

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 2022:517  
Boulder Valley School District**

**DECISION**

**INTRODUCTION**

On April 18, 2022, the parents (“Parents”) of a student (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> filed a state-level complaint (“Complaint”) against Boulder Valley School District (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified three allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. § 300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from April 18, 2021 through April 18, 2022 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

**SUMMARY OF COMPLAINT ALLEGATIONS**

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

1. Failed to identify and evaluate Student between April 18, 2021 and December 31, 2021, when the District was on notice that Student may have a disability and be in need of special education and related services, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).

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

2. Failed to conduct an initial evaluation, as requested by Parents, between April 18, 2021 and December 31, 2021, to determine whether Student qualified as a child with a disability under the IDEA, in violation of 34 C.F.R. § 300.301.
3. Failed to provide Parents with prior written notice of the District’s refusal to initiate an evaluation of Student between April 18, 2021 and December 31, 2021, in violation of 34 C.F.R. § 300.503.

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire Record,<sup>2</sup> the SCO makes the following FINDINGS OF FACT:

#### **A. Background**

1. During the 2021-2022 school year, Student completed second grade at a District elementary school (“School”). *Interviews with Parents*. Student has attended School since kindergarten. *Id.*
2. In February 2022, a multidisciplinary team reviewed Student’s initial evaluation and found him eligible for special education and related services under the disability categories of Serious Emotional Disorder (“SED”) and Other Health Impairment (“OHI”). *Exhibit A*, p. 1. Additionally, Student was identified as gifted. *Exhibit J*, p. 33.
3. Student is an incredibly smart young man who excels academically. *Interviews with Parents, Second Grade Teacher #1, and Special Education Teacher*. He is artistic and loves to draw. *Id.* Student is imaginative and creates vivid imaginary worlds. *Id.* In the classroom, Student struggles to complete non-preferred tasks that he finds boring and would rather draw instead. *Id.* He also has difficulty building peer relationships. *Id.*

#### **B. 2020-2021 School Year**

4. Student was in first grade during the 2020-2021 school year. *Interviews with Parents*. That year, Student primarily received remote instruction due to the COVID-19 pandemic and its accompanying school closures and quarantines. *Id.* During the second semester, Parents elected for Student to receive exclusively remote instruction. *Id.*
5. Student struggled to stay engaged with remote instruction and found the virtual lessons boring. *Id.* In January 2021, Parents hired Tutor—a former elementary school teacher—to assist Student with remote instruction. *Id.* Parents hoped Tutor could supplement

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<sup>2</sup> The appendix, attached and incorporated by reference, details the entire Record.

Student's remote instruction with in-person projects targeting the same curricular areas to increase Student's engagement. *Id.*

6. In February 2021, Parents had a parent-teacher conference with Student's first grade teachers ("First Grade Teachers"). *Id.* During the conference, Parents expressed concerns about Student's behavior during remote instruction. *Id.* Though Student was excelling academically, First Grade Teachers indicated they shared the same concerns as Parents. *Id.* Those concerns included Student's inattention and refusal to do work during online classes (especially writing). *Id.* Student complained of being bored, melted down, acted out, and even became physically violent with Tutor. *Id.*
7. Following the conference, First Grade Teachers, Former Principal, and Social Worker discussed Student during a grade-level "kid talk" meeting. *Exhibit G*, p. 7. School holds regularly scheduled "kid-talk" meetings to allow staff to raise concerns about specific students and brainstorm ways to support those students. *Interview with Mental Health Advocate #1*. The "kid-talk" meetings are one component of School's multi-tiered system of supports ("MTSS") process. *Id.*
8. At this meeting, First Grade Teachers communicated Parents' concerns to the group. *Exhibit G*, p. 7. Specifically, they shared Parents' worry that Student was "reluctant to participate in any activities but particularly activities that involve[d] writing." *Id.* First Grade Teachers indicated they had "noticed these challenges during virtual learning and ha[d] seen [Student] hit parents, appear angry, type off topic comments in the chat, and generally seem defiant about home learning." *Id.*
9. Afterwards, Former Principal emailed Parents, asserting that School staff shared Parents' concern for Student and indicating that Mental Health Advocate #1 would help Parents with ideas and resources for outside support. *Id.*; *Interview with Mental Health Advocate #1*. Mental Health Advocate #1 was not a member of the School's special education team but, instead, provided an additional layer of support for School staff and connected families with outside resources. *Interview with Mental Health Advocate #1*.
10. On April 2, 2021, Parents and Mental Health Advocate #1 met virtually. *Interview with Mental Health Advocate #1*; *Exhibit J*, pp, 143, 151. Parents, again, shared that Student struggled to engage in virtual learning and was demonstrating defiant behavior. *Interview with Mental Health Advocate #1*. Mental Health Advocate #1 provided Parents information regarding individual therapy, family therapy, and other community resources. *Id.* Parents did not specifically request a special education evaluation during this meeting. *Id.*
11. The same day, Mental Health Advocate #1 also met with Tutor. *Id.*; *Exhibit J*, p. 141. Tutor voiced concerns surrounding Student's behavior, including defiance, refusal, and anger.

*Interview with Mental Health Advocate #1.* Mental Health Advocate #1 discussed ways Tutor could help set up a structure and routine to support Student. *Id.*

12. One day later—on April 3—Parents emailed First Grade Teachers to indicate that Student was “super reluctant to write even though he ha[d] the skills and coordination.” *Exhibit J*, p. 141. When he wrote, Student “said that the letters move[d] all around and [made] weird words that [didn’t] make sense.” *Id.* Per Student, the letters changed color and size. *Id.* Tutor responded and shared that it required “extreme focus and energy” for Student to write. *Id.* Tutor also recommended that Student be evaluated: “When I spoke to [Mental Health Advocate #1], she asked if [I] recommend an evaluation, and I think I’ve spent enough time working with him to recommend one wholeheartedly.” *Id.*
13. On April 6, Mental Health Advocate #1 mentioned Student during a second “kid-talk” meeting. *Interview with Mental Health Advocate; Exhibit G*, p. 7. Per the meeting notes, First Grade Teacher #1 reported that:

[F]amily is asking for a ‘writing evaluation.’ Student reports to family that letters ‘swirl around.’ Online learning is very difficult for him, and his behavior is significantly impacted.

*Exhibit G*, p. 7 (quotations in original). The documented outcome of the meeting was that School’s special education team:

need[ed] to respond within 10 days, because family has requested an evaluation. [First Grade Teacher #1] will forward family’s email to the Sped team so that they can respond appropriately. The 1<sup>st</sup> grade team will schedule a Kid Talk with the Sped team.

*Id.*

14. On April 14, First Grade Teacher #1, Former Principal, Mental Health Advocate #1, and Social Worker met to discuss Student. *Id.* With regard to Student’s behavioral challenges, Social Worker recommended “focusing on therapy to start and then looking at where evaluations might be helpful.” *Id.* With regard to Student’s writing, the attendees reviewed samples of Student’s writing that were above grade level and noted that Student had not shown difficulty writing during kindergarten when he attended School in person. *Interview with Mental Health Advocate.* As a result, the attendees concluded that they did not suspect a disability in writing. *Exhibit G*, p. 7.
15. At the time of the April 14 meeting, Student had been receiving remote instruction for more than a year, and his family was in the midst of some of their own challenges. *Interviews with Mental Health Advocate #1 and Parents.* District staff thought Student’s emotional difficulties were “bleeding into his academics.” *Id.* They found it difficult to

determine whether Student's challenges were attributable to familial stress and COVID-19 or indicative of something more. *Interview with Mental Health Advocate #1.*

16. On April 22, Special Education Teacher emailed Parents, stating:

We understand that you might have some questions about evaluation assessments. We would like to have an opportunity to answer your questions. I am sending you two dates for a meeting. Please, let us know which one works for you.

*Exhibit J, p. 132.* At the time she scheduled the meeting, Special Education Teacher understood the purpose of the meeting was to answer Parents' questions about the evaluation process and talk about what accommodations School would provide when Student returned to in-person instruction during the 2021-2022 school year. *Interview with Special Education Teacher.*

17. On May 24, Parents met with First Grade Teacher #1, Former Principal, Mental Health Advocate #1, Social Worker, and Special Education Teacher. *Exhibit G, p. 8; Interviews with Mental Health Advocate #1, Parents, and Special Education Teacher.* Parents reiterated their concerns about Student's writing and behavior. *Interviews with Parents; Exhibit G, p. 8.* Specifically, Parents worried Student might have a vision issue that was impacting his writing. *Interviews with Parents.* The remainder of the meeting focused on Student's upcoming return to in-person instruction. *Interviews with Mental Health Advocate #1, Parents, and Special Education Teacher; Exhibit G, p. 8.* No specific plan was developed, though the attendees agreed that:

- At the beginning of the school year, Student would be given a couple of weeks to adjust to his new classroom.
- Classroom teachers would then collect baseline data for Student.
- School would provide MTSS interventions in Student's areas of need and monitor Student's response to the interventions.

*Exhibit G, p. 8.*

18. There was no mention during the May 24 meeting of Parents' requested "writing evaluation" that District staff discussed during the April 6 and April 14 meetings. *Interviews with Mental Health Advocate #1, Parents, and Special Education Teacher.* The District did not issue any PWNs during the 2020-2021 school year or provide Parents a copy of the procedural safeguards notice. *See Exhibit C, pp. 1-5; Exhibit J, pp. 1-207.*

19. Parents acknowledged that they did not send a formal written request to the District asking that Student be evaluated for special education and related services. *Interviews with Parents.* Instead, Parents asked that Student be evaluated and questioned what

other resources were available and how Student could get more support. *Id.* In response, Parents were told that Student was too high achieving academically to qualify or benefit from special education. *Id.*

### **C. Beginning of the 2021-2022 School Year**

20. Student began second grade at School on August 18, 2021. *Interviews with Parents; Exhibit H*, p. 3. Before the first day of School, Parents emailed Second Grade Teachers detailing some of Student’s challenges and providing some suggestions on managing those challenges based on their experience and input from Student’s therapist. *Exhibit J*, pp. 122-124. The email specifically noted Student’s issues in the areas of sensory integration, vision, writing, attention, and aggression. *Id.* Parents reiterated Student’s difficulty with writing. *Id.*
21. Second Grade Teacher #1 did not share Parents’ concerns regarding Student’s writing. *Interview with Second Grade Teacher #1*. In fact, Second Grade Teacher #1 found Student to be a great writer. *Id.* His imagination helped him to create elaborate stories. *Id.* Second Grade Teacher #1 also saw no issues with Student’s fine motor skills. *Id.* However, she acknowledged that Student struggled to write anything other than fiction. *Id.*
22. At the outset of the school year, Student displayed typical behaviors, and Second Grade Teachers did not have any concerns about Student. *Interview with Second Grade Teacher #1*. However, Student quickly began to display worrisome behaviors. *Id.* As early as September 2, Second Grade Teachers expressed concern about Student’s work refusal, noting that “it can be hard to get [Student] to do his work, but that once he starts he can typically do it quickly.” *Exhibit J*, p. 93.
23. When Student refused to work, he usually wanted to draw. *Interview with Second Grade Teacher #1*. His drawings were often violent; Second Grade Teacher #1 recalled a drawing where one character stabbed another character with a knife with a lot of blood. *Id.*
24. Student also destroyed classroom property. *Interview with Second Grade Teacher #1*. On September 2, Second Grade Teachers expressed concern to Parents about Student breaking numerous pencils and ripping up a worksheet. *Exhibit J*, p. 93. Student struggled with this behavior during kindergarten as well. *Id.*; *Interviews with Parents*.
25. Student’s imagination took hold and it appeared to School staff that he had trouble separating reality from fantasy. *Interviews with Counselor and Second Grade Teacher #1*. Student told School staff members—including Counselor and Second Grade Teacher #1—that he was from another planet. *Id.* Student had a boss on that planet who gave him orders he had to follow. *Id.* Because Student had to complete the orders, he could not do his schoolwork. *Id.* The orders from his boss were often violent. *Id.*

26. On October 13, Counselor emailed Second Grade Teachers and Mental Health Advocate #2 regarding Student's behavior. *Exhibit G*, p. 3. Student "shared that he has been fighting a ghost for the last two years. It appears this ghost is intending to kill him so he has to be on the lookout." *Id.* Counselor was concerned that the ghost seemed very real to Student and that Student "was disassociating in such a way that it was hard for me to bring him back to the present moment." *Id.* Second Grade Teacher #2 described the behavior as "very concerning." *Id.* at p. 2.
27. A few days later, Student and a classmate stole the coins used for math from Second Grade Teacher #1's classroom. *Exhibit G*, p. 3; *Interview with Second Grade Teacher #1*.
28. On November 4, staff noted that Student "was focused all day on things he had to do for his 'boss' from another planet. He drew and wrote a lot of detailed, scary things related to violence and death." *Exhibit G*, p. 3.
29. The following day, on November 5, Student told a classmate he wanted to poke her eye out. *Id.*
30. The parents of one of Student's friends became concerned about "inappropriate talk" from Student and encouraged their child to find new kids to play with at School. *Id.* at pp. 3-4. In response, on November 9, Student told the other student that he would kill her if she kept playing with other friends. *Id.*
31. The District initiated a threat assessment based on the incidents on November 5 and November 9. During the threat assessment process, Student stated that his rage is a "reflex" and that he would "probably hurt a person if he can't control his rage." *Exhibit E*, p. 10. He indicated he would "follow through and that it's not just a threat." *Id.* Though Student said he knows violence is not acceptable, he said "on his planet, it's acceptable." *Id.* at p. 7.
32. Ultimately, the threat assessment team determined that Student did not appear to pose a threat of violence. *Id.* at p. 19. However, the team remained "concerned about [the] state of [Student's] mental health and whether [S]tudent is able to distinguish fantasy from reality." *Id.* To ensure the safety of Student's peers, the District decided to provide Student with one-to-one paraprofessional support, search his backpack, and watch him during recess to ensure he was not making weapons. *Id.* The paraprofessional "shadowed" Student and did not work with Student to develop emotional regulation skills. *Interview with Second Grade Teacher #1*.
33. Meanwhile, on December 13, Student dictated a story to another student. *Exhibit E*, p. 3. The dictated story included "you are deten to kill [Student] in his [minotaur] Form." *Id.* (errors in original). Student told the other student he would push him off the slide if he

did not write the story as instructed. *Id.* As a result of this incident, Student received a two-day out-of-school suspension. *Id.*

#### **D. Supports and Interventions Provided to Student**

34. Even though Student started demonstrating atypical behaviors early in the school year, Second Grade Teacher #1 did not necessarily suspect Student had a disability but, instead, said the School team needed time to gather data to figure it out. *Interview with Second Grade Teacher #1.*
35. To support Student, staff created a toolbox specifically for Student with fidgets and other items he could use to regulate. *Interview with Counselor.* He was allowed to go for a walk or take a restroom break. *Interview with Second Grade Teacher #1.* Second Grade Teachers also used an incentive system, where Student could earn time to draw after he completed his work. *Id.* However, when Student earned time to draw, it became difficult to get him to stop drawing when time was up. *Id.*
36. Additionally, all second grade students were taught the Zones of Regulation, and each classroom had a “peace corner” where students could go to self-regulate. *Exhibit J, pp. 88; Interview with Counselor.*
37. When Student became dysregulated in class, Counselor visited with Student—either inside or outside the classroom—to help him regulate. *Interview with Counselor.* During the first semester, Counselor estimated she helped Student regulate once or twice a week. *Id.* Student did not have any regularly scheduled time with Counselor and only visited when he was dysregulated. *Id.*
38. When asked, anecdotally, whether any of the supports worked well for Student, Second Grade Teacher #1 indicated some of the strategies (such as the toolbox) worked well for Student but only for a very short time. *Interview with Second Grade Teacher #1.* Once the support was not new anymore, it was no longer effective. *Id.*
39. The District did not develop any written intervention or support plan for Student and did not track his response to the interventions and supports provided. *Interview with Second Grade Teacher #1.*

#### **E. Private Evaluation and Consent to Evaluate**

40. On November 2, Private Psychologist completed an evaluation (“Private Evaluation”) of Student. *Exhibit F, pp. 30-46.* The Private Evaluation concluded that Student was intellectually gifted with developmental trauma disorder (with associated psychosis) and attention deficit hyperactivity disorder. *Id.* at p. 43. Private Psychologist recommended



Student have an IEP and provided the District with suggested school-based interventions and accommodations. *Id.* at pp. 44-45.

41. Parents forwarded the Private Evaluation to Assistant Principal, Counselor, Mental Health Advocate #2, and Principal on November 17. *Exhibit J*, p. 54. In the email, Parents stated: “we’d like to discuss [Private Psychologist’s] recommendation that [Student] receive an IEP. Can we discuss all of these recommendations and learn more about the IEP process? What would be the next steps to get an IEP?” *Id.*
42. Principal forwarded Private Evaluation to Special Education Teacher on November 18. *Id.* That same day, Special Education Teacher sent the Private Evaluation to School Psychologist and Case Manager for discussion at a December 1 meeting and then a meeting with Parents. *Id.*
43. On December 10, School Psychologist emailed Parents regarding the Private Evaluation. *Id.* at p. 42. The email stated, in part:

I understand [Private Psychologist] recommended an IEP, which is where I (along with the other members of our special education team) come in. I would like to allow for us to have plenty of time to gather more information and the necessary data to properly capture [Student’s] strengths and needs should we decide as a team to move forward with a comprehensive special education evaluation.

*Id.* Given the upcoming winter break, School Psychologist proposed meeting on January 4 or 5. *Id.* She explained that “[a]t this meeting, [Parents] would have the opportunity to share more about [their] hopes for [Student] and the school-based team members would be able to share their perspective on his progress as well.” *Id.* This was the first substantive response Parents received to their November 17 email. *Interviews with Parents.*

44. Parents responded on December 14, asking the District to initiate a special education evaluation. *Id.* at p. 35. Parents expressed frustration, stating:

We’re quite concerned that we have been requesting a start to the IEP process, both when [Student] was in kindergarten and last spring, and both of those previous times we didn’t get anything in writing. We now have an additional request that hasn’t been acted on yet. We’d like to sign the consent form to begin the IEP evaluation process this week. Alternatively, if you are declining to evaluate him, we would like to get the Prior Written Notice of that this week.

*Id.*

45. The following day, School Psychologist sent Parents a consent to evaluate form and a copy of the procedural safeguards. *Id.* The District agreed to evaluate Student in the areas of academics, attention, social-emotional, sensory, and motor. *Exhibit C*, p. 2; *Exhibit D*, p. 13.
46. Even though Parents had provided consent to evaluate, Parents met with School staff in January to discuss the evaluation process. *Interviews with Parents*. During that meeting, School staff cautioned Parents about evaluating Student for SED. *Id.* Staff wanted Parents to understand “how heavy” SED eligibility could be and how it might impact the way Student’s teachers viewed him. *Interviews with Parents and Special Education Teacher*.

**F. Evaluation, Eligibility Determination, and Development of Student’s IEP**

47. On February 9, 2022, the District completed Student’s initial evaluation (“Evaluation”). *Exhibit F*, pp. 2-29.
48. The same day, a multidisciplinary team met to consider Student’s eligibility for special education and related services in light of the Evaluation. *Exhibit C*, pp 4-5. Ultimately, the team determined that Student was eligible under SED (primary) and OHI (secondary). *Id.* The District issued a PWN regarding Student’s eligibility, which noted that:

[Student’s] behaviors of concern have been escalating and requiring more intensive supports; these behaviors have resulted in a threat assessment. [Student] has a difficult time separating fantasy from reality, requiring intensive support and interventions. These behaviors have been escalating since the beginning of the school year and have been impacting his ability to access the general education curriculum.

*Exhibit C*, p. 4.

49. A properly composed IEP Team subsequently met on February 22 to develop Student’s initial IEP. *Exhibit A*, pp. 1-18. Under the IEP, Student receives the following special education and related services:
- **Specialized Instruction:**
    - 120 minutes per month of direct specialized instruction outside the general education classroom, and
    - 120 minutes per month of direct specialized instruction inside the general education classroom.

- Psychologist/Social Work Services:
  - 120 minutes per month of direct psychologist/social work services outside the general education classroom, and
  - 30 minutes per month of indirect psychologist/social work services outside the general education classroom.
- Occupational Therapy:
  - 75 minutes per month of direct occupational therapy outside the general education classroom, and
  - 20 minutes per month of indirect occupational therapy outside the general education classroom.

*Id.* at p. 16. The IEP Team intended for Student to receive specialized instruction outside general education by participating in a friendship group or having a sensory break from the classroom. *Interview with Case Manager.* The specialized instruction inside the general education classroom would target development of social skills at recess. *Id.*

50. The IEP Team also developed a behavior intervention plan, targeting Student’s work refusal behavior. *Exhibit A*, pp. 21-23.

#### **G. District Policies and Procedures**

51. The District does not have any policies that pertain specifically to identification of children for special education and related services, though the District indicated it follows applicable federal and state law, as well as CDE guidance, during the child find process. *Response*, p. 4.

52. Child find for elementary-aged children occurs at the school level. *Interview with Executive Director of Special Education.* Each school has a multidisciplinary team that would meet to discuss any suspected disability. *Id.* If that team determines that an evaluation is necessary, the evaluation would be initiated within the school. *Id.*

53. Each school has a designated individual—often the school psychologist—who leads the school’s special education team and acts as a point person for special education referrals and requests for evaluations. *Id.* Additionally, each school has a student support team process with regularly scheduled meetings. *Id.* General education teachers can raise concerns regarding students at these meetings. *Id.*

54. When a parent requests an evaluation, staff are trained to meet and review the parent’s request. *Id.* If it is unclear whether a parent has requested a special education evaluation, staff should ask the parent to clarify what he or she means by “evaluation.” *Id.*

## CONCLUSIONS OF LAW

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

**Conclusion to Allegation No. 1: The District failed to identify and evaluate Student after the District was on notice that Student may have a disability and need special education and related services, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3). This violation resulted in a denial of FAPE.**

In their Complaint, Parents asserted that the District failed to identify and evaluate Student even after the District was on notice that Student might have a disability and need special education and related services. Though Parents alleged the District had a reason to suspect Student might have a disability as early as 2020, the SCO will evaluate only whether the District was on notice beginning on April 18, 2021, due to the one-year time limitation of state complaints.

### **A. The Child Identification Process under the IDEA**

The IDEA mandates that states develop and implement adequate procedures to identify, locate, and evaluate children with disabilities who may need special education and related services. 34 C.F.R. § 300.111(a). In Colorado, the child identification process “shall include child find, special education referral, initial evaluation, and determination of disability and eligibility for special education.” ECEA Rule 4.02(1)(a)(ii).

Under the “special education referral” component of the identification process, school districts have an affirmative obligation to evaluate a child where the district has reason to suspect a qualifying IDEA disability and a need for special education and related services. 34 C.F.R. § 300.111(c); ECEA Rule 4.02(1)(a). This obligation exists even where the child advances from grade to grade. 34 C.F.R. § 300.111(a). A student who is gifted may still be eligible for special education and related services under the IDEA as long as the student has a qualifying disability. *Letter to Anonymous*, 110 LRP 52277 (OSEP 01/13/10) (“[S]tudents who have high cognition, have disabilities, and require special education and related services are protected under the IDEA and its implementing regulations”).

The threshold for suspecting a disability is relatively low. *Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001). The appropriate inquiry by a school district is “whether the child should be referred for an evaluation, not whether the child actually qualifies for the services.” *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). Suspicion “may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation.” *Cheyenne Mtn. Sch. Dist. 12*, 117 LRP 25901 (D. Colo. 2017) (quoting *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)).

The actions of a school district in terms of whether it had knowledge of, or reason to suspect, a disability must be evaluated in light of the information the district knew, or had reason to know,

at the relevant time. *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). It should not be based on hindsight. *Id.*; see also *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). School districts must systematically seek out IDEA-eligible students and may not take a passive approach and wait for others to refer students for special education. *Compton Unified Sch. Dist. v. Addison*, 54 IDELR 71 (9th Cir. 2010). Remaining vigilant for red flags and referring students who may have a disability and need special education is part of this ongoing obligation. *Arapahoe County Sch. Dist.* 5, 117 LRP 2988 (SEA CO 12/21/16) (citing *Cincinnati City Sch.*, 115 LRP 26069 (SEA OH 5/07/15)).

To decide whether the District fulfilled its child find obligations here, the SCO considers the individual circumstances of this case to determine whether the District had a reason to suspect that Student needed to be evaluated for special education. *Cherry Creek Sch. Dist.*, 119 LRP 30204 (SEA CO 5/17/19); *Weld RE-4 School District*, 119 LRP 5662 (SEA CO 1/2/19) (citing *Clark County Sch. Dist.*, 114 LRP 45477 (SEA NV 8/28/14)).

### **B. Concerns regarding Student's Behavior and Writing**

The evidence in the Record establishes that the District had a reasonable suspicion that Student needed to be evaluated for special education long before the District initiated the evaluation in December 2021. By at least April 2021, the District was aware of Parents' and Teachers' concerns regarding Student's behavior and his writing. (FF #s 6-16.) Specifically, Parents and Tutor—a former elementary school teacher—voiced concern about Student's refusal to engage in virtual learning and his difficulty with writing tasks. (*Id.*) First Grade Teachers shared the same concerns. (FF #s 6, 8, 9.) At the time, Student had not regularly attended School in-person for over a year due to the COVID-19 pandemic. (FF #s 4, 15.) And Student's family was undergoing some personal challenges as well. (FF # 15.) School staff understandably had difficulty determining whether Student's behaviors were a result of the COVID-19 pandemic and familial stress or indicative of something more. (*Id.*)

Regardless, once Student returned to in-person instruction in Fall 2021, he began to demonstrate more concerning behaviors. Just as in Spring 2021, Student frequently refused to complete his work and avoided writing tasks. (FF #s 21-23.) But Student also told School staff that he had a boss on another planet that gave him orders to complete. (FF # 25) Student disassociated and had difficulty distinguishing fantasy from reality. (FF # *Id.*)

Second Grade Teachers provided Student some interventions in the classroom, though the interventions were minimally effective and Student still needed to visit Counselor once or twice a week for help regulating his emotions. (FF #s 34-39.) Student destroyed property, stole property, and even threatened to harm his classmates. (FF #s 24, 27, 29, 30.) His behavior continued to escalate during the Fall semester, eventually leading to a threat assessment in November and a three-day suspension in December. (FF #s 28-33.) Despite all of this information, the District did not initiate a special education referral. District staff attributed the delay to the need to gather data on Student and get to know him better. (FF # 34.) But the Record lacks much,

if any, information regarding the interventions and supports offered to Student and Student's response to those interventions. (FF #s 38, 39.)

After the threat assessment, the District provided a paraprofessional to supervise Student and ensure his safety and the safety of his classmates. (FF # 32.) There is no indication in the Record, however, that the paraprofessional acted as anything more than a bodyguard. (*Id.*) That is, the paraprofessional was not helping Student stay regulated but, instead, was an extra set of eyes trained solely on Student.

The District did not initiate a special education referral even after Parents provided the Private Evaluation to School staff and asked about getting an IEP. (FF #s 41-44.) Though Private Psychologist had already identified Student as having developmental trauma disorder with associated psychosis, District staff cautioned Parents about evaluating Student for SED, warning them "how heavy" such an identification could be and how it could impact the way Student's teachers viewed him. (FF #s 40, 46.)

For these reasons, the SCO finds and concludes that the District had reason to suspect Student needed a special education evaluation by October 2021. By that time, Student had been attending School in-person for a couple of months and School staff had an opportunity to implement appropriate supports (and evaluate their efficacy). The District's failure to refer Student for an initial evaluation resulted in a procedural violation of 34 C.F.R. § 300.111(c).

### **C. Procedural Violation**

The United States Supreme Court has stressed the importance of complying with the IDEA's procedural requirements. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). However, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation: (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause substantive harm where it seriously infringes upon a parent's opportunity to participate in the IEP process).

Here, the District failed to refer Student for a special education evaluation despite mounting evidence concerning Student's behavior. The District was on notice by October 2021 that Student might need special education, yet the District still had not initiated an evaluation by December 14, when Parents requested an evaluation. (FF #s 43-45.) If Parents had not requested an evaluation, it is unclear when or if the District would have referred Student.

In February 2022, the District found Student eligible for special education and related services. (FF # 48.) The District's failure to timely identify Student prevented Student from receiving special

education and related services earlier in the school year. For this reason, the SCO finds and concludes that the District's failure impeded Student's right to a FAPE.

#### **D. Compensatory Education**

Compensatory education is an equitable remedy intended to place a student in the same position he would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education need not be an "hour-for-hour calculation." *Colo. Dep't of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child and ensuring children receive the services to which they are entitled. *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010). Compensatory education remains available to students even after graduation. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 63 (1st Cir. 2002). The SCO now explains a compensatory education package designed to help place Student in the same position he would have been had the District timely referred Student for a special education evaluation.

Here, the District failed to refer Student for a special education evaluation for two months after the District suspected or should have suspected Student might need an evaluation. The District's failure denied Student the ability to receive a FAPE during that period of time. Student's behavior continued to escalate, resulting in a threat assessment and a suspension.

Student was subsequently found eligible for special education. (FF # 48.) But for the District's violation, Student's IEP would have been implemented before late February 2022, and Student would have been receiving services sooner. Consistent with Student's IEP, the SCO finds an award of the following compensatory services appropriate: (1) 240 minutes of direct specialized instruction; (2) 120 minutes of direct psychologist/social work services; and (3) 75 minutes of direct occupational therapy.

**Conclusion to Allegations No. 2 and No. 3: The District failed to conduct an initial evaluation of Student or properly respond to Parents' request for an evaluation, in violation of 34 C.F.R. § 300.301. Additionally, the District failed to provide Parents with a copy of the procedural safeguards notice, in violation of 34 C.F.R. § 300.504(a)(1). These violations resulted in a denial of FAPE.**

An initial special education evaluation seeks to determine whether a child has a disability within the scope of the IDEA and, if so, aids the IEP Team in the development of the child's IEP. 34 C.F.R. § 300.304(b)(1)(i)-(ii); ECEA Rule 4.02(4). School districts must complete a comprehensive initial evaluation before providing special education services to a child with a disability. 34 C.F.R. § 300.301(a).

As explained above, a school district may initiate a special education evaluation, or a parent may request an initial special education evaluation. *Id.* § 300.301(b); ECEA Rule 4.02(3)(a). Once a

parent requests an evaluation, a school district has two options: (1) agree to evaluate the child and obtain parental consent for the evaluation, or (2) deny the request to evaluate and provide the parent with prior written notice explaining its decision. *Cherry Creek Sch. Dist.*, 119 LRP 30204 (SEA CO 5/17/19); 34 C.F.R. § 300.503(a). Neither the IDEA nor the ECEA require parents to submit requests for evaluation in writing or use any magic language for their request. *Charlotte-Mecklenburg Bd. of Ed. v. Brady*, 2022 WL 989231, 122 LRP 11445 (W.D. N.C. 2022) (collecting cases) (finding notice of student’s diagnoses and request for information about available resources sufficient to constitute a request for an evaluation).

#### **A. Parents’ Request for Evaluation**

Here, the SCO finds and concludes that Parents requested a special education evaluation twice during the one-year period of this investigation. Most recently, Parents indisputably requested a special education evaluation on December 14, 2021. (FF # 44.) The District responded appropriately, providing Parents with consent to evaluate and timely completing Student’s initial evaluation (FF #s 45, 47.) That initial evaluation resulted in Student being found eligible for special education and related services. (FF # 48.)

But the SCO also finds that Parents requested a special education evaluation in April 2021. During the parent-teacher conference and subsequent meetings, Parents shared concerns about Student’s writing and behavior. (FF #s 6-15.) They asked Second Grade Teachers whether Student could be evaluated and what other resources and supports were available for Student. (FF # 19.) Indeed, in April, District staff met to consider Parents’ request for a “writing evaluation.” (FF #s 13-15.) The meeting notes indicated that School’s special education team needed to respond to the requested evaluation within 10 days. (*Id.*) Ultimately, staff determined that they did not suspect a disability in writing and did not move forward with the evaluation. (FF #s 14-15.)

Parents have acknowledged they did not submit a written request asking explicitly for a special education evaluation. (FF # 19.) However, Parents asked for Student to be evaluated and for additional support. (*Id.*) Even though Parents’ request may have been generic, the SCO cannot ignore how District staff responded to the request at the time it was made. In *El Paso Independent School District v. Richard R.*, the school district claimed the parents did not request a special education evaluation but, instead, merely raised the possibility of an evaluation. 567 F. Supp. 918, 946 (W.D. Tex. 2008). The school district responded promptly to parents’ request, treating it, at the time, as if it were a request for an evaluation. *Id.* The *Richard R.* court noted the “conflated logic” in the district’s argument and found that parents had, indeed, requested an evaluation as evidenced by the district’s notes and response. *Id.*

Here, the Record makes clear that District staff treated Parents’ request for a “writing evaluation” like a request for a special education evaluation. (FF #s 13-16.) The District cannot now claim Parents never formally requested an evaluation. Even though the District was not obligated to evaluate Student, Parents’ request for an evaluation triggered additional obligations for the District, as discussed below.



## **B. PWN and Procedural Safeguards**

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

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

34 C.F.R. § 300.503(a). Failure to provide prior written notice within a reasonable time before refusing to initiate or change a student's identification constitutes a procedural violation that may result in a denial of FAPE. *See El Paso County Sch. Dist. 2*, 113 LRP 44602 (SEA CO 08/15/13). The notice must be provided so that parents have enough time to fully consider and respond to the action before it is implemented. *Letter to Chandler*, 59 IDELR 110 (OSEP 2012).

PWN must include a description of the action proposed or refused by the district; an explanation of why the district proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report used by the district as a basis for the action; a description of other options the IEP team considered and the reasons why those options were rejected; and a description of any other factors relevant to the district's proposal or refusal. 34 C.F.R. § 300.503(b)(1)-(3) and (6)-(7). Additionally, a copy of the procedural safeguards notice must also be provided in response to a parent's request for evaluation. *Id.* § 300.504(a)(1).

Here, the District did not provide Parents with PWN or the procedural safeguards notice following Parents' request for an initial evaluation in April 2021. (FF # 18.) The District considered Parents' request and determined that no disability was suspected at the time. (FF #s 13-15.) However, the District was obligated to provide Parents with PWN explaining why the District refused to evaluate Student and a copy of the procedural safeguards notice. Because the District failed to provide Parents with PWN or the procedural safeguards notice, the SCO finds and concludes that the District violated 34 C.F.R. §§ 300.503(a) and 504(a)(1). This failure resulted in a procedural violation of the IDEA.

## **C. Procedural Violation**

As noted above, failure to comply with a procedural requirement amounts to a violation of FAPE only if the procedural violation: (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001) (concluding a procedural violation can cause

substantive harm where it seriously infringes upon a parent’s opportunity to participate in the IEP process).

Here, the District’s failure to provide Parents with PWN and the procedural safeguards notice significantly impeded Parents’ opportunity to participate in the decision-making process. At the time, Parents had little to no understanding of how the special education evaluation process worked. Had the District provided Parents with the required documentation, Parents would have better understood the action taken by the District and their rights in responding to that action. The District’s failure impeded Parents’ access to the information they needed to advocate on behalf of Student and placed the burden on Parents to figure out what to do next. For these reasons, the SCO finds and concludes that the procedural violation resulted in a denial of FAPE.

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

Pursuant to its general supervisory authority, the CDE must also consider and ensure the appropriate future provision of services for all IDEA-eligible students in the district. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the State Complaint Procedures are “critical” to the SEA’s “exercise of its general supervision responsibilities” and serve as a “powerful tool to identify and correct noncompliance with Part B.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46601 (Aug. 14, 2006).

Here, nothing in the record indicates that the District’s failure to properly refer students for special education evaluations or properly respond to requests from parents for evaluations is systemic in nature. However, this investigation raises significant concerns about the understanding of School staff with regard to child find or, at least, their implementation of District-wide procedures and practices related to child find. The violations spanned two separate school years and involved a broad swath of staff (first grade, second grade, administration, and special education). To remedy this, the SCO has required all School staff to participate in the ordered training.

### **REMEDIES**

The SCO concludes that the District violated the following IDEA requirements:

- a. Failing to identify and evaluate a student when the District was on notice that the student may have a disability and be in need of special education and related services, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3);

- b. Failing to conduct an initial evaluation as requested by parents, to determine whether a student qualified as a child with a disability under the IDEA, in violation of 34 C.F.R. § 300.301;
- c. Failing to provide parents with prior written notice following the District’s refusal to initiate an evaluation of a student, in violation of 34 C.F.R. § 300.503; and
- d. Failing to provide parents a copy of the procedural safeguards notice following parents’ request for an evaluation, in violation of 34 C.F.R. § 300.504(a)(1).

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

**1. Corrective Action Plan**

- a. By **Wednesday, July 20, 2022**, the District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
  - i. Attendance and completion of training provided by CDE on child find and initial evaluations. This training will address, at a minimum, the requirements of 34 C.F.R. §§ 300.111, 300.301, 303.503, and 300.504(a)(1) and the related concerns addressed in this Decision. Director of Special Education and CDE Special Education Monitoring and Technical Assistance Consultant will determine the time, date, and format of the training. This training may be conducted in-person or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast. This training is mandatory for Executive Director of Special Education, Director of Special Education, and all School staff. Such training shall be completed no later than **Friday, August 19, 2022**.
  - ii. Evidence that this training occurred must be documented (i.e., training schedule(s), legible attendee sign-in sheets, or other form of documentation, with names, titles, and signed assurances that they attended the training) and provided to the CDE no later than **Wednesday, August 24, 2022**.
- b. The CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm the District’s timely correction of the areas of noncompliance.

## 2. Compensatory Education Services for Denial of FAPE

- a. Student shall receive **240 minutes of direct specialized instruction** provided by a District special education teacher. These services must target Student's current annual IEP goals. All 240 minutes must be completed by **Friday, December 16, 2022.**
- b. Student shall receive **120 minutes of direct school psychologist/social work services** provided by a District school psychologist or social worker. These services must target Student's current annual IEP goals. All 120 minutes must be completed by **Friday, December 16, 2022.**
- c. Student shall receive **75 minutes of direct occupational therapy** provided by a District occupational therapist. These services must target Student's current annual IEP goals. All 75 minutes must be completed by **Friday, December 16, 2022.**
- d. **By Wednesday, August 10, 2022,** the District shall schedule compensatory services in collaboration with Parents. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. The District shall submit the schedule of compensatory services to the CDE no later than **Wednesday, August 17, 2022.** If the District and Parents cannot agree to a schedule by August 10, 2022, the CDE will determine the schedule for compensatory services by **Wednesday, August 24, 2022.**
  - i. The parties shall cooperate in determining how the compensatory services will be provided. If Parents refuse to meet with the District within this time, the District will be excused from delivering compensatory services, provided that the District diligently attempts to meet with Parents and documents such efforts. A determination that the District diligently attempted to meet with Parents, and should thus be excused from providing compensatory services, rests solely with the CDE.
- e. Monthly consultation between the provider(s) delivering compensatory services and Director of Special Education shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. The District must submit documentation that these consultations have occurred **by the second Monday of each month,** once services begin, until compensatory services have been

completed. Consultation logs must contain the name and title of the provider and the date, the duration, and a brief description of the consultation.

- f. To verify that Student has received the services required by this Decision, the District must submit records of service logs to the CDE by the **second Monday of each month** until all compensatory education services have been furnished. The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log.
- g. These compensatory services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. If for any reason, including illness, Student is not available for any scheduled compensatory services, the District will be excused from providing the service scheduled for that session. If for any reason the District fails to provide a scheduled compensatory session, the District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parents and notify the CDE of the change in the appropriate service log.

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

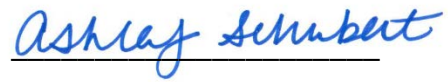
Colorado Department of Education  
Exceptional Student Services Unit  
Attn.: Special Education Monitoring and Technical Assistance Consultant  
1560 Broadway, Suite 1100  
Denver, CO 80202-5149

**NOTE:** Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the CDE. **Given the current circumstances surrounding the COVID-19 pandemic, the CDE will work with the District to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

### **CONCLUSION**

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

Dated this 17th day of June, 2022.



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Ashley E. Schubert  
State Complaints Officer

## APPENDIX

### Complaint, pages 1-6

- Exhibit 1: Communication log
- Exhibit 2: Email correspondence
- Exhibit 3: Threat assessment documentation
- Exhibit 4: Email correspondence
- Exhibit 5: Email correspondence
- Exhibit 6: Private evaluation
- Exhibit 7: Suspension notice
- Exhibit 8: Email correspondence
- Exhibit 9: IEP
- Exhibit 10: BIP

### Response, pages 1-4

- Exhibit A: IEPs
- Exhibit B: Notices of Meeting
- Exhibit C: PWNs
- Exhibit D: Evaluation requests
- Exhibit E: Discipline records
- Exhibit F: Evaluations
- Exhibit G: MTSS documentation
- Exhibit H: Academic calendars
- Exhibit I: District policies and procedures
- Exhibit J: Email correspondence
- Exhibit K: List of District staff
- Exhibit L: Verification of delivery to Parents

### Reply, pages 1-2

### Telephone Interviews

- Case Manager: May 31, 2022
- Counselor: May 27, 2022
- Executive Director of Special Education: June 1, 2022
- First Grade Teacher #1: May 27, 2022
- Mental Health Advocate #1: May 31, 2022
- Parents: June 2, 2022; June 13, 2022
- Special Education Teacher: May 31, 2022