

<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>[Complainant], parent of [Student],</b> Complainant,</p> <p>vs.</p> <p><b>CHERRY CREEK SCHOOL DISTRICT NO. 5,</b> Respondent.</p>	
<b>DECISION</b>	

Complainant alleges that Cherry Creek School District (School District) denied her son, [Student], a free appropriate public education in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482. A due process hearing, convened in accordance with 20 U.S.C. § 1415(f) and its implementing regulation 34 CFR § 300.511, was held before Administrative Law Judge (ALJ) Robert Spencer at the Office of Administrative Courts on December 10 and 11, 2019. Igor Raykin, Esq., Kishinevsky & Raykin, Attorneys at Law, represented Complainant. Elizabeth R. Friel, Esq., Caplan and Earnest LLC, represented the School District.

### Case Summary

#### *The Requirement of FAPE*

The purpose of the IDEA is 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. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and revise an Individualized Education Program (IEP) calculated to meet the eligible student’s specific educational needs. 20 U.S.C. § 1414(d). A school district satisfies the requirement for FAPE when, through the IEP, it provides a disabled student with a “basic floor of opportunity” that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982).

#### *Child Find*

Key to a school district’s ability to provide FAPE is its obligation to identify, locate, and evaluate disabled children who are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 CFR § 300.111. This obligation, known as Child Find, extends to any child age 3 to 21 suspected of being a child with a disability, and regardless of the severity of the disability is in need of special education, even though

the child may be advancing from grade to grade. 34 CFR § 300.111(c)(1). Either the school district or the parents may request a special education evaluation. 34 CFR § 300.301(b). However, because Child Find is an affirmative obligation upon the school district, a parental request for evaluation is not required. *Robertson County Sch. Sys. v. King*, 99 F.3d 1139 (6<sup>th</sup> Cir. 1996).

### *The Allegations*

[Student] is an 18 year-old male who, prior to November 2017, attended [High School], a school within the School District. In November 2017, [Student] was involved in a disciplinary incident that resulted in his expulsion from [High School]. Following his expulsion, Complainant arranged for [Student]'s transfer to [High School 2], a school within [School District 2]. [Student] graduated from [High School 2] in May 2019.

In April 2019, Complainant filed a Due Process complaint alleging that the School District failed its Child Find obligation to identify [Student] as a disabled child needing special education. Specifically, she alleges that, as early as April 2017, the School District knew or should have known that [Student] was suffering a serious emotional disorder (SED) that was interfering with his ability to access the educational environment and adversely affecting his grades. She alleges that had the School District met its Child Find obligation, it would have promptly identified [Student]'s special education needs and developed an IEP that would have prevented his educational and emotional decline. As it was, the School District allegedly neglected this responsibility until after the disciplinary event in November 2017 that resulted in [Student]'s expulsion. Although the School District thereafter promptly evaluated [Student] and developed an IEP, Complainant contends the delay caused [Student] harm entitling him to compensatory services including reimbursement of treatment and therapy costs and college expenses.

The School District denies that it failed its Child Find responsibility. Although it ultimately identified [Student] as suffering an SED, it contends that, prior to the disciplinary event in November 2017, there was insufficient reason to think that he was suffering an SED or was in need of special education. The School District points out that it engaged in a variety of interventions to help [Student] emotionally and academically. Only after it became apparent that those interventions were ineffective did the need for special education arise. Furthermore, the School District contends that even if there was some delay in meeting its Child Find obligation, the delay was minimal and caused no academic harm to [Student]. The IEP it developed in December 2017 was adopted by [Student]'s new school district in January 2018, and [Student] successfully graduated on time in May 2019. Finally, the School District asserts that much of the monetary compensation Complaint seeks, such as reimbursement for medical care and drug abuse treatment, is not compensable.

For reasons explained below, the ALJ concludes that the School District did not violate its Child Find obligation. Because that conclusion is dispositive of the complaint, the ALJ will not address the School District's other defenses.

## Findings of Fact

1. [Student] is an 18 year-old male who, in 2015 at the age of 14, moved with his family from [Other State] to [City], Colorado. He lives with his parents and [Siblings].

2. At the beginning of his freshman year in the fall of 2015, [Student] enrolled in the School District and began attending [High School]. [Student] found the transition from his old school in [Other State] to [High School] difficult because his old school was small and he knew everyone; whereas, [High School] is very large and he knew no one.

3. [Student] was academically successful at his old school. He testified that he was an honor roll student and had ambitions to attend a four-year college with a music major. [Student]'s "passion" was the saxophone.

4. Although [Student] continued to do well academically at [High School] in the fall of 2015, he began to struggle emotionally due to difficulty making new friends and his perception that his teachers were not supportive of him. In addition, due to his college ambitions, he was taking rigorous Advanced Placement and Honors classes that posed new academic challenges. Nonetheless, he achieved a B average (3.049 unweighted) in the fall 2015 semester. Ex. 26, p. 1.<sup>1</sup>

5. In January 2016, Complainant contacted [Student]'s school counselor, [School Counselor], to ask for help. She told [School Counselor] that [Student] was saying "everyone hates him" and he has no friends. He also believed his teachers were "rude" and did not care for him. According to Complainant, [Student] was coming home in tears and depressed every day. She was extremely worried about [Student] and asked [School Counselor] to speak with him. Ex. 5, p. 16.

6. The following day, [School Counselor] responded that although he could not meet with [Student] that day, he would meet with him soon. Ex. 5, p. 16. [School Counselor] testified that when he spoke with [Student], he noted [Student] was having some difficulty transitioning to the new, larger, school environment, but did not detect any specific needs. [Student] was doing well academically, was making more friends, and was "working up in band."<sup>2</sup>

7. In the spring of 2016, [Student] continued to do well academically. He continued to maintain a B average (3.049, unweighted). Ex. 26, p. 1. However, he continued to struggle emotionally. Because he resented his parents' decision to move to Colorado, he was also having conflicts at home.

8. At the beginning of his sophomore year in the fall of 2016, [Student]'s grades began to deteriorate. Whereas he previously received mostly A's and B's, he now received D's in two classes, with a semester unweighted GPA of 2.334. Ex. 26, p. 1. Because these classes were rigorous Honors classes, his counselor, [School Counselor], suggested that [Student] consider scaling back to standard grade-level

---

<sup>1</sup> Exhibit 26 is a grade transcript from [School District 2], but includes [Student]'s grades while at [High School].

<sup>2</sup> [Student] believed his band teacher did not recognize his musical talent, and consequently had not advanced his leadership position within the band to where [Student] believed he should be.

courses that were less challenging. [Student] resisted this idea because of his college ambitions.

9. There is some evidence [Student] continued to suffer emotionally. A log note entry by [School Counselor] on October 6, 2016 indicates that he received an after school text message from two of [Student]'s friends who were concerned about his welfare. In response, [School Counselor] contacted Complainant and asked the county sheriff's office to conduct a welfare check. The record contains no other information about the incident, other than that [Student] was reported to be "OK." Ex. 12, p. 2.

10. [Student]'s grades continued to deteriorate in the spring of 2017. Although his grade in Honors Chemistry improved from a D to a C, he was now failing his Honors English class. In addition, his grade in Geometry deteriorated from a C to a D. His semester GPA fell to a 2.210, unweighted. Ex. 26, p. 1.

11. [Student]'s emotional stress reached a crisis level in April 2017 when he expressed suicidal ideation. On April 23, 2017, Complainant reported to [School Counselor] and two of [Student]'s teachers that following an ugly argument, [Student] fled the house and tried to kill himself by stepping in front of a car. [Student] said he felt dumb and stupid, hated himself and his parents, and felt the easiest thing to do was give up. He also reported someone in his band class was bullying him, but Complainant was not sure if the report was true. She expressed a desire to obtain therapy for [Student], but was financially unable to do so. Ex. F, p. 2.

12. The next day, on April 24, 2017, [High School] psychologist, [High School Psychologist], met with [Student] to conduct a suicide risk assessment.<sup>3</sup> [Student] disclosed to [High School Psychologist] that he had been feeling suicidal and tried to kill himself by walking into traffic. The car, however, swerved and he was not injured. He reported crying, not sleeping well, and lacking motivation. Ex. G.

13. [High School Psychologist] concluded that [Student] was at high risk of suicide and arranged for Complainant to immediately transport [Student] to the [Crisis Center], where he was evaluated and found safe to return home. [High School Psychologist] also advised [Student]'s teachers of what occurred. Ex. F, p. 4.

14. The following day, Complainant contacted [High School Psychologist] to ask that he follow up with [Student] Ex. F, p. 5.

15. On April 28, 2017, [Student] told [High School Psychologist] that although he was doing better he was still having negative thoughts when alone. [High School Psychologist] therefore arranged for a referral to the Second Wind Fund, which provides financial assistance to parents whose child is in need of mental health counseling. Ex. 12, p. 2. He also provided Complainant with a list of therapists who participate in the Second Wind referral program.

16. On May 7, 2017, Complainant wrote to [High School Psychologist]

---

<sup>3</sup> [High School Psychologist] has 23 years' experience as a school psychologist, during which he has also maintained a private practice in clinical psychology.

expressing frustration with [Student]'s emotional outbursts. She felt [Student] was attempting to manipulate her by making threats to hurt himself. She acknowledged receiving the list of therapists [High School Psychologist] provided, but reported that seeing a therapist would be a waste of time "as he will not cooperate." She also expressed concern that [Student] was using drugs. Ex. I, p. 1.

17. There is no record of [High School Psychologist]'s response to this communication; however, on May 24, 2017, [High School Psychologist] and Complainant met and agreed that because [Student] failed his Honors English class, he should transfer to a standard grade-level English class. According to his Honors English teacher, [English Teacher], [Student] struggled both academically and emotionally and, it had been "a difficult year with many conversations with the family." Ex. I.

18. Pursuant to this plan, [Student] took the grade-level English class during the summer semester and did well, earning a B+ average. Ex. 26, p. 1.

19. [Student]'s junior year in the fall of 2017 began reasonably well. However, by September 2017, [Student] was having significant problems at home. On September 14, 2017, Complainant reported to [School Counselor] that [Student] was "giving us a really hard time right now." She was "almost certain" he was abusing drugs and was hanging out with friends during his off period rather than doing his homework. She reported that he is "always angry" and "needs a wake-up call." Complainant asked [School Counselor] to speak with [Student] about his slipping grades and to ensure that he used his time appropriately. Ex. 5, p. 9.

20. Pursuant to Complainant's request, [School Counselor] spoke with [Student] the next day. [Student] told [School Counselor] that he felt he was getting behind on his schoolwork and generally had a negative outlook. [Student] also said he felt disengaged at home and spent a lot of time in his room. However, he expressed an interest in joining the school pep band, earning a spot on the all-state band, and obtaining a part-time job. [School Counselor] discussed with [Student] ways to get back on track with his schoolwork, and agreed to help him join the pep band. He also encouraged [Student] to self-reflect on what was causing his negative outlook, to find a way to communicate with his parents, and to set goals for himself. Ex. 5, p. 9.

21. On September 19, 2017, [Student] had an emotional break down at home and fled the house at 2 a.m. saying he was depressed and did not want to live. According to Complainant, [Student] was also engaging in self-injury by superficial cutting and violent head-banging. When [Student] was located, he was taken to Children's Hospital where he was admitted for inpatient psychiatric treatment including a regimen of antidepressant medication.

22. [Student] was discharged on September 24, 2019 with diagnoses of Major Depressive Disorder and Unspecified Anxiety Disorder. Ex. L.

23. On September 26, 2017, [High School Psychologist] met with [Student] to develop a school re-entry plan. Complainant participated in the meeting by phone. The plan included outpatient mental health therapy, in-school check-ins with [School

Counselor] and [High School Psychologist] over the following two weeks, and help managing his outstanding class work. Ex. K.

24. The same day, [High School Psychologist] sent a confidential e-mail to [Student]'s teachers advising them of [Student]'s mental health concerns and [Student]'s anxiety about getting caught up with his class work following his absence. [High School Psychologist] asked [Student]'s teachers to work with [Student] to get caught up within a reasonable time frame and to consider waiving or reducing non-essential missing assignments. Ex. J, pp. 6-7.

25. As an additional part of the re-entry plan, [High School Psychologist] recommended that [Student] meet with an academic tutor or meet with his English teacher who had the same off-hour as [Student]. Ex. K. Although [Student] expressed an openness to these options, he did not take advantage of either one.

26. During the fall semester, [Student] continued to struggle academically and began having attendance issues. Although he did not have a history of unexcused absences, he was over ten minutes late to his American Literature class on three occasions in late August to early September 2017, and missed the class entirely on three occasions in late September to early October 2017. Ex. B, p. 1.<sup>4</sup> He was disciplined for his truancy first by a warning, then by after school detention. Ex. 12, p. 1.

27. On September 30, 2017, Complainant contacted [High School Psychologist] to report that [Student] was "doing weed" at home and that he admitted he was skipping class to go to a friend's house to use drugs. Ex. J, p. 1.

28. When Complainant confronted [Student] about his unexcused absences, he responded that his schoolwork was too much and no one cared or helped him. He was crying and depressed. Ex. 7, p. 2.

29. On Wednesday, October 11, 2017, Complainant e-mailed [School Counselor] and [High School Psychologist] to say that [Student] was still mentally fragile and to ask for a meeting on Friday to develop a 504 Plan.<sup>5</sup> [High School Psychologist] responded that a formal 504 Plan meeting could not be arranged that quickly, but he agreed to meet with Complainant to "talk about how to help [[Student]] right now." Ex. M, p. 1.

30. [High School Psychologist] met with Complainant on Friday, October 13<sup>th</sup> to establish a further plan to help [Student] get organized and caught up in class. Ex. M, p. 3. As a result of this meeting, [High School Psychologist] referred [Student] to an SAIP teacher,<sup>6</sup> [SAIP Teacher], to help with the plan. [SAIP Teacher] is an experienced special education teacher who, as an extra duty, provides structure and teaches organizational skills to selected general education students who are struggling

---

<sup>4</sup> Unexcused tardiness is denoted by "T", unexcused absence by "Q."

<sup>5</sup> This is a reference to Section 504 of the Rehabilitation Act of 1973 which, as applied to schools, provides that students with disabilities receive accommodations necessary to function in the general education environment.

<sup>6</sup> SAIP stands for Student Achievement Incentive Plan.

academically.

31. [SAIP Teacher] testified that although she sent [Student] several passes asking him to meet with her, he never did so.

32. [High School] was on fall break the week of October 23<sup>rd</sup>. Following fall break, [High School Psychologist] asked [Student] to meet with him, but [Student] did not do so.

33. On November 9, 2017, [School Counselor] met with [Student]'s father, who brought [Student] to school after missing the bus. [Student]'s father was concerned about an argument with [Student] that morning, and wanted [School Counselor] to know that [Student] was still upset. Ex. 12, p. 1. Later that day, [School Counselor] asked [Student] to come to the counseling office to see him, but [Student] did not appear. [School Counselor] informed Complainant and asked her to encourage [Student] to see him. [Student], however, told Complainant that she could not make him see [School Counselor] and ran out of the house. She reported he was crying, screaming and hitting things. Ex. N, p. 1.

34. The next day, a friend of [Student] reported to the school dean that [Student] made a comment two days earlier that he was going to bring weapons to school in a duffel bag and "shoot up the school." The school immediately convened a Threat Assessment Team and interviewed [Student]. Ex. P. [Student] told school psychologist [School Psychologist] that his comment about shooting up the school was a joke and he never intended to harm anyone. He admitted arguing with his parents, but denied suicidal ideation. While the team was discussing the situation, [Student] eloped from school and called Complainant, telling her he was going to kill himself. Ex. 12, p. 1. The police located [Student] and took him to Children's Hospital where he was admitted for inpatient psychiatric treatment.

35. [Student] remained at Children's Hospital until his discharge on November 15, 2017. His diagnoses upon discharge were Recurrent and Severe Major Depressive Disorder and Generalized Anxiety Disorder. Ex. S, p. 2. Discharge recommendations included participation in family and individual therapy, and exploration of an IEP "to help with emotional support." Ex. S, p. 3.

36. As a consequence of his threat to "shoot up the school," [Student] was expelled and did not return to school.<sup>7</sup> However, he transitioned to the School District's Home/Hospital program where, from November 2017 through January 2018, he received one-on-one instruction in his core classes from teacher [One-on-one Instructor]. Ex. 23. [One-on-one Instructor] testified that although [Student] was initially stressed by the amount of class work he missed and by the difficulty of making it up, he gradually came to feel better about his progress and his outlook improved.

37. On November 15, 2017, Complainant requested a special education evaluation with a view toward developing an IEP. [High School Psychologist]

---

<sup>7</sup> Complainant has not formally challenged [Student]'s expulsion, or the School District's determination that his misconduct was not a manifestation of his disability.

immediately forwarded the request to the school's Student Achievement Services Coordinator to arrange for the evaluation. Ex. R, p. 1.

38. On November 17, 2019, a psychological evaluation was conducted under [High School Psychologist]'s supervision.<sup>8</sup> The psychological report found that although [Student] had average cognitive ability, he was struggling with social and emotional difficulties and was experiencing significant symptoms of anxiety and depression. Consequently, [High School Psychologist] felt that [Student] "may benefit from added support within the home and school environment to address his social and emotional needs." Ex U, p. 12.

39. On December 13, 2017, the school IEP team met and concluded that [Student] had a Serious Emotional Disability (SED) as shown by his inability to build and maintain interpersonal relationships, his inappropriate behavior under normal circumstances, his general pervasive depressive mood, and his tendency to develop symptoms and fears associated with personal and school problems. Ex. V, p. 1.

40. Furthermore, the IEP team found that [Student]'s SED prevented him from receiving educational benefit from general education. Ex. V, p. 1.

41. Finally, the IEP team concluded that [Student]'s SED rendered him eligible for special education services because: (1) a variety of general education interventions had been tried but were unsuccessful; (2) his social/emotional dysfunction was marked and was at a rate and intensity outside the norm; (3) his social/emotional dysfunction was observable in at least two settings, including the school environment; and (4) his social/emotional dysfunction was not an isolated incident but existed over a period of time. Ex. V, p. 2.

42. On the same date, the IEP team developed an IEP with two educational goals for [Student]: (1) development of social/emotional wellness, and (2) development of self-determination in meeting with classroom teachers to arrange for necessary accommodations. Ex. W, p. 6. His accommodations included allowance of class time to seek adult support, extended time for homework, frequent checks for understanding, consideration of more time for independent work, and access to headphones during independent work, as appropriate. Ex. W, p. 6-7.

43. To assist in meeting his goals, [Student] was to receive specialized instruction and related services. This included two hours per month of in-school services from a mental health provider ([High School Psychologist]), and a half-hour per month of specialized instruction from a special education case manager ([SAIP Teacher]). Ex. W, p. 9.

44. Although [High School Psychologist] and [School Counselor] were both aware that [Student] was experiencing emotional and behavioral problems at home, prior to his threat to "shoot up the school" in November 2017 he had not displayed behavioral problems at school. Furthermore, they believed that interventions such as

---

<sup>8</sup> This was an extraordinarily prompt evaluation. State rules require completion of an initial evaluation within 60 calendar days of the referral. 1 CCR 301-8, 2220 Rule 4.02(3)(c).



moving [Student] from English Honors to a grade-level English class, periodic check-ins, referral to tutors, and referral for funding of outpatient mental health therapy would be adequate to address his slumping grades. At no time prior to the incident in November 2017 did they believe that [Student] suffered a disability requiring special education.

45. [Student], however, testified that he “could have used more help” while at [High School], but felt he never received the help he needed. He found the transition from his small middle school in [Other State], where he was doing well, to [High School] where he had no friends, “a little rough.” However, he still had the dream of going to college and “wanted to do his best.” Unfortunately, in his sophomore year, he lost focus and motivation, and believed his teachers were doing nothing to help. He became depressed and started using drugs to get through the day. He says the only thing that kept him going was his passion for music and his friends in the [High School] music program. However, when his grades declined in the fall of 2017, he knew he would never qualify for admission to a four-year college and gave up his dream of being a professional musician. When he was expelled in November 2017, he lost access to his friends and the music program that was his passion. He believes that had he gotten the help he needed earlier, he would not have been expelled.

46. Complainant is a Spanish teacher employed by [School District 2]. In January 2018, she withdrew [Student] from the Cherry Creek School District and transferred him to [School District 2] where he enrolled at [High School 2].

47. Because of his transfer to [School District 2], the IEP was never implemented at [High School]. However, it was adopted by [School District 2] as the basis for its IEP.

48. [Student]’s final fall 2017 semester grades at [High School] included two B’s, four C’s, a D in U.S. History, and a failing grade in Physics. The failing grade in Physics was largely due to a significant number of missed lab assignments that [Student] was unable to make up during his Home/Hospital schooling. His unweighted GPA for the fall semester was 1.875. Ex. D, p. 4.<sup>9</sup>

49. In the first semester following his transfer to [High School 2], [Student]’s grades markedly improved, resulting in an unweighted GPA of 3.390. Ex. 26, p. 1.

50. Unfortunately, in his senior year at [High School 2], [Student]’s grades again fell, with an unweighted GPA of 2.266 in the fall 2018 semester and an unweighted GPA of 2.0 in the spring 2019 semester. Ex. 26, p. 1.

51. According to [Student], his grades initially improved because he received more attention and accommodations from his teachers at [High School 2] than he had at [High School]. However, in his senior year, his grades dropped because he was again abusing drugs and lost focus. Although he was taking some college level courses, he skipped classes and no longer cared about his future.

---

<sup>9</sup> The failing grade in Chamber Ensemble/Instrument class shown on Ex. 26, p. 1 is in error. Complainant actually achieved a B in that class. Ex. D, p. 4.

52. Despite his deteriorating grades, [Student] successfully graduated from [High School 2] in May 2019.

53. [Student]'s current plan is to enroll in [Community College] and obtain an Associate of Applied Science degree in automotive service technology.

## **Discussion and Conclusions of Law**

### *Burden of Proof*

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion “where it usually falls, upon the party seeking relief.” See also *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10<sup>th</sup> Cir. 2008) (“The burden of proof . . . rests with the party claiming a deficiency in the school district’s efforts.”) Complainant therefore bears the burden of proving that the School District violated its Child Find obligation.

### *The Child Find Obligation*

Per IDEA § 1412(a)(3), school districts have the affirmative obligation to ensure that any child with a disability, regardless of severity, who needs special education and related services is “identified, located, and evaluated.” According to 34 CFR § 300.111(c)(1), this obligation extends to all children who are “suspected of being a child with a disability . . . in need of special education, even though they are advancing from grade to grade.”

The threshold for suspicion of a disability is relatively low, and is not whether the child actually qualifies for special education services, but rather whether the school district has reason to suspect a disability and that special education services may be necessary to address that disability. *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F.Supp. 2d 1307, 1311 (D. Utah 2002). Knowledge of the disability may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for evaluation. *Id.* A school district need not “rush to judgment or immediately evaluate every student exhibiting below-average capabilities,” *D.K. v. Abington*, 696 F.3d 233, 252 (3<sup>rd</sup> Cir. 2012); rather, Child Find requires a school district to identify and evaluate a child “within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.” *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 320 (5<sup>th</sup> Cir. 2017).

An unreasonable delay in conducting an evaluation may be a procedural violation of the IDEA, but will serve as a basis for recovery only if it “resulted in the loss of an educational opportunity for the disabled child.” *T.B. v. Prince George’s County Bd. of Educ.*, 897 F.3d 566, 573 (4<sup>th</sup> Cir. 2018) (“procedural violations [are] harmless where the student nonetheless received an IEP and achieved reasonable educational progress.”) See also *Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1126-27 (10<sup>th</sup> Cir. 2008) (noting 10<sup>th</sup> Circuit precedent that a procedural failure amounts to a substantive failure of the IDEA only if the procedural inadequacy deprived the student of educational benefit). But see *Dep’t of Educ v. Cari Rae S.*, 158 F.Supp. 2d

1190, 1196 (“No IEP, no FAPE”) and *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 766 (6<sup>th</sup> Cir. 2001) (failure to develop an IEP necessarily resulted in loss of educational opportunity.)

### *The Definition of Serious Emotional Disability*

As a consequence of the School District’s evaluation in November 2017 and disability determination in December 2017, [Student] was found to be a child with a serious emotional disability in need of special education. There is no dispute about that determination. The only dispute is whether the School District failed its Child Find obligation by not conducting a special education evaluation earlier than it did. The resolution of that dispute depends largely upon the definition of “serious emotional disability.”

A “child with a disability” includes a child suffering from a serious emotional disability (SED). 34 CFR § 300.8(a). An 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 that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 CFR § 300.8(c)(4)(i);<sup>10</sup> 1 C.C.R. 301-8, 2220 Rule 2.08(3)(a).

Absent evidence of these criteria, the term does not apply to a child who is socially maladjusted. 34 CFR § 300.8(c)(4)(ii); 1 CCR 301-8, 2220 Rule 2.08(3)(d); *A.E. v. Indep. Sch. Dist. No. 25*, 936 F.2d 472, 476 (10<sup>th</sup> Cir. 1991).

Furthermore, to qualify as a child with an SED, there must be documentation of all of the following qualifiers:

- (i) A variety of instructional and/or behavioral interventions were implemented within general education and the child remains unable to receive reasonable educational benefit from general education.
- (ii) Indicators of social/emotional dysfunction exist to a marked degree; that is, at a rate and intensity above the child's peers and outside of his or her cultural norms and the range of normal

---

<sup>10</sup> The federal regulation refers to an SED as an “emotional disturbance.”

development expectations.

- (iii) Indicators of social/emotional dysfunction are pervasive, and are observable in at least two different settings within the child's environment. For children who are attending school, one of the environments shall be school.
- (iv) Indicators of social/emotional dysfunction have existed over a period of time and are not isolated incidents or transient, situational responses to stressors in the child's environment.

1 CCR 301-8, 2220 Rule 2.08(3)(c).

Finally, a child with an SED will be eligible for special education only if, as a result of the SED, there is an impairment in academic functioning as demonstrated by “an inability to receive reasonable educational benefit from general education,” or there is an impairment in social/emotional functioning as demonstrated by:

[A]n inability to build or maintain interpersonal relationships which significantly interferes with the child's social development. Social development involves those adaptive behaviors and social skills which enable a child to meet environmental demands and assume responsibility for his or her own welfare.

1 CCR 301-8, 2220 Rule 2.08(3)(b).

#### *The School District Complied with its Child Find Obligation*

Complainant says the School District had reason to suspect [Student] was a child with a disability in need of special education as early as April 2017 when he attempted suicide, his grades were deteriorating, and she had alerted the school months earlier that [Student] was coming home from school depressed and in tears. Confirmation of his disability came in September 2017 when he was hospitalized for depression and anxiety and his grades continued to decline. According to Complainant, had the School District complied with its Child Find obligation, [Student] would have been evaluated, found eligible, and received special education that would have prevented his academic decline and avoided the disciplinary incident in November 2017 that resulted in his expulsion.

The School District does not agree. It argues that, under the federal and state rules, a mental health condition qualifies as an SED only if it has existed “over a long period of time and to a marked degree.” 34 CFR § 300.8(4)(i); 1 CCR 301-8, 2220 Rule 2.08(3)(a). Although [Student] was hospitalized and diagnosed with depression and anxiety in September 2017, his diagnoses did not qualify as an SED until the second hospitalization in November 2017. Prior to that time, the condition had not existed “over a long period of time” and, because his condition had not previously resulted in behavioral problems at school, it did not exist to a “marked degree.”

The School District also argues that, pursuant to the state rules, a condition does not qualify as an SED unless a variety of general education interventions have been

implemented without success; the social/emotional dysfunction is observable in the school environment, and the dysfunction is not the result of transient, situational stressors in the child's environment. 1 CCR 301-8, 2220 Rules 2.08(3)(b)(i), (iii) and (iv). The School District says these conditions were not satisfied until November 2017 when [Student] threatened to "shoot up the school." Prior to that, the School District had every reason to think that its general education interventions, such as downgrading class levels, periodic check-ins, and referral to tutors and the SAIP teacher, would be successful. Furthermore, because [Student]'s behavioral problems had primarily been confined to the home environment and were not observed in school, it was reasonable to believe that his dysfunction was due to situational stressors at home.

Having carefully considered the law and cases cited by the parties, as applied to the facts found above, the ALJ concludes that the School District did not violate its Child Find responsibility. This is because, prior to November 2017, there was no compelling reason for the School District to believe that [Student] had an SED as defined by state and federal regulation. Specifically:

(1) Although, in April 2017, the School District was aware that [Student] was depressed and at high risk of suicide, it was reasonable for the School District to view [Student]'s depression as a situational response to the transient stress of transitioning from a small school environment where he knew everyone and had many friends, to a large school environment in another state where he had no friends and knew no one. A situational response to transient stressor does not qualify as an SED. 1 CCR 301-8, 2220 Rule 2.08(3)(c)(iv). The School District properly responded to this event by conducting a suicide risk assessment and referring [Student] first to the [Crisis Center] for evaluation, then arranging for funding of private therapy. Unfortunately, [Student] chose not to avail himself of that therapy.

(2) Although [Student] failed an Honors English class in the spring semester of 2017, there was no reason for the School District to necessarily conclude the failure was due an SED. [Student] achieved A's, B's and C's in other classes. It was reasonable for the School District to conclude that [Student]'s failure in Honors English was likely due to the extraordinary rigor of the coursework, which could be remedied by transferring him to a grade-level English course. The fact that [Student] took that course over the summer of 2017 and did extremely well, achieving a B+ average, vindicates the School District's judgment. Because [Student] received educational benefit from this instructional intervention, he did not qualify as a child with an SED simply because he failed Honors English. 1 CCR 301-8, 2220 Rule 2.08(3)(c)(i).

(3) Following [Student]'s release from the hospital in September 2017, the School District properly responded with general education interventions, such as developing a re-entry plan, providing for periodic check-ins with his counselor and school psychologist, and referring him to a tutor and one-on-one assistance from an available teacher. The School District had no reason to believe these interventions would not be successful. Unfortunately, [Student] again chose not to avail himself of this assistance.

Complainant is correct that general education interventions cannot substitute for a special education evaluation of a child suspected of having a disability requiring special education. *Memorandum to State Directors of Special Education*, OSEP 11-07, 56 IDELR 50 (Jan. 21, 2011). Even a 504 Plan is not an adequate substitute for an IEP. *Muller v. Islip*, 145 F.3d 95, 105 (2nd Cir. 1998). However, Complainant's argument overlooks the fact that an SED does not exist *unless* general education interventions have first been tried and found wanting. 1 CCR 301-8, 2220 Rule 2.08(3)(c)(i).

(4) When [Student] was hospitalized in September 2017 and diagnosed with major depression and anxiety, it became clear that his depression was not transient. However, there still was no reason to suspect that his anxiety and depression was causing his poor academic performance. He was, up to that time, regularly attending classes, getting his assignments in on time, and had exhibited no behavioral problems at school. Rather, the need for hospitalization was due to conflicts with his parents that resulted in ugly arguments, self-injurious behavior, and suicidal ideation in the home environment. Because these problems were not observable in the school environment, [Student] did not at the time qualify as a child with an SED. 1 CCR 301-8, 2220 Rule 2.08(3)(c)(iii).

(5) There was no significant manifestation of social/emotional dysfunction in the school environment until November 10, 2017, when it was reported that [Student] threatened to "shoot up the school." When this occurred, the School District immediately, and properly, conducted a threat assessment and referred him for a special education evaluation. There is no allegation and no evidence that the referral, the subsequent evaluation, or the ultimate IEP was deficient in any way. Although the School District ultimately determined that [Student] had an SED and needed special education, that determination does not mean that it violated its Child Find duty by failing to make that determination earlier. The appropriateness of a student's eligibility must be assessed in terms of its appropriateness at the time of the child's evaluation, and not from the perspective of a later time with the benefit of hindsight. *L.J. v. Pittsburgh Unified Sch. Dist.*, 850 F.3d 996, 1004 (9<sup>th</sup>. Cir. 2017).

(6) It is an open question whether [Student]'s impaired social/emotional functioning was due to his depression or his drug use. The fact that [Student]'s academic performance improved after transfer to [High School 2], but declined again in his senior year when he resumed using drugs despite being on an IEP, suggests his poor academic performance was linked to his drug abuse, not his depression. "Untangling cause and effect in the context of drug use, misbehavior, and depression can be difficult." *Nguyen v. Dist. of Columbia*, 681 F.Supp. 2d 49, 51 (D.D.C. 2010) (in the face of the student's drug use and poor attendance, the argument that his depression and mood disorder caused his poor academic performance was speculative). An SED does not exist if the impairment in social/emotional functioning is due to a social maladjustment, such as drug abuse. 34 CFR § 300.8(c)(4)(ii); 1 CCR 301-8, 2220 Rule 2.08(3)(d).

In summary, prior to November 2017, there was insufficient reason for the School District to believe that [Student] suffered an SED, as defined by state and federal

regulation, that interfered with his access to educational benefit and required special education.

Two cases upon which [Student] relies, *Pennsbury Sch. Dist.*, 65 IDELR 220 (SEA Pa. 2015) and *Krawietz v. Galveston Indep. Sch. Dist.*, 69 IDELR 207 (S.D. Texas 2017), *aff'd* 900 F.3d 673 (5th Cir. 2018), are distinguishable. In *Pennsbury*, a high school student whose grades were deteriorating was admitted to the hospital for inpatient psychiatric treatment due to self-harming behavior. Two months later, he was readmitted to the hospital, again for self-harming behavior. When the student's parents advised the school district that the student would not be returning to school for the remainder of the school year, the district advised the parents to withdraw the student from school. Not until four months later did the district initiate a request for special education evaluation. The IHO found this delay violated the district's Child Find obligation and required the district to pay for the educational portion of the student's residential treatment program. Unlike *Pennsbury*, the School District here referred [Student] for evaluation immediately after his second hospitalization in November 2017.

In *Krawietz*, the court held that a high school student's academic decline, hospitalization, and criminal misconduct during the school semester should have triggered the school district's obligation to refer the student for special education evaluation. However, the district did not attempt to conduct the evaluation for six months. Significantly, the student had previously received special education services while in the elementary grades, but the district had lost those records. Again, the facts in the present case bear little resemblance to those in *Krawietz*.

### *Summary*

The evidence shows that as early as April 2017, [Student] was suffering from depression and anxiety that was causing problems at home. At the end of the 2017 spring semester, he failed an Honors English course but did well on the grade-level English course taken during summer school. Although he was admitted to the hospital for depression and anxiety in September 2017, there was insufficient evidence of the necessary SED qualifying conditions to suspect that he was a child with a disability requiring special education. That evidence did not exist until November 2017 when [Student] threatened to "shoot up the school." Then, and only then, did the School District's Child Find obligation accrue. Because the School District immediately referred [Student] for special education evaluation at that time, there was no IDEA violation.

### **Decision**

The School District did not violate its Child Find obligation.

This decision is the final decision of the independent hearing officer, pursuant to 34 CFR §§ 300.514(a) and 515(a). In accordance with 34 CFR § 300.516, either party may challenge this decision in an appropriate court of law, either federal or state.

**Done and Signed**

December 18, 2019

/s/ Robert N. Spencer  
ROBERT N. SPENCER  
Administrative Law Judge

Hearing recorded by: Carol Bazzanella  
Stevens-Koenig Reporting  
700 17<sup>th</sup> Street, Suite 1750  
Denver, CO 80202  
(303) 988-8470

Exhibits admitted:  
Complainant exhibits 5, 7, 12, 18-21, 23, 25-27, 35  
School District exhibits B-N, R-W, DD (pp. 3-17 only)