

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

State-Level Complaint 2019:549
Colorado Charter School Institute

DECISION

I. INTRODUCTION

The mother and father (“Parents”) of a student (“Student”) not currently identified as child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ initiated this action against the Colorado Charter School Institute (“Institute”) through a state-level complaint (“Complaint”) properly filed on Student’s behalf by legal counsel (“Student’s Attorney”) on Thursday, July 11, 2019.

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.

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 is limited to events that transpired no earlier than July 11, 2018 to determine whether or not a violation of IDEA occurred. *Id.* Additional information prior to this date may be considered to fully investigate the allegation accepted in this matter. Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed.

III. COMPLAINT ALLEGATION

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

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 as a child with a suspected disability who is in need of special education and related services, from November 19, 2018 to present, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)(a).

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 sixteen-year-old not presently identified as eligible for special education and related services as a child with a disability under the IDEA, enrolled on August 17, 2016 as a freshman at a high school ("School") authorized by Institute. *Exhibit H*, p. 27. Institute is a non-district charter school authorizer that serves as the administrative unit—Colorado's term for local educational agency—with administrative authority for delivering special education services to School. *Exhibit AA*, p. 3. The administrative unit is ultimately responsible for full administration of its schools' special education services and programming, to include a child find framework, or the provision of a FAPE for all IDEA-eligible children with disabilities. ECEA Rule 2.02.
2. Student completed the 2016-2017 and 2017-2018 academic years at School, but Parents formally withdrew him from both School and Institute on January 14, 2019, one week into the second semester of the 2018-2019 academic year. *Exhibit H*, pp. 6, 27; *Exhibit K*. At all times between October 25, 2018 and the date of withdrawal, Student remained on "homebound" status. *Exhibit G*, p. 2; *Interviews with Parents and Head of School*. To that end, Student was offered educational programming through online coursework and one concurrent enrollment English course at a local community college. *Interview with Head of School*.
3. Student is described as dependable, polite, passionate, and introverted. *Interviews with Parents and Head of School*. Principal further characterized Student as independent, proficient, and self-directed, noting that he garnered dean's list accolades during his freshman and sophomore academic years. *Interview with Principal*. Student's struggles center primarily on social interaction, peer relationships, boundaries, and a specific drive to serve the "protector role" of his friends or to be "very protective of everybody." *Interviews with Parents, Head of School, and Personal Learning Coach*. Parents deemed "security" as a "major issue" for Student, describing his School entrepreneurship project as "[]". *Interview with Parents; Exhibit I*, p. 20.
4. The current controversy stems from Parents' contention that Institute failed to identify and evaluate Student as a child with a suspected disability and in need of special education

services, as early as November 19, 2018, based on a “significant decline in [Student’s] grades combined with concerns from [Student’s] teachers and administration . . .” *Complaint*, pp. 2-7. Parents further argue that School “had substantial evidence that [Student] may have been depressed.” *Id.* at p. 7. School and Institute counter that Student did not exhibit “clear signs” of a potential qualifying disability over the course of a four-month period, and thus an IDEA evaluation was not required. *School Response; Institute Response.*

5. The parties’ respective positions require this SCO to evaluate information the Institute knew or had reason to know, starting November 19, 2018, to determine if the Institute violated a duty to identify and evaluate Student as a child suspected of having a disability and in need of special education. The 2018-2019 academic year is instructive to the instant investigation.

B. The 2018-2019 Academic Year: School’s First Semester

6. School’s 2018-2019 academic year started on August 14, 2018. *Exhibit K.* By all accounts, and as corroborated by the Record, Student demonstrated “strong” academic performance and lack of social-emotional or behavioral concerns while attending School for ninth and tenth grade. *Interviews with Parents, Head of School and Principal; Exhibit H*, p. 27; *Exhibit N*, p. 1. Student’s lowest grades across the 2016-2017 and 2017-2018 school years were a C+ in pre-algebra and biology in ninth grade, and a C in Physics in tenth grade. *Exhibit H*, p. 27.
7. Student did not report to Parents any episodes of being teased, intimidated, rejected, or bullied by his peers while attending School. *Exhibit E*, p. 57. Parents reiterated to the SCO that “up until the end of the previous [school] year, [Student] was very much involved in school and very focused.” *Interview with Parents.* They added that Student did not present any disciplinary-related problems as “he seemed to do very well and nobody [at School] ever brought up any concerns.” *Id.* However, by mid-September 2018, Parents observed a “change” in Student, finding he was not “as connected” or “as focused.” *Id.* They attributed this “change” to Student starting college classes, a turnover in School staff, including an entrepreneurship teacher, and the end of friendships with peers. *Id.* By the end of September 2018, School staff, too, recognized a shift in Student’s social interactions and academic performance. *Interviews with Head of School, Personal Learning Coach, and Principal.*
8. For example, on September 20, 2018, peers reported to Personal Learning Coach that Student was expressing “negative beliefs” about himself via online platforms, and expressed concerns about Student potentially running away or harming himself. *Exhibit E*, pp. 2-5; *Interviews with Personal Learning Coach and Principal.* Personal Learning Coach, who provides general academic, career, and social-emotional counseling at School, first established a rapport with Student when he was assigned as one of her mentees in August 2018 as part of School’s mentorship program. *Exhibit I*, p. 3; *Interview with Personal Learning Coach.* Equipped with these peer concerns, Personal Learning Coach conducted an informal screen of Student to

gauge any potential suicidal ideation. *Exhibit E*, p. 3; *Interview with Personal Learning Coach*. Student admitted telling friends he thought about running away, but indicated to Personal Learning Coach that he was not serious about it. *Id.* Student denied having a plan to commit suicide, stating he most recently experienced such thoughts two years earlier. *Id.*

9. At the end of September 2018, educators labeled Student as “melancholy” on a form titled “MTSS Step 2: Data Collection and Cultivating Strong Tier 1 Supports/Interventions.” *Exhibit D*, p. 8. According to School staff, behavioral data collection was the first point in the multi-tiered system of support (“MTSS”) process. *Interviews with Principal and Personal Learning Coach*. “Big team general conversations” based on core teacher reports received at weekly collaboration meetings—where all School staff and educators meet to discuss classroom-based student observations and needs—informed Student’s “melancholy” designation. *Id.* None of the underlying documentation describes the basis for the “melancholy” designation, such as how Student exhibited “melancholy” or when and in what environment the observations occurred. *Exhibit D*, pp. 8-10. Personal Learning Coach described Student’s “melancholy” as a “mood” and not depression. *Interview with Personal Learning Coach*. For instance, Personal Learning Coach told the SCO that Student was often observed laughing and being sarcastic amongst his peers. *Id.*
10. The SCO received one additional document titled “Wednesday Small Groups” and “MTSS Tier II Intervention.” *Exhibit D*, pp. 9-10. The data contained therein did not pertain to Student, but a note indicates Student may “benefit better with 1:1 Interventions.” *Id.* at p. 10. School staff reiterated that the MTSS process was at its initial stages for Student, and that they were considering small group intervention for him to “build a sense of belonging and comradery.” *Interviews with Principal and Personal Learning Coach*. Student indicated he was not interested in small group intervention, but Personal Learning Coach kept him on the “maybe” list while awaiting further data collection. *Id.* Personal Learning Coach reported that observation forms had been passed out to core teachers to start “scribing data on a more formal” basis. *Interview with Personal Learning Coach*. Despite not receiving copies of these observation forms, this SCO finds that, by the end of September 2018, School staff had recognized a potential need for Student to participate in an early intervening service program.
11. Consistent with the timing of this “change” in Student, his Behavior Detail Report contains four event entries, all in October 2018, with the final incident resulting in a three-day out-of-school suspension. *Exhibit G*, pp. 2-5. First, on October 5, School staff observed Student “drawing a very detailed facsimile of a gun” during an assembly. *Id.* at p. 4. Head of School met with Student to relay “that this type of behavior made other students nervous in the current climate around school safety” and to request that Student “cease such behavior.” *Id.*
12. Second, on October 12, a peer reported allegations of harassment by Student, including: obsessive contact through social media and text messages; frequent violation of personal space, such as unsolicited physical contact and physical intimidation; inappropriate solicitation of attention, such as staring at the peer for long periods of time and drawing

photos of the peer; references to the peer as “doll” and “angel”; and unsolicited compliments about the peer’s physical features. *Id.* at p. 3. The peer further reported that Student allegedly referred to himself as a “monster” and posted photos and drawings of the peer online. *Id.* Head of School, Principal, and Personal Learning Coach met with Student to discuss social and physical boundaries and what constitutes a “healthy level of correspondence.” *Id.* at p. 4; *Interview with Personal Learning Coach*. Head of School also apprised Parents by telephone of these accusations. *Exhibit G*, p. 4; *Interview with Parents*.

13. Third, on October 19, Head of School met with Student “and asked him to cease any activity related to weapons or school shootings even if it is about his venture project . . . [to include] any writings, conversations, drawings, or web searches.” *Exhibit G*, p. 3. The “venture project” refers to the entrepreneurship project described above at FF #3, dubbed “[redacted].” *Exhibit I*, p. 52. Parents indicated that Student is “passionate about safety for all” and that he wants to “start a private security firm with its own weaponry.” *Id.* Personal Learning Coach observed Student to be “obsessing with his entrepreneurship project which was overriding his other academics.” *Interview with Personal Learning Coach; Exhibit 6*, p. 2.
14. Finally, on October 22, Entrepreneurship Teacher and peers reported Student “having conversations about 1st person shooter games, then talking about guns, bullets, and types of bullet proof vests.” *Exhibit G*, pp. 2, 6. As the “conversation was becoming more about the ammunition (different calibers of bullets and penetration impact) [Entrepreneurship Teacher] broke up their talk.” *Exhibit 5*, p. 1. It was further reported that Student “was also looking up bullet proof vest on the [School] Chromebook.” *Exhibit G*, p. 2. Alongside this classroom observation, School administration received a photo of a watch posted to Student’s “verified social media account” on October 4 with the following message: “[w]atch yourself. One day you may find trouble where you least expect it.” *Id.* at pp. 2, 40-41. School suspended Student for three days starting October 22, 2018, and following a series of crisis response team meetings that same day, scheduled a re-entry meeting for October 25, 2018, with a note that he was to return to School on October 29, 2018. *Id.* at p. 2; *Exhibit E*, pp. 8-9.
15. The re-entry meeting did not occur because Head of School, Principal, and Personal Learning Coach completed a threat assessment screen on October 25, and ultimately decided a full team threat assessment was warranted. *Exhibit E*, pp. 14-15. The next day, Head of School e-mailed Student’s mother to inform her that the re-entry meeting would need to be rescheduled and that she should “plan on [Student] being out of school all of next week” based on information gathering and support plan development. *Exhibit I*, p. 22. It was determined that additional information was needed to complete the threat assessment, which amounted to eight witness interviews between October 31 and November 5. *Exhibit E*, pp. 34-62. Head of School also notified Student’s mother by e-mail that “even before these most recent incidents a few initial concerns had been raised by staff about [Student’s] markedly different attitude and drop in attention to his academic work.” *Exhibit I*, p. 22. He

added that in the “interim [Student] has a Chromebook so that he can keep up with his school work.” *Id.*

16. On November 5, 2018, Student’s mother e-mailed Head of School inquiring about the number of “days school [has] written down as suspended” and advising that Student “is unable to move forward at all in his classes.” *Exhibit 10*, p. 3. Head of School replied the next day, attaching a copy of School’s parent handbook and noting the “discipline policy begins on page 12, but is not necessarily relevant to this situation.” *Id.* at p. 1. He added that Student “is on an approved ‘leave’ until we complete the Response, Management and Support Plan” as part of the threat assessment. *Id.* In terms of academics, Head of School advised in part that “while [Student] cannot currently take content assessments, the platform provides plenty of work in the project areas (70% of his grade) for him to complete.” *Id.* He added that School could provide a math tutor and access to the online tutorial ThatTutorGuy, and that he would be in touch about getting Student back to School “hopefully before the end of the week.” *Id.*
17. On November 10, 2018, Head of School sent a text message to Student’s mother indicating that he and Principal were “worried” for Student, and that they had recently come across information about his “emotional well-being” which, “coupled with other findings . . . [has] us very anxious.” *Exhibit 3*, pp. 2-3. Student’s mother responded, in part, that she was “aware of how depressed [Student] was feeling before he was suspended/approved leave,” but “that was 3 weeks ago . . . [and Student] met with the counselor, and is now much happier.” *Id.* at pp. 6-7. On November 12, 2018, Head of School and Principal met with Parents. *Id.* at p. 4; *Interviews with Parents, Head of School, and Principal*. The SCO received conflicting accounts about the substance of this meeting. *Interviews with Parents, Head of School, and Principal*.
18. Parents’ position is that School staff would not allow Student to return to School and instead offered to pay for Student to complete high school full-time at the local community college. *Interview with Parents*. Contrarily, School staff reported that Parents’ preference was for Student not to return to School and instead to work out an alternative plan for him to earn his high school diploma. *Interviews with Head of School and Principal*. There are no meeting notes chronicling the parties’ discussion, but the next day Parents e-mailed Head of School and Principal writing “[t]hough he does not have any need to be on campus, is there anything listed that says he is not allowed to be?” *Exhibit I*, p. 29. An e-mail from Head of School to Student’s father in mid-December 2018 asks whether he still wants “to proceed with the agreement that [Student] take the Math and Student Success classes in the spring at [the community college],” adding that School would “pay for books and tuition.” *Id.* at p. 37. Whether Parents conceded to concurrent enrollment or not is unclear, but an e-mail they received on November 18, 2018 shows this option was selected for Student moving forward, wherein he was to complete some coursework at the local community college. *Id.* at p. 30.
19. On November 19, 2018, the first of School’s five-day Thanksgiving break, Principal e-mailed to Student’s mother a Response, Management and Support Plan Outline (“Support Plan”) created as part of the threat assessment. *Exhibit 13; Exhibit K*. The Support Plan identifies

“Intervention Recommendations” and “Emphasized Expectations” for Student. *Exhibit 13*, pp. 2-3. Based on consultation with a CDE Specialist, the SCO finds the Support Plan to function as a crisis management tool as opposed to an MTSS-related approach. The Support Plan contains strategies but no true interventions in terms of indicating what is being taught academically, behaviorally, socially, or emotionally, or how performance will be measured with a focus on a specific identified skill. *Id.* For instance, the Support Plan includes contact information for academic and counseling services at the local community college and a directive for Student to maintain engagement in martial arts and writing as part of its “Level II Interventions.” *Id.* at p. 2.

20. Notwithstanding, the Support Plan was never implemented for Student following completion of the threat assessment on November 30, 2018, and a re-entry meeting for Student never took place. *Interviews with Parents and Principal; Exhibit E*, p. 33. The final threat assessment determination, based on all information collected and considered, indicates that Student “does not appear to pose a threat of violence at this time, but exhibits behaviors that indicate a continuing intent to harm and potential for future violence.” *Exhibit E*, p. 25. As part of the threat assessment resolution, Student retained a “homebound” designation. *Exhibit G*, p. 2. Principal told the SCO that “we could have expelled [Student]” given all of the information and social media threats, but instead School “tried to take a compassionate route, meet his needs, and still be able to provide an education with homebound.” *Interview with Principal*.
21. The SCO finds that, while “homebound” between October 25, 2018 and December 19, 2018, Student rarely logged into School’s online platform. *Interviews with Parents, Head of School, Principal, and Personal Learning Coach; Exhibit I*, pp. 42-49. For example, Principal e-mailed Student’s father on November 28, 2018 that she was “having all [Student’s] activity on our platform (curriculum) looked into as well since the student has not been participating all year in his academics.” *Exhibit I*, p. 49. Also, on December 14, 2018, School’s IT Specialist advised Principal by e-mail that Student had not used his login for more than thirty days. *Id.* at p. 42. Parents reported to the SCO that although Student was provided with a Chromebook, they do not have internet access in their residence and it was not possible for Student to work without teacher guidance. *Interview with Parents*. Student’s father wrote to School staff that they had access to the internet at paternal grandmother’s home, but that the Chromebook did not allow Student to download required virtual applications for lab work. *Exhibit I*, p. 40.
22. The SCO finds that, while Student’s connection to academics may have been an “e-mail away,” he did not receive in-person instruction from, or interaction with, any School staff, teachers, or peers while “homebound.” *Interviews with Parents, Head of School, Principal, and Personal Learning Coach*. Based on this degree of accessibility, and through consultation with CDE Specialist, the SCO also finds that any MTSS-related academic or behavior progress monitoring data collection ended by October 22, 2018, the date Student was suspended. As noted by CDE Specialist, in order to adequately implement an MTSS infrastructure, a student needs to be physically available to educators either at the school or in the home environment because development of interventions is based on the fidelity of data collection and analysis.

23. School's response to intervention ("Rtl") team, led by personal learning coaches in partnership with core teachers, meets bi-weekly to "discuss, monitor, evaluate and intervene with students referred for intervention." *Exhibit BB*, p. 18; *Interviews with Principal and Personal Learning Coach*. Director of Special Education highlighted the interrelatedness of MTSS and Rtl, specifically describing MTSS as a broader approach which could include Rtl under its umbrella, adding that Institute holds School responsible for implementing its own MTSS program. *Interview with Director of Special Education*. Rtl's six key features informed creation of MTSS' five essential components, both of which emphasize careful data collection to inform instruction, performance, interventions, fidelity of implementation, and resource efficiency. *CDE MTSS, Rtl, and Positive Behavioral Interventions and Supports Crosswalk*.
24. CDE Specialist advised that a "general" model for working through MTSS or Rtl may involve two interventions conducted at each of the three tier levels, though these interventions need not be implemented hierarchically. From a statistical perspective, CDE Specialist added that behavioral data, measured as frequency, duration or intensity, may be collected daily and "generally" requires fifteen data points per intervention. Thus, each behavioral intervention should run at least fifteen days in length before moving on to a different intervention or modifying an existing one. Consistent with this information, CDE recommends that "targeted interventions must be evidence-based, delivered with fidelity, and monitored on a regular basis." *Guidelines for Determining Eligibility for Special Education for Students with SED*. Students respond differently, rendering it difficult to determine in advance an appropriate duration of a specific intervention, but typically four to eight weeks "is considered an adequate period for determining whether interventions are having an impact." *Id.*
25. According to Principal, Student had been referred to School's Rtl team at the end of September 2018, or fourteen student contact days prior to the October 22, 2018 suspension. *Exhibit K; Interview with Principal*. Director of Special Education reviewed the records involved in this matter and indicated that, given the serious nature of information developed through the threat assessment, School appropriately focused on establishing related interventions through the Support Plan. *Interview with Director of Special Education*. This included connecting Student with a licensed professional counselor to create mental health interventions. *Exhibit I*, p. 28. He added that referrals may arise through a threat assessment, or consistent with School policy, as identified by a core teacher or other staff as part of a formal child find framework. *Interview with Director of Special Education; Exhibit BB*, p. 16.
26. Director of Special Education stated that Institute trains School staff on special education policies, procedures, responsibilities, and resources at the beginning of each academic year and two times regionally on related topics later in the fall and in the spring. *Interview with Special Education Director*. This includes recent trainings on MTSS, individualized problem solving within Rtl, individualized versus systems problem solving, and—as relevant to the allegation here regarding depression—Serious Emotional Disability ("SED"). *Exhibit EE*, pp. 2-15, pp. 26-54. Director of Special Education emphasized that, when considering SED,

Student's behaviors here were "short-lived" over the course of a few months, particularly where School started to initiate interventions. *Interview with Special Education Director*. For this reason, to include Student's past performance, Director of Special Education concluded that a referral for a special education evaluation would have been premature in this case. *Id.*

27. With six days left in the first semester, Parents requested that they be removed from all School-related communications and indicated that they were waiting to find out what Student's "actual status is at [School]." *Exhibit I*, p. 36. On December 17, 2018, Head of School responded, in part, that he removed them from the absence call list and indicated that it "looks like the home-bound program is not working for [Student]." *Id.* at p. 37. The first semester concluded on December 19, 2018, at which time Student's transcript corroborated this observation by denoting an "F" in Cybersecurity, an "F" in Entrepreneurship, an "F" in US History, an "F" in Chemistry, a "D" in Integrated Math II, a "D" in English, and a "PASS" in Club Tech Trek Club. *Exhibit H*, p. 27; *Exhibit K*. Student's cumulative weighted grade point average, at 3.0 entering the 2018-2019 academic year, dropped to 2.17. *Exhibit H*, pp. 3, 27.

C. The 2018-2019 Academic Year: Start of School's Second Semester

28. On January 8, 2019—one day into School's second semester—Head of School provided Parents with a Withdrawal Notification form based on an e-mail received from Student's father five days earlier indicating their "intent is to withdrawal [sic] [Student] from [School] and enroll him elsewhere." *Exhibit I*, pp. 56-58. School received a signed Withdrawal Notification form from Parents on January 14, 2019, reflecting Student's last days of attendance and enrollment at School and a local community college as October 22, 2018 and December 5, 2018, respectively. *Exhibit H*, p. 6.

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: The Institute did not violate Child Find by failing to initiate a special education evaluation when it 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 issue to be analyzed here implicates IDEA eligibility, a status which requires a qualifying disability and, because of that disability, a need for special education and related services. 34 C.F.R. § 300.8(a)(1). The IDEA mandates that school districts develop and implement adequate procedures to locate, identify, 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). The school district in which the child attends school retains responsibility for child identification. *Id.*

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.*, 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)).

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 Sch. Dist.*, 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 Institute should have referred Student for an initial evaluation. *Weld RE-4 Sch. Dist.*, 119 LRP 5662 (SEA CO 1/2/19) (citing *Clark County Sch. Dist.*, 114 LRP 45477 (SEA NV 8/28/14)).

B. Parents’ Child Find Concerns

The instant Complaint introduces concerns with Student’s social-emotional struggles, manifesting as depression, along with a substantial decline in Student’s grades. *Complaint*, p. 7.

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 knew of or 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, 1195 (citing

numerous warning signs including failing one class while incurring seventy-nine absences in ninth grade and acquiring many behavioral referrals and 159 absences while also exhibiting signs of drug use leading to hospitalization in tenth grade); *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676-677 (5th Cir. 2018) (finding a six-month delay in evaluating a tenth-grade student violated child find where the school district knew of the student’s history of behavioral problems, academic decline, hospitalization, and theft). Red flags can also include anxiety, distress, depression, or social discord. *In re: Student with a Disability*, 72 IDELR 198 (SEA CT 2018).

Colorado’s criteria for eligibility under the SED category includes depression, and provides that a child with SED “shall have emotional or social functioning which prevents the child from receiving reasonable educational benefit from general education.” ECEA Rule 2.08(3). SED is defined as:

[A] condition exhibiting one or more of the following characteristics *over a long period of time and to a marked degree*:

2.08(3)(a)(i) An inability to learn which is not primarily the result of intellectual, sensory or other health factors;

2.08(3)(a)(ii) An inability to build or maintain interpersonal relationships which significantly interferes with the child’s social development;

2.08(3)(a)(iii) Inappropriate types of behavior or feelings under normal circumstances;

2.08(3)(a)(iv) A *general pervasive mood of unhappiness or depression*; and/or

2.08(3)(a)(v) A tendency to develop physical symptoms or fears associated with personal or school problems.

ECEA Rule 2.08(3)(a) (emphasis added). SED is unconnected from the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) or other medical model equivalent, and thus a child is not required to meet such criteria for major depression in order to have a “general pervasive mood of unhappiness or depression.” *See, e.g., Los Angeles Unified Sch. Dist.*, 107 LRP 27850 (SEA CA 04/20/07) (rejecting a school psychologist’s opinion that a student must meet DSM criteria for depression to establish pervasive unhappiness). However, the lack of such a diagnosis may raise an issue as to whether a student is depressed enough to qualify for IDEA services based on a “general pervasive mood of unhappiness or depression.” *See, e.g., Conejo Valley Unified Sch. Dist.*, 507 IDELR 213 (SEA CA 1985) (finding that a student, characterized as sad, unhappy and depressed, often exhibited behaviors inconsistent with pervasive unhappiness such as looking forward to starting high school, participating and being motivated in school, and having a friend). Colorado’s SED eligibility criteria excludes indicators of social/emotional dysfunction that are

“isolated incidents or transient, situational responses to stressors in the child's environment.” ECEA Rule 2.08(3)(c)(iv).

Neither the ECEA Rules nor the IDEA define how protracted a qualifying “long period of time” must be, but the Office of Special Education Programs (“OSEP”) provides that a generally acceptable definition is “a range of time during which the behavior must have been present, generally two to nine months.” *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989). This assumes that preliminary interventions have been implemented and proven ineffective during this time period. *Id.* A Colorado SCO applying this definition recently concluded that the totality of a case’s circumstances was not sufficient to trigger a child find obligation. *Douglas County Sch. Dist.*, 119 LRP 30206 (SEA CO 5/31/19). There, the child moved to Colorado the summer preceding the 2018-2019 academic year and was enrolled for only one semester. *Id.* Although the child “displayed concerning behaviors in the short time she was . . . enrolled[,]”—including an attempted suicide, significant number of unexcused absences, and failing grades—it was reasonable for the school district to consider the difficulties to be a situational response to the child’s recent move and parent’s remarriage as opposed to evidence that she may have a disability. *Id.*

In considering the type of information that may link depression to a suspected disability, specifically a potential emotional disturbance under 34 C.F.R. § 300.8(c)(4)(i), courts have determined that a school district’s knowledge of suicidal ideation or attempted suicide, psychiatric hospitalizations, and/or diagnosis or treatment of mental health conditions can be sufficient to trigger the obligation to request parental consent to evaluate. *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 27 (D. D.C. 2008) (concluding combined knowledge of a diagnosis of major clinical depression, a suicide attempt and suicidal ideation resulting in hospitalizations in ninth and tenth grade, parent notification of untreated depression and attention deficit hyperactivity disorder, deteriorating grades, and erratic attendance was sufficient to trigger child find); *H.M. v. Weakley County Bd. of Educ.*, 65 IDELR 68 (W.D. Tenn. 2015) (reversing an administrative decision that found a high schooler ineligible for IDEA services given evidence of a history of sexual abuse, diagnosis of severe major depression at age nine, medical and educational evaluations showing post-traumatic stress disorder, and a marked, long-lasting “major depression” affecting academic performance); *Manhattan Beach Unified Sch. Dist.*, 34 IDELR 249 (SEA CA 2001) (deciding a student’s inappropriate behavior, clinically diagnosed depression, self-expressed sentiments of depression, hospitalization, and decline in grades over the course of one academic year supported eligibility as a child with an emotional disturbance).

In the present case, the SCO concludes the evidence in its totality supports that Institute did not have sufficient reason to suspect a disability and a need for special education services between November 19, 2018 and January 14, 2019. First, Student progressed through ninth and tenth grade at School without any significant behavioral issues, social-emotional challenges, or academic difficulties. In fact, Parents described Student at FF #7 as “very much involved in school and very focused” through the end of the 2017-2018 school year. Student predominantly earned letter grades of A and B during that time, resulting in dean’s list recognition according to Principal.

Second, the evidence shows that both Parents and School staff first detected a “change” in Student in late September 2018, the first semester of the 2018-2019 academic year. Between September 20, 2018, the date peers alerted Personal Learning Coach to the concerns outlined at FF #8, and January 14, 2019, the date Parents withdrew Student from School and Institute, a total of 116 calendar days, or nearly four months, elapsed. This calendar day total includes School’s five-day Thanksgiving break and the eighteen calendar days between School’s first and second semesters. Student was suspended for three days starting on October 22, 2018 and never physically returned to School, though he was never expelled. Parents here, like the mother in *Douglas County Sch. Dist.*, formally withdrew Student from Institute soon after close of the at-issue school semester. In light of *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989) and CDE Specialist’s guidance at FF #24, even if Student had exhibited one of the five “characteristics” detailed at ECEA Rule 2.08(3)(a), he did not do so “over a long period of time” and with the provision of preliminary interventions that had proven to be ineffective during that timeframe.

Third, unlike the children in *N.G., H.M.*, and *Manhattan Beach Unified Sch. Dist.*, Student in this case never underwent a psychiatric hospitalization, never attempted suicide, and never received a clinical diagnosis of major depressive disorder or other mental health-related disorder. In September 2018, Personal Learning Coach informally screened Student for suicidal ideation based on reported peer concerns, but Student denied wanting to commit suicide. Personal Learning Coach’s observations that Student often laughed and displayed sarcasm, despite the concerns raised by classmates, run contrary to pervasive unhappiness. There is no doubt Student evinced alarming behaviors and statements with respect to weapons and ammunition in October 2018, as described at FF #11-14, leading to suspension and initiation of a threat assessment. This includes School’s knowledge of peer harassment claims against Student, with those behaviors detailed at FF #12. Whether these behaviors were indicative of a suspected disability or “situational responses” to feelings of peer rejection, starting college classes, School staff turnover, or an obsession with the entrepreneurship project, the SCO concludes that it was reasonable for School staff to institute pre-referral data collection by the end of September 2018.

A school district may attempt pre-referral interventions before initiating an IDEA evaluation. *See, e.g., M.G. v. Williamson County Schs.*, 71 IDELR 102 (6th Cir. 2018, *unpublished*). However, MTSS and RtI processes cannot be used to delay or deny an evaluation. *Letter to Ferrara*, 60 IDELR 46 (OSEP 2012). If there is reason to suspect that a student is a child with a disability in need of special education and related services, a school district can violate its referral obligation by repeatedly monitoring a student’s response to interventions rather than conducting a timely evaluation. *See, e.g., El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 946 (W.D. Tex. 2008). Here, although the initial stages of data collection chronicled at FF #9-10 are unclear in terms of the frequency, duration, or intensity of any observed behaviors leading to Student’s “melancholy” designation, Student was suspended about twenty-two calendar days into the MTSS data collection period, on October, 22, 2018, and he never returned to School.

The SCO understands the delicate balance here between Institute meeting Student's needs while also protecting the safety and well-being of all children and staff given any potential for violence at School. And while the SCO does not reach the conclusion that Institute used MTSS to delay or deny an IDEA evaluation, especially considering the time and effort required to complete a thorough threat assessment, the findings present concerns with respect to continuance of associated formal data collection and observations given Student's "homebound" status. Had Parents not formally withdrawn Student at the start of the second semester, Institute may have improperly delayed an evaluation if it continued to rely on October 2018 MTSS response data where MTSS was not effectively available due to the "homebound" setting. This is true given information about Student's "emotional well-being" uncovered through the threat assessment that left Head of School and Principal "worried" for Student. Head of School e-mailed Student's mother on November 6, 2018 that Student was on "approved 'leave'" until completion of the Support Plan, but there is no official educational record detailing Student's status following the three-day suspension, and Principal informed the SCO that School "could have expelled" Student.

Fourth, though the evidence at FF #27 definitively presents a sharp decline in grades for Student, to include four Fs and two Ds, this performance played out over one semester. *See Cari Rae S.*, 158 F. Supp. 2d at 1195 (citing, in part, poor academics and a decline in grade point average across three school years as merits of a child find violation). There is no doubt School staff here, by the end of October 2018, had observed a "drop in attention to [Student's] academic work." However, based on Student's prior academic and attendance track records with School during two academic years, in conjunction with difficulties experienced while on "homebound" status, to include challenges logging into the online platform, lack of physical access to core teachers, and Head of School's comment in December 2018 that it appeared the "homebound" program was not working for Student, the SCO attributes a significant portion of this decline to being on "approved 'leave'" status rather than a suspected disability. For instance, Principal wrote to Student's father on November 28, 2018 that he had "not been participating all year in his academics" and IT Specialist concluded on December 14, 2018 that he had not logged into the online platform for more than thirty days.

Finally, though not required to do so as the IDEA and ECEA Rules render the child find obligation affirmative, Parents did not suggest that Student might have a qualifying disability at any time during Student's time attending School. Rather, FF #12 indicates Head of School reached out to Parents in mid-October 2018 with concerns about Student's behavior, though not IDEA specific.

Based on the entirety of the foregoing information known to Institute between November 19, 2018 and January 14, 2019, the SCO concludes that Institute did not have reason to suspect that Student might be a child with a disability as defined under the IDEA. Institute was thus under no obligation to refer Student for an initial evaluation during this stretch of time and, therefore, did not violate 34 C.F.R. § 300.111 or ECEA Rule 4.02(1)-(3).

VI. REMEDIES

The SCO finds and concludes that Institute 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 9th day of September, 2019.

Brandon Edelman, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1-9

- Exhibit 1: Student's Transcript
- Exhibit 2: School Discipline Form dated October 22, 2018
- Exhibit 3: Text Message Correspondence
- Exhibit 4: October Detail Report/Song Lyrics
- Exhibit 5: E-mail Correspondence
- Exhibit 6: Threat Assessment
- Exhibit 7: Computer-Aided Dispatch Report
- Exhibit 8: E-mail Correspondence
- Exhibit 9: E-mail Correspondence
- Exhibit 10: E-mail Correspondence
- Exhibit 11: E-mail Correspondence
- Exhibit 12: School Discipline Form dated October 22, 2018 and October Detail Report
- Exhibit 13: Intervention Recommendations
- Exhibit 14: Gibson Test of Cognitive Skills

School's Response, pages 1-14

- Exhibit A: *no responsive documents provided*
- Exhibit B: *no responsive documents provided*
- Exhibit C: *no responsive documents provided*
- Exhibit D: Support, Behavior, and Response to Intervention Plans
- Exhibit E: Threat Assessment documentation
- Exhibit F: Documentation received from Parents
- Exhibit G: Disciplinary documentation
- Exhibit H: Academic and Attendance records
- Exhibit I: Correspondence
- Exhibit J: Memorandum of Understanding and School's Special Education/504 Policies
- Exhibit K: Academic Calendars
- Exhibit L: School Staff Contact Information
- Exhibit M: Verification of School's Response delivery to Parents
- Exhibit N: Demand Letter

Institute's Response, pages 1-5

- Exhibit AA: Charter School Contract
- Exhibit BB: School's Special Education/504 Program Plan
- Exhibit CC: Memorandum of Understanding
- Exhibit DD: Student Services Screener Outcomes and Report
- Exhibit EE: Special Education Related PowerPoint Trainings
- Exhibit FF: Child Find and Early Intervening Services Procedures
- Exhibit GG: Verification of Institute's Response delivery to Parents

Reply, pages 1-6²

- Exhibit 14: Student's Second Amendment Essay

Telephonic Interviews

- Parents: August 1, 2019
- Head of School: August 13, 2019
- Principal: August 13, 2019
- Personal Learning Coach: August 13, 2019
- Director of Special Education: August 13, 2019

² On August 9, 2019, Student's Attorney requested a four-day extension of time to submit a Reply to Responses from School and Institute. The SCO granted this request by *Order for Extension of Time* issued to all parties on August 9, 2019. Student's Attorney submitted a Reply to the SCO and all parties by e-mail on August 13, 2019, but CDE did not receive a hand-delivered or mailed copy of the Reply until August 15, 2019, in violation of ¶7(b) of *Colorado's State-Level Complaint Procedures*. Although delivery of the hard copy Reply to CDE was untimely, the SCO in his sole discretion considered the late filing and attached Exhibit 14 as part of this investigation based on the August 13, 2019 electronic submission.