

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	
[Mother], Parent of [Student], Complainant, vs. ADAMS COUNTY SCHOOL DISTRICT 27J, Respondent.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> CASE NUMBER: EA 2019-0006
DECISION	

Complainant filed this amended due process complaint alleging that [Student] is a child with a disability and Respondent (the School District) failed to provide [Student] with a free appropriate public education (FAPE) and that the School District violated its obligation to identify [Student] as a child with a possible disability, and evaluate her to determine if she had a disability under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* as implemented by federal regulation 34 CFR § 300.510 and state regulation 1 CCR 301-8, § 2220-R-6.02. Hearing was held in accordance with the IDEA on September 23, 24 and 25, 2019, before Administrative Law Judge (ALJ) Hollyce Farrell at the Office of Administrative Courts in Denver, Colorado. Elliot V. Hood, Esq. and M. Gwyneth Whalen, Esq. of Caplan & Earnest represented the School District. Igor Raykin, Esq. and Christie Bebo, Esq. of Kishinevsky and Raykin, represented the Complainant. At hearing, Complainant’s Exhibits 7, 8, 10, 11, 13 through 16, 26, 37, 38, 42, 43, 46, 47, 50, 51, 53, 54, 57 and 58 and the School District’s Exhibits A through AA were admitted into evidence.

Case Summary

[Student] is a 17 year-old girl who is currently a high school senior in [Another State]. Before moving to [Another State], [Student] was a student at [High School], which is in Adams County School District 27J, where she completed her first three years of high school. During the fall of 2018, which was her junior year, [Student] was sexually assaulted by another [High School] student. As a result of the assault, [Student] became depressed, anxious and suicidal. After [Student] reported the incident to a law enforcement officer and [Student]’s mother reported the incident to staff at [High School], [Student] wanted to have minimal time at the physical location of the high school. [Student]’s mother requested that [Student] be able to take all but two of her classes online for the fall 2018 semester. The School District complied with her request. Ultimately, [Student] did not feel comfortable coming to the school building at all and on December 5, 2018, one of her health care providers determined that she was not medically stable to return to school at that time.

Throughout the fall 2018 semester, the staff at [High School] were in frequent contact with [Student]’s mother, addressing her concerns, and doing what they could to meet [Student]’s school needs. The School District did not evaluate [Student] to determine if she was a child with a disability during the fall semester as they saw her as a student in crisis, and they were taking steps to address the crisis. [Student] finished the semester, but in two of her classes, she took an “Incomplete,” but eventually got a “D” in both of those classes by finishing some work late in the spring 2019 semester.

At [Student]’s mother’s request, [Student] was homebound for all of her classes for the spring 2019 semester. She was assigned a homebound teacher who met with [Student] and provided her with support throughout the semester. Even though [Student] was hospitalized during the spring semester, she successfully completed all of her classes. She is on track to graduate, and may even graduate a semester early.

[Student]’s mother filed a due process complaint on January 23, 2019 alleging that [Student] is a student with a disability within the meaning of the IDEA and the School District had failed to evaluate [Student] for a disability and had failed to provide her with FAPE. In response to the due process complaint, the School District conducted an evaluation of [Student], which included several assessments of [Student]. The evaluation included input from [Student]’s teachers, her mother and [Student]. Subsequently, [Student]’s school psychologist and [Student]’s homebound teacher wrote an evaluation report, which was sent to [Student]’s mother a week before the evaluation meeting. When [Student]’s evaluation team met, it determined that [Student] was not a child with a disability as she did not require specialized instruction to access the general curriculum. Thus, she was not in need of an IEP. The team did conclude that [Student] would benefit from a 504 plan, and one was implemented for her.

For reasons explained below, the ALJ concludes that [Student] was not a child with a disability within the meaning of the IDEA, The ALJ further concludes that even if [Student] were a child with a disability within the meaning of the IDEA, the School District did not violate the “child find” requirement of the IDEA, and did not deny her FAPE.

Findings of Fact

1. [Student] is a 17 year-old girl ([Date of Birth]) who was a student at [High School] in [City], Colorado. [Student] and her family have since moved to [Another State]. [Student] is currently a senior in high school and expected to graduate in December 2019. Complainant, [Mother], is her mother.

2. On October 30, 2018, [Student]’s chemistry teacher sent [Student] to see her school counselor, [Counselor], because [Student] had not seemed to be herself and was crying quietly in class. [Counselor] spoke with [Student] for about ten minutes. While she seemed down, [Student] was calm and [Counselor] did not notice anything unusual about her demeanor, but felt she was not forthcoming when he asked her what was bothering her.

3. That same day, [Student] met with a detective about a sexual assault on another female student by a male student at the school, [male student].

4. [Student]’s mother was present with [Student] during the interview. While speaking to the detective, [Student] disclosed that she had also been sexually assaulted by [male student] at her home on September 16 or September 17, 2018. Prior to the interview with the detective, [Mother] was not aware of the assault.

5. Although [Mother] was not aware of the assault, she had noticed that while [Student]’s grades had not suffered, [Student] was more withdrawn and depressed. After learning of the assault, [Mother] was understandably very upset, felt panicked and did not know how to take care of the situation.

6. Prior to November 2016, [Student]’s math teacher observed that [Student] was engaged in the math coursework, was keeping up in the class and was working at grade level. He also noticed that she was a well-behaved student who was respectful of her peers and socialized effectively. After November 2018, the math teacher noticed that [Student] was much more quiet, needed a little more personal space, and that she “checked out” sometimes. However, she was not disruptive, did not act inappropriately towards her peers and had no trouble controlling her emotions in class. She was also still capable of doing her coursework.

7. [Student]’s chemistry teacher noted that prior to October 31, 2019, [Student] was a typical high school student who sometimes didn’t pay attention because she was talking to friends or looking at her phone. After October 31, the chemistry teacher noticed that sometimes [Student] had her head down on her desk, but other times she was talking to her friends, or looking at her phone just as she had done in the previous months. She also noticed that after October 31, 2018, [Student] was more inconsistent in turning in her assignments.

8. [Student]’s chemistry teacher described [Student] as student who was right in the middle of the Bell curve academically. She further described her as well-behaved and respectful, and could socialize normally with her peers.

9. [Student]’s English and history teachers noticed no difference in [Student]’s behavior from the beginning of the fall 2018 semester until the time that [Student] left school in November 2018. Her English teacher, [English Teacher] credibly testified that [Student] had no problems keeping up with the coursework but would have an attitude change with things that were difficult for her, like writing. [Student] would say things like, “I can’t do this,” and, “This is dumb.” [Student]’s English teacher credibly testified that [Student] had the issue with her attitude change during the entire semester.

10. As a result of the assault, [Student] was very anxious, depressed and suicidal. Bullying by other students at school exacerbated [Student]’s anxiety and depression. [Student], who had been traumatized, was in a state of crisis.

11. On October 31, 2018, [Counselor] called [Mother] to inform her about the chemistry teacher referring [Student] to his office as she did not seem to be herself, and he wanted to offer his support. [Mother] told [Counselor] that something terrible had happened with [Student], but she couldn’t tell him what it was. Indeed, the detective had told [Student] and [Mother] that they weren’t allowed to tell anyone anything until after [Student] had a forensic interview. [Mother] did tell [Counselor] that she and [Student] were

working with the District Attorney and that [Student] was going to have a forensic interview.

12. [Student] had her forensic interview on November 5, 2019, and it was more brutal than [Mother] expected it to be. [Mother] emailed [Counselor] at 4:49 p.m. on November 5, 2019, and told him that the issue with [Student] was bigger than she thought and there were concerns about [Student]'s mental health and safety.

13. [Mother] further stated in the email that [Student] needed extensive counseling, and that she would be receiving private counseling outside of school. [Mother] also asked for guidance and options regarding the situation as she felt [Student] would never be safe at [High School] because the person who had assaulted her was at the school. [Mother] did not provide [Counselor], or anyone at the school, with [male students]'s identity on November 5, 2018.

14. [Counselor] called [Mother] back the next day, November 6, 2019. At that time, [Mother] provided him with the details of the assault and [male student]'s name. [Counselor] said he would have to talk to the school's administrators, but offered three options for [Student] on that date. Those options were: (1) leaving school early in order to avoid running into [male student] and his friends; (2) [Student] could change high schools; or (3) [Student] could be a homebound student. [Mother] rejected the offer for [Student] to change schools. [Counselor] offered the options to [Mother] as a means of helping [Student] succeed with school.

15. In addition to speaking to [Counselor] on November 6, 2018, [Mother] emailed [Counselor], [Assistant Principal 1] and [Assistant Principal 2], who are both Assistant Principals at [High School], regarding the assault and her concerns. She also left a message for [Intervention Services Coordinator], who was the school's Intervention Services Coordinator.

16. On November 7, 2018, [Mother] was still concerned because [male student] was still attending school. She left messages for [Assistant Principal 1], [District Director] and [Assistant Principal 2].

17. Within minutes of receiving [Mother]'s November 7, 2018 message, [Assistant Principal 1] sent her a text telling her he would call her the next morning, which he did.

18. [Assistant Principal 2], the Assistant Principal in charge of special education at [High School], also responded to [Mother] the next day, and spoke at length with [Mother]. Prior to their conversation, [Assistant Principal 2] was not aware of the sexual assault.

19. During the conversation, [Mother] told [Assistant Principal 2] that she wanted [Student] to be a homebound online student for all of her classes, with the exception of math and chemistry. Math and chemistry were [Student]'s weakest subjects, and she felt she needed the face to face instruction that she would receive at school. [Mother] told [Assistant Principal 2] that she didn't think the school would handle the situation correctly because [male student] was still at school, and she was concerned about [Student]'s safety. [Mother]'s primary stated concern was minimizing [Student]'s time at school.

20. Historically, [Student] has been a C student in both math and science. They

have always been her weakest subjects.

21. [Assistant Principal 1] saw [Student] as a student in crisis and the situation as being very serious.

22. One of the School District's Directors in Student Achievement, [District Director], also returned [Mother]'s telephone call on November 8, 2018, and said that [Intervention Services Coordinator] would call her. One of [Intervention Services Coordinator]'s duties was to coordinate homebound services for students. [Mother] told [District Director] that she would contact a lawyer if her demands regarding online classes with the exception of math and chemistry were not met.

23. On November 8, 2018, [Counselor] emailed [Student]'s teachers and asked them to provide work for [Student]; this was standard procedure for a student who is going to be out of school. He received homework back from the math and chemistry teachers and forwarded to [Mother].

24. On November 8, 2018, [Intervention Services Coordinator] called [Mother]; they had a lengthy discussion about the allegations against [male student]. Later that day, [Intervention Services Coordinator] called [Mother] and informed her that the school and suspended [male student].

25. On November 9, 2018, [Mother] returned [Assistant Principal 1]'s telephone call. She told him that [Student] was being bullied at school. [Assistant Principal 1] asked for the names of the students who were bullying [Student] so he could handle the situation immediately, but [Mother] would not provide him with any names. [Assistant Principal 1] assured [Mother] that he wanted [Student] to be safe and to earn her high school credits.

26. [Assistant Principal 1] also gave [Mother] the options of [Student] attending another school, receiving homebound services or being home schooled. [Mother] rejected the options of home schooling and changing schools.

27. Also on November 9, 2018, [Intervention Services Coordinator], and [Assistant Principal 2] made a joint telephone call to [Mother]. In that telephone call, they came to an agreement with [Mother] that [Student] would take math and chemistry at school, and that she could take the remainder of her classes online. They were also working on a plan where [Student] could continue with her two electives, choir and catering.

28. Because choir and catering were both performance-based classes, [Student] was exempt from some of the assignments. It is unclear what additional work [Student] did in those classes after November 14, 2018, but she got an "A" in each class. The school was aware that even without those two classes, [Student] had enough elective credits to graduate. On December 11, 2018, [Mother] sent an email to [Counselor] that [Student] would soon finish her choir assignments soon. On December 20, 2018, [Mother] sent an email to [Counselor] informing him that [Student] was finishing the last of her work for catering.

29. During the November 9, 2018 telephone call, [Mother] asked [Assistant Principal 2] and [Intervention Services Coordinator] if [Student] needed to be on an Individualized Education Program (IEP) or a 504 plan because she was taking some of her

classes online. They told her that such [Student] did not need to be on an IEP or a 504. [Intervention Services Coordinator] stated that [Student] should not be assessed while she was in a time of crisis as the results may be skewed. [Mother] indicated that she was in agreement with the school's proposed accommodations.

30. [Mother] made it clear that [Student] was receiving mental health treatment outside school. Accordingly, the school did not offer mental health services, but was trying to accommodate [Student] in any way it could to support her in accessing her education.

31. On November 14, 2018, [High School] convened a meeting to discuss [Student]'s plan for the remainder of the semester, including her safety. Present at the meeting were [Mother], [Student], [Assistant Principal 1], [Assistant Principal 2], [Counselor], [Intervention Services Coordinator], and [Homebound/Online Coordinator], the school's Online Coordinator. [Student] presented as very quiet during the meeting.

32. During the meeting, everyone, including [Mother] and [Student], agreed that [Student] would come to school to attend her math and chemistry classes, and she would take her literature and history classes online. They agreed to work out a way for [Student] to finish catering and choir.

33. During the November 14, 2018 meeting, [Mother] brought up the possibility of [Student] being on an IEP or a 504 plan, but did not request that [Student] be on either of those plans. [Assistant Principal 2] responded that at that time, the school was working on accommodations to get [Student] through the situation and meet her immediate needs and they would revisit the possibility of 504 or IEP assessment in December when [Student] had stabilized. [Mother] did not disagree with that plan.

34. At the meeting, [Mother] raised the issue of [Student] being bullied by [male student]'s friends while at school. Again, the school district employees asked for the names of the individuals responsible for the bullying, but neither [Student] nor [Mother] would provide any names. Without knowing who was responsible for the bullying, the school was unable to hold those individuals accountable.

35. The school personnel offered to make accommodations so [Student] would not run into the individuals who were bullying her, but [Student] said no accommodations were needed to attend chemistry and math. During the meeting, the school established two points of contact for [Student] if she felt unsafe while attending school for math and chemistry. First was the math and chemistry teachers; second was the counseling office. The school also offered to have faculty present at a certain location if it was a location where [Student] did not feel safe. [Student] did not indicate that she felt unsafe at any locations at [High School].

36. The November 14, 2018 meeting was a collaborative effort with [Student] and [Mother]. [Mother] agreed to the plan created in the meeting and [Student] did not have any questions regarding the plan's components.

37. [Mother] also stated that [Student] was struggling in math and chemistry and asked for a tutor, but the school did not have a tutor to provide.

38. On November 16, 2018, [Student] was diagnosed with post-traumatic stress

disorder (PTSD) by her private health counselor.

39. Also on November 16, 2018, a Friday, [Mother] emailed [Student]'s math teacher that [Student] was failing math. At that point, [Student] was only missing a few assignments, and had not missed a lot of work. School was not in session the following week because of the Thanksgiving holiday.

40. When [Mother] did not receive a reply from the math teacher, she emailed [Assistant Principal 1] and [Assistant Principal 2] on November 26, 2018, to tell them that [Student] needed help with math and chemistry. Because of the Thanksgiving break, this was just a few school days after the November 14 meeting. When [Student] received the list of work from her math and chemistry teachers, she felt overwhelmed.

41. [Assistant Principal 1] and [Assistant Principal 2] quickly responded to [Mother] and scheduled a meeting on November 28 with [Student] and [Mother]. The meeting included both the math and chemistry teachers; the purpose of the meeting was to come up with a plan to support [Student] in math and chemistry. The result of the meeting was to provide accommodations for math and chemistry and specific steps she could follow for those classes. Specifically, they tried to break the classes down into smaller chunks to address the overwhelm, and to be flexible. [Mother] did not raise any concerns regarding [Student]'s other classes, and she agreed with the plan developed during the November 28, 2018 meeting

42. [Student] appeared motivated during the meeting, and no one had any concerns about her ability to complete the work and finish her classes.

43. During the meeting [Mother] told the school personnel that [Student] had been in the hospital, was having panic attacks, was seeing a counselor and was on medication. She also said that [Student] needed academic support for math and chemistry. [Mother] again indicated that [Student] still wanted to attend school for those classes. However, [Student] wanted to be on campus as little as possible so she was exempted from chemistry labs, which reinforce the material taught in the class. [Mother] did not disagree with [Student] being exempt from attending the chemistry labs.

44. Both the math teacher and the chemistry teacher offered to work with [Student] one-on-one after school, and the chemistry teacher offered to give up her planning period to help [Student]. The math teacher offered to provide one-on-one help to [Student] during his lunch period. [Student] did not visit either of those teachers for additional help.

45. Although [male student] was suspended, he appeared on the [High School] Campus on December 4, 2018. Although he had no contact with [Student], [Assistant Principal 2] called [Mother] to let her know. At that point, [Mother] decided that [Student] could not be safe at [High School], and would not return to the school campus.

46. There were only 12 school days from the time [Mother] first informed the school on November 6, 2018 of the assault and December 4, 2018 when she decided [Student] would not be returning to school. In that time frame, [Mother] had 11 phone conversations with individuals from the school and attended two meetings initiated by the

school to address [Student]'s needs. [High School] was very responsive to [Mother] and doing what it could do to accommodate [Student] during her time of crisis. The school was acting in good faith and trying to create something specifically for [Student] to meet her unique needs.

47. On December 5, 2018, [Mother] sent a letter from one of [Student]'s health care providers to the school's attendance office, which stated that [Student] was not medically stable enough to return to school.

48. On December 11, 2018, [Mother] called [Assistant Principal 2] and told her that the catering class was easy, and that the choir class would work out. She further informed [Assistant Principal 2] that [Student] was completely caught up in history, and was working on English, but could "blow right through" those classes. She stated, however, that [Student] was not stable enough for chemistry and math.

49. [Assistant Principal 2] told [Mother] that during the spring semester, [Student] could hopefully meet one-on-one with the math and chemistry teachers about completing the classes. At that point, [Mother] told [Assistant Principal 2] that [Student] would not be coming back to [High School].

50. [Assistant Principal 2] suggested that [Student] take an "Incomplete" in those classes, and [Mother] agreed. On December 11, 2018, there were only two weeks left in the semester. [Assistant Principal 2] suggested that [Student] take "Incomplete" in the two classes because [Student] was having good days and bad days, and she didn't want her to be held to a set schedule that could hurt her academically. Additionally, [Mother] had mentioned that [Student] was changing medication, and [Assistant Principal 2] thought an extension of time would be helpful so [Student] could adjust to her new medications.

51. During the December 11, 2018 conversation, [Mother] told [Assistant Principal 2] that [Student] wasn't stupid, and could get caught up, but was in crisis. She further stated that [Student] had been in honors classes while living in [Another State], and whatever work was sent home from the school, [Student] could do it. [Assistant Principal 2] said that the school wanted to adjust to [Student]'s needs, and [Mother] agreed that that sounded good.

52. [Student] completed the fall semester of her junior year with a 2.8 GPA, which was higher than her GPA for the spring semester of her freshman and sophomore years.

53. On January 8, 2019, [Assistant Principal 2] called [Mother]. At that time, [Mother] asked if [Student] would be a full-time homebound student. The School District agreed to that request, and [Student] completed the spring semester of her junior year as a homebound student. [Mother] further indicated that [Student] did not want to take an "Incomplete" in math and chemistry, but wanted to make a fresh start. [Student] did finally complete the fall semester math and chemistry classes with a grade of "D." The reason for her lower grades were the facts that she missed a lot of the material presented in class and she did not turn in work.

54. When [Student] did turn in work for those classes, her work was fine, and the teachers had no concerns regarding her ability to do the work.

55. In response to her January 8, 2019 telephone call with [Mother], [Assistant Principal 2] contacted [Intervention Services Coordinator] to get things started for complete homebound instruction for the spring semester. [Counselor] coordinated make up work for [Student] to improve her grades and math and chemistry.

56. On January 11, 2019, [Mother] had a telephone call with [Homebound/Online Coordinator], the homebound coordinator for the school, and asked for homebound math and chemistry.

57. [Student] began inpatient treatment as a result of the trauma she had suffered from January 23, 2019 through February 5, 2019 and from February 13, 2019 through February 20, 2019. After her hospitalizations, she had intensive outpatient therapy. Even with the treatment, [Mother] thought [Student] could do online school.

58. In March of 2019, [Mother] had a telephone conversation with [High School]'s psychologist, [School Psychologist]. [Mother] told [School Psychologist] that she regretted telling the school about the assault because otherwise [Student] would have been fine if she had not been bullied. She also told [School Psychologist] that [Student]'s medications were working, and she didn't know if [Student] would qualify for an IEP, but should remain a homebound student.

59. In March of 2019, [Mother] was extremely concerned that [Student] might commit suicide as she had made suicidal attempts, but did not think [Student] had special needs for her school subjects.

60. [Student] and her family moved to [Another State] after the 2018-2019 school year after [Student] completed the spring semester. [Student] finished the Spring semester with all B grades. In her homebound teacher's opinion, [Student] could have gotten higher grades if she had gone back and corrected some of her work, but [Student] did not want to do that.

61. At the time of hearing, [Student] was in high school in [Another State], and was hoping to graduate in December 2019, a semester early. She wants to go college and become a neo-natal nurse.

62. On January 23, 2019, [Special Education Director], who was the Special Education Director at [High School] received the complaint which initiated these proceedings. In response to receiving the complaint, [Special Education Director] reached out to [Mother] to obtain consent to evaluate [Student] to determine if she was a student with a disability who qualified for an IEP or if she needed a 504 plan. [Special Education Director] has participated in hundreds of IEP evaluations during her career.

63. The team [Special Education Director] put together for [Student] included [Special Education Teacher], who is a high school special education teacher and a highly qualified high school English teacher. [Special Education Teacher] is qualified to conduct assessments to determine if a student requires specialized instruction.

64. One of the reasons [Special Education Director] selected [Special Education Teacher] was [Special Education Teacher]'s ability to quickly establish relationships with students, and she wanted [Special Education Teacher] to be [Student]'s homebound

provider. It was important to [Special Education Director] that [Student] had a relationship with [Special Education Teacher] so she could trust the person who would be with her.

65. As [Student]’s homebound provider, [Special Education Teacher] began supporting [Student] in mid-March of 2019, and stopped at the end of May 2019.

66. [Special Education Teacher] would personally meet with [Student] every Saturday at the public library to see how her classes were going. She provided strategies to [Student] to help her with her classes. For example, when [Student] was having trouble with a math concept, [Special Education Teacher] provided her with a website that would give her step-by-step assistance in figuring out problems, which was helpful to [Student]. [Student] finished the 11th grade math class almost on her own, and earned a B in that class.

67. [Special Education Teacher] found [Student] to be an incredible, hardworking student who was sometimes uncertain about her abilities. [Student] worked at her own pace, and her pace was pretty quick. [Student] finished science and history before [Special Education Teacher] started working with her. With the exception of referring [Student] to the math website, and providing her with one English lesson, [Student] finished all of her classes on her own.

68. [Special Education Teacher] would act as a cheerleader for [Student] or talk things through with her. [Special Education Teacher] had no questions regarding [Student]’s cognitive abilities. [Special Education Teacher] further found that sometimes [Student] “settled” for grades because she did want to put forth extra effort to raise her grade. [Special Education Teacher] credibly testified that many kids settle for grades as [Student] did.

69. During her work as [Student]’s homebound provider, [Special Education Teacher] credibly testified that [Student] did not strike her at all as a child who needed an IEP, and although sometimes it took her a bit “to get there”, [Student] could focus on school work, and found that [Student] could complete classes in a week with little or no assistance.

70. For the most part, [Student] did her lessons online, and then answered targeted questions about the material, which had been presented to her. During [Special Education Teacher]’s work with [Student], [Student] would say things like, “I don’t like math. It’s hard,” and “I don’t like writing.” In [Special Education Teacher]’s opinion, [Student] was “shutting down” due to a lack in confidence, but [Student] demonstrated that she could do the work. She would also tell [Special Education Teacher] that she wasn’t the same person that she used to be.

71. [Special Education Teacher] participates in the evaluation process for the School District to determine whether a child is eligible for an IEP as part of her job duties. She has participated in over 500 evaluations.

72. In participating in [Student]’s IDEA eligibility assessment in March of 2019, [Special Education Teacher] focused on the academic piece of it. As she does with all students, she sent out requests for teachers reports and surveys to [Student]’s teachers,

and received information back from them.

73. [Special Education Teacher] knew that [Student] had not been successful in math and chemistry the fall semester, but she determined that was not a reflection of [Student]'s ability. She saw [Student]'s poor grades in those classes and determined that [Student]'s attitude in her ability changed when she suffered personal trauma.

74. [Special Education Teacher] looked at [Student]'s behavior, attendance and her previous grades, and determined there were no previous academic concerns. She had no concerns about [Student]'s behaviors.

75. In reviewing [Student]'s credits, [Special Education Teacher] noted that [Student] was on target to graduate and her GPA of 2.78 to be "good."

76. During her review, [Special Education Teacher] saw that [Student] had an F in math and English for the spring semester. [Special Education Teacher] was not concerned by these grades as [Student] was focusing on her other online classes, and would focus on those classes when she completed the other classes. Indeed, [Special Education Teacher] was correct as [Student] finished with a B in both of those classes.

77. In the assessment, [Special Education Teacher] had [Student] read aloud to her so she could assess her oral reading fluency. While [Student] was a slower oral reader, [Special Education Teacher] was not concerned. She felt that there were ways to accommodate slower reading such as allowing [Student] to spend more time while reading.

78. In another reading test, MAZE, where she was allowed to read silently, [Student] had a perfect score, and was reading at an advanced level.

79. To test her [Student]'s writing, [Special Education Teacher] asked [Student] to write a paragraph. [Student]'s writing was typical for an 11th grader.

80. Overall, [Special Education Teacher] assessed [Student] to be "low risk" for writing. When looking at a grade level rubric, educators want students to score around a 4, and [Student] was testing at 3.5, which is typical for an 11th grader. [Student] also had some scores of 1, such as in technical writing. One of [Student]'s teachers told [Special Education Teacher] that [Student] wasn't confident in writing. [Special Education Teacher] credibly testified that there was nothing significant in [Student]'s scores and they could tweak what was necessary in providing the general education curriculum.

81. [Special Education Teacher] also administered a test known as the NWEA, which is a national test to determine benchmark abilities for 11th graders across the nation. [Student] had a score very close to the national level, but showed a slight gap in technical writing, but her overall score was advanced, which is not unusual for students. [Special Education Teacher] credibly testified that [Student]'s gaps were not significant, and could be addressed with general education, not specialized instruction. For example, [Student] scored a 221 in reading, which put her at the mid-10th grade level. A score of 225 indicates an 11th grade reading level.

82. [Special Education Teacher] also administered the NWEA test for math to obtain [Student]'s RIT score, which determines if a student is working at grade level.

[Student] got a score of 222, which is equivalent to an 8th grader, and [Special Education Teacher] found that [Student] was a “medium risk.” An 11th grader would normally score around 236 to 238. In her freshman year, [Student] had a RIT score of 227. [Special Education Teacher] attributed the drop in [Student]’s score to [Student]’s trauma, but still did not believe that she was in need of special education services.

83. [Special Education Teacher] was not concerned with the dip in [Student]’s scores because of the trauma that she experienced. [Special Education Teacher] credibly testified that if there had been cause for alarm, she would have done additional testing. She further felt that [Student] could access the general education curriculum with help that did not require specialized instruction.

84. Overall, [Student] was close to grade level on the NWEA, but had gaps in math and English. The NWEA showed that [Student]’s strengths were in comprehension and vocabulary, and her possible areas of need related to reading nonfiction or more technical/instructional material.

85. [Special Education Teacher] did not assess [Student]’s communication skills as it was not appropriate in [Student]’s situation; a communication assessment does not assess a student’s ability to communicate feelings. Instead, it assesses a student’s ability to produce sounds.

86. The team also included the school psychologist, [School Psychologist], who has clinical experience as well as educational experience. [School Psychologist] is also qualified to conduct assessments.

87. [School Psychologist] is a licensed psychologist. She participates in 30 to 60 special education eligibility evaluations, including writing an evaluation report and attending the evaluation meeting, each year for the last nine years.

88. Prior to evaluating [Student] in March of 2, 2019, [School Psychologist] emailed [Mother] and had a telephone interview with her so she could introduce herself, build rapport, and gather social and emotional information about [Student]. [Mother] told [School Psychologist] that [Student] was doing other testing with a teacher, and had a lot of anxiety afterwards. In [School Psychologist]’s opinion, that anxiety is not uncommon

89. [Mother] reported to [School Psychologist] that [Student]’s early development was typical and she was a happy and outgoing child until the fall of 2018 when she became more irritable and quicker to anger. She further told [School Psychologist] that [Student] was receiving outside counseling, had been treated in an inpatient setting, and had tried a variety of medications. [Mother] expressed that she was hopeful that [Student]’s treatment was on the right course.

90. [Mother] told [School Psychologist] that she doubted [Student] would qualify for and IEP, but probably needed a 504 because she was a homebound student.

91. [School Psychologist] met [Student] at the public library on two different days to conduct one-on-one testing, for a total of three hours of testing. [School Psychologist] observed that [Student] was noticeably sad and withdrawn, but was able to complete the assessments. [School Psychologist] had no concerns regarding [Student]’s accuracy

during the testing.

92. [School Psychologist] used the WISC test, which measures a child's IQ in five domains. Following the test, [School Psychologist] had no concerns about [Student]'s intelligence. She found [Student]'s cognitive function to be "low average" when compared to her peers.

93. [School Psychologist] also administered a test known as the NEPSY-2, which evaluates a child's executive function. After the test, [School Psychologist] concluded that [Student] had normal executive function in some areas, but gave up when she perceived something as challenging. [School Psychologist] testified that she has seen other children give up when things are perceived as challenging. [School Psychologist] persuasively testified that giving up on challenging material does not indicate a need for an IEP.

94. On the NEPSY-2, [Student] performed within the typical range for her same age peers, but showed difficulty in responding quickly to sustained attention activities. This showed high inattention and poor vigilance. [School Psychologist] noted that [Student] exhibited poor self-monitoring skills, and had significant difficulty in switching her thinking. If [Student] were asked to switch her thinking quickly, she gave up and quit.

95. [School Psychologist] persuasively testified that students who have trouble sustaining attention can be given breaks, smaller tasks or adult prompting.

96. In addition, [School Psychologist] administered at test known as the Brief-2 to [Student]. The Brief-2 consists of questionnaires completed by different people regarding their observations of the student. [School Psychologist] then analyzes the data from the questionnaires and scores them.

97. For the Brief-2, [Student], [Mother], [Student]'s math teacher and [Student]'s English teacher completed the questionnaires. In comparing the observations, [School Psychologist] noted that [Student] and [Mother] both rated [Student] as being more dysfunctional than [Student]'s teachers had rated her. [Student] showed higher executive functioning at school than she did at home. [School Psychologist] took into account that [Student]'s teachers had not interacted with her since November of 2018 in reviewing [Student]'s results.

98. The English teacher noted that [Student] had difficulty shifting her thinking when she was facing challenged. [School Psychologist] persuasively testified that [Student]'s cognitive abilities and difficulty shifting thinking were age appropriate.

99. Through her evaluation, [School Psychologist] determined that [Student] had a deficit in processing speed. She further persuasively testified that [Student]'s deficits could be addressed with accommodations, such as taking breaks. In [School Psychologist]'s opinion, [Student]'s deficit was not significant.

100. [School Psychologist] noted that [Student]'s Auditory attention was way below what she expected. In that test, the student listens to recordings and then follows instructions. She was below average in all categories. [Student] had poor self-monitoring skills; when she realized she had made a mistake, [Student] would give up. [School Psychologist] felt like [Student] underperformed in both of their testing sessions because

she gave up.

101. In the cognitive summary of her evaluation of [Student], [School Psychologist] noted that [Student] had age-appropriate intelligence, with a relative weakness in processing speed. She further noted in her summary that [Student] has significant difficulty in processing her thinking and struggles to keep up with shifting demands and recovering from feelings of frustration or failure. Moreover, she found that [Student] had significant difficulty with emotional control across tasks and environments.

102. To assess [Student]'s social skills and emotions regulation, [School Psychologist] used a test called the BASC-3. In addition to administering the BASC-3 test, [School Psychologist] interviewed [Mother], [Student]'s math and English teachers, [Student], [Student]'s guidance counselor and one of the assistant principals. Similar to the Brief-2 results, the BASC-3 results showed that [Mother] reported more significant behaviors at home than at school.

103. [Student]'s English teacher noted that [Student] had a tendency to shut down when she was frustrated and had difficulty adapting to change. [School Psychologist] persuasively testified that accommodations could be made to address those issues, such as giving [Student] warnings when there were going to be changes.

104. [School Psychologist] administered the SAED-2 test which looks at characteristics of emotional disturbance in five different domains. The teachers found that [Student] was average and [Mother] found them to be significant. [School Psychologist] testified that the difference in home and school on this test is common because there is more structure at school than at home. With the increased structure, according to [School Psychologist], there is better behavior.

105. On page 12 of her report, [School Psychologist] noted that before the fall of 2018, [Student] was a normal teenager but in November of 2018, her functioning changed significantly.

106. [School Psychologist] is not surprised by [Student]'s extensive mental health and psychiatric issues, but does not believe [Student] needed an IEP. Instead, she was able to take online courses and receive homebound instruction as an accommodation.

107. After conducting all of her evaluations, [School Psychologist] concluded that [Student] did not need an IEP. She felt that based on the input she received from all of the individuals with whom she spoke regarding [Student], the issues [Student] was having at school were related to her trauma.

108. [School Psychologist] was concerned that at the time of the evaluation meeting, [Student] had an "F" in English and in math, but felt that the low grades could be the result of the issues she was facing.

109. [Special Education Director] selected [Special Education Teacher] and [School Psychologist] to conduct the assessment on [Student]. [Special Education Director] informed each of them that they would be working with a sensitive situation.

110. When the evaluation report was finished, [Special Education Director]

provided it to [Mother] on March 27, 2019, a week before the April 4, 2019 evaluation meeting.

111. At the April 4, 2019 evaluation meeting, [School Psychologist] and [Special Education Teacher] presented their evaluation summaries, and there was discussion about the report with [Mother] and her legal counsel present. While [Mother] and her legal counsel asked questions about why the chemistry teacher was not present at the meeting, they had no questions regard the content or data contained in the evaluation report.

112. At some point during the meeting, the group turned to complete a Determination of Eligibility: Serious Emotional Disability. The second question on that form provides, "The child **can** receive reasonable educational benefit from general education alone. (Answer must be "no" in order for the child to be eligible for services.)" [Emphasis in original.]

113. The group, with the exception of [Mother] and her legal counsel felt that "Yes" was the appropriate answer to the question. If "No" had been selected as the answer to the second question, the group would have completed the other questions on the form which discussed specialized instruction. Because "Yes" was selected, there was no need to answer the next question regarding specialized instruction.

114. Even though [Mother] and her legal representative disagreed with the answer to question 2, the District employees made the decision because they are better trained in determining whether a student will benefit from general instruction. They concluded that [Student] was able to make progress in grade level content by accessing general education, and did not required specialized instruction or an IEP. The team, with the exception of [Mother] and her counsel, determined that there was not, over time, a significant impact towards [Student]'s progress to grade level standards.

115. The team took [Student]'s depression and anxiety, including her hospitalizations for those conditions, as well as her evaluations, into consideration in making its determination, but did not feel that she had an emotional disturbance or serious emotional disability. The team further found that [Student]'s medical diagnoses did not equate to an educational disability under the IDEA. Moreover, the fact that a student is homebound does not mandate an IEP or mean that the student is disabled under the IDEA.

116. When [Mother] and her legal counsel stated that they disagreed with the "Yes" answer to question 2, [Special Education Director] attempted to explain what specialized instruction was and grade level standards. Specially designed instruction is usually a change in the intensity, content and delivery method of instruction to meet a child's needs. It includes things like push-in and pull-out services from general education or having a special education teacher present to capture what a general education teacher was saying and breaking it down so a student can understand it. Specialized instruction is appropriate for students who have significant gaps in learning.

117. [Special Education Director] also suggested skipping Question 2 and moving on to the next questions, but [Mother] and her legal representative left the meeting. Thus,

any further discussion with [Mother] was not possible that day.

118. The remaining members of the team determined that [Student] would benefit from a 504 plan, and developed one for her that day. The team had the family permission to develop the 504 plan.

119. [Student] did not require specially designed instruction.

120. The ALJ finds as fact [Student]’s trauma and resulting diagnoses adversely affected her educational performance but she could still receive reasonable educational benefit from general education alone. [Student] successfully completed grade level courses during both semesters of her junior year, and there was no evidence presented that she did not continue to take grade level courses in her senior year after moving to [Another State].

121. In her due process complaint, [Student] indicated that she is seeking compensatory services dating back to no later than November 9, 2018. There was insufficient evidence to determine what compensatory services [Student] is seeking. She is also seeking prospective relief, including payment for counseling services, mental health services, therapy, non-academic services and other educational services, including college costs until she turns 21 years old. The only costs presented at hearing were medical bills and a receipt from American Furniture Warehouse. These appear to be costs for related services, only.

Discussion

A. Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion “where it usually falls, upon the party seeking relief.” That is to say, “the person who seeks court action should justify the request.” *Id.* at 56 (quoting C. Mueller & L. Kirkpatrick, *Evidence* § 3.1, p. 104 (3d ed. 2003)). Although parents are typically the party seeking relief, the rule applies with equal effect to a school district when it is the party seeking court action. *Id.* at 62. Because the Complainant is the party asking the ALJ to enter an order finding that the School District violated the IDEA by failing to identify [Student] as a child with a disability and failed to provide her with FAPE, she must bear the burden of proof.

B. The Requirement of FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). Central to the IDEA is the requirement that school districts develop, implement, and revise an IEP calculated to meet the eligible student’s specific educational needs. 20 U.S.C. § 1414(d); *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (“[t]he IEP is ‘the centerpiece of the statute’s education delivery system for disabled children’ . . . and is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child”) (internal citations

omitted).

In this case, two issues have been raised. First, is [Student] a child with a disability within the meaning of the IDEA? Second, if [Student] is a child with a disability within the meaning of the IDEA, did the School District violate its child-find duty with respect to [Student] and deny [Student] FAPE?

C. Analysis

The District did not Fail to Identify [Student] as a Child with a Disability because [Student] does not have a Disability within the Meaning of the IDEA.

A "child with a disability" is a child who has one of the IDEA's thirteen qualifying disabilities and, by reason thereof, needs special education services. See 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); ECEA Rule 4.02(l)(a). Complainant argues that [Student] has the qualifying disability of a serious emotional disability (SED).

Under Colorado's Exceptional Children's Education Act, "a child with a serious emotional disability shall have emotional or social function that prevents the child from receiving reasonable educational benefit from general education." 1 C.C.R. 301-8, 2220 Rule 2.08(3). Under both the IDEA regulations and ECEA rules, a child with a serious emotional disability must exhibit at least one of the following characteristics "over a long period of time and to a marked degree": (1) inability to learn which is not primarily the result of intellectual, sensory, or other health factors; (2) inability to build or maintain relationships which significantly interferes with the child's social development; (3) inappropriate types of behavior or feelings under normal circumstances; (4) a general pervasive mood of unhappiness or depression; or (5) a tendency to develop physical symptoms or fears associated with personal or school problems. 34 C.F.R. § 300.8(c)(4); 1 C.C.R. 301-8, 2220 Rule 2.08(3)(a).

The evidence did not establish that [Student] had an inability to learn or an inability to build or maintain relationships, which significantly interfered with her social development. She also did not demonstrate inappropriate types of behavior or feelings under normal circumstances, and there was insufficient evidence to establish that she developed a tendency to develop physical symptoms or fears with personal or school problems, other than wanting to avoid [male student] and his friends. She did have a pervasive mood of unhappiness and depression following her assault.

However, ECEA rules further state that in order to be identified as a child with a serious emotional disability, the child must exhibit either (a) impairment of academic functioning "as demonstrated by an inability to receive reasonable educational benefits from general education which is not primarily the result of intellectual, sensory, or other health factors, but due to the serious emotional disability, or (b) "impairment of social/emotional functioning as demonstrated by an inability to build or maintain interpersonal relationships which significantly interferes with the child's social development." 1 C.C.R. 301-8, 2220 Rule 2.08(3)(b). There was insufficient evidence to establish that [Student] met either of these criteria. To the contrary, the credible

evidence established that [Student] demonstrated the ability to receive reasonable educational benefits from general education and when she did attend school following the assault, she was well behaved, respectful and demonstrated an ability to interact appropriately with her peers.

Additionally, "all four of the following qualifiers must be documented" for a child to be identified as having a serious emotional disability: "(i) a variety of instructional and/or behavioral interventions were implemented within general education and the child remains unable to receive reasonable educational benefits from general education; (ii) indicators of social/emotional dysfunction exist to a marked degree; that is, at a rate and intensity above the child's peers and outside of his or her cultural norms and the range of normal developmental expectations; (iii) indicators of social/emotional dysfunction are pervasive, and are observable in at least two different settings within the child's environment, including school; and (iv) indicators of social/emotional dysfunction have existed over a period of time and are not isolated incidents or transient, situational responses to stressors in the child's environment." 1 C.C.R. 301-8, 2220 Rule 2.08(3)(c). While [Student] did have indicators of emotional dysfunction that were observable at home and school, the credible evidence established that her dysfunction was a situational response to the assault and the bullying that she endured from other students. Moreover, she was able to receive reasonable educational benefit from general education and her social/emotional dysfunction was not at a rate or intensity outside of normal developmental expectations. [Student] does not, therefore, does have all four of the qualifiers documented. [Student] does not qualify as having an SED under the IDEA.

Moreover, a child is not a "child with a disability" under the IDEA merely because the child has a diagnosed condition such as depression or anxiety. Instead, the child's disability must "adversely affect" her educational performance such that the student cannot receive "reasonable educational benefit" from general education alone. 34 C.F.R. § 300.8(a),(c); 1 C.C.R. 301-8, 2220, Rule 2.08. That is true of all qualifying disabilities, including an SED. See 1 C.C.R. 301-8, 2220 Rule 2.08(3)(c) (listing qualifying factors for SED, including that child is unable to receive "reasonable educational benefit from general education"); see also *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 65 (2d Cir. 2000) ("Under the IDEA, the term 'children with disabilities' means, among other things, children with a 'serious emotional disturbance ... who, by reason thereof, *need special education* and related services.") (emphasis in original). In this case, the weight of the evidence established that although [Student] had diagnoses of anxiety, depression and PTSD, she was able to receive reasonable benefit from general education alone. The evaluation report prepared by [Special Education Teacher] and [School Psychologist], as well as their persuasive and credible testimony, clearly established that fact.

If a child requires only related services such as counseling or psychological services to access the general education curriculum, that child is not a "child with a disability" within the meaning of the IDEA. See 34 C.F.R. § 300.8(a)(2)(i),(ii) (stating that child who "only needs a related service but not special education" is not a "child with a disability" within the meaning of the IDEA). There was insufficient evidence presented

that [Student] received anything other than related services to access the general education curriculum.

Likewise, if a child needs only "accommodations" to access the general education curriculum, like extended testing time or a flexible schedule, that child is not a "child with a disability" within the meaning of the IDEA. See *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 85 (1st Cir. 2016) ("[A] child who needs only accommodations or services that are not part of special education" does not need special education under the IDEA); *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1110-11 (9th Cir. 2007) (child not entitled to special-education services because child could be adequately accommodated in general-education classroom). [Special Education Teacher] and [Psychologist] both credibly and persuasively testified, based on their thorough evaluations of [Student], that [Student] needed only accommodations such as extra time and homebound instruction in order to access the general education curriculum.

Because [Student] was not a child with a disability, the School District did not owe [Student] a "child-find" duty and did not deny her FAPE.

Even if [Student] were a Child with a Disability, the School District did not Violate its Child-Find Duty with respect to [Student].

"Child find" is triggered when a school district has reason to suspect a child residing within its jurisdiction is a "child with a disability." The IDEA requires school districts to develop and implement procedures for locating and evaluating children who may be eligible for "special education" services under the IDEA. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); ECEA Rule 4.02(1)(a). This affirmative obligation is known as "child find." The child find duty is triggered when a school district has reason to suspect that a child residing within its jurisdiction is a "child with a disability" within the meaning of the IDEA. The IDEA's child-find duty does not require that school districts evaluate every struggling student. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 at 249 (3d Cir. 2012); *Mr. P v. Hartford Bd. of Educ.*, 885 F.3d 735 at 749 (2d Cir. 2018); *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d, 635 at 661 (S.D.N.Y. 2011). Instead, school districts are obligated to identify, locate, and evaluate students suspected of needing "special education" services. 34 C.F.R. § 300.111.

In *Scarsdale, supra*, a federal court in New York concluded that a school district did not have enough reason to suspect that a child struggling with mental health issues, who attempted suicide, and who had declined academically, was a "child with a disability" within the meaning of the IDEA. *Scarsdale*, 826 F. Supp. 2d at 661-64. The *Scarsdale* court reasoned that while the student had been diagnosed with several disabilities, including depression, anxiety, and an affective-mood disorder, and district knew she was "going through a difficult time in her life," the district had no reason to suspect that the child required "special education" services. *Id.* The court emphasized that, despite the child's mental health issues and declining grades, she was capable of performing work required in her classes, was able to "bounce back" from her academic decline and responded positively to interventions at school and mental health services her parents had provided outside of school. *Scarsdale*, 826 F. Supp. 2d at 664. Thus, the court

concluded the district did not violate the IDEA's child find requirement by declining to evaluate her.

[Student]'s situation is not unlike the situation in *Scarsdale*. The School District in this case was aware of [Student]'s diagnoses and was aware of her assault and trauma. However, it had no reason to suspect that she needed special education services. [Mother] assured the School District that [Student] could do the work, and [Student] demonstrated that she was capable of doing her school work. Moreover, there were not many school days between the time [Mother] advised the School District of the assault and the end of the semester. During that time frame, the School District was far from ignoring [Student]'s situation. They were in almost constant contact with [Mother] during the 2018 fall semester, and were doing all they could do respond to [Student]'s educational needs. [Student] seemed to be responding positively to the accommodations made by the School District, and there was no reasonable suspicion that she was a child with a disability or needed special education services.

Order

The ALJ concludes that that Complainant failed to meet her burden that [Student] was a child with a disability and that the School District failed to provide FAPE to [Student]. No relief is warranted.

This Decision is the final decision except that any party has the right to bring a civil action in an appropriate court of law, either federal or state, pursuant to 34 C.F.R. § 300.516.

So Ordered

October 31, 2019



HOLLYCE FARRELL
Administrative Law Judge