

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

**State-Level Complaint 2018:533
Weld RE-4 School District**

DECISION

I. INTRODUCTION

The mother (“Parent”) of a child (“Student”) not currently identified as an eligible child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ initiated this action against Weld RE-4 School District (“District”) through a state-level complaint (“Complaint”) properly filed on October 15, 2018.

On October 18, 2018, the parties agreed to extend the 60-day investigation timeline to engage in mediation. Mediation resulted in impasse on November 5, 2018, and the State Complaints Officer (“SCO”) consequently resumed the investigation.

The SCO determined that the Complaint identified one allegation 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. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

II. RELEVANT TIME PERIOD

The Colorado Department of Education (“CDE”) has the authority to investigate alleged violations of the IDEA that occurred not more than one year from the date the Complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, this investigation will be limited to events that transpired no earlier than October 15, 2017 to determine whether or not a violation of IDEA occurred. *Id.*

Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* and its corresponding regulations are found at 34 C.F.R. § 300.1, *et seq.* IDEA implementation in Colorado is governed by the Exceptional Children’s Educational Act (“ECEA”).

III. COMPLAINT ALLEGATION

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

1. Failed to identify Student as a child with a disability from March of 2018 to September 24, 2018, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(2).

IV. FINDINGS OF FACT

After a thorough analysis of the record as detailed in the appendix attached and incorporated by reference, the SCO makes the following FINDINGS OF FACT:

A. Background

1. Student, an eleven-year-old not currently identified as eligible for special education and related services as a child with a disability under the IDEA, relocated to Colorado during the spring of the 2017-2018 academic year. *Complaint*, p. 2. Student has continuously resided within District’s boundaries since his family’s move, and he started attending elementary school (“School”) in District as a fourth grader on March 20, 2018. *Exhibit J*, p. 6.
2. Student did not arrive to School with an IEP setting forth special education services, and his most recent evaluation concluded that he did not meet IDEA eligibility standards. *Exhibit D*, pp. 5-13. The IEP team at an out-of-state school determined on March 24, 2016 that while Student met the criteria for autism, this qualifying disability neither had an adverse effect on educational performance nor required specially designed instruction. *Id.* at p. 5.
3. Parent accordingly circled “N” in response to the question “[d]oes any child receive special services?” on a *Letter of Intent* form, and did not check any corresponding boxes when asked whether her “student [is] currently receiving additional educational services?” on a *Student Registration* form, both submitted to School ahead of enrollment. *Id.* at pp. 15-16.
4. Parent reports that Student previously received special education services through an IEP at all times between preschool and the midpoint of second grade, at which time she placed Student in a homeschool setting. *Interview with Parent*. Parent has been unable to obtain copies of Student’s prior IEP records, but she described difficulties for him within earlier academic settings to include temper tantrums, heightened flashes of frustration, issues with transitions, and trouble forming friendships and working in groups with peers. *Id.*
5. Student’s transition to School was met with comparable challenges in the education setting, described below starting at FF #12. *Interviews with Parent and Fourth Grade Teacher*. This prompted Fourth Grade Teacher and Elementary Dean/Counselor (“Counselor 1”) to

implement behavioral interventions within weeks of his arrival to School. *Interviews with Fourth Grade Teacher and Counselor 1.*

6. Fourth Grade Teacher first conveyed observations of Student's behavior to Parent on April 4, 2018, and Parent responded that Student had both previously received services through an IEP and been diagnosed with autism. *Exhibit I*, p. 2; *Exhibit 1*, p. 1. School consequently requested documentation from the out-of-state school on April 10, 2018, and received in part the March 2016 evaluation report and eligibility determination. *Exhibit D*, p. 19; *Exhibit I*, p. 19. Special Education Teacher reviewed this information on May 16, 2018, and noted by e-mail on August 29, 2018 that while "they recognized his behaviors" Student was determined ineligible. *Interview with Special Education Teacher; Exhibit I*, p. 21.
7. Student continued to exhibit concerning conduct during the first week of fifth grade, with these behaviors manifesting on multiple occasions, and to varying degrees, throughout August and September of 2018, as described beginning at FF #25. *Exhibit I*, pp. 13-14, 28-33. As a result, Fifth Grade Teacher and Elementary Counselor ("Counselor 2") initiated behavioral interventions as early as August 17, 2018, just two days into the 2018-2019 academic year. *Interviews with Fifth Grade Teacher and Counselor 2; Exhibit J*, p. 5.
8. It is uncontroverted that, generally, Student performed well academically at School. *Exhibit H*. Still, behavioral concerns led to two disciplinary actions: Student was subject to a one-day, in-school suspension following a physical altercation with three peers during a football game at recess on April 25, 2018, and he was subject to a two and one-half day suspension, which was extended to five days pending a police investigation, for making threats of violence against classmates on September 20, 2018. *Exhibit J*, pp. 3-4; *Exhibit I*, p. 40.
9. The September 20, 2018 incident resulted in charges filed against Student. *Exhibit J*, p. 3. Parent enrolled Student in an online education program, withdrew him from School on September 24, 2018, and filed the instant Complaint on October 15, 2018. *Id.* at p. 6.
10. Parent asserts that District should have evaluated Student for IDEA eligibility given his behavioral and social struggles at School, and her stated concerns to School staff that Student has autism. *Complaint; Interview with Parent*. District responds that School had no reason to suspect that Student was a child with a disability and in need of special education services because he performed "stellar . . . academically." *Response*, p. 2. District adds that his behavioral issues were successfully addressed through interventions, and that Parent never requested an evaluation for special education and related services. *Id.* at pp. 2-3.
11. The issue therefore presented through Parent's Complaint is whether District, in light of information that it knew or had reason to know, from March 20, 2018 through September 24, 2018, should have referred Student for an evaluation to determine his IDEA eligibility.

B. Fourth Grade Academic Year at School (March 20, 2018 – May 24, 2018)

12. Student, who first started attending School on March 20, 2018, is characterized as friendly, personable, and intelligent. *Interviews with Parent, Fourth Grade Teacher, Fifth Grade Teacher, Counselor 1, and Counselor 2.* The interviews, as corroborated by the Record, consistently indicate that Student’s amiable demeanor could change instantly through “frustrations,” “meltdowns,” and “outbursts” in the classroom environment. *Id.*
13. Within two weeks of receiving Student in homeroom, Fourth Grade Teacher observed him becoming “frustrated,” evidenced primarily through grunting sounds, balling up of fists, deep breaths, and on the “extreme” end of the behavior, crying. *Interview with Fourth Grade Teacher.* These episodes occurred once or twice per week, through the end of the 2017-2018 academic year on May 24, 2018, and typically commenced when he did not “get his way.” *Id.* District adds that Student would “sometimes become agitated and pound his desk or stomp his feet when frustrated with an academic task,” and that he “struggled to make friends and work effectively with peers” upon his arrival to School. *Response*, p. 2.
14. Fourth Grade Teacher executed behavioral interventions, to include using calming strategies, pairing Student with peers with whom he worked well together, allowing Student to sit apart from peers, and checking in with Student to gauge his feelings. *Id.*; *Interview with Fourth Grade Teacher.* On “rare” occasions she pulled Student out of the classroom and spoke with him in order to get him to “cool down.” *Interview with Fourth Grade Teacher.* In one such instance on May 9, 2018, Student had a “reaction that [Assistant Principal] was called down to assist [with].” *Exhibit I*, p. 7.
15. Fourth Grade Teacher first approached Parent during an April 4, 2018 field trip to find out more information about Student, and was told by Parent that Student had previously been diagnosed with autism. *Exhibit I*, p. 2. Fourth Grade Teacher relayed this information to Counselor 1, and followed up with an e-mail to Parent the next day to both request the diagnosis and to report that Student “got very frustrated” in class. *Id.* Parent responded in writing that Student “was diagnosed a long time ago.” *Id.*
16. Counselor 1 visited with Student on three separate occasions to address his “outbursts” and “impulsiveness.” *Interview with Counselor 1.* She emphasized calming strategies, such as taking deep breaths or a drink of water, and also spoke with Student about removing himself from situations when he became upset. *Id.* Parent informed Counselor 1 in April of 2018 by telephone that Student had previously been diagnosed with autism, but that he was not found IDEA eligible. *Id.*; *Interview with Parent.* Counselor 1 attributed Student’s behavior to “anger issues” stemming from not wanting to follow directions, and she did not suspect him to have a disability. *Interview with Counselor 1.*

17. Still, when providing Parent with a list of professional outside counseling resources by e-mail on April 27, 2018, Counselor 1 specifically directed Parent’s attention to one behavioral therapist that “works a lot with sensory and autistic children” and one practice specializing in speech and occupational therapy that “a parent of an autistic student recommended.” *Exhibit I*, p. 5. These endorsements arrived on the heels of Student’s first disciplinary incident of April 25, 2018, the physical altercation during recess described at FF #8. *Interview with Counselor 1*.
18. Due to this fight, Counselor 1 e-mailed Student’s fourth grade teachers, Assistant Principal, and Elementary Education Director to advise of “potential, aggressive physical behavior” and to instruct them to “vigilantly be watching [Student] during transition times, recess, and dismissal.” *Exhibit I*, p. 4. She also noted that Student had “trouble verbalizing when he gets upset,” explaining to the SCO that he becomes so overwhelmed with emotions that he cannot adequately express what it is he would like to say. *Id.*; *Interview with Counselor 1*.
19. School has a student success team (“SST”), comprised of educators to include special education teachers, as a component of its proactive multi-tier system of supports (“MTSS”). *Interview with Elementary Education Director*. The SST is available as a resource to teachers who might need to adjust the intensity and nature of classroom-based behavior interventions, or acquire further feedback, based on observations of a student’s responsiveness to the interventions. *Id.* Teachers receive MTSS training annually. *Id.*
20. Fourth Grade Teacher reported that she did not refer Student to the SST because she did not have adequate instruction time to observe impact of tier one strategies. *Interview with Fourth Grade Teacher*. With more time, she added, she likely would have started the SST process to obtain additional feedback and strategies to support him moving forward. *Id.*
21. Academically, Student earned A’s and B’s in fourth grade at School. *Exhibit H*, p. 1. Student’s grades are reflective of his work performance, work completed, and participation. *Interview with Fourth Grade Teacher*. Fourth Grade Teacher rated Student’s work habit standards on an end-of-year report card, with scores ranging from one (“rarely”) to four (“consistently”), at three (“frequently”) for preparedness and participation, and at two (“sometimes”) for productiveness and demonstration of positive classroom behavior. *Id.*
22. Student “Met Expectations” in math and English language arts, and “Approached Expectations” in social studies, on the Colorado Measures of Academic Success (“CMAS”). *Exhibit H*, p. 3; *CDE Interpretive Guide to Assessment Reports*. On the Measures of Academic Progress (“MAP”), Student scored in the sixty-eighth percentile for reading, but did not finish the math portion because he “became volatile and noncompliant with testing.” *Exhibit H*, p. 6; *Exhibit I*, p. 25. Student finished the reading portion of the MAP through a makeup session as he “tended to get easily frustrated in class” *Response*, p. 4; *Interview with Assistant Principal*.

23. Ahead of standardized testing, on April 9, 2018, Special Education Teacher e-mailed Assistant Principal that “[w]e are all a bit worried about [Student] testing tomorrow with his class.” *Exhibit I*, p. 3; *Interview with Special Education Teacher*. She had received “reports” about Student pertaining to distracting behavior and anger in the classroom. *Id.* She also notified School Psychologist that he had been “struggling in class” with his behaviors. *Id.*
24. The 2017-2018 academic year ended on May 24, 2018, and Student started fifth grade at School on August 15, 2018. *Exhibit J*, p. 6.

C. Fifth Grade Academic Year at School (August 15, 2018 – September 24, 2018)

25. Not unlike Student’s fourth grade school year, as represented by District, “fifth-grade teachers observed that he was doing well academically but was getting easily frustrated in class and was struggling to get along with peers.” *Response*, p. 4.
26. In a limited time period, Student earned A’s and B’s, apart from one F in reading due to frustrations with having to perform a specific academic task. *Exhibit H*, p. 2; *Interview with Fifth Grade Teacher*. He scored in the ninety-fourth percentile in math and the seventy-eighth percentile in reading on the MAP, and scored in the eighty-seventh percentile in math and the fifty-third percentile in reading on the STAR assessment. *Exhibit H*, pp. 7-15.
27. Fifth Grade Teacher first contacted Parent on August 21, 2018 after Student had “become very agitated” in class over the first week of the academic year, which had “led up to him pounding his fists, stomping his feet, yelling, and even throwing his binder and books.” *Exhibit I*, p. 13. Student sometimes slapped or tapped his head when he had trouble understanding an academic task, though there did not seem to be any one “trigger” driving his overall behavior. *Interview with Fifth Grade Teacher; Exhibit I*, p. 14.
28. Fifth Grade Teacher spoke with Student, and implemented a series of strategies to address his behavior, which included using his voice to ask the teacher for assistance, taking deep breaths, going for a walk, and smelling “something yummy.” *Id.* She reported to the SCO that while the interventions were successful, she was considering obtaining feedback on these strategies from the SST. *Interview with Fifth Grade Teacher*. As in fourth grade, Student’s desk was physically separated from classmates at his request. *Id.*
29. Parent wrote in response to Fifth Grade Teacher’s August 21, 2018 e-mail that “this is not new behavior from [Student].” *Exhibit I*, p. 13. She added that he was previously diagnosed with autism, and that while he “seemed to be doing really well” at the out-of-state school and was no longer on an IEP, his behavior worsened since moving to Colorado in terms of “being angry and frustrated and having outbursts regularly.” *Id.*

30. During an August 30, 2018 meeting between Assistant Principal, Dean of Students, and Student's parents, Parent again mentioned Student's diagnosis of autism and prior IEPs, and Assistant Principal requested "paperwork" reflective of this information. *Interviews with Assistant Principal and Parent; Response*, pp. 4-5. The SCO finds credibility in Parent's belief that School desired "paperwork" prior to moving forward with any action related to special education, corroborated by FF #6 which indicates School had formally requested all of Student's records from out-of-state school on April 10, well before this August 30 meeting.
31. Student exhibited further frustrations in September of 2018 necessitating e-mails to Parent. *Exhibit I*, pp. 28-29, 33. He whined loudly, was very destructive, and laid under his desk in Fifth Grade Teacher's class on September 4, was "going to start pounding his head into his Chromebook" in specials on September 6, and threw his binder on the desk and screamed on September 19 in science class because he "couldn't get his stuff out fast enough." *Id.*
32. Student was also observed to become agitated while working in groups, and yell at partners, when he did not get his way. *Interview with Fifth Grade Teacher*. Student sometimes became frustrated with loud noises in the environment, for example during classroom celebrations of achievement. *Id.* Fifth Grade Teacher also reached out to Counselor 2 during the first week of the 2018-2019 school year for assistance. *Id.*
33. Counselor 2 met with Student in-person on August 17, September 3, and September 13 to address peer relationship difficulties. *Response*, p. 5; *Exhibit J*, p. 5. Counselor 2 derived strategies to calm Student down once he became overwhelmed in class as this could "prevent him from completing assignments." *Interview with Counselor 2*. For instance, Counselor 2 equipped Student with a deep breathing exercise, and a toy to take to Fifth Grade Teacher's classroom, which was used as "laughing gas" to help calm him down. *Id.*
34. Student also had trouble transitioning. *Interviews with Fifth Grade Teacher and Counselor 2*. Specifically, Student wanted his binder "neat and orderly" prior to moving on to math class, and often times it took him longer to pack up his belongings. *Id.* Student therefore arrived late to math on four out of the first five days of class, resulting in him becoming upset and having "a hard time being able to keep up in math class." *Exhibit I*, p. 31.
35. Teachers and Counselor 2 worked with Student on transitions, to include providing positive reinforcement through extra "rock star tickets" when he gathered his materials and arrived timely to math class. *Interviews with Fifth Grade Teacher and Counselor 2*. Fifth Grade Teacher stated that this strategy, like others she effectuated, were fruitful. *Interview with Fifth Grade Teacher*. Still, Parent met with Fifth Grade Teacher and Fifth Grade Math Teacher on September 13 to further discuss transition. *Exhibit I*, p. 31; *Exhibit 1*, p. 2.
36. Student soon after received a suspension for the incident involving threats of violence directed against peers on September 20, 2018. *Exhibit J*, p. 3. District conducted a threat

assessment, and School contacted the Windsor Police Department. *Id.* Parent submitted to the SCO witness statements provided as part of the police investigation. *Exhibit 5*, pp. 2-4.

37. Fifth Grade Math Teacher's written statement to police provides that, during the two weeks Student was under her instruction, she observed the following behaviors: arriving "late to class banging on the door so loudly that it scared the class multiple times," as well as tossing papers, slamming books, and pounding the desk. *Id.* at p. 2. She also indicated that Student "is not patient and will interrupt the class to meet his needs not appropriately." *Id.*
38. Fifth Grade Teacher reported "alarming [and] slightly concerning" behavior, including an incident where Student was "highly excited [and] he grabbed a student in front of him by the neck [and] shook him for about 3 seconds." *Id.* at p. 4. She also witnessed "explosive behavior" within the classroom that caused Student to scream, throw papers, and slam his hands and head on the desk. *Id.* She wrote that Student was "very verbally aggressive" when speaking with peers, and that he became "agitated with them very easily." *Id.*
39. Elementary Education Director imposed the suspension on September 20, 2018, and Parent withdrew Student from School on September 24, 2018. *Exhibit I*, p. 40; *Exhibit J*, p. 6. Post-mediation held on November 5, 2018, the parties arranged for District to evaluate Student, who is not enrolled in School, and also set an eligibility meeting for mid-December 2018.
40. The District, apart from all findings and of its own accord, advised the SCO on December 17, 2018 that it intends to institute Child Find training for relevant School staff, and submitted a detailed *Professional Development* agenda on December 22, 2018 in support of its proposal.
41. The agenda specifically provides that, through a two-hour training, with additional time or sessions added as necessary, staff will learn: common ways to identify school performance concerns; what Child Find is and how it works (review of statutes and regulations); what to do if/when they suspect a student may have a disability; what to do if/when a parent indicates their child has or may have a disability; what to do if/when a parent directly asks for an evaluation or IEP; who to communicate with regarding whether an evaluation is warranted; and what steps to take to gather information, report performance and work with the school-based Child Find team to support struggling students.

V. CONCLUSIONS OF LAW

Based on the FINDINGS OF FACT set forth above, the SCO enters the following CONCLUSIONS OF LAW:

Conclusion to Allegation No. 1: District violated its Child Find duty by failing to pursue an initial evaluation of Student where suspicion of a disability arose through Parent's professed concerns, disclosure of a prior autism diagnosis, and in-class behavioral and social issues.

A. Child Find under the IDEA

Parent asserts that District violated its obligation to identify and evaluate Student as a child with a suspected disability between his first day of enrollment at School, March 20, 2018, and his final day of enrollment at School, September 24, 2018. *Complaint*.

As an initial matter, the SCO dispatches District's position that is tantamount to Parent possessing the burden to request an evaluation. The parent of a child may initiate a request for an initial evaluation to determine if the child is a child with a disability. 34 C.F.R. § 300.301(b). However, parents are not required to request that a school district identify and evaluate a child. *Robertson County Sch. Sys. v. King*, 24 IDELR 1036 (6th Cir. 1996).

It is undisputed that Parent neither explicitly requested an evaluation nor indicated that Student received special education services when completing School's enrollment forms, which he did not at the time. These circumstances, though, do not drive the SCO's analysis here.

Instead, the IDEA and Colorado law mandate that districts develop and implement procedures for locating, identifying and evaluating all children who may have a disability and are eligible for special education and related services, even though such children are advancing from grade to grade. 34 C.F.R. § 300.111(a); ECEA Rule 4.02(1)(a). This affirmative, ongoing obligation, known as "Child Find," is triggered when a district has reason to suspect a child residing within its jurisdiction has a disability and is in need of special education and related services. *Id.*

The threshold for suspicion of a disability is relatively low, and the initial inquiry is not whether the child actually has a disability or qualifies for special education services, but instead whether the child should be referred for an evaluation. *Boulder Valley School District*, 118 LRP 28098 (SEA CO 5/18/17) (citing *State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001)). Suspicion of a disability "may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation." *Smith v. Cheyenne Mountain Sch. Dist. 12*, 2017 WL2791415 at *18 (D. Colo. 2017) (citing *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)).

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), *cert. denied*, 112 LRP 1321, 132 S. Ct. 996 (2012). 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 School District 5*, 117 LRP 2988 (SEA CO 12/21/16) (citing *Cincinnati City Schools*, 115 LRP 26069 (SEA OH 5/07/15)). The actions of a district in terms of whether it had knowledge of, or reason to suspect, a disability, must be evaluated in light of the information that it 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. State of Oregon* 195 F.3d 1141, 1149 (9th Cir. 1999).

Absent a test articulated by the Tenth Circuit defining what might be a relatively low threshold, the SCO concludes that the individual circumstances of this case collectively raise a reasonable suspicion that Student should have been referred for an evaluation. *See Clark County Sch. Dist.*, 114 LRP 45477 (SEA NV 8/28/14). The information known to District at the relevant time, Parent's articulated concerns in conjunction with Student's in-class behaviors, were sufficient red flags to tip the scale in favor of triggering District's Child Find obligation.

B. Parent Concerns

Parent told School on at least four separate occasions that Student had been diagnosed with autism at an earlier age, and that Student previously received special education and related services through an IEP. She did so by way of an in-person conversation with Fourth Grade Teacher on April 4, 2018, a telephone conversation with Counselor 1 in April of 2018, an e-mail to Fifth Grade Teacher on August 21, 2018, and, at the peak of suspicion, a meeting with Assistant Principal and Dean of Students on August 30, 2018, all detailed at FF #15-16, 29-30.

The comments of April 4 prompted a follow up e-mail to Parent on April 5, and Fourth Grade Teacher's communication of these concerns to Counselor 1 on a forthwith basis, as well as School's request of Student's out-of-state records on April 10, resulting in receipt and review of the March 2016 autism diagnosis by mid-May 2018. Further sparking suspicion of a disability, as described at FF #17, 23, was Special Education Teacher's e-mail articulating concerns about Student testing with his class in early April, and Counselor 1's e-mail to Parent in late April categorically pointing out two therapists that work well with children diagnosed with autism.

Though Parent did not unequivocally ask for an evaluation, there is no IDEA requirement that specific language be used to request an evaluation, and school districts should pay close attention to any communications regarding a child's suspected disability or need for special education. *Renaissance Acad.*, 115 LRP 9496 (SEA OH 2/11/15); 34 C.F.R. § 300.301(b).

The SCO thus concludes that District's Child Find obligation activated on or about August 30, 2018, at which point District was armed with Parent's sufficiently stated belief that Student might have a disability, the disclosure of the out-of-state autism diagnosis, and ongoing reports from educators regarding Student's disruptive in-class behaviors. Bolstering the SCO's conclusion here is the combination of these factors, to include Student's behavior and peer relationship concerns, as now analyzed below.

C. Behavioral and Social Concerns

Student's behavior instantly drew the attention of School upon his arrival during the 2017-2018 academic year, prompting the implementation of behavioral interventions described at FF #14, 16, 28, 33, 35. District argues that these interventions successfully addressed his behaviors.

Child Find is not contravened where a district considers a response to intervention (“RTI”) prior to referring a student for an evaluation. *See 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.*

In this matter, within two weeks of Student’s arrival to School on March 20, 2018, he began exhibiting inappropriate behavior, detailed at FF #12-13. Student’s increasingly concerning behavior carried over into the first week of the 2018-2019 academic year, and escalated in frequency and severity, as described at FF #27, 31-32, 36-38. The behavior was consistently and collectively characterized as “frustrations,” “meltdowns,” and “outbursts” in the classroom.

Teachers and counselors credibly reported that Student responded to tier one supports implemented through School’s RTI, or MTSS. Still, the nature and frequency of the behavior here suggest School should have initiated the evaluation process while it monitored Student’s response to any evidence-based, general education interventions. This is true where Parent’s comments permeated fourth and fifth grade, and the behavior was of a “potential, aggressive physical” quality within one month of Student’s attendance of School, as noted by Counselor 1.

Schools “need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities” *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012) (noting a district was not required to conclude misbehavior denoted a disability because the behaviors were not atypical during early primary school years). Nevertheless, once a district is on notice of behavior that is likely to indicate a disability, the child must be identified and evaluated within a reasonable time period thereafter. *Smith*, 2017 WL2791415 at *18 (citing *Wiesenberg*, 181 F. Supp. 2d at 1311). A child so identified is not automatically IDEA eligible, but instead must undergo an initial evaluation to determine whether the child is a child with a disability, and what the educational needs of the child are. 34 C.F.R. § 300.301; ECEA Rule 4.02(4).

The SCO does not conclude that behavior alone, where Student attended School for forty-eight days in fourth grade and twenty-eight days in fifth grade, raises suspicion of a disability here. Nonetheless, the SCO concludes that Student’s behavior, considering his age and that Parent apprised two homeroom teachers, Counselor 1, Assistant Principal, and Dean of Students that he might have autism, should have put District on notice that it could indicate a disability. Moreover, this behavior was witnessed by individuals with knowledge of Parent’s concerns, and some instances were described, at FF #38, as “alarming,” “slightly concerning,” and “explosive.”

The Record also reflects issues with social-emotional functioning, illustrated in part by Student grabbing a peer by the neck, as well as exhibiting “verbally aggressive” behavior while working with others and becoming “agitated with them very easily.” Moreover, Student struggled with

timely transitions to the math environment, described at FF #34-35, 37, sometimes became frustrated with loud noises, and unquestionably had problems “verbalizing” when upset.

District cites Student’s academic performance, described at FF #21-22, 26, as evidence that he does not fit the profile of a child with a disability under the IDEA. Academic performance, not unlike behavior, can sometimes constitute a referral red flag. *Smith*, 2017 WL2791415 at *18 (citing *Wiesenberg*, 181 F. Supp. 2d at 1311). Here, apart from one F in reading, Student earned all A’s and B’s while enrolled at School, and certainly made growth in reading on the fall 2018 MAP test. Although important, these facts should not immediately lead to the conclusion that Student does not have a disability.

Districts should be careful not to assume that strong academic performance negates the need to evaluate. *Lawrence Co. Sch. Dist. v. McDaniel*, 72 IDELR 8 (E.D. Ark. 2018). In *Lawrence Co. Sch. Dist.*, a fifth-grader with autism demonstrated behavioral and social concerns, but was not evaluated because the child earned good grades and was an honor student. In upholding a hearing officer’s order requiring the district to evaluate, the federal court noted that the hearing officer concluded an adequate evaluation did not take place on the assumption that children with disabilities who perform well academically do not require special education, and explained that while “this position comports with common sense . . . it contravenes the IDEA’s implementing regulations and guidance from the United State Department of Education.” *Id.*

The IDEA provides protections for students with “high cognition and disabilities who require special education and related services to address their individual needs.” *Letter to Anonymous*, 55 IDELR 172 (OSEP 2010). Intellectual prowess should not undermine Child Find activities. *Id.* Despite Student’s academic performance at School, the SCO concludes that his behavior raised enough of a suspicion that it may negatively impact an ability to access general education, particularly in view of: “volatile and noncompliant” behavior preventing MAP math testing; a grade of F in reading; concerns about Student testing in the same room as peers; occasional removals from the classroom for brief “cool down” stints; and the isolation of Student’s desk.

The totality of the circumstances here, primarily the combination of Parent’s expressed concerns of autism combined with the aforementioned behavioral and social issues, constitute a reason to suspect a disability and a need of special education services that triggered the Child Find duty by August 30, 2018. Accordingly, District’s failure to identify and evaluate Student for IDEA eligibility results in a violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(2).

D. Standard for Violations of Child Find

Violations of Child Find, and of the duty to assess, are procedural in nature. *State of Hawaii*, 158 F. Supp. 2d at 1196; *D.K.*, 696 F.3d at 249-250. It is well-settled that procedural violations of the IDEA are only actionable to the extent they impede a child’s right to a FAPE, significantly impede a parent’s opportunity to participate in the decision-making process regarding the

provision of FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Sytsema v. Academy School District No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008).

FAPE is an education “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017). Procedural inadequacies “alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity.” *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001). A “child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place.” *R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007). Otherwise stated, a “procedural violation cannot qualify an otherwise ineligible student for IDEA relief.” *Id.*

In this case, District did not evaluate Student while he attended School from March 20, 2018 through September 24, 2018. The SCO cannot speculate as to whether Student would have qualified for services under IDEA, and thus have a right to FAPE, as Child Find does not assure eligibility but instead serves as a locating and screening framework to identify those children potentially in need of services. District disregarded its procedural obligations, but Student did not establish that he was, or should have been, IDEA eligible during the at-issue timeframe.

District has since evaluated Student to determine if he is a child with a disability under the IDEA. Recognizing this fact, but that Student remains enrolled in an online education program apart from District, the SCO shall provide relief in light of the purposes of the IDEA. This can include an award of staff training in the area of law in which violations were found to benefit a specific student or to remedy procedural violations that may benefit other students. *See Park, ex rel. Park v. Anaheim Union High School District*, 464 F.3d 1025, 1034 (9th Cir. 2006).

Fourth Grade Teacher and Fifth Grade Teacher demonstrated a commitment to positive parent-teacher communication, and a qualified knowledge of SST. Also, District is partially credited for its autonomous proposal to train School staff on responsibilities related to identifying all IDEA-eligible children residing in its jurisdiction. This plan coincides with the SCO’s own conclusion that tailored instruction within the confines of Child Find is appropriate, particularly where the air of suspicion in School regarding Student’s behavior and social interactions involved multiple personnel, upon whom Parent had imparted knowledge of a previous diagnosis of autism.

VI. REMEDIES

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

- a. Failing to identify Student as a child with a disability from March of 2018 to September 24, 2018, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(2).

To remedy this procedural violation, the District is ORDERED to take the following actions:

1. By February 13, 2019, the District must submit to CDE a proposed corrective action plan (“CAP”) that effectively 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 the District is responsible. The CAP must, at a minimum, provide for the following:
 - a. Comprehensive Child Find training, in accordance with this decision and the *Professional Development* agenda proposed by District at FF #40-41, must be conducted with School’s special education staff, appropriate members of School’s SST, and at least one School administrator, in addition to any other School staff deemed appropriate by District, no later than April 22, 2019.
 - b. Evidence that such training has occurred must be documented (i.e. training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets, with roles noted) and provided to CDE no later than April 29, 2019.

CDE will approve or request revisions to the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to confirm the District’s timely correction of the areas of noncompliance.

Please submit the documentation detailed above to CDE as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Beth Nelson
1560 Broadway, Suite 1100
Denver, CO 80202-5149

Failure by District to meet any of the timelines set forth above may adversely affect District’s annual determination under the IDEA and subject District to enforcement action by CDE.

VII. 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. *Id.*; *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 2nd day of January, 2019.

Brandon Edelman, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1-2

Response, pages 1-10

- Exhibit D: Parent-Provided Documentation/Records
- Exhibit G: District Child Find Policies and Procedures
- Exhibit H: Grade and Standardized Testing Reports
- Exhibit I: Correspondence
- Exhibit J: Attendance and Disciplinary Documentation
- Exhibit K: District Staff List
- Exhibit L: UPS Delivery Notification

Reply²

- Exhibit 1: Parent-Produced Timeline and Correspondence
- Exhibit 2: October 2013 Psychological Testing
- Exhibit 3: January 2015 Brain Mapping Results
- Exhibit 4: Brain Balance Achievement Centers Documentation
- Exhibit 5: Windsor Police Department Witness Statements

Telephonic Interviews

- Parent: December 5, 2018
- Fourth Grade Teacher: December 6, 2018
- Counselor 2: December 6, 2018
- Assistant Principal: December 6, 2018
- Fifth Grade Teacher: December 6, 2018
- Exceptional Student Services Director: December 6, 2018
- Elementary Education Director: December 6, 2018
- Counselor 1: December 6, 2018
- Special Education Teacher: December 11, 2018

² In place of submitting a written Reply, Parent filed a cover letter and Exhibits 1 – 4 on November 30, 2018, and thereafter addressed the District's Response during an interview with the SCO on December 5, 2018. The SCO requested Exhibit 5 from Parent following the interview.