

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

State-Level Complaint 2019:527
San Luis Valley BOCES

DECISION

I. INTRODUCTION

The mother (“Parent”) of a student (“Student”) not currently identified as an eligible child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ initiated this action against San Luis Valley Board of Cooperative Educational Services (the “BOCES”) through a state-level complaint (“Complaint”) properly filed on Student’s behalf by legal counsel (“Attorney 1 for Student”) on Monday, April 22, 2019.

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

II. RELEVANT TIME PERIOD

The Colorado Department of Education (“CDE”) has the authority to investigate alleged violations of the IDEA that occurred not more than one year from the date the Complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, this investigation will be limited to events that transpired no earlier than April 22, 2018 to determine whether or not a violation of the IDEA occurred. *Id.* Additional information prior to this date may be considered to fully investigate the allegation accepted in this matter. 34 C.F.R. § 300.152(a)(4). Findings of noncompliance, if any, shall be limited to one year prior to the date the Complaint was filed. 34 C.F.R. § 300.153(c).

III. COMPLAINT ALLEGATION

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

1. Failed to identify and evaluate Student when it was on notice that Student may have a disability and be in need of special education and related services, from August 29,

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* and its corresponding regulations are found at 34 C.F.R. § 300.1, *et seq.* IDEA implementation in Colorado is governed by the Exceptional Children’s Educational Act (“ECEA”), found at 1 CCR 301-8, 2220-R-1.00, *et seq.*

2018 to present, in violation of 34 C.F.R. §§ 300.111 and 300.301, and ECEA Rule 4.02(1)(a).

IV. FINDINGS OF FACT

After a thorough analysis of the Record as detailed in the appendix attached and incorporated by reference, the SCO makes the following FINDINGS OF FACT:

A. Background

1. Student, a sixteen-year-old not presently identified as eligible for special education and related services as a child with a disability under the IDEA, is enrolled as a sophomore at a high school ("School") within a BOCES member school district ("District"). *Response*, p. 1; *Interview with Parent*. However, pursuant to the terms of an April 2019 Deferred Expulsion Agreement, Student has completed the latter portion of the 2018-2019 academic year through online coursework. *Exhibit H*, pp. 28-30; *Interview with Parent*.
2. The Deferred Expulsion Agreement resulted from a fourth violation of School's Code of Conduct on February 26, 2019, culminating in a recommendation for expulsion as Student had "engaged in a pattern of disruptive and detrimental behavior that qualifies as being declared habitually disruptive under C.R.S. § 22-33-106(1)(c.5)." *Exhibit H*, pp. 24, 28-33. This most recent incident, and each of Student's three prior transgressions during the 2018-2019 academic year, on September 5, 2018, September 27, 2018, and January 16-17, 2019, ended in suspension for Student as fully described below in these findings. *Id.* at pp. 1-3, 8, 10, 12.
3. Despite these recent behaviors, Student is characterized as caring, resolute, outgoing, and intelligent. *Interviews with Parent, School Interventionist, and School Counselor*. His struggles center primarily on becoming easily frustrated and angry in certain situations on account of a "quick temper." *Id.* School Interventionist, in recounting the joy of observing Student mature since she first instructed him in reading at the second grade level within District, also cited apathy as an obstacle for Student on occasion. *Interview with School Interventionist*.
4. During Student's third grade academic year, on March 7, 2012, an individualized education program team ("IEP Team") qualified him to receive special education and related services under the IDEA as a child with a speech or language impairment. *Exhibit N*, p. 29. Student continuously received special education services through an IEP until December 19, 2014, his sixth grade school year, at which time the IEP Team terminated eligibility following a triennial reevaluation. *Id.* at p. 1. The IEP Team concluded that Student was "performing above the required standards to receive Special Education services[,]" and advised that a response to intervention ("RTI") team would "continue to monitor his academics." *Id.* at pp. 1, 7. At all times following the December 19, 2014 determination of eligibility meeting, Student has been enrolled solely within District's general education curriculum. *Interview with Parent*.

5. The instant dispute arises from Parent’s assertion that the BOCES failed to identify and evaluate Student as a child with a suspected disability and in need of special education and related services, as early as August 29, 2018, based on knowledge of Student’s “serious behavior issues.” *Complaint*, p. 10. The BOCES responds that it had no reason to suspect a disability and a need for special education services as a result in this case. *Response*, pp. 5-8.
6. The parties’ respective positions require the SCO to evaluate information the BOCES knew or had reason to know, from August 29, 2018 to present, to determine if the BOCES violated a duty to identify and evaluate Student as a child suspected of having a disability and in need of special education and related services. The SCO now examines the 2018-2019 school year.

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

7. Student’s sophomore year started on August 20, 2018. *Exhibit K*, p. 2. As illustrated by Student’s complete Behavior Detail Report, the SCO finds that disciplinary-related incidents surfaced swiftly this school year, standing in stark contrast to the 2017-2018 academic year during which Student’s behavior did not lead to any officially documented reports or sanctions. *Exhibit 2*, pp. 1-4; *Exhibit H*, pp. 1-7. Although Parent stated that Student received multiple suspensions during ninth grade, his full disciplinary file documents one suspension in fourth grade for a physical altercation with a peer, two suspensions in fifth grade for defiance of authority and a display of anger, two suspensions in seventh grade for fighting, and one suspension in eighth grade for fighting. *Interview with Parent; Exhibit H*, pp. 4-7.
8. This year’s first disciplinary matter occurred on September 5, 2018 when Student refused to turn his cell phone in to a teacher for placement into a “Yondr pouch” pursuant to School policy, and his “temper got the best of him” when asked by Principal to hand the cell phone over. *Interview with Parent; Exhibit 2*, p. 3. The Behavior Detail Report indicates that he thereafter “approached [Principal] in a threatening way in the hall and in the office.” *Exhibit 2*, p. 3. Student earned a one-half day out-of-school suspension for “defiant and disrespectful and threatening behavior, not for having his phone.” *Id.* With a meeting already set, a School RTI Team, to include Student, Parent, School Interventionist, Principal, and Social Studies Teacher, convened the next day to review Student’s 2017-2018 RTI Plan. *Exhibit D*, pp. 8-14.
9. Both the 2017-2018 and 2018-2019 RTI Plans identify “Academics-Reading” and “Behavior – Self Control” as areas of concern, and include the goal of “[c]ontrol temper” as Student “[has a tendency to overreact during stressful situations and lose his temper.” *Id.* at pp. 3, 9. Each plan provides that it is “important for [Student] to have structure . . . [and if] the daily routine changes, it is difficult for [Student] to adapt.” *Id.* at pp. 2, 9. Additionally, both plans reflect that Student has a “hard time focusing in when he is in a small space . . . [and that given] his addiction from drugs he needs the extra space due to sensory and attention issues.” *Id.* at pp. 2, 8. The SCO finds no evidence of substance abuse in the Record, but Student did inform School staff within the last two years that his biological mother abused drugs while he was in utero. *Interviews with Director of Exceptional Services and School Interventionist.* The SCO

also finds that, though ambiguous as documented, the statement regarding an “addiction from drugs” in each plan corresponds to this recent information provided to School staff. *Id.*

10. The overall status for the updated 2018-2019 RTI Plan remained at a Tier 2 level of support, with the intensity of each specific intervention falling within either a Tier 1 or Tier 2 category. *Exhibit D*, pp. 4-13. Tier 1 is appropriate for children who can self-advocate, and is typically facilitated by the classroom teacher, while Tier 2 generally involves the use of an interventionist to supplement a classroom teacher’s supports. *Interview with School Interventionist*. Tier 3 enlists more intensified strategies, and commonly necessitates contacting a school psychologist or behavior specialist to design extensive programming. *Id.* The SCO finds, through consultation with a CDE behavioral specialist (“CDE Specialist”), a proper RTI program should utilize varying levels of tiers simultaneously to measure progress.
11. Both the 2017-2018 and 2018-2019 RTI Plans allow for Student to “calm down” or “cool down” in the office when needed. *Exhibit D*, pp. 4, 10. Parent stated that Student utilized this accommodation during the current academic year one or two times per week, and sometimes not at all in a weeklong period, with the “cool downs” generally lasting fifteen to twenty minutes. *Interview with Parent*. School Counselor indicated that the “cool downs” happened on occasion, but in a sporadic and inconsistent manner. *Interview with School Counselor*. In addition to this accommodation, both plans include three distinct intervention methods, with a fourth strategy added to the 2018-2019 RTI Plan. *Exhibit D*, pp. 4-5, 10-11.
12. Intervention 1 reads that where “a teacher knows that they are going to be gone please contact [Student] ahead of time so he is able to prepare himself for the day.” *Id.* at pp. 4, 10. School Interventionist reported that this strategy worked for Student when implemented, and that he required more support in this respect at a younger age. *Interview with School Interventionist*. She added that, even though difficulties in adapting to daily routine changes may be indicative of social-emotional struggles, this was not the case with Student recently. *Id.* She explained to the SCO that any observed issues in this respect were a consequence of Student instead manipulating this intervention, mostly in situations where he simply did not like a certain substitute teacher, as he might respond by “storm[ing] out of the room.” *Id.*
13. Intervention 2 allocates a set period of time for Student to “catch up on class work” when needed with School Interventionist. *Exhibit D*, pp. 4, 10. This “Study Skills” class benefited Student academically, with Parent reporting that it “lead to him being successful in the classes he had a hard time with.” *Interviews with Parent and School Interventionist*. School Interventionist worked with Student during fifth period on organization in terms of the work he needed to complete for his core curriculum, and on note taking because he was unmotivated in this area. *Interview with School Interventionist*. He was also able to complete homework, and “let some steam off” through “brain and physical breaks.” *Id.* By all accounts, Student and School Interventionist sustained an “excellent relationship” throughout the current academic year. *Interviews with Parent, School Interventionist, and School Counselor*.

14. Intervention 3 relates to instances where Student exhibits “aggressive behavior, frustration with a teacher or student, frustration with an assignment or another situation in the classroom or at school.” *Exhibit D*, pp. 5, 11. The 2018-2019 RTI Plan specifically provides:

1. Teacher will give a warning, that will consist of ‘[Student], really?’
2. If it continues the teacher will encourage [him] to step out of the room to a designated area for ‘cooling off time’ to the main office.
3. If [he] chooses to leave and is unable to communicate with the teacher he will write RTI on the top of his work.

Id. at p. 11. Student has never physically harmed another individual, but “yells and gets frustrated to the point his speech patterns become pressured and he walks away.” *Interview with Parent*. He appeared to be “losing his temper more” during the current school year, and to be “angrier and angrier” in January and February 2019. *Interview with School Interventionist*. Educators attributed some of this anger to the end of a romantic relationship, and to Student quitting the wrestling team, with Parent adding that sports, such as football where he was one of a few sophomores selected to play at the varsity level, “kept [Student] going.” *Interviews with Director of Exceptional Services, School Interventionist, and Parent*.

15. Intervention 4 was added to the 2018-2019 RTI Plan as part of the RTI Team’s review on September 6, 2018, and relates to “[s]elf [c]alm[ing]” in the form of Student using essential oils. *Exhibit D*, p. 11. School Interventionist never observed him to implement this strategy, but Parent maintained that Student applied essential oils both prior to and throughout the school day. *Interviews with Parent and School Interventionist*. The SCO finds no evidence that any use of essential oils by Student negatively impacted his performance at School. *Id.*

16. Though not memorialized in the 2018-2019 RTI Plan, a School Counselor Intern met with Student on a weekly basis to work on “behavior modification” strategies, such as writing down thoughts and alternative approaches to “exploding.” *Interview with School Counselor*. Student had received in-school mental health services throughout his elementary education within District, but a “turnover in counselors . . . impacted his trust” and thus, at the election of Parent and Student, he has not received mental health services at School for at least the past two academic years. *Interview with Parent*.

17. Shortly after the update to the 2018-2019 RTI Plan, on September 27, 2018, Student’s second Code of Conduct violation occurred when a teacher reported that he was “displaying two knives in class.” *Exhibit 2*, pp. 2-3. This incident did not involve any threatening or aggressive behavior by Student, with Parent reporting that a classmate asked to use one of the knives, and Student received a one-day out-of-school suspension. *Id.* at p. 3; *Interview with Parent*.

18. In addition to the first two incidents leading to suspension, Parent cited to another event toward the beginning of the first semester to support the position that Student “continued to demonstrate behavior that indicated social and emotional issues that suggested a need for special education and related services.” *Complaint*, pp. 4-5; *Interview with Parent*. On August

29, 2018, Social Studies Teacher e-mailed School Counselor with information that peers the day prior reported Student became “visibly agitated” during an assembly and said “I would rather shoot up this school than turn in my phone.” *Exhibit 2*, p. 13. Student left the assembly, but returned with a positive demeanor. *Id.* Social Studies Teacher surmised it was “just another case of [Student’s] temper getting the better of him . . .” *Id.* School Counselor forwarded the e-mail to Principal and District Superintendent. *Id.* No disciplinary action ensued, and while Parent contested the supposed statement, she confirmed that Student was frustrated with the newly-created “Yondr pouch” phone policy. *Interview with Parent.*

19. The first semester concluded on December 20, 2018, at which time Student’s report card denoted an “82” in Algebra 2, a “79” in Biology 1, a “79” in Earth Science, a “75” in Economics/Geography, a “72” in English, an “80” in Spanish 1, a “94” in Study Skills, and a “P” in Physical Education. *Exhibit K*, p. 2; *Exhibit G*, pp. 1, 3. These grades are consistent with Parent’s report that his academic record historically reflects “average or in some areas above average” performance. *Interview with Parent.* For example, the 2017-2018 academic year, described by School Counselor as “stellar” for Student, reflects a 3.143 grade point average for both the first and second semesters. *Interview with School Counselor; Exhibit G*, p. 2.
20. In terms of standardized assessments, Student has always been a “terrible test taker.” *Interview with Parent.* The most recent standardized total scores from the Preliminary SAT/National Merit Scholarship Qualifying Test placed Student in the fourth percentile on October 11, 2017, in the sixteenth percentile on April 11, 2018, and in the first percentile on October 10, 2018. *Exhibit E.* School Interventionist stated she was always disappointed in Student’s standardized scores because she never knew if he “took a test seriously.” *Interview with School Interventionist.* For instance, Student has told her on prior occasions that he “put all Cs down” on an assessment and that he “did not want to read” portions of other tests. *Id.*
21. After School recessed for its winter break, but prior to onset of the second semester, School administration received a Safe2Tell report on January 4, 2019 regarding an “[a]nonymous threat over social media . . .” *Exhibit H*, p. 2. A local sheriff and District Superintendent visited Student at his residence, but no disciplinary action transpired. *Id.* His next suspension occurred after the second semester started on January 7, 2019. *Id.* at pp. 1-2; *Exhibit K*, p. 2.

C. The 2018-2019 Academic Year: School’s Second Semester

22. Student’s third disciplinary offense occurred from January 16-17, 2019, and involved the use of profanity in the presence of teachers and classmates. *Exhibit 2*, pp. 1-2. Specifically, Student “used profanity” in Social Studies Teacher’s classroom and the hallway on January 16, in addition to refusing to participate and being “rude to visitors observing the class and the teacher.” *Id.* at p. 2. The next day, “[Student] directed profanity toward [School Counselor] in [the] classroom . . . [and] directed profanity toward [a] substitute teacher.” *Id.* As a result of this, Student served an out-of-school suspension from January 21-24, 2019. *Id.*

23. Student's name was "popping up" more frequently, and for this reason School Counselor reached out to School Psychologist to "ensure [they] were doing everything to meet [Student's] needs." *Interview with School Counselor*. Though not contemplating a referral for special education, School Counselor stated that Student had "definitely progressed to the point where a conversation with [School Psychologist] was needed." *Id.* School Psychologist interviewed Student and Parent on January 22, 2019, with the aim of developing a behavior intervention plan, and created additional supports for Student to include a "2x10" strategy where a School staff person was to spend two minutes per day for ten days with Student to "check in and build a relationship with [Student]." *Exhibit Q; Interview with School Counselor*.
24. Parent conveyed uncertainty with the decision to consult School Psychologist. *Interview with Parent*. She explained that the BOCES had access to the entirety of Student's educational records, and knew Student well as he has been continuously enrolled in District since kindergarten. *Id.* Given Parent's concerns that a special education referral was delayed in favor of interventions, Director of Exceptional Services acknowledged that a child does not have to receive RTI in order to be identified for special education. *Interview with Director of Exceptional Services*. In terms of a transition from RTI to special education, she clarified that it is "about how the team feels a child is accessing general education and social communication around the school." *Id.*
25. In Student's case, she explained that he was "very successful" with the interventions in place for the previous three academic years. *Id.* As an example, she mentioned Student's continued success in working with School Interventionist through the "Study Skills" course. *Id.* And while the "defiant behavior" on September 5, 2018 could be "linked" to the behaviors targeted through Student's interventions, Director of Exceptional Services added, the behaviors associated with the other three incidents, even considering the suspensions, "are not connected." *Id.* She cited, for instance, the knife incident on September 27, 2018. *Id.*
26. School Interventionist, with twenty years of special education expertise, leads School's RTI process and explained that where interventions are unsuccessful for a child over three six-week periods of time, she contacts School Psychologist, or a special education staff person, to attain additional expertise on educational programming moving forward. *Interview with School Interventionist*. Approaching School Psychologist in January 2019, School Counselor noted, was the "natural progression that is standard in the RTI process . . ." *Interview with School Counselor*. Through interaction and instruction with Student over the past two years, neither School Counselor nor School Interventionist suspected that Student might have a disability necessitating specialized instruction. *Id.; Interview with School Interventionist*.
27. Director of Exceptional Services recapped the BOCES' procedures for locating, identifying, and evaluating all children who are suspected of having a disability and needing special education services. *Interview with Director of Exceptional Services*. Specifically, the relevant policies provide in part that the BOCES must ensure the "special education referral process is clearly delineated from the building level processes that use universal screenings or the provision of

systematic instructional options.” *Exhibit J*, p. 3. They further mandate that the BOCES assure “any other interested person who believes that a child is in need of an initial evaluation works with the parents . . . in order to refer a child for a special education evaluation.” *Id.* at p. 4.

28. To that end, Director of Exceptional Services, now in her twenty-ninth year of special education, advised that School has a “building-level problem solving team” to include Principal, School Interventionist, School Counselor, School Psychologist, and the teachers familiar with a child. *Interview with Director of Exceptional Services*. Where an educator suspects that a child may have a disability, it is expected that the suspicion be elevated to the “problem solving team.” *Id.* These individuals may collect data points to determine, for instance, how a child functions within general education or what interventions might be needed. *Id.* Comprehensive data allows for the “problem solving team” to communicate a child’s difficulties to the School Psychologist or Director of Exceptional Services in order to assess whether intensified supports, or a special education referral, are warranted. *Id.* Potential indicators of a disability can include social-emotional or behavioral concerns, declining grades, relationship challenges, previous receipt of special education services, and lack of success through RTI. *Id.*; *Interviews with School Counselor and School Interventionist*.
29. CDE Specialist, based on a review of Student’s disciplinary file, explained to the SCO that it is reasonable for an intervention team to consult a school psychologist once a child appears to no longer be making progress through an RTI program, particularly where behaviors occur within the context of a single academic year. CDE Specialist described the RTI process as one aimed to collect data in a “longitudinal” fashion as opposed to a “moment in time” manner. For Student, even where behavior was not perfect this academic year, CDE Specialist added it was appropriate for the School intervention team to contact an individual with a more extensive skillset as a “check and balance” to supports Student had already been receiving.
30. On January 24, 2019, Principal and School Counselor Intern met with Parent and Student to review the 2018-2019 Behavior Plan. *Exhibit 2*, p. 2; *Exhibit D*, p. 15. The updated plan provides that “[Student] is demonstrating difficulty in self-regulation, aggressive and disruptive behavior in the school” *Exhibit D*, p. 15. Consequently, the updated plan lists the following in anticipation of Student displaying “appropriate behavior” at School:

1. The expectation is that [Student] identify his triggers and be proactive in self-regulating
2. [Student] will use appropriate language while in school
3. [Student] will use non-aggressive behavior while in school
4. [Student] will be compliant in the classroom and complete assignments
5. Cool downs will happen in the office with processing before re-entering class

Id. A behavior plan, along with an RTI Plan, were first created for Student during the 2015-2016 academic year, with each deriving from the BOCES’ “problem solving process.” *Interviews with Parent and Director of Exceptional Services*. The inaugural, single-page

Behavior Plan for seventh grade similarly signifies behavioral challenges to include “problem-solving, self-regulation, and aggressive and disruptive behavior in the classroom.” *Exhibit D*, p. 1. The goal of that early plan was to lower “the instances of aggression and getting sent to the office, which interferes with the amount of academic instruction [Student] receives.” *Id.*

31. These documents were developed soon after Student exited special education during the 2014-2015 school year. *Exhibit N*, p. 1. Student’s most recent IEP dated February 25, 2014, in addition to speech language services, details an accommodation that “[Student] needs immediate feedback to be successful . . . minimal distractions, and to be allowed to calm down and take a break in a designated area if needed.” *Id.* at pp. 34, 37. The 2014 IEP also notes that “[his] behavior in the classroom has been becoming more increasingly disruptive to his learning and the learning of others.” *Id.* at p. 31. It adds that while Student was “making growth academically . . . his core teachers report that his outburst in the classroom are becoming more frequent and he is not verbalizing what he is frustrated about.” *Id.*
32. Conversely, an Evaluation Report dated November 12, 2014 provides that teachers had commented how “the behavior contract has been working well for [Student], and . . . he now takes it upon himself much more often to take a cool-down break before becoming upset.” *Id.* at p. 7. It further indicates that while “conflict in [his] relationship with teachers” had an impact on his academics when he was first started special education in March 2012, he had become “very amenable to talking through frustration, particularly hearing logical reasons and consequences for things, which helps him face unpreferred [sic] activities.” *Id.* This was not the case for Student on February 26, 2019, however. *Exhibit 2*, p. 1. That date marked a fourth disciplinary referral for an “altercation/confrontation” with a peer during lunch. *Id.*
33. The Behavior Detail Report provides that “[Student] would not discontinue yelling and aggressive behavior when asked by a teacher.” *Id.* The dispute involved a school-related project, and the pair quit quarreling after School Interventionist stepped between them. *Id.*; *Interviews with Parent and School Interventionist*. Shortly thereafter, a teacher heard Student “using a very loud voice and profanity in the bathroom . . . [t]he teacher waited for a minute and finally, asked [him] to go to the office and cool down. [He] left the bathroom and went directly back to a classroom.” *Exhibit 2*, p. 1. Student received a three-day out-of-school suspension, and a recommendation for expulsion based on the “habitually disruptive student” provision of District’s Grounds for Suspension/Expulsion policy. *Exhibit H*, p. 24.
34. Parent requested an expulsion hearing, and thus District extended Student’s suspension up to and through March 28, 2019 by letter issued on March 9, 2019. *Id.* at p. 26. School’s third quarter had concluded on March 7, 2019, at which point Student’s report card reflected an “80” in Algebra 2, a “78” in Biology 1, an “81” in Earth Science, an “80” in Economics/Geography, an “83” in English, an “85” in Spanish 1, a “92” in Study Skills, and a “P” in Physical Education. *Exhibit K*, p. 2; *Exhibit G*, p. 3. Student’s cumulative grade point average is 2.952, and he was absent only a total of nine times this school year. *Id.* at pp. 1, 3.

35. In place of proceeding to an expulsion hearing on March 28, 2019, the parties entered into the Deferred Expulsion Agreement. *Exhibit H*, pp. 28-30. Consistent with this agreement, Parent stated that Student was finishing the school year online, and that he received coursework to complete either electronically from teachers or in person from a peer. *Id.*; *Interview with Parent*. Shortly after Parent signed the Deferred Expulsion Agreement, and Attorney 1 for Student filed the instant Complaint, a second attorney for Student (“Attorney 2 for Student”) requested on April 24, 2019 that the BOCES evaluate Student in accordance with the IDEA. *Exhibit R*, p. 4.
36. Legal counsel for the BOCES (“BOCES Attorney”) provided Attorney 1 for Student and Attorney 2 for Student with a Consent to Evaluate Student in the areas of general intelligence, communicative status, academic performance, social and emotional status, and health on April 26, 2019. *Id.* at pp. 8-11. Parent signed the Consent to Evaluate on May 13, 2019, and after an initial evaluation of Student, a Determination of Eligibility issued on May 30, 2019 indicating that Student did not meet the criteria for special education eligibility. *Exhibit T*. Specifically, the “multidisciplinary team concluded that [Student] is able to benefit from general education when provided Tier 2 support with academics and social/emotional skills.” *Id.* at p. 23.
37. The single allegation before the SCO is grounded in the core tenet of compliance with IDEA’s preplacement procedures, in this case a BOCES’ affirmative obligation to seek out children who may be IDEA-eligible and refer those children for an initial evaluation, and thus requires legal analysis of the foregoing findings of fact within the purview of this screening principle.

V. CONCLUSIONS OF LAW

Based on the FINDINGS OF FACT set forth above, the SCO enters the following CONCLUSIONS OF LAW:

Conclusion to Allegation No. 1: The BOCES did not violate Child Find by failing to initiate a special education evaluation prior to Parent’s request when it did not have reason to suspect that Student may be in need of specialized instruction as a result of a qualifying IDEA disability.

A. The Child Identification Process under the IDEA

Parent alleges that, by reason of suspicion stemming from a lengthy history of behavioral issues requiring an RTI Plan and manifesting in an extensive disciplinary record, the BOCES failed to affirmatively identify Student as needing an initial evaluation to determine his IDEA eligibility. *Complaint*, pp. 10-11. Parent asserts further that “struggles in the classroom” and “social and emotional issues” imparted upon the BOCES suspicion of a disability and a need to evaluate. *Id.*

Eligibility for IDEA special education services requires a qualifying disability and, because of that disability, a need for special education. 34 C.F.R. § 300.8(a)(1). As implicated through the instant

Complaint, the IDEA mandates that school districts develop and implement adequate procedures to identify, locate, and evaluate children with disabilities who may be in need of special education and related services. 34 C.F.R. § 300.111(a). In Colorado, the child identification process applies to a BOCES and “shall include child find, special education referral, initial evaluation, and determination of disability and eligibility for special education.” ECEA Rule 4.02(1)(a)(ii).

An essential element of child identification is the special education referral, placing upon school districts an affirmative obligation to evaluate a child where there is reason to suspect a qualifying IDEA disability and a need for special education and related services. 34 C.F.R. § 300.111(c); ECEA Rule 4.02(1)(a). The threshold for suspicion of a disability is relatively low, and the inquiry is not whether the child actually has a disability or qualifies for special education services, but whether the child should be referred for an evaluation. *State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001). Suspicion “may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation.” *Smith v. Cheyenne Mountain Sch. Dist. 12*, 2017 WL2791415, at *18 (D. Colo. 2017) (quoting *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)).

This “child-find obligation is in no way absolute.” *Id.* For example, if a student is determined not to be a “child with a disability,” then he is not owed a “child-find duty.” *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1196 (11th Cir. 2018) (reasoning that “[l]ike the FAPE obligation, the IDEA requires States accepting IDEA funds to identify, locate, and evaluate only ‘children with disabilities’”). Where there is a child find contravention, it is considered procedural. *Cari Rae S.*, 158 F. Supp. 2d at 1196; *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249-250 (3d Cir. 2012). Procedural inadequacies “alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity.” *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001). A “procedural violation cannot qualify an otherwise ineligible student for IDEA relief.” *R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007).

The actions of a school district in terms of whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of the information that it knew, or had reason to know, at the relevant time. *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). It should not be based on hindsight. *Id.*; *See also Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). Altogether, school districts must systematically seek out IDEA-eligible students, and may not take a passive approach and wait for others to refer students for special education. *Compton Unified Sch. Dist. v. Addison*, 54 IDELR 71 (9th Cir. 2010), *cert. denied*, 112 LRP 1321, 132 S. Ct. 996 (2012).

Remaining vigilant for red flags, and referring students who may have a disability and need special education, is part of this ongoing obligation. *Arapahoe County School District 5*, 117 LRP 2988 (SEA CO 12/21/16) (citing *Cincinnati City Schools*, 115 LRP 26069 (SEA OH 5/07/15)). Absent a test in *Cari Rae S.* or the Tenth Circuit defining a relatively low threshold, the SCO turns to this case’s individual circumstances to determine if they collectively raised a reasonable suspicion that the BOCES should have referred Student for an initial evaluation. *Weld RE-4 School District*, 119 LRP 5662 (SEA CO 1/2/19) (citing *Clark County Sch. Dist.*, 114 LRP 45477 (SEA NV 8/28/14)).

B. Parent's Child Find Concerns

Parent's paramount concerns converge on Student's alleged "long history of behavioral issues that have led to numerous disciplinary problems throughout his history with the District." *Complaint*, p. 2. The behavior of a child can be a red flag that triggers a special education referral obligation, and though the circumstances of each case drive whether a school district knew of or should have suspected a disability in a student, and not any one red flag alone is generally sufficient to activate the obligation, suspicion may arise from numerous or increasing disciplinary referrals for violations of a student code of conduct, significant absences, and failing or noticeably declining grades. *Smith*, 2017 WL2791415, at *7; *See also Cari Rae S.*, 158 F. Supp. 2d at 1192.

School districts "need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities . . ." *D.K.*, 696 F.3d at 252; *See also District of Columbia Public Schools*, 114 LRP 30785 (SEA DC 06/17/14) (finding four short-term suspensions, and numerous incident reports and telephone calls to parent at the start of seventh grade, did not trigger child find prior to parent's November evaluation request given no behavioral issues the prior school year). Still, child find requires that school districts identify and evaluate "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." *Cari Rae S.*, 158 F. Supp. 2d at 1194 (quoting *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995)).

In *Cari Rae S.*, a U.S. District Court concluded that a school district had, or should have had, reason to suspect a disability and that special education services may be needed to address that disability by the beginning of a student's eleventh grade academic year. *Id.* at p. 1195. In finding a child find violation for waiting to evaluate until the end of eleventh grade, the U.S. District Court cited "numerous incidents or warning signs" to include failing one class while incurring seventy-nine absences in ninth grade, and acquiring many behavioral referrals and 159 absences while also exhibiting signs of drug use leading to hospitalization in tenth grade. *Id.* at pp. 1192, 1195.

Elsewhere, the Fifth Circuit Court of Appeals recently affirmed a decision that a school district's six-month delay in evaluating a tenth-grade student for IDEA services violated child find where the school district knew of the student's history of behavioral problems, academic decline, hospitalization, and theft. *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 676 (5th Cir. 2018). State educational agencies and other courts also emphasize significant behaviors leading to hospitalization as potential signs of an underlying disability that interferes with a child's ability to learn. *Pennsbury Sch. Dist.*, 65 IDELR 220 (SEA PA 2015) (finding that a tenth-grade student's self-harming behaviors beginning in ninth grade, and admission to an inpatient facility for mental health issues at the start of tenth grade, triggered a school district's child find duties); *Mr. P. v. West Hartford Board of Education*, 885 F.3d 735, 757 (2d Cir. 2018) (finding that a school district's decision to evaluate a tenth-grade student after it learned of his second psychiatric hospitalization, along with a refusal to attend school, was reasonable under the circumstances).

In the present matter, as noted at FF #7, Student successfully completed ninth grade at School without any formally documented disciplinary incidents. Student started tenth grade at School

on August 20, 2018 with his Behavior Detail Report, dating back to the 2012-2013 academic year, revealing six separate sanctions leading to suspension. At that time, the earliest behavior-related event took place in fourth grade, and the most recent episode had unfolded during eighth grade.

Between September 5, 2018 and February 26, 2019 of the current academic year, Student accumulated four independent suspensions. The distinct violations of School's Code of Conduct, the fourth of which generated a recommendation for expulsion, involved the following behaviors more fully described at FF #8, #17, #22, and #32-33: defiance of authority on September 5, display of knives on September 27, profanity on January 16 and 17, and a verbal altercation on February 26. At all times since seventh grade, and shortly after Student's IDEA eligibility ended in December 2014, the BOCES addressed Student's needs through a Behavior Plan and an RTI Plan. Parent contends that the continued use of these interventions and supports, when considering Student's full disciplinary file and prior special education status, did not absolve the BOCES from a duty to evaluate Student as a child with a disability in need of special education. *Reply*, p. 3.

A school district may attempt pre-referral interventions before referring a student for an IDEA evaluation. *See, e.g., M.G. v. Williamson County Schs.*, 71 IDELR 102 (6th Cir. 2018, *unpublished*). However, RTI cannot be used to delay or deny an evaluation. *Letter to Ferrara*, 60 IDELR 46 (OSEP 2012). If there is reason to suspect that a student is a child with a disability in need of special education and related services, a school district can violate its referral obligation by repeatedly monitoring a student's response to interventions rather than conducting a timely evaluation. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d 918, 946 (W.D.Tex.2008); *See also Memorandum to State Dirs. of Special Educ.*, 56 IDELR 50 (OSEP 2011); *Jackson v. Northwest Local Sch. Dist.*, 55 IDELR 71 (S.D. Ohio 2010), *magistrate's report and recommendation adopted at* 55 IDELR 104 (S.D. Ohio 2010); *Special Sch. Dist. of St. Louis County*, 73 IDELR 271 (SEA MO 2019).

In *Jackson*, a U.S. District Court found that a school district had knowledge of a student's disability where behavioral issues escalated despite receiving intervention services for two years without result. Notably, the circumstances triggering child find there also included intensifying behaviors leading an intervention team to refer the student to an outside mental health agency. *Id.* In *Special Sch. Dist. of St. Louis County*, the state educational agency found a school district's unsuccessful use of interventions for one school year to be too long to delay an evaluation. There, the parents requested an evaluation at the beginning of student's sixth and seventh grade years. *Id.* In sixth grade, the school implemented interventions but the student earned inconsistent grades, was disciplined eighteen times, and was absent thirty-eight times. *Id.* In seventh grade, the student earned Ds and Fs in most subjects, was absent from class numerous times, and was disciplined for fighting and placing false 911 calls. *Id.* A child find violation emerged upon parent's second evaluation request, the state educational agency determined. *Id.*

In the present case, this SCO concludes the evidence in its totality supports that the BOCES did not have sufficient reason to suspect a disability and a need for special education services between August 29, 2018 and April 24, 2019. It is undisputed at FF #36 that the BOCES formally evaluated Student in conformity with the IDEA following Parent's April 24, 2019 request, and that

Student did not qualify for special education and related services as a child with a disability under the IDEA. Because Student was not a “child with a disability,” the BOCES “did not owe him a child-find duty.” *Durbrow*, 887 F.3d at 1196. The Determination of Eligibility described at FF #36, because it was issued over one month after CDE received the instant Complaint, is not dispositive of any potential procedural violation but rather shows that the BOCES did not deprive Student of a FAPE. *T.S.*, 265 F.3d at 1095. Nevertheless, the SCO now explains why the BOCES did not procedurally breach its child find obligation to Student during the 2018-2019 academic year.

First, across six academic years starting in fourth grade, Student served short-term suspensions for only six separate incidents. He completed ninth grade, the 2017-2018 school year, without any significant behavioral issues or any officially documented discipline reports. While some of Student’s behavior leading to suspension stemmed from frustration and profanity, there is no evidence of numerous incident reports, or even telephone calls to Parent, regarding warnings or office referrals related to behaviors targeted in the RTI or Behavior Plan. Thus, even considering latter discipline, these circumstances did not stir suspicion of a disability on the basis of numerous or increasing referrals for violations of a student code of conduct, or as alleged in the Complaint, Student’s “long history of behavioral issues [leading] to numerous disciplinary problems”

Second, the four individual events ending in expulsion for Student occurred within the context of five calendar months across the current academic year, as opposed to a full school year or more. A School RTI Team reviewed and updated Student’s RTI Plan one day after the first disciplinary matter of September 5, 2018. Unlike the child in *Jackson*, Student had not received intervention services for two years without result as the evidence shows he had been successful and made meaningful progress academically and behaviorally through the RTI Plan during ninth grade. A lack of referral to a mental health agency, and the fact that Student has not recently received mental health treatment or services as noted at FF #16, further distinguish this case from *Jackson*.

Moreover, unlike the children in *Krawietz, Pennsbury Sch. Dist.*, and *Mr. P.*, Student’s behaviors during the current school year were not so alarming as to require hospitalization. For instance, though a violation of School’s Code of Conduct, Student’s second suspension resulted from a docile display of two knives on September 27, 2018. Following a third violation of School’s Code of Conduct in January 2019 for profanity, School Counselor contacted School Psychologist to provide further support to Student and review the Behavior Plan. Student violated School’s Code of Conduct for a fourth time just one month later. Like the child in *District of Columbia Public Schools*, Student here did not exhibit behavioral problems one academic year prior to the at-issue school year, and Student’s four suspensions also occurred within a comparable time frame. Plus, unlike the child in *Cari Rae S.* who was absent seventy-nine times in ninth grade and 159 times in tenth grade, or unlike the child in *Special Sch. Dist. of St. Louis County* who was absent thirty-eight times in sixth grade, Student here was absent nine times during the 2018-2019 school year.

Third, as reflected at FF # 19 and #34, there is no evidence of failing or noticeably declining grades for Student, unlike the children in *Cari Rae S.* and *Special Sch. Dist. of St. Louis County*, as Student’s aggregate grade point average is 2.952. He earned a 3.143 grade point average for each semester

in ninth grade, and his lowest grade for the current academic year was a “72” in English. Parent and educators attributed Student’s academic success in part to the “Study Skills” class, described at FF #13, as implemented by School Interventionist through Student’s RTI framework. There is evidence of poor progress on the Preliminary SAT/National Merit Scholarship Qualifying Test as of October 10, 2018, as noted at FF #20, but Parent characterized Student as a “terrible test taker” and educators indicated that Student often did not take standardized testing “seriously.”

Fourth, it was reasonable for School staff, based on the knowledge and timing of Student’s recent breakup and Student’s decision to quit the wrestling team, to consider Student’s behavior a situational response to such changes. These findings suggest that the disciplinary-related concerns were more indicative of recent disappointments as opposed to a suspected disability. Relevant here, the serious emotional disability eligibility criteria excludes indicators of social/emotional dysfunction that are “isolated incidents or transient, situational responses to stressors in the child’s environment.” ECEA Rule 2.08(3)(c)(iv).

Finally, although not required to do so as the child find obligation is affirmative, Parent did not suggest that Student might have a disability at any time prior to explicitly requesting an initial evaluation in writing through Attorney 2 for Student on April 24, 2019. The BOCES did have knowledge of Student’s prior special education eligibility as a child with a speech or language impairment. However, Student has not received special education services since sixth grade in 2014, and there is no evidence of recent expressive language deficits or other speech-related needs in the Record.

Based on the entirety of the foregoing information known to the BOCES between August 28, 2018 and April 24, 2019, the SCO concludes that Student’s behavior did not thrust the BOCES beyond the threshold of suspicion that Student might be a child with a disability as defined under the IDEA. The BOCES was thus under no obligation to refer Student for an initial evaluation during this timeframe, and accordingly did not violate 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).

VI. REMEDIES

The SCO finds and concludes that the BOCES did not violate any requirements of the IDEA. Accordingly, there are no remedies ordered pursuant to the IDEA and my authority as an SCO.

VII. CONCLUSION

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13. If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *Id.*; *See also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 21st day of June, 2019.

Brandon Edelman, Esq.
State Complaints Officer

APPENDIX

Complaint, pages 1-13

- Exhibit 1: Notice to Extend Suspension dated March 9, 2019
- Exhibit 2: Disciplinary-Related Documentation and 2015-2016 Behavior Plan
- Exhibit 10: 2018-2019 RTI Plan

Response, pages 1-10

- Exhibit D: Behavior and Response to Intervention Plans
- Exhibit E: PSAT/NMSQT Score Reports
- Exhibit F: Screens Summary Reports
- Exhibit G: Grade and Attendance Reports
- Exhibit H: Disciplinary-Related Documentation and Policies
- Exhibit J: Special Education Policies and Procedures
- Exhibit K: Academic Calendars
- Exhibit L: Staff List
- Exhibit M: UPS Delivery Notification
- Exhibit N: 2012-2014 Special Education Documentation
- Exhibit O: E-mail Correspondence
- Exhibit P: E-mail Correspondence
- Exhibit Q: January 2019 Behavior/Intervention Plan Meeting Notes
- Exhibit R: E-mail Correspondence and April 2019 Consent for Evaluation
- Exhibit S: Professional Development for 2019-2020
- Exhibit T: May 2019 Initial Evaluation and Eligibility Determination Documentation

Reply, pages 1-5

- Exhibit 11: FERPA Request

Telephonic Interviews

- Parent: May 16, 2019
- Director of Exceptional Services: May 21, 2019
- School Interventionist: May 21, 2019
- School Counselor: May 21, 2019