

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

State-Level Complaint 2019:543
St. Vrain Valley School District

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on June 3, 2019 by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

Based on the written Complaint, the 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 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate allegations of violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from June 3, 2018 through June 3, 2019 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate the allegation. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

SUMMARY OF COMPLAINT ALLEGATION

Whether the District violated the IDEA and denied Student a free appropriate public education (FAPE) by:

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

² Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

1. Failing to identify Student as IDEA eligible when it did not refer Student for a special education evaluation from December 2018 to present, despite persistent disciplinary incidents and failing grades, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(2).

FINDINGS OF FACT

After thorough and careful analysis of the entire record,³ the SCO makes the following FINDINGS:

Background

1. Student, an eleven-year-old who recently finished sixth grade at School within the District, is currently identified as eligible for special education and related services under the disability category of Other Health Impairment (OHI). *Email correspondence with Parent's Legal Counsel and District Legal Counsel 7/31/19*. Student is also identified as a student with a disability pursuant to Section 504 of the Rehabilitation Act of 1973, based on an outside ADHD diagnosis which affects Student's focus and concentration. *Exhibit B*, p. 5. Student's initial 504 plan was created on February 25, 2017 during his fourth-grade year. *Exhibit B*, p. 28.
2. Student is described as an intelligent, inquisitive person with a great sense of humor. *Interviews with Parents, Counselor, Assistant Principal*. All persons interviewed stated that when Student is interested in a subject or activity, he becomes extremely engaged and immerses himself completely. *Id.* However, as discussed in more detail below, as a result of his disability, Student has a difficult time with executive functioning and concentration.
3. During the 2018-19 school year, Student began displaying increased work-avoidance and disruptive behavior at School. At the time, Student had not yet been identified as IDEA eligible. Whether these behaviors, combined with a precipitous decline in Student's academic performance, were sufficient to trigger the District's child find obligation is the central question in this Complaint.
4. Parents assert that the District should have referred Student for an IDEA evaluation based on his failing grades, his identification as a student with a disability pursuant to Section 504, frequent removals from class based on behavioral issues, and the fact that Assistant Principal offered Student to attend part-time school. *Complaint*, p. 4. The District contends that School staff took appropriate measures to address Student's behavioral concerns, including adjustments to his 504 plan and the provision of general education interventions through its Multi-Tiered System of Supports (MTSS) program.

³ The appendix, attached and incorporated by reference, details the entire record.

Accordingly, the District believes “[t]he facts and circumstances of [Student’s] second semester at [School] do not demonstrate ‘clear signs of disability.’” *Response*, p. 4.

5. To resolve the issue presented in this Complaint, the SCO must determine whether the District, in light of the information that it knew or should have known, beginning in December 2018, should have located, identified, and evaluated Student as a child suspected of having a disability who may be in need of special education and related services.

Transfer to School and second quarter

6. Student began the 2018-19 school year at School 2 within the District, and transferred to School on October 3, 2018. *Exhibit D*, p. 6. Student’s grades from three classes carried over to School from School 2: C in literacy lab, F in science, and B- in social studies. *Exhibit H*, p. 5. As discussed below in Finding of Fact # 15, Student’s overall grades declined during this quarter, resulting in a C in science, C- in math and language arts, and D- in social studies and literacy lab. *Exhibit H*, p. 7. Parents and Assistant Principal agree that besides Student’s declining grades, the time period between October 3 and the winter break was not notable for excessive disciplinary incidents or behavioral problems. *Interviews with Parents and Assistant Principal*. Parent attributes this to Student settling in to a new school. *Interview with Parent*. Math Teacher explained that during this period, Student was doing really well, and was still kind and polite towards her. *Interview with Math Teacher*.
7. On October 8, 2018, Counselor met with Parents to review Student’s 504 plan. *Exhibit B*, p. 17; *Interviews with Counselor and Parents*. In anticipation of this meeting, Parent emailed Counselor a list of information about Student that the family thought may be helpful in crafting his 504 plan. *Exhibit J*, p. 343. Counselor explained to Parents that if they were happy with the 504 plan from School 2, they could simply carry it over to School. *Interview with Counselor; Exhibit J*, p. 169. Parents agreed with this course of action, and Counselor subsequently adopted Student’s 504 plan as it was written from School 2. *Id.*
8. Student’s 504 plan provides the following accommodations to address his educational needs: (1) use of a planner to write down homework and other assignments, that teachers were to check and sign off on daily, (2) extended time for assignments and assessments, (3) chunking of assignments and checks for understanding, and (4) preferential seating in the classroom. *Exhibit B*, p. 5. Student was responsible for bringing his planner to class each day and presenting it to his teachers. Parents were responsible for supporting Student at home with his homework, communicating with School staff, and ensuring Student took his medication. *Id.*

9. On November 5, 2018, Parent emailed Counselor and teachers stating that Student continued to have issues understanding what his homework was. Parent requested Counselor speak to Student and “see if there’s anything the school can do to help him stay organized.” *Exhibit J*, p. 306. Social Studies Teacher responded that she noticed Student had fallen into a cycle during which he was trying to complete make up work during class and then falling behind on the day’s current assignments. She noted additionally: “He does not bring his planner up to be signed, even though I remind him every day to write in it. We’ll see if he remembers today after the consequence at home. I think as long as we’re on the same page, [Student] should benefit.” *Exhibit J*, p. 306.
10. On December 6, 2018, Student received a disciplinary referral for leaving Pride Time under false pretenses and going to a different class and getting on a chat site on his iPad. *Exhibit E*, p. 7. Pride Time is a dedicated 33 minute class period offered to students for academic support. *Interview with Assistant Principal*. This was Student’s only disciplinary referral in the second quarter. Assistant Principal described the incident as an example of Student trying to get out of doing his school work. *Interview with Assistant Principal*.
11. On December 6, 2018, Parent emailed School staff concerned about Student’s grades, which according to Parent were: F in social studies, F in language arts, D in literacy lab, C- in science, and a C in band. Parent also suggested: “given his poor grades, I’m think [sic] we need more than the daily sheet he gets signed. It doesn’t track if he’s doing his homework or if he did well on tests.” *Exhibit J*, p. 258.
12. Counselor explained that during this time, she checked in with Student on a daily basis. In November she spoke to Student about his grades. Student was missing homework assignments and not completing his classwork, and seemed to not understand why he was failing. *Interview with Counselor*. This is consistent with an email Counselor sent to Parents on December 6, 2018 stating: “I have meet [sic] with [Student] several times to check in about grades. I would say that there has been days were [sic] he seemed not to understand why he is failing and there are days that he can verbalize exactly what he needs to get done.” *Exhibit J*, p. 287.
13. Math Teacher explained that Student struggled with beginning and completing assignments in class, as well as completing and turning in homework. As an example, Math Teacher would repeatedly tell Student to take out a pencil to begin his work. After a number of requests, Math Teacher would then have to prompt Student to pick up his pencil and begin working. Without this type of frequent and consistent redirection, Student would sit in class and not complete the assignment. Math Teacher also described Student completing tasks slowly, such as taking twenty minutes to log into his computer when his classmates had done so at the beginning of class with no such delay. Student did well when Math Teacher sat right next to him to keep him on

task. However, she could not constantly sit next to Student and teach the other students in her class. *Interview with Math Teacher.*

14. In December 2018, Math Teacher submitted a referral for Student to School's MTSS team. Math Teacher explained that all of Student's teachers agreed a referral to MTSS was appropriate because no one could figure out how to connect with Student and effectively prompt him to begin and complete his school work. *Interview with Math Teacher.* Assistant Principal's notes from a December 12, 2018 meeting state that Student's "biggest issue is constant redirection and that he isn't a self-starter." Assistant Principal also noted: "If teacher is not over his shoulder (the entire time), he will not work; he is smart & capable, but as soon as teacher takes eyes off him, he is off-task (not misbehaving, but not doing anything)" *Exhibit L*, p. 1.
15. On December 20, 2018, at the end of the second quarter, Student's grades were: C- in language arts, C- in math, C in science, D- in social studies, B in band, and D- in literacy lab. *Exhibit H*, p. 7.

Third quarter: behavioral disruptions and decline in grades

16. On January 9, 2019, Math Teacher emailed Parents requesting a meeting to discuss Student. She wrote, in part: "Welcome to the third quarter! It is a fresh start for [Student]. We, the core teachers, would like to meet with you to set up a plan that will be successful for [Student]. We, teachers and parents, tried many things last quarter without much avail." *Exhibit J*, p. 114.
17. On January 10, 2019, Parents, Student, and teachers met to discuss how to better support Student in the classroom. The primary purpose of the meeting was Student's academic struggles. Parent explained to the group that all electronics had been taken away at home. The team created a behavior log to facilitate communication between school staff and Parents. According to Parent, the thrust of the meeting was creating open communication between all sides. *Interview with Parent.* Math Teacher explained that the meeting was convened because all of Student's teachers wanted Student to have a successful third quarter at School. Student's teachers were concerned because they had been unable to prompt Student to work during class and complete his assignments. According to Math Teacher, Parents were overwhelmed and frustrated and did not know how to support Student. Math Teacher could not recall what the plan was at the conclusion of the meeting. However, she did recall that the team decided not to use the behavior log. *Interview with Math Teacher.*
18. On January 25, 2019, Parent emailed Math Teacher concerned because Student was having trouble completing his homework. Parent inquired about two assignments that were to be completed online. Math Teacher replied: "He has spent 34 minutes on this IXL last night. This was assigned to him on January 7th and due on January 21st. We

work on it every Tuesday and Thursday with time for questions and 1 on 1 work time. He has not taken advantage of this opportunity.” *Exhibit J*, p. 120.

19. On January 28, 2019, Parent again emailed Math Teacher explaining they were having difficulty getting Student to complete his homework. Parent told Student that he would miss recess on the days he did not complete his work. Math Teacher explained this would likely be acceptable. Social Studies Teacher expressed concern that recess may not provide enough time for Student to complete all necessary work. Social Studies teacher suggested Tiger Support as an alternative, which Assistant Principal approved. *Exhibit J*, p. 112. Tiger Support is an after school tutoring program that convenes on Tuesdays and Thursdays for one hour. *Interview with Assistant Principal*.
20. Assistant Principal stated that in February and March 2019 Student’s work avoidance became more noticeable. *Interview with Assistant Principal*. Math Teacher agreed, stating that beginning in the third quarter Student became increasingly disinterested in academic work as well as being disruptive and defiant towards his teachers. *Interview with Math Teacher*. Student would argue with Math Teacher, refuse to follow directions, and refuse to work during class. Math Teacher explained that all of Student’s teachers reported the same argumentative and disrespectful behavior. *Id.* For instance, following a February 22 disciplinary referral, Literacy Lab Teacher noted Student was “[t]alking, making noise, and generally disruptive throughout class. [He] [t]alked back to the teacher multiple times. [He] [r]efused to fill out in-class refocus form. [He] [w]as reminded several times to fill it out, but kept saying ‘No.’” *Exhibit E*, p. 6.
21. Assistant Principal noted Student’s work completion and tardiness to class as concerns on his MTSS notes from January 30, 2019. Additionally, it is noted that Student’s teachers reported that Student “doesn’t seem to care.” *Exhibit L*, p. 2. However, it is unclear from the exhibits and interviews conducted what general education interventions Student was receiving at this time.
22. In the exhibits submitted by the District, there is one general education intervention listed in Student’s Academic Progress and Support (APAS) plan. This intervention is the alteration of Student’s schedule discussed below in Finding of Fact #30, substituting Student’s time in the literacy lab for a study hall or Pride Time with Counselor in order to complete work and bring up grades. This intervention began on March 11 and ended on May 17 due to it being ineffective. *Exhibit B*, p. 15. In Assistant Principal’s MTSS notes, interventions listed are: a fast food lunch reward for good behavior, lollipops for good behavior, and working in the “counseling area for referrals.” *Exhibit L*, p. 3. However, there are no dates indicating when these interventions began. Additionally, there is no progress monitoring data indicating whether these interventions were being implemented or whether they were successful. When asked by the SCO regarding general education interventions, Assistant Principal’s answers were consistent with his notes referenced above. *Interview with Assistant Principal*. However, it is still unclear

when these interventions began, where they were documented, and who was responsible for implementing them. Based on the lack of information in the record, the SCO cannot accurately determine what general education interventions School provided to Student.

23. Student received three disciplinary referrals during the third quarter: on February 12 for refusing to work and disrupting class; on February 22 for being disruptive in class by talking, making noise, and being confrontational towards his teacher multiple times; and on March 7 for disrupting class by walking around the classroom, throwing pencils, and refusing to respond to redirection. *Exhibit E*, pp. 6-7.
24. A draft email from Social Studies Teacher to Parents on February 13, 2019 is illustrative of Student's behavior at this time. Social Studies Teacher wrote, in part:

I am writing you out of concern for [Student] and also concern for the other students in class. Increasingly, [Student] has been refusing to work in class. Lately, he is disrupting the students who are working by talking off task (sometime [sic] across the room) to another student in class. He was so disruptive yesterday that the group working near him asked to move. I did refer this to the office because of the disruption.

Exhibit J, p. 605.

25. Math Teacher concurred that Student's behavior became increasingly disruptive during this period. However, most of the time, Math Teacher tried to manage Student's behavior in the classroom or sent him to the counseling office when he was disruptive or disrespectful, rather than initiating a formal disciplinary referral. *Interview with Math Teacher*. Additionally, Parents recalled receiving frequent telephone calls during this period from School staff regarding Student's behavior. Accordingly, the SCO finds that the number of documented disciplinary incidents do not accurately reflect the frequency or severity of Student's behavior during this period.
26. On February 14, 2019, Assistant Principal arranged for an eighth-grade student to tutor Student. *Exhibit J*, p. 594. The tutor began working with Student on February 21, 2019 every Tuesday and Thursday in the library. *Exhibit J*, p. 603. However, by March 20, the tutor requested to stop working with Student because he refused to work on his assignments. *Interview with Assistant Principal*.
27. On February 25, 2019, Parent emailed Social Studies Teacher, Counselor, and Assistant Principal explaining the steps that were being taken at home to support Student. Parent explained that they had taken away "all his electronics, play time, and anything fun outside of school If the school has any recommendations, we are open to suggestions and are happy to set up some time to meet with the teachers again to

regroup.” *Exhibit J*, p. 248. Parent also stated they had hired a high school senior to tutor Student. *Exhibit J*, p. 249.

28. On February 28, 2019, Counselor met with Parents to discuss Student’s grades and behavioral issues. Parents had requested this meeting because they believed the supports in place for Student were not working and wanted to know what other options School had to support Student. *Interview with Parents*. Counselor stated that Student was “just not caring anymore.” *Exhibit B*, p. 17. Student then joined the meeting, and when asked why he did not care about school anymore, broke down crying and said he was overwhelmed and upset that Parents were putting too much pressure on him. Counselor also stated “there was no solid plan coming out of this meeting, except [Student] will spend P[ride] T[ime] with me for the rest of the quarter. We will work on one subject at a time during P[ride] T[ime].” *Exhibit B*, p. 17. Following this meeting, Student began spending Pride Time with Counselor. *Interviews with Counselor and Assistant Principal*.
29. On March 8, 2019, Parents, Counselor, and Assistant Principal met to discuss Student’s 504 plan and make a plan for the 4th quarter. *Interviews with Parents and Counselor*. Following this meeting, Counselor emailed Student’s teachers to remind them to follow the 504 plan accommodations, and listed Student’s current accommodations. They were unchanged from when the plan was adopted in October 2018. *Id.*; *Exhibit J*, p. 108. Assistant Principal explained that there was no need for further accommodations at that time, and that the problem was that no one could prompt Student to complete his work. *Interview with Assistant Principal*.
30. Also at the March 8 meeting, Parents requested that Student be taken out of the literacy lab, and instead have him work with Counselor during that time to complete missing assignments and get caught up on his work. *Exhibit B*, p. 17; *Interview with Counselor*. Counselor explained that during that period Student would sit on a beanbag chair outside of her office and work on his classwork. Counselor would check in with him directly by telling him exactly what he needed to do, and Student would have to show his work. *Interview with Counselor*.
31. The last day of the 3rd quarter was March 8, 2019. Student’s grades had declined precipitously during this quarter: D- in language arts, F in math, F in science, F in social studies, B in band, and an F in literacy lab. *Exhibit H*, p. 7.

Fourth quarter

32. During the fourth quarter, Student’s work avoidance became even more pronounced, and his behavioral issues escalated. By March 20, Assistant Principal noted that “not only is he refusing to do work, but he’s also struggling behaviorally now.” *Exhibit L*, p. 2.

This is documented by an increasing rate of disciplinary referrals during the fourth quarter.

33. From March 21 to May 17, Student received six disciplinary referrals: on March 21 for throwing a broken piece of phone and distracting another student; on April 24 for arguing with and being confrontational towards Math Teacher; on April 26 for stealing lollipops that a teacher had brought in as a reward; on May 8 for asking to use the restroom, not returning to class, and subsequently being found by staff wandering the halls; and on May 9 for refusing to put his backpack in his locker and arguing extensively. *Exhibit E*, pp. 3-5. Finally, on May 17, 2019, Student received a two-day suspension for possessing marijuana on School grounds. *Exhibit B*, p. 25.
34. The consensus view among School staff at this time was that they were doing all they could for Student, and that his struggles were the result of an indifferent attitude towards his education and a failure to complete his work. *Interview with School Psychologist*. Assistant Principal's March 20 MTSS notes state Student "has accommodations and modified assignments (teachers are doing everything they can)." *Exhibit L*, p. 2. However, these accommodations are not listed in Assistant Principal's notes. *Id.* Additionally, as discussed in Finding of Fact # 22, the SCO cannot determine what general education interventions were in place during this time due to a lack of documentation.
35. On April 2, 2019, Assistant Principal sent an email to Social Studies Teacher and Math Teacher stating that "the onus is now on [Student] to participate. We are already doing everything (and more) than we can on our end." *Exhibit J*, p. 280. In response to an email from Parent concerned because Student continued to struggle with missing assignments, Math Teacher explained that all of Student's teachers were following Student's 504 plan, and providing additional support in the form of: small group support, mentoring, Pride Time, Tiger Support, and encouraging, positive and motivational words. *Exhibit J*, p. 123. "Unfortunately, he is not taking advantage of these supports. I have talked with [] and he agrees that something different needs to be done in order to motivate [Student]." *Id.*
36. On May 15, 2019, Parents formally requested Student undergo an IDEA evaluation. *Exhibit J*, p. 140. On May 21, 2019, School Psychologist provided Parents with a combined Prior Written Notice (PWN) and consent for evaluation. The areas listed to be evaluated were: general intelligence, communicative status, academic performance, social and emotional status, and motor abilities. *Exhibit F*, p. 1. Parents signed consent on May 22. *Id.*
37. May 23, 2019 was the last day of school. Student's grades had not substantially improved by this time: C- in language arts, F in math, F in science, F in social studies, and B in band. *Exhibit H*, p. 7.

38. The District completed Student's evaluation in July 2019, and an eligibility meeting was held on July 30, 2019. At that meeting, Student's IEP team determined he was eligible for special education and related services under the disability category of Other Health Impairment (OHI). *Email correspondence with Parent's Legal Counsel and District Legal Counsel 7/31/19.*

CONCLUSIONS OF LAW

Based on the Findings of Fact above, the SCO enters the following CONCLUSIONS OF LAW:

Conclusion to Allegation No. 1: The District violated its Child Find obligation when it did not seek parental consent to evaluate Student until May 2019 because Student's behavior and academic performance were sufficient to put the District on notice by March 8, 2019 that Student may have an IDEA qualifying disability and be in need of special education and related services.

School Districts have an affirmative, ongoing obligation to identify, locate, and evaluate all children with disabilities residing within their jurisdiction that either have, or are suspected of having, disabilities and need special education and related services as a result. 34 C.F.R. § 300.111; ECEA Rule 4.02(1)(a). "The threshold for suspicion of a disability is relatively low, and is not whether the child actually qualifies for special education services, but rather whether the child should be referred for evaluation." *Boulder Valley Sch. Dist.*, 118 LRP 28098 (SEA CO 5/18/17) (citing *State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001)). Suspicion of a disability "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) (citing *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)); *see also Weld Re-4 Sch. Dist.*, 119 LRP 5662 (SEA CO 1/2/19).

Absent a test articulated by the Tenth Circuit defining what might be a relatively low threshold, the SCO concludes that the individual circumstances of this case raised a reasonable suspicion that Student should have been referred for an evaluation. *See Clark Cty. Sch. Dist.*, 114 LRP 45477 (SEA NV 8/28/14); *see also Weld RE-4 Sch. Dist.*, 119 LRP 5662 (SEA CO 2019).

Based on the below discussion, the SCO concludes that by March 8, 2019 the information known to the District raised a reasonable suspicion that Student should have been referred for an initial evaluation to determine if he qualified for special education and related services. The failure to refer Student for an IDEA evaluation until Parents' request in May 2018 resulted in a procedural violation.

First, Parents expressed their concerns that Student was struggling academically via email on November 5, December 6, January 25, January 28, and February 25. *Wiesenberg*, 181 F. Supp. 2d at 1311 ("Knowledge of a disability may be inferred from written parental concern . . .").

Additionally, all of Student's teachers requested a meeting with Parents at the beginning of the third quarter to discuss strategies to try and help Student succeed. *Id.* ("Knowledge of a disability may be inferred from . . . teacher concern . . ."). Math Teacher acknowledged in her email setting up the meeting that Parents and all of Student's teachers had tried various strategies in the second quarter, none of which were effective. Thus there is no question that in early January 2019, at the beginning of the third quarter, Parents and School staff recognized that Student was struggling academically. During subsequent meetings, Parents explained the steps they had taken to address Student's work avoidance, such as taking away all electronics at home, and hiring a high school senior to tutor Student. Counselor and Math Teacher both described Parents as being frustrated and overwhelmed, and looking to School for support.

Second, during the third quarter, Student's disruptive behavior and work avoidance sharply increased. *Id.* ("Knowledge of a disability may be inferred from . . . the behavior or performance of the child . . ."). Though Student only received three disciplinary referrals during this period, it is clear that his behavior was consistently defiant, disruptive, and argumentative towards his teachers. As stated in FF 25, the fact he only received three disciplinary referrals during the third quarter is not dispositive as to the extent of Student's disruptive behaviors. Additionally, Math Teacher's report that Student would not complete work during class is consistent with other core teacher's experience. This work avoidance behavior contributed to the sharp drop in Student's grades. Student's behavioral issues and work avoidance continued to escalate in the fourth quarter, as evidenced by the six disciplinary referrals Student received.

Third, general education interventions and Student's 504 plan accommodations were ineffective at addressing his behavioral concerns and academic decline. Math Teacher and Assistant Principal both stated that all of Student's teachers were implementing his 504 plan in the classroom. Though the record is unclear as to the timing, duration, and extent of any general education interventions provided, Student's escalating behavioral difficulties and declining grades show they were unsuccessful. Several times, as noted in FF 34-35, Assistant Principal stated that School staff was doing everything they could for Student, and more.

Moreover, all staff and teachers attributed Student's educational decline to a perceived lack of motivation and refusal to complete his work. Math Teacher specifically stated that Student is intelligent and capable, and that his decline was not an academic issue. However, when there is "evidence that [a] [Student] ha[s] a qualifying disability and [is] struggling academically despite previous interventions, the School District [is] obligated to evaluate him for special education, and not rely upon just a 504 Plan." *Cheyenne Mountain Sch. Dist. 12*, 113 LRP 46751 (SEA CO 7/11/13). Here, Math Teacher, Assistant Principal, and Counselor all explained that Student's 504 plan accommodations and general education interventions were fully implemented. Despite this, at the end of the third quarter Student had failed math, science, social studies, and literacy lab, clearly indicating that he was struggling academically, and therefore in need for a referral for an IDEA evaluation.

Fourth, the combination of Student's ADHD diagnosis and failing grades contributed to the body of knowledge showing that the District had sufficient reason to suspect Student may be in need of special education and related services. "The mere existence of an ADHD condition does not demand special education. Children having ADHD who graduate with no special education or any § 504 accommodation are commonplace." *Strock v. Indep. Sch. Dist. No. 281*, No. 06-CV-3314, 2008 WL 782346, at *7 (D. Minn. March 21, 2008). "Therefore, to establish an entitlement to a FAPE, a student with Attention Deficit Hyperactivity Disorder must show (1) that her ADHD adversely affects her academic performance; and (2) 'by reason thereof,' she needs special education." *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1193 (11th Cir. 2018). Here, it is unclear whether Student's academic decline was attributable to his ADHD diagnosis. However, a student's "inattentiveness, inability to focus, failure to complete assignments, and inability to follow instructions [are] all consistent with ADHD." *Cheyenne Mountain Sch. Dist. 12*, 113 LRP 46751 (SEA CO 7/11/13); see also *Hawaii v. Z.B.*, 52 IDELR 213 (D. Hawaii 2009) (school district's position that student's lack of motivation was intrinsic rather than a symptom of his disability constituted a "fundamental misunderstanding of ADHD"). Here, School staff continually attributed Student's difficulties to a lack of motivation, rather than consider that Student's issues with work initiation and completion could be a symptom of his disability. Under these circumstances, knowledge of Student's diagnosis combined with a rapid academic decline should have alerted the District that Student's needs were not being met, and that a referral for an IDEA evaluation was necessary.

In its Response, the District cites to *D.K. v. Abington School District* for the proposition that the District was "not required to jump to the conclusion that [Student's] academic struggles or misbehavior denoted any disability." *Response*, p. 4. Indeed, in *D.K. v. Abington* the Third Circuit Court of Appeals declined to find a child find violation, stating: "the School District was not required to jump to the conclusion that [student's] misbehavior denoted a disability or disorder because hyperactivity, difficulty following directions, and tantrums are not atypical during early primary school years." 696 F.3d 233, 251 (3rd Cir. 2012). The court in *D.K. v. Abington* also stated "schools need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when children are developing at different speeds and acclimating to the school environment." *Id.* at 252. However, unlike Student, the court noted that "D.K.'s report cards and conference forms indicated intermittent progress and even academic success in several areas." *Id.* at 251. Here, Student's academic performance sharply declined by the end of the third quarter. Student had earned a D- in language arts, and had failed math, science, social studies, and literacy lab.

Accordingly, the District's failure to refer Student for an initial evaluation under the IDEA constitutes a violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1). Contraventions of child find, and of the duty to assess, are procedural in nature. *State of Hawaii*, 158 F. Supp. 2d at 1196; *D.K.*, 696 F.3d at 249-250. 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 "child ineligible for IDEA opportunities

in the first instance cannot lose those opportunities merely because a procedural violation takes place.” *R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007). Otherwise stated, a “procedural violation cannot qualify an otherwise ineligible student for IDEA relief.” *Id.*

Having concluded that the District’s child find duty was triggered on March 8, 2019, and the subsequent failure to refer Student for an IDEA evaluation resulted in a procedural violation, the SCO must determine if the violation resulted in a denial of FAPE. A procedural violation results in a denial of FAPE if it: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

Based on the timing and circumstances of this case, the SCO concludes that this procedural violation did not result in substantive harm. Here, the District’s child find duty activated on March 8, 2019. Accordingly, that is that date by which the District was obligated to seek parental consent to conduct an IDEA evaluation. After parental consent is received, a district must complete the evaluation within 60 days. 34 C.F.R. § 300.301(c); ECEA Rule 4.02(3)(c)(ii). Therefore, had the District received parental consent on March 8, an evaluation would have had to be completed by May 7, 2019. However, after the evaluation is completed, a group of professionals and the student’s parents must determine whether the child has a disability and needs special education and related services. 34 C.F.R. § 300.306. If the child is determined IDEA eligible, an IEP must be developed “within 90 calendar days of the date that parental consent was obtained to conduct the initial evaluation.” ECEA Rule 4.03(1)(d)(i). Here, had the District properly obtained parental consent on March 8, it would have been obligated to create an IEP for Student within 90 days, which would have been June 6, 2019. The last day of the 2018-19 school year at School was May 23, 2019. Therefore, even if the District had properly fulfilled its child find obligation, the IEP developed would have only gone into effect at the start of the 2019-20 school year. As noted above, Parents signed consent to evaluate on May 22, 2019 following their evaluation request. The District evaluated Student and the IEP team determined he qualified as eligible under the disability category of OHI on July 30. Though the parties are still scheduling the meeting to develop Student’s IEP, he will receive special education and related services during the 2019-20 school year. Accordingly, the SCO concludes that the procedural error did impede Student’s right to a FAPE, or cause a deprivation of educational benefit.

Relief is now provided in light of the IDEA’s purposes, which may include an award of staff training in the area of law in which violations were found to benefit a specific student or to remedy procedural violations that may benefit other students. *See Park, ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006).

REMEDIES

The SCO concludes that the District has violated the following IDEA requirements:

- a) Failing to refer Student for an initial evaluation under the IDEA after March 8, 2019, consistent with 34 C.F.R. § 300.111 and ECEA Rule 4.02.

To remedy these violations, the District is ordered to take the following actions:

1. By **August 23, 2019**, the District must submit to CDE a proposed corrective action plan (“CAP”) that effectively addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the District is responsible. The CAP must, at a minimum, provide for the following:
 - a. Training on the requirements of 34 C.F.R. § 300.111 and ECEA Rule 4.02, in accordance with this Decision, to address special education referrals, must be conducted with Counselor, Assistant Principal, appropriate members of School’s MTSS team, and any other School staff deemed appropriate by the District, no later than **October 8, 2019**.
 - b. Evidence that such trainings have occurred must be documented (i.e. training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets, with roles noted) and provided to CDE no later than **October 15, 2019**. This training may be conducted in-person, or through an alternative technology-based format, such as a video conference, web conference, webinar, or webcast. If the individuals identified in paragraph (a) above are no longer employed by the District when the training occurs, the District may train staff occupying identical roles in order to demonstrate compliance with this remedy.
2. The District shall convene an IEP team meeting and develop an IEP for Student for the 2019-20 school year. The District must provide a copy of Student’s IEP to the Department to show compliance with this order no later than **August 20, 2019**.

The Department will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the District’s timely correction of the areas of noncompliance.

Please submit the documentation detailed above to the Department as follows:

Colorado Department of Education
Exceptional Student Services Unit

Attn.: Michael Ramirez
1560 Broadway, Suite 1100
Denver, CO 80202-5149

NOTE: Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the Department.

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. See 34 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 46607 (August 14, 2006).

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Dated this 2nd day of August, 2019.

Thomas Treinen
State Complaints Officer

Appendix

Complaint, pages 1-5

- Exhibit 1: February 2017 Notice of Meeting, Eligibility Determination, Evaluation Report
- Exhibit 2: i-Ready report
- Exhibit 3: 2018-19 APAS report
- Exhibit 4: Behavior/Safety agreement dated 5/20/19
- Exhibit 5: Email correspondence

Response, pages 1-7

- Exhibit A: Child Find information from District's website
- Exhibit B: 2017-18 and 2018-19 504 plans
- Exhibit C: *information included with exhibit B*
- Exhibit D: 2018-19 attendance records
- Exhibit E: 2018-19 discipline records
- Exhibit F: Prior Written Notice dated 5/21/19
- Exhibit G: *no responsive documents provided*
- Exhibit H: 2017-18 and 2018-19 grade reports
- Exhibit I: Assessment reports
- Exhibit J: Email correspondence
- Exhibit K: List of District and School staff

Reply, 1 page

- Exhibit 6: Email correspondence dated 5/15/19
- Exhibit 7: Email correspondence from March 2019
- Exhibit 8: Email correspondence from dated 1/9/19

Interviews with:

Parents
Assistant Principal
Counselor
School Psychologist
Math Teacher
Special Education Director