

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

**State-Level Complaint 2019:518
Cherry Creek 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 Cherry Creek School District (“District”) through a state-level complaint (“Complaint”) properly filed on Student’s behalf by legal counsel (“Attorney”) on Monday, March 18, 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.

District filed a response to the Complaint (“Response”) on April 3, 2019. The SCO learned on April 10, 2019 that Attorney and Parent discontinued their attorney-client relationship in this matter, and given the timing of this circumstance in relation to the opportunity for Parent to file a reply to the Response (“Reply”) pursuant to established investigatory timelines, the SCO extended the submission deadline to April 19, 2019. Parent filed a Reply to the Response on April 18, 2019.

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 March 18, 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).

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”), found at 1 CCR 301-8, 2220-R-1.00, *et seq.*

III. COMPLAINT ALLEGATIONS

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

1. Failed to identify and evaluate Student when District was on notice, as early as April 2018, that Student may have a disability and be in need of special education and related services, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).
2. Failed to conduct an initial evaluation, as requested by Parent on December 18, 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 thirteen-year-old not currently identified as eligible for special education and related services as a child with a disability under the IDEA, presently attends seventh grade at a neighborhood middle school (“School”) located within District. *Complaint*, p. 2; *Response*, p. 2. At all times since starting sixth grade on August 14, 2017, Student has been enrolled solely in School’s general education curriculum. *Exhibit D*, pp. 2-3; *Exhibit H*, p. 3.
2. When completing District registration paperwork, as well as medical forms for the 2017-2018 and 2018-2019 academic years, Parent did not identify social-emotional concerns, or provide information with respect to any suspected IDEA-eligible disabilities or related referrals and evaluations. *Exhibit C*; *Interview with Parent*. Parent documented diagnoses of asthma and allergies, and corresponding over-the-counter medications, on the medical forms. *Exhibit C*.
3. Student is described as exceptionally social, outgoing, and popular, and as “very well-liked” by both peers and teachers at School. *Interviews with Parent and School Counselor*. She is engaged in after-school activities, to include athletics, and characterized academically as a “good student.” *Interview with Parent*. Student’s affinity for friendship, while not uncommon at this stage of development for a child her age, presented challenges for her during the 2017-2018 academic year. *Interviews with Parent and School Counselor*. These struggles with peer relationships at that time, chronicled primarily as “conflict” and “drama” with female classmates which became a “distraction” for Student, are detailed later in these findings. *Id.*
4. The instant dispute arises from Parent’s assertion that District failed to identify and evaluate Student as a child with a suspected disability, as early as April 2018, based on knowledge of

Student's social-emotional issues, behavioral problems, and academic struggles. *Complaint*, pp. 10-11. Parent also argues that District did not promptly provide an initial evaluation for Student consistent with the IDEA and her written request of December 18, 2018. *Id.* at p. 11.

5. District responds that it did not possess information between April 2018 and December 18, 2018 to suspect that Student might have a disability, and that it undertook reasonable efforts to target areas of suspected disability with Parent prior to providing Prior Written Notice & Consent for Initial Evaluation ("Consent to Evaluate") in February 2019. *Response*, pp. 4-6.
6. The parties' respective positions require the SCO to evaluate both the information District knew or had reason to know, between April 2018 and December 2018, to determine if District should have identified and evaluated Student as a child suspected of having a disability who may be need of special education and related services, and the actions District took upon acquisition of Parent's written request for an initial evaluation in accordance with the IDEA.

B. The 2017-2018 Academic Year: Sixth Grade at School

7. Parent emphasized to the SCO during this investigation, after the close of Attorney's legal representation in this matter on or about April 10, 2019, that she "does not have a complaint for sixth grade" as that "is in the past." *Interview with Parent*. However, she did not withdraw the positions presented in the instant Complaint regarding the two allegations accepted for investigation. *Id.*; *Reply*. Accordingly, the SCO now considers each of these cited concerns, with the initial pair materializing between October 16, 2017 and December 22, 2017, the second quarter of Student's sixth grade year at School. *Complaint*, pp. 2, 5; *Exhibit H*, p. 3.
8. First, as described in the Complaint, District administered the Naglieri Nonverbal Ability Test Third Edition ("NNAT3") on November 15, 2017, an assessment with two primary purposes: to identify gifted and talented students, and to provide a brief nonverbal measure of general ability. *Exhibit 10*; *NNAT3 Manual Levels E-G*, p. 4. Student scored in the low average range, with a Naglieri Ability Index of 83, which corresponds to a percentile rank of 14. *Exhibit 10*.
9. Second, on December 5, 2017, Student's father contacted School Counselor to obtain updates on Student's "behavior," specifically writing "I know she was having problems with those girls again. She's still struggling socially from what I witness or phone calls I get." *Exhibit 2*. School Counselor advised Student throughout this academic year, and explained to the SCO that this e-mail pertained to "conflict" between groups of girls in which Student was also involved. *Interview with School Counselor*. Student conferred with School Counselor to process peer-related issues, such as when she and a friend "broke up." *Id.* Although Student could become "quite upset" in such situations, she never expressed any anxieties, stress, or depression. *Id.*
10. Parent characterized these conflicts as "jealousy and drama" with peers, stating that this lead to anxiety and social distress for Student. *Interview with Parent*. For instance, Parent pointed to one incident of "harassment" wherein an anonymous individual wrote a disparaging

statement on a restroom wall directed toward Student. *Id.* Some of this “drama” stemmed from Student’s “overly popular” status. *Id.* On December 22, 2017, Student and several peers were required to enter into a No Contact Contract “because of a previous history of smack talk and threatening.” *Exhibit 1*, pp. 3-6. Parent stated that the “drama” also distracted Student academically to the point she was “not performing as she was capable,” adding that Student’s academic record is historically consistent with a “B” average. *Interview with Parent.* School Counselor deemed it “impressive [Student] was able to maintain such good grades in sixth grade given the level of conflict she was involved in.” *Interview with School Counselor.*

11. Student’s second quarter grade report aligns with Parent’s depiction of “average” academic performance, apart from a D+ in Math and a D in Science, as she earned an A in Drama, a B- in Language Arts, a B in Physical Education, and an A in Social Studies. *Exhibit 6.* Student had finished School’s first quarter with As and Bs in the same subjects, aside from a C in Math. *Id.*
12. The next series of concerns cited in the Complaint center primarily on behavior between January 8, 2018 and March 16, 2018, the third quarter of Student’s sixth grade year at School, connected to the peer “conflict” and “drama.” *Complaint*, pp. 2-3; *Exhibit H*, p. 3; *Interviews with Parent and School Counselor.* On January 26, 2018, Student and multiple peers were required to enter into a No Contact Contract “because of a previous history of smack talk and threatening.” *Exhibit 1*, pp. 1-2. The behaviors outlined in this No Contact Contract are identical to those set out in the earlier No Contact Contract of December 2017, to include “[t]alking about each other to others, creating drama at school, [t]hreatening to fight at school, [and] [b]eing in inappropriate areas of the building looking for other students.” *Id.*
13. On February 2, 2018, Assistant Principal 1 filed a Behavior Management Referral after Student was discovered “hanging out in the hallway with her friends and slapping each other in the butt.” *Exhibit 3.* Student received two after school detentions, and was required to enter into a Student Behavior Agreement on February 8, 2018 to acknowledge a “violation of at least one of [School’s] disciplinary policies . . . in regards to fighting, intimidation/harassment or being tardy.” *Id.*; *Exhibit 4.* Student did not thereafter violate the Student Behavior Agreement, and a review of Student’s disciplinary file shows that this “Inappropriate Contact” hallway incident constitutes her sole disciplinary action at School to date. *Exhibit B*, p. 2.
14. School Counselor stated it was “highly unusual” for a sixth grader to be involved in “heavy levels of communication and conflict” with other students for such a long period of time, but added that Student responded positively to the behavior-related interventions while other involved peers required further discipline. *Interview with School Counselor.* Parent promoted a positive rapport with School Counselor and met with him multiple times to address Student’s grades and “drama” because “he was an advocate of her being a good student.” *Interview with Parent.* By all accounts, the “drama” and “conflict” resolved and did not continue into the 2018-2019 academic year. *Interviews with Parent and School Counselor.*

15. School's third quarter concluded on March 16, 2018, at which point Student's grade report denoted a C+ in Language Arts, C+ in Math, B- in Physical Education, D in Science, B+ in Social Studies, and D+ in Spanish. *Exhibit 6*. These results, Parent concluded, epitomize the adverse impact of the distracting social issues on her academic performance. *Interview with Parent*.
16. The remaining set of concerns cited in the Complaint for Student's sixth grade year occurred between March 19, 2018 and May 25, 2018, School's fourth quarter. *Complaint*, pp. 3-5; *Exhibit H*, p. 3. On March 22, 2018, Student and a peer "concocted a story" and "ditched" the second half of Social Studies class. *Exhibit 5*. The SCO finds no evidence in the Record that she exhibited similar or additional attendance-related behaviors from this point to May 25, 2018, the date School issued Student's fourth quarter grade report. *Interview with Parent*.
17. To close out the 2017-2018 academic year, Student earned a B in Language Arts, a C in Math, a C+ in Physical Education, a B- in Science, a B in Spanish, and a D in Social Studies. *Exhibit 6*. Parent stated to the SCO that Student's "social anxiety and distraction" affected her grades during School's latter three quarters, and that she does not attribute any related struggles to absenteeism or failing to complete compulsory coursework. *Interview with Parent*. Contrarily, at least for the fourth quarter Social Studies class, the SCO finds that Student did not turn in a "final" project comprising 22.73% of the overall grade. *Exhibit D*, p. 6. Parent affirmed that teachers adequately apprised her when grades fell below expectations, and that Student "does whatever it takes to get her grades back up." *Interview with Parent*.
18. Parallel to the concerns with academics, the Complaint asserts that Student's spring 2018 Colorado Measures of Academic Success ("CMAS") "scores were a departure downward from [Student's] 4th and 5th Grade assessments." *Complaint*, p. 5. Student "Did Not Yet Meet Expectations" in English Language Arts/Literacy and Math, scoring in the third and first percentile respectively. *Exhibits 7-8*. She had "Met Expectations" in English Language Arts/Literacy and "Partially Met Expectations" in Math on spring 2016 and 2017 CMAS assessments. *Exhibit 9*, pp. 1-4, 9-12. Parent was not familiar with the CMAS scores, but stated that Student is not a "good test taker" as she is "more of a hands-on learner" and lacks concentration to focus for long periods of time. *Interview with Parent*. While a CDE specialist indicated below average performance on the CMAS and the NNAT3 could have prompted School's consideration of instructional interventions or other supports, based in part on certain academic performance, neither she nor the SCO reach such a definite determination.
19. Overall, while Parent assigned less significance to the scope of Student's sixth grade year as initially presented through the Complaint's allegations, principally because the "peer issues" with a specific group of girls subsided, she underscored to the SCO during an interview that her "biggest concern" emanates from the 2018-2019 academic year. *Interview with Parent*.

C. The 2018-2019 Academic Year: Seventh Grade at School

20. This chief concern identified by Parent purportedly occurred on September 18, 2018, more than five weeks after the first day of class on August 13, 2018. *Exhibit 12*, p. 2; *Exhibit H*, p. 2. An Incident Report completed by Student on September 20, 2018 alleges that Social Studies Teacher inappropriately touched her leg during class. *Exhibit 12*, p. 4. Assistant Principal 1 contacted Parent and law enforcement, pursuant to District's mandatory reporting process, upon receipt of the allegations. *Exhibit 12*, pp. 1-3. Following an official investigation, law enforcement did not find probable cause to file criminal charges, and Parent did not pursue any independent legal action. *Exhibit 16*, p. 11; *Interview with Parent*.
21. Parent reported a decline in Student's cumulative social, emotional, and mental health as a result of the alleged incident, specifically stating that Student experienced heightened anxiety and depression, and a decrease in confidence, thus impacting her relationship with School Counselor and all aspects of her education to include athletics. *Complaint*, p. 6; *Interview with Parent*. She also cited an increase in academic and behavior struggles. *Complaint*, p. 5.
22. Student's first quarter grade report of October 12, 2018 does not support alleged academic difficulties as she earned an A- in Art, an A- in Language Arts, a B in Math, an A+ in Money, a B+ in Physical Education, and a B in Science. *Exhibit 6*; *Exhibit H*, p. 2. School staff moved Student under the instruction of another teacher for Social Studies, and Student still earned an A despite the mid-quarter transition. *Interview with School Counselor*; *Exhibit J*, pp. 3-4.
23. School staff also placed Student in a different "community" within the building, and offered the opportunity to alter her entire academic schedule, but Parent opted to incrementally modify only certain classes, to include a change in School counselors. *Interview with School Counselor*. Despite these changes, Parent asserted that Student's issues were compounded when she arrived to math class on November 6, 2018 and had to leave when she encountered Social Studies Teacher serving as a substitute instructor. *Interview with Parent*; *Exhibit 13*. Parent stated to the SCO that Student was not taking schoolwork "very seriously" and that Student continued to be distracted within the educational setting. *Interview with Parent*.
24. With three days left in the second quarter, on December 18, 2018, English Teacher e-mailed Parent to detail "ongoing issues with phone usage and complaining during class." *Exhibit 14*. She wrote that Student "seems to avoid coming to class as well" and that upon arrival "she almost always asks to leave for some reason." *Id.* As an example, she highlighted an incident where Student lied to a teacher in order to remain in that teacher's classroom. *Id.* She further indicated that Student "often says work is too hard for her, but she refuses help" and that Student "is too smart to pretend that she doesn't understand." *Id.* Parent wrote back that this update "definitively caught [her] off guard as this is the first time [she has] had one of [Student's] teacher's reach out to [her] about behavioral issues and missing class." *Id.*

25. Parent assured English Teacher she would speak with Student about the behavior, noting it is “definitely out of character for her to be disruptive and disrespectful in class.” *Id.* That same morning, Parent also e-mailed School Counselor with “concerns that [Student] is having social/emotional issues that are interfering with her education. Her grades are dropping and I received a concerning email from her English teacher this morning. Could you please evaluate her for an IEP?” *Exhibit 15.* School Counselor wrote in response that evening “I would love to have a conversation before we start such extreme problem solving. I will call you soon!” *Id.* He immediately elevated the request to Coordinator of Student Achievement, simultaneously copying three assistant principals, two deans, and another counselor on the correspondence. *Exhibit E*, p. 71. On December 19, 2018, Assistant Principal 2 forwarded the thread to Special Education Coordinator, writing “[w]e will need to prompt this process.” *Id.*
26. When asked by the SCO about classifying Parent’s request as “extreme problem solving,” School Counselor said he was “really surprised by this e-mail” because, based on his work with Student, he did not believe she might have a disability. *Interview with School Counselor.* Despite perplexity, the SCO finds that School Counselor, now in his twenty-fifth year of education, with the last eight spent in his current role at School, followed building-level policy by notifying multiple School staff. *Id.* He added that Coordinator of Student Achievement is School’s contact in instances where one might suspect a student needs additional supports, and that Parent’s request required him to take the instantaneous action of informing her. *Id.*
27. Secondary Special Education Director reviewed Student’s PowerSchool records, and consistent with School Counselor’s position, did not find any concerns to “trigger” a suspicion that Student might have a disability and be in need of special education and related services as of April 2018. *Interview with Secondary Special Education Director.* With more than forty years of special education experience, Secondary Special Education Director provided the SCO with an overview of District’s procedures and responsibilities related to the identification of children with disabilities, to include her ongoing trainings with “secondary coordinators” across eleven middle schools and seven high schools.” *Id.* School’s coordinated care team, she added, remains alert for a “myriad of reasons” to suspect a student might have a disability, such as through attendance, health, grades, or discipline. *Id.* She also emphasized District’s broad commitment to public awareness and community referrals in this respect. *Id.*
28. Student completed School’s second quarter on December 21, 2018, earning a B+ in Art, a B in Everyone has a Story, a C- in Language Arts, an A- in Math, an A- in Physical Education, a C in Science, and an A in Social Studies. *Exhibit D*, p. 2; *Exhibit H*, p. 2. Also on that last day of the second quarter, Special Education Coordinator introduced herself to Parent by e-mail to acknowledge receipt of the request for an IDEA evaluation. *Exhibit E*, p. 67. She advised that she would contact Parent after School’s winter break, December 24, 2018 through January 4, 2019, to answer questions and collect additional information regarding concerns. *Id.*; *Exhibit H*, p. 2. Parent confirmed this correspondence with the SCO, but denied receiving five subsequent contacts from Special Education Coordinator starting in School’s third quarter, one day after a scheduled teacher workday held on January 7, 2019. *Interview with Parent.*

29. A Student Narrative prepared by Special Education Coordinator describes seven specific contacts with Parent, to include the initial December 21, 2018 e-mail. *Exhibit E*, p. 76. The next entry of January 8, 2019 reads that Special Education Coordinator phoned Parent and left a voice message asking that Parent return the call in order to “discuss the IEP evaluation process and talk about [Student’s] strengths, needs and concerns.” *Id.* The next record of January 11, 2019 provides that Special Education Coordinator called and spoke with Parent by telephone, at which time Parent was “not able to talk” and thus they “made a plan for [Special Education Coordinator] to call her back on Tuesday, 1/15/19, around 10:00 AM.” *Id.* Entries of January 15, 2019, January 17, 2019, and January 28, 2019 indicate that Special Education Coordinator again called Parent and in each instance left her a voice message. *Id.*
30. Parent told the SCO that she did not receive any voice messages from Special Education Coordinator in January 2019, and that she did not remember the conversation of January 11, 2019. *Interview with Parent.* Upon review of the Student Narrative, Parent then reported that she did “recall speaking with her on the 11th.” *Id.* Parent added that she communicates by e-mail so there is always a “paper trail” to “show when the correspondence happens.” *Id.*
31. The Student Narrative’s typed descriptions are the only “paper trail” evidence here, and the SCO finds them credible based on the detail and the contemporaneity with which Special Education Coordinator entered them into PowerSchool after calling the telephone number of record for Parent. *Exhibit E*, p. 76; *Interview with Special Education Coordinator.* While Parent referenced limited availability due to being “out of town on business,” the Student Narrative reflects an unrelated telephone conversation Parent had with Dean on January 14, 2019 regarding a “phone incident,” and on January 15, 2019 Parent responded to an e-mail from English Teacher explaining that she is “worried that [Student] is letting her grades slip due to the distraction of the phone.” *Exhibit E*, pp. 59, 76; *Interview with Parent.*
32. Principal advised District Paralegal on January 30, 2019 that Parent had requested an initial evaluation, and that Parent had been largely unresponsive to Special Education Coordinator’s numerous attempts to reach her regarding the Consent to Evaluate. *Exhibit E*, p. 64. District Paralegal replied that she would have District’s legal counsel contact Parent’s Attorney. *Id.*
33. Special Education Coordinator e-mailed Parent on February 1, 2019, writing “[s]ince I have left you several phone messages and have not heard back from you, I wanted to reach out to you by email.” *Interview with Parent; Exhibit E*, p. 52. The e-mail continues “I would like to discuss [Student’s] strengths and concerns with you. Then, we can determine which areas of assessment are needed, obtain your written consent for evaluation, and the [School] IEP team can begin testing.” *Exhibit E*, p. 52. Special Education Coordinator promptly forwarded this communication to District Paralegal, summarizing the attempted contacts at FF #29 and asking “If I do not hear back from [Parent] by the end of next week, would you advise I send home (by mail) the Consent for Evaluation form and Parent Rights anyway?” *Id.* at pp. 51.

34. Special Education Coordinator, not having received a response from District Paralegal, followed up on February 12, 2019 to again request guidance. *Id.* at p. 51. District Paralegal wrote “I am not sure how to proceed” and forwarded Special Education Coordinator’s inquiry to Secondary Special Education Director. *Id.* at pp. 50-51. The next day, Secondary Special Education Director instructed Special Education Coordinator to provide Parent with the “parental PWN and procedural safeguard” by certified mail and e-mail, and to ensure Parent is aware that her input is requested with respect to any additional assessments. *Id.* at p. 50.
35. Special Education Coordinator copied Principal on the February 1 and February 12, 2019 communications, but did not initially e-mail Secondary Special Education Director because Principal notified her that Student’s family had legal representation. *Interview with Special Education Coordinator.* If Parent had not been represented, she would have reached out to Secondary Special Education Director. *Id.* Secondary Special Education Director prefers direct communication from her team, but told the SCO that in this case, at a recommended minimum, at least three contacts with Parent were reasonably made and appropriately documented to ensure her informed decision-making and a comprehensive initial evaluation design. *Interview with Secondary Special Education Director.* This process includes garnering supplementary information concerning the child, which the SCO finds to be especially important here as Special Education Coordinator did not meet Student until April 2019. *Interviews with Secondary Special Education Director and Special Education Coordinator.*
36. Special Education Coordinator provided Parent with the Consent to Evaluate, along with CDE’s Procedural Safeguards Notice, by certified mail on February 19, 2019 and by e-mail on February 20, 2019. *Exhibit A*, pp. 2-6; *Exhibit E*, p. 11. Each correspondence explained that parental consent is required to determine if Student is eligible for special education, and the e-mail advised that parental input throughout the evaluation process is important. *Id.* The four areas of evaluation outlined in the Consent to Evaluate, which was definitively received by Parent on February 20, 2019, include general intelligence, academic performance, communicative status, and social-emotional status. *Exhibit A*, p. 3; *Interview with Parent.*
37. One hour prior to receiving Special Education Coordinator’s e-mail on February 20, 2019, Parent was informed by English Teacher that while “[Student] has a much better attitude and has been getting her work done . . . she is still at an F in my class.” *Exhibit E*, p. 5. Student planned to attend tutorials for essay assistance, English Teacher added, and Parent thereafter scheduled a conference with English Teacher to discuss Student’s academic performance. *Id.*
38. One week later, on February 27, 2019, Parent called Special Education Coordinator to ask if Student could return the Consent to Evaluate, which Parent signed on February 25, 2019, directly to Special Education Coordinator at School. *Id.* at p. 2; *Interviews with Parent and Special Education Coordinator.* Special Education Coordinator accepted delivery of the signed Consent to Evaluate from Student at School on March 11, 2019. *Exhibit E*, p. 3.

39. School's third quarter ended four days later, on March 15, 2019, at which point Student earned a B- in Healthy Habits, a C+ in Language Arts, a B+ in Math, an A in Physical Education, a B- in Science, a B in Social Studies, and a B in Technology. *Exhibit D*, p. 2; *Exhibit H*, p. 2. With School's spring break occurring March 18 through March 22, 2019, and School experiencing a "few snow days" as well, Social Worker commenced the initial evaluation process on April 1, 2019 by calling Parent to schedule a social-emotional assessment. *Exhibit E*, p. 76; *Exhibit H*, p. 2; *Interview with Special Education Coordinator*. Special Education Coordinator serves as the "team lead for this evaluation," with the full group consisting of Social Worker, School Psychologist, Speech Teacher, and a School counselor. *Exhibit E*, p. 3.
40. The two claims before the SCO are connected through a core tenet of compliance with IDEA's preplacement procedures, whether affirmatively grounded in a school district's suspicion that a child may have a disability and need special education services or initiated by a parental request for an initial evaluation, and require analysis within the purview of these processes.

V. CONCLUSIONS OF LAW

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

Conclusion to Allegation No. 1: District did not violate Child Find by failing to initiate a special education evaluation prior to Parent's request when District did not have reason to suspect that Student may be in need of specialized instruction as a result of a qualifying IDEA disability.

A. The Child Identification Process under the IDEA

The SCO first considers Parent's allegation that, by reason of suspicion stemming from a history of social-emotional, behavioral, and academic issues, District failed to affirmatively identify Student as needing an initial evaluation to determine her IDEA eligibility. *Complaint*, pp. 10-11.

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).

An essential element of the child identification process is the special education referral, placing upon school districts an affirmative obligation 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.” *Smith v. Cheyenne Mountain Sch. Dist.* 12, 2017 WL2791415, at *18 (D. Colo. 2017) (quoting *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)). Nevertheless, this “child-find obligation is in no way absolute.” *Id.*

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). Altogether, 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 in *Cari Rae S.* or the Tenth Circuit defining a “relatively low” threshold, the SCO turns to this case’s individual circumstances to determine if they collectively raised a reasonable suspicion that School staff 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)).

B. Parent’s Concerns with Student’s Behavior and Academics

Parent raised concerns with Student’s social-emotional issues leading to behavioral problems and academic struggles, each of which can be a red flag that triggers a school district’s special education referral obligation. *Smith*, 2017 WL2791415, at *18 (citing *Wiesenberg*, 181 F. Supp. 2d at 1311); *See also Krawietz v. Galveston Indep. Sch. Dist.*, 118 LRP 33959 (5th Cir. 08/17/18).

Although the circumstances of each case drive whether a school district knew of or should have suspected a disability in a student, and not any one red flag alone is generally sufficient to trigger a special education referral, suspicion may arise from numerous or increasing disciplinary referrals for violations of a student code of conduct, significant absences, and failing or noticeably declining grades. *Smith*, 2017 WL2791415, at *7; *Cari Rae S.*, 158 F. Supp. 2d at 1192 (holding that 159 absences, numerous behavioral referrals and failing grades should have triggered a special education referral during student’s sophomore year). Red flags can also include anxiety, distress, depression, or social discord. *In re: Student with a Disability*, 72 IDELR 198 (SEA CT 2018).

Still, school districts “need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities” *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 252 (3d Cir. 2012). 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 SCO concludes that District here, based on the weight of the evidence presented, had insufficient reason to suspect a disability between April 2018 and Parent’s evaluation request of December 18, 2018.

In terms of the 2017-2018 academic year here, it is uncontested at FF #9-10 and FF #12-14 that it brimmed with “conflict” and “drama” for Student and a group of particular peers. It is also uncontroverted that these “peer issues” for Student endured through at least the first week of February 2018, and that the “drama” developed widely in the context of companionship cessation. As a result, School required Student and other peer participants at FF #10 and FF #12 to sign No Contact Contracts on December 22, 2017 and January 26, 2018 “because of a previous history of smack talk and threatening.” The specific behaviors identified in each No Contact Contract included “[t]alking about each other to others, creating drama at school, [t]hreatening to fight at school, [and] [b]eing in inappropriate areas of the building looking for other students.”

As detailed at FF #13, Assistant Principal 1 issued a Behavior Management Referral on February 2, 2018 for two after-school detention sessions because Student was “hanging out in the hallway with her friends and slapping each other in the butt.” Consequently, Student entered into a Student Behavior Agreement on February 8, 2018. The evidence here shows that Student was not subject to any additional disciplinary actions, apart from the two-after school detentions, and that Student fully complied with the Student Behavior Agreement. Although School Counselor at FF #14 categorized the level of “conflict” and “drama” as “highly unusual” for all students involved given its duration, he reported a positive response for Student, and noncompliance from certain other peers necessitating additional discipline, to these behavior-related interventions.

There is evidence of a mild downturn in Student’s academic performance in conjunction with a portion, but not all, of the aforementioned “drama” and “conflict.” As noted at FF #11, while Student’s lowest grade of School’s first quarter was a C in Math, this fell to a D+ following School’s second quarter, at which point Student also earned a D in Science. At FF #15, Student’s Math grade improved to a C+ by the end of School’s third quarter, but her Science grade did not change and she earned a D+ in Spanish. By the end of School’s fourth quarter on May 25, 2018, more than three months after entry of the Student Behavior Agreement, Student at FF #17 improved the Math grade to a C, the Science grade to a B-, and the Spanish grade to a B. She did finish Social Studies with a D, failing to complete a “final” project, and at FF #16 “ditched” half of Social Studies class on March 22, 2018 with a classmate. While it may have been prudent for School to at least explore targeted academic interventions for Student based on this slight decline in certain grades and some standardized testing results as noted at FF #18, Student did not fail any coursework and she improved performance in Math, Science, and Social Studies in seventh grade.

As for the 2018-2019 academic year, Parent’s primary concern pertains to the alleged incident of September 18, 2018 involving Social Studies Teacher, outlined at FF #20. This includes Student, having been removed from Social Studies Teacher’s instruction shortly after the allegations, later entering Math class on November 6, 2018, at FF #23, to find Social Studies Teacher as a substitute instructor. The evidence before the SCO does not support Parent’s position that Student’s academic performance, and social, emotional, and mental health, deteriorated as a direct result.

Student's lowest grade throughout the first three quarters of the 2018-2019 school year was a C- in Language Arts. Across each of these first three quarters, reflected fully at FF #22, FF #28, and FF #39, she earned a B, an A-, and a B+ in Math, a B, C, and B- in Science, and an A, A, and B in Social Studies, all of which were academic areas of concern identified by Parent for sixth grade.

The SCO also found no evidence of depression, anxiety, or social discord experienced by Student. The only indication of any behavioral concerns related to Student's attitude and "phone usage" within the classroom, as reflected at FF #24 by English Teacher's e-mail to Parent on December 18, 2018. English Teacher further reported that Student "seems to avoid coming to class as well" and that she "often says work is too hard for her, but she refuses help." Taken aback, Parent responded that this information "definitively caught [her] off guard as this is the first time [she has] had one of [Student's] teacher's reach out to [her] about behavioral issues and missing class." Student finished School's first quarter on December 21, 2018 with an A- in Language Arts, and English Teacher reported a "much better attitude" for Student as of February 20, 2019.

School certainly had sufficient reason to suspect that Student might have a disability requiring special education, so as to potentially warrant a referral, following Parent's December 18, 2018 "request for an evaluation." *Smith*, 2017 WL2791415, at *18 (D. Colo. 2017) (quoting *Wiesenberg*, 181 F. Supp. 2d at 1311). Notwithstanding, based on the entirety of the foregoing information known to School between April 2018 and December 18, 2018, the SCO concludes that Student's "behavior or performance" did not raise a reasonable suspicion that Student might be a child with a disability as defined under the IDEA. *Id.* District was thus under no obligation to refer Student for an initial evaluation during this timeframe, and accordingly did not violate 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3). The SCO now considers Parent's second allegation.

Conclusion to Allegation No. 2: District did not unduly or unreasonably delay a request for parental consent, and appropriately initiated an initial evaluation in accordance with the IDEA.

Parent asserts that District, despite receipt of a written request, did not timely initiate an initial special education evaluation for Student. *Complaint*, p. 11. It is undisputed at FF #25 that Parent asked School Counselor by e-mail on December 18, 2018, prior to the end of School's second quarter during the 2018-2019 academic year, if he could "please evaluate [Student] for an IEP?"

The parent of a child may request an initial IDEA evaluation, the purpose of which 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. §§ 300.301(b) and 300.304(b)(1)(i)-(ii); ECEA Rule 4.02(3)(a). School districts must therefore conduct a full and individual initial evaluation before the initial provision of special education services to a child with a disability. 34 C.F.R. § 300.301(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).

If a school district agrees to assess a child, it must first provide the parent with prior written notice and attain informed parental consent. 34 C.F.R. § 300.300(a). A school district must make “reasonable efforts” to obtain this informed parental consent, and to meet this “reasonable efforts” requirement document its attempts at doing so consistent with 34 C.F.R. §§ 300.322(d), such as through detailed records of telephone calls, correspondence sent to the parents, and visits made to the parent’s home or place of employment. 34 C.F.R. §§ 300.300(a)(1)(iii), (d)(5).

The IDEA does not require school districts to seek parental consent within a specific timeframe, however, the U.S. Department of Education cautions that “delays of several months are generally unacceptable.” *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008); *See also 71 Fed. Reg. 156, 46637* (August 14, 2006) (noting “it would generally not be acceptable for an LEA to wait several months to . . . seek parental consent for an initial evaluation if the public agency suspects the child to be a child with a disability”). Thus, school districts “would be well-advised to request parental consent for evaluations as soon as possible.” *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008).

In this case, FF #25 shows that School Counselor swiftly acknowledged Parent’s request for an IDEA evaluation, and forwarded the original e-mail he received to Coordinator of Student Achievement, five School administrators, and another school counselor. The following day, Assistant Principal 2 informed Special Education Coordinator of Parent’s request. As detailed at FF #28, Special Education Coordinator contacted Parent by e-mail on December 21, 2018, the final day of School’s second quarter, to inform her that she would be in touch following School’s winter break to fully process the request and to attain additional information on Student’s needs.

Special Education Coordinator and Parent presented opposing narratives of the resultant January 2019 correspondence, described starting at FF #29. Special Education Coordinator stated that she contacted Parent by telephone five times between January 8 and January 28, 2019, leaving a voice message on four of the occasions asking Parent to return the call to “discuss the IEP evaluation process and talk about [Student’s] strengths, needs and concerns.” Parent denied receiving these four voice messages, but confirmed a conversation with Special Education Coordinator on January 11, 2019, during which Parent requested that Special Education Coordinator call her back four days later as Parent was “not able to talk” at that time. The SCO concludes Special Education Coordinator’s report is credible based on documentary evidence, a PowerSchool Student Narrative, containing corresponding contact entries posted by Special Education Coordinator contemporaneously with each telephone call. A January 30, 2019 e-mail from Principal to District Paralegal at FF #32 also corroborates the attempted telephone contacts.

On February 1, 2019, Special Education Coordinator contacted Parent by e-mail, writing in part at FF #33 “I would like to discuss [Student’s] strengths and concerns with you. Then, we can determine which areas of assessment are needed, obtain your written consent for evaluation, and the [School] IEP team can begin testing.” She also forwarded this e-mail to District Paralegal seeking advice on how to proceed if she did not hear back from Parent by February 8, 2019. District Paralegal did not respond until Special Education Coordinator at FF #34 sent a second e-mail on February 12, 2019, writing “I am not sure how to proceed.” District Paralegal forwarded

the inquiry to Secondary Special Education Director, and ultimately, following Secondary Special Education Director's instruction, Special Education Coordinator at FF #36 provided Parent with the Consent to Evaluate by certified mail on February 19, 2019 and e-mail on February 20, 2019.

Parent claims that it was unreasonable for District, despite receiving the initial evaluation request on December 18, 2018, to wait until February 20, 2019 to seek informed consent. *Complaint*, p. 7. A delay in seeking parental consent may result in the denial of FAPE. *District of Columbia Pub. Schs.*, 12 ECLPR 109 (SEA DC 2015) (finding that a school district denied a first-grader FAPE when it failed to timely provide parent with referral and consent forms in response to her oral evaluation request). In *District of Columbia Pub. Schs.*, the parent requested an evaluation, and was then invited to attend a referral meeting, which never took place. While a referral meeting is an appropriate method of obtaining parental consent, it cannot be used as a prerequisite to obtaining parental consent. *Id.* The school district violated the IDEA where it did not provide the parent with consent forms within a 120-day timeframe set out by a state-imposed regulation. *Id.*

A delay in seeking consent for an evaluation will not result in the denial of FAPE where a student does not suffer harm as a result of the procedural violation. *P.P. et al v. West Chester Area Sch. Dist.*, 585 F.3d 727 (3rd Cir. 2009). There, the parents submitted a written request for an evaluation on November 22, 2004, but did not receive a consent form until February 2, 2005, seventy-two calendar days later. *Id.* at p. 732. The parents signed a revised consent form on April 11, 2005, the school district started assessing the student in June 2005, and the IEP was finalized in September 2005. *Id.* at pp. 732-733. The Third Circuit Court of Appeals agreed with the district court in that while "the delay in evaluating [the student] was unfortunate," the violation was procedural and thus compensatory education was not proper. *Id.* at pp. 737-738.

In the instant matter, sixty-four calendar days passed between December 18, 2018, the date of Parent's evaluation request, and February 20, 2019, the date Parent received the Consent to Evaluate by e-mail. This timeframe includes School's winter break, from December 24, 2018 through January 4, 2019, covering sixteen calendar days with weekends and one teacher workday. This time period also includes Special Education Coordinator's six attempts to contact Parent to ensure the inclusion of her informed decision-making, between the first day of School's third quarter on January 8, 2019 and February 1, 2019, covering twenty-four calendar days with weekends. Finally, nineteen calendar days elapsed between February 1, 2019, when Special Education Coordinator sought advice from District Paralegal on how to proceed with the matter, and February 20, 2019, the date Parent received the Consent to Evaluate by mail and by e-mail.

Unlike *District of Columbia Pub. Schs.*, where parent was presented with a consent form more than 120 days after the initial evaluation request, and *West Chester Area Sch. Dist.*, where parent was provided with a consent form seventy-two calendar days after the initial evaluation request, Parent here received the Consent to Evaluate sixty-four calendar days after sending the at-issue evaluation request. The SCO recognizes that while a delay of several months is generally unacceptable and that school districts are advised to request consent as soon as possible under *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008), it is also appropriate for a school district to

suggest a referral meeting to ensure a parent provides fully informed consent. *District of Columbia Pub. Schs.*, 12 ECLPR 109 (SEA DC 2015). Here, Special Education Coordinator undertook “reasonable efforts” in accordance with 34 C.F.R. § 300.300(a)(1)(iii) to obtain consent and incorporate Parent’s insight and concerns into the evaluation process. Special Education Coordinator surpassed Secondary Special Education Director’s advised minimum of three parental contacts in this respect, and as documented in PowerSchool consistent with 34 C.F.R. § 300.300(d)(5), Parent was generally unresponsive to five of the seven total contacts attempted.

The SCO concludes it was reasonable for Special Education Coordinator to attempt to speak with Parent over the course of three weeks to identify “strengths, needs and concerns,” especially where Special Education Coordinator had no prior knowledge of, or contact with, Student. All told, these twenty-four calendar days combined with School’s winter break and teacher workday account for forty of the total sixty-four calendar day time period. Special Education Coordinator’s decision to contact District Paralegal on February 1, 2019, instead of Secondary Special Education Director, was unconventional and resulted in the passage of an additional twelve calendar days before receiving a response on how to proceed with the Consent to Evaluate. She explained at FF #35 that if Student’s family had not retained legal counsel, she would have instead contacted Secondary Special Education Director. One more calendar week transpired between that time and Special Education Coordinator’s issuance of the Consent to Evaluate by both mail and e-mail.

Nonetheless, neither the IDEA nor Colorado law establish a parental consent timeline, and in consideration of winter break, the teacher workday, and Special Education Coordinator’s efforts to reach Parent, the SCO finds and concludes that District overall requested “parental consent within a reasonable period of time and without undue delay.” *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008). As noted at FF #38, Parent signed the Consent to Evaluate on February 25, 2019, and requested on February 27, 2019 that Student be permitted to return the endorsed form to Special Education Coordinator at School. Based upon receipt of the Consent to Evaluate from Student on March 11, 2019, District commenced an initial evaluation of Student on April 1, 2019 to determine if she is a child with an IDEA-eligible disability. The sixty-day deadline to complete the initial evaluation pursuant to the IDEA was May 10, 2019. 34 C.F.R. § 300.301(c).

VI. REMEDIES

The SCO finds and concludes that District did not violate any requirements of the IDEA. Accordingly, there are no remedies ordered pursuant to the IDEA and my authority as an SCO.

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 17th day of May, 2019.

Brandon Edelman, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1-14

- Exhibit 1: No Contact Contracts
- Exhibit 2: E-mail dated December 5, 2017
- Exhibit 3: Behavior Management Referral
- Exhibit 4: Student Behavior Agreement
- Exhibit 5: E-mail dated March 22, 2018
- Exhibit 6: Student's Grade Report
- Exhibit 7: Spring 2018 English Language Arts/Literacy CMAS Performance Report
- Exhibit 8: Spring 2018 Mathematics CMAS Performance Report
- Exhibit 9: 2015-2016 and 2016-2017 CMAS Performance Reports
- Exhibit 10: November 2017 Naglieri Nonverbal Ability Test Third Edition
- Exhibit 11: E-mail dated September 20, 2018
- Exhibit 12: September 20, 2018 Incident Reports
- Exhibit 13: November 16, 2018 Incident Report
- Exhibit 14: E-mails dated December 18 and 19, 2018
- Exhibit 15: E-mail dated December 18, 2018

Response, pages 1-8

- Exhibit A: Requests for Parental Consent (April 2018 to present)
- Exhibit B: Disciplinary-Related Documentation
- Exhibit C: Student's Medical Information
- Exhibit D: Student's Grade Report
- Exhibit E: Correspondence
- Exhibit F: District Policies and Procedures
- Exhibit G: USPS Delivery Confirmation
- Exhibit H: Academic Calendars
- Exhibit I: April 2019 Student Narrative and Correspondence
- Exhibit J: Report Cards and Social Studies Individual Student Report

Reply, pages 1-3

- Exhibit 16: General Offense Report

Telephonic Interviews

- Parent: April 16, 2019
- Secondary Special Education Director: April 23, 2019
- Special Education Coordinator: April 23, 2019
- School Counselor: April 23, 2019