

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

**State-Level Complaint 2019:532
Brighton 27J School District**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on April, 29, 2019, by the parents of a child not presently identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

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

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. § 300.153(c), the Colorado Department of Education (CDE) has the authority to investigate alleged violations of IDEA that occurred not more than one year from the date the Complaint was filed. Accordingly, this investigation will be limited to the period of time from April 29, 2018 through April 29, 2019 to determine whether or not a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations accepted for investigation. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

SUMMARY OF COMPLAINT ALLEGATION

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

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.*

1. Failed to identify and evaluate Student when it was on notice that Student may have a disability and be in need of special education and related services, from August 31, 2018 to present, in violation of 34 C.F.R. §§ 300.111 and 300.301, and ECEA Rule 4.02(1)(a).

FINDINGS OF FACT

After an analysis of the record detailed in the appendix, the SCO makes the following findings:

Background:

1. At all times relevant to the Complaint, Student was fourteen years old and resided with Parents within the District's boundaries. Although Student has been identified with a disability under *Section 504 of the Rehabilitation Act of 1973* (Section 504), he has not been identified with a qualifying IDEA disability and resulting need for special education and related services.
2. From August 2018 to February of 2019, Student attended Charter School, a District charter school serving grades nine through twelve.
3. In this Complaint, Parents alleged that Student's history of increasingly significant behavior and disciplinary incidents, as well as declining academic performance, together put the District on notice that Student may be IDEA eligible in the fall of 2018. *Complaint*, pp. 2-8. Based on correspondence between counsel for Parents and the District, the SCO finds that the primary basis for the Child Find allegation was Student's social-emotional functioning in light of behavioral incidents that resulted in expulsion in March of 2019. *Exhibit I*, pp. 3-9.

2018-19 School Year: 504 Plan and Academic Performance

4. Student began his freshmen year at Charter School with an existing 504 plan. On August 23, 2018, a multidisciplinary team met to review and revise Student's 504 plan to address Student's needs in high school. Members of the team included Student, Parent, School Counselor, and at least four of Student's teachers. *Ex. 1*, pp. 2-3. The 504 Plan identified Student's disability and learning area as Dyslexia, Mood Disorder NOS, chromosomal duplication, and sensory integration processing disorder, based on diagnoses obtained through Private Hospital. *Ex. 1* at 1. Parent also reported that Student was participating in a 12-week dialectical behavioral therapy program. During the meeting, Student's teachers reported that they had not seen any "behavior shut-downs that have required [Student] to go the counselor's office." *Id.* Aside from the accommodations listed below, the 504 plan does not further describe Student's disability-related needs.
5. Accommodations provided in the 504 Plan to address *academic performance* included the following:
 - Frequent check-ins for focus in-class;

- Allow when appropriate as designated by classroom teacher for fixing and returning assignments;
- Extra time to complete written assignments and allow the opportunity to type written responses for classroom work when true effort is exhibited by [Student];
- Chunk and break down large assignments. Break down one essential learning target at a time to help [Student] understand the big picture;
- Allow the use of blue cover overlays and or blue colored paper for reading, classwork, and homework assignments as requested by [Student];
- Have Student repeat back directions for understanding; and
- Allow speech to type instruction on the computer.

6. Accommodations provided in the 504 Plan to address *behavior* included the following:

- Allow use of sensory items (chewing gum, fit ball, stress ball, rubber band/clay) and access to counselor;
- Preferential seating and peer grouping;
- Prepare [Student] before any changes in normal daily schedule; and
- Allow access to the front office during assemblies.

7. There is no evidence that Parents expressed concerns related to the 504 Plan at the time it was developed. Moreover, Student’s academic performance and classroom behavior never raised concerns from his classroom teachers or school counselor that resulted in a referral to Charter School’s Response to Intervention (RtI) Committee, a component of the Charter School’s Child Find and special education referral process. *Interviews with English Teacher, School Counselor, Special Education Director, Special Education Teacher, and Charter School Principal.*

8. As one component of its referral process, Charter School uses an “RtI Team model” to review concerns about a particular student. At the beginning of the school year, staff are instructed that anyone in the building can refer a student to the RtI Committee for review by submitting a referral form. The RtI Committee meets at least monthly to discuss referrals, and if appropriate, develop an RtI plan. The RtI Committee also has the authority to refer a student for a special education evaluation. *Response at 5; Ex. P; Interviews with Charter School Principal, Special Education Director, School Counselor, English Teacher, and Special Education Teacher.*

9. English Teacher and School Counselor were both members of the 2018-19 RtI Committee and reported that Student was never the subject of a referral or any other discussion of the committee. Based on her firsthand experience, English Teacher reported that Student did not have difficulty accessing the general education curriculum or maintaining appropriate classroom behavior. Although Student was quiet in class, English Teacher reported that he would participate in discussions when asked and socialized appropriately with peers he liked. And although Student had weaknesses in demonstrating legible handwriting, as well as some challenges in the area of executive functioning, specifically starting and completing tasks,

English Teacher stated that the accommodations on his 504 addressed these areas. *Interview with English Teacher*. Similarly, other teachers reported that Student did not demonstrate difficulty comprehending instruction or academic content. Student did, however, struggle to complete assignments outside of class time. In addition, at least two teachers reported that Student appeared to have difficulty forming friendships and would often sit by himself. *Ex. B*, pp. 1-2.

10. For the 2017-18 and 2018-19 school years, Student's academic performance was average. At the end of the first semester of the 2018-19 school year, Student earned passing grades in all classes, with a grade point average of 2.71. Specifically, Student earned an "A" in Film Appreciation, Foundations of Algebra, and Spanish 1. Student's lowest grades, a "D" in Introduction to Literature and Composition and World History, were the result of missing work. *Ex. F* at 3; *Ex. B* at 2. Similarly, Student's final grades for the 2017-18 school year were also average. Specifically, Student earned an "A" in science, a "B" in band and social studies, a "C" in language arts, a "D" in math, and an "F" in Spanish.

Behavioral and Disciplinary Incidents

11. During the 2018-19 school year, Student had three occurrences of concerning behavior. First, on October 12, 2018, a female student reported that Student was "blackmailing" her by threatening to disclose that she had been vaping in a bathroom on campus, if she did not send him a nude photo. Student had requested nude photos on multiple occasions from this student, as well three other female students. In response to this disclosure, Charter School Principal contacted law enforcement, and Student was interviewed by a police officer. Immediately following the incident, the Charter School developed a safety plan to limit contact between Student and the four female students he had blackmailed that included some changes to Student's schedule. Student also wrote apology letters to the female students and expressed remorse about his behavior. *Ex. G* at 10.

12. Charter School Principal, with over 40 years in education, stated that this kind of behavior is not uncommon in high school, and such behavior would not, in and of itself, raise a suspicion that the conduct might be related to a disability. *Interview with Charter School Principal*. Indeed, because the "inappropriate use of social media among high school students is a relatively common occurrence," Student did not receive a disciplinary consequence as a result of this conduct. *Response* at 2.

13. Second, on February 7, 2019, Student had a physical altercation with another student that resulted in a one-day suspension. During lunch, Student palmed the face of another student who responded by punching Student in the side of the face, knocking Student's glasses off. A fight ensued until a third student intervened. *Ex. G* at 2.

14. Third, on February 13, 2019, a female student disclosed to School Counselor that Student had inappropriately touched her in a sexual manner on multiple occasions in the fall of

2018. This student was not among the four female students blackmailed by Student in October. *Ex. G*, pp. 2 and 16-33. Following an investigation that included law enforcement involvement, Charter School initiated a due process expulsion hearing. *Ex. G* at 7.

15. Student was expelled on or around March 19, 2019, and received educational services through an online program for the remainder of the 2018-19 school year. *Response* at 3; *Interviews with Special Education Director and Parent*.

16. In the Complaint, Parent asserted that Student has a long history of behavioral and disciplinary challenges. *Complaint*, pp. 3-7. The record, however, does not support this assertion. For the 2015-16 school year, Student received two detentions, one of which was for throwing snow at recess. *Ex. G* at 49. In addition, Student demonstrated argumentative behavior, emotionality, and a lack of engagement in a specific class that appeared related to an ongoing conflict with another student in that very same class. *Id.* at 50. No other concerns were reported for the 2015-16 school year. For the 2016-17 school year, no disciplinary incidents or behavioral concerns were reported. For the 2017-18 school year, the only concerns reported involved incidents in October of 2017 where Student was disruptive in class and made troubling comments about bringing a gun to school and shooting people. *Id.* at 54. There were no other behavioral concerns noted for the 2017-18 school year. Reviewing the evidence submitted concerning the last four school years, the SCO finds that behavioral concerns and disciplinary incidents are few and far between, and as such, they do not constitute a long history of concerning or otherwise inappropriate behavior.

Parent Request for IDEA Evaluation and Eligibility Determination:

17. Parents, through their attorneys, requested an IDEA evaluation on March 8, 2019, in advance of the expulsion hearing. *Exhibit 1 at 3*.

18. On March 26, 2019, the District requested parental consent to evaluate Student for IDEA eligibility in the following areas: social-emotional; motor (sensory processing); cognitive (including executive functioning); academic; and speech language. *Exhibit I at 1*. The District received parental consent to conduct the evaluation on April 12, 2019. *Id. at 2*.

19. On May 14, 2019, the District convened a multidisciplinary team (MDT) to consider Student's eligibility for special education and related services under the categories of serious emotional disability, specific learning disability, and speech language impairment based on the results of a comprehensive initial evaluation. *Exhibit B at 18-24*. The MDT concluded that Student did not meet eligibility criteria to qualify as a student with SED, SLD, or SLI. *Id.*

20. Following the eligibility determination, Parents requested an independent education evaluation (IEE). The District granted the request, and Parents anticipate the IEE will be completed sometime in July. *Interview with Parent*.

CONCLUSIONS OF LAW

Based on the Findings of Fact above, the SCO enters the following CONCLUSIONS OF LAW:

The District did not violate its Child Find obligation when it did not seek parental consent to evaluate Student until March of 2019 because Student’s behavior and academic performance were not sufficient to put the District on notice that Student may have an IDEA qualifying disability and be in need of special education and related services.

Each local education agency, here the District, is required by IDEA to identify, locate, and evaluate children with disabilities who need special education and related services. To do so, school districts conduct what are commonly known as Child Find activities. 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 child identification 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 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)). Notably, 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).

Accordingly, the SCO evaluates the individual circumstances presented here to determine if they collectively raised a reasonable suspicion that the District should have referred Student for an initial evaluation prior to Parent’s request for an evaluation in March of 2019. *Weld RE-4 School District*, 119 LRP 5662 (SEA CO 1/2/19). As described in FF #3, Parents alleged that the District should have initiated a special education evaluation based on a long history of behavioral concerns and disciplinary incidents, as well as declining academic performance. It is well established that the behavior of a child can be a red flag that triggers a special education referral obligation, and though the circumstances of each case drive whether a school district should have suspected a disability in a student, and not any one red flag alone is generally sufficient to activate the obligation, 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; *See also Cari Rae S.*, 158 F. Supp. 2d at 1192.

School districts, however, “need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities . . .” *D.K.*, 696 F.3d at 252; *See also District of Columbia Public Schools*, 114 LRP 30785 (SEA DC 06/17/14) (finding four short-term suspensions, and numerous incident reports and telephone calls to parent at the start of seventh grade, did not trigger child find prior to parent’s November evaluation request given no behavioral issues the prior school year). Indeed, school districts must be careful not to over-identify students as IDEA eligible. 34 C.F.R. § 300.173.

In this case, contrary to Parents’ assertion, Student did not have a lengthy history of behavior or discipline problems. As described more fully in FF # 11-15, Student presented three behavior and/or disciplinary incidents in the 2018-19 school year. The incidents in October and February were indeed serious and similar in nature, with both requiring intervention from law enforcement. The third incident, however, involved a fight during lunch, and consequently represented conduct unrelated to the other two. Additionally, the behavioral concerns Student exhibited from the 2015-16 school year to the 2018-19 school year were few and far between, and therefore do not evidence a long history of disciplinary and behavior concerns. Finally, Student’s academic performance for the 2017-18 and 2018-19 school years was similarly average and did not evidence a significant decline. The SCO concludes, that these facts together were not sufficient to raise a reasonable suspicion that Student may have an IDEA qualifying disability and be in need of special education.

Moreover, the “child-find obligation is in no way absolute.” *Smith*, 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*)). For example, if a student is determined not to be a “child with a disability,” then he is not owed a “child-find duty.” *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1196 (11th Cir. 2018) (reasoning that “[l]ike the FAPE obligation, the IDEA requires States accepting IDEA funds to identify, locate, and evaluate only ‘children with disabilities’”). Relevant here, Student was evaluated at Parent’s request in April of 2019, and subsequently determined not to be eligible for special education and related services under IDEA. Accordingly, Student was not owed a “child find duty.”

REMEDIES

The SCO finds and concludes that the 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.

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. See, 34 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Dated this 24th day of June, 2019.

Candace Hawkins, Esq.
State Complaints Officer

Appendix

Complaint, pages 1-11

Exhibit 1: Personalized Learning Plan (504)

Exhibit 2: Contact log

Exhibit 3: Contact log

Exhibit 4: Behavior incident reports

Response, pages 1-9

Exhibit A: No documents responsive to request

Exhibit B: Evaluation/assessment report

Exhibit C: 504 plans and documentation

Exhibit D: Contact logs

Exhibit E: Documentation from Parent

Exhibit F: Grade and attendance reports

Exhibit G: Disciplinary and behavioral incident reports

Exhibit H: Correspondence

Exhibit I: Requests for parental consent to evaluate

Exhibit J: Prior written notice

Exhibit K: Notices of meeting

Exhibit L: District policies, practices, and procedures related to identification and evaluation

Exhibit M: District academic calendar

Exhibit N: Contact information for witnesses

Exhibit O: Verification of delivery

Exhibit P: Description of Charter School's RTI model

Exhibit Q: District initiated request for consent to speak with Student's therapist

Reply, pages 1 -4

Interviews:

- Parent
- Special Education Director
- Charter School Principal
- English Teacher
- School Counselor
- Special Education Teacher