responded well to the support he received in school and appeared to be functioning well by the end of seventh grade.<sup>9</sup> According to Middle School Counselor, at no time during her work with Student did he present as a student who should be referred for a special education evaluation or who required special education services.<sup>10</sup>
5. Based upon Student's response to the supports he received in seventh grade, Student did not require extensive supports during eighth grade, though he had access to a counselor and was free to seek additional support as needed. Student did receive some support to help with organizational skills, but did not exhibit any behavioral or mental health problems.<sup>11</sup>
6. By all accounts, including Mother's and Student's, Student had a good year in eighth grade - Student reports that he did well, particularly during the first half of the year. Student did particularly well in his elective courses, such as home economics and computer technology. Student stated that he did not do as well in the second part of the year, but that he was not having behavioral or mental health problems; rather, he reported that completing homework and tests was a problem.<sup>12</sup> Student was very open and forthcoming with the SCO in characterizing his academic issues as based upon a lack of interest or motivation in school. Essentially, Student did not find school particularly interesting, and he preferred to socialize with his friends; this is consistent with the accounts of School District staff who were familiar with Student.<sup>13</sup> The SCO finds that during Student's eighth grade year, there was no basis for the School District to suspect that Student might be a child with disability who needed to be evaluated.
7. In her interview with the SCO, Mother stated that during the eighth grade year, she requested an IEP for Student. Mother was not able to provide a specific date when such a request was made, but opined that perhaps it was early in the 2015-2016 school year.<sup>14</sup> There is no documentary evidence in the record supporting this claim.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Interview with Student.

<sup>13</sup> Interviews with Student and Mother; Interview with Seventh Grade Counselor; Ex. C., p. 19.

<sup>14</sup> Interview with Mother.

8. When questioned on this point by the SCO, School District staff contradicted Mother's recollection. Middle School Counselor recalled that during middle school - either toward the end of seventh grade or at the beginning of eighth grade - the School District proposed using a progress monitoring tool called BIMAS<sup>15</sup> to track Student's social/emotional functioning. In response to that proposal, Parents were adamant that they were not interested in special education for Student and did not want him evaluated for special education eligibility.<sup>16</sup> School Psychologist shared this same fact about Parents' response to the BIMAS, based upon conversations with individuals from middle school as part of the special education evaluation at issue.<sup>17</sup> Both witnesses provided this information (specifically, Parents' response to the School District's proposal to do progress monitoring via the BIMAS) independently of each other, and in response to an open-ended question by the SCO regarding whether Parents ever sought special education services for Student during eighth grade.
9. The SCO finds no evidence that during the 2015-2016 school year, Parents requested special education services for Student. Rather, the evidence suggests that Parents specifically voiced their opposition to any special education evaluation or services for Student.
10. Following what both the School District staff and Student described as a relatively successful year, with no behavioral incidents or mental health red flags, Student proceeded to high school. Per the School District's practice/procedure for students transitioning from Middle School to High School, information is transmitted to High School staff in April (*i.e.*, during the spring prior to the start of ninth grade) about students who have IEPs, Section 504 plans, or who might require additional support during the transition because of family problems, behavioral concerns, or academic concerns.<sup>18</sup> Because Student was not a student with an IEP or any behavioral problems or interventions, there was not any concerning information to pass on to High School via this process, and the SCO finds that there was no basis to notify High School that Student was someone who might have a disability or who should be evaluated for special education eligibility.

### **Transition to Ninth Grade**

11. The 2016-2017 school year started on August 8, 2016. Like many incoming freshmen, Student experienced difficulty with the new rigors of high school.<sup>19</sup>

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<sup>15</sup> BIMAS stands for Behavior Intervention Monitoring Assessment System, and is a measure of social, emotional, behavioral, and academic functioning in children and adolescents that is used for screening and assessing response to intervention.

<sup>16</sup> Interview with Middle School Counselor.

<sup>17</sup> Interview with School Psychologist.

<sup>18</sup> Interview with High School Counselor.

<sup>19</sup> Interviews with School Psychologist and High School Teacher.

School Psychologist explained that students transitioning from middle school to high school are often overwhelmed or “floored” by how much more responsibility they have, how much more independent they must be, how much more organization is required for them to succeed, and how much more challenging the academic content is.<sup>20</sup> Though a few students are able to adjust right away, many others experience a period during which they struggle before finally settling in and becoming more accustomed to the challenges of high school.<sup>21</sup>

12. During the first five weeks of school, Student presented like a typical ninth grader. He did not exhibit behavioral or mental health problems, nor did he appear to have attention/focus problems. High School Teacher, who taught Student science and whose class was the last hour of the school day - a time when everyone is fidgety and ready to go home - described Student as being like any other freshman boy. Occasionally he required some redirection to get back on track to do his work, but he was easily redirected and did not exhibit any concerning behaviors or mental health issues.<sup>22</sup> Other teachers who provided information as part of either the threat assessment (see below) or the special education evaluation in this case had similar reports, namely, that during this time period, Student presented as a typical ninth grade boy who gave no indication of having problems with either behaviors or attention.<sup>23</sup> When Student chose to do his work, he was an average student.<sup>24</sup>
13. Grades are reported on a quarterly schedule; the first report cards would not have been due until late October 2016. During the first five weeks of school, Student’s grades were poor - mostly Ds and Fs.<sup>25</sup> However, so early in the school year, a D or an F could simply be a reflection of one or two missed assignments, rather than an indicator that Student was experiencing significant problems that required intensive intervention or even special education. Given the difficulty many ninth graders have transitioning into high school and the teacher reports that Student was not particularly enthusiastic about school or about getting his work done, the SCO does not find that Student’s poor grades through the first five weeks of the 2016-2017 school year should have caused the School District to suspect that Student might require special education services.

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<sup>20</sup> Interview with School Psychologist; *also*, Interviews with High School Principal and High School Teacher.

<sup>21</sup> *Id.*

<sup>22</sup> Interview with High School Teacher.

<sup>23</sup> Ex. C., pp. 13-22; Interviews with High School Counselor and School Psychologist.

<sup>24</sup> *Id.*

<sup>25</sup> Ex. B, p. 105.

## Expulsion

14. On September 21, 2016, Student threatened a middle school student on the bus, threatening to kill him by stabbing him.<sup>26</sup> Student admitted to having knives, and knives were found in his possession.<sup>27</sup> For purposes of this State Complaint, the facts of the incident are not in dispute.
15. Following the September 21 incident, the School District conducted a threat assessment to determine if Student was a threat to himself or others. Part of the threat assessment was a parent questionnaire, which was completed by Mother.<sup>28</sup> On the questionnaire, Mother indicated that Student had had suicidal thoughts in 7<sup>th</sup> grade, that since then, she did not have any concerns that high might be suicidal.<sup>29</sup> Mother does not dispute or deny these responses.<sup>30</sup> The SCO finds that the information provided by Mother on the questionnaire did not provide a basis for the School District to suspect that Student was suffering from current suicidal ideations or mental health problems.
16. Based upon the September 21 incident, the School District recommended that Student be expelled.<sup>31</sup> Expulsions in the School District are for one calendar year. However, the School District frequently offers students who have been expelled a “deferred expulsion” option, through which they can come back to school before the full year is up by fulfilling certain conditions.<sup>32</sup> In this case, the School District offered Student a deferred expulsion to allow him to return to school at the beginning of the 2017-2018 school year, rather than having to wait until later in the Fall to return.<sup>33</sup> The deferred expulsion agreement offered by the School District included mental health support, tutoring, a special education evaluation, and a requirement that Student participate in counseling.<sup>34</sup> The special education evaluation was recommended in part because of the behaviors surrounding the September 21 disciplinary incident, including the young age of the victim and Student’s sexually explicit and disturbing statements.<sup>35</sup>
17. Sometime in the nine days between September 21 (the incident on the bus) and September 30, Assistant Principal spoke with Mother on the phone to discuss the possibility of a deferred expulsion agreement, including that one of the terms of a deferred expulsion agree would be that Student would receive

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<sup>26</sup> Ex. B.

<sup>27</sup> *Id.*

<sup>28</sup> Interview with Mother.

<sup>29</sup> Ex. B, p. 93.

<sup>30</sup> Interview with Mother.

<sup>31</sup> *Id.*

<sup>32</sup> Interviews with Assistant Principal and Dean of Students.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; Ex. 6.

<sup>35</sup> Ex. B.

mental health counseling.<sup>36</sup> According to Assistant Principal and Dean of Students, both of whom were interviewed separately,<sup>37</sup> Mother objected to the mental health counseling requirement.<sup>38</sup>

18. On September 30, 2016, Assistant Principal and Dean of Students met with Parents to discuss and review the terms of the deferred expulsion.<sup>39</sup> At the end of the meeting, Mother indicated that she would have to think about it before signing the agreement, and the meeting ended without a signed agreement.<sup>40</sup> Parents ultimately did not agree to the deferred expulsion agreement.<sup>41</sup>
19. Notwithstanding the Parents' rejection of the deferred expulsion, on October 3, 2016, they requested academic and behavioral testing to determine if Student requalified for special education.<sup>42</sup>
20. Without a deferred expulsion agreement, the School District proceeded with the full one-year expulsion, as required by School District policy.<sup>43</sup> Parents initially sought to appeal the expulsion, and an expulsion hearing was scheduled for October 19, 2016. Prior to the hearing, Parents withdrew their challenge to the expulsion, such that no hearing was held.<sup>44</sup> Student was formally expelled on October 19, 2016.<sup>45</sup>
21. Since being expelled, Student has participated in online classes and received tutoring support from Special Education Teacher in his online classes.<sup>46</sup> Tutor particularly works with Student on English. Special Education Teacher describes Student as pleasant with a nice sense of humor, and states that Student is very easily redirected and does not demonstrate any indicators of mental health problems or ADHD behaviors. Special Education Teacher stated that during their work together, Student has learned some good skills for writing.<sup>47</sup> Special

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<sup>36</sup> Interview with Assistant Principal

<sup>37</sup> In the course of investigating this Complaint, the SCO interviewed Mother, Student, and fifteen School District witnesses. Mother and Student were interviewed together, but all of the School District witnesses were interviewed separately.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Ex. 6.

<sup>41</sup> Interviews with Assistant Principal and Dean of Students.

<sup>42</sup> Ex. A, p. 25, email dated October 3, 2016, from Assistant Principal for Special Education to School Psychologist.

<sup>43</sup> Interviews with Assistant Principal, Dean of Students, and Principal; Ex. B.

<sup>44</sup> Exs. 2 and 3.

<sup>45</sup> Ex. 3.

<sup>46</sup> Special Education Teacher volunteered to do some tutoring and was assigned to Student; she has not been providing him with special education services.

<sup>47</sup> Interview with Tutor.

Education Teacher also reports that Student's grades for his online/expulsion classes are low Bs and high Cs, and that he is making "decent progress."<sup>48</sup>

### Special Education Evaluation

22. On October 19, 2016 (the same day as the expulsion), the School District's counsel sent the following offer to Student's counsel:

As with all expelled students, the District would like to immediately enroll [Student] in a different educational plan. The District is offering him online classes in English, science, math, and social studies. He will also be able to earn elective credits. The District believes this is a good option for [Student] as it will give him a chance to improve his grades in these courses, which will be reflected in his transcript, thereby, ultimately, improving his GPA. The District is also trying to figure out how to give him partial credit for the work he has already performed in his automotive and technology elective courses. In addition, the District is offering [Student] mental health and academic support services from the DC Support Center.<sup>49</sup>

23. In that same communication, the School District's counsel referenced its recent unsuccessful efforts by the School District to meet with Parents since October 3 to discuss and obtain parental consent to proceed with a special education evaluation of Student.<sup>50</sup> Accordingly, that day (October 19), the School District sent the consent form, which had been prepared on October 17, to Parents via certified mail.<sup>51</sup>
24. Parents apparently signed the consent form on November 19, 2016 (one month later), but did not return it to the School District until December 1, 2016 - almost one and one half months after receiving the form from the School District.<sup>52</sup>
25. Upon receipt of the consent to evaluate, the School District commenced an evaluation of Student. The School District sought to be as thorough and comprehensive as possible in obtaining information relevant to Student's potential areas of eligibility, including SLD (Specific Learning Disability), SED (Serious Emotional Disability), and OHI (Other Health Impaired). The evaluation included:

- Parent interview with School Psychologist;

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<sup>48</sup> Ex. C, p. 19.

<sup>49</sup> *Id.*

<sup>50</sup> Ex. 3.

<sup>51</sup> Ex. 3; Ex. 4; Ex. C, p. 3.

<sup>52</sup> Complaint, p. 3.

- Interviews with Student’s teachers at High School;
- Interview with Student’s tutor;
- Information from Student’s Middle School teachers;
- A health summary;
- Social/Emotional assessments including the Differential Scales of Social Adjustment and Emotional Disturbance, the Connors ratings scales (for attributes related to ADHD), and the Behavior Assessment for Children (BASC) (looking at behavior, personality, and adaptive skills);
- An academic achievement assessment via the Woodcock-Johnson IV Tests of Achievement.

The evaluation report also included scores from cognitive testing from 2009 and 2012, which were considered to be accurate.<sup>53</sup>

26. The health summary was compiled by School Nurse, whose role in the evaluation was to obtain clinical information related to Student’s health and health needs, based upon information derived from Infinite Campus (the School District’s online records system), a health questionnaire sent to Parents, and an interview with Mother.<sup>54</sup> The information provided to School Nurse included that Student is diagnosed with ADHD, asthma, and depression, that Student sees a therapist for depression, and that Student takes medication.<sup>55</sup>
27. School Nurse reported that neither the information provided by Mother in the questionnaire nor in the conversation with Mother raised any “red flags” related to Student’s current mental health functioning. Mother did not express any concerns that Student was having current mental health problems that were impacting his education or that he was in anything resembling a mental health crisis (such as suicidal ideations). Based on the information provided indicating that Student did not have current mental health issues affecting education, School Nurse did not see a need for requesting additional health information (such as therapy notes, discharge summaries, or similar) from Student’s current or previous mental health providers.<sup>56</sup>
28. Parents argue that in providing initial consent to evaluate in December 2016, they also provided a medical release to allow the School District to obtain Student’s therapy/mental health records, and that those records should have been obtained and used by the team in considering Student’s eligibility on January 27, 2017 (*see below*).<sup>57</sup> The SCO finds no evidence in the record that this occurred. Parents submitted no such document either with their Complaint or their Reply, nor is the School District in possession of any such document.

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<sup>53</sup> Ex. C, pp. 13-22.

<sup>54</sup> Interview with School Nurse.

<sup>55</sup> Ex. C, p. 18.

<sup>56</sup> Interview with School Nurse.

<sup>57</sup> Complaint, p. 5.

Indeed, even in her interview with the SCO, Mother was equivocal on this point, essentially expressing that she was not sure that such a release had been provided to the School District prior to the January 27 meeting. Accordingly, the SCO finds that Parents did not provide the School District with a release to obtain therapy or medical records prior to January 27, 2017.

29. On the social/emotional ratings scales, a few of the subscores on the BASC were in the at-risk or clinically significant range, though most were not. On the Connors (looking at ADHD), Mother's and Student's scores were in the clinically significant range, as were those of one of the teachers (Teacher 2).<sup>58</sup> Student's scores put him in the "not at risk" range for maladjustment or emotional disturbance.<sup>59</sup>
30. Apart from the ratings scale subscores mentioned above, however, none of the other information obtained in the evaluation gave any indication that Student was having mental health or ADHD-related behaviors impeding his ability to function in school. The educators uniformly described a student who was pleasant, relatively well-behaved, occasionally unfocused but easily redirected, and cognitively able to do the work but unmotivated to do so, particularly with respect to completing homework or turning in assignments. In other words, Student was similar to many other ninth grade students navigating the challenges of transitioning to high school.<sup>60</sup>
31. The SCO notes that even the teacher whose scores yielded "clinically significant" ratings on the Connors did not see Student as having attention problems that impeded his ability to access his education. Teacher 2 on the Connors was High School Teacher, the science teacher whose class fell at the end of the day. In her mind, many of the behaviors that caused her to score the Connors the way she did derived from her class being the last hour of the day, when everyone was "squirrely" and ready to go home; even so, she described Student as well-mannered and easily redirected, and indicated that virtually every student in her end-of-the-day science class demonstrated "off task" behaviors like Student's. Student was not an outlier at all, but rather behaved and performed like his peers.<sup>61</sup>
32. The SCO finds that the School District evaluation of Student was comprehensive and was reasonable for purposes of determining whether Student is an eligible student with a disability.

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<sup>58</sup> Ex. C, pp. 15-17.

<sup>59</sup> Ex. C, p. 18.

<sup>60</sup> Ex. C, pp. 13-22.

<sup>61</sup> Interview with High School Teacher.

## The January 27 Eligibility Meeting

33. A meeting to review the evaluation and to determine whether Student was an eligible child with a disability was convened on January 27, 2017, before the 60 day deadline for doing so. In attendance were Assistant Principal for Special Education, Parents, Special Education Director One, Special Education Director Two, High School Teacher, School Psychologist, Assessment Specialist, Special Education Coordinator, Special Education Teacher, School Nurse, Student, and School District Attorney. Parents' Attorney was scheduled to attend in person, but did not show up. After attempts were made to locate Parents' Attorney, the School District staff offered Parents the options of rescheduling the meeting entirely, reviewing the evaluation but reconvening to discuss eligibility, or proceeding with the meeting in its entirety. Parents agreed to proceed in the absence of their attorney.<sup>62</sup>
34. The team began by reviewing the evaluation report in detail.<sup>63</sup> The various team members discussed the portions of the evaluation that they had completed, and discussed their experiences with Student generally.<sup>64</sup> Through this portion of the meeting, the team members described the meeting as cordial and collaborative.<sup>65</sup> At no time in discussing the evaluation report did Parents raise objections to its findings, nor did they state that Student was currently experiencing suicidal thoughts or significant mental health problems.<sup>66</sup>
35. At some point, around the end of the discussion of the evaluation report, Parents' Attorney joined the meeting by phone.<sup>67</sup> After that, the tenor of the meeting changed, as Parents' Attorney became argumentative.<sup>68</sup> Numerous participants interviewed by the SCO described the meeting as becoming uncomfortable, in that they felt that Parents' Attorney was combative and refused to allow other participants to speak or answer questions.<sup>69</sup>
36. The team progressed to the discussion of whether Student was eligible as a child with a disability. First the team discussed whether Student was eligible as

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<sup>62</sup> Interviews with School Psychologist, School Nurse, Assessment Specialist, Special Education Coordinator, Special Education Director One, Special Education Director Two; *see also* Ex. A, p. 246.

<sup>63</sup> Interview with School Psychologist.

<sup>64</sup> Interviews with School Psychologist, School Nurse, Assessment Specialist, Special Education Coordinator, Special Education Director One, Special Education Director Two.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

a child with a specific learning disability (SLD); the consensus was that he did not.<sup>70</sup>

37. Next, the team discussed whether Student met the eligibility criteria for Serious Emotional Disability (SED); this is where the discussion stalled. Parents' Attorney focused on the scores on the BASC and the Connors showing that some teachers had rated Student in the "at risk" or "clinically significant" range, and argued that those scores alone meant that Student should qualify as a child with SED.<sup>71</sup> Other members of the team disagreed, based on Student's success in 8<sup>th</sup> grade, and the fact that during the first 5 weeks of 9<sup>th</sup> grade, Student was polite and agreeable, did not display or describe any emotional problems, exhibited no issues with behaviors in class that interfered with his ability to participate in class, and was easily redirected and did not display any attention problems impeding his ability to participate in class.<sup>72</sup> Rather, his transition to high school was consistent with what typical ninth grade students experience in the beginning of high school.
38. At this point in the meeting, Parents and Parents' Attorney raised the question of Student's suicidal ideations. Some of the School District staff participating in the meeting believed that Parents' Attorney was describing current suicidal ideations or new mental health problems that Student was experiencing; others believed that Parents and Parents' Attorney were describing the suicidal ideations that Student had experienced two years prior, when Student was in 7<sup>th</sup> grade. In any event, there was confusion on this point; based on these concerns and the insistence by Parents and Parents' Attorney that the team did not have enough information to proceed, the School District agreed to halt the meeting and the eligibility consideration in order to obtain additional information.
39. Following the meeting, the School District provided Parents with releases of information for them to sign, so that Student's health information could be obtained.<sup>73</sup> Upon receipt of the signed releases, School Nurse promptly contacted Student's mental health providers in order to obtain therapy notes, progress notes, and discharge summaries.<sup>74</sup> These health records were provided to the School District within four or five days of the January 27 meeting.
40. The majority of the health records (approximately 76 out of 85 pages) provided to the School District were discharge notes from Student's treatment in 7<sup>th</sup> grade (for suicidal thoughts), and therapy progress notes dating from 2009

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Ex. C, pp. 31-33.

<sup>74</sup> *Id.*

through 2015.<sup>75</sup> The remaining 9 pages were progress notes from 9 therapy sessions from October 20, 2016 (after Student’s expulsion) through January 18, 2017. In part, the progress notes described Student’s frustration with his expulsion from school, difficulties with choosing appropriate peer relationships, arguments with Parents (particularly Father), and anger. However, the progress notes also demonstrate that Student is working toward being more respectful and better behaved, is getting his school work done and making better choices, often feels like things are going well.<sup>76</sup> Of the 9 recent therapy notes, none describes suicidal ideations, and eight of the nine reflect that overall, things are going relatively well.<sup>77</sup> Accordingly, Parents’ assertion in their Reply that the therapy notes demonstrate that Student has “continuing and substantial mental health issues” is simply not borne out by the evidence.

41. The SCO notes that even had the School District requested a release on October 17, 2016 (when it initially requested consent to evaluate) so that it could obtain Student’s mental health records, there would have been nothing current to obtain at that point, given that Student did not resume seeing a psychologist until October 20, 2016. Further, neither parent raised mental health concerns with the School District while Student was receiving services following his expulsion, nor in working with Special Education Teacher (who tutored Student in his online classes) did Student give any indication of being in any mental health distress.
42. On February 1, 2017, the School District provided Parents with another request for consent to evaluate, in order to obtain additional information. Parents returned the signed consent form approximately two months later.
43. Around this same time period (the beginning of February 2017), the School District granted Parents’ request to obtain an IEE at public expense. Based upon the SCO’s conversation with Parents’ Attorney in mid-April, the IEE has been completed, though it does not appear to have been provided to the School District at this point.
44. Since mid-April, the School District has made numerous efforts to schedule the meeting to review the IEE, the health records obtained by the School District in late January, and to resume the discussion of Student’s potential eligibility for special education service. The meeting has been rescheduled a number of times, at Parents’ request, and is currently slated to occur on May 9, 2017.

### CONCLUSIONS OF LAW

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<sup>75</sup> Ex. C, pp. 34-36; 46-118.

<sup>76</sup> Ex. C, pp. 37-40, 42-45.

<sup>77</sup> *Id.*

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

**Issues 1 and 2: The School District did not have a reason to suspect that Student was a child with a disability who should be evaluated to determine special education eligibility, and did not violate Student's rights in failing to do so.**

1. Under the IDEA, local education agencies (such as the School District) are required to provide eligible students with disabilities with a free appropriate public education ("FAPE") by providing special education and related services individually tailored to meet the student's unique needs and provided in conformity with an individualized education program developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. Prior to the initial provision of special education and related services to a child with a disability, a public agency (in this case, the School District) must "conduct a full and individual initial evaluation" in accordance of the requirements of the law. 34 C.F.R. 300.301(a). A child is eligible when he or she has been evaluated in accordance with the IDEA's requirements as having one of the disabling conditions under the law and, by reason of that disability, "needs special education and related services." 34 C.F.R. § 300.8(a); ECEA Rule 2.08.
2. The IDEA places an affirmative, ongoing obligation on states and local districts to identify, locate and evaluate all children with disabilities residing within the school district. 34 C.F.R. § 300.111(a)(1). This includes children who are suspected of being children with disabilities, even if they are advancing from grade to grade. *Id.* This requirement is referred to as the "child find" obligation.
3. In this case, the credible evidence in the record is that Student had had a relatively successful 8<sup>th</sup> grade year, during which he had not demonstrated any mental health or behavioral problems, or issues with inattention, that should have given rise to a special education evaluation. Similarly, during the first five weeks of 9<sup>th</sup> grade, Student presented as a typical new freshman going through a typical transition from middle school to high school. During this time period (8<sup>th</sup> and 9<sup>th</sup> grade), Parents never indicated that Student was experiencing mental health, behavioral, or attention issues that may have warranted a special education evaluation, and in 8<sup>th</sup> grade, they had stated that they were opposed to a special education evaluation or an IEP.
4. Accordingly, the SCO concludes that the School District did not have basis to believe that Student might be a child with a disability who required special education and related services, and thus did not violate the IDEA's child find requirement or deny Student a free appropriate public education.

**Issue 3: The School District was entitled to expel Student from school without a manifestation determination.**

5. A school district may not expel a child with a disability from school for a violation of the student code of conduct if the conduct in question “was caused by, or had a direct and substantial relationship to, the child’s disability” or if the conduct in question was “the direct result of” the school district’s failure to implement the child’s IEP. 34 C.F.R. 300.530(e). Accordingly, before expelling a child with a disability, the school district must conduct a manifestation determination to ensure that the expulsion is not based upon conduct that is a manifestation of the child’s disability. *Id.* If the conduct is a manifestation of the child’s disability, then the expulsion may not proceed.
6. On the other hand, a child who is not identified as a child with a disability is only entitled to a manifestation determination if the school district “had knowledge (as determined in accordance with [34 C.F.R. § 300.534(b)])” that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.” 34 C.F.R. 300.534(a). The regulations state that a school district has knowledge under Section 300.534 if “the parent of the child expressed concern in writing ... that the child is in need of special education and related services,” if the parent requested an evaluation of the child, or if the child’s teacher or other school district personnel “expressed specific concerns about a pattern of behavior demonstrated by the child to the director of special education of the agency or to other supervisory personnel of the agency.” 34 C.F.R. 300.534(b). Further, a school district would not be deemed to have knowledge if “the child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability...” 34 C.F.R. 300.534(d).
7. It bears noting that the protections of 34 C.F.R. § 300.534(a) are not triggered any time a school district may have or should have been on notice that, prior to the behavior precipitating the disciplinary action, the child may be a child with a disability. Rather, the regulation is very clear in stating that the basis of knowledge must be “in accordance with” 34 C.F.R. § 300.534(b). Thus, if one of the conditions listed in Section 300.534(b) does not exist, then the school district will not be deemed to have had knowledge that the child in question was a child with a disability, and the disciplinary action may proceed.
8. Student was exited from special education in 2012, approximately four years prior to the incidents relevant to this case. Since that time, and particularly during the one year limitations period over which the SCO has jurisdiction, Student has been served as a student in general education, and neither Student’s parents nor any School District teachers or staff expressed any concerns that Student might be a child with a disability. Accordingly, the regulatory prerequisites for Student to be treated as a child with a disability

for disciplinary purposes are not met. The School District was therefore entitled to expel Student without a manifestation determination.

**Issues 4 and 5: The School District conducted an appropriate special education evaluation of Student and complied with the IDEA's timelines for evaluations.**

9. The IDEA requires that evaluations must include a variety of assessment tools and strategies to provide relevant functional, developmental and academic information about the child, in order to determine with the child is a child with a disability, and if so, what special education and related services would be appropriate. 34 C.F.R. § 300.304(b). The evaluation may not rely upon “any single measure or assessment as the sole criterion for determining” eligibility, must use assessments and evaluation materials that are reliable, are administered by trained professional in accordance with the test instructions, and must be tailored to assess specific areas of educational need. 34 C.F.R. § 300.304(c). A child must be assessed in all areas related to the suspected disability. *Id.*
10. In making eligibility determinations, the IDEA requires that a group of qualified professionals and the parent of the child “review and interpret the evaluation data” and “draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations.” 34 C.F.R. § 300.306.
11. The regulations also require that initial evaluations to determine special education eligibility must be completed within 60 days of receiving parental consent, and that meeting to discuss the initial evaluation and to determine if the child has a disability must be held within a “reasonable period of time” after the initial evaluation is completed. 34 C.F.R. 301(c); ECEA Rules 4.02(3)(c) and 4.02(6)(a)(i).
12. In this case, upon receipt of the consent to evaluate, the School District promptly commenced with conducting a comprehensive evaluation that was tailored to assess all potential areas of eligibility (SLD, SED, and OHI). The evaluation included interviews with Student’s parents and teachers (in both middle school and high school) and Student’s tutor during his expulsion, a health summary, assessments in the areas of social/emotional functioning, ADHD, and behavior, and cognitive and achievement assessment information. Nothing in the information provided in Student’s records or in interviews with Student’s parents teachers gave the School District any reason to believe that additional information was needed to determine Student’s emotional or mental health needs. The evaluation conducted by the School District complied with

the IDEA regulations as described above, and was sufficient for the School District to determine eligibility on January 27, 2017.

13. As noted above, the School District was prepared to discuss and determine eligibility on January 27, 2017, which fell within the 60 day timeline discussed above. And in discussing the evaluation report itself, the team - including Parents - did not contest its findings or suggest that additional information was required. It was not until Parents' Attorney joined the meeting by phone and suggested that Student's suicidal ideations or tendencies should be considered by the team, did the discussion of eligibility come to a halt. As noted above, there was confusion among the team as to whether the suicidal thoughts were current and thus represented new information for the team to consider, and Parents' Attorney was adamant that Student's mental health records needed to be considered in order for the team to make an eligibility determination. Accordingly, the School District agreed to obtain and review additional mental health information and then reconvene to finish the eligibility determination.
14. Under the circumstances, the SCO concludes that the School District did not violate the IDEA or the timelines governing initial evaluations. The School District had done an appropriate evaluation as defined by IDEA, but was presented by Parents' Attorney with what appeared to many on the team to be new information that warranted further consideration. As a result, it was appropriate for the School District to wait to complete the eligibility determination so it could obtain further information.

**Issue 6: The School District did not “predetermine” eligibility.**

15. Finally, Parents allege that the School District has “predetermined” eligibility (or, in this case, lack thereof) by engaging in “delay tactics” and a “systematic process of dragging its feet” to put off an eligibility determination by “running out the clock” on the school year. The SCO finds no evidence that this has occurred.
16. As noted above, there was no basis for the School District to request a special education evaluation prior to the expulsion incident - Student was not exhibiting any mental health, behavioral, or attention issues of significance that would have given rise to a suspicion that he might be a student with a disability. As soon as Parents requested a special education evaluation on October 3, 2016, the School District promptly prepared the relevant documents, including requesting parental consent to evaluate. Parents did not respond to efforts by the School District to meet, such that on October 17, 2016, the School District sent out a request for consent to evaluate.

17. Parents did not return the signed consent form for approximately 1 ½ months. As soon as the School District obtained consent to evaluate, it commenced and completed the evaluation promptly and scheduled a meeting to discuss the evaluation and consider eligibility.
18. On January 27, the team was fully prepared to complete a full consideration of Student's eligibility for special education services, and appeared on track to do so until Parents and Parents' attorney insisted that additional mental health records were essential to the team's consideration. Because of the confusion surrounding whether Student was having current mental health problems, the School District staff at the meeting agreed to obtain additional information and then reconvene. The SCO concludes that this was a reasonable course of action, under the circumstances, and not evidence of predetermination or of any efforts to delay the eligibility consideration.<sup>78</sup>
19. Since the January 27 meeting, the School District has been prompt in its efforts to obtain the additional health information (it did so within one week of obtaining the release from Parents), and has been awaiting the completion of the IEE to convene a meeting to complete the eligibility determination. The only delays in scheduling the meeting have been at the request of Parents.
20. Accordingly, the SCO concludes that that the School District has not predetermined eligibility or engaged in delay tactics to "run out the clock" and avoid making an eligibility determination before the end of the school year.

### REMEDIES

Having found no violations, no remedy is ordered.

### CONCLUSION

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. See, 34 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

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<sup>78</sup> Indeed, given the Parents' insistence that additional information was necessary to the eligibility determination, it may be evidence of predetermination had the School District **refused** to obtain and consider additional information.

Dated this 1<sup>st</sup> day of May, 2017.



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Wendy Jacobs, Esq.  
State Complaints Officer

### **Appendix**

#### **Complaint, pp. 1-10**

- Exhibit 1 - October 17 letter from School District to Parents, p. 1
- Exhibit 2 - October 18 Expulsion letter, pp. 1-2
- Exhibit 3 - October 19 email from School District attorney, pp. 1-3
- Exhibit 4 - Consent to evaluate forms, pp. 1-3
- Exhibit 5 - January 27, 2017 evaluation report, pp. 1-12

#### **Response, pp. 1-11**

- Exhibit A: Requested emails, pp. 1-280
- Exhibit B: Requested disciplinary records, pp. 1-113
- Exhibit C: Evaluation documents, including requested mental health records, pp. 1-118
- Ex. D: School District policies, pp. 1-33
- Ex. E: List of School District staff with knowledge
- Ex. F: Evaluation documents from 2012

#### **Reply, pp. 1-9**