

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

State-Level Complaint 2019:507
Douglas County School District

DECISION

I. INTRODUCTION

The mother (“Parent”) of a student (“Student”) not currently identified as an eligible child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ initiated this action against Douglas County School District (“District”) through a state-level complaint (“Complaint”) properly filed on Student’s behalf by legal counsel (“Attorney”) on Thursday, February 14, 2019.

The State Complaints Officer (“SCO”) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

II. RELEVANT TIME PERIOD

The Colorado Department of Education (“CDE”) has the authority to investigate alleged violations of the IDEA that occurred not more than one year from the date the Complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, this investigation will be limited to events that transpired no earlier than February 14, 2018 to determine whether or not a violation of the IDEA occurred. *Id.* Additional information prior to this date may be considered to fully investigate all allegations accepted in this matter. 34 C.F.R. § 300.152(a)(4). Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed. 34 C.F.R. § 300.153(c).

III. COMPLAINT ALLEGATIONS

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

1. Failed to identify and evaluate Student as a child with a suspected disability who is in need of special education and related services, from September 24, 2018 to present, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).

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

2. Failed to conduct an initial evaluation as requested by Parent on October 31, 2018 to determine if Student qualifies as a child with a disability under the IDEA, in violation of 34 C.F.R. § 300.301.

IV. FINDINGS OF FACT

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

A. Background

1. Student, a six-year-old not currently identified as eligible for special education and related services as a child with a disability under the IDEA, presently attends half-day kindergarten at a charter school (“School”) located within District. *Complaint*, p. 5; *Exhibit 7*. The 2018-2019 kindergarten academic year commenced at School on August 9, 2018. *Response*, p. 2.
2. Student is collectively described as an intelligent, caring child with a “tenacity for life” and a “personality that his peers admire.” *Interviews with Parent and Kindergarten Teacher*. Though eager to learn, Student struggles in the areas of articulation, reading, and math. *Id.*
3. Parent asserts that District should have located, identified and evaluated Student for IDEA eligibility based upon an adverse effect speech-language challenges have conferred upon his academics, in conjunction with bullying behavior directed at Student. *Complaint*, pp. 7-9. District answers that School did not suspect Student to have a disability, and adds that general education interventions resulted in measurable progress for Student. *Response*, pp. 7-9.
4. Parent argues further that District, upon receipt of a written request on October 31, 2018 that Student be evaluated for IDEA eligibility, sidestepped its obligation to obtain informed parental consent to conduct an initial evaluation. *Complaint*, p. 8. District counters that Parent withdrew this specific evaluation request on November 12, 2018. *Response*, p. 9.
5. The issues raised through the Complaint are related, but first require a determination of whether District, in light of information that it knew or had reason to know, as early as September 24, 2018, should have located, identified and evaluated Student as a child suspected of having a disability who may be need of special education and related services.

B. School’s First Quarter: August 9, 2018 – October 9, 2018

6. Prior to class starting on August 9, Parent completed a District registration form, marking that Student previously received services in the area of “Speech/Language.” *Exhibit D*, p. 2. He participated in private speech-language therapy in 2016, and started similar individualized services in 2018. *Exhibits 1-3*. A privately attained speech-language evaluation dated May 2,

2018 indicates that he “presents with significant articulation disorder with below age level receptive and expressive language abilities . . . difficulties with articulation may influence his ability to be understood by others and engage in conversation, participate in a typical preschool classroom/kindergarten, [and] develop age-appropriate pre-literacy skills.” *Exhibit 1*, p. 4.

7. The Goldman-Fristoe Test of Articulation, one component of this private evaluation, measures consonant sound articulation, and at the time, Student’s “sound production was immature for age and was characterized by omissions, substitution, [and] distortions.” *Id.* at pp. 4-9. It was also noted that his “articulation error pattern of omission of final consonants maybe [sic] impacting his grammatical expression.” *Id.* at p. 4. The evaluation returned diagnoses of developmental articulation and receptive expressive language disorders, and advised Parent to “determine if your child is eligible for speech language services, you will need to share a copy of this report with your district Child Find Program.” *Id.* at pp. 4-5.
8. Parent routinely provided Student’s speech therapist (“Private Therapist”) with educational progress updates, first stating on September 11 that “kindergarten is going ok.” *Id.* at p. 41. She informed Kindergarten Teacher by e-mail on September 13 that Student was engaged in this speech therapy, that he has an “articulation delay,” and that she was “seeing consistent progress/improvement in his speech” as a result of therapeutic services. *Exhibit F*, pp. 3-4.
9. During parent-teacher conferences on September 19, Kindergarten Teacher reviewed with Parent the results of Student’s Kindergarten Readiness Assessment, a tool to identify strengths and needs across developmental and academic domains so as to foster a responsive learning environment, originally administered on August 31. *Exhibit J*, p. 39; *Interview with Kindergarten Teacher; CDE Kindergarten School Readiness Initiative Guide*, p. 2. This informed the creation of an Individual Readiness Plan (“IRP”), dated September 26, which noted comparative areas of weakness for Student in literacy and math. *Exhibit J*, pp. 20-21.
10. A student success team (“SST”) brainstormed “next steps and options” for Student as it developed the IRP, with Kindergarten Teacher writing down: “[p]lace on Read Act NCLB – possible I.E.P.” *Id.* at p. 8; *Interview with Kindergarten Teacher*. Notably, with respect to literacy, the IRP signals that Student “[u]ses very little language to express ideas,” that Student’s speech “contains many articulate [sic] errors and is often unintelligible,” that Student “asks questions or contributes to discussions infrequently,” and that Student exhibits “[n]o/little discrimination of” both rhyme and initial sounds. *Exhibit J*, pp. 20-21.
11. Kindergarten Teacher elaborated on these observations, stating it was sometimes difficult to understand Student’s speech pattern, especially when he spoke “quickly” or “out of context.” *Interview with Kindergarten Teacher*. It was a “fact” Student presented with articulation issues, however, she noted it is not uncommon for five-year-olds to have such difficulties. *Id.* In her experience, Kindergarten Teacher added, students “gradually grow out of” these

challenges as they mature over the course of one school year and move into first grade. *Id.* She estimated that Student's difficulties with articulation were "part of his maturity." *Id.*

12. The SST created instructional strategies for Student, with literacy support to include pull-out intervention, weekly monitoring, in-class small group intervention, letter naming, letter sounds, phonemic awareness activities, and articulation practice. *Exhibit J*, p. 21. The SST also developed a Reading to Ensure Academic Development Act plan ("READ Plan"), effective October 2. *Id.* at pp. 34-40. The Read Plan included Tier 2 reading interventions provided by a reading specialist ("Literacy Interventionist"), three times per week for thirty minutes each session, with a primary focus on Student's skill needs in phonological and phonemic awareness. *Id.* at p. 38; *Exhibit D*, p. 19; *Interviews with Parent and Kindergarten Teacher*.
13. The SCO finds that Student also received assistance to access the demands of the general education classroom, from an instructional assistant, in the form of models, letters to trace, prompts to work through a task, and guidance in following directions. *Exhibit D*, p. 19. The instructional assistant worked with all students in the classroom, and while Parent stated to the SCO that Student did not receive any additional interventions apart from reading support, she also reported that the instructional assistant "worked diligently in that classroom with [Student]." *Interviews with Kindergarten Teacher and Parent*. Also, on September 11, Parent mentioned to Private Therapist that she "loves the educational assistant." *Exhibit 1*, p. 41.
14. The SST monitored Student's progress through the Dynamic Indicators of Basic Early Literacy Skills ("DIBELS"), first administered on September 17. *Exhibit J*, p. 34. The measures utilized here through the Read Plan, to assess Student's acquisition of early literacy skills and reading proficiency, included First Sound Fluency ("FSF"), Letter Naming Fluency, Nonsense Word Fluency - Whole Words Read ("NWF-WWR"), Nonsense Word Fluency - Correct Letter Sounds ("NWF-CLS"), and Phoneme Segmentation Fluency ("PSF"). *Id.* at pp. 29-30. His benchmark performance by October was classified as "in the red," a color-coded gauge of progress tied to a composite score of "Well Below" expectations. *Interview with Kindergarten Teacher*.
15. One week after the initial DIBELS assessment, as recounted to the SCO, Parent stated it was "alarming" to find out from Student on September 24 that a classmate grabbed his throat. *Complaint*, pp. 3-4; *Interview with Parent*. Parent added that she was not notified until "later in the afternoon" or in what she "would deem a timely manner." *Interview with Parent; Exhibit F*, p. 5. This report is unreliable as Kindergarten Teacher e-mailed Parent at 1:17 p.m., one hour after class adjourned on September 24, to "let [her] know that another student squeezed the skin on [Student's] neck" but that "[he] is fine." *Exhibit 8*, p. 3. At 2:06 p.m., Parent replied "thank you so much for letting me know! [Student] hadn't told me of anything, yet. I sincerely appreciate your notification and how well you care for your students!" *Id.*
16. Parent reported the "bullying" behavior to Private Therapist the next day, on September 25, also stating that she would be amenable to "speech intervention" at School. *Exhibit 1*, p. 45. Private Therapist informed Parent that she could request this service, along with a response

to intervention (“RTI”) plan. *Id.* Parent indicated that Kindergarten Teacher noted “reading” as a concern for Student, but then Parent demonstrated for Private Therapist that Student understood letters and sounds, at which point Private Therapist explained that “articulation concerns are not separate from early phonics work.” *Id.* At the next appointment on October 2, when Parent remarked that she was unsure as to how to ask for Student to get assistance at School, Private Therapist recommended speaking with Kindergarten Teacher. *Id.* at p. 46.

17. The first quarter concluded with Student earning a B in English/Language Arts, an A in History, an F in Math, a D in Reading, and a C in Science. *Exhibit E*, p. 3. While Student’s grades in History and Science are reflective only of participation, his marks in Reading and Math are based on work performance and testing. *Interview with Kindergarten Teacher*. For instance, Reading grades derive primarily from Journey’s Benchmark Assessments, which focus on phonological awareness, comprehension, phoneme segmentation, and rhymes, in addition to assigned homework and reading logs. *Id.* Kindergarten Teacher could not recall the basis for Student’s academic deficiencies, adding only that she is “assuming” he did not perform well on reading unit assessments and that “possibly he was struggling with writing.” *Id.*
18. The aforementioned curriculum continued for Student into School’s second quarter, starting October 15, as did Parent’s concern with “bullying” behavior. *Exhibit 8*, pp. 8-10.

C. School’s Second Quarter: October 15, 2018 – December 21, 2018

19. On October 23, Parent e-mailed Kindergarten Teacher that a peer, in her presence, routinely called “[Student] names that while age appropriate, [were] far from conduct appropriate.” *Id.* at p. 9. She was not able to recall dates of these purported playground instances, and the asserted teasing she cited did not pertain to Student’s speech-language abilities. *Interview with Parent*. Principal and Kindergarten Teacher met with Parent on October 26, with evidence from ensuing e-mails reflecting that her concerns were addressed. *Exhibit F*, p. 9.
20. Parent did not mention any subsequent “bullying” behavior, and met with Literacy Interventionist on October 29 to obtain a copy of the READ Plan. *Interview with Parent; Exhibit J*, p. 27. With concerns grounded in Student’s “articulation and consonant deletion related speech delay,” Parent e-mailed Principal and Kindergarten Teacher on October 31:

We are writing to request [an] assessment for our son, [Student], to determine if he is eligible for special education services. We are requesting assessments in the areas of speech and academics, as we have noticed that [Student] is struggling with reading . . . [and] number recognition and math . . . [t]herefore, we would like [Student] to be evaluated for an IEP, please provide the consent to do so.

Exhibit 9, p. 3. Principal replied the next day, November 1, also copying Kindergarten Teacher, IEP Case Manager and other School staff on the e-mail “so that they can review [the] request and guide us on our next steps.” *Id.* at p. 2. Parent wrote back

to Principal that “we were advised [Student] should be evaluated for speech, as we’ve been going to speech at [local hospital] — we just want him to be evaluated so as to see his eligibility.” *Exhibit F*, p. 13.

21. Also on November 1, IEP Case Manager contacted Parent to gather background information and propose dates for a referral meeting to “pinpoint the areas of concern and provide consent for evaluation if . . . that is the necessary next step.” *Id.* at pp. 16-17. IEP Case Manager learned from Parent that “the main concern is his speech articulation, which he was evaluated for at [local hospital] and qualified for services.” *Id.* at p. 16. Parent selected November 14 for a referral meeting, with IEP Case Manager later confirming the date via e-mail on November 12. *Id.* at p. 18. Parent replied at 1:04 p.m. on November 12 with “[c]an you please call me — I wanted to further discuss this – thank you.” *Id.* at p. 19.
22. The SCO received conflicting accounts of the resultant November 12 telephone conversation. *Interviews with Parent and IEP Case Manager.* IEP Case Manager stated that Parent withdrew the evaluation request and canceled the referral meeting, opting instead to monitor Student’s progress through outside speech therapy and private tutoring since he only attended kindergarten on a half-time basis. *Interview with IEP Case Manager.* Parent reported that she requested the referral meeting be reset after Thanksgiving break on account of her family’s move to a new home on November 19. *Interview with Parent.*
23. The SCO finds IEP Case Manager’s characterization of this conversation credible, primarily based on the following e-mail she sent to School staff at 1:22 p.m. on November 12:

Hello team, [Student’s] parents have decided not to pursue Special Education testing at this time. They were able to get [him] into more Speech Therapy . . . and would like to see how he does with that and extra math tutoring. I explained that we could regroup come Jan./Feb. to discuss his academic progress here and potentially meet if necessary. Let me know if you have any questions!

Exhibit F, p. 42. Further corroborating this explanation with respect to speech therapy are progress notes from the local hospital, dated October 2, which contain Parent’s reference to insurance limits and her request for “more than the 20 authorized visits.” *Exhibit 1*, p. 47.

24. Also, when asked by the SCO if she withdrew the evaluation request during this telephone conversation, Parent answered with different degrees of conviction, stating both “to the best of my knowledge I do not recall specifically asking them not to evaluate” and “I said [Student] needs to be evaluated.” *Interview with Parent.* While the SCO finds Parent to be engaged in Student’s educational programming, based primarily on consistent written communication with School and a self-described affinity for “paper trails,” there is no subsequent documentary evidence to support her rendition of the November 12 telephone call. *Id.*

25. District did not provide Parent with prior written notice to explain its rationale for not conducting the evaluation, and the parties did not explore the topic again until School's third quarter, summarized in more detail below. *Interviews with Parent and IEP Case Manager.*
26. On December 18, Parent e-mailed Kindergarten Teacher and Literacy Interventionist to receive a better understanding of the DIBELS data, contemporaneously thanking them for "[Student's] progress in reading" and stating "I believe he is making progress . . . we have been working at home to foster growth in reading/phonetics awareness/articulation." *Exhibit 4*, p. 4. Literacy Interventionist explained the scores to Parent, noting that while Student was "showing slow and steady growth" his "issues with speech are hindering" his FSF and PSF skills, both of which were the only oral DIBELS assessments administered. *Id.* at p. 2. A Literacy Performance Report dated December 12 verifies Literacy Interventionist's conjecture as Student required the "most support" in phonemic awareness. *Exhibit 5*, p. 2.
27. The second quarter concluded with Student earning the following grades: A in English/Language Arts, B in History, F in Math, F in Reading, and A in Science. *Exhibit E*, p. 3.

D. School's Third Quarter: January 8, 2019 – March 15, 2019

28. Student continued to receive Tier 2 reading interventions into the third quarter, but the thirty-minute sessions were increased from three to five times per week on January 30 and carried out in a smaller group of peers. *Exhibit D*, p. 19; *Response*, p. 3. As documented in a *Special Education Referral* issued on February 13, "[Student] was making [DIBELS] progress, his progress was slow and [Literacy Interventionist] observed that his articulation was hindering his progress through this intervention." *Exhibit D*, p. 19. Literacy Interventionist had previously remarked to Kindergarten Teacher, in January, that his articulation issues might possibly be related to his struggles with reading. *Interview with Kindergarten Teacher.*
29. A DIBELS data progress check in February confirms Literacy Interventionist's suspicion that Student's "articulation" stymied progress. *Exhibit D*, p. 19; *Exhibit J*, pp. 28-30, 34. He fell "Well Below" benchmark performance with an FSF score of "3" in September, and while the score increased to "12" by December, this mark fell short of a set goal of "30." *Id.* Student's FSF score reached "24" in February. *Id.* With a set goal of "20" on PSF, Student earned a "1" in December, and while this mark increased to "12" by January, it decreased to "5" in February. *Id.* Student exceeded a set goal of "17" on NWF-CLS by December, and the score climbed to "34" by February, but he recorded "0" three times on measures of NWF-WWR. *Id.*
30. The SCO finds, through consultation with a CDE speech language pathologist specialist ("CDE Specialist"), a complication in assigning exact meaning to the accuracy of this DIBELS data, and whether or not Student is on track for grade-level reading success, given observations that articulation hindered progress and his ability to identify sound. For instance, it is possible scores could reflect articulation miscues, as opposed to an ability to understand sound-

symbol association, based upon numerous errors identified in the private speech-language evaluation and the frequency at which “unintelligible” speech is referenced in the Record.

31. A child must be able to articulate speech as a precursor to adequately administer DIBELS, CDE Specialist explained, and should not be penalized for imperfect pronunciation due to articulation. For example, if a child consistently substitutes /w/ for /r/ and pronounces “ring” as “wing,” the examiner should use the child’s responses and any prior knowledge of the child’s speech patterns to appropriately note the basis for the error as articulation. Here, there was an observed inability to produce sounds necessary to accurately respond to test stimuli. Moreover, while DIBELS and the Read Plan assist with phonemic awareness, CDE Specialist stated that neither directly address speech intelligibility. To that end, the SCO finds no evidence in the Record that Student generalized sound such that Literacy Interventionist could satisfactorily reinforce articulation and phonemic awareness in a concurrent manner.
32. One week prior to the DIBELS progress check, on February 13, Parent again requested that District evaluate Student for IDEA eligibility. *Exhibit D*, p. 19. Parent consented to the initial evaluation at a referral meeting on February 19, and District thereafter issued a *Prior Written Notice of Special Education Action* on February 22. *Exhibit A; Exhibit B; Exhibit C*. District is currently assessing Student in the areas of general intelligence, communicative status, and academic performance. *Exhibit A; Interview with Parent*. On February 15, IEP Case Manager requested all speech-language assessment documentation from Parent. *Exhibit F*, pp. 20-21.
33. This second evaluation request from Parent occurred shortly after Student transitioned into a new kindergarten classroom toward the beginning of February. *Id.* at p. 33. IEP Case Manager contacted Parent after receiving the instant Complaint, filed with CDE on February 14, to discuss expanding the evaluation into the social-emotional arena, however, Parent did not consent to the administration of any social-emotional assessments. *Exhibit B*. Indeed, Student’s current and past teachers reported that he is a “positive, happy, and well-liked scholar who demonstrates typical behavior and social skills for his age and grade-level.” *Id.*
34. The two allegations raised through the instant Complaint, though distinct, are connected through the IDEA’s core tenet of ensuring children suspected of having a disability are properly evaluated, either upon a parental request or as initiated by a school district. The SCO therefore turns to jointly analyze each allegation within the purview of this principle.

V. CONCLUSIONS OF LAW

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

Conclusion to Allegations No. 1 and No. 2: District procedurally violated the IDEA by failing to provide Parent with prior written notice following her request for an initial evaluation on

October 31, 2018, and by failing to pursue an initial evaluation of Student where suspicion of a disability arose through Parent's written concerns and Student's speech-language deficiencies.

A. Request for an Initial Evaluation under the IDEA

The SCO first addresses Parent's allegation that District failed to provide an initial evaluation for Student despite receiving a written request to do so on October 31, 2018. *Complaint*, p. 9.

The purpose of an IDEA initial evaluation is twofold: (1) to determine whether the child has a disability, and because of the disability needs special education and related services, and (2) to help the IEP team determine the child's specific needs. 34 C.F.R. § 300.304(b)(1)(i)-(ii). Thus, school districts must conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability. 34 C.F.R. § 300.301(a).

Either the parent of a child or a school district may initiate a request for an initial evaluation. 34 C.F.R. § 300.301(b); ECEA Rule 4.02(3)(a). If a parent requests an evaluation, the school district has two options: (1) agree to evaluate the child and obtain parental consent to conduct the evaluation, or (2) deny the request to evaluate and provide parent with written notice explaining its decision. *Poudre School District*, 118 LRP 28104 (SEA CO 2/5/18).

In this case, it is evident, based on FF #20, that Parent formally requested an initial evaluation for Student by e-mail on October 31, 2018. IEP Case Manager immediately contacted Parent to learn more about Student and to schedule a referral meeting for November 14, a date selected by Parent. Two days prior to the November 14 referral meeting, as noted at FF #21, Parent requested a conversation with IEP Case Manager. While Parent and IEP Case Manager offered differing narratives of the resultant telephone contact of November 12, detailed at FF #22, the SCO finds and concludes that Parent withdrew the October 31 request for an initial evaluation during this discussion. The SCO's determination is bolstered by FF #23-24, namely the specificity and contemporaneity of IEP Case Manager's e-mail to School staff following the telephone call.

Again, while the IDEA does not require school districts to assess all children for whom evaluations are requested, school districts must still provide parents with written notice of any decision not to evaluate. *Pasatiempo by Pasatiempo v. Aizawa*, 103 F.3d 796, 804 (9th Cir. 1996); 34 C.F.R. § 300.503(a). Failure to provide prior written notice within a reasonable time before refusing to initiate or change a student's identification constitutes a procedural violation that may result in a denial of FAPE. *See El Paso County Sch. Dist. 2*, 113 LRP 44602 (SEA CO 08/15/13). FAPE is an education "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

It is undisputed from a review of the Record here, and the interviews with Parent and IEP Case Manager, that School did not provide Parent with prior written notice of its decision not to evaluate Student. Although Parent withdrew her initial evaluation request by telephone on November 12, School's failure to provide Parent with prior written notice thereafter to inform

her of the decision reached, and the underlying rationale, results in a procedural violation of the IDEA. *El Paso County Sch. Dist. 2*, 113 LRP 44602 (SEA CO 08/15/13).

The United States Supreme Court stressed the importance of compliance with the IDEA's procedural safeguards. *Board of Education v. Rowley*, 458 U.S. 176, 205-206 (1982). It is well-settled that procedural violations are only actionable to the extent they impede a child's right to a FAPE, significantly impede a parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2); *Sytsema v. Academy School District No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008).

In the instant matter, Parent initiated, and participated in, the November 12 conversation with IEP Case Manager, during which Parent asked that School not proceed with the initial evaluation. Parent made the informed decision to instead monitor Student's progress through speech-language therapy, as chronicled at FF #23. Plus, as noted at FF #32, District is currently assessing Student for IDEA eligibility. Consequently, the SCO concludes that this procedural violation did not result in substantive harm to either Parent or Student. 34 C.F.R. § 300.513(a)(2).

Although parents may request that a school district evaluate their child, they are not required to do so. *Robertson County Sch. Sys. v. King*, 24 IDELR 1036 (6th Cir. 1996) (unpublished); *See also D.G. v. Flour Bluff Indep. Sch. Dist.*, 59 IDELR 2 (5th Cir. 2012) (unpublished). Thus, in light of Parent's additional allegation raised through the Complaint, the SCO now shifts to determine whether District should have suspected Student to have a disability between September 24, 2018 and her second request for an initial evaluation on February 13, 2019. *Complaint*, pp. 7-9.

B. The Child Identification Process under the IDEA

The IDEA mandates that school districts develop and implement adequate procedures to identify, locate, and evaluate children with disabilities who may be in need of special education and related services. 34 C.F.R. § 300.111(a). In Colorado, the child identification process "shall include child find, special education referral, initial evaluation, and determination of disability and eligibility for special education." ECEA Rule 4.02(1)(a)(ii).

With respect to "child find," the identification process shall include strategies such as "[r]eferral procedures to ensure that parents of children are given information about all public and private resources that can meet identified needs." ECEA Rule 4.02(2)(c)(v). In this matter, the evidence at FF #7 and #16 support a conclusion that District met its duty related to planning and development in the arenas of public awareness and community referral systems. For instance, Private Therapist provided Parent with child find information, and educated her on requesting special education services through School, on May 2, September 25, and October 2. Accordingly, as further demonstrated by Parent's written request for an initial evaluation on October 31, 2018, the SCO concludes Parent was appropriately and adequately advised by a community referral.

Under the “special education referral” aspect of the identification process, there exists an affirmative obligation for school districts to evaluate a child where there is reason to suspect a qualifying IDEA disability and a need for special education and related services. 34 C.F.R. § 300.111(c); ECEA Rule 4.02(1)(a). The threshold for suspicion of a disability is relatively low, and the initial inquiry is not whether the child actually has a disability or qualifies for special education services, but whether the child should be referred for an evaluation. *State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001). Suspicion “may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation.” *Cheyenne Mountain Sch. Dist. 12*, 117 LRP 25901 (D. Colo. 2017) (quoting *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)).

The actions of a school district in terms of whether it had knowledge of, or reason to suspect, a disability must be evaluated in light of the information that it knew, or had reason to know, at the relevant time. *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). It should not be based on hindsight. *Id.*; *See also Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). However, the “child-find obligation is in no way absolute.” *Wiesenberg*, 181 F. Supp. 2d at 1311.

School districts must systematically seek out IDEA-eligible students, and may not take a passive approach and wait for others to refer students for special education. *Compton Unified Sch. Dist. v. Addison*, 54 IDELR 71 (9th Cir. 2010), cert. denied, 112 LRP 1321, 132 S. Ct. 996 (2012). Remaining vigilant for red flags, and referring students who may have a disability and need special education, is part of this ongoing obligation. *Arapahoe County School District 5*, 117 LRP 2988 (SEA CO 12/21/16) (citing *Cincinnati City Schools*, 115 LRP 26069 (SEA OH 5/07/15)). Absent a test articulated by the Tenth Circuit defining a “relatively low threshold,” the SCO turns to this case’s individual circumstances to determine if they jointly raised a reasonable suspicion that School should have referred Student for an initial evaluation. *Weld RE-4 School District*, 119 LRP 5662 (SEA CO 1/2/19) (citing *Clark County Sch. Dist.*, 114 LRP 45477 (SEA NV 8/28/14)).

C. Parent’s Concerns with Bullying and Speech Articulation

The SCO recognizes that school districts are not required to evaluate every child showing substandard capacity, “. . . especially at a time when young children are developing at different speeds and acclimating to the school environment.” *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 252 (3d Cir. 2012) (holding that a delay in evaluating a grade schooler with a history of academic and behavioral problems was appropriate in light of the child’s age and progress he made with accommodations and support services). Liability for child find obligations is imposed only where there are clear notifications or a “reason to believe” that a school district should take action. *Id.* at p. 243. The weight of the evidence here, despite Student’s age, establishes a reasonable suspicion that District should have moved to special education identification by January 8, 2019.

First, Parent raised concerns with “bullying” which, in circumstances involving a student who has not been previously identified as a child with a disability, can be a red flag that triggers a school district’s child find obligations. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013). In this

case, the SCO concludes that the instances highlighted by Parent at FF #15 and #19, even if classified as bullying, which the SCO does not, never raised suspicion of a disability at any point. The undefined teasing cited by Parent, and the single incident of September 24, did not effectively prevent Student from learning or occur frequently and in a manner to raise a red flag.

Second, Parent cited Student's significant language-based deficiencies, in the area of speech articulation, as a reason for District to refer Student for an evaluation. *Complaint*, pp. 7-9. While Parent did not provide School with Student's private speech-language evaluation reports and associated documentation until February 2019, she did check a box on a District registration form ahead of enrollment to indicate his prior receipt of "Speech/Language" services, noted at FF #6.

On September 13, as recounted at FF #8, Parent reported to Kindergarten Teacher that Student participated in private speech therapy, and reiterated a belief that he has an "articulation delay." Kindergarten Teacher at FF #11 conceded to the SCO that it was occasionally difficult to understand Student when he spoke "quickly" or "out of context." The IRP finalized on September 26 denotes, at FF #10, that Student "uses very little language to express ideas," that Student's speech "contains many articulate [sic] errors and is often unintelligible," that Student "asks questions or contributes to discussions infrequently," and that Student exhibits "[n]o/little discrimination of" both rhyme and initial sounds. Further, based on Kindergarten Teacher's notes at FF #10, it is apparent that the SST was considering Student for a "possible I.E.P." in September.

By November 1, FF #20 shows that Principal, IEP Case Manager, and other School staff had knowledge of Parent's initial evaluation request, to include the written statement that concerns centered on Student's "articulation and consonant deletion related speech delay." IEP Case Manager learned more about Parent's concerns through a telephone call that same day, detailed at FF #21, which revealed that "the main concern is his speech articulation, which he was evaluated for at [local hospital] and qualified for services." Parent withdrew the initial evaluation request on November 12, but IEP Case Manager explained to her at FF #23 that they "could regroup come Jan./Feb. to discuss his academic progress here and potentially meet if necessary."

Student's grades noted at FF #17 and #27 reflect a D in Reading and an F in Math as of October 9, and an F in Reading and an F in Math as of December 21. The grades in Reading and Math were based on work performance and testing, as opposed to only participation in other subjects, and Kindergarten Teacher surmised that Student did not score well on unit reading assessments. As of December 18, Literacy Interventionist had observed, at FF #26, that Student's "issues with speech [were] hindering" his progress through the DIBELS monitoring assessments.

District argues that "general education interventions resulted in measureable progress." *Response*, p. 7. The child identification process is not contravened where a district considers a response to intervention ("RTI") prior to referring a student for an evaluation. *See Letter to Ferrara*, 60 IDELR 46 (OSEP 2012). RTI is a "schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student

achievement and reduce problem behaviors.” *Memo to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011). RTI cannot be used to delay or deny a timely initial evaluation. *Id.*

In this matter, as recounted at FF #9-10, School appropriately assessed Student through a Kindergarten Readiness Assessment on August 31, and thereafter developed the IRP, which reflected weaknesses for Student in literacy and math. The SST also created a READ Plan for Student by October 2, and implemented Tier 2 reading and literacy interventions, as noted at FF #12. By January 30, School increased the frequency of the Tier 2 reading supports because, as noted by Literacy Interventionist at FF #28, Student’s “articulation was hindering his progress.” The primary measure of Student’s progress, the DIBELS, was first administered on September 17.

District asserts that based on Student’s “progress as a result of the interventions already in place, the school team saw no need to pursue a special education evaluation” by November 12, the date Parent withdrew the initial evaluation request. *Response*, p. 7.

While Student surpassed an NWF-CLS goal by December, his FSF score was “Well Below” benchmark in September, and he had not met a goal of “30” by February, as detailed at FF #29. Kindergarten Teacher recognized Student’s struggles by October based on her comment at FF #14 that his benchmark performance was “in the red.” And whether the scores demonstrate growth or not, as outlined at FF #30-31, it is difficult to assess reading readiness given Student’s articulation and verbal communication challenges. Private Therapist at FF #16 reiterated to Parent on September 25 that “articulation concerns are not separate from early phonics work.” Plus, as noted at FF #31, the interventions utilized here do not directly address articulation errors.

Again, school districts “need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities” *Abington Sch. Dist.*, 696 F.3d at 252. Nevertheless, once a school district is on notice of behavior that is likely to indicate a disability, the child must be identified and evaluated within a reasonable time period thereafter. *Wiesenberg*, 181 F. Supp. 2d at 1311. A child so identified is not automatically eligible, but instead must undergo an initial evaluation to determine whether the child is a child with a disability, and what the educational needs of the child are. 34 C.F.R. § 300.301; ECEA Rule 4.02(4).

In the instant matter, the SCO concludes that District’s knowledge of Student’s articulation struggles, as of the start of School’s third quarter on January 8, 2019, raised a reasonable suspicion that Student should have been referred for an initial evaluation. The totality of the circumstances at that time demonstrate that School was equipped with: (1) an understanding that Student received private speech-language therapy, (2) statements on separate occasions from Parent to Kindergarten Teacher and IEP Case Manager that Student has an articulation delay, (3) the October 31 request for an initial evaluation sent to Principal and other School staff citing articulation and consonant deletion as a concern, (4) Kindergarten Teacher’s in-class observations of Student’s speech, (5) the IRP revealing articulation errors and often unintelligible speech, (6) Student’s academic performance in Math and Reading, and (7) Literacy Interventionist’s observation that Student’s speech issues impeded his intervention progress.

Accordingly, District's failure to refer Student for an initial evaluation under the IDEA constitutes a violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1). Contraventions of child find, and of the duty to assess, are procedural in nature. *State of Hawaii*, 158 F. Supp. 2d at 1196; *D.K.*, 696 F.3d at 249-250. Procedural inadequacies "alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity." *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001). A "child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place." *R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007). Otherwise stated, a "procedural violation cannot qualify an otherwise ineligible student for IDEA relief." *Id.*

In this case, District is currently evaluating Student to determine if he is a child with an IDEA-eligible disability, and based upon Parent's consent dated February 19, the sixty-day deadline for its completion is April 20. 34 C.F.R. § 300.301(c). District did not commence an initial evaluation of its own accord between the point at which the air of suspicion within School regarding Student's speech-language challenges peaked, January 8, 2019, and February 13, 2019, the date Parent again requested that School evaluate Student based on ongoing speech-related concerns.

Still, the SCO cannot "speculate as to whether Student would have qualified for services under IDEA, and thus have a right to FAPE, as Child Find does not assure eligibility but instead serves as a locating and screening framework to identify those children potentially in need of services." *Weld RE-4 School District*, 119 LRP 5662 (SEA CO 1/2/19). Although District disregarded its procedural obligations, Student has not established that he was, or should have been, IDEA eligible during the at-issue timeframe. Relief is now provided in light of the IDEA's purposes, which may include an award of staff training in the area of law in which violations were found to benefit a specific student or to remedy procedural violations that may benefit other students. *See Park, ex rel. Park v. Anaheim Union High School District*, 464 F.3d 1025, 1034 (9th Cir. 2006).

VI. REMEDIES

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

- a. Failing to provide prior written notice of the decision to not conduct an initial evaluation following Parent's October 31, 2018 request, consistent with 34 C.F.R. § 300.503.
- b. Failing to refer Student for an initial evaluation under the IDEA, between January 8, 2019 and February 13, 2019, consistent with 34 C.F.R. § 300.111 and ECEA Rule 4.02.

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

1. By **May 6, 2019**, the District must submit to CDE a proposed corrective action plan ("CAP") that effectively addresses the two (2) violations noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as

to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:

- a. Training on the requirements of 34 C.F.R. § 300.503(a), in accordance with this Decision, to address the provision of prior written notice, must be conducted with IEP Case Manager and Principal, in addition to any other School staff deemed appropriate by District, no later than **June 21, 2019**.
- b. Training on the requirements of 34 C.F.R. § 300.111 and ECEA Rule 4.02, in accordance with this Decision, to address special education referrals, must be conducted with Kindergarten Teacher, IEP Case Manager, Literacy Interventionist, appropriate members of School's SST, and at least one School administrator, in addition to any other School staff deemed appropriate by District, no later than **June 21, 2019**.
- c. Evidence that such trainings have occurred must be documented (i.e. training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets, with roles noted) and provided to CDE no later than **June 28, 2019**. These two trainings may be conducted in-person, or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast. If the individuals identified in paragraphs (a) and (b) above are no longer employed by the District when the training occurs, the District may train staff occupying identical roles in order to demonstrate compliance with this remedy.

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

Please submit the documentation detailed above to CDE as follows:

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

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

VII. CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13. If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due

Process Complaint on the issue with which the party disagrees. *Id.*; *See also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 15th day of April, 2019.

Brandon Edelman, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1-10

- Exhibit 1: May 2018 Speech-Language Evaluation and Progress Notes
- Exhibit 2: December 2018 Speech-Language Progress Summary
- Exhibit 3: April 2016 Speech-Language Assessment and Evaluation Summary Report
- Exhibit 4: December 2018 E-mail Correspondence
- Exhibit 5: December 2018 Literary Performance Report
- Exhibit 6: September 2018 Individual Readiness Plan
- Exhibit 7: Student Grade Report
- Exhibit 8: September and October 2018 E-mail Correspondence
- Exhibit 9: October and November 2018 E-mail Correspondence

Response, pages 1-11

- Exhibit A: All Requests for Parental Consent (2018-2019 Academic Year)
- Exhibit B: All Prior Written Notices (2018-2019 Academic Year)
- Exhibit C: All Notices of Meetings (2018-2019 Academic Year)
- Exhibit D: Student's Health/Medical History Documentation
- Exhibit E: All Grade Reports (2018-2019 Academic Year)
- Exhibit F: Correspondence
- Exhibit G: District Policies and Procedures
- Exhibit H: Witness/Staff List
- Exhibit I: UPS Delivery Confirmation
- Exhibit J: Readiness Assessment, Individual Readiness Plan, DIBELS scores, READ Plan

Reply, pages 1-7

Telephonic Interviews

- Parent: March 7, 2019
- Kindergarten Teacher: March 11, 2019
- IEP Case Manager: March 11, 2019