

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	[Parents], Complainants, vs. Cherry Creek School District No. 5 Respondent.	▲ COURT USE ONLY ▲ CASE NUMBER: EA 2022-0012
AGENCY DECISION		

On March 4, 2022, the Colorado Department of Education (“CDE”), Exceptional Student Services Unit, received a due process complaint filed by [Parents] (“Complainants” or “Parents”) on behalf of their minor son, [Student] alleging that Cherry Creek School District Number 5 (“Respondent” or “District”) violated the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482, (“IDEA”), under its implementing regulations at 34 C.F.R. § 300.511, and Colorado’s Exceptional Children’s Educational Act, 1 CCR 301-8, by failing to provide [Student] with a free appropriate public education (“FAPE”). Specifically, Parents filed the due process complaint asserting that the District failed its “child find” obligation by failing to identify [Student] as a child with a disability in need of special education and related services until his freshman year in high school, and that he qualified for special education and related services under the “Other Health Impairment (“OHI”) and social/emotional disability (“SED”) categories.

Parents seek compensatory services as a remedy until [Student] is made whole. The District denies that it failed to timely identify [Student] as a person who qualified for special education and related services and asks the court to dismiss all claims.

The due process complaint was forwarded to the Office of Administrative Courts (“OAC”) and assigned to Administrative Law Judge (“ALJ”) Tanya T. Light for an impartial due process hearing on March 4, 2022. The hearing was convened in accordance with 20 U.S.C. § 1415(f), and held by telephone, video and Google Meet in Denver, Colorado on November 1 through 4, 2022.

Miriam Kerler, Esq., of Kishinevsky & Raykin, LLC, represented Complainants, and Robert P. Montgomery, Esq., of Semple, Farrington, Eoverall, & Case, P.C, represented the District. At hearing, the ALJ admitted into evidence the following stipulated exhibits: Complainant’s exhibits: V, BB, CC, NN, VV (as in Victor Victor), XX, and YY, and the

District's exhibits: 14, 18, 23, 25, 26, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 49, 50, and 51.

The following exhibits were also admitted into evidence:

The Complainant's exhibits: A, P, Q (over relevance objection), U, Z (over standing statute of limitations objection¹); EE pp. 1, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 27, 28, 29, 30, and 31), (over standing statute of limitations objection) and EE p. 32; II, pp. 9, 10, 11, 12, 13, 15, 20, 21, 22, 23, 24, 25, 26, 27, 31, 32, 33, 34, 35, 36, 41, 43, 44, 47 and 48 (over standing objection); JJ pages 2, 3, 4, 10, and 11 (over standing objection) KK (over standing objection); LL, pp 1, 4 and 6 (over objection); MM, pp. 19 (over the standing statute of limitations objection), 99-102 (except for the email from [Language Arts Teacher] which the ALJ did not admit because of a hearsay objection); MM 105 and 106 (over the statute of limitations standing objection); QQ, and WW.

The District's Exhibits: 8, 10, 19, 20, 44, 47, 48 (over a hearsay objection); 52, and 54.

ISSUES PRESENTED

Whether Parents have met their burden of proof establishing that the District failed its Child Find obligation to [Student]; that such procedural failure amounted to a substantive violation in that it caused [Student] not to receive FAPE, and, if so, what the proper remedy is, if any.

FINDINGS OF FACT

[Student]

1. [Student] is a 16 year-old boy (date of birth [month/date], 2006), who, by all accounts, is a smart and charming young man who has struggled with issues like impulse control and defiance for many years.

¹ A parent may file a due process complaint "not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint." 34 C.F.R. § 300.507(a)(2). At hearing, the ALJ noted she did not know how the statute of limitations applied to Child Find cases, and therefore stated she would admit into evidence some possibly relevant exhibits that concern incidents and issues that occurred prior to the statute of limitations, which is March 4, 2020, but would indicate in the decision how much weight, if any, she was giving these exhibits. Now that the ALJ has had time to review all the facts and law in this case, she notes for the record that the exhibits from seventh grade on will be given full weight because the District "should have known" that [Student] was a student who needed to be evaluated for special education services during his seventh grade year. The exhibits that are in evidence prior to [Student's] seventh grade year are only given weight as background in this case.

2. [Student] attended [Middle School] in the District in 6th, 7th, and 8th grades. He attended [High School] for a portion of ninth grade and then transferred to the [County] School District at the start of tenth grade. [Middle School] and [High School] are in the District.

3. [Parent 1], [Student's] mother, and [Student's] father, [Parent 2], are divorced, and she is remarried. In July of 2017 [Student] began living with his father in [City]. [Student] has lived with his mother since November of 2021. She currently lives in [City].

4. [Student] is a sophomore at [High School].

[Parent 1]

5. [Parent 1] was a credible witness. She credibly testified to the following:
 - a. [Student's] behavioral issues began in pre-kindergarten.
 - b. [Student] was diagnosed with Oppositional Defiant Disorder ("ODD") and Attention Deficit Hyperactivity Disorder ("ADHD").
 - c. [Student] was diagnosed with ODD around the 5th grade. [Parent 1] believes she shared the ODD diagnosis with school personnel at the end of middle school, which would be the end of [Student's] 8th grade year.
 - d. The ODD causes [Student] to have almost no control over his defiance; his defiance is an impulse.
 - e. [Student] began taking medicine for ADHD in 7th grade, which helped a bit. [Parent 1] believes she shared that fact with [Student's] teachers because she remembers the school nurse being concerned about [Student] taking the medication at school.
 - f. In 7th grade, [Student's] teachers were reaching out to her for suggestions concerning how to work with [Student]

[Parent 2]

6. [Parent 2] is [Student's] biological father. He was a credible witness but not entirely reliable regarding dates and minute details due to the amount of stress, trauma, and mental health issues he had experienced during the years in question.

7. [Parent 2] credibly testified to the following:

- a. [Parent 2] candidly admitted that he was diagnosed with bipolar disorder;

- b. [Parent 2] credibly testified that, “we were all really struggling a lot” and that he, [Parent 2], “was struggling a lot with mental illness, so he [[Student]] couldn’t come to me” when [Student] lived with him.
- c. [Parent 2] and his second wife divorced at some point during the events of this case, which was difficult for [Student]
- d. [Parent 2] credibly testified that, “the last five years have been emotional trauma for everyone.”
- e. [Parent 2] described [Student] as “colorful, lighthearted, good-natured, confused, not the best student but overall a good kid.” He also testified that [Student] is bright and curious, and really does enjoy learning.
- f. [Student] started living with him in 5th or 6th grade.
- g. [Student] has no qualms about being open and candid, and that he is a very emotional person who shares his emotions with others.
- h. [Student] has been withdrawn and depressed at school, and even if he tries to mask his feelings, they show.
- i. He cannot remember a time that [Student] ever did well academically.
- j. [Student’s] ADHD and ODD impact [Student] at school in every way. He cannot sit still; he wants to be defiant and oppositional just for the sake of being oppositional. If he is not engaged in class, he is checked out mentally. [Student’s] impulsivity causes him to act before he thinks.
- k. [Student’s] difficulty focusing impacts him greatly. He grasps things quickly but when the thrill of learning wears off problems start.
- l. [Parent 2] had a lot of contact with [Student’s] schools, usually for disciplinary reasons. There were weeks where he received a call every day about trouble [Student] was in. [Parent 2] spoke primarily with [Counselor], [Student’s] school counselor, or with [Dean], a dean at [Middle School].
- m. [Student’s] teachers would call [Parent 2] because they were at a loss concerning [Student’s] behavior, and so they asked [Parent 2] for advice on getting [Student] to not be so disruptive in class.
- n. [Student] always improved in the beginning with every new intervention that the schools tried, but eventually [Student] would “throw up his hands and give up.”

- o. [Student's] behavior was always an issue at school and that every year [Parent 2] had to sit down with the school staff to come up with systems to put into place to help [Student] control his behavior better.
- p. [Parent 2] did not believe that [Student] received the support he needed to succeed in middle school. He testified, "I don't know how it could be so blatant but so overlooked." [Parent 2] also testified "We all came together and nothing stuck. I don't know if a 504 or IEP happened if he would have done better."

[Student's] Sixth Grade Year: 2018-2019²

8. "PowerSchool" is a student narrative tool that is used in the District to record any student behavioral or health issues, as well as any parent contacts about students.

9. A September 19, 2018 PowerSchool note stated that:

As investigations unfolded, [Student] did not report the whole story. Started with him throwing pencils at [classmate] and escalated to pushing, shoving, kicking with both participating. Exhibit 14 at 11.

10. On October 2, 2018, [Student] was evaluated for self-injury at school. He reported [harmful behavior]. He stated he had not been as angry until recently, and he reported that he was in trouble at home because of his [inappropriate behavior] and his grades. Exhibit Z.

11. On October 10, 2018, [Student] received a Uniform Behavioral Referral. It stated:

Several students have witnessed [[Student]] slap students on [body part], use inappropriate language/gestures, talk about having [inappropriate comment] with students, and [inappropriate comment 2]. There were multiple incidents of occurrence in Sept. 2018 which were reported starting on 10/3/18. Exhibit II at 15.

12. [Student] received a two day suspension for his behavior, on October 11 and 12, 2018. On October 22, 2018, [Dean] sent an email to [Student's] teachers stating in part, "[[Student]]'s re-entry meeting was this morning and he now has a daily tracker...and a behavior plan. He is very motivated to make better choices and do things

² [Student's] 6th grade year is outside the statute of limitations, as well as being outside the time period the court has concluded the District "should have known" that [Student] needed to be evaluated for special education and related services. Therefore, this information is included as background information only.

right.” Exhibit 31.

13. A re-entry meeting is held with a student and his or her parent and a dean when a suspended student returns to school. The student also signs a “Re-entry Contract” which states the school’s expectations going forward.

14. [Student] was referred for mental health counseling with [Counselor] because of his talking about [inappropriate comment 1] with students. He also received help from the school social worker and the school psychologist.

15. On October 22, 2018, [Student] was placed on a Behavior Support Plan, which included items such as “[Student] will enter each classroom quietly and calmly” and “[Student] will follow directions without arguing.” It also included interventions such as “[Student] will continue [to] seek support from [Counselor]; [Student] will check-in each morning with [Dean] or [Administrative Assistant]; and [Student] will complete his daily tracker.” Exhibits JJ at 3 and 28.

16. [Student] had daily morning check-ins with [Dean] or her assistant, [Administrative Assistant], to obtain a “barometer” of how he was doing that morning. These were usually brief meetings but appeared to [Dean] to be helpful to [Student]. [Dean] continued the morning check-ins in [Student’s] eighth grade year because she cared about him and they had a good relationship.

17. [Student’s] daily tracker gave him rewards or consequences for positive or negative behavior. Each teacher would circle a “1”, “2”, or “3” to indicate how [Student] behavior in class was that day. Exhibit JJ at 4.

18. [Student] would pick up his tracker at his morning check-ins with [Dean]. He took it to all his classes and his teachers filled it out each day. He strived to receive “3’s” because that score was the best. If [Student] received good scores he would receive a reward, like 10 minutes of “hoop time” or snacks or candy.

19. [Dean] felt that by and large the tracker was impactful. It did not eliminate [Student’s] negative behaviors but she felt it did help with them. [Student] received “re-directs” from his teachers through their use of the trackers.

20. The tracker was changed because it was not working as well as hoped. [Dean] informed [Student’s] teachers that she had just met with [Student] to “update him on his new tracker.” She stated:

I did explain to [Student] that teachers are frustrated with the continual talking, and if changing the tracker does not work, then they will start either automatically assigning him to lunch detention through my office, or writing referrals that will most likely carry more significant consequences.” Exhibit JJ at 2.

21. Ultimately, any success with the tracker was short lived.

22. On December 17, 2018, [Student] received a Uniform Behavioral Referral. [Dean] was the referring staff person, and she wrote “after exchanging words, [[Student]] punched another student in the head after school.” Exhibit II at 22.

23. [Student] was suspended on December 19 and 20, 2018, for defiance and aggressive behavior. See Exhibit II at 20.

24. On December 19, 2018, [Dean] wrote to [Student’s] parents that the reason for the suspension was as follows (in part):

This letter is to document that your student [[Student]] has received five disciplinary referrals for the following actions: **Other Violations of Code of Conduct: Disobedient/Defiant Behavior or Repeated Interference and Truancy**. Specifically, the disciplinary referrals are documented as follows:

1. 12/13/2018 for **Disobedient/Defiant Behavior or Repeated Interference**
2. 12/12, 12/11 & 12/10/2018 for **Disobedient/Defiant Behavior or Repeated Interference**
3. 12/17/2018 for **Disobedient/Defiant Behavior or Repeated Interference**
4. 12/17/2018 for **Disobedient/Defiant Behavior or Repeated Interference**
5. 12/18/2018 for **Violation of Violent/Aggressive Behavior Policy**. Exhibit II at 21 (bold and underline in original).

25. The letter above was referring to incidents of [Student] punching a student in the head; talking out of turn and refusing to follow a teacher’s directions; pushing a desk over; pushing papers off a table and onto the floor of a classroom; throwing things in class; making noises even after being asked to stop by the teacher; distracting others; and being disrespectful to a substitute teacher. Exhibit II at 22-27.

26. On February 1, 2019, [Student] was suspended for two days for defiance and horseplay. Specifically, he disrupted the learning environment by making noises; he was defiant to the teacher and refused to do classwork; and he flipped a desk over. Exhibit II at 31-36.

27. Not all of [Student’s] behaviors interrupted the learning environment, but many did.

28. On February 14, 2019, [Student] received a Uniform Behavioral Referral for saying to a girl in class “[Inappropriate comment 3].” Exhibit II at 41.

29. On April 12, 2019, [Student] received a Uniform Behavioral Referral for saying to a sixth grade girl, “[Inappropriate comment 4?]” *Id.* at 43.

30. On April 12, 2019, [Student] received a second Uniform Behavioral Referral for screaming at two females, “[inappropriate comment 5]” and “[inappropriate comment 6].” *Id.* at 44.

31. On April 25, 2019, [Student] was suspended for five days, from April 25, 2019 through May 1, 2019. The suspension was because “[Student] was walking with gym shorts on and had pulled his jeans to his ankles walking back and forth prior to this.” While [Student] was walking like this, another student tried to pull [Student’s] pants off, and [Student] and that student got into a fight. They both fell to the ground and were rolling, pushing, and punching each other, which caused a crowd to form and caused disruption. *Id.* at 48.

32. [Dean] felt that by the end of [Student’s] 6th grade year the number of negative incidents went down. However, [Student] he received 13 days of suspension in 6th grade, and [Dean] agreed that 13 days of suspension was a lot.

[Student’s] Seventh Grade Year: 2019-2020³

33. On August 18, 2019, at the start of 7th grade, [Student] received a Uniform Behavioral Referral from a substitute teacher. The referral said that [Student] was disrespectful and “walked out of class without permission, played music through his speaker, started taking off his shirt, bothered others extensively by being wildly disruptive.” Exhibit EE at 3.

34. On September 12, 2019, [Dean] wrote an e-mail to [Counselor], and to [Assistant Principal], [Middle School] Assistant Principal, stating that [Student] was “starting to pop up again with similar behaviors from last year – disruptive, defiant, etc.” In the email, [Dean] wrote three bullet points to try to put a plan in place to help [Student], and she asked for input from [Assistant Principal] and [Counselor] about the plan. Exhibit 34.

35. Also on September 12, 2019, [Student] received a Uniform Behavioral Referral. The teacher who submitted it wrote:

I asked [[Student]] several times to get to work. He did not and instead tried to get other students off task by making noises. Finally

³ As a reminder, the statute of limitations is March 4, 2020. However, the court is giving full weight to the entirety of [Student’s] 7th grade year because, as will be discussed, the court concludes that the District should have known [Student] needed to be evaluated in seventh grade.

I told him to go to the dean because I needed a break. He turned around and said something. Then before he left he bang [sic] the door. Exhibit EE at 1.

36. [Student] received an out of school suspension for the above referral.

37. On September 14, 2019, [Dean] sent an email to[Assistant Principal], [Counselor], and[Principal], Principal at [Middle School], stating in part that "I did tell [Teacher][a teacher at the school] that...I would communicate with [Name] [[Counselor]] so we could set up a mtg ASAP with all of his [[Student's]] teachers to come up with a behavior plan. I had given him the chance to prove himself, he has failed at that...and now we need to reestablish a plan." Exhibit MM at 100.

38. On September 18, 2019, [Dean] informed [Student's] teachers that [Student] was given "code words" to use if he started to escalate in class. If he used one of those words, like "chill out" or "take a minute" he could have a minute or two to go to the hallway outside the classroom door to pace back and forth and reset. If he used a code word three times, he could have a time out in the Dean's Center.

39. Additionally, if [Student] received three behavioral referrals he would automatically be suspended. [Student] was a social person and hated being suspended, so everyone was hoping that the threat of suspension after three referrals would help him improve his behavior. Exhibit A.

40. On September 20, 2019, [Student] received a Uniform Behavioral Referral. The teacher wrote:

[[Student]] was given 3 chillout breaks and each time reentered distracting students. Plugged speaker into Chromebook and was told to put away. 10 minutes later was playing music over the same speaker in the middle of class. Exhibit EE at 6.

41. On September 27, 2019, [Student] received a Uniform Behavioral Referral for "Disruptive and defiant behavior in class: singing, dancing, talking, purposely bothering classmates." *Id.* at 7.

42. On September 27, 2019, [Student] emailed [Counselor] stating:

Hey[Counselor], Today I just got my third referral and I am really scared [sic] I really tried today but I just couldn't do it and I don't know what to do. I don't know if [Teacher 2] was just saying that so I would stop which I did at THAT point but I think I just screwed up and I was wondering if we could talk about it? Exhibit 36.

43. On September 27, 2019, [Counselor] wrote a note in PowerSchool that stated, "Talked with MOC [mother of child] on phone about his outside therapy and struggles he is having, then met with student around strategies that could help with his ODD, emailed a follow-up to MOC and one of his teachers that he had trouble with today. Exhibit 14 at 7.

44. On October 3, 2019, in [Student] "Re-Entry Contract," which is used when a suspended student returns to school, the school's expectations were the following:

- Not bringing personal audio speaker to school.
- While at school, focus your energy on learning and academics.
- Follow instructions from your teachers and do not argue back.
- With three additional referrals, [[Student]] will be suspended.
Exhibit EE at 9.

45. On the same Re-Entry Contract, [Student] wrote:

- I will commit to really, really trying to avoid the three referrals.
- I will try to write a letter if I have time (probably will).
- Overall I will commit to doing better and maintaining it. *Id.*

46. [Student] often did try to do better immediately after being suspended.

47. [Student] received three Uniform Behavioral Referrals on October 8, 2019. One was for being in a trashcan and acting out in front of students; the second referral was for having his shirt off and cursing and yelling at a security specialist who told him to put his shirt back on; and the third referral was for defiance and disruption of class. Exhibit EE at 10-16.

48. Also on October 8, 2019, [Counselor] wrote an email to the assistant principal and all of [Middle School's] leadership team. In part, [Counselor] said:

Is there a tracker/intervention that SPED would recommend we try with these students to gather data that they may be appropriate for SPED testing, what do you look for or expect to see for students that end up qualifying as SED? For students that come out of Tier II, not because they are successful but also not because they are being referred to Tier III interventions, what do we do with them/what programming would help them at this point? I don't think there are super easy answers with these kind of kids, but thought a brainstorming session with stakeholders would help us establish a

plan for now. Exhibit 37 at 2.

49. On October 8, 2019, [Special Education Teacher 1], a special education teacher, wrote an email to [Counselor] and other school staff explaining what kinds of interventions could be included in a student's IEP if that student had a serious emotional disorder, or "SED." The email was not about [Student] specifically. She wrote in part:

Hey Team,

To kind of touch on what SED programming looks like it can be different for each student's individual need. It can include but is not limited to...

- Check in/Check out with Case manager
 - Affective Ed classes
 - Academic Support class
 - Tiered Advisory class to help with behaviors and problem solving.
 - Para Support in classes
 - Accommodations in classroom to minimize problem behaviors
 - Modifications in classroom to minimize problem behaviors
 - Place to cool down and take a break (accommodation).
- Exhibit 37 at 1.

50. On October 9, 2019, [Dean] wrote an email to [Counselor] and several of [Student's] teachers in part:

[[Student]] is suspended out of school for four days – primarily for this referral [presumably referring to the three referrals on October 8, 2019] but there are a couple of other things involved as well (not related to this). He cried in my office today when I told him he was out for four days – which is a first. He is really struggling. He is smart enough to know the right choices to make, but just does not make them sometimes. I did feel for the kid. He told me that he did feel terrible about the [name blacked out] situation. Any kind of reflection with him about these types of situations is a first with me.

[PE Teacher] [[Student] PE teacher], I think he told me that he had talked to you briefly about apologizing to the group/class – did he? He does want to do that – so he told me today. I just can't remember if he said he talked to you about it or not. I also did talk to [name blacked out] during second period – he saw her in the hallway and he apologized to her, on his own. She felt it was sincere and she was very appreciative of it. She was feeling better about going to

gym class on Wednesday because he did apologize. Exhibit 38.

51. On October 10, 2019, [Counselor] sent an email to [Student's] private therapist to set up a time to talk about how to best help [Student] in school. [Counselor] knew about [Student's] ODD diagnosis when she spoke with his private therapist. Exhibit 40.

52. On [Student's] October 22, 2019 Re-Entry Contract, the school's expectations of [Student] moving forward were:

- While at school, focus your energy on learning and academics.
- Refrain from confrontation and physical contact with other students at all times while on school grounds.
- If you are feeling frustrated or upset with a particular student or see a situation where an adult is needed, seek help from a dean, counselor, or teacher. Exhibit EE at 17.

53. On October 22, 2019, [Dean] wrote in PowerSchool:

[[Student]] wants to move forward. [Dean] pointed out that there was a larger gap of time between suspensions this time and the last time. Something positive. [[Student]] reflected that when he crashed, he crashed huge. He doesn't realize when he is starting to spiral. That may be the key. [Dean] mentioned this to dad and [Counselor]-who has an appt. to talk to [[Student's]] outside therapist this week. Dad will mention that as well. If [[Student]] does not get OSS between 10/22 and 11/26 (Thanksgiving break) [Dean] will buy him the Mitsubishi Lancer lanyard that he wants. Exhibit 14 at 6.

54. On November 12, 2019, [Student] received a Uniform Behavioral Referral for refusing to sit and stop talking. After being warned about receiving a referral, [Student] continued to "rap/sing out loud inappropriate lyrics." Exhibit EE at 18.

55. On December 3, 2019, [Student] received a Uniform Behavioral Referral for "repeated Defiant and disruptive behavior." *Id.* at 19.

56. On December 10, 2019, [Student] received a Uniform Behavioral Referral for "rapping loudly in class and using the 'F' word repeatedly." Exhibit EE at 20.

57. [Campus Administrator] worked at [Middle School] half time as a dean and half time as a choir teacher in 2020. [Campus Administrator] knew [Student]. She liked him and felt he was very bright, easy to talk to, and was a "nice kid."

58. On January 9, 2020, [Campus Administrator] gave [Student] a Uniform Behavioral Referral for being in a fight with another student. Exhibit EE at 22 and 23.

59. [Student] received a five day out of school suspension for the fight. *Id.*

60. [Student] also received a police ticket and had to do community service and take certain classes. Exhibit U at 9.

61. On January 15, 2020, there was an email exchange between [Dean] and [Student]. [Dean] wrote to [Student], "I am looking forward to having you back...small bump in the road...does not define your semester!" Exhibit 41.

62. On January 17, 2020, [Student] wrote back to [Dean], "a small bump A SMALL BUMP?! this is the police and a charge we are talking about not some 3-day suspension so I think it will have a little defining with my every next move. This isn't some brush off thing, this is serious and I'm taking it so." Exhibit 41.

63. On February 6, 2020, [Student] received a Uniform Behavioral Referral for being disruptive, yelling while a substitute teacher was trying to talk, and dancing out of his seat. The substitute teacher said she had to re-direct him five times and it did not work. Exhibit EE at 27.

64. On February 10, 2020, [Student] received a Uniform Behavioral Referral because "[[Student]][displayed inappropriate behavior]." [Student] received an in-school suspension for that incident. Exhibit EE at 28.

65. On February 12, 2020, a teacher submitted a Uniform Behavior Referral for [Student] having four tardies in her Language Arts class. Exhibit EE at 29. [Campus Administrator] did not refer him for suspension. She credibly testified that tardiness is about not being in class, so she did not want to punish that behavior by having him out of class more.

66. On February 27 and 28, 2020, [Student] received Uniform Behavioral Referrals because he "went into the ILC classroom on Friday and Monday and threw trash and books around the room. He said he was protesting." Exhibit EE at 30.

67. [Campus Administrator] credibly testified that [Student] always took responsibility for his actions; was always calm and remorseful; and reflected on what he could do differently.

68. [Student] did not receive any more suspensions through the remainder of seventh grade. However, the school shut down on March 13, 2020 due to Covid, and remained shut for the rest of [Student's] seventh grade. The school was fully remote

during this time. However, students could still be disciplined for behaviors during remote classes. During the shut-down, [Student] and [Counselor] had weekly telephone calls in which they discussed academics, such as any missing assignments, as well as any mental health challenges [Student] was having.

69. On February 21, 2020, [Student] received a "Positive Behavior Referral" from a teacher that stated, "[[Student]] has improved his behavior and work habits by 100% this week. He has also been willing to help those who need it. Great job." Exhibit 8.

70. An April 29, 2020 PowerSchool entry stated, "Copy of Medication Consent Form emailed home in preparation for 2020-2021 school year for ADHD/ADD diagnosis. Offer to mail form if family is unable to print at home." Exhibit 14.

71. On April 29, 2020, [Nurse], [Middle School's] school nurse, sent [Parent 1] an email that stated in part:

You are receiving this email because your student has the following diagnosis listed as a health condition: ADD/ADHD. If your student will be needing to take a daily OR 'as needed' medication during the school day for the 2020-2021 school year, the attached form will need to be completed by your child's healthcare provider prior to the beginning of school in August. Exhibit P.

72. In 7th grade, [Student's] grades were as follows:

Quarter 1

Art – mixed media	no grade
Core Support 7	C-
Language Arts 7 Honors	A
Lunch/Pride 7	S
Math 7	D
PE/Health 7	D
Robotics 7	no grade listed
Science 7	F
Social Studies 7	D
Student Assistant	no grade listed

Quarter 2

Art – mixed media	no grade listed
Core Support 7	no grade listed
Language Arts 7 Honors	D+
Lunch/Pride 7	S
Math 7	D-
PE/Health 7	C-

Robotics 7	no grade listed
Science 7	F
Social Studies 7	F
Student Assistant	S

Quarter 3

Art – mixed media	B+
Core Support 7	no grade listed
Language Arts 7 Honors	C+
Lunch/Pride 7	S
Math 7	C-
PE/Health 7	no grade listed
Robotics 7	B
Science 7	D
Social Studies 7	C+
Student Assistant	no grade listed

Quarter 4

Art – mixed media	S
Core Support 7	no grade listed
Language Arts 7 Honors	S
Lunch/Pride 7	S
Math 7	S
PE/Health 7	no grade listed
Robotics 7	S
Science 7	S
Social Studies 7	S
Student Assistant	no grade listed. Exhibit 10.

73. The “S” grades in quarter 4 were the equivalent of a passing grade in a pass/fail grading situation. The District had made a District-wide decision to give the S grades to everyone due to Covid shutting down the schools in March of that year.

74. [Counselor] does not think that these grades are reflective of [Student’s] academic ability.

[Student’s] 8th Grade Year: 2020-2021

75. The first and second quarters of eighth grade were hybrid where the students were taught in-person in the school building two days per week. The students had virtual instruction one day per week and worked on their own two days per week.

76. The Monday after the presidential election the school went to being fully remote. The third quarter began in January 2021 after winter break, and the school went back to a hybrid schedule of two days in person and the rest of the week remote. In the

fourth quarter of [Student's] eighth grade year the school went back to fully in-person.

77. [Counselor] remembers [Student's] 8th grade year being overall better for him. However, [Parent 2] credibly testified that [Student] was completely disengaged in eighth grade. The remote learning was not good for him academically. He testified that [Student's] grades were not near what he was capable of. [Parent 1] also credibly testified that [Student] was not doing well socially/emotionally during this school year. He was working from home and he became very depressed due to the isolation.

78. In August of 2020 the school was on a hybrid schedule and [Student] struggled with being at home. He struggled setting up the computer, and he struggled sitting still in front of the computer.

79. In August of 2020, [Counselor] and [Student] had an email conversation where [Student] recognized things that would get in the way of him being successful, such as being in the same cohort as several kids he had had problems with over the summer. [Counselor] credibly testified that it was "absolutely" significant that [Student] recognized things that would get in his way of being successful, and it showed he was thinking more and coming to correct conclusions. It also showed he had the problem-solving skills to resolve a bad situation. See Exhibit 43.

80. On August 26, 2020, [Student] emailed [Counselor] asking to move back into honors math from regular math. He felt honors math would better meet the level he was at. See Exhibit 44.

81. [Student's] regular math teacher sent [Student] an email explaining he was not ready for Honors Math because he had not mastered linear equations and had failed a test. On September 1, 2020, [Student] wrote back to his math teacher, "OK thank you I assumed I didn't pass and is there any material you can give me for now to work on to better strengthen my accuracy with this subject? Or is this something that I have to wait for? If so please let me know so I can get started on that as soon as possible." Exhibit 45.

82. [Student] took medication for his ADHD diagnosis. He never took it at school, and he stopped taking the medicine in 8th grade.

83. On November 20, 2020, [Student] emailed [Math Teacher], [Student's] math teacher, the following:

Hey [Math Teacher] I just want to apologize for the way I acted today in class. Things are terrible at home right now give [sic] the fact of remote learning and my dad and stepmom splitting up and us having to sell our house stuff is rough right now and on top of that I am swimming in assignments because I am so turned around right now. I know and realize now that I should've just participated especially

because you said we were going to be able to do work. I want you to know that I am trying my best to hold it together and these little outbursts are the voice screaming in the back of my head trying to get out. I'm just trying to get all I can get done before it's too late. I wanted to apologize and tell you I am trying and that this won't happen again that you have my word on this. If there's anything I can do to make it up please let me know so I can do it. Thanks.
Exhibit 49.

84. [Math Teacher] explained that the above apology email came about because they were fully remote at this time and she had called on him several times in the virtual class and he had not responded. [Math Teacher] credibly testified that she and [Student] talked a lot at this time and that his father and step-mother's divorce "definitely" impacted him at school. He needed to listen to music more; he was distant. He talked a lot with [Math Teacher] about the split-up.

85. [Math Teacher] credibly testified that for [Student], all the things going on at his home were impacting him negatively. As the year went on, the number of those things increased, and he became more and more distracted at school. [Math Teacher] would talk with [Student] about his lack of focus. [Student] told her that the death of his grandfather that he was close to really impacted him at school, and that his home burdens had really increased.

86. On December 10, 2020, [Student's] Language Arts teacher forwarded to [Counselor] a message that [Student] had sent to her. It stated in full:

I have literally had no time in this trash pile they call school to even try to think about anything give [sic] the fact of my dad and step moms [sic] terrible relationship and it coming to a crashing end is too much for me to even join class when I constantly want to sit and scream and beat everything to shreds just for something to feel my pain and the fact that I even try to do my work is really beyond me I'd rather burn this place to the ground and use my tears to fuel the fire that ignites. Exhibit 50.

87. On December 11, 2020, [Counselor] wrote in PowerSchool:

Category: Non-Discipline. Title: social emotional check-in

[[Student]] has a weekly check-in while we are remote, a teacher received an email where he expressed being in pain right now due to family matters. I checked on him earlier than normal to make sure he was OK and emailed the teacher back after he said he was fine and was expressing himself through writing, so the teacher would

- know why he was behind on work. *Id.*
88. On January 26, 2021, [Counselor] wrote in in PowerSchool:
- Category: Note Non-Discipline Title: social emotional check-in
Seeing therapist 2x a month again, but recently lost his grandpa and other home situations have been difficult. It is hard for him to get work done outside of school, he wants to try talking to his teachers about this on his own. Exhibit 14.
89. On February 28, 2021, [Student] emailed his teachers and [Counselor] the following (verbatim):
- Hey, I am trying my best right now to get everything done that I have and I am drowning right now and I don't know what to do I was just wondering if maybe you guys could send me stuff that will raise my grade the most or help me lighten my load I'm asking a lot right know I understand that but I really need it right now I have been bouncing back and forth between every class today trying to figure out what to do and I can't do it I've missed some class today from trying to do all this please I am begging for help right now. Please I just need [the email stops after word "need"]. Exhibit 51.
90. [Counselor] emailed [Student] back with some general suggestions on how to catch up and she set goals for him. She also helped keep him organized.
91. [Counselor] did not receive reports from teachers or other school staff about [Student] being disruptive in 8th grade.
92. In [Student's] 8th grade year, he received the following grades:

Quarter 1:

Advisory/lunch:	S
Art – Mixed Media:	B
Language Arts 8 Honors:	C
Math 8:	B
Science 8:	D
Social Studies 8:	D-
Study Hall:	S.

Quarter 2:

Advisory/lunch:	S
Art – Mixed Media:	B-
Language Arts 8 Honors:	D
Math 8:	C

Science 8:	D
Social Studies 8:	C-
Study Hall:	A-. Exhibit V.
<u>Quarter 3:</u>	
Advisory/lunch:	S
Language Arts 8 Honors:	D-
Math 8:	C-
PE8:	A-
Science 8:	C
Social Studies 8:	C
Tech Design and Engineering 2:	C+

<u>Quarter 4:</u>	
Advisory/lunch:	S
Art – Mixed Media:	B
Language Arts 8 Honors:	D-
Math 8:	D-
Science 8:	D
Social Studies 8:	D
Tech Design and Engineering 2:	D. Exhibit V.

[Student's] Ninth Grade School Year: 2021-2022

93. [Student] attended [High School] for his ninth grade year. He was excited to start school but struggled to keep up with his classes. [Student] often skipped school.

94. On August 27, 2021, a District employee named [Social Studies Teacher] wrote in PowerSchool the following:

[[Student]] made some comments about not liking school and how in MS between either 6-7 or 7-8 he dabbled into pot, but that it was taken care of and dealt with and he is on a better track now. He said he hates homework and just doesn't get school or understand why he is in AP. We had a discussion about how he does retain the knowledge and is willing to give input, but that going into Global Studies would bore him and not challenge him, which he agrees with. I spoke to [District Employee], so that we could keep an eye on him. Exhibit 14.

95. On October 2, 2021, a District employee named [District Employee] wrote in PowerSchool:

Category: Note Non-Discipline Title: 2021 Sent out of class

Received info that [[Student]] was sent out of class for saying strange things: 'I hate gingers, I will kill your mom.' Information sent to social worker. Exhibit 14.

96. On October 11, 2021, [District Employee] wrote:
[[Student]] was asked to follow directions or go to the deans – he chose to go to the dean but never showed up. Detention. Spoke with mother and step mother. Exhibit 14.
97. In October of 2021 [Student] posted on Snapchat about a [inappropriate threat]. Someone saw the post and called the "Safe to Tell" phone number that teenagers are encouraged to use if they suspect danger. The police came to [Student's] home to talk with him about his post.
98. The school noted the following about the incident:

Over fall break the school received information that [[Student]] was threatening students. In the first threat, he said 'There is about to be[Inappropriate threats 2]'...The school also received information that prior to fall break, [Student] made a direct threat to [name blacked out]. She reported that while they were walking to PE class, he was talking about [inappropriate threats 3], he [name blacked out] expressed concern that one of [Student's] 'friends' may have [inappropriate item]. Exhibit 14.
99. The District performed a threat assessment on [Student] because of the concerns stemming from this post. Under "Other information" in the threat assessment was written the following:

[[Student]] has a significant number of prior incidents in his school-record including 63 incident entries since 2018 where his role is offender (some of these are the same event with multiple entries.) Interviews with peers indicate that [Student] habitually makes comments regarding[inappropriate comments 7]. [[Student]] states in his interview he is not suicidal and has not thought of hurting himself or others. Exhibit LL at 4.
100. Based on [Student's] post, he was suspended from [High School] from October 25, 2021 through November 5, 2021. Then, on November 3, 2021, [Deputy Superintendent], Deputy Superintendent of the District sent [Parent 1] and [Parent 2] and his wife a letter informing them that the District was extending [Student's] suspension for 14 additional days, through November 30, 2021. Exhibit Q.
101. On November 12, 2021, [Student] was referred for special education

evaluation. Exhibit QQ.

102. After November 30, 2021, [Student] did not return to school; instead, he was given [alternate education] pending a manifestation determination hearing; that hearing ended his suspension.

103. In one of his quarters (the undersigned cannot tell which quarter), [Student] received the following grades in 9th grade:

English 9 Honors:	D
AP Human Geography:	F
Algebra 1:	F
Biology Honors:	F
Drawing/Painting 1:	D-
Personal Finance:	F
PE 9 th grade:	F
Advisory 9:	S. Exhibit V.

[Student's] Manifestation Determination

104. After the above incident about [inappropriate threat], [Student] was recommended for expulsion. Prior to expulsion he underwent a Manifestation Determination on February 28, 2022.

105. The manifestation Report concluded: "The determination after considering school reports parent and teacher input and assessments, the IEP team determined that [[Student's]] conduct was a manifestation of a disability." Exhibit QQ.

[Student's] Evaluation

106. [Parent 1] requested a special education evaluation for [Student] prior to November 12, 2021 because she felt some of the things that were happening at school were related to [Student's] ADHD and ODD, and that he needed more help at school than what he was receiving. The undersigned does not know when she requested the evaluation.

107. [Student's] evaluation was completed on January 12, 2022. It was conducted over several days. See Exhibit 18.

108. [Parent 1] credibly testified that her answers to the questions she was given on [Student's] evaluation would have been the same two years' earlier because his behaviors have been the same his whole life, including inappropriate behaviors or feelings, and depression. However, she clarified that his behaviors are not as bad now. She further explained that [Student] has had the same symptoms of ADHD since age 4.

109. Part of the evaluation was the Weschler Intelligence Scale for Children – Fifth Edition. [Student's] overall score was a 97, which was in the average range compared to other teenagers his same age. On the Verbal Comprehension Index, [Student] scored 111, which is in the high average range. [Student's] Visual Spatial Index score was also in the high average range. The tester wrote “His performance was better than approximately 82 of 100 examinees his age” on this test. Exhibit 18. [Student's] other subtests on the Weschler fell into the average or high average range, except for the Processing Speed Index, which fell into the low average range. *Id.*

110. The evaluation included teacher reports. [Student's] Honors Biology teacher wrote:

In my conversations with him, he has always been polite and respectful...[but] [Student] has been highly resistant to completing assignments all year. He did not complete any classwork while he was in the building and has only completed a handful of assessment assignments while he has been out. He has indicated to me that he doesn't see the point in doing classwork assignments and that he would rather just take a test to show that he knows the material. While he was not a behavioral concern for me in class, he was very avoidant at doing anything (assignments, labs, group work, individual work, etc.) and did not redirect to get on task. Exhibit 18.

111. [Student's] Geometry teacher wrote in part:

Unless there was a substitute in the class [[Student]] was fine. He was social and would talk to other students. He walked out of class one day when we had a sub, because the sub moved him to the front because he won't stop talking...After being out of school for a week or two at the beginning of the semester, [[Student]] changed. He refused to engage in class, take notes, or try problems. He would listen to music and put his head down. When approached by either [Math Teacher 2] or myself [[Student]] would say he was choosing to not be engaged in class.” Exhibit 18.

112. [Student's] PE teacher stated that, “[Student] was frequently off-task and didn't follow classroom norms.” *Id.*

113. [Student's] AP Human Geography teacher stated:

He chooses to not do any assignments or work on actual class activities. He would rather draw. He does well with listening to lectures/discussion, but will not write anything down. During work time he will get up and distract other students or just sit there quietly

and draw. *Id.*

114. [Student's] English 9 Honors teacher wrote in part:

[[Student]] was having a hard time beginning tasks. He would refuse and ignore me when I tried to reason with him. During the class period's first quarter to write an essay, [[Student]] instead clicked 'enter' on his computer for the entire period until it was over 1000 pages, without writing anything. I asked if we could work on writing a thesis statement together to get started, but he refused.

At one point in the first quarter, [[Student]] was out in the hall to work on a writing assignment that was impacting his grade. Instead of writing, he pulled out a video game controller and played a video game on his phone. When I asked him to put it away, he ignored me. We had a conversation where, for not the first time, he brought up the stress from his parents' divorce. Exhibit 18.

115. Part of the evaluation tested [Student's] executive functioning. He received a score of 67, which is a potential sign of executive functioning issues. *Id.* [Parent 1] was not surprised at his score because she credibly testified that [Student] is not able to self-start and he gets overwhelmed. He is also unable to break tasks down into steps.

116. On the Social and Emotional Assessments that were used as part of the overall evaluation, [Student] scored in the At-Risk or Clinically Significant classification range for anxiety, depression, atypicality, withdrawal, and functional communication. Exhibit 18.

117. [Student] stated that:

he wishes the school would have offered him a behavior plan. [[Student]] says that with 72 behavioral incidents someone should have tried to give a little help. [[Student]] says that when he was at a different school district he was on a behavior plan after one in-school suspension. [[Student]] says he believes he would benefit from being able to take a lap if he is really stressed out in class, overwhelmed, or needs to refocus. Exhibit 18.

118. The evaluator summarized in part as follows:

Results of the BASC indicate clinically significant scores on the areas of hyperactivity, inattention, externalizing problems, learning problems, school problems, and there were elevated scores in the Behavioral Symptoms Index...The Conners-3 assessment expressed very elevated scores in the areas of Inattention and

Defiance and Aggression across all four raters....The BRIEF-2 completed by one teacher and [[Student's]] mother indicate scores in the clinically elevated range across both raters in the areas of inhibition, shift, emotion regulation, and plan/organize...The EDDT [Emotional Disturbance Decision Tree] also indicates moderate clinical scores in the area of social maladjustment across three out of four raters with the fourth rater's scores falling in the mild at risk range. *Id.*

119. The outcome of the testing was that [Student] was eligible for special education and related services.

[Student's] IEP

120. [Student's] IEP team met on February 16, 2022. His primary diagnosis was OHI (Other Health Impairment) and his secondary diagnosis was Serious Emotional Disorder. There were no disagreements among the IEP team that [Student] qualified for special education and related services. Exhibit 20.

121. In the "Student Needs and Impact of Disability," the IEP team wrote:

[[Student's]] ADHD impacts his ability to initiate and sustain tasks, especially during non-preferred activities. Deficits in Executive Functioning Skills, including Inhibit, Shift, Emotional Control, and Planning/Organization, impair his ability to take appropriate notes in class, he has a very difficult time getting caught up. At times [[Student]] feels depressed which can impact his motivation and he lacks the appropriate skills to get started in catching up with his classmates. Exhibit 20.

122. The IEP included only two goals. Goal 1 was in the area of need of "self-determination." These were the goals for goal 1:

By January 2023, [[Student]] will improve his attention and work completion in the academic setting as demonstrated through the behaviors described in the objectives below, improving from a baseline of 4 out of 10 incidences to a goal of 8 out of 10 incidences.

1. [[Student]] will persevere through tasks requiring sustained attention in 8 out of 10 incidences (classroom tasks).
2. [[Student]] will maintain focus in the classroom setting during non-preferred activities in 8 out of 10 incidences.
3. [[Student]] will show improvement in attention and work completion by turning in at least 80% of all assignments. Exhibit

123. Goal 2 was in the “Area of Need” of Social/Emotional Wellness. The goals were:

By January 2023, during one on one or small group sessions with the mental health provider [Student] will identify emotions he is experiencing and name possible coping strategies to cope with those emotions to allow him to move forward with his academic tasks, improving from a cumulative score of 3 to 8 on the SEL Scoring Rubric.

1. [[Student]] will notice and identify physical sensations and thoughts that accompany different emotions, improving from a baseline score of 2 to 4 on the SEL Scoring Rubric.
2. [[Student]] will name two possible strategies to manage those emotions so that he may proceed with his academic tasks, improving from a baseline score of 1 to 4 on the SEL Scoring. Exhibit 20 at 11.

124. The following is a complete list of all of the accommodations and modifications that [Student’s] IEP called for:

- Positive reinforcement and feedback/attend to positive behavior.
- Opportunity to process with preferred adult when upset or frustrated.
- Provide wait time for answers to accommodate processing delays associated with ADHD.
- Frequent checks for understanding.
- Advance warnings before transitions and changes in routines.
- Maintain consistent expectations and follow-through.
- Encourage and support the use of organizational tools, i.e. Schoology planner, or other online tools.
- Preferential seating to reduce distractions.
- Reduce redundancy by shortening assignments to a length that still reflects understanding and mastery of content (e.g., highest level offered first, focus on critical content/skills).
- Extra time to transition as needed.
- Allow for breaks/use of pressure pass for designated area/allow [[Student]] to take space in the hall for short period of time.
- Break down large assignments into smaller more reasonable pieces.
- During classroom assessments opportunities for breaks. Exhibit 20.

125. The “Service Delivery Statement” of [Student’s] IEP stated in pertinent part:

[[Student]] will receive 230 minutes of direct support from a learning specialist in an Academic Support Lab to work on executive functioning skills needed for task and assignment completion.

[[Student]] will receive 60 minutes monthly of direct service outside the general education classroom from a mental health provider in order to work on social-emotional wellness skills. Exhibit 20.

126. In addition to the above, [Student] was to receive 30 minutes monthly of indirect specialized instruction outside the general education classroom. *Id.*

127. [Student] was to be placed in general education classes 80% of the time. *Id.*

128. [Student] returned to school in early March of 2022. His return did not go well because [Student] felt the [alternate education] teacher was not working on the same things as the school was, so he gave up. [Parent 1] does not believe [Student] received any credits for 9th grade.

[Special Education Teacher 2]

129. [Special Education Teacher 2] was a credible witness. She was a special education teacher at [High School] during the 2021-2022 school year. She had been in that role since 2001. She taught several pull-out classes, she case-managed students on IEPs, and she helped write IEPs. She also performed special education evaluations.

130. [Special Education Teacher 2] knew [Student] when she was given the assignment to evaluate him, and then she became his case manager. She did [Student’s] academic testing.

131. [Special Education Teacher 2] testified that [Student] was referred in November of 2021 and his evaluation was completed in early 2022. See Exhibit 18.

132. [Special Education Teacher 2] performed a general assessment of [Student’s] achievement in math and reading, and performed the Woodcock Johnson test. See Exhibit 18 at 7.

133. [Special Education Teacher 2] testified that all of [Student’s] scores fell into the average range. She also testified that she believes the test results were accurate.

10th Grade: 2022-2023 School Year: [County] County School District

134. [Student] wanted a fresh start for his sophomore year. Moreover, [Student's] father, whom [Student] had been living with in [City], was having mental health problems. Therefore, [Student] transferred to [High School] for his sophomore year, which is in the [County] County School District. He was able to move from 9th to 10th grade because [High School] gave him a class to help him catch up, and he also attended an online class for credit recovery.

135. [High School] performed a Transfer IEP meeting and adopted the IEP that the District had created. See Exhibit 54.

136. As of September 29, 2022, [Student] was failing most of his classes at [High School]. See Exhibit WW (showing [Student's] grades in 10th grade which were all failing grades except for P.E., in which he was receiving an 88%).

137. As of September 29, 2022, [Student's] other grades in 10th grade in the [County] County School District school were 55% in Physical Science; 36% in Geometry in construction; 61% in Modern History; 66% in English; and 42% in “[homeroom].” Exhibit WW.

138. At hearing on November 1, 2022, [Parent 1] testified that the last time she checked [Student's] grades they were much lower. She also testified that socially/emotionally [Student] is doing about the same and that he continues to ditch school a lot.

139. [Parent 1] has not challenged the Transfer IEP that is in place. She signed it on October 5, 2022. Exhibit 54.

Miscellaneous

140. The District implemented a “pyramid” program called MTSS, which consisted of three tiers. Tier 1 was the bottom level and included the most students. Tier 1 students needed some help but were not in serious need of help. Tier 2 student were fewer in number and needed more help, and Tier 3 was comprised of the fewest students who needed the most help. [Dean] testified that she remembered receiving an email from [Assistant Principal], the Assistant Principal of [Middle School], telling [Dean] that [Student] was “beyond Tier 2” and that the school needed to have him placed on a 504 plan. A 504 is a specialized plan for students who do not qualify for special education and related services.

141. Concerning the MTSS process, [Counselor] explained that if a student was not responsive MTSS, the school would try something different, and if nothing worked, the school would look at developing an IEP or other problem solving with the experts in the school.

142. [Counselor] credibly testified that “Core Support” is for Tier 2 students. It is a class to help them with academics. It is a flexible class in that throughout the quarter or semester they could come in or out of the Core Support class as needed.

143. [Student] was in Core Support for a while, but then came out of that class because there was data that showed that he was doing well academically at that time, and the Core Support interventions were no longer needed. See Exhibit 37 at 2. [Counselor] credibly testified that she remembers [Student] as being a bright student who wanted to be in classes that challenged him.

144. [Counselor] credibly testified that the school had coping mechanisms available to [Student] such as fidget spinners, puzzles, sensory devices, etc., that were designed to help students regulate themselves. [Student] also had break passes to go to counseling to see [Counselor]. His teachers were told that if he said he needed to go immediately, they needed to let him go see [Counselor] immediately.

145. [Counselor] explained that Core Support is not for kids on IEPs because they would already be getting support from their IEP. [Counselor] explained that moving [Student] out of Core Support was an intervention for him. She explained that what worked better for [Student] was to be in classes that he felt were worth his time; so changing classes was more helpful than Core Support.

146. [Counselor] testified that she and the school team never referred [Student] for special education testing because some of the interventions they were using with him were working and they saw improvement in [Student] from 7th to 8th grade.

147. [Campus Administrator] was part of the MTSS system at [Middle School]. She did not recall that [Student] was part of the MTSS system. She testified that students are referred to MTSS for mental health problems, academic issues, attendance and behavioral problems.

148. She never referred [Student] because she never worried that he had a disability. That was because he was in advanced classes, he was very smart, and she was not worried about him having a social/emotional disability because his interactions with her were very healthy.

149. [Campus Administrator] credibly testified that she could tell [Student] was very bright because some of his written statements in his reentry contracts are well above average, and she has read over 1000 student statements. She testified his would be in the top 10%.

150. [Math Teacher] testified that all general education teachers have a responsibility to either refer students to special education or to talk to one of their colleagues about testing the student for special education.

151. [Math Teacher] testified that [Student] was a “character.” On the first day of class he made a strong impression on her. She had all the students introduce themselves, and [Student] introduced himself by saying “Hi, I’m [Student] I had a run-in with the police this summer and I have changed and I’m going to do better this year.”

152. [Math Teacher] credibly testified that [Student] “most definitely” could access the math she taught. He was verbal, so she would ask him questions and he answered them on grade level.

DISCUSSION

The Requirement of a FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that provides 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 IEP calculated to meet the eligible student’s specific educational needs. 20 U.S.C. § 1414(d). To satisfy FAPE’s requirement, the school district “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas County School District RE-1*, 580 U.S. __; 137 S.Ct. 988 (2017).

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 (10th Cir. 2008) (stating that, “[t]he burden of proof...rests with the party claiming a deficiency in the school district’s efforts”). Parents therefore bear the burden of proving by a preponderance of the evidence that the District violated its Child Find obligations under the IDEA which resulted in a substantive failure to provide [Student] with FAPE.

Child Find Regulations

The Child Find obligation is found in 34 CFR § 300.111(1), which mandates that:

the State must have in effect policies and procedures to ensure that

(i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special

education and related services, are identified, located, and evaluated...

A child with a disability can be a child who has a serious emotional disturbance, which is also referred to as an emotional disturbance. 34 CFR § 300.8 (a)(1). Emotional disturbance 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 § 308.8.c.4.(i) (emphasis added).

"Other Health Impairment" means:

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.
34 CFR § 300.8.c.9.I and II.

Discussion

By way of reminder, there are three issues in this case:

1. Whether Parents met their burden of proof establishing that the District failed its Child Find obligation to [Student];
2. That such procedural failure amounted to a substantive violation in that it caused [Student] not to receive FAPE, and, if so,
3. What the proper remedy is, if any.

1. Whether Parents met their burden of proof establishing that the District failed its Child Find obligation to [Student]

Concerning the first issue, the court is persuaded by a preponderance of the evidence in the record that the District failed to meet its Child Find obligations to [Student]. That said, it should be noted that this was not a simple case or an easy decision to make. It was a close call because the District did many things right, including the daily check-ins with [Dean]; giving [Student] chill passes to leave class and walk outside the classroom door in order to de-escalate or calm himself down; and instructing [Student's] teachers to let [Student] leave their classrooms whenever he felt the need to see his counselor. [Student] had a good relationship with [Counselor], and the evidence is persuasive that she was overall helpful to him. [Counselor] was a trusted adult in whom [Student] could confide. [Counselor] continued to support [Student] during the shutdown with weekly check-ins. When the District's schedule was hybrid, as well as during the shut-down, [Counselor] helped [Student] get and stay organized. [Counselor] also proactively sought information from [Student's] parents and his private therapist in order to gather as much information as possible so that she and the District could help [Student] succeed.

Other interventions the District tried with [Student] included utilization of the Daily Tracker; informing him that he would be suspended after receiving three referrals; and putting him in Core Support for a time. In other words, the evidence is persuasive that District personnel, including [Counselor], [Dean], [Math Teacher], and many other teachers and staff who testified but are not included in this decision, all genuinely cared about [Student] and sincerely wanted him to succeed. These teachers and staff members tried numerous interventions with [Student], and when the interventions eventually failed, which they always did, the District staff did not give up but instead pivoted to create new interventions that might work. [Dean] and [Counselor] in particular were both patient with [Student] and never gave up on him despite his numerous behavioral referrals, suspensions, and police contact. However, despite all of the District's genuinely impressive patience, creativity, and persistence, in the end it was only when [Student] was faced with expulsion that the District convened an IEP meeting prior to a manifestation determination. The ALJ concludes an IEP meeting should have been convened before that date, and because it was not, the District failed to meet its Child Find obligations to [Student].

In *J.N. v. Jefferson Cnty. Bd. of Educ.*, 421 F. Supp. 3d 1288, (N.D. Ala. 2019), the Court held that:

The child-find obligation extends to all '[c]hildren who are suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade....However, the child-find obligation 'does not extend to testing every student who is

not successful when factors other than a disability would also explain the failure to progress; evaluations are only required when the evidence is sufficient to cause a school system to have a reasonable belief that such an evaluation is necessary.' (internal citations omitted and emphasis added).

The J.N. case provided the undersigned the test she used to determine that seventh grade was when [Student] should have been evaluated, and the reason is because in seventh grade there was sufficient evidence to cause [Middle School] to have a reasonable belief that [Student] needed to be evaluated. That evidence included:

- [Student] received a Uniform Behavioral Referral for negative behaviors on the following dates:
August 18, 2019
September 12, 2019
September 20, 2019
September 27, 2019
October 8, 2019 (first referral that day)
October 8, 2019 (second referral in the same day)
October 8, 2019 (third referral that day)
November 12, 2019
December 3, 2019
December 10, 2019
January 9, 2020
February 6, 2020
February 10, 2020
February 12, 2020
February 27, 2020
February 28, 2020
On March 13, 2020 the school shut down due to Covid.
- The above Uniform Behavioral Referrals were not necessarily for minor offenses. They included negative behaviors by [Student] such as:
 - Walking out of class without permission
 - Playing music through his speaker in class, disrupting the entire class
 - Taking his shirt off in class
 - Being "wildly disruptive" in class
 - Making disruptive noises in class
 - Banging the door shut when asked to leave class
 - Disrupting the class when he came back to class after using a chill pass

- Plugging his speaker into his Chromebook and playing music out loud during class
 - Disruptive and defiant behavior in class including singing, dancing, talking, and purposely bothering other students
 - Cursing and yelling at a security guard who told him to put his shirt back on
 - Acting out in front of other students
 - Refusing to sit and stop talking and instead continuing to rap and sing inappropriate lyrics
 - Repeated defiant and disruptive behavior
 - Rapping loudly in class and using the “F” word repeatedly in class
 - Physically fighting with another student
 - Yelling while a substitute teacher was trying to speak
 - Dancing out of his seat
 - Being re-directed five times by the same substitute teacher referred to above, and those five re-directions failing to stop [Student’s] behaviors
 - [displayed inappropriate behavior] Having four tardies in one class
 - Throwing trash and books around a classroom
- [Middle School] staff knew about [Student’s] ADHD diagnosis in seventh grade
- [Middle School] staff knew about [Student’s] ODD diagnosis in seventh grade
- [Dean’s] September 12, 2019 email to [Counselor] and [Assistant Principal] that [Student] was starting to “pop up again with similar behaviors from last year – disruptive, defiant, etc.”
- [Dean’s] September 14, 2019 email to [Assistant Principal], [Counselor], and [Principal], the principal, asking to set up a meeting “ASAP” with all of [Student’s] teachers to develop a behavior plan. She stated, “I had given him the chance to prove himself, he has failed at that...and now we need to reestablish a plan.”
- [Student’s] multiple out of school and in school suspensions, which were the following:
 - One day OSS (out of school suspension) around September 12, 2019
 - Four days OSS on or around October 9, 2019
 - Five days OSS on or around January 9, 2020
 - One day in school suspension on or around February 10, 2020
- [Student] received a police ticket for his behavior that the school knew about on or around January 9, 2020
- Low and failing grades that most of [Middle School’s] teachers and staff knew were not the grades he was capable of achieving, including:

- 3 D's and 1 F in the first quarter. The Ds were in Math 7, PE, and Social Studies; and the F was in Science 7
 - 1 D+, one D-, and 2 Fs in the second quarter. The D+ was in Honors Language Arts; the D- was in Math 7; and the 2 Fs were in Science 7 and Social Studies 7
 - One D in science in the third quarter
- At least some [Middle School] staff knew about the problems [Student] was having at home.
- At least some [Middle School] staff knew about the problems [Student] had at school the previous year.

The J.N. case had similarities to this case. In the end, that Court held:

Indeed, throughout M.N.'s middle school years, Board personnel had notice of M.N.'s ADHD diagnosis, but there is no evidence indicating that any teacher or school administrator considered whether, in light of that diagnosis, M.N.'s academic and behavioral issues could have been attributed to a disability rather than typical middle school problems. Thus, giving due weight to the hearing officer's decision, and based on a preponderance of the evidence, including M.N.'s ADHD diagnosis, declining grades in her seventh grade year, poor results on standardized tests, and behavioral issues, the court finds that the Board violated its child-find obligation by overlooking clear signs of disability by the end of M.N.'s seventh grade year. *J.N. v. Jefferson Cnty. Bd. of Educ.*, 421 F. Supp. 3d 1288, 1297-98 (N.D. Ala. 2019).

Based on the above, as well as all the evidence in the record, including such things as [Student's] poor grades and negative actions beginning again in 8th grade, the ALJ concludes that Parents met their burden of proof by a preponderance of the evidence establishing that the District failed its Child Find obligations to [Student]

2. That such procedural failure amounted to a substantive violation in that it caused [Student] not to receive FAPE

Under the Tenth Circuit, "liability under the IDEA is determined ... by whether the preponderance of the evidence indicates that [a] school district's procedural failures resulted in a denial of educational benefit to the student." *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1127 (10th Cir. 2008). According to the J.N. case, "a child find violation constitutes a denial of FAPE if it results in substantive harm." The ALJ is persuaded by the evidence in the record that the District's failure to identify and evaluate [Student] earlier than November 12, 2021 did cause [Student] substantive harm. The substantive harm was a failure to provide [Student] FAPE. FAPE was not provided during the many days that [Student] received no instruction whatsoever because

he was in OSS or in-school suspension, including in eighth grade. Evidence that FAPE was not provided is also seen in the fact that [Student] received numerous low and failing grades despite [Middle School] staff and teachers knowing and some testifying that he was capable of doing much better in school academically. Indeed, when [Student] was eventually evaluated for special education, it was shown by objective measures that [Student] had an average I.Q. and tested at least in the average range in almost every academic measure.

Thus, the ALJ concludes that the parents have met their burden of proof by a preponderance of the evidence that the Child Find failure in this case amounted to a substantive violation of the IDEA in that the District did not provide FAPE to [Student].

3. What is the proper remedy

In Parents' closing brief/argument, they seek compensatory education in the form of two years' worth of 230 minutes weekly of special education services and two years' worth of 60 minutes of monthly mental health services. Parents additionally request this court order the District to pay for [Student] to receive services from a credit retrieval program so that he may receive credit for his freshman year courses which he failed as a result of not being identified as a student that qualifies for special education. Parents request that the District pay for tutoring for [Student] in his four core classes (Language Arts, Math, Science, and History) until [Student] is able to "demonstrate sufficient progress in these courses." Parents request \$50.00 per hour for tutoring. Finally, parents request that the District pay for [Student's] outside mental health services at a rate of \$140.00 per month until [Student] "is made whole."

In Parents' due process complaint they requested the following: 1. Compensatory services for the time he was not on an IEP; 2) Stay-put provisions; 3. District-paid psychological services for [Student] "that will enable him to access a general education curriculum successfully" and 4. Attorneys fees.

In IDEA matters, courts and hearing officers have the authority to "grant such relief as the court determines appropriate." 34 C.F.R. § 300.516(c)(3). Concerning Parents' requests, "Under the theory of compensatory education, courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program." *Smith v. Cheyenne Mountain Sch. Dist.*, 2018 WL 3744134, *3 (D. Colo. 2018). The *Garcia* case explained that "an award of compensatory education vindicates the student's substantive right to receive a FAPE and compensates for a past deprivation of educational opportunity rather than a deprivation of purely procedural rights." *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1127 (10th Cir. 2008).

Based on everything in the record, the ALJ determines that the following is an appropriate award:

1. Every request that was not specified in the due process complaint is denied, unless specifically awarded below.
2. The District shall pay for [Student] to receive 230 minutes weekly of special education services and 60 minutes of monthly mental health services for the number of weeks and months, respectively, that is between March 4, 2020 (the date of the statute of limitations) and February 16, 2022 (the date [Student's] IEP was developed). The court will leave the math up to the parties, but the intent is to compensate [Student] for the time he was not on an IEP but should have been, but with that timeframe limited by the statute of limitations. The 230 minutes and 60 minutes are taken from the IEP that the District eventually developed and that was still in place as of the hearing in this case. Notably, the District's IEP was not challenged and remained in place at least as of the date of the hearing in this matter.
3. The minutes of special education services awarded in number 2 above shall be provided by a person with the same credentials as the person that the District used.
4. The minutes of mental health services shall be provided by a person with the same credentials as the person that the District used.
5. The request for academic tutoring is denied because academic tutoring was and presumably is not on [Student's] IEP, and that IEP has not been challenged by Parents.
6. Because this was a close case, 50% of reasonable attorney's fees is awarded to Parents.

DECISION

Cherry Creek School District No. 5 is ordered to comply with the award of compensatory education and attorneys' fees set forth immediately above.

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 January 11, 2023

/s/ Tanya T. Light
TANYA T. LIGHT
Administrative Law Judge