

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

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**State-Level Complaint 2014: 509**  
**Adams 12 Five Star Schools**

**DECISION**

**INTRODUCTION**

This state-level complaint (Complaint) was filed on April 8, 2014, by the parents of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).<sup>1</sup> The sixty-day timeline in this investigation was extended upon agreement of the Parties to engage in mediation.

Based on the written Complaint, the State Complaints Officer (SCO) determined that the Complaint identified three allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.<sup>2</sup> The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

**COMPLAINT ALLEGATIONS**

Parent's Complaint raised three allegations, summarized as follows:

1. Beginning on or around April 22, 2013, Charter School failed to initiate the special education referral/evaluation process when it was on notice that Student may have a disability and be in need of specialized instruction, resulting in a denial of a free appropriate public education (FAPE);
2. Beginning on or around October 4, 2013, Charter School failed to timely respond to a parental request for special education evaluation, resulting in a denial of FAPE; and
3. Beginning on or around March 17, 2014, the District failed to properly determine Student's eligibility, resulting in a denial of FAPE.

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<sup>1</sup> 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.*

<sup>2</sup> 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).

## **FINDINGS OF FACT**

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

### **Background information:**

1. Student is [age] years old and was determined eligible for special education and related services as a child with an emotional disability on May 7, 2014.<sup>4</sup> Student is also gifted. Parents filed this Complaint prior to the initial eligibility determination because they believed that Charter School and the District both failed to timely evaluate Student for special education eligibility, resulting in the denial of a free appropriate public education from April of 2013 to May 7, 2014.
2. Because Parents complain that both Charter School and the District failed to timely evaluate Student, the SCO first addresses the responsibilities of Charter School and the District concerning an initial evaluation. While the authorizing administrative unit, here the District, is ultimately responsible for ensuring that the special education referral process, including child identification and initial evaluation, is conducted in accordance with state and federal regulations, there is a contract between Charter School and District that describes specific responsibilities concerning initial eligibility that are relevant to this investigation.
3. The contract specifically provides that Charter School “agrees to maintain compliance with all District policies and regulations, the District’s Special Education Comprehensive Plan, and the requirements of federal and state law concerning the education of children with disabilities by providing special education and related services to eligible students with disabilities enrolled in the School.”<sup>5</sup> Concerning the obligation to identify and evaluate children who may be eligible for special education, the contract requires Charter School personnel “to participate in identifying and referring students as provided by District guidelines for assessment of special education needs and determination of eligibility for special education services.”<sup>6</sup>

### **Allegations Concerning the Charter School’s Failure to Evaluate: April-November 20, 2013**

4. Parents alleged that Charter School was on notice as early as April 22, 2013, that Student may have a disability because Charter School Principal was aware that Student was seeing a private therapist to address behavioral concerns.<sup>7</sup> As discussed more fully in FF 8

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<sup>3</sup> The appendix, attached and incorporated by reference, details the entire record.

<sup>4</sup> Exhibit 12.

<sup>5</sup> Exhibit 9/10, p. 15.

<sup>6</sup> Exhibit 9/10, p. 15.

<sup>7</sup> Complaint, p. 2.

below, Charter School Principal learned that Student was seeing a private therapist in mid-April of 2013 because Parents invited Private Therapist to a meeting with Charter School Principal and School Counselor to discuss Student's behavior. The knowledge that Student was seeing Private Therapist, by itself, was not sufficient to have put Charter School on notice, as early as April 22, 2013, that Student may have a disability and be eligible for special education.

5. Consequently, the SCO examines whether the knowledge that Student was seeing Private Therapist, combined with other relevant facts, was sufficient to create a reasonable suspicion that Student may be a child with a disability and in need of special education. In other words, when, if ever, did Charter School have a basis of knowledge sufficient to trigger its obligation to request parental consent to evaluate Student?

6. To begin, the SCO examines Student's behavior at Charter School. Although Student had exhibited some concerning behavior as early as second grade, these incidents were becoming more frequent and more serious.<sup>8</sup> In the spring of 2013, Student's teachers expressed concerns about Student's behavior at Charter School to Parents and School Counselor. Overall, the behavior reported by Student's teachers can be characterized as disruptive to other students, disrespectful of teachers and students, bullying, and violent. For example, Student had been observed calling other students names; making crude, inappropriate and disruptive comments in class; taking items from other students without permission; poking and throwing rocks at others; expressing the desire to hurt or kill animals; and talking about access to guns and knives. Finally, Student was routinely defiant and disrespectful in response to redirection from teachers and other adults.<sup>9</sup>

7. On April 22, 2013, Parents met with Charter School Principal and School Counselor to discuss Student's behavior with the goal of changing the path that Student was on, from negative to positive. Parents brought Student's Private Therapist, an educational psychologist, to the meeting, informing Charter School staff that Student was seeing Private Therapist to address behavioral concerns. At this meeting, Parents requested that Student change literacy class, that Student be sent to the School Principal rather than School Counselor for behavioral concerns, and that "think sheets"<sup>10</sup> no longer be used to process behavioral incidents. In an effort to set a more positive tone, Parents requested that Student be provided with positive reinforcement and that more minor incidents be overlooked because they believed Charter School was too punitive in the way it was addressing Student's behavior.<sup>11</sup>

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<sup>8</sup> Interview with Parents.

<sup>9</sup> Exhibit 7, pp. 114-138. School Counselor is no longer employed by Charter School and was not available for an interview.

<sup>10</sup> A think sheet is a tool used by Charter School to process behavioral incidents. It asks the student to reflect on what happened, how they were feeling, what other choices they could have made, and how they could make amends or repair the harm. See, e.g., Exhibit 7, p. 28.

<sup>11</sup> Exhibit 7, p. 14; Interviews with Parents.

8. As a result of the meeting on April 22, 2013, Charter School agreed to the change in literacy teacher, to making Charter School Principal the point of contact for behavioral concerns, and provided Student with a pet that he could care for at school.<sup>12</sup> Student's behavior appeared to improve after these changes, and Parents were reportedly satisfied with Student's progress for the remainder of the 2012-13 school year.<sup>13</sup> Therefore, although the behavior cited above was concerning, Student did show improvement in his behavior after these changes were made. Further, Charter School was aware that Student was adjusting to changes at home, and it was reasonable to consider such behavior situational.<sup>14</sup> Consequently, the SCO finds that Charter School did not have reason to suspect Student was a child with a disability in need of special education during the spring of 2013.

9. The positive direction in which Student appeared to be heading at the end of the 2012-13 school year did not continue. Rather, Student's behavior at Charter School during the fall of 2013 resulted in numerous incident reports, emails, and disciplinary consequences, including a five-day suspension. During this time, Student displayed behavior described as bullying or threatening the safety of others, such as refusing to allow another student out of a bathroom stall, chasing other students with sticks, calling students names, and hitting or attempting to hit other students with rocks and sticks. In addition, Student displayed behavior described as inappropriate, including using safety cones in a sexually suggestive manner, jiggling or shaking his bottom in response to directives from teachers, laughing or giggling at inappropriate times, using foul language towards students and adults, and displaying an excessive interest in violent topics. Finally, Student routinely displayed behavior described as defiant or disrespectful of adults, including repeatedly running in the opposite direction at the end of recess, sneaking back onto the playground after losing recess privileges, ignoring playground safety rules even when redirected, and using foul language or inappropriate gestures in response to redirection. Much of Student's defiance appeared directed at Special Education teacher, the teacher who routinely supervised recess.<sup>15</sup> Charter School's Executive Director and/or Assistant Principal were notified of the behavior described above by teachers or the School Counselor.<sup>16</sup>

10. While many of the reported incidents occurred outside of class, i.e., lunch, recess, before and after school, Student also displayed inappropriate and disruptive behavior during class. Math/Science Teacher reported "daily instances of off-task behavior, inappropriate comments or interruptions, and disrespect for rules."<sup>17</sup> Because Student's behavior disrupted class, Math/Science Teacher often seated him away from other students.

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<sup>12</sup> Exhibit 7, p. 14; Interviews with Parents. Charter School Principal was on a leave of absence and was not available for an interview. School Counselor is no longer employed at Charter School and was not available for an interview.

<sup>13</sup> Exhibit 7, pp. 15-16.

<sup>14</sup> Parents were recently divorced.

<sup>15</sup> Exhibit 7; Interview with Special Education Teacher and Assistant Principal.

<sup>16</sup> Exhibit 7, pp. 22-137.

<sup>17</sup> Exhibit 7, p. 93; Interview with Math/Science Teacher.

11. On October 4, 2013, Charter School staff met with Parents to discuss Student's behavior. Charter School Principal and Assistant Principal, several teachers, Parents, and Private Therapist attended the meeting. At Parents' request, School Counselor and School Psychologist were not permitted to attend the meeting or provide support/assistance to Student regarding behavioral incidents because Parents did not believe they were properly qualified.<sup>18</sup> According to Charter School Principal, the purpose of the meeting was to discuss possible causes for Student's behavior and set clear expectations and support for Student.<sup>19</sup>

12. At the meeting, Charter School Principal informed Parents that she had received "dozens" of reports from students and educators about bullying, harassment, vandalism, name-calling, and physical violence. In response, Parents expressed their concern that Student was being targeted and that the punitive response to Student's behavior at Charter School was not appropriate or effective. To change course, Parents requested that Charter School focus on providing positive support to Student to foster a sense of belonging, rather than isolate and punish Student. In support of Parents' request, Private Therapist described therapy she was providing to treat Student's anxiety and offered insight into what kind of reinforcers motivated Student.<sup>20</sup>

13. During this discussion, it was agreed that Private Therapist would draft a behavior support plan and provide it to Charter School and Parents for input and discussion. Although Mother believed that she requested a special education evaluation at this meeting, the SCO finds it more likely than not that Mother, based on her history of excluding Charter School staff with expertise in this area from interacting with Student, did not communicate a request to the Charter School staff; rather, Mother wanted Private Therapist to be the one to provide an evaluation and draft a behavior plan.<sup>21</sup>

14. As a result of this meeting, Charter School and Parents agreed to develop a plan to provide positive support to Student and improve communication and consistency between school and home. On October 14, 2013, Student's Private Therapist provided a functional behavior assessment (FBA) and behavior support plan to Charter School, as agreed by Charter School and Parents during the meeting on October 4, 2013.<sup>22</sup> From October 14 through November 1, 2013, Parents made repeated requests to meet with Charter School Principal and Assistant Principal to discuss the plan provided by Private Therapist and how it could be implemented at Charter School.<sup>23</sup>

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<sup>18</sup> Exhibit 7; Interviews with Assistant Principal and Parents. The SCO notes that Parents tried to exclude teachers as well but Charter School Principal included them as necessary participants. Teachers were not present for entire meeting. Interview with Assistant Principal.

<sup>19</sup> Exhibit 7, p. 32.

<sup>20</sup> Exhibit 7; Interviews with Assistant Principal and Parents.

<sup>21</sup> Exhibit 7, pp. 37-42; Interviews with Parents and Assistant Principal.

<sup>22</sup> Exhibit 7, pp. 37-47; Interviews with Parents and Assistant Principal.

<sup>23</sup> Exhibit 7, pp. 37-47.

15. In response to an email from Assistant Principal on November 1, 2013, concerning Student's continuing demonstration of defiant and dangerous behavior, Father expressed frustration that Charter School had not incorporated any of the positive behavioral supports described in the plan developed by Private Therapist, even though Charter School requested it. In addition, Charter School had not scheduled a meeting to discuss the plan, as repeatedly requested by Parents. In the email, Father stated "[t]here needs to be a meeting immediately to find a positive solution because this approach is not working."<sup>24</sup>

16. Charter School never responded to Parents' request by scheduling a meeting. Instead, Charter School developed a chart designed to reinforce and track positive behavior, e.g., worked productively, safe hands and body, followed directions, and demonstrated appropriate social behavior. Although Charter School asserted that Student's behavior improved following the use of this chart, the SCO finds that this claim is not supported by the evidence because the chart does not define the targeted behaviors with enough specificity to provide reliable and consistent data. And even if the SCO agreed that the data provided by the behavior chart demonstrated an improvement in Student's behavior, the improvement only lasted a week.<sup>25</sup>

17. More importantly, there is no credible evidence that Charter School was providing any specific positive behavioral supports or interventions. When asked why Charter School did not utilize any of the behavioral supports described by Private Therapist, e.g., scheduled breaks, relaxation and guided imagery techniques, teaching self-monitoring, Assistant Principal replied that the plan developed by Private Therapist was not based on observation of Student in a classroom setting.<sup>26</sup> While this is a legitimate concern, Charter School did not follow this concern with a request for parental consent to conduct its own evaluation/observation or even schedule a meeting with Parents to discuss the need for classroom observation.

18. Throughout November, Student's behavior continued to escalate. Between November 12 and November 15, 2013, Student resumed inappropriate and defiant behavior, including destroying another student's property, talking inappropriately about drugs, disobedience, and disrespect toward teachers.<sup>27</sup> On or around November 20, 2013, Parents were notified that Student was to be suspended for five days due to his "history of violence, preoccupation with weapons," and hostility toward Special Education Teacher, the teacher who routinely supervised recess. The specific incident resulting in Student's suspension involved one of Student's teachers overhearing Student making a comment about shooting a teacher with a 22.<sup>28</sup>

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<sup>24</sup> Exhibit 7, p. 47; Interview with Father.

<sup>25</sup> See, e.g., Exhibit 7, p. 61.

<sup>26</sup> Exhibit 7, pp. 37-41; Interview with Assistant Principal.

<sup>27</sup> Exhibit 11.

<sup>28</sup> Exhibit 7, pp. 82-92; Interviews with Assistant Principal and Parent. It is unclear whether Student was suspended on November 20 or 21.

19. Based on the facts described above, the SCO finds that Charter School should have suspected that Student may be a child with a disability in need of special education on October 4, 2014, and should have requested parental consent to evaluate Student within a reasonable time. Under these circumstances, the SCO finds that a reasonable period would have been October 14, 2013, the date Charter School received the plan it requested from Private Therapist, accompanied by the request from Parents to meet and discuss the plan.

20. Parents withdrew Student from Charter School following the notice that Student was going to be suspended. Consequently, Student's last day at Charter School was on or around November 20, 2014. Because Charter School subsequently extended Student's suspension in order to complete a threat assessment, Student's transfer paperwork was not signed until December 6, 2014.<sup>29</sup> This means that Student was effectively suspended and not eligible for enrollment at another school for nine days.<sup>30</sup>

#### **Allegation concerning the District's Evaluation: December 18, 2013 to May 7, 2014**

21. Student started attending an elementary school (School) in the District on or around December 16, 2013. On December 18, 2013, Parent emailed District School Psychologist to request a special education evaluation. On January 7, 2014, the District requested parental consent to evaluate Student. Because the District was on Winter Break from December 19, 2013, to January 7, 2014, the District's request for parental consent to evaluate was timely, coming almost immediately after Parent requested an evaluation.

22. The consent to evaluate form informed Parent that Student would be "screened" in the areas of academic, language, and motor ability, and "be given formal social and behavioral assessments to establish whether he is eligible for special education."<sup>31</sup> The purpose of the evaluation was "to establish whether [Student] is eligible for services with an IEP including support and interventions necessary in the areas of social/emotional development."<sup>32</sup> Parent signed consent for evaluation on January 9, 2014.<sup>33</sup> The initial evaluation was completed on March 9, 2014.<sup>34</sup>

23. On March 17, 2014, the District scheduled a meeting to discuss evaluation results and determine eligibility.<sup>35</sup> At this meeting, the IEP concluded that they needed additional information to properly determine whether Student was eligible for special education and related services. With respect to the specific eligibility criteria for a child with a serious emotional disability (SED), the IEP team determined that they did not have enough information to determine whether a variety of instructional and/or behavioral interventions had been

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<sup>29</sup> Exhibit 7, pp. 146-154.

<sup>30</sup> Exhibit 13. Note that number reflects Thanksgiving break.

<sup>31</sup> Exhibit 1, p. 2.

<sup>32</sup> Exhibit 1, p. 2.

<sup>33</sup> Exhibit 1, p. 2.

<sup>34</sup> Exhibit 5/6.

<sup>35</sup> Exhibit 4, p. 1.

utilized and that his behavior was a distraction to others. While at School, Student's educators had not witnessed behavior that was atypical of other student's his age, nor had Student exhibited the kind and degree of inappropriate social behavior at School that he had exhibited at Charter School, i.e., behavior that would demonstrate an impairment of social functioning.

24. In response, Parents expressed their continuing concern that Student had an unusually high level of fear and anxiety about school. Concerned about the difference between what Parents were reporting and what had been observed during the initial evaluation, the District proposed further evaluation and requested additional time to thoroughly gather the information necessary to make the eligibility determination. Parents agreed with the extension to conduct further evaluations.<sup>36</sup>

25. On March 18, the District provided a written request for parental consent to further evaluate Student in the area of social-emotional functioning and written language. Consistent with the discussion at the IEP meeting, the consent to evaluate informed Parents that the District proposed further evaluation due to the discrepancy in currently observed social-emotional functioning and previously collected data as well as discrepancies reported between parental and educator observation.<sup>37</sup> On March 31, 2014, Parents signed and returned the consent to evaluate.<sup>38</sup>

26. As part of this evaluation, Assistant Special Education Director, a behavioral specialist, performed additional classroom observations of Student to evaluate whether Student experienced or exhibited signs of excessive anxiety, the specific concern raised by Parents at the March IEP meeting. Assistant Special Education Director reported that Student's expression of anxiety was more subtle than what is typically observed in a student with SED. For example, Student was not throwing chairs, hiding under his desk, i.e., exhibiting overt behaviors that are more commonly associated with a student identified as SED. To illustrate, Assistant Special Education Director recalled that when she conducted an informal observation, Student approached her as soon as she walked into his classroom and asked her if she was there to watch him. Assistant Special Education Director explained that, in her professional opinion, this behavior was atypical for a student his age but could also be easily missed by an observer as an expression of excessive anxiety because of its subtleness.<sup>39</sup>

27. While the evaluation proceeded, Student began receiving positive behavioral supports, such as a check-in/check-out strategy, direct instruction from the school counselor, and participation in a small discussion group focused on building anger management skills and reducing anxiety.<sup>40</sup>

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<sup>36</sup> Interviews with Mother and Assistant Special Education Director.

<sup>37</sup> Exhibit 1, p. 1; Exhibit 7, p. 252; Interviews with Mother and Assistant Special Education Director.

<sup>38</sup> Exhibit 7, p. 268.

<sup>39</sup> Interview with Assistant Special Education Director.

<sup>40</sup> Interview with Assistant Special Education Director.



28. On May 7, 2014, the District convened an IEP team to consider the additional evaluation data and determine eligibility.<sup>41</sup> At this meeting, the IEP team determined Student was eligible for special education as a child with an emotional disability and developed an IEP addressing Student's need for development of appropriate social skills and interactions with peers and adults.<sup>42</sup> Because Parents signed initial consent to evaluate on January 9, 2014, the District should have determined eligibility and developed an IEP for Student no later than April 9, 2014. Although the District failed to comply with these timelines, the reason for the delay was to appropriately respond to information provided by the Parents and ensure that the District had provided a comprehensive evaluation that addressed all areas of suspected disability. Further, Student was provided with behavioral support and interventions that allowed him to be successful in the school environment during the extension.

29. Despite the disruption Student experienced during the fall of 2013, Student's academic performance is at or above-grade level. And although Student has had minor behavioral incidents at School, he has not demonstrated behavior of the severity and frequency exhibited at Charter School. As a result, the SCO finds that the actions taken by the District as soon as Student arrived at School remedied the harm caused by Charter School. Accordingly, Student did not experience substantive educational harm as a result of Charter School's failure to timely evaluate Student.

### **CONCLUSIONS OF LAW**

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

**Allegations One and Two: Although Parents did not request a special education evaluation while Student was at Charter School, Charter School should have requested parental consent to evaluate by October 14, 2013, but failed to do so.**

1. As a threshold matter, the SCO addresses the responsibilities shared by the District and Charter School as they relate to Parents' first two allegations. Pursuant to ECEA Rule 8.04(1)(d), the District remains ultimately responsible for ensuring that Charter School complies with state and federal requirements for conducting initial evaluations. Because the District is ultimately responsible for compliance with IDEA in this matter, the SCO will reference the District as the entity responsible for providing documentation that it has complied with any remedies issued in this Decision. The SCO will reference Charter School in the discussion regarding these first two allegations because the contract between Charter School and the District specified that Charter School was responsible for conducting initial evaluations for its enrolled students.

2. First, Parents alleged that Charter School should have evaluated Student for special education eligibility because it was on notice that Student was a child with a disability in April of 2013. In response, Charter School essentially argued that they believed Student's behavior was

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<sup>41</sup> Exhibit 1, p. 1.

<sup>42</sup> Exhibit 12.

the result of a contentious divorce and not a disability. As discussed below, the SCO concludes that Charter School did not have an adequate basis of knowledge that Student may be a child with a disability until October 4, 2013. Once Charter School did have reason to suspect Student may be a child with a disability, it failed to timely request parental consent to evaluate.

3. A public agency must develop and implement procedures for locating, identifying, and evaluating all children who may have a disability and are eligible for special education and related services, even though such children are advancing from grade to grade. 20 U.S.C. 1412(a)(3); ECEA Rule 4.02(1)(a). Under IDEA, the public agency has an affirmative obligation to evaluate all children who may be in need of special education and related services due to a suspected disability. 20 U.S.C. 1412(a)(3). In this case, Charter School had an obligation to initiate an evaluation once it suspected or had reason to suspect that Student had a disability and may be in need of special education.

4. For guidance in evaluating whether Charter School had a basis of knowledge sufficient to trigger its obligation to request an initial evaluation, the SCO references the criteria for eligibility under serious emotional disability. To be eligible for special education as a child with an emotional disability, a student must demonstrate a condition exhibiting specific characteristics for a long period of time and to a marked degree that impair his ability to learn and/or function socially. Relevant to the behavior Student exhibited at Charter School, a student is eligible for special education as a child with an emotional disability when he exhibits an inability to build or maintain interpersonal relationships which significantly interfere with social development or demonstrate inappropriate behavior or feelings under normal circumstances that results in an impairment of social/emotional functioning, including the development of adaptive behaviors and social skills which enable the child to “meet environmental demands and assume responsibility for [his] own welfare.” ECEA Rule 2.08(3).

5. Since March of 2013, Student had been exhibiting increasingly inappropriate behavior at Charter School. Although Student’s behavior improved following changes to his schedule in April of 2013, the concerning behavior returned, escalating in frequency and severity, during the fall of 2013. Student’s behavior during this time was described as disruptive to others, and unsafe for himself and for those around him. As a result, Student was often isolated from other students in the classroom, restricted from recess, and eventually suspended. The behavior Student exhibited at Charter School could reasonably be described as the kind of behavior that interfered with his ability to maintain interpersonal relationships and develop the social skills needed to meet expectations at school, i.e. behavior that is consistent with eligibility criteria for a serious emotional disability.

6. In addition to persistent and escalating behavior, Charter School was aware that Student had been seeing Private Therapist, an educational psychologist, since April of 2013. While this knowledge was not sufficient to put Charter School on notice that Student may be IDEA eligible in April of 2013, the meeting on October 4, 2013, added significantly to Charter School’s basis of knowledge. It was during this meeting that Charter School learned that Private Therapist was

treating Student for excessive anxiety and that Parents were requesting a positive behavioral support plan. Further, Charter School requested assistance from Private Therapist in developing a behavior support plan that could be used at Charter School. The discussion and agreements made at this meeting indicate that Charter School should have been aware that Student's behavior may be more than a situational response to changes at home, i.e., that the behavior was solely related to Parents' divorce. The fact that Parents did not want School Counselor to attend this meeting does not excuse Charter School from recognizing that Student may have a disability. Student's history of behavioral problems, combined with the knowledge gained during this meeting provided Charter School with a basis of knowledge sufficient to trigger its obligation to initiate a special education referral/evaluation and request parental consent to evaluate Student.

7. Although IDEA does not specify how long a school may take to initiate a special education evaluation, federal Department of Education policy dictates that a school must seek parental consent within a reasonable period of time after it has reason to suspect that a child may have a disability and be in need of special education. 71 Fed. Reg. 46637; *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011)("[i]t has been the Department's longstanding policy that the LEA must seek parental consent within a reasonable period of time after the referral is made, if the LEA agrees that an initial evaluation is needed."). Accordingly, Charter School should have sought parental consent to evaluate Student within a reasonable time after October 4, 2013. In this case, it would not be reasonable for Charter School to wait longer than October 14, 2013, to request an evaluation because by this date Charter School had received the plan that it requested from Private Therapist and knew that Parents wanted to meet to discuss the plan. Most importantly, Student's inappropriate behavior was now occurring on daily basis, a clear indication that whatever support was being provided to Student was not working. If Charter School determined that the plan developed by Private Therapist was not appropriate for the school setting, it should have requested consent to conduct its own evaluation. Instead, it ignored Parents' repeated requests to meet and discuss a behavior support plan. Finally, the Charter School's perception that Parents were hostile to special education services is of no consequence because Charter School has an affirmative obligation to request parental consent once it has reason to suspect a child is IDEA eligible. If Parents had refused to provide their consent for an initial evaluation, then, and only then, would Charter School have been excused from its obligation to conduct an evaluation.

8. Second, Parents alleged that Charter School failed to respond to their request for a special education evaluation on or around October 4, 2013. A parent of a child may also initiate a special education referral by requesting an evaluation. 34 CFR § 300.301 (b); ECEA Rule 4.02 (3)(a)(ii). Once a parent requests evaluation, the school district has two choices: agree to evaluate the child and obtain parental consent to conduct the evaluation or deny the request to evaluate and provide parent with written notice explaining its decision. In this case, the SCO found that Parents did not request a special education evaluation as alleged on October 4, 2013, or at any other time while Student attended Charter School. Although the SCO concludes that Charter School did not violate IDEA or ECEA by failing to appropriately respond to a

parental request for evaluation, it did, as discussed above, fail to timely request parental consent for one.

9. Because Charter School failed to request parental consent for an initial evaluation by October 14, 2013, the SCO concludes that that it violated federal and state regulations concerning initial evaluations at 34 CFR § 300.301 (b) and ECEA Rule 4.02 (3)(a). The question now is whether Charter School's failure to initiate a special education referral and not seek parental consent for evaluation resulted in substantive harm to Student, i.e., impeded his right to FAPE or caused a deprivation of educational benefit. In this case, Student did not suffer substantive educational harm as he performs academically at or above grade-level and has not demonstrated the behavioral problems that resulted in suspension or other disciplinary consequences since attending School on or around December 16, 2013. The actions taken by the District since Student first arrived at School, such as providing positive behavioral supports, remedied educational harm caused by Charter School's failure to timely initiate a special education evaluation.

**Allegation Three: The District failed to conduct an initial evaluation and develop an IEP in accordance with IDEA and ECEA timelines but the failure did not result in substantive harm to Student.**

10. Parents alleged that the District failed to timely and properly determine Student's eligibility on March 17, 2014, resulting in a denial of a free appropriate public education. Once a special education referral has been initiated, the administrative unit, here the District, must complete the initial evaluation within 60 days. 34 CFR § 300.301 (c); ECEA Rule 4.02 (c). The special education referral process is initiated, and the 60-day clock starts, when the district has received a request for an initial evaluation from the parent *and* the parent has provided written consent for the initial evaluation. 34 CFR § 300.301 (b); ECEA Rule 4.02 (3)(c)(ii). A meeting to discuss the initial evaluation and determine eligibility must be held within a reasonable time after the initial evaluation is completed. ECEA Rule 4.02 (6)(a)(i). Finally, the initial IEP for a child shall be developed within 90 calendar days of the date that parental consent to conduct the initial evaluation was obtained. ECEA Rule 4.03 (1)(d)(i).

11. In this case, Parents requested a special education referral on December 18, 2013. The District requested parental consent to evaluate Student on January 7, 2014, a date immediately following parental request after factoring the dates School was closed over Winter Break. Parents signed consent to evaluate on January 9, 2014. Based on the date Parents signed consent, the initial evaluation should have been completed by March 9, 2014, and Student's IEP should have been developed by April 9, 2014. Although the District completed Student's initial evaluation by March 9, 2014, and scheduled an eligibility meeting within a reasonable time, Student's IEP was not developed until May 7, 2014, because the IEP team determined that it needed additional information about Student to determine eligibility.

12. An evaluation under IDEA has two primary purposes: 1) to determine whether the child has a disability, and because of the disability needs special education and related services, and 2) to help the IEP team determine the child's specific needs. 34 CFR 300.304(b)(1)(i)-(ii); *see also* 71 Fed. Reg. 46548. In this case, the District requested parental consent to conduct additional evaluations of Student based on Parents' input at the March 2014 IEP meeting that Student experienced excessive anxiety about school. Because Parents were describing behavior that had not been observed at School, the District offered to conduct further evaluations/observations that would be targeted to Parents' specific concerns. Without this additional information, Student would likely not have been determined eligible.

13. The SCO concludes that the District acted in accordance with the intent of IDEA when it extended the timeline for conducting an initial evaluation for the purpose of thoroughly evaluating Student in all areas of suspected disability, and did so with Parents' agreement. Parents provided written consent for further evaluations on March 31, 2014, and agreed to continue the eligibility determination until the additional evaluation was completed. While the District conducted additional evaluations, Student was provided with behavioral supports and interventions similar to the ones identified on his IEP. On May 7, 2014, a properly constituted IEP team determined Student was IDEA eligible as a child with an emotional disability and developed an IEP. Most importantly, Student has done very well at School, academically and socially, with the appropriate services and supports provided by the District.

#### **REMEDIES**

The SCO has concluded that the District violated the following IDEA and ECEA requirements:

- a) Initial Evaluation at 34 CFR § 300.301 and ECEA Rule 4.02 (3).

To remedy this violation, the District is ordered to take the following actions to ensure Charter School compliance concerning initial evaluations:

- 1) **By September 19, 2014**, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the failure to timely request parental consent to conduct an initial evaluation, as noted in the 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 suspected of having disabilities enrolled in Charter School. The CAP must, at a minimum, provide for the following:
  - a) Submission of compliant, written policies and procedures and, as applicable, compliant forms that address Child Find and the special education referral process, **no later than October 3, 2014**.
  - b) District Special Education Administration/staff must conduct training for anyone at Charter School in the position to receive a request for special education

referral/evaluation, including Charter School Administration (Charter School Principal and Assistant Principal), psychologists, school counselors, special education teachers and service providers, and intended designees concerning the policies and procedures, to be provided no later than October 31, 2014. This training must also include identification of students with emotional disabilities and the appropriate use of positive behavioral interventions and supports for children whose behavior impedes learning.

- c) Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department no later than November 7, 2014.
- d) Starting immediately, and for the remainder of the 2014-15 school year, the District's Charter School Liaison and at least one District Special Education Administrator/Designee must meet with Charter School staff identified in section (b) above on a monthly basis to review students who are receiving special education and related services or may be in need of evaluation, including those students receiving disciplinary consequences. Documentation that the monthly meeting has occurred must include the date and time of the meeting, attendees sign-in sheet, agenda, and a brief summary of the discussion. Documentation must be provided to the Department no later than 7 days following each monthly meeting.

The Department will approve or request revisions to 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.

The District shall provide the Department with documentation that it has complied with this requirement no later than June 30, 2015. Please submit the documentation detailed above to the Department as follows:

Colorado Department of Education  
Exceptional Student Services Unit  
Attn.: Joyce Thiessen-Barrett  
1560 Broadway, Suite 1175  
Denver, CO 80202-5149

**NOTE:** Failure by the District to meet any of the timelines set forth above will 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 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

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

Dated this 22<sup>nd</sup> day of August, 2014.

*Candace Hawkins*

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Candace Hawkins, Esq.  
State Complaints Officer

## Appendix

### **Complaint, pages 1-4.**

Exhibit A: Eligibility Report dated March 2014.

Exhibit B: Psychotherapy summary.

Exhibit C: IEP dated May 2014.

### **Reply, pages 1-9.**

#### **Response, pages 1-8.**

Exhibit 1: Prior Notice and Consent to Evaluate.

Exhibits 2 and 3: Evaluation and Assessment Data for 2013-2014 school year.

Exhibit 4: Evaluation and Assessment Data Report dated March 2014.

Exhibits 5 and 6: Notices of Meeting,

Exhibit 7: Email Correspondence.

Exhibit 8: District Policies and Procedures related to special education evaluation.

Exhibits 9 and 10: Contract between Charter School and District.

#### **Additional Documentation Requested by the SCO.**

Exhibit 11: Behavior Detail Report

Exhibit 12: IEP dated May 7, 2014

Exhibit 13: School Calendar

#### **Interviews with:**

- Parents
- Special Education Director
- Assistant Special Education Director
- Charter School Assistant Principal
- Special Education Teacher
- Math/Science Teacher
- Charter School Special Education Learning Specialist

The SCO requested interviews with the following individuals who were not available because they no longer work for Charter School or were on a leave-of-absence:

- School Principal
- School Counselor
- School Psychologist
- Charter School Teacher(s)