

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

**State-Level Complaint 2024:521
Pueblo School District 60**

DECISION

INTRODUCTION

On February 21, 2024, the grandparents 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 Pueblo School District 60 (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 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 February 21, 2023 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 District denied Student a Free Appropriate Public Education (“FAPE”) because District:

1. Failed to conduct an initial evaluation to determine whether Student qualified as a child with a disability under the IDEA—as requested by Parent between August 2023 and present—or provide Parent with prior written notice explaining its decision to not evaluate Student, in violation of 34 C.F.R. §§ 300.301 and 300.503(a).

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 identify and evaluate Student—from August 2023 to present—when 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).

FINDINGS OF FACT

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

A. Background

1. Student is fifteen years old and is in ninth grade. *Response*, p. 1. From the start of the 2023-2024 academic year through November 2023, he attended a District high school (“School”). *Interviews with Parents and School’s Assistant Principal (“Assistant Principal”)*. From November 27, 2023 through February 12, 2024, Student attended District’s educational program for expelled students (“Expulsion Program”). *Exhibit K*, p. 10. From February 13, 2024 through the date of this Decision, Student has attended District’s online high school program (“Online Program”). *Interview with Online Program’s Principal (“Principal”)*.
2. Student has not been identified as student with a disability. *Response, Interview with District Special Education Coordinator (“Special Education Coordinator”)*.
3. Student lives with his grandparents (“Parents”), who are his legal guardians. *Interview with Parents*.
4. This investigation concerns District’s responses to Parents’ requests for an IEP evaluation, as well as District’s child find obligations during the 2023-2024 academic year. *Exhibits C and G; Interview with Parents*.

B. District’s Policies, Practices and Procedures

5. District’s assistant director of special education (“Assistant Director”) described District’s responsibilities regarding its response to a request for an evaluation, stating that upon receiving a parent’s request that a student be evaluated for an IEP, a team of staff members should gather a body of evidence, review the student’s data, and discuss that data with the parent. *Interview with Assistant Director*. Following this, District should issue a prior written notice (PWN) either requesting parent’s consent to perform an evaluation or explaining District’s decision not to initiate an evaluation. *Id.*
6. Assistant Director further stated that if District suspects a student may be affected by a disability, whether or not a parent has requested an evaluation, it is obligated to ask the parent for consent to evaluate the student. *Id.* This suspicion may be triggered by, among

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

other factors, a lack of expected academic progress, parent provision of information indicating a disability, or a pattern of student behavior. *Id.*

7. District provides to its staff a guide detailing Districts policies and procedures with respect to special education. *Exhibit N.* Among other topics, this guide discusses District's responsibilities with respect to the identification and evaluation of students and describes the required contents of a PWN declining to evaluate a student. *Id.*
8. A Student who "has caused a material and substantial disruption three or more times during the course of the school year" may, under District's Student Conduct and Discipline Code, be declared a "habitually disruptive student" and subject to expulsion. *CDE Exhibit 2*, p. 54. After each "disruption" leading toward this designation, the student and parent should receive a Letter of Habitual Disruption, informing them of District's habitually disruptive student policy, and the potential that should further disruptions occur, student may be subject to expulsion. *Id.*

C. Student's Enrollment at School

9. Student, entering high school, enrolled at School for the 2023-2024 academic year. *Interviews with Parents and Assistant Principal.*
10. On August 14, 2023, the day before the first day of classes, Parent met with Assistant Principal to discuss Student's entry into the high school environment. *Id.* Parent noted that Student had been arrested over the prior summer on a weapons charge and was required to wear an ankle monitor. *Id.* They were concerned that this might inhibit his ability to successfully connect with peers. *Id.* The next day, Assistant Principal informed the school principal and school resource officer of these concerns. *Exhibit L*, p. 18.
11. On August 16, 2023, Student was observed at lunch pulling up his pant leg to display his ankle monitor and what School staff perceived to be gang colors. *Interview with Parents, Exhibit L*, p. 18.
12. The next day, Parent attended a safety plan meeting at School. *Exhibit L*, pp. 1, 18. At this meeting, it was determined that Student would be searched upon entrance to School each day. *Id.* At this meeting, Parent verbally requested testing for special education – District recorded this request in Student's "Behavior and Intervention Summary Timeline." *Id.* After this meeting, Parents reduced their request for a special education evaluation into writing on August 26. *Interview with Parents; Exhibit G.*
13. Parent states that he also gave Assistant Principal a note from Student's nurse practitioner. *Interview with Parent.* This note, dated August 17, 2023, states that Student "is currently under my medical care. I do recommend that he establishes with a therapist of behavioral health," and encourages the reader to contact her office for additional information. *CDE Exhibit 1.* Assistant Principal, however, states that she did not receive this note, and that the

only note in Student's records is a note from Student's nurse practitioner stating that Student "is currently under my medical care and may not return to school at this time," and asking that Student be excused from school. *Interview with Assistant Principal; CDE Exhibit 6*. This note shares a letterhead and formatting with the note provided by Parent, but indicates that it was generated five minutes after that note. *CDE Exhibits 1 and 6*. The SCO finds that the note describing Student's behavioral health treatment was not provided to Assistant Principal, but that the note asking that Student be excused from school due to medical care was provided.

14. On August 21, 2023, Student was involved in a fight with a peer. *Exhibit L*, p. 18. Student received a three-day out-of-school suspension. *Id.* Based upon this incident, Student received a Letter of Habitual Disruption. *Id.*

D. The August 28, 2023 and August 30, 2023 Meetings

15. On August 28, 2023, Parents attended a reinstatement meeting at School. *Exhibit L*, p. 15.
16. At this meeting, a Safety Plan was established, outlining a few interventions the team believed would help Student to succeed in the school environment. *Id.* These interventions include prohibiting Student from contact with three peers and providing Student with a "Fast Pass." *Id.* This "Fast Pass" allowed Student to, when he was feeling escalated, leave class to go to the counselor's office. *Interviews with Parents, Assistant Principal, and School Psychologist.*
17. At the start of this meeting, Parents provided District with the written request that Student "be evaluated for an Individual Educational Plan (IEP) and any reasonable accommodations for his continuing education be met." *Interview with Parents; Exhibit G*. Assistant Director stated that she understood Parents' verbal and written request for an evaluation to be a sufficient request that Student be evaluated for an IEP. *Interview with Assistant Director.*
18. That day, Assistant Principal sent an email to School Psychologist stating: "We have a request from parents to complete ESS [special education] testing for this student. [. . .] He has had several behavioral issues this year and we need to perform an FBA [functional behavior assessment] to determine the appropriate interventions for either ESS or the MTSS process. Are you available to complete this FBA?" *Exhibit O*, pp. 1-2.
19. School Psychologist did not complete an FBA in response to this request, instead asking to attend Student's next meeting to "problem solve next steps." *Interview with School Psychologist; CDE Exhibit 7*. No FBA was initiated for Student until November, following an additional request as part of Student's expulsion process. *Interviews with Assistant Principal and School Psychologist.*

20. Between August 17, 2023 and August 30, 2023, Assistant Principal also reached out to a District special education coordinator (“Coordinator”) for assistance in responding to Parents’ request for an evaluation. *Interviews with Assistant Principal and Coordinator.*
21. On August 30, 2023, a “problem solving” meeting was held at School to discuss Parents’ request for an evaluation. *Interviews with Parents, Assistant Principal, Coordinator, and School Psychologist.*
22. During that meeting, Parents indicated that they were in the process of helping Student to find behavioral health services. *Exhibit D.* School staff explained Student’s “Fast Pass” and noted that he would check in with Assistant Principal before school each day. *Id.* The team decided to reconvene “in 6 weeks, or sooner as needed.” *Id.*
23. After the meeting, School Psychologist issued a PWN refusing to initiate an evaluation for Student, stating: “The team met and discussed [Student]’s transition to [School] and agreed that a disability is not suspected.” *Exhibit C*, pp. 1-2. School Psychologist stated that at the time this PWN was issued, Parents agreed that a disability was not suspected. *Interview with School Psychologist.* Parents stated that they still suspected a disability at that time. *Interview with Parents.*
24. This PWN noted that Student would be provided a “Fast Pass” and would have daily check-ins with a trusted adult. *Exhibit C*, p. 2. It also noted that the team agreed to meet again on October 11, 2023, to review Student’s progress. *Id.*
25. Daily check-ins are widely recognized as an effective antecedent strategy for students with behavioral concerns, and access to methods of de-escalation such as a visit to the school counselor would potentially benefit such a student. *Consultation with CDE Specialists.* CDE Specialists noted concern with these interventions insofar as they do not seek to teach Student new behavioral skills that might help to address concerning behaviors. *Id.*

E. Continuing Behavioral Concerns

26. On September 13, 2023, Student’s language arts teacher (“Teacher”) noticed Student punching a classroom wall and directing inappropriate language and racial slurs toward a peer. *Interview with Teacher; Exhibit L*, p. 7.
27. Teacher encouraged Student to use his “Fast Pass” to go to the counselor’s office, but Student returned to the classroom almost immediately, using derogatory language to describe his disapproval of the school counselors. *Id.*
28. This behavior referral was addressed through a conference with Student and did not result in the issuance of a Letter of Habitual Disruption. *Exhibit L*, p. 7.
29. On September 18, 2023, Student attempted on three instances to leave the classroom using his “Fast Pass.” *Id.* at pp. 6-7; *Interview with Parents.* The teacher, a substitute who was not

familiar with Student's "Fast Pass" system, instructed Student to "sit down and stay in class." *Id.* Student became upset and began to refer to the substitute teacher using racial slurs, and school security was called to de-escalate. *Exhibit L*, p. 7.

30. Student received a two-day in-school suspension, and a second Letter of Habitual Disruption because of this incident. *Id.*
31. On September 20, 2023, while serving the in-school suspension for the September 18, 2023 incident, Student was asked to turn over his cell phone according to in-school suspension rules. *Id.* at p. 6. Student began yelling at the in-school suspension supervisor, referring to her using inappropriate and derogatory language. *Id.*
32. In response to this incident, and in lieu of issuing a third Letter of Habitual Disruption which would expose student to potential expulsion, on September 28, 2023, Assistant Principal referred Student to a District expulsion prevention program. *Id.*; *Exhibit L*, p. 16; *Exhibit O*, pp. 11-12.

F. The October 11, 2023 Review Meeting

33. A meeting to review Student's school performance and his response to the interventions discussed at the August 30, 2023 meeting was scheduled for October 11, 2023 at 3:30 p.m. *Exhibit L*, p. 2.
34. That morning at 9:35 a.m., Assistant Principal sent an email to Student's teachers, apologizing for the short notice but asking for the teachers' feedback on Student's behavior in class, his performance on classroom work, and his strengths and difficulties. *Exhibit O*, p. 24.
35. Three teachers responded prior to the time of the meeting, noting that Student's behavior in their classes is usually not disruptive. *Id.* at pp. 24-25; *Exhibit L*, p. 19. One of these teachers noted that Student was not completing classwork, whereas the other two expressed that he was completing classwork. *Id.*
36. Two teachers, including Teacher, responded after the time of the meeting, expressing concern with Student's behavior and work completion. *Id.* at pp. 25-26.
37. At the start of the meeting, Parents asked about the progress of their request for an IEP. *Interview with Parents*. School staff stated that Student was responding well to the interventions put into place at the previous meeting and that it was not necessary to proceed with an evaluation. *Interviews with Parents, Assistant Principal, Coordinator and School Psychologist*. Assistant Director stated that she understood this inquiry to be a request that Student be evaluated for an IEP. *Interview with Assistant Director*.
38. Participants in the meeting disagreed whether Student's three behavioral referrals between the previous meeting and the October 11 meeting were discussed during the October 11 meeting. *Id.* Parents, Coordinator, and School Psychologist do not recall these behavioral

incidents being discussed at the meeting. *Interviews with Parents, Coordinator, and School Psychologist*. Assistant Principal stated that she would have discussed behavioral incidents at any meeting like that which occurred on October 11, 2023. *Interview with Assistant Principal*.

39. The Response to Intervention Plan, which documents the October 11 meeting, lists meeting attendees but does not indicate the topics discussed. *Exhibit L*, pp. 1-2. It does, however, describe the goal of the plan as “Behavior Regulation.” *Id.* Under the section labeled “Intervention Deliveries,” the document states “No intervention delivery data has been entered.” *Id.* at p. 2.
40. Assistant Principal stated that the team determined that the interventions were successful despite the continued behavioral referrals because the behavioral referrals during September were distinct in nature from the behavioral referrals prior to the August 30, 2023 meeting. *Interview with Assistant Principal*.
41. Following the meeting, School Psychologist issued a PWN refusing to initiate an evaluation, stating: “The team met to review [Student]’s progress from the 08/30/2023. The team agreed that [Student] is able to be successful with the accommodations currently in place. The team does not suspect a disability.” *Exhibit C*, pp. 3-4. School Psychologist clarified to SCO in an interview that while Student did not have accommodations under Section 504 at the time, she used the term “accommodations” to refer to Student’s interventions put into place at the August 30, 2023 meeting. *Interview with School Psychologist*.
42. The SCO finds, based upon consultation with CDE Specialist, that because Student’s behaviors of concern were continuing and escalating, the data in the Record does not support the team’s determination that the August interventions were successfully addressing Student’s behavioral concerns. *Consultation with CDE Specialists*.
43. A follow-up meeting was scheduled for January 17, 2024. *Exhibit C*, p. 4; *Exhibit O*, p. 16.

G. Student’s Expulsion

44. On October 18, 2023, Student participated in a class as part of the District intervention program to which he had been referred after the September 20, 2023 incident. *Exhibit L*, p. 19.
45. On October 19, 2023, Teacher observed Student writing initials of classmates onto a fabric chair with a pen during class. *Id.* at pp. 5-6; *Interview with Teacher*.
46. In response to this incident, Student received a four-day out-of-school suspension and a third Letter of Habitual Disruption. *Id.*
47. Because Student had received three Letters of Habitual Disruption, Assistant Principal initiated District’s procedures for expulsion. *Interview with Assistant Principal*; see *CDE Exhibit 2*, pp. 56-57.

48. On November 1, 2023, Assistant Principal sent School Psychologist an email stating: “I have a student that I am working closely with. He continues to display detrimental behavior and we need to complete an FBA for him. Can I meet with you as soon as possible to arrange this?” *Exhibit O*, p. 20.
49. On November 2, 2023, Student physically confronted a classmate with whom he had been arguing on social media near a school restroom. *Exhibit L*, pp. 5, 20.
50. Student received an eight-day out-of-school suspension, a fourth Letter of Habitual Disruption, and Parents were notified of the initiation of the expulsion process. *Exhibit L*, p. 5.
51. On November 13, 2023, School Psychologist completed her FBA, concluding that Student engages in disruptive behavior “as a way to avoid the task and access attention from his peers” and engages in “behaviors of higher concern (threats, displays of gang affiliation), with a similar function of accessing attention from his peers and gaining social capital.” *Exhibit L*, pp. 12-14.
52. In determining whether a student may be affected by an emotional disability, behavior with a function of “accessing attention from peers” would tend to indicate an emotional disability, whereas behavior with a function of “gaining social capital” would tend to indicate social maladjustment. *Consultation with CDE Specialists*. While social maladjustment as the sole function of behavior might indicate that a student is not affected by an emotional disability, the presence of both an emotionally motivated function and a non-emotionally motivated function would tend to indicate an emotional disability. *Id.*
53. On November 14, 2023, District issued an “Expulsion Review and Recommendation” which recommended: “Expulsion with a 45 day review based on attendance/behavior/work completed.” *CDE Exhibit 4*. This document stated that the 45-day review date would be February 12, 2024, provided that Student enrolled in and attended Expulsion Program during the interim. *Id.* District sent a letter on December 12, 2023 noting the board had approved the expulsion and explaining he would be eligible for review and reinstatement after 45 school days from the date of his November 6, 2023 suspension. *CDE Exhibit 5*.
54. Following the November 14, 2023 expulsion hearing, Student’s guardian ad litem (“GAL”) sent an email to Coordinator, Assistant Principal, and School Psychologist stating “I learned for the first time today during the expulsion hearing that [Student] has ODD/RAD diagnoses. No one had informed GAL that there were evaluations containing this information. [...] The issue is that those formal evaluations were required to be shared (formally written evaluations) with the school prior to the August meeting.” *Exhibit 3*. Based on this, the SCO finds that although District was not informed of Student’s specific diagnoses prior to November 14, 2023, it was aware of these diagnoses as of November 14, 2023.

55. A medical report dated August 10, 2023 was attached to District documentation regarding a 504 Plan dated May 2, 2024. *CDE Exhibit 7*, pp. 6-18. This medical report documents concerns regarding anxiety, reactive attachment disorder, and oppositional defiant disorder. *Id.* at pp. 14-15, 18.
56. Anxiety is a condition which can contribute to an interpretation of student behavior being due to an emotional disability. *Consultation with CDE Specialists*. Reactive attachment disorder, which is grounded in attachment theory, can also indicate an emotional disability. *Id.* A diagnosis of oppositional defiant disorder, on the other hand, may indicate that a student's behaviors are rooted in social maladjustment. *Id.* Where both emotional and non-emotional bases for a student's behavior exist, a student should be evaluated for a potential emotional disability. *Id.*
57. If a district learns of these diagnoses after behavioral issues have occurred, it should use the newly discovered information to provide context to the behavior in determining its function and whether it triggers suspicion of a disability. *Id.*

H. Student's Education After Expulsion

58. One District school ("Alternative School") houses, among other programs, District's Online Program and District's Expulsion Program. *Interview with Principal of Alternative School ("Principal")*.
59. When a student is expelled from a District school, the student may participate in Expulsion Program during the term of expulsion, after which Student may re-enroll at a traditional District school. *Id.* Expulsion Program operates using short, six-week terms, during which participants can earn school credits transferable out of the program. *Id.*
60. Student attended Expulsion Program remotely via the internet during his 45-day expulsion period. *Exhibit K*, p. 10. A summary of his participation in Expulsion Program reads: "[Student] has been online only during his 45 days expulsion period. He has pretty much checked in daily and has worked consistently in [Expulsion Program's online learning program]. He has completed both math classes (1 year) and part way done with 3 other classes." *Id.*
61. The entry on Student's Expulsion Program records for February 8, 2024 reads "45 Day Review, He's good to go. [Student] has met all the requirements." *Id.*
62. On February 8, 2024, Student's 45-day review occurred. *CDE Exhibit 3*. Principal noted that Student had no behavior issues during his time in Expulsion program, and that he was progressing well in his classes. *Id.* Student expressed that he liked his experience at Alternative School, and Parents and Student stated that they wanted Student to continue at Alternative School. *Id.* Student was determined to have completed his expulsion requirement. *Id.*

63. Student was enrolled in Online Program, where he currently attends. *Interviews with Principal and Parents.*

64. Principal is not aware of Parents' intentions with respect to Student's enrollment for the 2024-2025 academic year but stated that Student is free to remain enrolled in Online Program, or re-enroll into a traditional District school. *Interview with Principal.*

CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District, in response to Parents' requests in August 2023 and October 2023, issued prior written notice explaining its decision not to evaluate Student, in accordance with 34 C.F.R. §§ 300.301 and 300.503(a). No IDEA violation occurred.

Parents' concern is that District did not conduct an evaluation following their August 2023 and October 2023 requests. (FF #s 12, 17, 36.)

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).

A school district may initiate a special education evaluation on its own reasonable suspicion, 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 IDEA nor 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).

PWN must be issued a reasonable time before a district proposes or refuses to change "the educational placement of the child or the provision of FAPE to the child." 34 C.F.R. § 300.503(a). PWN must include: (1) a description of the action proposed or refused by the district; (2) an explanation of why the district proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report used by the district as a basis for the action; (4) a statement that the parents of a child with a disability have protections under the procedural safeguards, and the means by which a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the information; (6) a description of other options the IEP team considered and the reasons why

those options were rejected; and (7) a description of any other factors relevant to the district's proposal or refusal. 34 C.F.R. § 300.503(b)(1-7). The notice must be "written in language understandable to the general public." Id. at § 300.503(c).

Here, the SCO finds and concludes that Parents requested a special education evaluation twice – once in August (verbally and in writing), and once, verbally, in October. (FF #s 12, 17, 37.) On August 17, 2023, Parents verbally requested that Student be evaluated for special education. (FF # 12.) On August 28, 2023, Parents followed up their verbal request in writing. (FF # 17.) At the outset of the October 11, 2023 meeting, Parents once again asked that Student be evaluated for special education. (FF # 37.)

Following these requests, District declined to initiate a special education evaluation. (FF #s 23, 41.) After holding meetings with Parents to discuss their concerns on August 30, 2023 and October 11, 2023, District determined that they did not suspect that Student had a disability as defined under IDEA. (FF #s 21-24, 33-41.) After each of these meetings, District issued PWNs, containing all information required by 34 C.F.R. § 300.502(b)(1-7), explaining its refusal to initiate an evaluation. (FF #s 23, 41.)

Based on these facts, SCO finds and concludes that although Parents requested that Student be evaluated, District properly responded to these requests by issuing adequate PWN explaining its refusal to initiate those evaluations.

Conclusion to Allegation No. 2: District failed to identify and evaluate Student when 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).

Parents' concern is that District failed to identify and evaluate Student after District was on notice that Student might have a disability and need special education services. (FF #s 10-64.)

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).

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)).

Although the threshold for reasonable suspicion of a disability is lower than that for finding a student eligible for special education services, the criteria used for such a determination may act as a guide for determining whether a school had adequate information to implement special education supports. *D.T. by & through Yasiris T. v. Cherry Creek Sch. Dist. No. 5*, 55 F.4th 1268, 1275 (10th Cir. 2022). The factors required to meet the disability category of Serious Emotional Disability under federal and state law in Colorado are that an in-school student must experience “social or emotional dysfunction that substantially impairs educational attainment or social development. Such dysfunction must be consistent, unusual, present in the school environment, and unmitigated by other academic or behavioral interventions.” *Id.* at 1274-75.

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)).

A school district may attempt pre-referral interventions before initiating an IDEA evaluation. See, e.g., *M.G. v. Williamson County Schs.*, 71 IDELR 102 (6th Cir. 2018, unpublished). However, a response to intervention (“RTI”) process cannot be used to delay or deny an evaluation. *Letter to Ferrara*, 60 IDELR 46 (OSEP 2012). RTI is a “schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors.” *Memo to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011). RTI cannot be used to delay or deny a timely initial evaluation. *Id.*

To decide whether District fulfilled its child find obligations here, the SCO considers the individual circumstances of this case to determine whether 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. District’s Reason to Suspect a Disability

Here, the Record illustrates numerous factors that provided District with knowledge of, or reason to suspect, a disability and thus a need for a special education evaluation. (FF #s 10-64.)

First, District received multiple parent requests that Student be evaluated for an IEP, including a verbal request made at a meeting on August 17, 2023, a written request provided at a meeting on August 30, 2023, and a verbal request at a meeting on October 11, 2023. (FF #s 12, 17, 37.)

Second, District was aware of an escalating pattern of behavior. Prior to his expulsion on November 14, 2023, Student received seven behavioral referrals: two in August, three in September, one in October, and one in November. (FF #s 11, 14, 26-28, 29-30, 31-32, 45-47, 49-50.) These referrals included behaviors such as fighting and aggression toward peers, aggression and verbal abuse directed toward teachers and staff, and destruction of property. From these referrals, Student was suspended four times for seventeen school days. (FF #s 14, 30, 46, 50.) Additionally, due to these referrals, Student received four Letters of Habitual Disruption, and would have received a fifth but for his diversion into an expulsion prevention program. (FF #s 14, 30, 32, 46, 50.) The accumulation of these Letters of Habitual Disruption led to Student's expulsion. (FF #s 47-53.)

Third, Student's behaviors conform to the factors used to determine whether a student has a serious emotional disability under Colorado and federal law. *T.R.* at 1274-75 (describing those factors as "social or emotional dysfunction that substantially impairs educational attainment or social development. Such dysfunction must be consistent, unusual, present in the school environment, and unmitigated by other academic or behavioral interventions"). Student's behavior here substantially impaired his ability to attain his education and socially develop, and indeed led to his exclusion from School entirely via numerous suspensions and an expulsion. (FF #s 10, 14, 30-31, 46-54.) These behaviors were present in the school environment and consistent across the school year, from his second day attending School to his last day prior to suspension and expulsion. (FF #s 11, 14, 26-32, 45-54.) They were unusual, identified as "behaviors of higher concern" by School Psychologist. (FF # 51.) And they were, despite School staff's contention following the October 11, 2023 meeting, unmitigated by behavioral interventions and continuing unabated following the implementation of those interventions in August. (FF #s 24-50.)

Fourth, School staff had expressed concern regarding Student's behavioral needs. Teacher observed multiple behavioral incidents and expressed this concern to other School staff. (FF #s 26-27, 36, 45.) Additionally, on August 28, 2023, Assistant Principal requested that School Psychologist conduct an FBA because of Student's behavioral issues. (FF # 18.) Despite recognizing the need for this FBA, it was not initiated until November, and was completed the day before Student's expulsion hearing. (FF #s 19, 48, 51.) When that FBA was completed on November 13, 2023, it identified several of Student's behaviors, including threats against peers and staff, as being of high concern. (FF # 51.) The FBA also identified a function of Student's behaviors as "accessing attention from his peers," a function that would support a suspicion of an emotional disability. (FF #s 51-52.) Although the other proposed function of behavior, "gaining social capital," would, if the sole function, support the proposition that Student is not affected

by an emotional disability, the presence of both would tend to indicate an emotional disability. (FF # 53.)

Fifth, District was aware of the failure of its proposed interventions to address Student's behavioral concerns. On August 30, 2023, District established two behavioral interventions designed to address his behavior: daily check-ins with Assistant Principal and a "Fast Pass" providing Student the ability to leave class to see a school counselor. (FF # 24.) The team agreed to meet on October 11, 2023, to review Student's response to those interventions. *Id.* At the time of that meeting, Student's "Response to Intervention Plan" stated that "no intervention delivery data has been entered." (FF # 39). Assistant Principal solicited teacher feedback regarding the interventions just hours before the meeting, meaning teachers with concerns were unable to provide that information prior to the meeting. (FF #s 34-36.) Since the interventions had been put into place, Student received three additional behavioral referrals, for aggressive conduct similar to the conduct that prompted the interventions in the first place. (FF #s 26-32.) Those behavioral referrals placed Student on the precipice of expulsion, and an additional referral a week later initiated the expulsion process. (FF #s 32, 47.) Multiple participants do not recall discussing Student's behavioral referrals during that meeting at all. (FF # 38.)

School staff present at the October 11, 2023 meeting determined that the data showed Student's interventions were working to address his behavioral concerns, and that no changes to those interventions or evaluations were necessary. (FF # 41.) The data relied upon by School staff in making this determination did not support the determination that the interventions were successful. (FF # 42.)

As stated above, school districts may make use of a response to intervention process prior to initiating an evaluation process. See *M.G.* However, the response to intervention process cannot be used to delay or deny an evaluation. *Letter to Ferrara*, 60 IDELR 46 (OSEP 2012). Here, District implemented interventions to help address Student's behavioral needs. (FF # 25.) But when it was clear those behaviors were continuing and worsening, placing Student on the precipice of expulsion, District instead determined that its interventions were working as intended and that they had no reason to suspect that Student might be affected by a disability. Instead, the continued behavioral concerns exhibited by Student in the face of interventions should have prompted District to conclude that its interventions were not addressing Student's behavior, and raised a suspicion that he might have a disability. (FF # 42.)

Sixth, although District was not provided with Student's medical records at the beginning of the school year, it was made aware of those diagnoses via GAL's email following the November 14, 2023 expulsion hearing. (FF # 54.) Medical records in the possession of District staff indicate diagnoses of anxiety and reactive attachment disorder, conditions that might inform appraisals of Student's previous behaviors as being based in an emotional disability. (FF #s 55-57.) Although District had ample reason to evaluate Student for a disability prior to learning this medical information, it should have reassessed its earlier decision not to evaluate considering this new information. (FF # 57.)

Taken together, the SCO finds that District’s mounting knowledge of Student’s behavior challenges over the span of time from October 11, 2023 to present raised a reasonable suspicion that Student should have been referred for an initial evaluation. Accordingly, the SCO finds and concludes that this results in a violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1).

In reaching the conclusion that District should have initiated a special education evaluation, the SCO recognizes this does not necessarily mean Student would have qualified for special education. See *Oxnard Sch. Dist.* It may be that after a comprehensive evaluation and a properly conducted eligibility meeting, Student is determined not to be a student with a disability. Without the benefit of such an evaluation, though, it is impossible to make that determination. Accordingly, the SCO has ordered a remedy below to address this violation.

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). For a district to be liable for a denial of FAPE, the student must be a student with a disability. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 59 IDELR 2 (5th Cir. 2012, *unpublished*) (holding that a district cannot be liable for a child find violation unless the student has a need for special education).

Here, the District failed to refer Student for a special education evaluation despite mounting evidence concerning Student’s behavior. As discussed above, it cannot be known until after an evaluation whether Student will qualify for special education. Without the ability to determine at this time whether Student is a student with a disability, the SCO cannot determine that the violation impeded Student’s right to a FAPE, significantly impeded Parents’ opportunity to participate in the decision-making process, or caused a deprivation of educational benefit. See *D.G.* For this reason, the SCO finds and concludes that the District’s violation did not result 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 violation is systemic in nature. Assistant Director described policies, practices, and procedures consistent with the requirements of IDEA. (FF #s 5-6.) Moreover, District provides a detailed special education guide to staff to guide them through decisions regarding District’s child find obligations. (FF # 7.) Accordingly, the SCO finds and concludes that the violation in this case was not systemic, and is unlikely to affect the future provision of services to children with disabilities.

REMEDIES

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

- a. Failed 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).

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

1. Corrective Action Plan

- a. By **Monday, July 8, 2024**, District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violation 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 District 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 District’s timely correction of the areas of noncompliance.

2. Final Decision Review

- a. The following individuals shall review this Decision no later than **Monday, July 1, 2024**:
 1. District’s Director of Special Education
 2. Assistant Director
 3. All District Special Education Coordinators
 4. Assistant Principal
 5. School Psychologist

- b. A signed assurance that all of the above-listed individuals have reviewed this Decision shall be submitted to CDE no later than **Monday, July 8, 2024**.

3. Evaluation and Eligibility Meeting

- a. District must provide Parents with consent for an evaluation of Student by **Monday, July 1, 2024**. The evaluation must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, consistent with 300.304-300.305. This evaluation shall include assessments evaluating Student's social-emotional and other health needs. The evaluation shall include, but is not limited to, a functional behavioral assessment. District shall also review and carefully consider any behavioral health or medical records provided by Parents.
 - i. If Parents refuse to sign consent for evaluation within 30 days of receipt, District will be excused from conducting the evaluation, provided District diligently attempts to resolve disagreements about the scope of the evaluation and secure signatures and documents such efforts. A determination that District diligently attempted to secure consent for the evaluation, and should thus be excused from evaluating Student, rests solely with CDE.
- b. Within 60 days of District's receipt of Parents' signed consent for evaluation, District shall convene a multidisciplinary team meeting in conformity with the requirements of 34 C.F.R. §§ 300.301-306. That multidisciplinary team shall determine whether Student is eligible for special education and related services. District shall issue a PWN in conformity with 34 C.F.R. § 300.503 describing the multidisciplinary team's determination.
- c. Should the multidisciplinary team determine that Student is eligible for special education and related services, District shall, within 30 days of that determination, convene an IEP team in conformity with the requirements of 34 C.F.R. §§ 300.320-328, and develop an appropriate IEP for Student.
- d. By **Friday, November 8, 2024**, District must provide copies of the signed consent for reevaluation, evaluation report, PWN, notice of the IEP meeting (if applicable), and finalized IEP (if applicable) to the CDE Special Education Monitoring and Technical Assistance Consultant.

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 31st day of May, 2024.



Nick Butler
State Complaints Officer

APPENDIX

Complaint, pages 1-11

- Exhibit 1: Various documents related to Student

Response, pages 1-8

- Exhibit A: n/a
- Exhibit B: n/a
- Exhibit C: Prior Written Notices
- Exhibit D: Documentation of meetings
- Exhibit E: n/a
- Exhibit F: n/a
- Exhibit G: Parent request for evaluation
- Exhibit H: n/a
- Exhibit I: n/a
- Exhibit J: n/a
- Exhibit K: Grades and attendance
- Exhibit L: Student disciplinary records
- Exhibit M: District academic calendars
- Exhibit N: District policies and procedures
- Exhibit O: Correspondence
- Exhibit P: Information regarding staff members with relevant knowledge
- Exhibit Q: Documentation of delivery of Response to Parents

Reply, pages 1-2

- Exhibit 2: Records request
- Exhibit 3: Student essay
- Exhibit 4: Email from Student's guardian ad litem

CDE Exhibits

- CDE Exhibit 1: August 17, 2023 doctor's note
- CDE Exhibit 2: District Student Conduct and Discipline Code
- CDE Exhibit 3: Student 45-day review (with typed transcription)
- CDE Exhibit 4: Expulsion hearing documentation
- CDE Exhibit 5: Student expulsion letter

Telephone Interviews

- Parents: May 1, 2024

- Assistant Principal: May 6, 2024 and May 8, 2024
- Coordinator: May 6, 2024
- School Psychologist: May 6, 2024
- Teacher: May 7, 2024
- Principal: May 7, 2024
- Assistant Director: May 7, 2024