

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

**State-Level Complaint 2023:576
Denver Public Schools**

DECISION

INTRODUCTION

On September 7, 2023, the guardian (“Guardian”) of a student (“Student”) not currently identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Denver Public Schools (“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 September 7, 2022 to the present 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 September 2022 and November 2022, 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);

¹ 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 appropriately determine the eligibility of Student from November 2022 to present, specifically by:
 - a. Failing to consider information provided by Guardian, in violation of 34 C.F.R. § 300.305(a)(1); and
 - b. Failing to draw upon information from a variety of sources, in violation of 34 C.F.R. § 300.306(c).
3. Failed to consider either an independent educational evaluation or a parent-initiated evaluation in decisions regarding the provision of FAPE to Student from January 2023 to present, in violation of 34 C.F.R. § 300.502(c).

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,² the SCO makes the following FINDINGS:

A. Background

1. Student attends seventh grade at a District charter school (“School”) that serves students from kindergarten through eighth grade. *Interviews with Guardian and Principal*. She has attended School since the 2021-2022 school year, when she was in fifth grade. *Interview with Principal*.
2. At School, Student is a hardworking, quiet, engaged young woman. *Interview with Special Education Teacher 1*. Student raises her hand, asks questions, and interacts with peers. *Id.* Outside of school, Student plays rugby, takes guitar lessons, and enjoys listening to music. *Interview with Guardian*. Though Student has a history of behavioral outbursts, she has not had any behavioral outbursts since January 2023. *Exhibit 1*, pp. 157-58. Student has a limited range of emotions and struggles with abstract concepts. *Interview with Guardian*.

B. Student’s Educational History

3. Student resided in another state with a relative until midway through fourth grade. *Interview with Guardian*. A prior school district developed an IEP for Student while she was in pre-kindergarten. *Exhibit D*, pp. 1-10. That IEP did not identify a qualifying disability or eligibility category. *Id.* However, the IEP identified Student’s “priority educational needs” as reading, math, and communication skills. *Id.* at pp. 1-2. To develop these skills, the IEP required

² The appendix, attached and incorporated by reference, details the entire Record.

Student to receive specialized reading, math, and communication instruction inside the general education classroom. *Id.* at pp. 6-8.

4. No other IEPs were provided during this investigation, and it is unclear how long Student had an IEP. Regardless, it is undisputed that no other IEPs were provided to any of Student's schools in Colorado. *Interview with Principal and Senior Manager of Special Education ("Senior Manager")*.
5. A behavior analysis assessment was completed in October 2018, when Student was in third grade ("2018 Behavior Assessment"). *Exhibit D*, pp. 13-33. That assessment noted that Student had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). *Id.* at p. 13. The assessment was conducted due to challenging behavioral issues, including tantrums, physical aggression, property destruction, verbal aggression, non-compliance, and elopement. *Id.* The behaviors occurred primarily at home. *Id.* The assessment created a behavior plan to be used with Student at home and recommended significant support from a Board Certified Behavior Analyst. *Id.* at pp. 13-33.
6. Student was in fourth grade during the 2019-2020 school year. *Id.* at p. 34. During the first semester, Student missed 37 days of school. *Id.* On assessments during Fall 2019, Student scored in the first percentile on a math assessment and in the twelfth percentile on a reading assessment. *Id.* at pp. 36-39.
7. In February 2020, Student moved to Colorado to live with Guardian after her caregiver passed away. *Interview with Guardian*. Guardian homeschooled Student for the remainder of the 2019-2020 school year. *Id.*
8. In the 2020-2021 school year, Student enrolled in a private school. *Id.* Guardian requested Student be enrolled as a fourth grader due to Student's absences during the 2019-2020 school year and her academic performance. *Id.*

C. Private Evaluations

9. In September 2020, Guardian obtained a neuropsychological evaluation from a private provider ("Private Evaluation 1"). *Exhibit D*, pp. 42-58. Student was referred for the evaluation due to "difficulties associated with processing, retention, and academic achievement." *Id.* at p. 42. Private Evaluation 1 utilized a variety of assessments and tools, including:
 - Weschler Intelligence Scale for Children, Fifth Edition ("WISC-5")
 - Wisconsin Card Sorting Test
 - Children's Memory Scale
 - Wide Range Achievement Test, Fifth Edition-Blue Form
 - Weschler Individual Achievement Test, Third Edition ("WIAT-3")
 - Vineland Adaptive Behavior Scales, Third Edition ("Vineland")

- Million Pre-Adolescent Clinical Inventory
- Conners Continuous Auditory Test of Attention
- ADHD Rating Scale
- Conners Comprehensive Behavior Rating Scales, Fourth Edition (“Conners-4”)

Id. at pp. 42-58. Student’s scores on the math portion of the WIAT-III fell within the moderately impaired to severely impaired range. *Id.* at p. 45. For that reason, Private Evaluation 1 concluded that Student had a Specific Learning Disorder (“SLD”) in mathematics. *Id.* Based on her childhood experiences, Private Evaluation 1 also found that Student had Unspecified Trauma- and Stressor-Related Disorder. *Id.*

10. Guardian also had a psychological evaluation of Student completed in March 2021 by a private provider (“Private Evaluation 2”). *Id.* at pp. 59-77. For Private Evaluation 2, the evaluator administered the following assessments:

- Integrated Visual and Auditory 2 Continuous Performance Test
- Autism Diagnostic Observation Schedule, Second Edition (“ADOS-2”)
- Autism Diagnostic Interview, Revised (“ADI”)
- Behavior Assessment System for Children, Third Edition (“BASC-3”)
- Trauma Symptom Checklist for Children
- Behavior Rating Inventory of Executive Function, Second Edition (“BRIEF-2”)
- Social Responsiveness Scale, Second Edition (“SRS-2”)

Id. at pp. 59-77. The evaluator found that Student did not meet the criteria for an Autism Spectrum Disorder (“ASD”). *Id.* at p. 68. Private Evaluation 2 noted:

While [Student] does have challenges in the domains of social communication and interactions, these challenges appear to be due to a lack of education and appropriate modeling of social skills. Not due to an inability to learn these skills or being too uncomfortable to engage in social interactions. . . . At the time of testing, it appears [Student’s] traumatic experiences in childhood are impacting her development and behavior, not autism.

Id. at p. 69. Private Evaluation 2 continued Student’s prior diagnosis of Unspecified Trauma- and Stressor-Related Disorder. *Id.* at p. 69.

D. Enrollment in School

11. Student enrolled in School for the 2021-2022 school year. *Interviews with Guardian and Principal.* Student was enrolled as a fifth grader. *Id.* Guardian sought an IEP for Student on several occasions during the 2021-2022 school year, as early as September 2021 or as late as April 2022. *Interview with Guardian; Exhibit 4*, pp. 1-20. Requests made during the 2021-2022

school year are outside of the one-year investigation time period but can be considered to determine whether violations occurred during the relevant time period. During her interview, Guardian asserted that the District “impeached” themselves through the documents produced in this investigation and that the District’s impeachment “opened the door” for the SCO to expand the one-year time limitation. *Interview with Guardian*.

12. Early in the 2022-2023 school year, Guardian again raised concerns about an IEP for Student. *Interview with Special Education Teacher 1*. On September 20, 2022, School staff met with Guardian to talk about her concerns and agreed to evaluate Student to determine whether she qualified for special education. *Exhibit N*, p. 3. Based on Guardian’s concerns, the District sought consent to evaluate Student in the areas of general intelligence, communicative status, academic performance, social/emotional status, health, and motor abilities. *Exhibit B*, p. 2. Guardian signed the consent on September 20, 2022, and returned it to the District on October 1, 2022. *Exhibit K*, p. 47.
13. During the same meeting, the attendees reviewed Student’s pre-kindergarten IEP and determined that it would not be adopted by the District. *Response*, p. 5; *Exhibit N*, p. 3. The District made this determination even though that IEP was no longer in effect and Student was now in sixth grade. *Response*, pp. 4-5. The District adopted an interim IEP that would be in effect until the District could complete Student’s evaluation and determine her eligibility. *Id.*

E. Initial Evaluation

14. The District completed Student’s initial evaluation on November 11, 2022. *Exhibit B*, pp. 4-47. The evaluation assessed Student in all areas identified in the consent to evaluate. *Id.* at pp. 2, 4-47.
15. School Psychologist evaluated Student’s general intelligence using the Kaufman Assessment Battery for Children, Second Edition (“KABC-2”). *Id.* at pp. 5-7. Student scored in the average or high average range on all five indices of the KABC-2. *Id.* School Psychologist also reviewed the WISC-5 from Private Evaluation 1, which Guardian provided to the District. *Id.* at p. 7. On the WISC-5, Student’s full-scale IQ was estimated to fall between a standard score of 87-96. *Id.*
16. Speech Language Pathologist (“SLP”) used a records review (including Private Evaluation 1 and Private Evaluation 2), Oral and Written Language Scales (“OWLS”), Children’s Communication Checklist (“CCC-2”), observations, and a language sample/interview to assess Student’s communicative status. *Id.* at pp. 7-12. Neither Private Evaluation 1 nor Private Evaluation 2 showed significant speech concerns. *Id.* at p. 8.
17. The OWLS showed Student’s language to be average. *Id.* SLP’s observations and interview with Student did not give rise to any communication concerns. *Id.* at pp. 9-11. On the CCC-2,

Student received average scores on most of the subscales; Student scored below average on the subscales for semantics, nonverbal communication, and social relations. *Id.* at p. 11. Student's General Communication Composite score was only slightly below average. *Id.* A Social Interaction Difference Index score of -11 or less can indicate ASD; however, Student's score was -9—greater than -11—and, therefore, not indicative of ASD. *Id.* at pp. 11-12.

18. Special Education Teacher 1 and Special Education Teacher 2 administered the WIAT-3 to assess Student's academic performance. *Id.* at pp. 12-16. The WIAT-3 showed Student had average overall math abilities, above average reading abilities, and superior written expression abilities. *Id.* at p. 15.
19. Special Education Teacher 1 and Special Education Teacher 2 also reviewed Student's scores on STAR assessments, CMAS, and AIMSweb assessments. *Interview with Special Education Teacher 1.* On the STAR assessments, Student scored in the 48th percentile for math and in the 56th percentile for reading. *Id.* at pp. 17-19. On Spring 2022 CMAS assessments, Student approached expectations for math and met expectations for language arts. *Id.* at pp. 20-21. Student's AIMSweb scores also demonstrated that her academic performance was on grade level. *Id.* at pp. 21-23.
20. Social Worker assessed Student's social/emotional status through a records review and by administering the BASC-3, Vineland, and SRS-2. *Id.* at pp. 25-36. Her records review included the 2018 Behavior Assessment, Private Evaluation 1, and Private Evaluation 2. *Id.* at pp. 25-27.
21. Guardian and two of Student's teachers completed the BASC-3 ratings scales. *Id.* at p. 29. Both teachers' ratings fell within the average range except one teacher rated Student at-risk in the area of depression and the other teacher rated student at-risk in the area of withdrawal. *Id.* Four of Guardian's scores (hyperactivity, attention problems, atypicality, and activities of daily living) fell within the clinically significant range, while seven of her scores (aggression, conduct problems, anxiety, withdrawal, adaptability, leadership, and functional communication) were identified as at-risk. *Id.*
22. Again, Guardian and two of Student's teachers completed the Vineland ratings scales. *Id.* at p. 31. The teachers' ratings for communication and daily living skills fell within the adequate range. *Id.* at p. 33. Their ratings for socialization were moderately high. *Id.* However, Guardian's ratings for all three areas all fell within the low to moderately low range. *Id.* For perspective, the composite scores based on teachers' ratings were in the 66th and 88th percentiles, while Guardian's ratings were in the 1st percentile. *Id.*
23. The SRS-2 questionnaire was completed by Guardian and one of Student's teachers. *Id.* The teacher's ratings resulted in a normal score, while Guardian's ratings resulted in a "severe total score." *Id.* Guardian's score was associated with a clinical ASD diagnosis. *Id.* The BASC-

3, Vineland, and SRS-2 all demonstrated a marked difference between Student's social/emotional functioning at School and at home. *Id.*

24. Physical Therapist completed the School Functional Assessment and timed assessments to evaluate Student's gross motor skills. *Id.* at pp. 37-38. Occupational Therapist relied on the Beery Buktenica Test of Visual Motor Integration, Sixth Edition ("VMI-6") and a writing sample to assess Student's fine motor skills. *Id.* at pp. 39-41. Neither Physical Therapist nor Occupational Therapist identified any motor concerns. *Id.* at pp. 37-41.
25. School Nurse obtained information regarding Student's health status through a records review and an interview with Guardian. *Id.* at pp. 36-37. School Nurse identified prior diagnoses of ADHD, Oppositional Defiant Disorder ("ODD"), and ASD as potential impacts for Student's access to her education. *Id.* at p. 37. No supporting documentation for prior diagnoses of ODD and ASD—at least as of November 2022—appeared in the investigation file.

F. Eligibility Determination

26. On November 15, 2022, School convened a multi-disciplinary team, including Guardian, District staff, and School staff, to determine Student's eligibility for special education and related services based on the District's evaluation. *Interviews with Principal, Senior Manager, and Special Education Teacher 1*. The team considered Student's eligibility under the disability categories of ASD, SLD, Other Health Impairment, and Speech-Language Impairment. *Exhibit F*, p. 1.
27. Guardian felt the team ignored Student's medical diagnoses and background. *Interview with Guardian; Complaint*, p. 9. During the meeting, the team reviewed the District's evaluation, Private Evaluation 1, and Private Evaluation 2, as well as background information provided by Guardian. *Interviews with Principal, Senior Manager, and Special Education Teacher 1*. Indeed, the results from Private Evaluation 1 and Private Evaluation 2 were included in the appropriate sections of the District's evaluation. *See Exhibit B*, pp. 4-47. Team members included relevant sections of Private Evaluation 1 and Private Evaluation 2 during their portion of the discussion. *Interview with Senior Manager*. For example, assessments of Student's speech needs in Private Evaluation 1 and Private Evaluation 2 were summarized by SLP during the meeting along with the assessments she completed. *Id.*
28. Ultimately, the team determined that Student was not eligible for special education and related services under any of the eligibility categories considered. *Exhibit C*, p. 1; *Exhibit F*, pp. 1-3. Guardian disagreed with the decision. *Interview with Guardian*. The team acknowledged Student's disabilities but concluded that Student was able to access the general education curriculum without special education or related services. *Interviews with Principal, Senior Manager, and Special Education Teacher 1*. School staff felt that they saw different emotions and behaviors at School than Guardian reported seeing at home. *Exhibit F*, p. 2. The District

prepared a lengthy prior written notice (“PWN”) detailing the team’s decision and all other factors considered by the team. *Id.* at p. 1. The eligibility determination ended the services Student was receiving under the interim IEP. *Id.*; *Interview with Special Education Teacher 1.*

29. The team discussed offering Student a 504 plan, but no 504 plan was ever developed for Student. *Interviews with Guardian and Senior Manager.*
30. Guardian sought an IEP to allow Student to receive private tutoring and music instruction after school at the District’s expense. *Interview with Guardian.* Guardian does not want Student to receive specialized instruction—either inside or outside the general education environment—but, instead, believes Student should be permitted to continue her private tutoring after school. *Id.*; *Exhibit 1*, p. 3. According to Guardian, the “leaps and bounds” Student has made since 2020 are attributable to her and not, in any way, to District or School staff. *Interview with Guardian.*

G. Request for IEE

31. On March 30, 2023, Guardian requested an IEE in an email to District and School staff members. *Exhibit K*, p. 1. School Counselor contacted Guardian to see if she was interested in pursuing a 504 plan, an option that had been discussed at the November 2022 eligibility determination meeting. *Id.* at pp. 2-3. However, Guardian reiterated that she wanted an IEE, not a 504 plan. *Id.* at p. 3.
32. The District issued a PWN on April 7, 2023, agreeing to the IEE. *Exhibit F*, pp. 4-5. The District’s evaluation and cost criteria were attached to the PWN. *Id.* Private Psychologist emailed a proposed scope and cost for Student’s IEE on May 9, 2023. *Exhibit K*, p. 9. After some back and forth, the District agreed to the full evaluation proposed by Private Psychologist. *Id.* at pp. 9-12.
33. Private Psychologist evaluated Student using a number of tools, including:

Intellectual Functioning

- WISC-5

Social Communication Functioning

- ADOS-2
- ADI

Academic Functioning

- WIAT-4
- Comprehensive Test of Phonological Processing, Second Edition
- Gray Oral Reading Test, Fifth Edition
- Test of Word Reading Efficiency, Second Edition

Attention/Executive and Social/Emotional Functioning

- Rey Complex Figure Test (“RCFT”)
- VMI-6
- Wide Range Assessment of Memory and Learning, Third Edition (“WRAML-3”)
- Tower of LondonDX, Second Edition (“TOLDX-2”)
- Delis-Kaplan Executive Function System (“D-KEFS”)
- Conners-4
- BRIEF-2
- BASC-3
- Multidimensional Anxiety Scale for Children, Second Edition (“MASC-2”)

Exhibit 1, pp. 156-76. In the IEE, Private Psychologist concluded that Student met the diagnostic criteria for level 1 ASD. *Id.* at pp. 170-71. This determination was based, in part, on Student’s lack of reciprocal conversation, limited conversation skills, poor eye contact, narrow range of facial expressions, and slow speech during the ADOS-2. *Id.* at p. 171. Private Psychologist’s interview with Guardian for the ADI also informed this diagnosis, as well as Student’s results on cognitive switching activities. *Id.* Private Psychologist noted that the ASD diagnosis was “without accompanying intellectual impairment or language impairment.” *Id.*

34. Private Psychologist also retained Student’s prior diagnosis of ADHD. *Id.* at p. 170. Because Student was taking ADHD medication at the time of the IEE, she performed “quite well” on testing related to executive functioning and attention (though she had some difficulty with cognitive switching activities). *Id.* at p. 172. Given Student’s extensive trauma history, Private Psychologist also kept her prior diagnosis of Unspecified Trauma- and Stressor-Related Disorder. *Id.* The IEE did not contain any other diagnoses or raise any other concerns. *Id.* at pp. 156-76.
35. Private Psychologist provided a final version of the IEE to Guardian and the District on August 17, 2023. *Exhibit K*, p. 95. Senior Education Instructional Specialist (“SEIS”) sent the IEE to the School team on August 21, 2023 and directed the team to schedule a meeting with Guardian. *Id.* at p. 620.
36. School convened a multi-disciplinary team on October 10, October 19, and October 30, 2023 to review the IEE and determine Student’s eligibility in light of the IEE. *Interview with Senior Manager*. The team discussed the IEE, as well as the November 2022 evaluation. *Id.* At the October 30 meeting, the team determined that Student could receive reasonable benefit from general education and, therefore, found Student ineligible for special education. *Id.*

H. Student’s Advancement

37. Beginning in, at least, March 2023, Guardian asked School to advance Student to eighth grade for the 2023-2024 school year. *Exhibit K*, p. 1; *Interview with Guardian*. If Student had not repeated fourth grade in the 2020-2021 school year, Student would currently be in eighth

grade based on her birthdate. *Interview with Guardian*. Guardian's requests for advancement were based on Student's academic performance. *Id.* Available data indicated that Student is "firmly at grade level." *Interview with Principal*. Grade-level content is appropriately challenging for Student. *Id.* As a result, School staff denied Guardian's request for advancement. *Id.*

38. Advancing Student to eighth grade is Guardian's primary concern and the outcome she hopes to obtain from the Complaint. *Id.* The IDEA does not address grade advancement or retention, and the SCO does not have the authority to advance or retain a student as a remedy in a state complaint investigation.

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 for special education and related services in September 2022, consistent with 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3). This violation did not result in a denial of FAPE.

The first allegation in Guardian's Complaint relates to the District's alleged failure to evaluate Student for special education and related services even after it was on notice that Student may have a disability.

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. Guardian’s Concerns

Here, Guardian’s allegation appears to stem primarily from the 2021-2022 school year. As early as September 2021 or as late as April 2022, Guardian asked School staff about obtaining an IEP for Student. (FF # 11.) These requests occurred well outside the one-year time limitation of this Complaint. (*Id.*)

During this investigation, Guardian asserted that the District “impeached” themselves in the documents produced in this investigation and that this “impeachment” somehow “opened the door” for the SCO to consider events beyond the one-year time limitation. (*Id.*) The law provides no such exception to the one-year time limitation. 34 C.F.R. § 300.153(c). In fact, the law provides no exception whatsoever to the time limitation. *Id.* See *Questions and Answers on IDEA Dispute Resolution Process*, at Question B-18 (OSEP 2013) (reiterating the one-year time limitation without exception).

The one-year investigation period for this Complaint began on September 7, 2022. On September 20, 2022, the District provided Guardian a consent to evaluate form. (FF # 12.) Therefore, the relevant period for any violation was the two weeks between September 7, 2022 and September 20, 2022. The District was on notice that Student might need special education and related services at least by April 2022, when Guardian seriously inquired about obtaining an IEP for Student. (FF # 11.) Yet the District did not move forward with Student’s evaluation until

September 2022, five months later. (FF # 12.) Guardian’s request for an IEP occurred outside the one-year time limitation. (FF # 11.) However, the District’s failure to fulfill its child find obligations continued until it sought consent to evaluate on September 20, 2022. Therefore, the SCO finds and concludes that the District failed to identify and evaluate Student between September 7, 2022 and September 20, 2022, resulting in a procedural violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).

Additionally, this legal conclusion does not, in any way, endorse the unconventional action taken by District and School staff in September 2022. Even though Student had been in the District for a year, the District reviewed Student’s 2015 IEP as if Student were a new transfer into the District. (FF # 13.) The District decided not to adopt the seven-year-old, expired IEP and then developed an interim IEP for Student while her evaluation was being completed. (*Id.*) These actions by the District were not grounded in IDEA principles. The IDEA’s transfer provisions apply only to students who transfer to a new school district within the same school year. 34 C.F.R. § 300.323(e). Because Student did not transfer to the District during the 2022-2023 school year, the transfer provisions were inapplicable. The District had no choice but to conduct an evaluation and, if Student was determined eligible, to have an IEP in place on the first day of the 2022-2023 school year, consistent with 34 C.F.R. § 300.323(a). Staff availability over summer vacation did not relieve the District or School of this obligation.

C. Procedural Violation

Failure to comply with a procedural requirement of the IDEA results in substantive harm supporting compensatory remedies if the 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); *see Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765-66 (6th Cir. 2001).

In this case, the District’s violation had little, if any, impact on Guardian or Student. The SCO acknowledges that, in reality, the District avoided its child find obligations from April 2022 (and, perhaps, earlier) to September 2022. (FF #s 11, 12.) But this investigation concerns only that portion of the violation that occurred within the relevant time period, namely September 7 to September 20. That two-week delay did not impede Student’s right to a FAPE or impact Guardian’s opportunity to participate in the decision-making process. The District timely completed its evaluation on November 11 and completed the eligibility determination on November 15. (FF #s 14, 26.) Student was not found to be eligible under the IDEA and, therefore, did not miss any services given the two-week delay. (FF # 28.) As a result, the SCO finds and concludes that the District’s procedural violation did not result in a denial of FAPE.

Conclusion to Allegation No. 2: The District considered information provided by Guardian and private evaluations when determining Student’s eligibility in November 2022, consistent with 34 C.F.R. §§ 300.305(a)(1) and 300.306(c). No IDEA violation occurred.

With her second allegation, Guardian asserts that the District determined Student’s eligibility in November 2022 without considering private evaluations or background information provided to the District by Guardian.

The IDEA requires a multidisciplinary team (“MDT”) to determine “whether the child is a child with a disability.” 34 C.F.R. § 300.306(a)(1). An analysis of the appropriateness of an eligibility determination involves two steps. First, the SCO examines whether the school district followed relevant standards and procedures in making the determination. *See Questions and Answers on IDEA Part B Dispute Resolution Procedures*, Question B-6 (OSERS 2013). Under the second step, the SCO determines whether the eligibility decision was consistent with the data in the record. *Id.*

A. Adherence to Standards and Procedures

Accordingly, the SCO begins by examining whether the District adhered to applicable IDEA procedures regarding evaluations and eligibility determinations. The IDEA has specific and extensive procedural requirements governing how school districts evaluate students and determine eligibility. *See* 34 C.F.R. §§ 300.304-306.

As part of an evaluation, an MDT must:

- (1) Review existing evaluation data on the child, including—
 - (i) Evaluations and information provided by the parents of the child;
 - (ii) Current classroom-based, local, or state assessments, and classroom-based observations; and
 - (iii) Observations by teachers and related service providers.

Id. § 300.305(a)(1). Once the evaluation is complete, an MDT meets to determine whether the child is a child with a qualifying disability. *Id.* § 300.306(a)(1). To make this determination, the MDT must consider information from a “variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior.” *Id.* § 300.306(c)(1)(i).

Here, the District determined Student’s eligibility during a multidisciplinary meeting on November 15. (FF #s 26-28.). The District’s evaluation incorporated information from all three of the private evaluations Guardian provided to the District. (FF #s 15, 16, 20, 25.) Social Worker included background information regarding Student’s prior IEPs and childhood trauma in the social/emotional section of the District’s evaluation, and School Nurse incorporated Student’s prior diagnoses and health background in the health section of the evaluation. (FF #s 20, 25.)

District staff recalled Student's background and the private evaluations being discussed by District staff during the meeting. (FF # 27.) As such, the Findings of Fact show that an MDT reviewed available data on Student when it determined her eligibility. For this reason, the SCO finds and concludes that the District adhered to the IDEA's standards and procedures in its evaluation and determination of Student's eligibility.

B. Consistent with Student-Specific Data

The SCO next considers whether the eligibility determination was consistent with the data in the Record.

The District's evaluation reiterated Student's prior diagnoses of ADHD, ODD, and ASD. (FF # 25.) The social/emotional portion of the evaluation captured Guardian's concerns about Student's behavior and acknowledged that two of her teachers rated her at-risk for depression or withdrawal. (FF #s 21-23.) Otherwise, the evaluation painted a picture of a hardworking, successful young woman. (FF #s 14-25.) Academically, Student was excelling. (FF #s 18-19.) Her performance even prompted Guardian to request that Student be advanced a grade for the 2023-2024 school year. (FF # 37.) District staff acknowledged that they saw a different Student at School than Guardian saw at home. (FF # 28.)

Guardian felt the District disregarded Student's diagnoses by private providers. (FF # 27.) At the time of the eligibility determination, Guardian reported that Student had been diagnosed with ODD and ASD, even though no documentation supported those diagnoses in the investigation file. (FF # 25.) In fact, Private Evaluation 2 had recently concluded that Student did not meet the diagnostic criteria for ASD. (FF # 10.) Regardless, nothing in the Record indicates that District staff questioned Student's private diagnoses. Instead, the question was whether those disabilities required Student to receive specialized instruction.

A medical diagnosis does not automatically qualify a student for special education and related services. *See Consideration of Clinical Diagnoses in the Educational Identification of Disabilities in Accordance with IDEA* (CDE Dec. 2015), available at https://www.cde.state.co.us/cdesped/ta_clinicaldiagnoses. Doctors cannot prescribe special education or even determine a student's eligibility for special education *Id.* Such eligibility can only be determined by an MDT. 34 C.F.R. § 300.306(a). To be eligible under the IDEA, a child must have a qualifying disability *and* need special education and related services as a result of that disability. 34 C.F.R. § 300.8; *see Miller v. Charlotte-Mecklenburg Sch. Bd. of Ed.*, 64 F.4th 569, 83 IDELR 1 (4th Cir. 2023) (holding that district complied with the IDEA when it considered a private ASD diagnosis even though it found student ineligible under the IDEA). An eligible child is "unable to receive reasonable benefit from general education" due to his or her disability. ECEA Rule 2.08.

Here, the MDT acknowledged Student's diagnoses but determined that Student was able to receive reasonable benefit from general education in spite of those diagnoses and without special education or related services. (FF # 28.) For these reasons, the SCO finds and concludes

that Student’s eligibility determination was consistent with the data in the Record. Thus, the SCO finds and concludes that District’s eligibility determination complied with the IDEA.

During this investigation, Guardian indicated she wanted Student to have an IEP so Guardian could be reimbursed for the private tutoring and music classes Student participates in after school. (FF # 30.) Guardian attributed Student’s success solely to these activities and not due to any effort by School staff. (*Id.*) Guardian did not want Student to receive any specialized instruction during the school day, either inside or outside of the general education classroom. (*Id.*) To clarify, even if Student were found eligible under the IDEA, Guardian would not be reimbursed for these expenses. The IEP is “the centerpiece of the statute's education delivery system for disabled children . . . [and] the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988); *Bd. of Ed. v. Rowley*, 458 U.S. 176, 181 (1982)). Stated simply, an IEP is a written document that outlines the specialized instruction, related services, and supports a student with a disability needs to access the general education curriculum. See 34 C.F.R. § 300.320. The school district provides instruction, services, and supports to the student during the school day, not after school through private providers. See *id.*

Conclusion to Allegation No. 3: The District considered the IEE, consistent with 34 C.F.R. § 300.502(c). No IDEA violation occurred.

The third allegation in Guardian’s Complaint asserts that the District failed to consider the IEE in determining whether Student was eligible under the IDEA.

If a parent obtains an IEE, the school district must consider the results of the IEE “in any decision made with respect to the provision of FAPE to the child.” 34 C.F.R. § 300.502(c). Though a school district must consider the results of an IEE, the district is not obligated to accept the evaluator’s recommendations or conclusions. *T.S. v. Bd. of Educ. of the Town of Ridgefield*, 10 F.3d (2d Cir. 1993); *G.D. v. Westmoreland Sch. Dist.*, 17 IDELR 751 (1st Cir. 1991).

Here, the evidence in the Record makes clear that the District considered the IEE. (FF # 36.) An MDT met on October 10, October 19, and October 30 to reconsider Student’s eligibility for special education and related services in light of the IEE. (*Id.*) During these meetings, the MDT discussed the District’s 2022 evaluation and the IEE in depth. (*Id.*) Only after three lengthy meetings did the team conclude that Student was not eligible for special education. (*Id.*) For these reasons, the SCO finds and concludes that the District considered the IEE consistent with 34 C.F.R. § 300.502©. No violation of the IDEA occurred.

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

Pursuant to its general supervisory authority, the CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in 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, the District’s failure to identify and evaluate Student was not systemic in nature. The violation appears to stem from the factual circumstances surrounding Student. Nothing in the Record indicates that this failure extends beyond Student or this singular incident.

REMEDIES

The SCO concludes that the District has violated the following IDEA requirement:

1. Failed to identify and evaluate Student for special education and related services, consistent with 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).

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

1. Corrective Action Plan

- a. By **Monday, December 4, 2023**, 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 Institute is responsible. 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. Final Decision Review

- a. Executive Director of Exceptional Student Services, Senior Manager, SEIS, Principal, Special Education Teacher 1, and Special Education Teacher 2 must review this Decision, as well as the requirements of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3). This review must occur no later than **Monday, January 8, 2024**. A signed assurance that these materials have been reviewed must be completed and provided to the CDE no later than **Friday, January 12, 2024**.

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

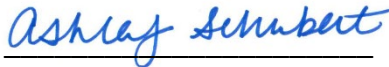
Colorado Department of Education
Exceptional Student Services Unit
Attn.: CDE Special Education Monitoring and Technical Assistance Consultant
1560 Broadway, Suite 1100
Denver, CO 80202-5149

NOTE: Failure by the 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.

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 6th day of November, 2023.



Ashley E. Schubert
State Complaints Officer

APPENDIX

Complaint, pages 1-27

- Exhibit 1: Supporting documents

Response, pages 1-7

- Exhibit A: IEPs
- Exhibit B: Evaluations
- Exhibit C: Determination of eligibility documents
- Exhibit D: Prior evaluations and background information
- Exhibit E: Blank
- Exhibit F: Prior written notices
- Exhibit G: Notices of meeting
- Exhibit H: Schedule, grades, and attendance reports
- Exhibit I: District's calendar
- Exhibit J: Policies and procedures
- Exhibit K: Correspondence
- Exhibit L: Witness information
- Exhibit M: Verification of delivery to Guardian
- Exhibit N: Meeting notes

Reply, pages 1-16

- Exhibit 2: Student statement
- Exhibit 3: Grievance and eligibility determination
- Exhibit 4: Requests for IEP
- Exhibit 5: Interim IEP
- Exhibit 6: Email correspondence regarding SLP services
- Exhibit 7: IEP-related documents
- Exhibit 8: IEE-related documents
- Exhibit 9: Email correspondence related to perceived harassment
- Exhibit 10: Advancement documents
- Exhibit 11: Interim IEP
- Exhibit 12: Evaluation
- Exhibit 13: IEE
- Exhibit 14: Learning tools
- Exhibit 15: IEE-related documents
- Exhibit 16: IEE-related documents

Telephonic Interviews

- Guardian: October 23, 2023
- Principal: October 17, 2023
- Senior Manager: October 18, 2023
- Special Education Teacher 1: October 17, 2023