

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	
[Parent], Parent of [Student], Complainant, vs. CHEYENNE MOUNTAIN SCHOOL DISTRICT 12, Respondent.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> CASE NUMBER: EA 2022-0019
AGENCY DECISION	

On April 6, 2022, [Parent] (Complainant) on behalf of her son, [Student], filed a due process complaint with the Colorado Department of Education (CDE), Exceptional Student Services Unit, against Cheyenne Mountain School District 12 (District). On April 6, 2022, CDE referred the complaint to the Office of Administrative Courts (OAC). Education Law Offices, LLC, represented Complainant in this proceeding. Anderson, Dude & Lebel, P.C. represented the Respondent District.

A prehearing conference was conducted by the undersigned Administrative Law Judge (ALJ) on June 1, 2022. Ms. Kate Gerland, Esq. and Ms. Elena Eisenberg, Esq. appeared for Complainant. Mr. John Stanek, Esq. appeared for District. At the prehearing conference, the parties set the hearing for July 25-29, 2022 in Colorado Springs, Colorado and extended the decision deadline to August 19, 2022. On July 18, 2022, the ALJ converted the hearing to video after each party included in their respective prehearing statements that several witnesses would need to appear via video. At hearing, the ALJ requested additional time to complete the decision due to the large number of exhibits and the decision deadline was extended without objection to September 16, 2022.

Hearing was held before the undersigned ALJ on July 25-29 and August 1, 2022, via Google Meet video conferencing. The proceedings were digitally recorded. The recording for the afternoon of July 25, 2022 failed and the parties agreed to redo the testimony which consisted of the remainder of Complainant's direct and all of her cross examination. At hearing, Ms. Kate Gerland, Esq. and Ms. Elena Eisenberg, Esq. represented Complainant. Mr. John Stanek, Esq. represented District. At hearing the ALJ admitted into evidence Complainant's Exhibits 1-18, 20-24, 26-49, 51, 56-81, and 88 and District's Exhibits A-CC, JJ-VV, YY-QQQQQQ. Complainant testified on her own behalf. [Executive Director], [Director of Special Education], [Principal], [School Counselor], [Special Education Teacher], [School Psychologist], [School Social Worker], [Math 2 Teacher], [Science Teacher], [Social Studies Teacher], [German Teacher], [Math 1 Teacher], [Clinical

Psychologist], [Academic Director], [Director of Transition], and [Cousin] provided testimony.

ISSUES PRESENTED

The ALJ must determine whether Complainant has established by a preponderance of evidence, the Respondent denied the Student a free appropriate public education (FAPE) by not timely evaluating the Student starting July 8, 2020.

Further, if the ALJ determines Respondent failed to timely provide FAPE, the ALJ must determine whether the private placement made by the parent is appropriate.

Finally, if the ALJ determines Student was denied a FAPE due to substantive or procedural violations, whether the Student is entitled to an award of compensatory services.

FINDINGS OF FACT – STIPULATED FACTS

The following findings are drawn from the parties' stipulation of facts:

1. Student attends the Cheyenne Mountain School District 12.
2. Student has not yet been identified by the District as a student with a disability under the IDEA.
3. During the 2020-2021 school year, Student was enrolled at [Junior High School] ([Junior High School]).
4. During the 2020-2021 school year, Student was a seventh grader.
5. Prior to attending [Junior High School], Student attended CMSD's [Elementary School] ([Elementary School]) for 4th, 5th and 6th grades.

FINDINGS OF FACT

Background

6. This complaint addresses events from June 2020 through April 6, 2022.
7. During the 2020-21 school year, Student resided in Complainant's home with his mother (Complainant), his sibling, and two adult cousins.
8. After the conclusion of the 2019-2020 school year, Student was admitted to [Mental Health Clinic] ([Mental Health Clinic]) on June 16, 2020. Ex. 1.
9. Student had not previously been hospitalized for inpatient psychiatric reasons or taken any prescribed psychotropic medications. Ex. 1.

10. Student is released from [Mental Health Clinic] inpatient hospitalization on June 24, 2020. Ex. 1.

11. On June 24, 2020, Student begins a partial hospitalization program at [Mental Health Clinic]. Ex. 2.

12. On July 2, 2020, Student is discharged to go home from [Mental Health Clinic]. Ex. 2.

13. Upon return home on July 2, 2020, Student elopes or runs away from home, is gone all night, and causes Complainant to call police and District seeking assistance.

14. On July 3, 2020, Complainant first contact several individuals at the District and [Elementary School] to advise that the Student was missing and requested help finding him. Ex. 38.

15. Upon being located on July 3, 2020, Student is readmitted to [Mental Health Clinic]. Ex. 3.

16. On July 8, 2020, Complainant verbally informs the District the Student was hospitalized in June and again in July and that on July 2, 2020, Student said he wanted to kill himself. Complainant wants people to know and requests suggestions for his return to school. Ex. 38.

17. On July 8, 2020, Student's Principal, [Principal] (Principal) and [School Counselor] (School Counselor) and [Assistant Principal] (Assistant Principal) are emails regarding the information provided by Complainant on July 8, 2020. Ex. 38.

18. On July 8, 2020, Student is discharged from inpatient hospitalization at [Mental Health Clinic] to a residential program at [Mental Health Clinic]. Ex. 3.

19. A [Junior High School] staff requests records from [Mental Health Clinic], but as of July 20, 2020 had not received a response from [Mental Health Clinic]. Ex. 38, pg. 4.

20. [Junior High School] starts the school year for the 2020-21 school year with completely virtual educational services.

21. Prior to the school year starting, [Junior High School] staff begin the process of implementing level II and III of its Multi Tier Support System (MTSS) to assist in addressing Student's needs upon his return to school. Ex. BB.

22. On August 25, 2020, Student is discharged from residential program at [Mental Health Clinic] to go home with Complainant. Ex. 4.

23. On August 25, 2020, prior to learning of Student's discharge, School Counselor informs Student's teachers he would not be able to log into the virtual classroom

due to being hospitalized. Later in the day, School Counselor informs teachers Student is home and would be logging in the next day. Ex. 39.

24. On August 26, 2020, Student logs into virtual classrooms and requests assistance from math teacher.

25. On September 4, 2020, District sets up a Safety Plan with Student and Complainant. Exs. U and 40. Part of the Safety Plan is for Student to check in with [Junior High School] health staff, specifically School Counselor, before and after school.

26. On September 9, 2020, District sends the safety plan to Student's teachers. Ex. 40.

27. On September 10, 2020, the [Junior High School] begins providing educational services with a hybrid model. Students attend in person school three days one week and two days the following week and are virtual for the remaining school days each week.

28. On November 11, 2020, [Junior High School] goes back to fully virtual educational services until the end of the semester.

29. When spring semester begins in January 2021, [Junior High School] starts fully virtual educational services until January 20, 2021.

30. Student attends in person school on January 20, 2021.

31. On January 21, 2021, Student is admitted to [Medical Center] due to suicidal ideations and two suicide attempts during the same week. Ex. 5.

32. On February 4, 2021, Student is discharged from [Medical Center]. Ex. 5.

33. On February 7, 2021, Complainant brings Student to [Emergency Care] for suicidal ideations and is released the same day. Ex. 6.

34. On February 10, 2021, Complainant brings Student to [Hospital] for depression, hallucinations, and suicide attempt and is transferred to [Behavior Health Center], a psychiatric facility. Ex. 7.

35. Student is admitted to [Behavior Health Center] ([Behavior Health Center]) on February 12, 2021. Ex. 8.

36. On February 15, 2021, Student is discharged from [Behavior Health Center]. Ex. 8.

37. On March 1, 2021, Complainant brings Student to Children's Hospital Colorado Springs emergency room for depression, hallucinations, and suicidal ideation. Ex. 9.

38. Complainant does not provide the District with copies of medical records or discharge summaries from any of the Student's hospitalizations.

Notice and Identification

39. June 2020 is Student's first hospitalization for mental health concerns, specifically, suicidal ideation and aggression. Ex. 1.

40. July 8, 2020, is the first time Complainant informs the District Student was hospitalized and wanted to harm himself.

41. On August 6, 2020, Complainant emails Principal regarding Student's math placement and [Mental Health Clinic] stay for PTSD. Principal replied addressing the math placement and informed Complainant [School Counselor] (School Counselor) will contact her the next week upon her return from the summer break. Ex. 39.

42. On August 12, 2020, Complainant emails Principal and states she has spoken with School Counselor. Ex. 39.

43. On August 12, 2020, School Counselor speaks with Complainant and among other topics, ensures the School Social Worker follows up with Complainant to provide her with recommended psychiatrists upon Student's release from [Mental Health Clinic]. Ex. 39.

44. On August 12, 2020, Complainant completes an authorization to request/release confidential information related to metal health for [Mental Health Clinic]. Ex. 39.

45. On August 12, 2020, Student is added to the District Vortex; a District process that tracks and monitors students with mental health concerns. Ex. 39.

46. When Student is discharged from [Mental Health Clinic] on August 25, 2020, Student and Complainant go to [Junior High School] and collect his materials and he meets his teachers. Complainant does not provide [Junior High School] with any records from [Mental Health Clinic].

47. On September 2, 2020, Complainant emails Students Teachers in relevant part:

As you may know he was discharged from [Mental Health Clinic] on 8/25 for PTSD, major depression and anxiety. Care was stopped suddenly due to insurance coverage so just trying to go slow at home as if his life depends on it because it does. Although school is VERY important to me and him we must get him the help he needs. He is starting a 2-3 week intensive treatment tomorrow, 9/3 and thus anticipated need of missing some class over the of next few weeks especially. This will be

transitioned to late afternoon 5pm sessions after first intense interval as progress allows and will be less disruptive. In the meanwhile twice daily treatment sessions are needed in addition to other medical appointments, thus morning classes unfortunately will be more impacted. I am trying to stagger some so not always the same class. For German I did get him set up with duolingo and [] of course for Math and plan to have him watch the recorded classes for ones he has missed but recognize that this does not allow for his participation in class.

I am open to any suggestions to help overcome these difficulties. Also wanted you to know that so far in coming home I have found that sudden loud noises can trigger his PTSD and cause him to break down. Thus, if possible to give heads up by announcing if some activity maybe especially loud during videos/experiments that may help him be prepared for this. As we are working through things there maybe other things that arise and will share as we figure more out. Also given his emotional state with anxiety and depression an occasional email, such as weekly, to check in with him would go a LONG way in helping him stay connected and help buffer from feeling overwhelmed.

...

Anticipated schedule as follows:

9/3: miss end German (930 leave), miss all Math, miss most Musical. Afternoon appointment 2pm thus miss end English and PE.

9/4: miss end Science, all German, miss most Math

9/8: miss most Social Studies, all English, all PE

9/9: miss end Science, all German, miss most Math

9/10: miss end German (930 leave), miss all Math, miss most Musical

9/11: miss end Science, all German, miss most Math

9/14: miss end German (930 leave), miss all Math, miss most Musical

9/15: miss end Science, all German, miss most Math

9/16: miss end Science, all German, miss most Math

9/17: miss end German (930 leave), miss all Math, miss most Musical

9/18: miss end Science, all German, miss most Math

Ex. 40.

48. On September 2, 2020, [Social Studies Teacher], Student's Social Studies Teacher, responds "So far, he has done a great job in my class. He has been engaged and participated regularly. I really enjoy having [Student] in my class." Ex. 40.

49. On September 4, 2020, Complainant signs authorizations to request/release confidential information related to mental health for [Doctor 1] at [Behavioral Health Services] and [Doctor 2] at [Neuropsychological Center]. Ex. 40.

50. On September 14, 2020, [Science Teacher], Student's Science Teacher, emails Student and fourteen other student about missing a lot of classwork. Ex. 40.

51. On September 14, 2020, Complainant emails School Counselor and states "Last minute adjustments to appointment schedule for [Student] as he desperately does not want to miss in person opportunities for school." Ex. 40. Complainant later emails School Counselor stating Student reported being a "9" anxiety at school. School Counselor reports to Complainant that School Social Worker met with him at the end of the day and Student reported being a 1 for depression and 0 for anxiety and that he was not displaying any signs of anxiety during the meeting.

52. As of September 29, 2020, Student is passing in all classes except German. Ex. 40.

53. On October 7, 2020, [English Teacher], Student's English Teacher, responded to an email from Complainant stating:

[Student] has been awesome in English class. He's engaged, always makes a point to participate, and I have no issues or complaints at this time. He's a great kid and has been doing just fine so far! I'll certainly let you know if I see any signs of struggle or difficulty, but for now, he's a great kid who's doing just fine, and I'm truly happy to have him in my class!

Ex. 41.

54. On October 12, 2020, Student arrives late due to anxiety and School Counselor emails teachers and reminds them of his Safety Plan and coping strategies. Ex. 41. Several teachers respond Student is not completing remote work day assignments. Student misses some class periods while he is in the School Counselor's office.

55. On October 21, 2020, Student misses in person learning. Complainant emails School Counselor and states:

Yesterday felt so depressed and anxious felt that he might hurt himself or run away. Able to get into extra treatment yesterday which helped and 2 treatments again today so hoping tomorrow is a better day than yesterday. He did email his

teachers to request his work. Looks like primarily behind in Science (did 2 worksheets today) and German.

Ex. 41.

56. On November 1, 2020, Complainant emails Student's Social Studies Teacher, about missing work and states "He did well with the Google meet platform at start of school but not good at independence in keeping himself going. Will check in with him daily again this week by logging on together. He is open to direct communication from you." Ex. 41.

57. On November 10, 2020, Student is moved to higher level math class due to his success in the Math I class. Ex. 42.

58. On November 13, 2020, School Counselor emails for a virtual check-in with Student and provides more mental health tips and strategies. Ex. 42.

59. On November 16, 2020, Principal emails Student regarding low grades in Science, Social Studies, German, and PE and encourages him to turn in missing assignments. Ex. 42.

60. On November 17, 2020, Student emails multiple teachers about not having his camera on because his dog "head butted" him last night and he has a goose egg on his forehead. Ex. 42. Teachers allow Student to leave his camera off.

61. On December 1, 2020, Complainant emails Student's teachers the following:

Hope Thanksgiving break was enjoyed. Just wanted to reach out and let you know [Student] is working through medication changes started last week but having difficulty making the transition with marked anxiety, depression and difficulty just eating and showering right now. One tool that helps him is a device that he uses for these acute episodes but requires him to place it in his nose. He is not comfortable using it during class because of the camera. I am requesting that you grant him permission to turn off camera and communicate using chat when using this device so he feels comfortable with the techniques that help him maintain school participation. Currently he feels he will get in trouble for turning his camera off but I am giving him permission from my perspective so I hope you can too. I anticipate this will improve over the next few weeks.

Ex. 43.

62. In response to the December 1, 2020 email, all of Student's teachers agrees to allow Student to leave his camera off. Ex. 43.

63. On December 2, 2020, School Counselor checks in with Student via email and asks if he would like to set up a virtual meeting. Ex. 43.

64. On December 6, 2020, in response to emails from [German Teacher], Student's German Teacher, about missing some class, Complainant stated "[w]orking through [Student]'s severe depression and anxiety following recent medication change so hard time with attendance last week. Goal this week is to attend classes and secondary, if possible, to have no missing assignments." Ex. 43

65. On December 10, 2020, Principal emails Student about failing grades in German, Math, Science, and a D in Social Studies because of missing assignments. Ex. 43.

66. On December 11, 2020, Complainant informs School Counselor:

[Student] working through panic attacks with urges to run away or self harm as of last night with appointments pending for this afternoon. Thus your on going contact is appreciated. He just doesn't know what help he needs for school so can't articulate what he needs others to do. Will work with him this weekend on missing assignments as much as he can tolerate.

Ex. 43.

67. On December 11, 2020, School Counselor responds:

I am so sorry that [Student] is dealing with so much right now. When we checked in yesterday morning, he seemed to be doing well. Although, I do know how feelings can change. May I share with his teachers this last email you sent to me so they are aware of [Student]'s current state of mind and emotions?

Ex. 43.

68. On December 17, 2020, Student emails German Teacher in response to inquiry about whether he can complete missing work, stating: "right now i am not up to the task thank you for the offer i will saddley decline". Ex. 44.

69. In the morning of December 18, 2020, Principal encourages Student to complete work and by the afternoon, Student completed sufficient work to pass German and all his classes. Ex. 44.

70. During November and December multiple teachers, including [Math 2 Teacher] (Math 2 Teacher), Science Teacher, and German Teacher ask Student to attend ACCESS class in their classroom in order to make up missing work. Exs 42-43.

71. Student's German Teacher and Science Teacher testified they frequently had Student come to their classrooms for ACCESS and Student is able to complete work assignments successfully without assistance from the teachers.

72. ACCESS is a class at the end of the school day for all students and students may either go to their homeroom classroom or one of their teacher's classrooms to complete work.

73. In December 2020, Student requests on a couple of days to not have his camera turned on during virtual learning and all teachers allow Student to participate in the virtual learning without his camera. Ex. 43.

74. In December 2020, Student is preparing to audition for musical theater program. Ex. 43.

75. Student's final fall grades were English D, Math D, Science D, Social Students C, German D, PE A, and Musical Theater A. Ex. O.

76. Student was absent 4.38 days (35 individual classes missed over the semester) and Tardy 4 times (2 of which were first period) in the Fall 2020 semester. Exs. O and R.

77. On January 20, 2021, after the first day of in person learning for spring semester, Complainant wrote to School Counselor "[s]o appreciate your meeting with [Student] and your input as he had a wonderful first day back. I think your idea for the in person instead of remote would be a great benefit to his mental health." Ex. 46.

78. January 21, 2021 is Student's last day to participate in educational services from the District.

79. Even after Complainant informs the District that Student is hospitalized in January 2021, the District repeatedly reaches out to Complainant to determine how it could provide educational services to Student. Complainant declines and District is unable to provide educational services in the spring semester.

80. February 11, 2021 [Hospital] provider notes under the heading "Education" states "[n]o behavioral concerns. PT has done well academically and has friends at school." Ex. 7.

81. Complainant credibly testified she signed a release of information on July 8, 2020, however, she did not give a copy of the June of 2020 discharge paperwork to the School District.

82. In May 2020, Student auditioned for and was accepted into [Junior High School]'s singing group, [Singing Group].

83. On January 22, 2021, Complainant informs the District that Student is hospitalized again and at some point prior to January 29, 2021, Complainant informed the District that Student had attempted suicide. Ex. 41.

84. Complainant testified Student was not motivated, wanting to sleep, not taking care of personal hygiene, requesting to leave school early on days he was in person, wearing his hoodie up, and not engaged in virtual learning.

85. Complainant did not provide context as to the day or month in which Student exhibited the behaviors described.

86. Complainant testified that in January, 2021, she had to monitor his every minute because Student repeatedly attempted to harm himself, which lead to the January 22, 2021 hospitalization.

87. [Cousin] (Cousin) is Student's adult cousin. She credibly testified that she was living with Complainant and Student in Fall 2020. She further credibly testified she would check in on Student in the mornings to ensure he was up, logged onto virtual learning, check on him throughout the day, and check that he completed his homework.

88. Cousin testified Student would call her to pick him up from in person school early. Cousin did not testify as to the frequency of the requests or provide when the requested occurred.

89. Cousin testified in November, 2020, when school went back to fully remote, the Student's behavior began to worsen and it was harder and harder to get him to engage in school or take care of himself.

90. Cousin was not asked and did not testify as to the types of behaviors she observed while Student was participating in virtual learning in fall 2020.

91. [Math 1 Teacher] (Math 1 Teacher) testified Student was motivated in his classroom, both in person and virtual, and Student received an A in his class. The Math 1 Teacher also testified that it is not uncommon for students' grades to fall when they switch to Math 2 mid-semester as Student had and that Student was capable of being successful in Math 2 with time.

92. Math 1 Teacher provided the IEP Team the following input: "It was my pleasure to teach [Student] at the beginning of the year. He had a positive attitude, worked well at school, and was demonstrating great progress in math. He was motivated to move to Math 2 and worked to make that happen." Ex. C.

93. Science Teacher testified Student's main barrier to learning was remote learning and not taking advantage of retaking tests or completing assignments. She further testified that during remote learning and in classroom, Student was interested in the class, had a good background in sciences, and participated by volunteering answers and raising his hand frequently. Science Teacher further credibly testified that even when

Student had his camera off later in the semester, he would raise his virtual hand and volunteer answers, even in December 2020.

94. Finally, Science Teacher credibly testified Student would come to her class during ACCESS to complete work for a variety of classes and did not need her assistance; she just felt he needed a place to be.

95. Science Teacher provided the IEP Team the following input: “[Student] has a good background knowledge of science, he was just constantly behind due to absences or not doing work. But he was completely capable of doing the work, doing it well, and not needing any sort of accommodations/modifications. He has ZERO behavioral concerns, great kid.” Ex. 46.

96. German Teacher credibly testified when Student was present he had his camera on or was participating in the class; however, the main impediment in her class was he was frequently absent for therapies and would not complete homework. The German Teacher credibly testified when he came to her class for ACCESS he was able to successfully complete assignments without her help. The German Teacher credibly testified lots of students struggled with the hybrid learning.

97. Social Students Teacher’s provided the IEP Team the following input:

During first semester I observed [Student] behaving in much the way an average 7th grader would behave both socially and academically. [Student] showed higher than average proficiency with lessons and homework. He participated at an appropriate level and worked well with his fellow students. At times he would be a bit more animated than his classmates, but overall I was pleased with his academic progress, how he generally took ownership for his learning and how he respected my class rules.

Ex. 46.

98. P.E. Teacher provided the IEP Team the following input: “[Student] was great in P.E. He really worked hard and had a terrific attitude. I know he was really into sports and exercise, so he was awesome in P.E.” Ex. 46

99. English Teacher provided the IEP Team the following input: “Strengths - attentive and positive student; engaged in class. I had a nice, jokey connection with [Student]. Areas of need - nothing that stands out. Typical 7th grade boy at the start of the year.” Ex. 46.

100. [Music Teacher], Music Teacher, provided the IEP Team the following input: “[Student] is an extremely talented singer and actor. He always came to class ready to contribute to the lesson in a positive and creative way. He also was willing to collaborate

and support his peers as they worked towards a common goal. Musical Theatre and [Singing Group] are a great fit for [Student]. This is where he shined!" Ex. 46.

101. The Principal and several teachers testified that the change from elementary school to junior high school is often difficult for students since there are now multiple teachers with homework assignments and the increased challenge level for classes. They all testified that the transition was made even more difficult for many students due to virtual learning.

102. [School Social Worker], School Social Worker credibly testified she did not observe Student displaying suicidal ideations or anxiety while at school and she is trained to identify and evaluate students with suicidal ideations.

103. School Counselor credibly testified during her check-ins with Student, he commonly reported anxiety and depression as 0 to 2 (low end of scale 0 -10) and one time she remembers him reporting a 6-7.

104. School Counselor credibly testified the remote and hybrid learning in 2020-2021 affected about a third of the students at [Junior High School] and particularly students treated at home days during hybrid learning as off days so they would not complete assignments and homework.

105. School Counselor credibly testified the behaviors observed of the Student while at school or participating in virtual learning were in high contrast to the behaviors Complainant reported at home.

106. [Clinical Psychologist] testified on behalf of Complainant and was certified as an expert witness in the field of clinical psychology, trauma, and neurofeedback.

107. [Clinical Psychologist] persuasively testified Student is not an accurate reporter of his mental health, has low motivation, was not performing activities of daily living, and his mental health symptoms exhibited themselves and affected Student with different severity.

108. [Clinical Psychologist] persuasively testified she diagnosed the Student with PTSD, anxiety, and depression and was treating Student.

109. [Clinical Psychologist] persuasively testified Student's mental health could cause cognitive issues, such as inattention, lack of focus, difficulty retaining information, and needing prompts for activities of daily living.

110. [Clinical Psychologist] persuasively testified Student was more severe in the Winter/Spring than he had been during the Fall 2020.

111. In a March meeting with the District, Complainant stated even she did not even recognize the severity and complexity of what was going on with Student until February 5, 2021.

Evaluation Process

112. On January 21, 2021, School Counselor asks Complainant if she would like the District to start the 504 process and Complainant replies yes. Ex. 46.

113. On January 29, 2021, Complainant emails and verbally requests Student be evaluated for suspected disability related to his mental health struggles. In the request, Complainant asks for an expedited evaluation process. Ex. 44, pg. 3.

114. The IDEA does not have a process or requirement for expedited evaluation process.

115. On February 2, 2021, District personnel started the process to consider whether the Student should be evaluated for special education services upon learning Student was currently hospitalized for mental health concerns and his suicide attempt. Ex. 45.

116. On February 2 and 5, 2021, [Director of Special Education], Director of Special Education, left messages for Complainant to contact her to discuss the evaluation process and to go over the consent to evaluate.

117. On Friday, February 5, 2021, Complainant and Director Special Education finally speak and Complainant requests Student be evaluated for suspected disability based on recent hospitalizations for mental health concerns and parental concerns of social emotional skills, executive functioning, and writing. Ex. 45.

118. On Monday, February 8, 2021, [Special Education Teacher], Special Education Teacher sends Complainant the proposed Prior Written Notice to evaluate, which also contained the consent to evaluate.

119. Complainant makes corrections to the Prior Written Notice and returned it on February 9, 2021. Ex. D.

120. Consent from Complainant to evaluate is received by the District on February 10, 2021. Ex. E.

121. The sixty days to evaluate Student began on February 10, 2021.

122. On February 15 and 16, 2021, [Neuropsychological Center] conducted a "Confidential Neuropsychological Evaluation." Ex. 21.

123. The report for the private [Neuropsychological Center] evaluation is dated March 3, 2021 and recommends a therapeutic boarding school placement. Exs. 21 and L.

124. The full [Neuropsychological Center] evaluation is not provided to the District until one week after a meeting on March 12, 2021 and Complainant does not allow [School Psychologist] (School Psychologist) to share the report with anyone else.

125. The first time the District is aware [Neuropsychological Center] conducted an evaluation was when Complainant informed the District just before a March 12, 2021 meeting.

126. [Neuropsychological Center] is not a part of the District and a request for an independent evaluation was not sent to the District.

127. [Neuropsychological Center] did not contact the District or its personnel nor did Complainant request the District provide [Neuropsychological Center] with educational records.

128. The [Neuropsychological Center] evaluation was based on DSM criteria and not IDEA procedures.

129. On February 16, 2021, District requests Complainant sign authorization to request/release confidential information related to mental health for [Mental Health Clinic], [Behavior Health Center], [Medical Center], [Doctor 1], and [Clinical Psychologist]. Complainant did not complete and sign any of the requested authorizations. Ex. AA.

130. On March 1, 2021, School Psychologist sends questionnaires to teachers as part of the evaluation process. Ex. 46.

131. On March 2, 2021, School Psychologist determines she would administer BASC for broad social-emotional assessment, BRIEF for executive functioning assessment, EDDT for emotional disabilities, and RCMAS for anxiety as evaluations and raises concerns regarding the lack of direct school observation impeding team's ability to determine eligibility and provide appropriate level of support if found eligible. Ex. 46.

132. A meeting with Complainant is scheduled for March 12, 2021 by School Psychologist and Director of Special Education.

133. Complainant only first sends the District a list of assessments conducted by [Neuropsychological Center] just before a March 12, 2021 meeting.

134. Discussion at March 12, 2021 meeting includes School Psychologist and Special Education Teacher introducing themselves to Complainant; the evaluation process; including, assessing the Student to see how student behaves during assessments; discussing how to support Student both in the short term and in the long term; gathering more information from Complainant regarding how he is doing; sharing with Complainant the types of questions District could ask Student; Complainant sharing Student's current struggles and what his day typically looks like; and discussing whether Student was able to participate in educational services.

135. At the March 12, 2021 meeting, School Psychologist explains the purpose of the evaluation is two-fold. First, to document eligibility, the challenge for the District in this case is to gather sufficient information for the required criteria for emotional disturbance. Specifically, the need to have observed the Student's mental health behaviors in a school

setting to see if they significantly impact his ability to access education. Since when Student was at school in the fall 2020, Student was capable to regulate himself at school, new observations are important. Second, the District needs to identify the skills Student needs in order to address the deficits related to his mental health and for him to be successful in school. School Psychologist further states she does not want to guess what Student needs.

136. During the March 12, 2021 meeting with the District, Complainant states several times that she understood the District needed to have eyes on Student, what Student is currently experiencing has not been seen by the District, and District needs to understand how Student is doing in an educational setting.

137. At the March 12, 2021 meeting, the District proposes the following options to evaluate Student: having homebound teacher come to the home to provide education and allow for observation of Student; District would be flexible on the day and time of day for an informal chat with Student; willing to reschedule if not a good day for Student; meeting would be casual; District did not want to trigger Student; and District would meet virtually with Complainant being present.

138. Complainant did not agree to any meeting with District and Student so that District could conduct assessments regarding Student's current level of ability to access educational services.

139. On March 16, 2021, Complainant provided the District with the [Neuropsychological Center] results for the WAIT-4 assessment. Ex. 46.

140. On March 16, 2021, [Clinical Psychologist] requests the District excuse Student from attending school as of January 22, 2021 due to medical conditions. Exs. 22 and J.

141. On March 29, 2022, Complainant returns her portion of the BASC assessment. Ex. 46.

142. On April 5, 2021, Special Education Teacher emails for input from all of Student's Fall semester teachers. Ex. 46.

143. Prior to the April 7, 2021 meeting, the Student does not participate in any assessments with the District personnel and District has not observed him in an educational setting since his last date of attendance on January 21, 2021.

144. Student has not been hospitalized since February 18, 2021.

145. On April 7, 2021, IEP team, including Complainant; Student's two adult cousins; [Private Evaluator], Student's Private Evaluator; Special Education Teacher; Director Special Education; School Counselor; [School Social Worker], School Social Worker; School Principal; and Math 2 Teacher, meet to discuss Student's eligibility for special education services. Exs. A and B. Eligibility was not determined at the meeting

because the IEP Team determines the evaluation was not sufficiently comprehensive to appropriately identify Student's needs without assessing Student's current abilities to access academic services.

146. At the April 7, 2021 meeting, the IEP team reviews information from the Student's Fall semester teachers; the evaluation report from [Neuropsychological Center]; Student's Fall semester grades; Student's educational record including, past discipline and standardized assessments; School Counselor's interactions during the Fall semester; the assessments conducted by the District; and information from the Complainant and Student's cousins. The IEP team concludes there is a disparity between what school staff observes while Student was at school in fall 2020 and behaviors being observed in the home. Since the [Neuropsychological Center]evaluation does not include any information from the District and the District has not seen Student since January 21, 2021, the IEP team discussed whether Student could participate in some sort of assessment process with the District evaluator. Ex. C.

147. At the April 7, 2021 meeting, Student's Private Evaluator states Student could tolerate some level of tutoring/observation for the purpose of evaluating but long term Student should not receive education at home. Private Evaluator understands the District needed more data regarding the Student in a school setting and short term tutoring was a good compromise. Ex. MM.

148. School Psychologist testified as an expert in the field of school psychology and IDEA.

149. School Psychologist persuasively testified the [Neuropsychological Center] Evaluation was only based on one setting, home environment, and did not include the required second setting of school environment.

150. School Psychologist persuasively testified the data from the District's assessments demonstrated Student was successful, enjoyed learning, and had friends at school and was a sharp contrast to the behaviors reported by Complainant of the Student in the home environment.

151. School Psychologist persuasively testified Complainant expressed significant fear and concern regarding the District's evaluation of the Student which appeared to be based on speculation on how Student may react.

152. School Psychologist testified District offered to Complainant to create an interim placement at [Junior High School] in small classroom or create a diagnostic placement with the assistance of Pikes Peak BOCES in order to assess Student in an educational setting.

153. Complainant declined all options for assessment with Student by the District. Ex. C.

154. On April 16, 2021, the District sends Complainant Prior Written Notice regarding the results of the April 7, 2021 meeting. The Prior Written Notice states no determination regarding eligibility was made and requests to conduct assessments with Student. Ex. G.

155. On April 16, 2020, Complainant, through her attorneys, notifies the District of her intent to place Student in a private placement. Ex. 51.

156. On April 20, 2021, [Clinical Psychologist] informs the District it would be detrimental to the Student's mental health to be interviewed. Ex. 24.

157. On May 4, 2021, District sends a Prior Written Notice to continue evaluation process of Student using the Pikes Peak BOCES School of Excellence Pathways Program due to the District's lack of interactions with Student since January 21, 2021. Ex. H.

Private Placement - [Private Boarding School]

158. On January 31, 2021, Complainant signs a contract with [Education Consulting Service]. The contract states "[Education Consulting Service] will provide the Family with a list of possible programs or schools, . . ." and the Contract concludes is after a student successfully completes of recommended residential placement, family removes from placement, family hires another consultant, or parties agree to terminate contract. The placement fee in the contract is \$6,800. Ex. 20.

159. Complainant's first payment for monthly tuition to [Private Boarding School] ([Private Boarding School]) is dated April 1, 2022. Ex. 18.

160. On April 16, 2021, Complainant, through her attorneys, notifies the District of her intent to place Student in a private placement, stating "[Complainant] has already postponed placing [Student] in an appropriate educational setting in order to permit the District to conduct its evaluation." Complainant also informs the District she intends to seek reimbursement for the private placement. Ex. 51.

161. Complainant testified it was not until after the April 7, 2021 meeting that she considered a private placement for Student.

162. [Private Boarding School] opens in May 2021.

163. On May 7, 2021, Complainant submits an application for Student to attend [Private Boarding School]. Ex. 12.

164. Student begins attending [Private Boarding School] on May 17, 2021.

165. [Private Boarding School] did not request copies of academic records from the District.

166. [Private Boarding School] is a private, therapeutic boarding school in [Other State].

167. As of the date of the hearing, the Student is still attending [Private Boarding School].

168. [Private Boarding School] program consists of a variety of behavioral therapy and educational services. Students reside at [Private Boarding School] and as they progress through the program, students return home for visits. Parents are required to participate both virtually and in person at [Private Boarding School] during the student's tenure.

169. [Private Boarding School] is not an accredited educational program in the State of [Other State].

170. [Academic Director], [Academic Director] for [Private Boarding School], designed an Individual Learning Plan for Student. Ex. 15.

171. The Individual Learning Plan is not prepared to be an Individual Education Plan under the IDEA.

172. [Director of Transition], [Director of Transition] and Student's Primary Therapist at [Private Boarding School], designed a Master Treatment Plan for Student. Ex. 13.

173. In the Master Treatment Plan for Student for the safety risk assessment portion, it states that on May 17, 2022 when Student arrived at [Private Boarding School] he "does not present risk at this time." Ex. 13.

174. [Director of Transition] credibly testified Student's progress has improved and regressed and then improved again while at [Private Boarding School]. Student improved to enter the transition portion in January 2022, but regressed and he exited transition in March 2022; and then, in June 2022 reentered transition portion.

175. [Director of Transition] credibly testified that when Student arrived he was not engaged in many of the services and programs and was mostly sleeping.

176. [Director of Transition] credibly testified Student is currently doing well and that his current behavior is similar to descriptions from [Junior High School] teachers' descriptions in the Fall of 2020, including, eager to contribute/great ideas and capable of doing work/great kid.

177. [Academic Director] credibly testified Student is currently doing well and that his current behavior is similar to descriptions from [Junior High School] teachers' descriptions in the Fall of 2020, including, completes work independently, behaviors typical of 7th grader socially and academically, awake and engaged, worked hard, terrific attitude.

178. While attending [Private Boarding School], Student repeated educational curriculum related to seventh grade. Student's grade report reflects scores ranging from 84 to 100 with most scores in the 90s for 2021/22 school year. Ex. 16.

179. At the beginning of his stay at [Private Boarding School], Student was not engaged in much of the programming, therapeutic or educational. However, over the course time, Student became more engaged and is currently successfully participating in educational activities.

180. Complainant traveled to [Private Boarding School] and the Student returned home several times (at least 2 trips each) during Student's tenure at [Private Boarding School].

181. Complainant paid an enrollment fee of \$4,950, a partial month tuition for May in the amount of \$6,241.95, and \$1,000 spending account on May 25, 2021. Ex. 18.

182. Complainant paid tuition to [Private Boarding School] in the amount of \$12,900 for June 2021 through April 2022. Although outside the scope of this due process complaint, Complainant continued to pay tuition after April 2022 while Student remained at [Private Boarding School]. Ex. 18.

183. Student is making academic progress at [Private Boarding School].

CONCLUSIONS OF LAW AND DISCUSSION

Complainant asserts that District violated the IDEA, 20 U.S.C. Section 1400, *et. seq.*, and accompanying regulations at 34 C.F.R. Section 300, *et. seq.*, and the Colorado Exceptional Children's Educational Act (ECEA, Colo. Rev. Stat. Section 22-20-101, *et. seq.*, and accompanying regulation at 1 CCR Section 301-8, *et. seq.*, by failing to provide a FAPE. More specifically, Complainant alleges that Respondent failed to provide a FAPE by not timely evaluating the Student starting July 8, 2020. If the ALJ determines Respondent failed to timely provide FAPE, the ALJ must determine whether the private placement made by the parent is appropriate and if the ALJ determines Student was denied a FAPE due to substantive or procedural violations, whether the Student is entitled to an award of compensatory services.

The burden of proof in an IDEA challenge rests with the party challenging a deficiency in the school district's efforts. *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008). In this case, Complainant has the burden of proving all the alleged violations as pled in her complaint and that she is entitled to relief as provided for in the IDEA.

COVID-19 PANDEMIC

COVID-19 is an infectious disease caused by SARS-CoV-2, a virus first discovered in December 2019. *Basics of COVID-19*, Ctrs. For Disease Control & Prevention (CDC), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html> (last visited September 15, 2022). In January 2020, the United States confirmed its first laboratory case of the COVID-19 in California. By the end of the January 2020, the U.S. Secretary of Health and Human Services declared a public health emergency. *CDC Museum COVID-19 Timeline*, CDC, <https://www.cdc.gov/museum/timeline/covid19.html> (last visited September 15, 2022). On March 11, 2020, the World Health Organization declared COVID-19 a pandemic. *Id.* On March 13, 2020, President Donald J. Trump declared a nationwide emergency. *Id.* Although decisions regarding education instruction are made at the local level, in recognition of the number of educational institutions throughout the United States closing their doors to in-person learning, on March 21, 2020, the U.S. Department of Education issued its first guidance regarding remote or distance learning for students with disabilities. *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, U.S. Department of Education, Office for Civil Rights and Office of Special Education and Rehabilitation Services, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf> (last visited September 15, 2022). The U.S. Department of Education also developed the “Return to School Roadmap” on August 24, 2021. The Return to School Roadmap is a question and answer document that provides guidance to schools regarding their on-going obligations under IDEA and in light of COVID-19 and students return to in person learning.

Question C-3: If a student received limited instruction due to educational disruptions as a result of the COVID-19 pandemic and also made little academic progress, should the Student be referred for an evaluation to determine eligibility for special education and related services? Answer: Not Necessarily. Levels of student performance primarily attributable to limited instruction do not mean the student requires special education and related services under IDEA. IDEA’s child find and eligibility procedures are designed to identify, locate, and evaluate students with a suspected disability to determine whether, as a result of the disability, the student requires special education and related services.

Return to School Roadmap: Child Find Under IDEA Part B, 79 IDELR 140 (OSERS 2021) https://sites.ed.gov/idea/idea-files/rts-qa-child-find-part-b-08-24-2021/#citem_854f-4259 (last visited September 15, 2022).

On March 5, 2020, Governor Jared Polis announced Colorado's first two positive cases of COVID-19. *One Year Later: A Colorado COVID 19 Timeline*, Rocky Mountain Public Broadcasting Station, <https://www.rmpbs.org/blogs/news/one-year-later-a-colorado-covid19-timelines/> (last visited September 15, 2022). On March 10, 2020, Governor Polis declared a State of Emergency regarding COVID-19. *Id.* By March 13, 2020, the first Coloradoan died as a result of COVID-19. *Id.* On March 18, 2020, Governor Polis issued executive order D 2020 007 ordering the suspension of all normal in-person educational instruction from March 23, 2020 through April 17, 2020; which was later extended through the end of the school year by executive order D 2020 041.

On March 25, 2020, Governor Polis issued executive order D 2020 017 putting into effect a state-wide stay at home order as the number of known COVID-19 cases reached 1,000 people. Colorado Department of Public Health and Environment (CDPHE) issued an Update Public Health Order 20-24 implementing the Governor's stay at home order on March 26, 2020. The Governor's amended Executive Order D 2020 0017 and the CDPHE's Order required all Coloradans to stay home except for necessary travel and activities and if outside of one's residence to maintain social distance. CDPHE's Order defines Necessary travel and activities specific to education the following: "K-12 public school and private schools for the purpose of providing meals, housing, facilitating or providing materials for distance learning, and providing other essential services to students, provided that Social Distancing Requirements are observed." *Colorado Public Health Order 20-24* (March 26, 2020). By April 3, 2020, more than 100 people in Colorado had died due to COVID-19. *Id.* As of November 26, 2021, Colorado has seen 820,431 cases of COVID-19 and 9,314 deaths as a result of COVID-19. *Colorado COVID-19 Data*, Colorado Department of Public Health <https://covid19.colorado.gov/data> (last visited September 15, 2022).

COVID-19 is a pandemic unlike anything seen in modern history. The effects of the COVID-19 pandemic have rippled through the entirety of the life of not only the people of Colorado, but the United States and the world. At the beginning of the COVID-19 pandemic, health officials and scientists were learning on a daily basis about the COVID-19 virus, including how it was transmitted, the medical impact upon patients, how to treat it, and who was affected by the virus. The learning continues as the COVID-19 virus changes.

This due process complaint begins with the first summer after students received instruction in a virtual platform from March 2020 through May 2020, which was the start of the COVID-19 pandemic in Colorado. During the early stages of the COVID-19 pandemic, schools, including Respondent District, were working with scarce information and an ever rapidly changing method of delivering educational services.

It is not the role of this Court to determine how to best protect Student or the public from COVID-19 or any other disease; however, the Court must view the allegations of this case in terms of the circumstances occurring during the time period related to the

allegations. As such, the Court will consider relevant factual information related to COVID-19 when determining whether Student was denied a FAPE.

Identification

The District has the affirmative obligation to identify and evaluate students suspected of being a person with a disability.¹ The obligation is referred to as “Child Find.” A school district's Child Find duty “is triggered when the [District] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.” *Wiesenberg v. Salt Lake City, supra*, 181 F. Supp.2d at 1310 (citation omitted). “[T]he child-find duty requires children to be identified and evaluated within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability. Knowledge 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.” *Id.* at 1311; *see also Smith v. Cheyenne Mountain Sch. Dist.* 12, No. CV 15-00881-PAB-CBS, 2017 WL 2791415 (D. Colo. May 11, 2017), report and recommendation adopted, No. 15-CV-00881 PAB-CBS, 2017 WL 2778556 (D. Colo. June 26, 2017). The Child Find obligation “imposes an affirmative obligation on the school district” and it “is in no way absolute.” *Wiesenberg v. Salt Lake City, supra*, 181 F. Supp.2d at 1310-11.

Complainant asserts the District’s Child Find obligations began in July 2020 when Complainant informed the District that Student had been hospitalized for among other concerns, suicidal ideations. The District contends that while it had notice of Student’s hospitalization in the summer of 2020, its obligations were not triggered until behaviors associated with Student’s mental health manifested within the classroom. District argues that upon learning of Student’s hospitalization, it developed a plan with Complainant, Student, and its mental health team and implemented its MTSS to support Student when he returned to school on August 25, 2022. District further argues while Student struggled to turn in work during remote learning, it was a behavior exhibited by a number of students due to COVID and virtual learning and when considered with teacher observations that Student was engaged in both the virtual and in person classrooms, it did not have reason to suspect Student’s mental health was impacting him in the classroom until his hospitalization in January 2021. District argues that upon learning of the January hospitalization, coupled

¹ All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services. 20 U.S.C. Section 1412(a)(3)(A). The Federal regulations at 34 C.F.R. Section 300.11state (a) General. (1) The State must have in effect policies and procedures to ensure that— (i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; . . . (c)Other children in child find. Child find also must include— (1) Children who are suspected of being a child with a disability under Section 300.8 and in need of special education, even though they are advancing from grade to grade; and . . .

with Complainant's request to evaluate, the District suspected Student as a person with disability and initiated the evaluation process.

The ALJ concludes the District had sufficient reason to suspect Student's mental health was impacting him in the classroom was in January 2021. *D.T., a minor, through Yasirs T., Plaintiff, v. Cherry Creek Sch. Dist. No. 5*, 79 IDELR 74, 121 LRP 26001 (June 23, 2021) (holding "It was not until Plaintiff's social-emotional functioning manifested in an academic setting . . . , and interfered with his ability to receive reasonable educational benefit, that the District to had reason to suspect a disability.") In January 2021, it was apparent the mental health concerns were not transient, but long lasting and with the new hospitalization, Student was significantly impacted in his ability to participate in educational services from the District. Although the Student was hospitalized at the end of June through August 2020, hospitalization is not alone sufficient to trigger the need to evaluate Student. See 1 C.C.R. 301-8, 2220 Rule 2.08(3)(c)(iv)(requiring documentation of "[i]ndicators of social/emotional dysfunction [that] have existed over a period of time and are not isolated incidents or transient, situational responses to stressors"). Student's hospitalization in the summer of 2020 was his first hospitalization and he had not been receiving medications for mental health concerns previously.

Upon learning of Student's summer 2020 hospitalizations, the District immediately implemented MTSS and put in place a number of measures to assist and monitor Student. The District was required to provide and document a variety of interventions in the general classroom. See 1 C.C.R. 301-8, 2220 Rule 2.08(3)(c)(i) (requiring documentation that "[a] variety of instructional and/or behavioral interventions were implemented within general education and the child remains unable to receive reasonable educational benefit from general education"). The ALJ concludes Student received interventions, including check-ins and turning off his camera and was engaged in his classes both virtually and in person, including actively participating in science, math 1 and the extracurricular [Singing Group]. Student routinely reported to mental health staff that his anxiety and depression were a level 0-2 or none to very little anxiety or depression. The ALJ notes that during both virtual and hybrid learning the ability to recognize the impact of mental health on all students was impacted because of the type and frequency of contact with students. While Student struggled to complete assignments, it is reasonable that Student's struggles could have been a result of the transition to junior high school and/or the isolation of COVID-19 virtual learning situation.

While the Complainant's description of a number of behaviors occurring at home that were reported to [Junior High School] starting in November are concerning and if they were observed in the educational setting would have provided the District reason to suspect a disability, the evidence does not suggest the behaviors were occurring in the educational setting. The ALJ is more persuaded by the descriptions from teachers and staff of the Student's behaviors while in both the virtual and in person classrooms, as well as, Student's ability to complete work without assistance during ACCESS period. While the Student clearly articulated how his mental health was impacting his ability to complete work on December 17, 2020, one day before the end of fall 2020 semester, the following day he

was able to complete sufficient work in all classes to receive passing grades. The ALJ notes that Student's Cousin indicated Student's mental health declined after returning to remote learning in November and [Clinical Psychologist], Student's mental health provider, indicated Student's mental health declined winter/spring. Both Student's Cousin and [Clinical Psychologist]'s observations are consistent with the conclusion that the District did not have reason to suspect a disability until January 2021. Additionally, Complainant told the District in March 2021 that she did not recognize the full extent and impact of Student's mental health struggles until February 5, 2021. Therefore, the ALJ concludes the District correctly suspected a disability for Student in January 2021.

Evaluation

Upon suspicion of a disability, the District is to complete an evaluation of the Student. The evaluation is to be conducted in accordance with the sections 300.304 through 300.306 of the IDEA within 60 days of receipt of parental consent. 34 C.F.R Section 300.301 and 20 U.S. C. Section 1414 (a)(1)(C)(ii)(II). The purpose of an evaluation is to determine whether the child is a person with a disability as defined by Section 300.8 and to determine the needs of the child. *Id.* A District is excepted from the 60 day timeframe if the parent repeatedly refuses to produce the child for evaluation. *Id.*

An initial evaluation may consist of review of existing data, evaluations and information provided by the parent and child, grades, state-wide assessment data, current classroom based observations, observations of teacher, assessments or other evaluation measures, and outside evaluations. 34 C.F.R Section 300.305. The IEP team may determine no additional data is necessary. *Id.* When a parent obtains an independent evaluation, the District must consider the independent evaluation if it meets agency criteria when making its decisions regarding eligibility and placement. 34 C.F.R Section 300.502(a)(1) and (c).

When deciding evaluation materials and making a determination regarding disability, the District must make determinations based on specific disabilities. In this case, the parties agree that the District was considering the disability category of "Emotional Disturbance" under the IDEA regulations and "Serious Emotional Disability" under the ECEA. IDEA defines Emotional Disturbance as:

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. Section 300.8(c)(4)(i). ECEA states “[a] child with a Serious Emotional Disability shall have emotional or social functioning which prevents the child from receiving reasonable educational benefit from general education. 1 CCR 301-8 Section 2220-R-2.0.2.08(3). It further defines

- (a) Serious Emotional Disability means a condition exhibiting **one or more** of the following characteristics **over a long period of time** and **to a marked** degree:
 - (i) An inability to learn which is not primarily the result of intellectual, sensory or other health factors;
 - (ii) An inability to build or maintain interpersonal relationships which significantly interferes with the child’s social development;
 - (iii) Inappropriate types of behavior or feelings under normal circumstances;
 - (iv) A general pervasive mood of unhappiness or depression; and/or
 - (v) A tendency to develop physical symptoms or fears associated with personal or school problems.
- (b) As a result of the child’s Serious Emotional Disability, as described above, the child exhibits **one** of the following characteristics:
 - (i) Impairment in academic functioning as demonstrated by an inability to receive reasonable educational benefit from general education which is not primarily the result of intellectual, sensory, or other health factors, but due to the identified serious emotional disability.
 - (ii) Impairment in social/emotional functioning as demonstrated by an inability to build or maintain interpersonal relationships which significantly interferes with the child’s social development. Social development involves those adaptive behaviors and social skills which enable a child to meet environmental demands and assume responsibility for his or her own welfare.
- (c) In order to qualify as a child with a Serious Emotional Disability, **all four** of the following qualifiers shall be documented:
 - (i) A variety of instructional and/or behavioral interventions were implemented within general education and the

child remains unable to receive reasonable educational benefit 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 development expectations.
- (iv) Indicators of social/emotional dysfunction are **pervasive**, and are **observable** in **at least two different settings** within the child's environment. For children who are attending school, **one of the environments shall be school**.
- (v) 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 CCR 301-8 Section 2220-R-2.0.2.08(3) (emphasis added)

Complainant argues District did not complete the evaluation process timely once it began in 2021, including not timely securing parental consent to evaluate. The Complainant requested evaluation on Friday, January 29, 2021. The Director of Special Education attempted to contact her on February 2 and 5, 2021 to review the evaluation process and go over parental consent. On Friday, February 5, 2021, Complainant and the District were able to speak. On Monday, February 8, 2021, the District sent the Prior Written Notice with parental consent to Complainant via email. After making changes requested by Complainant; Complainant returned the completed parental consent on February 10, 2021. Complainant argues the ten days between her request and consent was too long. The ALJ does not agree. The District demonstrated it diligently attempted to secure the required consent from Complainant while understanding that Student was currently hospitalized for an attempted suicide. The Complainant's expectation that District could evaluate Student during the next five business days that Student was in the hospital following the attempted suicide is also unreasonable.

District asserts that it has not seen Student since January 21, 2021, eight days prior to Complainant's request for evaluation and made numerous attempts to conduct assessments with Student. Complainant contends that 1) it was too dangerous for Student to undergo assessments by District and 2) its private evaluation should be sufficient. The District argues that Student did not display any of the behaviors described by Complainant while at school and it could not determine Student's current condition without some sort of contact with Student and argues the private evaluation is insufficient because it did not assess any information from the educational setting. The ALJ agrees with the District.

While it is not the ALJ's role to determine the mental health condition of Student, there is evidence that Student's mental state was not so severe that qualified mental health professionals from the District could not find a way to safely assess Student's current

mental health. The staff at [Private Boarding School] safety assessment did not find Student to be at risk upon arriving at the facility on May 17, 2021. Private Evaluator indicated that assessing Student could be an option on April 7, 2021. District's data demonstrated wide discrepancy between teacher observations for fall 2020 and Complainant's observations at home. The District offered several options to Complainant and she declined all. The ALJ understands Complainant concerns for her son and the extraordinarily difficult situation she must have been under at the time. However, the ALJ cannot in good conscious say the District failed to timely complete its evaluation when Complainant failed to produce Student for evaluation. See 34 C.F.R Section 300.301 and 20 U.S. C. Section 1414 (a)(1)(C)(ii)(II).

Additionally, the ALJ concludes that the private evaluation conducted by [Neuropsychological Center] in February 2021 was not sufficient to demonstrate "social/emotional dysfunction are pervasive, and are observable in at least two different settings within the child's environment. For children who are attending school, one of the environments shall be school." 1 CCR 301-8 Section 2220-R-2.0.2.08(3). The [Neuropsychological Center] evaluation only took educational history from Complainant; it did not include any educational records from the District, it did not include any classroom observations by the evaluator; it did not include any data from Student's teachers; and it was not conducted or based on the requirements and definitions of disability in the IDEA and ECEA. Therefore, the ALJ concludes the District was correct that the evaluation was not complete without observation and/or assessment of Student in his current condition in an educational setting.

The ALJ also notes that it appears Complainant contemplated private placement for Student as early as January 31, 2021 when she entered into the contract with [Education Consulting Service], sole purpose of which was to find and assist in the placement of Student outside the District. Complainant's actions in scheduling and having the private evaluation conducted less than five days after signing consent for the District to evaluate and then refusing all options for the District to conduct its own assessments further demonstrates to the ALJ Complainant's desire for Student to be placed in a residential facility outside the District. While Complainant may not have chosen the facility, until after the April 7, 2021 meeting, it is clear to the ALJ, that Complainant did not trust and did not intend to have Student complete the evaluation and placement process with the District. The ALJ is encouraged to hear Student is doing well at [Private Boarding School] and is likely to return to Colorado soon. Ultimately, the ALJ concludes that the District was excused from completing the evaluation within sixty days of consent because the Complainant repeatedly failed to produce Student.

Conclusion

The ALJ concludes the District had sufficient information to suspect Student's mental health was impacting him in the classroom in January 2021. The ALJ further concludes that District complied with all procedural requirements regarding evaluation, including, timely securing parental consent to evaluate and correctly determining it did not have sufficient information to complete its evaluations without observation/current assessment of the impact of Student's current mental health on his ability to access educational services. In this case, the ALJ concludes that District did not violate either the procedural or substantive requirements of the IDEA and ECEA and that it did provide Student with a FAPE. Therefore, District is not responsible for reimbursing Complainant for her unilateral private placement of Student in the residential facility or any providing compensatory educational services.

ORDER

The ALJ concludes that Complainant failed to meet his burden of proof establishing that District violated the IDEA and ECEA and thus, Complainant did not prove District failed to provide Student with FAPE. No relief is warranted and the complaint is dismissed.

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. Section 300.516.

September 16th, 2022.

/s/ Heidi L. Kutcher
HEIDI L. KUTCHER
Administrative Law Judge