

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><b>[PARENT], ON BEHALF OF HER MINOR CHILD, [STUDENT],</b> Complainant,</p> <p>vs.</p> <p><b>DENVER PUBLIC SCHOOLS,</b> Respondent.</p>	
<b>DECISION</b>	

[Parent] (Complainant) alleges that the Denver Public Schools (DPS) denied her son, [Student], a free appropriate public education in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. sections 1440 – 1482 (2018). A due process hearing held in accordance with 20 U.S.C. section 1415(f) and its implementing regulations at 34 C.F.R. section 300.511, was held before Administrative Law Judge (ALJ) Robin E. Hoogerhyde at the Office of Administrative Courts on May 9 – 11, 2023. Miriam Kerler and Igor Raykin of Kishinevsky & Raykin, Attorneys at Law represented Complainant. Robert Montgomery of Semple, Farrington, Everall & Case, P.C. represented DPS.

Prior to the hearing, the parties stipulated to the admission of Complainant's Exhibits 4, 5, 6, 7, 8, 9, 10, 20, 28, 30, 31, 33, 34, 35, 36, 44, 51, 54, 55, 56, 57, 61, 63, 67, 69, 79, 81, 83, 91, and 99 and DPS's Exhibits V, DD, CC, BB, EE, FF, U, II, JJ, LL, NN, XX, TT, UU, YY, VV, MMM, OOO, GGG, and N. At hearing, the ALJ also admitted Complainant's Exhibits 34, 16, 17, 1, 26, 45, 46, 93, 52, 60, 65, 66, 100, 2, 72, 70, 92, 78, 14, 15, 13, 32, 41, 42, 53, 80, 88, 25, 29, 94, 40, 9, 75, 49, 74, 71, 87, and DPS's Exhibits Q, III, R, S, JJJ, KKK, QQ, and P into evidence. The ALJ excluded Complainant's offered Exhibits 18 and 19. The following witnesses testified: Complainant, [School Psychologist], [School Psychologist 2], [Fourth Grade Teacher], [Special Education Teacher], [Second Grade Teacher], [Principal], [Senior Manager of Special Education], [Reading and Writing Teacher], [Teacher], and [Special Education Teacher]. The hearing was digitally recorded using the FTR machine.

**ISSUE PRESENTED**

Whether Complainant has established by a preponderance of the evidence that DPS violated both procedural and substantive requirements of the IDEA and denied [Student] a free appropriate public education. And, if so, whether [Student] is entitled to

an award of compensatory education.

### **FINDINGS OF FACT**

1. During the 2019-20 school year, [Student] was a first grade student at [Elementary School] ([Elementary School]), a school within DPS.
2. [Elementary School] is a small school located within DPS. The school has three core tenants: hands on learning, supporting growth of the whole child, and individualized approaches to education.
3. [Elementary School] grades students on a scale of 1 – 4. 1 means the student is not yet meeting grade level expectations. 2 means the student is approaching grade level expectations. 3 means the student meets grade level expectations. And 4 means the student is above grade level expectations.
4. During the 2019-20 school year, DPS, by executive order of the Colorado governor, introduced virtual educational services, also known as remote learning, due to the COVID-19 pandemic.
5. From March 2020 through the end of the school year, all classes at [Elementary School] were remote.

### *2020-21 School Year*

6. During the 2020-21 school year, [Student] attended second grade at [Elementary School]. During the 2020-21 school year, [Elementary School] had both in-person and remote learning.
7. [Student's] second grade teacher was [Second Grade Teacher]. [Second Grade Teacher] testified:
  - a. During second grade, [Student] was energetic, loved to learn, loved reading, and was very technologically savvy. She did not observe [Student] have difficulty interacting with people or struggling socially or emotionally.
  - b. At the start of the school year, all instruction was remote. From October through Thanksgiving break, in-person classes resumed. From Thanksgiving to January 2021, all instruction was again remote. Beginning January 2021 through the end of the school year, instruction was in-person.
  - c. [Student] had normal relationships with his peers and appeared typical for a second grader. [Student] was on grade level for many of his subjects. See Ex. 5.
  - d. Because of the COVID-19 pandemic, there was little physical pencil and

paper work completed by students. Students “socially distanced” in the classroom and at recess, and generally students showed higher than normal stress levels because of the pandemic.

8. During the 2020-21 school year, Complainant observed [Student] reverse letters, struggle to make decisions on writing prompts, engage in awkward and/or inappropriate social behavior, and exhibit general stress. Based on her observations, and speaking with [Student’s] primary care physician, Complainant decided to have [Student] evaluated for learning disabilities. See Ex. 32.

9. [Second Grade Teacher] did not observe [Student] engage in most of the behaviors Complainant was concerned about. In her opinion, [Student] performed academically and socially as “typical for a second grader.”

10. In February 2021, Complainant provided [Second Grade Teacher] with a “NICHQ Vanderbilt Assessment Scale – TEACHER” questionnaire for [Student]. Ex. 16; Ex. U. [Second Grade Teacher] filled out the questionnaire and returned it to Complainant.

11. On February 14, 2021, Complainant emailed [Second Grade Teacher]:

Thank you so much for filling out the questionnaire for [[Student]] recently. Based on your responses, my partner’s and my responses, and a visit with his PCP, they’re referring him to [Hospital] for a learning evaluation. She can’t diagnose anything officially, but she says he’s showing signs of ADHD combined type and anxiety (which she believes is a result of the ADHD). The wait to get in for an eval to [Hospital] can be up to 8 months.

In the meantime, I’d like to request a special education evaluation for [[Student]] to determine if he qualifies for any accommodations or services. Can you let me know how to do that please?

Ex. 32.

12. [Second Grade Teacher] forwarded Complainant’s request to [Elementary School] principal [Principal], and included Complainant so that they could provide her with next steps for having [Student] evaluated. Ex. 32.

13. On February 17, 2021, [Principal] responded to Complainant:

Thank you for reaching out. I’m glad you are working with your PCP to figure out how to best support [[Student]]. You can request an evaluation at any time, but it really helps us to know what you are worried/wondering about. What are your

concerns?

[[Second Grade Teacher]], can you weigh in too? Are there specific areas that you are concerned about regarding [[Student's]] learning, behavior, or social-emotional growth?

I've cc:ed . . . one of our special education teachers, so we are all on the same page.

Ex. 32.

14. [Principal] testified that she asked Complainant about her concerns with [Student] in part because [Student] performed well academically and was not “already on the radar” at school.

15. Complainant responded:

My biggest concern is [[Student's]] emotional health. He has way too much anxiety for a seven year old. Also, he tells me that he's not a good person frequently and whenever I ask him about his day at school he tells me how he messed up. When he got an eagle feather a few weeks ago he told me how he didn't deserve it.

It's hard to explain what else I think is going on but [[Student]] has always marched to his own drum. Many times that's good – he's very intelligent, creative, makes amazing connections, and can be super kind. Other times, it causes problems. [[Student]] is a very “black or white” thinker. He's either the best or the worst, he's either completely right or 100% wrong, there is no middle ground. He can also go from moving extremely fast (talking constantly, unable to hold still, etc) to extremely slow (can't move past one topic of conversation and gets fixated on things for long periods of time). It's like he's never at the same pace as those around him. That's caused issues with friends and I do think his social skills are a little delayed. He understands the mechanics of social skills (we had him in a social skills group pre-COVID) but he can be too physical with other kids and it seems that many of his peers are moving past that stage. I also think he has some sensory issues – primarily auditory and tactile. Those have gotten much better as he's gotten older but I wonder if they're still impacting him more than I realize.

At home, I see him struggling with writing and spelling. He still reverses some letters (that might still be normal?) and still

has to use his finger to put the correct amount of space between words. I think this will cause issues with testing and his ability to demonstrate that he understands the material in class if it isn't already. During virtual school I noticed that whenever he had to pick a writing prompt he spent most of the writing time trying to decide which prompt to pick. I don't know if he was trying to delay the writing portion of the assignment (he does not like writing) or if he was really unable to decide but it was very difficult to get him to pick one.

I am going to ask [Hospital] about an autism evaluation in addition to the learning evaluation. I don't necessarily think he has autism but I see some traits of it so I would like an expert opinion.

Ex. 32.

16. [Second Grade Teacher] responded to [Principal] as well, writing:

I would agree that [[Student]] is very intelligent. He is able to articulate his thoughts and construct arguments to "defend" them. I am going to include some things we are seeing in [[Student]] in the classroom, but it is important to note that none of these are seen consistently. They will happen then we won't see them happen again for a while. I am still trying to get a really clear picture on [[Student]].

We are absolutely seeing the letter reversal, these are still appropriate for a portion of second grade but we are approaching the point where we are hoping to not see them anymore.

[[Student]] will fixate on small details. Last week he fell behind on his phonics works because he spent [the] majority of the working time to make sure his first and last name were written "perfectly." The direction was just to write your first and last name on the top of the paper.

[[Student]] struggles a bit with organizing his things. We have worked on reminding him that he should take the time to put things back in his folder, but when the time comes I am not sure if he is concerned about not doing it quickly or if he forgets but things are often not where they should be.

But I worry most about the eagle feather comment as we have seen that reaction too. He is unable to move on from a

decision that was “wrong” to identify his strengths. We are also working on telling him that just because you have a “bad” moment doesn’t mean everything about you and your day was bad. (I use “bad” and “wrong” very loosely in this context).

Ex. 32.

17. The school contact log, Ex. 4, shows that on February 19, 2021, [Elementary School] school psychologist, [School Psychologist], called Complainant to discuss her request for support for [Student] *Id.*

18. [School Psychologist] began meeting one-on-one with [Student] in February 2021. Ex. 4; Ex. 33.

19. On February 19, 2021, Complainant emailed [Principal], [Second Grade Teacher], [School Psychologist], and [Elementary School] special education teacher [Special Education Teacher] and requested that DPS “hold off” on evaluating [Student] Ex. U. Complainant wrote:

I just spoke with [School Psychologist] and she’s offered to visit [[Student]] a little next week. [Hospital] had a cancellation and is able to get [[Student]] in for that eval on March 15 which is much sooner that I was expecting.

So can we please hold off on a special education eval while those two things are in the works? We can revisit after we see what [Hospital] says and decide what to do from there.

*Id.*

20. [Principal] and [Second Grade Teacher] both testified that they understood Complainant’s email to ask the school not to move forward with a special education evaluation of [Student]

21. [Second Grade Teacher] testified that Complainant did not re-raise the request for a special education evaluation through the end of the school year.

22. On March 24, 2021, Complainant received the learning evaluation from [Hospital]. Ex. 1. The evaluator diagnosed [Student] with “written expression disorder.” *Id.*

23. [Elementary School] special education teacher [Special Education Teacher] testified that a written expression disorder can be a specific learning disability in writing, but does not have to be. Generally, test scores below the twelfth percentile qualify a student for a specific learning disability in writing.

24. Specific learning disabilities are one of the qualifying disabilities enumerated in the

IDEA defining “a child with disabilities.” 20 U.S.C. § 1401(3)(A).

25. On March 26, 2021, Complainant provided the [Hospital] evaluation to [School Psychologist]. Ex. 17; see Ex. 4 (March 18, 2021 contact log note that Complainant and [School Psychologist] spoke about the [Hospital] learning evaluation).

26. [School Psychologist] did not share the learning evaluation with [Principal], [Second Grade Teacher], or any other staff at [Elementary School].

27. [School Psychologist] told Complainant it would be difficult for [Student] to qualify for special education services based on a written expression disorder.

28. On April 5, 2021, Complainant emailed [School Psychologist] and told her that [Student’s] primary care physician recommended a “neuro-psych/autism evaluation” after reviewing the learning evaluation. Ex. 34. Complainant told [School Psychologist] [Student’s] physician asked:

if we could put a 504 plan<sup>1</sup> in place now and then do the Special Education eval in the fall when, hopefully, he’s not feeling as anxious like you recommend. I told her that he’s getting some 504 services without a formal plan. Do you think there’s any benefit to requesting a 504 evaluation now and waiting until the fall for the special education eval or does it make sense to look at both this fall?

*Id.*

29. [School Psychologist] did not begin a 504 evaluation of [Student] at that time. The 2020-21 DPS school year ended on May 28, 2021.

30. [Student] received consistent grades of “3” in writing in second grade. Ex. 5. Overall, [Student] performed at grade level in second grade. *Id.*

31. During summer 2021, Complainant enrolled [Student] in private therapy to address his anxiety.

#### *2021-22 School Year*

32. The 2021-22 DPS school year began on August 23, 2021. Ex. KKK. During the

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<sup>1</sup> “504” concerns Section 504 of the Federal Rehabilitation Act of 1973, 29 U.S.C. § 794 (2018). Section 504 is enforced by the United States Department of Education Office for Civil Rights and, therefore, is not within the jurisdiction of the ALJ. See 34 C.F.R. § 100.7. The ALJ includes findings of fact surrounding Complainant’s request for a 504 evaluation and plan as it is an integral to explaining the services and supports [Student] received at [Elementary School] during the time in question.

2021-22 school year, [Student] was in third grade at [Elementary School]. The 2021-22 school year was the first year back full-time in classrooms after remote learning.

33. [Student] was part of a “platooning” classroom in third grade, where [Teacher] taught homeroom, social sciences, mathematics, and science, and [Reading and Writing Teacher] taught reading and writing. See Ex. 5.

34. On September 7, 2021, Complainant, [School Psychologist], [Teacher], and [Reading and Writing Teacher] held a meeting over Google Meet to discuss [Student] and strategies “to support [[Student]] both at home and at school when he might become anxious or overly self critical.” Ex. 4.

35. [Teacher] testified:

a. Prior to the start of the school year, she had a “pass on” conversation with [Second Grade Teacher] about [Student]. This was to get a feel for [Student] as a student and what his needs may be.

b. She was not told that [Student] was diagnosed with a written expression disorder.

c. During the school year, [Student] was very inquisitive, remembered lots of facts, and was good in math. [Student] struggled with peer relationships, managing his emotions, and writing. [Student] particularly struggled during unstructured time such as recess and physical education.

d. [Student’s] behaviors during the fall semester were not out of the ordinary for a typical third grader. While [Student] could be anxious, he was able to participate in class, his specials, and interact with his peers.

e. Some of the tools she implemented to help [Student] manage his emotions were redirection, “brain breaks,” self-awareness, and sensory breaks outside the classroom. See Ex. LL. When [Student] was stuck on writing in science class, she would help him orally rehearse what he wanted to write and, on occasion, presented him with sentence stems.

f. [Student’s] handwriting was poor and difficult to reach due to spelling. In her estimation, because of the COVID-19 pandemic, a third of the class struggled writing and so [Student’s] handwriting did not particularly concern her.

36. [Reading and Writing Teacher] testified:

a. In the classroom, she did not observe many of the anxious and self-critical behaviors Complainant told them [Student] was exhibiting at home.

b. She was not told that [Student] had been diagnosed with a written

expression disorder in March 2021.

c. On his report card, [Student] received a “2” in writing because he could not consistently meet grade level expectations.

d. She found [Student’s] handwriting difficult to read, but he often used a computer.

e. She instituted “scaffold supports” for [Student] to help with his writing. Some of the supports she provided [Student] with were sentence stems or starters and scribing, where [Student] would tell her a story and she typed the story for him while including verbal prompts for the elements of fiction writing she was teaching.

f. With the supports she provided him, [Student] produced grade level appropriate work. She observed that [Student’s] level of interest in the writing subject impacted his effort and his writing.

g. She observed [Student] make many connections with other classmates during the 2021-22 school year. Because of the COVID-19 pandemic and remote learning, [Reading and Writing Teacher] also observed many students struggling due to the pandemic and gaps in their understanding.

37. [Student] struggled with peer interactions during the fall semester. See Ex. DD; Ex. FF. For example, [Student] became upset during afternoon recess when “a couple of classmates were calling him names that he did not appreciate related to his doing [Sport].” Ex. DD.

38. Complainant testified that [Student] was the target of bullying during third grade. Complainant exchanged multiple emails with [Student’s] teachers and [Elementary School] staff about her concerns. See, e.g., Ex. 37; Ex. JJ; Ex. 52.

39. [Principal], [Teacher], and [Reading and Writing Teacher] testified that [Student’s] negative peer interactions focused mostly with one other student ([Student 2]). [Student] considered [Student 2] a friend and wanted to spend time with him, but the interactions often resulted in conflict between [Student] and [Student 2].

40. [Principal] testified that [Student’s] relationship with [Student 2] did not involve bullying, as there was no imbalance of power between the two. Rather, both [Student] and [Student 2] struggled with emotional regulation, which often resulted in conflict between the two.

41. Complainant requested that [Elementary School] staff separate [Student] and [Student 2]. Ex. JJ; see Ex. 4. The staff at [Elementary School] kept [Student] and [Student 2] apart based on Complainant’s request. Ex. 48.

42. When [Student], or any student in the class, was upset, [Reading and Writing

Teacher] would approach the student to have a quiet conversation, and, if the student needed additional time to calm down they would be offered the option to go to the “quiet corner” of the classroom. According to [Reading and Writing Teacher], all classrooms at [Elementary School] have a “quiet corner” with a bean bag chair where a student could go when things felt “difficult.”

43. On October 12, 2021, Complainant emailed [School Psychologist]:

Can we start the 504 process for [[Student]]? I had his parent/teacher conference today and I really think he needs some more supports in class in addition to the time he gets with you. I know his teachers are already putting some supports in place because they’re awesome but I think he needs more help and I’d also like to get it documented so we can figure out what works best for him before he leaves [Elementary School] in a few years.

Ex. 26.

44. On October 29, 2021, [School Psychologist] emailed Complainant the BASC 3 Parent Rating Scale for evaluation of [Student] Ex. 4.

45. Complainant returned that evaluation to [School Psychologist]. [School Psychologist] did not do further work on the 504 evaluation for [Student] during 2021. See Ex. 41 (December 8, 2021 email from [School Psychologist] stating: “How dare you invoke the ‘paperwork that shall not be named’ or ‘the bane of my existence this year’ – aka 504. No one has any 504s with accommodations right now. When do these need to be finalized to apply to CMAS? The only one I can think of that may have any in the near future (as per parent request because he isn’t using any accommodations in the class right now) is [[Student]]. His 504 evaluation is in progress right now.”).

46. Complainant’s concerns about [Student] continued into the spring semester. Ex. 46; Ex. II; Ex. JJ; Ex. LL; Ex. 93; Ex. 52; Ex. 28. Complainant routinely emailed [Elementary School] staff asking about [Student’s] behaviors and schoolwork, and asking about implementing accommodations for [Student] See *id.*

47. Complainant followed up with [School Psychologist] about the 504 evaluation and plan on January 24, 2022. Ex. 45.

48. On February 6, 2022, Complainant emailed [School Psychologist], [Reading and Writing Teacher], [Teacher], [Principal], and two additional school members. Ex. II. Complainant wrote:

I was going to reach out and let you know that [[Student’s]] number came up on the wait list for the mental health and development evaluation at [Hospital] that I mentioned last

year. He's going to have a few appointments over the next few months and I'll share anything they find or recommend but I think he's doing so much better than he was this time last year and I made sure to mention that to the providers along with telling them about the amazing support he gets at school. Thank you for all you do.

Ex. II.

49. Beginning in March 2022, [Student] exhibited increasingly disruptive behaviors in the classroom. For example, [Student] was grabbing peers, pushing furniture, and throwing markers. Ex. 52; Ex. 28; Ex. 60. [Reading and Writing Teacher] testified that at this time she saw [Student] begin to physically express his emotions (particularly anger) rather than being able to speak about how he was feeling.

50. [Student's] escalated behaviors came after conflicts he had with classmates.

51. [Principal] worked with [Student] to help conduct "restorative conversations" where she, as a trusted adult, would help [Student] and whomever he was in conflict with speak through their conflict. [Principal] often saw improvement when [Student] participated in a restorative conversation.

52. On March 10, 2022, [Principal] met with Complainant to develop a support plan for [Student] based on his increased behaviors. Ex. 4. The plan included telling [Student] when he was in "the red zone" and creating a safe space – known as "[Student's] Corner" – where [Student] could go and decompress if he was feeling intense emotions. Ex. 9; see Ex. 54.

53. [Principal] observed [Student] using his body physically to get out his emotions so she created additional accommodations for [Student] by allowing him to lift weights in her office or use a weighted vest or weighted blanket.

54. The support plan created by [Principal] was a multi-tiered support services (MTSS) plan. Ex. 9. The leadership team, special education team, mental health team, and teachers at [Elementary School] work together to create a MTSS.

55. It was at this time that [Principal] became concerned that [Student's] behaviors were affecting his learning. However, because [Student] continued to meet academic expectations despite his behaviors, she did not suspect that an IEP was necessary for [Student]. Rather, in her professional opinion, the appropriate focus was on the 504 plan that was being developed for [Student].

56. When [Principal] asked [School Psychologist] about [Student's] 504 plan, [School Psychologist] told her that Complainant wished to wait until she had an evaluation from [Hospital].

57. [Student] continued to exhibit disruptive behaviors. Ex. 4. [Principal] emailed Complainant on April 26, 2022, Ex. YY; Ex. 64, spoke with Complainant on April 27, 2022, Ex. 4, and had a meeting with Complainant, [Student's] teachers, and [School Psychologist] on April 29, 2022 to discuss [Student] and Complainant's continued concerns of bullying, Ex. 4. See Ex. YY.

58. [Student] completed an assessment at [Hospital] on April 28, 2021. See Ex. 2.

59. During the April 29, 2022 meeting between [Elementary School] staff and Complainant, the parties decided to implement a behavior tracker for [Student] to help with his disruptive behaviors. See Ex. 8.

60. On May 2, 2022, [School Psychologist] emailed Complainant, [Reading and Writing Teacher], [Teacher], and [Principal] concerning the behavior tracker being developed for [Student] Ex. 69. As a part of the response to this email chain, [Principal] wrote:

I would like to recommend that we complete a full IEP evaluation given that this evaluation from [Hospital] pointed out a learning disability in written expression. If we go this route it would put us on a longer timeline, but we could start ASAP in August.

Ex. 69.

61. [Principal] was unaware that Complainant had provided [School Psychologist] with a copy of that learning evaluation in March 2021.

62. Complainant responded:

Thanks for bringing that up [[Principal]]. . . I've gone back and forth about that for almost two years.

I think it's worth at least considering an IEP eval even if it ends up being ruled out and we end up with a 504. I think he's receiving accommodations that are helping him outside of any formal processes so I'm comfortable waiting for now. I'll request an IEP eval at the beginning of next year unless anybody has any concerns with that.

So, for the rest of the school year my goal for [[Student]] is that he has as many positive experiences as possible, isn't disruptive to his classmates or teachers, and is as engaged as possible in the learning objectives. If the check ins/tracking sheet we've discussed will be beneficial to that then I'd love to talk about the criteria he's being measured against. Or,

should we wait to implement anything more until next year?  
At a minimum, I did get some good recommendations that I'd like to share with somebody in case it can help in the few weeks remaining this year.

Ex. 69.

63. On May 6, 2022, Complainant provided the initial report concerning [Student's] additional assessment from [Hospital] with [School Psychologist]. Ex. 83.

64. That evaluation diagnosed [Student] with autism spectrum disorder, generalized anxiety disorder (by history), and specific learning disability in written expression (by history). Ex. 2.

65. On May 6, 2022, during recess, [Student] "escalated during kickball and poked a child in the neck and then put his hands on the other child's neck in a choking manner." Ex. 4.

66. Around this time, [School Psychologist] left her employment with [Elementary School] prior to the end of the 2021-22 school year. [School Psychologist] dated a 504 Evaluation Report she completed for [Student] April 18, 2022. Ex. 99. However, that report contains information concerning [Student's] diagnosis of autism spectrum disorder, which was not provided to [School Psychologist] by Complainant until May 6, 2022.

67. [Assistant Principal], [Elementary School's] Assistant Principal, took over as the "504 coordinator" at [Elementary School]. Complainant had a meeting with [Assistant Principal] to develop [Student's] 504 Plan on May 17, 2022. See Ex. 10.

68. On May 19, 2022, [Student] elbowed a classmate in gym and choked another student during recess. [Student] "was placed in a safe space to de-escalate. [[Student]] overturned chairs, a table, threw objects in the room and repeatedly banged on the walls." Ex. 4.

69. [Principal] created a safety plan for [Student] after the May 19 incident. Ex. 11.

70. The last day of school for the 2021-22 school year was June 3, 2022. Ex. KKK. [Student] received a finalized 504 plan from [Assistant Principal] on June 3, 2022. Ex. 10; see Ex. 7 – 9; see *also* Ex. 79.

71. On June 3, 2022, Complainant emailed [Assistant Principal] stating: "I'll reach out before school starts to discuss the services times [in the 504 plan] and start the IEP evaluation." Ex. 79.

#### *2022-23 School Year*

72. The 2022-23 DPS school year began on August 22, 2022. Ex. LLL.

73. On August 17, 2022, special education teacher [Special Education Teacher] emailed Complainant a consent to evaluate form to begin a special education evaluation of [Student] Ex. III. Complainant responded to the request:

Thanks for reaching out but [[Student]] no longer attends [Elementary School]. I do not give consent for you, or anybody at [Elementary School] elementary, to evaluate him at this time.

*Id.*

74. Complainant enrolled [Student] at [Elementary School 2] in the [School District 2]. Complainant immediately requested [School District 2] conduct a special education evaluation of [Student] Ex. 25.

75. [Elementary School 2] school psychologist [School Psychologist 2], [Elementary School 2] fourth grade teacher [Fourth Grade Teacher], and [Elementary School 2] special education teacher [Special Education Teacher] testified concerning [Student's] experiences at [Elementary School 2] and the special education evaluation process in [School District 2].

76. On November 3, 2022, [School District 2] completed an evaluation of [Student]. Ex. 14. [School District 2] determined [Student] was a student with disabilities pursuant to the IDEA. Ex. 15.

### **Conclusions of Law and Discussion**

In her Due Process complaint, Complainant alleges that DPS (1) denied [Student] a free appropriate public education pursuant to 34 C.F.R. § 300.101 and 34 C.F.R. § 300.17; (2) violated the IDEA's "child find" requirement under 34 C.F.R. § 300.111; (3) failed to conduct an initial evaluation of [Student] pursuant to 34 C.F.R. § 300.301; (4) failed to have a proper individualized education plan (IEP) under 34 C.F.R. § 300.323 and 34 C.F.R. 300.324; and (5) predetermined an IEP for [Student]

#### *I. Burden of Proof*

Complainant bears the burden of proof to establish that DPS violated the IDEA and its implementing regulations. *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008) ("The burden of proof in such a challenge rests with the party claiming a deficiency in the school district's efforts . . .").

#### *II. Law and Analysis*

The IDEA was created to "ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further

education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A).

#### *A. DPS Failed its Child Find Obligation*

“The child find obligation requires schools to proactively ‘identify, locate, and evaluate’ students with disabilities who may need special education or other academic supports.” *D.T. v. Cherry Creek Sch. Dist. No. 5*, 55 F.4th 1268, 1273 (10th Cir. 2022) (quoting 20 U.S.C. § 1412(a)(3)); see *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1110 (9th Cir. 2016) (“In order to provide a free appropriate public education to all children with disabilities States must, of course, first identify those children and evaluate their disabling conditions.”).

A “child with a disability” is a student with a qualifying disability under IDEA and “who, by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a)(1); 20 U.S.C. § 1401(3)(A). Federal regulation clarifies child find is triggered when children “are *suspected* of being a child with a disability . . . even though they are advancing from grade to grade.” 34 C.F.R. § 300.111(c)(1) (emphasis added). Thus, the child find duty is triggered when the school district has reasonable suspicion to believe that a student is a “child with a disability.”

*D.T.*, 55 F.4th at 1273-1274. “Districts must act ‘within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.’” *Id.* (quoting *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 250 (3d Cir. 2012)).

The IDEA expressly includes “specific learning disabilities” as a qualifying disability for purposes of receiving special education. 20 U.S.C. § 1401(3)(A) (“The term ‘child with a disability means a child – with . . . specific learning disabilities, who, by reason thereof, needs special education and related services.”).

Based on the evidence in the record, Complainant correctly argues DPS failed its child find obligation when it did not evaluate [Student] for special education services after she provided [School Psychologist] with the [Hospital] learning evaluation diagnosing [Student] with a written expression disorder. While a diagnosis of a written expression disorder does not automatically mean the child has a specific learning disability, the information in the evaluation was enough to trigger the child find obligation because [Student] could be “suspected” of being a child with a disability. Here, Complainant emailed [School Psychologist] a copy of that evaluation on March 26, 2021. Ex. 17. Over a year later, in May 2022, [Principal] suggested an evaluation of [Student] based on the exact diagnosis in that evaluation. Complainant’s request that [Elementary School] “hold off” on testing [Student] acts as a red herring in this matter; Complainant provided the completed evaluation by [Hospital] to DPS in March 2021. That evaluation triggered DPS’s obligation to evaluate [Student]. See, e.g., *T.B.*, 897 F.3d at 573.

However, the fact that DPS failed to meet its affirmative child find duty does not end the inquiry. In order to obtain the compensatory education he seeks, [Student] must show that this defect in the process envisioned by the IDEA adversely effected his education. The ALJ concludes that [Student's] education was not adversely effected, and, therefore, he was not denied FAPE.

*B. [Student] Did Not Experience a Loss of Educational Opportunity*

A procedural violation of the IDEA may not serve as the basis for recovery unless it “resulted in the loss of an educational opportunity for the disabled child.” *M.M. [ex rel. D.M. v. Sch. Dist. of Greenville Cty.]*, 303 F.3d 523, 533 (4th Cir. 2002)]. A “mere technical contravention of the IDEA” that did not “actually interfere with the provision of a FAPE” is not enough. *DiBuo [v. Bd. of Educ.]*, 309 F.3d 184, 190 (4th Cir. 2002)] (quoting *M.M.*, 303 F.3d at 533). Rather, the procedural violation must have caused substantive harm. Specifically, the prospect of recovery for a procedural violation of the IDEA depends on whether the student’s disability resulted in the loss of a FAPE.

*T.B.*, 897 F.3d at 573; see 20 U.S.C. § 1415(f)(3)(E)(ii); see also *Doe v. Brighton Sch. Dist. 27J*, 2022 U.S. Dist. LEXIS 160474, at \*17-18 (D. Colo. Sept. 6, 2022).

“A school district satisfies its obligation to provide a FAPE to a disabled child ‘by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.’” *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E.*, 798 F. Supp. 3d 1177, 1179 (D. Colo. 2011), *aff’d*, 702 F.3d 1227 (10th Cir. 2012), (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982)).

Initially, the ALJ notes that DPS did offer to conduct an evaluation of [Student] at what would have been the beginning of his fourth-grade year. Complainant declined that offer as the family had moved to [School District 2] during the summer and [Student] would no longer be attending [Elementary School]. Therefore, had [Student] remained at DPS, he would have been evaluated for services and, likely, received an IEP. Thus, the fact that DPS never created an IEP for [Student] does not establish that [Student] was denied FAPE as DPS offered an evaluation and Complainant declined to have the evaluation completed at that time.

More importantly, Complainant has failed to establish that [Student] was denied FAPE. While there was plenty of testimony at hearing about what did and did not happen during [Student's] second and third grade years, there was no evidence as to how these actions “impeded” [Student's] right to FAPE or how [Student] was “deprived of educational benefits” during this time. Rather, the evidence at the hearing establishes that the staff

at [Elementary School] went to great lengths to ensure [Student's] access to FAPE based on Complainant's concerns and the behaviors seen in the classroom. Without knowing of [Student's] diagnosis of a written expression disorder, [Student's] classroom teachers provided him accommodations in the form of computer access, sentence stems, and scribing. With that support, [Student] continued to approach or meet expectations for grade level appropriate writing. Concerning his emotional regulation, [Student] had counseling, restorative conversations, "[Student's] Corner," and additional supports to help him with his emotions. Throughout this time, [Student] continued to go to school, access the material, and, although not the end-all-and-be-all, meet grade level expectations. [Student] benefited educationally from the personalized instruction with supports he received at [Elementary School], even without an evaluation or an IEP. Thus, [Student] received FAPE and Complainant is not entitled to any relief for DPS's procedural violation of the IDEA.

### *III. Conclusion*

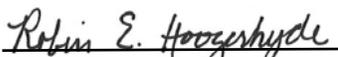
Complainant established that DPS procedurally violated the IDEA by violating its child find obligation pursuant to 20 U.S.C. § 1412(a)(3). However, Complainant failed to establish that [Student] was denied FAPE by DPS based on that procedural violation. 20 U.S.C. § 1415(f)(3)(E)(ii). Therefore, Complainant is not entitled to relief under the IDEA under any of the theories presented in the Due Process Complaint.

### **ORDER**

The ALJ concludes that Complainant failed to meet her burden of proof establishing that DPS failed to provide [Student] with FAPE.

This decision is the final decision of the independent hearing officer pursuant to 34 C.F.R. §§ 300.514(a) and 300.515(a). Any party has the right to bring a civil action in appropriate court of law, either federal or state, pursuant to 34 C.F.R. § 300.516.

**SIGNED:** July 28, 2023.

  
Robin E. Hoogerhyde  
Administrative Law Judge

