

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

**State-Level Complaint 2023:503
Denver Public Schools**

DECISION

INTRODUCTION

On January 10, 2023, the parent (“Parent”) of a student (“Student”) not currently identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)¹ filed a state-level complaint (“Complaint”) against Denver Public Schools (“District”). 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. Therefore, the SCO has jurisdiction to resolve the Complaint.

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged 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 January 10, 2022 through January 10, 2023 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. 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 denied Student a Free Appropriate Public Education (“FAPE”) because the District:

1. Failed to identify and evaluate Student between January 10, 2022 and present, when the District was on notice that Student may have a disability and be in need of special education and related services, in violation of 34 C.F.R. § 300.111 and ECEA Rule 4.02(1)-(3).

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 C.F.R. § 300.1, *et seq.* The Exceptional Children’s Education Act (“ECEA”) governs IDEA implementation in Colorado.

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,² the SCO makes the following FINDINGS OF FACT:

A. Background

1. Student began the 2021-2022 school year as a kindergartener at a District elementary school ("School"). *Interviews with Parents and School Psychologist*. He attended kindergarten at School until February 15, 2022, when he was disenrolled by Parent. *Interview with Parents*. Parents homeschooled Student for the remainder of the 2021-2022 school year. *Id.* Student now attends a separate District elementary school. *Id.*
2. Student is not currently eligible for special education and related services. *Id.*
3. Student is an expressive young man with strong communication and reading skills. *Interviews with Parents and School Psychologist*. He enjoys basketball, cars, and playing with his friends. *Id.*

B. Beginning of 2021-2022 School Year

4. The 2021-2022 school year began on August 23, 2021. *Exhibit G*, p. 1. School has a dual-language immersion program where [] the instruction is in Spanish and [] English. *Interview with School Psychologist*. Students who do not speak Spanish often take longer to adjust to School and integrate into their classroom. *Id.* Nonetheless, staff expect students to adjust within six to eight weeks. *Id.*
5. Student previously attended a smaller preschool program, and he entered School not speaking any Spanish. *Interview with Parents*. Student was excited to attend School, though he had some difficulty adjusting to the new environment. *Interviews with Restorative Justice Coordinator ("Coordinator") and Parents*. Specifically, Student needed some redirection to stay focused on tasks and found repetitive tasks to be boring. *Interviews with Parents; Exhibit C*, p. 35.
6. Student hit two classmates during lunch on September 7. *Exhibit C*, p. 74. According to Student, he hit one classmate because he sat in Student's seat, and he hit the other classmate because he pushed the button on the water fountain when Student wanted to push it. *Id.* Coordinator spoke with all three students and facilitated a restorative conversation between Student and his peers. *Id.*

² The appendix, attached and incorporated by reference, details the entire Record.

7. School does not utilize a punitive discipline system but, instead, uses a restorative justice system. *Interviews with Coordinator and School Psychologist*. Under the restorative justice approach, students and staff work to repair any harm caused or restore what was broken. *Id.* When an incident occurs, Coordinator speaks with the student who has a complaint and then separately speaks with the accused student. *Interview with Coordinator*. If both students agree, Coordinator then leads the students in a restorative conversation where the accused student has an opportunity to apologize (if appropriate) and the harmed student has the opportunity to accept the apology. *Id.*
8. On September 22, 2021, Student asked a classmate to see her [body part]. *Exhibit C*, p. 74. That classmate refused and told the teacher. *Id.* Coordinator spoke with Student and reminded him that “no one gets to see or touch where your bathing suit[] goes and you don’t get to touch or see anyone else.” *Id.*
9. On October 12, 2021, Student touched a classmate’s [body part] in the restroom. *Id.*; *Interviews with Coordinator and School Psychologist*. School Psychologist met with Student to discuss friendship and appropriate touching. *Exhibit C*, p. 74; *Interview with School Psychologist*. Coordinator spoke with Parent, who explained that Student was reading a book about anatomy at home that might have caused some curiosity in Student. *Interview with Coordinator*. Given this, Coordinator viewed Student’s behavior as developmentally appropriate. *Id.*; *Exhibit C*, p. 1.
10. Following this incident, School staff implemented a plan to ensure the safety of all students. *Id.* That plan required an adult to accompany Student to the bathroom and keep him in sight, especially during unstructured times like lunch, recess, and playtime. *Interview with Coordinator; Exhibit C*, p. 1.
11. Over the next two weeks, School Psychologist met with Student to continue conversations about friendship and develop a relationship with Student. *Interview with School Psychologist*.
12. In November and December, Student displayed some physical aggression towards other kids in gym class and, at times, had difficulty engaging in academic work. *Id.*; *Exhibit C*, p. 10. Parents recalled Student being separated from his classmates and sent to the office for his behavior in gym class. *Interview with Parents*.
13. Parents felt frustrated by repeated calls from the School about Student’s behavior and requested to meet with School staff. *Id.* In response, School Psychologist scheduled a meeting with School’s student intervention team. *Interview with School Psychologist; Exhibit C*, p. 5.

C. Response to Student’s Behavior

14. School’s student intervention team met on December 15 to discuss Student’s behavior. *Exhibit C*, p. 34; *Interviews with Coordinator and School Psychologist*. Coordinator,

Kindergarten Teacher, Parents, School Psychologist, and Special Education Teacher attended the meeting. *Exhibit C*, p. 34. The team discussed Student's strengths and areas of growth, noting that Student's academic performance was at grade level. *Id.* at pp. 34-35.

15. As next steps, the team decided to: (1) use social stories to teach expectations and social skills; (2) focus on using affirmations and positive reinforcement; (3) have Student participate in a friendship group with School Psychologist; and (4) provide additional support in art class. *Id.* at p. 36. The team agreed to meet in mid-February to look at Student's progress. *Id.*
16. After the meeting, School Psychologist sent a summary of the meeting to all attendees, including Parents. *Id.* at p. 8.
17. Meanwhile, on December 17, Student tried to touch a classmate's [body part] while in the bathroom. *Id.* at p. 10. Student indicated he was touching the classmate because "he is my best friend." *Id.* Coordinator led a restorative conversation between both students. *Id.* School Psychologist emailed Parent about the incident and provided Parents some suggestions for talking about friendship with Student. *Id.* Parent replied, stating that she had spoken to Student and was "grateful for this new approach and idea." *Id.* at p. 12.
18. After winter break, School staff implemented the plan developed at the December 15 meeting. *Interview with School Psychologist; Exhibit C*, pp. 72-73. According to School Psychologist and Coordinator, the interventions appeared to reduce Student's unwanted behaviors. *Interviews with Coordinator and School Psychologist.*
19. On January 12, 2022, Student hit a classmate while coming in from recess. *Exhibit C*, p. 75. Coordinator reminded Student to use safe hands and then Student read a book to Coordinator. *Id.* The book Student read was significantly above his grade level and prompted Coordinator to question whether Student was gifted. *Interview with Coordinator.*
20. In response, School Psychologist reached out to Gifted and Talented Teacher on January 13, to ask whether Student had completed any screening for giftedness. *Exhibit I*, p. 7. Specifically, School Psychologist stated that "[w]e're trying to tease out if he is bored in class and/or how we can modify his instruction." *Id.*
21. On January 25, 2022, Student touched a classmate's [body part]. *Exhibit C*, p. 75. School Psychologist had a restorative conversation with Student. *Id.* Later, School Psychologist notified Parent of the incident and informed her that if Student inappropriately touched a classmate, his consequence would be eating lunch in the office. *Id.*
22. School Psychologist emailed School staff, reminding them that Student "responds really well to positive praise." *Id.* p. 18. She also asked staff to help Student earn time to play basketball by recognizing his positive behavior so he could earn smiley faces. *Id.* In closing, School Psychologist stated "[w]e want him to feel successful more often than 'in trouble'." *Id.*

23. On February 14, Student hit a classmate in the hallway. *Id.* School Psychologist facilitated a restorative conversation with both students. *Id.* Student indicated he was trying to get the classmate's attention, so School Psychologist spoke with Student about other ways to get someone's attention, and they engaged in role playing. *Id.*
24. The following day, Student touched a classmate's [body part] during lunch and again at recess. *Id.* Coordinator told Parent about the incident and informed her that the District needed to report Student's behavior pursuant to Title IX. *Id.; Interview with Coordinator.*
25. Student did not return to School after February 15. *Interviews with Parent and School Psychologist.* Parents withdrew Student from School and homeschooled him for the remainder of the 2021-2022 school year. *Interview with Parents.* Parents were frustrated that School was not "trying to get to the root" of the issues Student was experiencing and felt that Student was disciplined more harshly than his classmates. *Id.*
26. After they withdrew him, Student told Parents that he was engaging in appropriate touching because he was mimicking a classmate asked to see Student's [body part]. *Interview with Parents.*
27. On March 7, Family Constituency Specialist sent an email indicating that Parent had contacted the District's Family and Community Engagement Office to express concern about School staff discriminating against Student. *Exhibit I*, p. 6. Specifically, Parent felt Student was disciplined more than other students. *Id.* The email does not mention any concerns related to his eligibility for special education. *Id.*
28. Parents never requested a special education evaluation. *Interview with Parents.*
29. School staff never suspected that Student had a disability. *Interviews with Coordinator and School Psychologist.*

D. District Policy and Procedure

30. General education teachers provide universal academic and behavioral supports for all students. *Interview with Senior Manager of Special Education for Early Childhood and Elementary ("Senior Manager").* If a student is "found to be at-risk in academics and/or behavioral areas", the general education teacher provides targeted interventions to the student and tracks the student's response to those interventions. *Exhibit L*, p. 2; *Interview with Senior Manager.* Generally, staff provide Tier II interventions for 6-8 weeks before evaluating their effectiveness. *Interview with Senior Manager.* If Tier II supports are not effective, staff would use more intensive strategies as Tier III interventions. *Exhibit L*, p. 2; *Interview with Senior Manager.*

31. If, at any point, staff suspected a disability, the District would move forward with an evaluation for special education. *Interview with Senior Manager.*
32. The District has outlined this pre-referral process in a written procedure. *Exhibit L*, pp. 1-4. Additionally, the District is in the process of drafting a pre-referral manual. *Id.*
33. At the School, no single person oversees the child find process; instead, different staff members take the lead depending upon the area of concern. *Interview with School Psychologist.* For example, School Psychologist would oversee the child find process for a student with behavioral or emotional concerns, while a speech language pathologist would oversee the child find process for a student with communication concerns. *Id.*

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 did not violate the IDEA by not identifying and evaluating Student for special education and related services, because the District had no reason to suspect that Student had a disability or needed special education.

Parent's Complaint alleges the District had a reason to suspect that Student might need special education and related services during the 2021-2022 school year, when School staff had concerns about Student's behavior and his ability to focus in class.

A. The Child Identification Process under the IDEA

The IDEA mandates that states develop and implement adequate procedures to identify, locate, and evaluate children with disabilities who may need special education and related services. 34 C.F.R. § 300.111(a). In Colorado, the child identification process "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).

Under the "special education referral" component of the identification process, school districts have an affirmative obligation to evaluate a child where the district has 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). This obligation exists even where the child advances from grade to grade. 34 C.F.R. § 300.111(a). A student who is gifted may still be eligible for special education and related services under the IDEA as long as the student has a qualifying disability. *Letter to Anonymous*, 110 LRP 52277 (OSEP 01/13/10) ("[S]tudents who have high cognition, have disabilities, and require special education and related services are protected under the IDEA and its implementing regulations").

The threshold for suspecting a disability is relatively low. *Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001). The appropriate inquiry by a school district is “whether the child should be referred for an evaluation, not whether the child actually qualifies for the services.” *Oxnard Sch. Dist.*, 118 LRP 48450 (SEA CA 11/13/18). Suspicion “may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation.” *Cheyenne Mtn. Sch. Dist. 12*, 117 LRP 25901 (D. Colo. 2017) (quoting *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002)).

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 the district 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. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). 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). 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 Sch. Dist. 5*, 117 LRP 2988 (SEA CO 12/21/16) (citing *Cincinnati City Sch.*, 115 LRP 26069 (SEA OH 5/07/15)).

To decide whether the District fulfilled its child find obligations here, the SCO considers the individual circumstances of this case to determine whether the District had a reason to suspect that Student needed to be evaluated for special education. *Cherry Creek Sch. Dist.*, 119 LRP 30204 (SEA CO 5/17/19); *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. Concerns about Student’s Behavior

The evidence in the record does not demonstrate that the District had a reasonable suspicion that Student had a disability or a need for special education and related services. As a kindergartener, Student had some difficulty staying focused in the classroom, especially during repetitive tasks. (FF # 5.) Initially, staff suspected this was due to Student transitioning to a new school (especially given School’s dual-language immersion program). (*Id.*) Later, instead of questioning whether Student had a disability, staff began to wonder whether Student was gifted. (FF #s 19-20.)

Separately, Student demonstrated curiosity in his classmate’s body parts. (FF #s 8, 9, 17, 21, and 24.) Student repeatedly engaged in—or attempted to engage in—inappropriate touching, though not with much frequency. (*Id.*) In total, such incidents occurred on five occasions over the seven months between September 2021 and February 2022. (*Id.*)

Not all behaviors—regardless of their frequency—give rise to a suspicion that a student has a disability. Here, nothing in the record indicates that Student’s behavior prevented him or his classmates from accessing the general education curriculum. Staff had no concerns about

Student's ability to access the general education curriculum and did not suspect that Student had a disability. (FF #s 14, 19, 20.)

Parents never requested a special education evaluation or shared any concerns with District staff regarding a suspected disability. (FF # 28.) Regardless, when Parents requested a meeting with School staff, School Psychologist convened the School's student intervention team to develop a plan to address Student's behavior. (FF #s 13, 14.) Staff implemented the plan, and Student's unwanted behavior appeared to be improving. (FF # 18.) The team agreed to reconvene in mid-February to evaluate Student's progress, though Parents withdrew Student before such a meeting occurred. (FF #s 15, 25.)

Parents' primary concerns related to a lack of effort by the School to understand Student and his behavior and perceived inequity in the School's response to Student's behavior. (FF #s 25, 27.) However, School staff took steps to understand Student's behavior. Staff recognized that Student's curiosity might stem from a lack of friendship skills. (FF #s 15.) Student participated in a friendship group, and staff prepared social stories to help Student understand friendship. (*Id.*) Even though it is not supported by the record, unequal discipline by School staff has no bearing on whether or not the District suspected Student had a disability.

For these reasons, the SCO finds and concludes that the District did not have a reasonable suspicion that Student might be a child with a disability as defined by the IDEA. As a result, the District had no obligation to evaluate Student and, therefore, did not violate 34 C.F.R. § 300.111 or ECEA Rule 4.02(1)-(3).

REMEDIES

The SCO concludes that the District did not violate the requirements of the IDEA or the ECEA as alleged in the Complaint. Accordingly, no remedies are ordered.

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. *CDE State-Level Complaint Procedures*, ¶ 13; *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 10th day of March, 2023.

Ashley Schubert

Ashley E. Schubert
State Complaints Officer

APPENDIX

Complaint, pages 1-8

Response, pages 1-3

- Exhibit A: Blank
- Exhibit B: Blank
- Exhibit C: Email correspondence, meeting notes, and behavior logs
- Exhibit D: Transcript and attendance records
- Exhibit E: Blank
- Exhibit F: Blank
- Exhibit G: District calendar
- Exhibit H: District policies
- Exhibit I: Email correspondence
- Exhibit J: Staff contact information
- Exhibit K: Letter from Parents
- Exhibit L: District pre-referral procedure

Telephone Interviews

- Parents: February 27, 2023
- Restorative Justice Coordinator: February 22, 2023
- School Psychologist: February 22, 2023
- Senior Manager of Special Education for Early Childhood and Elementary: February 23, 2023